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Utah Zoning Law and Proposals for Legislative Change

Richard S. Dalebout

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*Richard S. Dalebout**

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I. INTRODUCTION

Within . . . zoning districts, the [local] legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land.¹

A. *The Acts*

The Municipal Land Use Development and Management Act² (the "City Act") empowers cities and towns in Utah to divide or "zone" the territory within their boundaries into districts and to regulate land uses therein. The County Land Use Development and Management Act³ (the "County Act") similarly empowers counties to zone the territory within their boundaries and to regulate land uses therein. Both of these acts (sometimes referred to hereinafter as "the acts" or "the enabling acts") were adopted in 1991⁴ and amended in 1992.⁵ They are the only comprehensive revision of Utah zoning enabling law to be enacted by the Utah State Legislature since the adoption of the first zoning enabling law for cities in 1925,⁶ and the first zoning enabling law for counties in 1941.⁷

B. *Background*

Although zoning existed in the United States before the mid-1920s,⁸ it gained a measure of legitimacy during that period because of two events: (1) the promulgation and near universal adoption of the Standard State Zoning Enabling Act; and, (2) the decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*⁹

1. UTAH CODE ANN. §§ 10-9-405(1)(b) (1992), 17-27-405(1)(b) (1991).

2. *Id.* §§ 10-9-101 to -1003.

3. *Id.* §§ 17-27-101 to -1003 (1991).

4. Planning and Zoning Revisions, ch. 235, 1991 Utah Laws 873.

5. Planning and Zoning Amendments, ch. 23, 1992 Utah Laws 181.

6. Cities to Regulate Size of Buildings, Use of Land, Etc., ch. 119, 1925 Utah Laws 240 (repealed 1991).

7. Zoning and Planning Commission, ch. 23, 1941 Utah Laws 29 (repealed 1991).

8. 6 RICHARD R. POWELL & PATRICK J. ROHAN, THE LAW OF REAL PROPERTY ¶ 867[1][a] (1993).

9. 272 U.S. 365 (1926); see 6 POWELL & ROHAN, *supra* note 8, ¶ 867[1][a].

1. *The Standard State Zoning Enabling Act*

In 1924, the United States Department of Commerce published a model land-use enabling act entitled the Standard State Zoning Enabling Act (Standard Act).¹⁰ "By 1925, 19 states had used the act in drafting state zoning enabling statutes."¹¹ In 1926, the Department issued a revised edition of the Standard Act, and by 1930 it was reported that the act "had been adopted as a whole or in part by 35 state legislature[s]."¹²

Utah was caught up in the popular tide created by the Standard Act and in 1925 adopted its first enabling act for cities,¹³ which was nearly identical to the Standard Act.¹⁴ In 1945, this enabling act for cities was substantially augmented by the adoption of a Municipal Planning Enabling Act.¹⁵

As noted above, a first enabling act for counties was not adopted until 1941.¹⁶ The language of this first zoning enabling act for counties was substantially different than the Standard Act.¹⁷

2. *Village of Euclid v. Ambler Realty Co.*

The second event contributing to the legitimacy of zoning was the decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*¹⁸ Prior to *Euclid*, the constitutionality of zoning had been suspect, but in that decision the Supreme Court affirmed that zoning was, in general, a proper exercise of governmental police power and not an unconstitutional taking of private property.¹⁹

10. 6 POWELL & ROHAN, *supra* note 8, ¶ 867[2][ii].

11. 4 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 2.21 (3d ed. 1986).

12. *Id.* (quoting M. LOHMANN, PRINCIPLES OF CITY PLANNING 253 (1931)).

13. Cities to Regulate Size of Buildings, Use of Land, Etc., ch. 119, 1925 Utah Laws 240 (repealed 1991).

14. Compare Standard State Zoning Enabling Act, *quoted in* 4 ANDERSON, *supra* note 11, § 2.21, with Cities to Regulate Size of Buildings, Use of Land, Etc., ch. 119, § 7, 1925 Utah Laws 240, 242-44 (repealed 1991).

15. Municipal Planning Enabling Act, ch. 23, 1945 Utah Laws 63 (repealed 1991).

16. Zoning and Planning Commission, ch. 23, 1941 Utah Laws 29 (repealed 1991).

17. Compare Standard State Zoning Enabling Act, *quoted in* 4 ANDERSON, *supra* note 11, § 2.21, with Zoning and Planning Commission, ch. 23, 1941 Utah Laws 29 (repealed 1991).

18. 272 U.S. 365 (1926).

19. *Id.* at 368.

C. *Review of Zoning Law and Proposed Changes*

Since Utah's adoption of the first enabling acts in 1925 (cities and towns) and 1941 (counties), both enabling acts have been amended on a piecemeal basis, culminating in their complete revision in 1991. In addition, the Utah Supreme Court and, more recently, the Utah Court of Appeals, have handed down over 70 decisions explaining how Utah zoning law should be applied.

The purpose of this article is twofold: first, to bring the current enabling acts and court decisions together into a general review of Utah zoning law; and, second, to propose changes in the enabling acts. In this article, separate reference is not made to "city" zoning law or "county" zoning law unless, in fact, a difference in the law exists. Each of the proposed changes is described under the heading, *Proposed Legislative Change*, with the proposed statutory modification language appearing in the footnotes.

II. THE PLANNING COMMISSION

The planning commission typically . . . has a major (and sometimes final) role in processing special-exceptions/conditional uses, in considering proposed subdivision maps and site plans, and in preparing general plans.²⁰

A. *Creation of a Planning Commission*

A planning commission is created by the local legislative body and is required for the exercise of zoning powers.²¹ The statutory language governing the creation of a planning commission is permissive.²² However, necessary functions like the creation of a general plan, recommending a zoning ordinance and amendments thereto, as well as recommending a subdivision ordinance and amendments thereto, cannot be accomplished without a planning commission.²³ Therefore, a planning commission is necessary and not optional.

20. ROBERT C. ELLICKSON & A. DAN TARLOCK, LAND-USE CONTROLS 214 (1981).

21. UTAH CODE ANN. §§ 10-9-201 (1992), 17-27-201 (1991).

22. *Id.* §§ 10-9-201(1)(a), 17-27-201(1)(a)(i).

23. *Id.* §§ 10-9-204(1), (2), (4), 17-27-204(1), (2), (4).

Proposed Legislative Change. A planning commission is necessary, and both acts are misleading where they provide that local units "may enact an ordinance establishing a planning commission."²⁴ Both acts should be amended to provide that each city or county *shall* appoint a planning commission.²⁵

B. Commission Membership

A city zoning ordinance establishes the number and terms of members, the mode of their appointment, procedures for filling vacancies, and removal of members from office.²⁶ This complete flexibility is not permitted in *counties* where the membership of a county planning commission is fixed by statute at seven members.²⁷ Each member of a county board serves a staggered three-year term.²⁸ Subject to these limitations, a county zoning ordinance prescribes the mode of appointment of commission members, their possible removal, and the filling of vacancies.²⁹ Provisions in the former county enabling act which required a county commissioner to serve on a planning commission have been repealed.³⁰ In both cities and counties, board members may be paid a per diem compensation and be reimbursed for expenses.³¹

Proposed Legislative Change. There is no apparent reason to deny counties the flexibility permitted to cities regarding the number and terms of planning commission members. The county act should be amended to provide that a county zoning ordinance may define the number and terms of planning commission members. In addition, the city act should require staggered terms, as the county act does.³²

24. *Id.* §§ 10-9-201(1)(a), 17-27-201(1)(a)(i) (emphasis added).

25. Specifically, UTAH CODE ANN. §§ 10-9-201(1) and 17-27-201(1) should be amended to provide:

(1)(a) Each municipality shall enact an ordinance establishing a planning commission.

26. UTAH CODE ANN. § 10-9-201(1)(b) (1992).

27. *Id.* § 17-27-201(1)(a)(ii) (1991).

28. *Id.* § 17-27-201(1)(a)(iii), (iv).

29. *Id.* § 17-27-201(1)(b).

30. Compare *id.* § 17-27-2 (repealed 1991) with Planning and Zoning Revisions, ch. 235, sec. 61, § 17-27-201, 1991 Utah Laws 873, 890.

31. UTAH CODE ANN. §§ 10-9-201(2) (1992), 17-27-201(2) (1991).

32. Specifically, UTAH CODE ANN. § 10-9-201(1)(b)(ii) should be amended to provide:

C. Organization and Procedure

In cities and counties, general organizational details and procedures for a planning commission are established in the zoning ordinance.³³ Examples of these details and procedures are as follows: the election of a commission chairperson³⁴ and his or her term of office (in counties, the chairperson is limited to a one-year term³⁵); the election of a commission vice-chairperson and his or her term of office³⁶; the appointment of alternate members, if any, and the mode of their appointment³⁷; possible removal and the filling of vacancies³⁸; the calling of meetings³⁹; open meeting requirements⁴⁰; and, the maintenance and classification of planning commission records.⁴¹

Proposed Legislative Change. No apparent reason exists to limit a county planning commission chair to a one-year term while allowing a city planning commission chairperson the flexibility to serve longer periods. The county act should be amended to repeal the provision that limits a county planning commission chairperson to a one-year term.⁴²

A planning commission may adopt its own policies and procedures.⁴³ However, the zoning ordinance may require that those policies and procedures be approved by the particular legislative body before they take effect.⁴⁴

(1)(b)(ii) the number and terms of the members, who shall serve staggered terms;

UTAH CODE ANN. § 17-27-201(1)(a)(iii) and (iv) should be repealed; and, UTAH CODE ANN. § 17-27-201(1)(a)(ii) should be amended to provide:

(1)(a)(ii) ~~[The commission shall consist of seven members appointed by the chief executive officer with the advice and consent of the legislative body.]~~ The ordinance shall define the number and terms of the members, who shall serve staggered terms.

33. UTAH CODE ANN. §§ 10-9-201(1)(b) (1992), 17-27-201(1)(b) (1991).

34. *Id.* § 10-9-202(1).

35. *Id.* § 17-27-202(1)(b) (1991).

36. *Id.* § 10-9-201(1)(b)(iv) (1992).

37. *Id.*

38. *Id.*

39. *Id.* § 10-9-202(2)(a).

40. *Id.*; see *infra* text accompanying note 512.

41. UTAH CODE ANN. §§ 10-9-201(1)(b)(iv), -202(2)(a) (1992).

42. Specifically, UTAH CODE ANN. § 17-27-202(1)(b) (1991) should be repealed.

43. UTAH CODE ANN. §§ 10-9-202(2)(a) (1992), 17-27-202(2)(a) (1991).

44. *Id.* §§ 10-9-202(2)(b), 17-27-202(2)(b).

Prior to 1991, the city and county enabling acts implied that planning commissions had contracting powers independent of the municipalities and counties they served. On that point, the Municipal Planning Enabling Act (adopted in 1945) provided that a city *planning commission* could "appoint . . . employees and staff" and "contract with city planners and other consultants."⁴⁵ In addition, the original county enabling act (adopted in 1941) provided that a county *planning commission* "shall have the power and authority to employ experts and a staff."⁴⁶ Both of these provisions were repealed in 1991.⁴⁷ It is now clear that the legislative body may control the "policies and procedures" of the planning commission.⁴⁸

D. Meetings and Records

A planning commission is a "public body" and therefore subject to open meetings requirements which, in general, require all meetings to be open to the public.⁴⁹ But if the commission is required to make a decision which is "judicial" in nature, the decision of the Utah Supreme Court in *Common Cause of Utah v. Utah Public Service Commission*⁵⁰ allows the "decision making" phase of the meeting to be a closed meeting.⁵¹

The records of a planning commission are "public records" and thus generally subject to public inspection.⁵² However, it is possible that some information related to commercial⁵³ or real estate transactions⁵⁴ may be protected from public inspection.

45. Municipal Planning Enabling Act, ch. 23, § 1, 1945 Utah Laws 63, 63 (repealed 1991).

46. Zoning and Planning Commission, ch. 23, § 3, 1941 Utah Laws 29, 29 (repealed 1991).

47. Planning and Zoning Revisions, ch. 235, 1991 Utah Laws 873, 877, 890.

48. UTAH CODE ANN. §§ 10-9-202(2)(b) (1992), 17-27-202(2)(b) (1991).

49. *Id.* § 52-4-3 (1989). Statutory exceptions to open meeting requirements are not normally applicable to the business of a planning commission. *Id.* § 52-4-5(1)(a) (Supp. 1994).

50. 598 P.2d 1312, 1315 (Utah 1979).

51. For a discussion of opening meeting requirements in connection with a zoning board, see *infra* text accompanying note 512.

52. UTAH CODE ANN. § 63-2-201 (1993).

53. *Id.* § 63-2-304(2).

54. *Id.* § 63-2-304(6), (7).

E. Powers and Duties

A planning commission has eight enumerated powers and duties, most of which are controlled by the discretion of the legislative body. Those eight powers and duties are as follows:

1. Prepare a general plan

A planning commission is required to prepare a "general" plan (formerly called a "master" plan⁵⁵) and subsequent amendments thereto.⁵⁶ A general plan is a comprehensive planning document including "maps, plats, charts and descriptive and explanatory matter"⁵⁷ describing how the community proposes to meet its "present and future needs."⁵⁸ The plan may address a broad range of health, safety, and general welfare concerns,⁵⁹ and may refer to territory which is not within the city.⁶⁰ The county plan may include any part of the county.⁶¹

A proposed general plan is adopted by the planning commission after public notice and hearing.⁶² The plan adopted by the planning commission is then "recommended" or "forwarded" to the legislative body.⁶³ After receiving the plan and after public hearings, the legislative body may modify and adopt the plan or reject it.⁶⁴ Subsequent amendments follow the same procedure.⁶⁵

The enabling acts do not explicitly require that a general plan be adopted *before* the text of the zoning ordinance is adopted. On that point a litigant in *Gayland v. Salt Lake County*⁶⁶ asserted "that the Salt Lake County Commission cannot

55. For cities, the "master" plan was introduced in 1945 in the Municipal Planning Enabling Act. Municipal Planning Enabling Act, ch. 23, § 2, 1945 Utah Laws 63, 63 (repealed 1991). For counties, the "master" plan was introduced in 1941 in the original county enabling act. Zoning and Planning Commission, ch. 23, § 4, 1941 Utah Laws 29, 30 (repealed 1991).

56. UTAH CODE ANN. §§ 10-9-204(1), -301(1) (1992), 17-27-204(1) (1992), -301(1) (Supp. 1994).

57. *Id.* §§ 10-9-302(2) (1992), 17-27-302(2) (Supp. 1994).

58. *Id.* §§ 10-9-301(1)(a), 17-27-301(1)(a).

59. *Id.* §§ 10-9-301(2)(a), 17-27-301(2)(a).

60. *Id.* § 10-9-302(1)(b).

61. *Id.* § 17-27-302(1)(b) (Supp. 1994).

62. *Id.* §§ 10-9-303(1) (1992), 17-27-303(1).

63. *Id.* § 10-9-303(2), 17-27-303(2).

64. *Id.* §§ 10-9-303(3)-(5), 17-27-303(3)-(5).

65. *Id.* §§ 10-9-304 (1992), 17-27-304 (1991).

66. 358 P.2d 633 (Utah 1961).

pass a valid zoning ordinance because it has not yet adopted a master plan."⁶⁷ Although the enabling acts then in force required the adoption of a general or "master" plan, the Utah Supreme Court disagreed with the litigant, noting "that nowhere in the act is there any express requirement that a master plan be adopted before zoning ordinances can be passed."⁶⁸

Proposed Legislative Change. A zoning ordinance is the specific implementation of the long-range forecast of a general plan. It is thus illogical to allow adoption of a zoning ordinance before adoption of a general plan. Both acts should be amended to require the adoption of a general plan to precede the adoption of a zoning ordinance.⁶⁹

The enabling statutes provide that a general plan, once adopted, is only "an advisory guide for land use decisions,"⁷⁰ even though the terms of the zoning ordinance may contain a provision "mandating compliance with the general plan."⁷¹ To mandate compliance with the general plan means that details of the text and map of the zoning ordinance must conform to the plans for community development described in the general plan. The positive side to mandating compliance is that zoning decisions may tend to be more consistent and far-sighted because they are based, as they must be, on the terms of the comprehensive general plan. The negative side to mandating compliance is that litigation may increase as litigants claim, wherever possible, that a zoning provision is invalid because it does not "comply" with the general plan.

The explicit language in the enabling acts that a general plan is only an "advisory guide" lays to rest the conflicting signals sent by the Utah Supreme Court about whether a zoning ordinance must comply with a general plan. The first of these signals is in *Naylor v. Salt Lake City Corp.*,⁷² where the reclassification of one-half of a city block from residential uses

67. *Id.* at 635.

68. *Id.*

69. Specifically, UTAH CODE ANN. §§ 10-9-404 and 17-27-404 (dealing with temporary zoning regulations) should be amended by adding a subsection (3) which would read as follows:

(3) Except as provided above, adoption of a zoning ordinance shall be preceded by adoption of a general plan relating to the zoned property.

70. UTAH CODE ANN. §§ 10-9-303(6)(a) (1992), 17-27-303(6)(a) (Supp. 1994).

71. *Id.* §§ 10-9-303(6)(b), 17-27-303(6)(b).

72. 410 P.2d 764, 766 (Utah 1966).

to commercial uses was challenged on the grounds, inter alia, that the new classification did not conform to the city's comprehensive plan which was adopted in 1927.⁷³ Tacitly acknowledging that the plaintiff was factually correct, the Utah Supreme Court replied:

It must be realized that zoning is not a static thing which once established becomes set in concrete forever. To require adherence to a plan formulated 40 years ago without any more reason than that the ordinance had been so long established would be quite impractical and in some instances would frustrate attempts to put into effect necessary changes to accomplish the objectives zoning was designed to serve. It is obvious that there must be some pliability so that in performing its function the Commission may keep abreast of changing conditions as life courses onward and meets the varying needs of the growing city.⁷⁴

However, in *Wilson v. Manning*,⁷⁵ a case dealing with the use of referenda to rezone, the Utah Supreme Court, in dicta, sent a second signal which suggested that an inconsistency between an ordinance and a master plan might nevertheless be a basis on which a local ordinance could be set aside:

One way to make that showing [that an ordinance should be held invalid], under these authorities, is to demonstrate that the amendment runs counter to the terms of or the policy established in the underlying law or ordinance or the zoning master plan.⁷⁶

2. *Recommend a zoning ordinance*

A "proposed zoning ordinance, including both the full text of the zoning ordinance and maps . . . for zoning all or any part of the area" within a city or county is prepared by the planning commission and recommended to the legislative body.⁷⁷

73. *Id.*

74. *Id.*

75. 657 P.2d 251 (Utah 1982).

76. *Id.* at 254 (dicta) (emphasis added).

77. UTAH CODE ANN. §§ 10-9-402(1) (1992), 17-27-402(1) (Supp. 1994); see also *id.* §§ 10-9-204(2) (1992), 17-27-204(2) (1991).

3. *Administer provisions of the zoning ordinance*

A planning commission may "administer provisions of the zoning ordinance, where specifically provided for in the zoning ordinance."⁷⁸ This provision recognizes the reality that in many, if not most, cities and counties, the planning commission and its staff handle most zoning administration. Zoning enforcement is one example of matters which the zoning ordinance might expressly authorize a planning commission to administer. This express authorization to administer zoning matters legitimizes actions by a planning commission in formulating an enforcement policy, supervising enforcement officers, and authorizing enforcement actions.

4. *Recommend subdivision regulations*

The acts provide that a city or county legislative body "may enact a subdivision ordinance."⁷⁹ Where this is done, "[t]he *planning commission* shall . . . prepare and recommend . . . [the] proposed subdivision ordinance to the legislative body."⁸⁰ The planning commission must hold a public hearing with respect to the proposed ordinance before recommending it to the legislative body.⁸¹ The same process is followed for amendments to a subdivision ordinance.⁸²

5. *Recommend approval or denial of subdivisions*

In cities and counties, a subdivision plat may not be recorded unless in relation to it "a recommendation has been received from the planning commission."⁸³

6. *Advise the legislative body*

"The planning commission shall . . . advise the legislative body on matters as the legislative body directs."⁸⁴ A simple illustration of the manner in which this provision could have

78. *Id.* §§ 10-9-204(3) (1992), 17-27-204(3) (1991).

79. *Id.* §§ 10-9-801, 17-27-801. For a discussion relating to subdivision ordinances, see *infra* text accompanying note 306.

80. UTAH CODE ANN. §§ 10-9-802(1)(a) (1992), 17-27-802(1)(a) (Supp. 1994) (emphasis added); see also *id.* §§ 10-9-204(4) (1992), 17-27-204(4) (1991).

81. *Id.* §§ 10-9-802(1)(b) (1992), 17-27-802(1)(b) (Supp. 1994).

82. *Id.* §§ 10-9-803 (1992), 17-27-803 (1991).

83. *Id.* §§ 10-9-805(1) (1992), 17-27-805(1) (Supp. 1994); see also *id.* §§ 10-9-204(5) (1992), 17-27-204(5) (1991).

84. *Id.* §§ 10-9-204(6) (1992), 17-27-204(6) (1991).

been applied is found in *Citizen's Awareness Now v. Marakis*.⁸⁵ In this controversy, the small community of East Carbon City was faced with a proposal to annex approximately 2,500 acres of land which would be used as "a privately owned solid-waste disposal facility."⁸⁶ Under its power to require advice from the planning commission, the legislative body of East Carbon City could have required its planning commission to give advice on whether this proposal should be approved, and, if so, under what terms.

7. *Hear and decide matters*

The acts provide that "[t]he planning commission shall . . . *hear or decide* any matters that the legislative body designates, including the approval or denial of, or recommendations to approve or deny, conditional use permits."⁸⁷ The power to *hear and decide* should be contrasted with the power to *administer*. The "hear and decide" language implies that a zoning ordinance may empower a planning commission, in ways that go beyond simple administration, to receive public comment or evidence and exercise discretion in making a decision. For example, in *Stucker v. Summit County*,⁸⁸ the local ordinance required a proposed use to be *compatible* with neighboring uses. Where compatibility was at issue, the ordinance then authorized the planning commission to hold hearings and make a decision resolving the issue:

When a developer and affected property owners cannot reach a consensus of opinion regarding compatibility of the proposed land use, *the Planning Commission holds a public hearing prior to making a decision and listens to the concerns of all affected property owners* and interested parties regarding the proposed project's compatibility.⁸⁹

Examples of other matters in which a planning commission might be asked to exercise the power to "hear and decide" include nonconforming uses,⁹⁰ historic building or district sta-

85. 873 P.2d 1117 (Utah 1994).

86. *Id.* at 1119.

87. UTAH CODE ANN. §§ 10-9-204(7) (1992), 17-27-204(7) (1991) (emphasis added).

88. 870 P.2d 283 (Utah Ct. App. 1994).

89. *Id.* at 285 (emphasis added).

90. *E.g.*, PROVO, UTAH, PROVO CITY ORDINANCES § 14.04.020(4) (1992).

tus,⁹¹ planned community plan approvals,⁹² so-called "performance development" evaluations,⁹³ and, of course, conditional use permits.⁹⁴

8. *Exercise necessary and delegated powers*

The provision to exercise necessary and delegated powers is apparently intended to serve two functions.⁹⁵ First, the authorization to exercise necessary powers helps avoid a strict or limiting construction of the enumerated powers described above for the planning commission.⁹⁶ Second, the authorization to exercise delegated powers accommodates the expanding tendency to delegate administrative responsibilities to planning commissions such as the responsibility to hold administrative hearings.⁹⁷

F. *Miscellaneous Powers*

The planning commission or its agents may enter upon land at reasonable times to make examinations or surveys.⁹⁸ In addition, a planning commission may have access to information held by the state or any of its agencies, unless that information is protected.⁹⁹ Cities and counties are entitled to receive available data, information and technical services from the state "without additional cost."¹⁰⁰

III. THE ZONING ORDINANCE

The power to restrict and regulate the size and use of buildings, structures and land for trade, industry, residence and other purposes, is granted to the *legislative body* of cities [and

91. *E.g.*, *id.* § 14.02.100.

92. *E.g.*, *id.* § 14.04.020(3).

93. *Thurman v. Cache County*, 626 P.2d 440, 443 (Utah 1981); *PROVO, UTAH, PROVO CITY ORDINANCES* § 14.31.050 (1992).

94. *E.g.*, *PROVO, UTAH, PROVO CITY ORDINANCES* § 14.04.020(2) (1992).

95. *UTAH CODE ANN.* §§ 10-9-204(8) (1992), 17-27-204(8) (1991).

96. *E.g.*, *Davis County v. Clearfield City*, 756 P.2d 704 (Utah Ct. App. 1988) (statute on appeals to the courts strictly interpreted).

97. *Stucker v. Summit County*, 870 P.2d 285 (Utah Ct. App. 1994). For a description in *Stucker* of administrative hearings, see *supra* text accompanying note 88.

98. *UTAH CODE ANN.* §§ 10-9-205 (1992), 17-27-205 (Supp. 1994).

99. *Id.* §§ 63-2-101 to -909 (1993) (Government Records Access and Management Act).

100. *Id.* §§ 10-9-203(2)(b) (1992), 17-27-203(2)(b) (1991).

counties] for the purpose of promoting the health, safety, morals and general welfare of the community¹⁰¹

A. *The Power to Zone*

A local legislative body may adopt and amend a zoning ordinance,¹⁰² including both text and map.¹⁰³ Exercise of the power to zone is an exercise of police power. The Utah Supreme Court held in *Marshall v. Salt Lake City*¹⁰⁴ that it was the police power that enabled a city legislative body to divide a city into zoning districts and regulate uses therein.¹⁰⁵ That holding was reiterated in *Western Land Equities, Inc. v. City of Logan*,¹⁰⁶ in which the Utah Supreme Court again stated that "[i]t is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power."¹⁰⁷

B. *Zoning Districts and Regulations*

The legislative body "may divide the territory over which [the city or county] has jurisdiction into zoning districts."¹⁰⁸ Within those districts "the legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land."¹⁰⁹ Within each district "the regulations . . . [must be] uniform for each class or kind of buildings . . . [,] but the regulations in one district may differ from those in other districts."¹¹⁰

In *Hargraves v. Young*,¹¹¹ it was held that the power to adopt regulations within zoning districts includes the power to designate sideyard and setback requirements.¹¹² By statute,

101. *Walton v. Tracy Loan & Trust Co.*, 92 P.2d 724, 725 (Utah 1939).

102. UTAH CODE ANN. §§ 10-9-401 to -403 (1992), 17-27-401 to -403 (Supp. 1994).

103. *Id.* §§ 10-9-402(1), 17-27-402(1).

104. 141 P.2d 704 (Utah 1943).

105. *Id.* at 707 ("[Dividing the city into zoning districts] is done under the police power.").

106. 617 P.2d 388 (Utah 1980).

107. *Id.* at 390.

108. UTAH CODE ANN. §§ 10-9-405(1)(a) (1992), 17-27-405(1)(a) (1991).

109. *Id.* §§ 10-9-405(1)(b), 17-27-405(1)(b).

110. *Id.* §§ 10-9-405(2), 17-27-405(2).

111. 280 P.2d 974 (Utah 1955).

112. *Id.* at 975.

the zoning regulations may "protect and ensure access to sunlight for solar energy devices"¹¹³ and must include regulations permitting residential facilities for elderly and handicapped persons.¹¹⁴ With respect to different uses in zoning districts, *Phi Kappa Iota Fraternity v. Salt Lake City*¹¹⁵ held that the power of the legislative body to designate uses within zoning districts includes the power to differentiate and regulate different residential uses.¹¹⁶

In addition, the state's high court held in *Buhler v. Stone*¹¹⁷ that regulations in a zoning ordinance may include "reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment."¹¹⁸ Moreover, ordinance language requiring the elimination of "unsightly or deleterious objects" or "junk [and] scrap metal"¹¹⁹ is not unconstitutionally vague. In relation to vagueness, the court adopted a very broad view:

Concerning the charge of vagueness, it should be realized that legislation must necessarily be in somewhat general terms because it is obviously impossible to describe in detail every act and circumstance a statute or ordinance is intended to deal with. It is but sensible and practical that courts should take into consideration the difficulties involved in describing such conditions with the last degree of precision of language. The pertinent parts of the ordinance should not be viewed in isolation for the purpose of finding fault with them and declaring it unconstitutional; they should be viewed in light of the total context and purpose; and an enactment should not be declared void for vagueness unless it is so deficient that it is susceptible of no reasonable construction which would make it operable.¹²⁰

113. UTAH CODE ANN. § 10-9-901 (1992).

114. See *infra* text accompanying note 252.

115. 212 P.2d 177 (Utah 1949).

116. *Id.* at 181.

117. 533 P.2d 292 (Utah 1975).

118. *Id.* at 294.

119. *Id.* at 293.

120. *Id.* at 294.

C. *The Health, Safety, and General Welfare Standard*

The traditional standard of the health, safety, and general welfare of the public is the abstract measure of the police power by which local governments divide their territory into districts and regulate therein.¹²¹ Although conceptually, a zoning regulation is unenforceable if there is not a sufficient nexus between it and the health, safety, and general welfare of community residents,¹²² the Utah Supreme Court has been explicitly reluctant to invalidate a zoning regulation for this reason. This reluctance was first illustrated in *Marshall* in which the Utah Supreme Court signalled the lengths it would go to defend local zoning regulations from claims that no nexus exists.¹²³

In *Marshall*, the zoning ordinance permitted "utility" business uses on intersection corners in residential districts. Acknowledging that the enabling statute required that territory should be divided into *districts* and not regulated by single lots or groups of lots,¹²⁴ the Utah Supreme Court nevertheless upheld the corner uses.¹²⁵ The basis for the holding was that the classification was part of a comprehensive plan designed to promote the general welfare, and the court would not second guess the city "[u]nless the action of [the governing body of the city] is arbitrary, discriminatory or unreasonable, or clearly offends some provision of the constitution or statute."¹²⁶

In *Phi Kappa Iota Fraternity v. Salt Lake City*,¹²⁷ a zoning provision, which prohibited residences located more than 600 feet from the University of Utah from use as a fraternity or a sorority, was challenged on the grounds that the requirement was discriminatory. Citing its decision in *Marshall*, the court refused to invalidate the provision and noted that the power to zone is a "discretionary power" with which the courts will not interfere "unless the discretion is abused."¹²⁸ And, said the court in reference to the issue of discrimination, "[t]he selection of one method of solving the problem in preference to another

121. UTAH CODE ANN. §§ 10-9-102 (1992), 17-27-102 (Supp. 1994).

122. See, e.g., *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559 (Utah 1967).

123. *Marshall v. Salt Lake City*, 141 P.2d 704, 711 (Utah 1943).

124. *Id.* at 708.

125. *Id.* at 711.

126. *Id.* at 709.

127. 212 P.2d 177 (Utah 1949).

128. *Id.* at 179.

is entirely within the discretion of the commission; and does not, in and of itself, evidence an abuse of discretion."¹²⁹

Again, in *Dowse v. Salt Lake City Corp.*,¹³⁰ the Utah Supreme Court refused to invalidate a zoning requirement because of a claimed lack of nexus between a zoning provision and the public health, safety, and general welfare.¹³¹ In *Dowse*, the plaintiff claimed his property should be classified as commercial and not residential. Disagreeing, the court responded that "[t]he wisdom of the plan, the necessity, the number, nature, and boundaries of the district are matters which lie in the discretion of the City authorities, and only if their action is confiscatory, discriminatory or arbitrary may the court set aside their action."¹³²

The same result was reached in *Hargraves v. Young*.¹³³ In *Hargraves*, a homeowner directly attacked the sideyard requirements of the Salt Lake City zoning ordinance claiming "that there is no reasonable relationship between prohibiting such structure in sideyards [referring to a carport which offended the sideyard requirements] and the public health, safety, morals, or general welfare."¹³⁴ Implicitly recognizing that health, safety, and general welfare was the correct standard, the Utah Supreme Court disagreed with the homeowner and held that the necessary nexus existed between that standard and the sideyard requirements.¹³⁵

The one exception in this line of cases is *Gibbons & Reed Co. v. North Salt Lake City*,¹³⁶ in which the Utah Supreme Court invalidated the rezoning of land being used as a gravel pit. The rezoning was from a forestry and natural resource zone to a residential zone and the court held that the rezoning was an unreasonable exercise of the police power.¹³⁷ The court distinguished its earlier decisions in *Marshall* and *Dowse* on the factual grounds that the present rezoning "makes almost useless otherwise valuable land."¹³⁸ Moreover, said the court,

129. *Id.* at 181.

130. 255 P.2d 723 (Utah 1953).

131. *Id.* at 723.

132. *Id.* at 724 (citing *Marshall*, 141 P.2d at 704).

133. 280 P.2d 974 (Utah 1955).

134. *Id.* at 974-75.

135. *Id.* at 975.

136. 431 P.2d 559 (Utah 1967).

137. *Id.* at 563-64.

138. *Id.* at 562.

the rezoning presented "no real gain to the public in general" because there was no substantial evidence that dust from the gravel pit was a nuisance.¹³⁹

Two years later, however, the general reluctance of the Utah Supreme Court to invalidate a zoning requirement for lack of nexus with the public health, safety, or general welfare explicitly reappeared in *Chevron Oil Co. v. Beaver County*.¹⁴⁰ In *Chevron Oil*, the Beaver County Commission refused to re-zone property near the I-15 freeway from a grazing zone to a highway services zone for the reasons (1) that the county did not wish to provide government services at that location, and (2) that new businesses by the freeway would harm established businesses in Beaver City.¹⁴¹ Citing its decision in *Dowse*, the Utah Supreme Court refused to invalidate the existing zone classification:

Whether we agree with the wisdom of the county commissioners or do not agree with it is of no importance. The matter is to be decided by a legislative body (the county commission), and the courts do not ordinarily interfere in such matters. However, should a board enact an ordinance which deprives a person of his property, and where it is clear that the board has acted arbitrarily, capriciously, or in a discriminating manner, the courts will grant redress.¹⁴²

Again in 1982, the Utah Supreme Court reiterated in dicta in *Wilson v. Manning*¹⁴³ the proposition that zoning provisions which are irrationally connected to the health, safety, and general welfare of community residents may be invalidated by the courts. Thus, stated the *Wilson* court: "County and city zoning ordinances can be set aside in the courts if they are confiscatory, discriminatory, arbitrary, capricious, or otherwise without basis in reason."¹⁴⁴ But the demonstrated reality is that the courts will respond in such cases only where the injustice is obvious. This reality was summarized in the 1990 decision of the court of appeals in *Sandy City v. Salt Lake County*.¹⁴⁵

139. *Id.* at 563.

140. 449 P.2d 989 (Utah 1969).

141. *Id.* at 990.

142. *Id.*

143. 657 P.2d 251 (Utah 1982).

144. *Id.* at 254 (dicta).

145. 794 P.2d 482 (Utah Ct. App. 1990).

It is well established in Utah that "courts of law cannot substitute their judgment in the area of zoning regulations for that of the [municipality's] governing body." Instead, the courts afford a comparatively wide latitude of discretion to administrative bodies charged with the responsibility of zoning, as well as endowing their actions with a presumption of correctness and validity, because of the complexity of factors involved in the matter of zoning and the specialized knowledge of the administrative body. Thus, the courts will not consider the wisdom, necessity, or advisability or otherwise interfere with a zoning determination unless "it is shown that there is no reasonable basis to justify the action taken."¹⁴⁶

D. "Spot" Zones

The statutory requirement that the territory of a city or county must be divided into *districts* prohibits, by definition, the division of territory into smaller parts which are sometimes referred to as "spot" zones.¹⁴⁷ In *Marshall v. Salt Lake City*,¹⁴⁸ the Utah Supreme Court described this limitation in the following language:

That the [enabling] statute contemplates a division and regulation by *districts*, instead of regulation by *single lots or small groups of lots*, is evident. The regulation of the use of property by lots or by very small areas is not zoning and does violence to the purpose and provisions of the statute.¹⁴⁹

In *Crestview-Holladay Homeowners Ass'n v. Engh Floral Co.*,¹⁵⁰ the Utah Supreme Court described the consequences of spot zoning:

Spot zoning results in the creation of two types of "islands." One type results when the zoning authority improperly limits the use which may be made of a small parcel located in the center of an unrestricted area. The second type of "island" results when most of a large district is devoted to a limited or restricted use, but additional uses are permitted in one or more spots in the district.¹⁵¹

146. *Id.* at 485-86 (citations omitted).

147. See generally 83 AM. JUR. 2d *Zoning and Planning* § 146 (1992).

148. 141 P.2d 704 (Utah 1943).

149. *Id.* at 708 (second emphasis added).

150. 545 P.2d 1150 (Utah 1976).

151. *Id.* at 1151.

Although seemingly clear in concept about the nature and consequences of spot zoning, the Utah Supreme Court has in practice deferred to the discretion of local legislative bodies.¹⁵² The result is that the court has thus far been unwilling to acknowledge the existence of a prohibited "spot" zone, even when the zoning district is no bigger than the corner lots described in *Marshall*.

In cases other than *Marshall*, spot zone challenges have likewise been unsuccessful. In *Naylor v. Salt Lake City Corp.*,¹⁵³ a zoning reclassification of one half of a city block from residential to commercial was challenged on the grounds, inter alia, "that the rezoning of this one-half block area for business is in effect a 'spot' zoning inconsistent with the zoning of the surrounding area."¹⁵⁴ Declining to substitute its judgment for that of the city commission, the court made no comment about the size of the new district and simply observed that the reclassification was consistent with changing circumstances.¹⁵⁵ The city commission, the court said, "must necessarily be allowed a wide latitude of discretion."¹⁵⁶

The result in *Crestview-Holladay Homeowners Ass'n*¹⁵⁷ was similar. In this action a long-established business, operating as a nonconforming use in a residential zone, had substantially expanded ("with annual gross receipts of more than \$1,200,000 and occupying approximately 13 acres") beyond its original nonconforming status.¹⁵⁸ Rezoning of the property from residential to commercial was challenged and "[t]he trial court held that the reclassification ordinance constitutes spot zoning and that the action of the Board of County Commissioners was arbitrary, unreasonable and capricious."¹⁵⁹ The Utah Supreme Court reversed, holding that "[i]t is doubtful that the term 'spot zoning' applies to this case in view of the size of the tract."¹⁶⁰ Citing, among others, its decisions in *Marshall*, *Dowse* and *Naylor*, the Supreme Court reiterated that zoning classifications "lie solely within [local legislative] discretion,"

152. See *supra* text accompanying note 146.

153. 410 P.2d 764 (Utah 1966).

154. *Id.* at 766.

155. *Id.*

156. *Id.* at 765.

157. 545 P.2d 1150 (Utah 1976).

158. *Id.* at 1151.

159. *Id.*

160. *Id.*

and, in the absence of action which "is illegal, arbitrary, discriminatory or capricious," that "[i]t is the policy of this court . . . that it will avoid substituting its judgment for that of the legislative body of the municipality."¹⁶¹

Thus, the result with respect to spot zones is similar to the result with respect to the health, safety, and general welfare standard. Although the courts have stated in concept that a spot zone will be invalidated when challenged, the reality is that even in the most egregious case, the court refused to invalidate the claimed spot zone.¹⁶²

E. The Procedure to Zone

A zoning ordinance (including text and maps) is prepared and recommended by the planning commission and adopted by the legislative body.¹⁶³ Thereafter, amendments may not be made to the zoning ordinance unless the proposal originated with the planning commission or was first referred to the planning commission "for its approval, disapproval, or recommendations."¹⁶⁴ Curiously, although the planning commission is explicitly required to hold hearings in relation to the proposed general plan it recommends to the legislative body, it is not explicitly required to hold hearings in relation to the proposed zoning ordinance it recommends to the legislative body.¹⁶⁵

Proposed Legislative Change. In an apparent oversight, the enabling acts do not expressly require the planning commission to hold a hearing on a proposed zoning ordinance before forwarding it to the legislative body. Both acts should be amended to expressly require such a hearing.¹⁶⁶

161. *Id.* at 1152.

162. *See, e.g., Marshall*, 141 P.2d at 707-11.

163. UTAH CODE ANN. §§ 10-9-402 (1992), 17-27-402 (Supp. 1994).

164. *Id.* §§ 10-9-403 (1992), 17-27-403 (1991).

165. *Compare id.* §§ 10-9-303(1), 17-27-303(1) with *id.* §§ 10-9-402(1), 17-27-402(1).

166. Specifically, UTAH CODE ANN. §§ 10-9-402 and 17-27-402 (preparation and adoption of zoning ordinance) should be amended as follows: the present subsection (2) of said sections should be renumbered as subsection (3) and the present subsection (3) of said sections should be renumbered as subsection (4). A new subsection (2) should be enacted which provides as follows:

(2)(a) After completing a proposed zoning ordinance, the planning commission shall schedule and hold a public hearing on the proposed ordinance.

(b) The planning commission shall provide reasonable notice of the public hearing at least 14 days before the date of the hearing.

Preparing, amending and adopting a zoning ordinance requires that legislative bodies first conduct public hearings.¹⁶⁷ In *Call v. City of West Jordan*,¹⁶⁸ the city adopted an impact fee pursuant to its power to enact subdivision ordinances, but evidence showed that the city failed to conduct a required public hearing first. The city argued, however, that the public hearing requirement was satisfied "because the ordinance was adopted at a regularly scheduled city council meeting which was open to the public."¹⁶⁹ The Utah Supreme Court disagreed and invalidated the impact fee ordinance:

[W]e hold that because the statute calls for a *public hearing* our legislature contemplated something more than a regular city council meeting held, so far as the record here discloses, without specific advance notice to the public that the proposed ordinance would be considered. Notice, to be effective, must alert the public to the nature and scope of the ordinance that is finally adopted. Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid.¹⁷⁰

Both the city and county enabling acts mandate that public meetings held for the purpose of rezoning must be preceded by notice thereof to the public.¹⁷¹ In this context it has been held that failure to give adequate public notice is a basis for invalidating an ordinance. For example, in *Melville v. Salt Lake County*,¹⁷² the former county enabling statute required *four* public notices as a prerequisite to zoning an area for the first time, but only one notice was given.¹⁷³ Consequently, the ordinance applying a zoning classification was held invalid.¹⁷⁴

In *Tolman v. Salt Lake County*,¹⁷⁵ the applicable statute required that notice of a rezoning be given by publication in a

(c) After the public hearing, the planning commission may make changes to the proposed zoning ordinance.

The proposed language is adapted from the notice and hearing provisions followed by a planning commission for a general plan. *Id.* §§ 10-9-303(1) (1992), 17-27-303(1) (Supp. 1994).

167. *Id.* §§ 10-9-402(2), 17-27-402(2).

168. 727 P.2d 180 (Utah 1986).

169. *Id.* at 183.

170. *Id.* (citations omitted).

171. UTAH CODE ANN. §§ 10-9-403(2) (1992), 17-27-403(2) (Supp. 1994).

172. 536 P.2d 133 (Utah 1975).

173. *Id.* at 134.

174. *Id.*

175. 437 P.2d 442 (Utah 1968).

newspaper and "by posting in three public places designed to give notice thereof to the persons affected."¹⁷⁶ The Utah Supreme Court invalidated the rezoning for lack of sufficient public notice, even though the literal requirements of the statute (one publication and three public postings) had arguably been met. The court was obviously influenced by the fact that the protestors had specially inquired about the rezoning and had been assured that it would not be adopted, and that thereafter, the applicant was personally notified of the rezoning hearing, but the protestors were not.¹⁷⁷

F. Initiative/Referendum

Article VI, section 1 of the Utah Constitution explicitly authorizes the use of initiatives and referenda by voters "of any legal subdivision of the state." Article VI, section 1 provides that

[voters] under such conditions and in such manner and within such time as may be provided by law, may initiate any desired legislation and cause the same to be submitted to a vote of the people of said legal subdivision for approval or rejection, or may require any law or ordinance passed by the law making body of said legal subdivision to be submitted to the voters thereof before such law or ordinance shall take effect.¹⁷⁸

In the context of local zoning legislation, the cases applying Article VI, section 1 and the related statutes¹⁷⁹ are muddled. The seminal case is *Keigley v. Bench*,¹⁸⁰ a case not dealing with zoning, which held that some decisions, although cast in the form of a legislative act, are in substance an administrative decision. Following that analysis, the issuing of bonds to finance construction of a municipal electric plant and system was held in *Keigley* to be legislative in nature and subject to a referendum.¹⁸¹ However, in *Shriver v. Bench*,¹⁸² the setting

176. *Id.* at 447 (emphasis added) (quoting UTAH CODE ANN. § 17-27-17 (1953) (repealed 1983)).

177. *Id.* at 445-46.

178. UTAH CONST. art. VI, § 1(2) (emphasis added).

179. UTAH CODE ANN. §§ 20A-7-401, -402 (Supp. 1994) ("Local Initiatives and Referenda--General Provisions").

180. 89 P.2d 480 (Utah 1939).

181. *Id.* at 482-86.

182. 313 P.2d 475 (Utah 1957).

of police officers' and firefighters' salaries was characterized as *administrative* in nature and thus not subject to a referendum.¹⁸³

Falling chronologically between *Keigley* and *Shriver* was the first zoning case, *Dewey v. Doxey-Layton Realty Co.*¹⁸⁴ In *Dewey*, the plaintiff claimed that a residential rezoning ordinance could be adopted through the *initiative* process.¹⁸⁵ His view was plausible because in *Marshall v. Salt Lake City*,¹⁸⁶ *Phi Kappa Iota Fraternity*,¹⁸⁷ and *Dowse*,¹⁸⁸ the court clearly treated zoning decisions as *legislative* in nature. However, the *Dewey* court would not allow an initiative to be used to make a zoning decision.¹⁸⁹ Discussing, but not explicitly adopting the legislative/administrative test from *Keigley*, the court noted that the zoning enabling statute required notice and hearing before the adoption of zoning legislation. The court held that, because the initiative process does not include notice and hearing, it cannot be used to rezone.¹⁹⁰

Ten years after *Dewey*, the issue of zoning by initiative or referendum was renewed in *Bird v. Sorenson*¹⁹¹ in which the plaintiffs demanded use of a *referendum* with respect to a rezoning. In *Bird*, the Utah Supreme Court issued a very brief opinion which made no reference to its decision in *Dewey* but simply cited *Keigley* and *Shriver* for the proposition that "[t]he determinative question is whether or not the action of the City Council was administrative or legislative."¹⁹² The court ignored its holdings in *Marshall*, *Phi Kappa Iota*, and *Dowse*, which state that the process of zoning is a *legislative* function,¹⁹³ and held that rezoning was *administrative* and refused the use of a referendum. In so holding, the *Bird* court

183. *Id.* at 480.

184. 277 P.2d 805 (Utah 1954).

185. *Id.* at 806.

186. 141 P.2d 704 (Utah 1943).

187. *Phi Kappa Iota Frat. v. Salt Lake City*, 212 P.2d 177 (Utah 1949).

188. *Dowse v. Salt Lake City Corp.*, 255 P.2d 723 (Utah 1953).

189. *Dewey*, 277 P.2d at 809.

190. *Id.*

191. 394 P.2d 808 (Utah 1964).

192. *Id.* at 808.

193. Subsequent decisions not related to the initiative/referendum controversy continue to treat the process of zoning and rezoning as a legislative function. See *Chevron Oil Co. v. Beaver County*, 449 P.2d 989 (Utah 1969); *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559 (Utah 1967); *Hargraves v. Young*, 280 P.2d 974 (Utah 1955); *Sandy City v. Salt Lake County*, 794 P.2d 482 (Utah Ct. App. 1990).

admitted what may have been its real concern, which was "[i]f each change in a zoning classification were to be submitted to a vote of the city electors, any master plan would be rendered inoperative."¹⁹⁴

The holding in *Bird* was followed 16 years later by *Wilson v. Manning*,¹⁹⁵ in which the plaintiffs demanded a referendum with respect to their objection to the rezoning of ten acres of land from residential to commercial. In a 3-2 decision, based at least in part on *stare decisis* grounds, the *Wilson* court reaffirmed its holding in *Bird* that a *rezoning* should be classified as *administrative*, and, therefore, beyond the reach of the initiative/referendum statute.¹⁹⁶ Although offering no answer to the challenge of the minority opinion which asked how such an obviously legislative act like rezoning property could be recharacterized as an administrative act,¹⁹⁷ the majority went on to hold out the possibility that major rezonings could nevertheless be done by referendum:

This ruling does not mean that an amendment to a zoning ordinance can never be the subject of a referendum. Some amendments can constitute such a material variation from the basic zoning law of the governmental unit as to constitute, in effect, the making of a new law rather than merely, as this Court said in *Bird v. Sorenson*, "implementing the comprehensive plan and adjusting it to current conditions."¹⁹⁸

The concession by the *Wilson* majority that rezonings which constitute a "material variation" to the local zoning plan could nevertheless be the subject of a referendum exposed the artificiality of the "legislative/administrative" test. If rezoning is genuinely administrative, as the majorities in *Bird* and *Wilson* hold, no amount of "material variation" to the local zoning plan will transform the inherently administrative process of rezoning back into a legislative process.

At the bottom of these twistings and turnings is the policy judgment that it is not wise to trust all zoning decisions to the popular vote. This concern is openly discussed in the most

194. *Bird*, 394 P.2d at 808.

195. 657 P.2d 251 (Utah 1982).

196. *Id.* at 253-54.

197. *Id.* at 255.

198. *Id.* at 254.

recent zoning case, *Citizen's Awareness Now v. Marakis*.¹⁹⁹ In *Marakis*, the trial court disallowed the use of a referendum to decide whether to annex approximately 2,500 acres of land into East Carbon City, in which it would be zoned for use as a privately owned solid waste facility.²⁰⁰ The Utah Supreme Court reversed summary judgment in favor of the city and remanded with instructions which are essentially an elaboration of its holding in *Wilson*.²⁰¹ In sum, the *Marakis* court held that a referendum may be used to resolve a zoning issue if two requirements related to voter participation are met.²⁰²

1. *Material change requirement*

The first requirement for referendum use is the *Wilson* requirement,²⁰³ that the proposed zoning change amount to a material change of zoning policy as opposed to the continued administration of an existing policy.²⁰⁴ If, indeed, the proposed change constitutes a material change in zoning policy, the proposal is characterized as *legislative*,²⁰⁵ and, with respect to this requirement, a referendum may be used. On the other hand, if the proposed change cannot be characterized as a material change in zoning policy, the proposal is characterized as *administrative*,²⁰⁶ and a referendum may not be used.

2. *Voter participation requirement*

The second requirement for referendum use is the question "whether the zoning change implicates a policy-making decision amenable to voter control."²⁰⁷ The *Marakis* court identified two instances where voters should not be allowed to alter zoning legislation by the use of referenda. The first instance where voters should not participate is when "the zoning change involve[s] a matter so complex that voters should be required to entrust the decision to their elected representatives"²⁰⁸; the second instance is where the use of referenda will interfere

199. 873 P.2d 1117 (Utah 1994).

200. *Id.* at 1119, 1121.

201. *Id.* at 1121-24, 1126.

202. *Id.* at 1117.

203. *Wilson v. Manning*, 657 P.2d 251, 254 (Utah 1982).

204. *Marakis*, 873 P.2d at 1124-25.

205. *Id.* at 1125-26.

206. *Id.* at 1125.

207. *Id.*

208. *Id.*

with the efficient operation of government.²⁰⁹ "Otherwise," said the court, "communities will be subject to the undesirable phenomenon of city government by referenda, an inefficient and often arbitrary system that virtually guarantees piecemeal land development."²¹⁰

Proposed Legislative Change. Whether voters should participate through initiative or referendum in the zoning process is a fair question for debate. However, the legislative/administrative test used to regulate the issue is flawed and should be replaced by statutory provisions which directly regulate the issue, as permitted by Article VI, section 1 of the Utah Constitution.²¹¹

G. Conditional Uses

1. Conditional uses allowed

Both acts expressly provide that "[a] zoning ordinance may contain provisions for *conditional uses* that may be allowed, allowed with conditions, or denied in designated zoning districts, based on compliance with standards and criteria set forth in the zoning ordinance for those uses."²¹² Both acts define a conditional use; in summary form, it is a land use which is made compatible with surrounding uses by meeting certain conditions or requirements.²¹³

209. *Id.*

210. *Id.*

211. Specifically, UTAH CODE ANN. §§ 10-9-403 and 17-27-403 (dealing with amendments and rezonings) should be amended by adding a new subsection (3), as follows:

(3) Neither an initiative nor a referendum shall be used to change any part of a zoning ordinance or a subdivision ordinance adopted pursuant to the authority of this act, unless the following conditions are met:

(i) That the provisions at issue include a material change in zoning policy.

(ii) That the complexity of the issues involved in the proposed change is such that they may be easily understood by the average voter in the context of an initiative or referendum.

(iii) That the initiative or referendum process will not unreasonably interfere with the efficient operation of the governmental body.

212. UTAH CODE ANN. §§ 10-9-407(1) (1992), 17-27-406(1) (1991) (emphasis added).

213. *Id.* §§ 10-9-103(1)(c) (1992), 17-27-103(1)(c) (Supp. 1994).

2. "Point" systems

The Utah Supreme Court has tacitly approved the use of a numerical evaluation system to help make conditional use decisions. In *Thurston v. Cache County*,²¹⁴ a numerical evaluation system was used as part of a conditional use approval process:

The "numerical evaluation system" referred to assigns or denies points to the application according to certain criteria. Points are awarded for residential development which lies closer to pre-existing development and has roadway and utility access, and are deducted for intrusions upon prime farm land or other factors which would be of detriment to agriculture. The evaluation system is advisory in nature, and not solely determinative of the disposition of any given application.²¹⁵

3. Neighborhood approval

Concerning the decision to grant or deny conditional use permits, the Utah Supreme Court has held that although it is appropriate to solicit information from neighboring landowners, it is inappropriate to base a zoning decision on their consent. Thus, in *Thurston*, it was alleged that the county "placed undue reliance on objections filed by landowners in the vicinity."²¹⁶ The Utah Supreme Court held the landowner's objections were properly treated by the county as advisory only. Moreover, the court maintained:

[w]hile it is true that the consent of neighboring landowners may not be made a criterion for the issuance or denial or [sic] a conditional use permit, there is no impropriety in the solicitation of, or reliance upon, information which may be furnished by other landowners in the vicinity of the subject property at a public hearing.²¹⁷

However, in *Davis County v. Clearfield City*,²¹⁸ the Utah Court of Appeals affirmed a district court holding that a "City Council's decision [refusing to grant a conditional use permit]

214. 626 P.2d 440 (Utah 1981).

215. *Id.* at 443.

216. *Id.* at 445.

217. *Id.*

218. 756 P.2d 704 (Utah Ct. App. 1988).

was based on 'public clamor' which was not a legally sufficient basis for denying [a] permit."²¹⁹ In a footnote, the court of appeals explained the nature of the public clamor it found objectionable: "The clamor is typified by the curious action taken at the Planning Commission hearing, where citizens in attendance were asked to vote on the application. Only one person voted for the facility and all others in the audience voted against it."²²⁰

The issue of neighborhood involvement in permit approval arose again in *Stucker v. Summit County*.²²¹ The local zoning ordinance allowed neighbors affected by a proposed permit to express their opposition or support.²²² Focusing on a distinction between "neighborhood veto power and neighborhood participation,"²²³ the court of appeals observed:

At no time during the proceedings did the Planning Commission delegate veto power to the neighbors. Rather, it simply listened to the objections of the affected landowners and interested parties, and then rendered a decision. Therefore, because the Planning Commission ultimately made the decision to deny the permit, and because *Thurston* allows the Planning Commission to use information gathered from neighbors in making a decision, we hold that the 1985 Code's absolute policy on compatibility does not impermissibly grant veto power to the Stuckers' neighbors.²²⁴

H. Special Exceptions

In addition to conditional uses, both enabling acts allow the local legislative body to "provide for *special exceptions*,"²²⁵ a term which is not defined in either act. The acts also cryptically provide that "[t]he legislative body may provide that conditional use permits be treated as special exceptions in the zoning ordinance."²²⁶

Most courts have held that there is no meaningful difference between a special exception and a conditional use permit.

219. *Id.* at 711.

220. *Id.* at 711 n.9.

221. 870 P.2d 283 (Utah Ct. App. 1994).

222. *Id.* at 289-90.

223. *Id.* at 289.

224. *Id.* at 290.

225. UTAH CODE ANN. § 10-9-706(1)(a) (1992) (emphasis added).

226. *Id.* §§ 10-9-706(3) (1992), 17-27-706(3) (1991).

"Different terms have been applied to . . . special permits, special exceptions and conditional uses, *but the consensus of judicial opinion is that they all refer to the same concept and are therefore interchangeable.*"²²⁷ In the words of another commentator: "The terms 'special permit,' 'special exception,' and 'conditional use permit' are *virtually synonymous.*"²²⁸ On that point, although it has not ruled directly on the issue, the Utah Supreme Court in *Thurston* was willing to assume, arguendo, that some "'special exceptions' are conditional use permits."²²⁹

Proposed Legislative Change. There is no difference between "conditional use" and "special exception," and definitions in both acts should be amended to reflect that reality.²³⁰

227. 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS 44.01[1] (1992) (emphasis added); see, e.g., *Lafayette College v. Zoning Hearing Bd. of Easton*, 588 A.2d 1323, 1325 (Pa. 1991) ("A special exception is a conditionally permitted use, legislatively allowed where specific standards and conditions detailed in the ordinance are met."); *Fairhope v. Fairhope*, 567 So. 2d 1353, 1355 (Ala. 1990) ("A special exception is a conditionally permitted use . . ."); *Urban Farms, Inc. v. Borough of Franklin Lakes*, 431 A.2d 163, 167 (N.J. 1981) ("Rather, a special exception or conditional use is a permitted use, subject to specific special controls and conditions."); *Zylka v. City of Crystal*, 167 N.W.2d 45, 48 (Minn. 1969) ("Provisions such as the one contained in defendant city's ordinance providing for *special-use permits*, sometimes called '*special exception permits*' or '*conditional use permits*,' were introduced into zoning ordinances as flexibility devices.")

228. Frank Schnidman & R. Lisle Baker, *Planning for Platted Lands: Land Use Remedies for Lot Sale Subdivisions*, 11 FLA. ST. U. L. REV. 505, 545 (1983) (emphasis added); see also 4 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 19.01 (3d ed. 1986) ("The 'special exception,' the 'special permit,' and the use permitted subject to administrative approval, are qualitatively the same."); Fred P. Bosselman, *The Impact of the Douglas Commission of Local Planning*, C851 A.L.L.-A.B.A. 433, 441 (1993) ("[T]he 'special exception' . . . has now grown to include many types of discretionary decisions bearing such names as 'conditional uses' and 'special-use permits.'"); W. G. Roeseler, *Regulating Adult Entertainment Establishments Under Conventional Zoning*, 19 URB. LAW. 125, 134 (1987) ("Traditionally, zoning ordinances distinguish between uses permitted as of right and conditional uses, sometimes known as 'special exceptions' . . ."); Douglas A. Yanggen & Leslie Amrhein, *Groundwater Quality Regulation: Existing Governmental Authority and Recommended Roles*, 14 COLUM. J. ENVTL. L. 1, 54 (1989) ("Conditional uses . . . are referred to as 'special exception uses' in many states' zoning enabling laws . . .").

229. *Thurston v. Cache County*, 626 P.2d 440, 446-47 (Utah 1981).

230. UTAH CODE ANN. §§ 10-9-103(c) and 17-27-103(c) (definitions) should be amended to read as follows:

(c) "Conditional use" means a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts. A conditional use is a type of special excep-

I. *Nonconforming Uses and Structures*

1. *Nonconforming uses and structures generally*

A nonconforming use or structure is a use or structure which legally existed under prior zoning regulations but does not conform to present zoning regulations.²³¹ A nonconforming use or structure may be continued²³² if it is not abandoned.²³³ It has been held that the burden of proving the existence of a nonconforming use falls on the person claiming it.²³⁴

In general, the legislative body may provide for "the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the zoning ordinance."²³⁵ However, it is a common rule that nonconforming uses cannot be expanded and still retain their lawful status.²³⁶ In that context, both acts provide that "[a] nonconforming use may be extended through the same building, provided no structural alteration of the building is proposed or made for the purpose of the extension."²³⁷ However, "the addition of a solar energy device to a building is not a structural alteration."²³⁸

2. *Termination of nonconforming uses*

In addition to the general power of government to terminate a nonconforming use by consent or by eminent domain, a nonconforming use may be terminated "by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use."²³⁹ Although there are no Utah cases focusing on the practice of terminating nonconforming uses by

tion.

231. UTAH CODE ANN. §§ 10-9-103(1)(j)-(k) (1992), 17-27-103(j)-(k) (Supp. 1994).

232. *Id.* §§ 10-9-408(1)(a), 17-27-407(1)(a) (Supp. 1994).

233. *Morrison v. Horne*, 363 P.2d 1113, 1114 (Utah 1961).

234. *Id.* For a further discussion of nonconforming uses, see *infra* parts V.G, VI.J.

235. UTAH CODE ANN. §§ 10-9-408(2)(a), 17-27-407(2)(a) (Supp. 1994).

236. *E.g.*, *Utah County v. Baxter*, 635 P.2d 61, 64 (Utah 1981) (finding that trial court did not err in holding that the defendant had unlawfully enlarged a nonconforming use).

237. UTAH CODE ANN. §§ 10-9-408(1)(b), 17-27-407(1)(b) (Supp. 1994).

238. *Id.* §§ 10-9-408(1)(c), 17-27-407(1)(c).

239. *Id.* §§ 10-9-408(2)(b), 17-27-407(2)(b).

amortization, the courts generally hold that *reasonable* amortization periods for the termination of nonconforming uses are valid.²⁴⁰ However, if the nonconforming use is in a billboard, involuntary termination of the use may be accomplished only through gift, purchase, agreement, exchange, or eminent domain.²⁴¹

J. Temporary Regulations (Moratoria)

There is no provision in the acts for a moratorium on development as such, but in the case of a "compelling, countervailing public interest," the legislative body is permitted to adopt temporary zoning regulations without a public hearing.²⁴² These temporary regulations may operate as moratoria because they may, for up to six months,²⁴³ "*prohibit* or regulate the erection, construction, reconstruction, or alteration of any building or structure or subdivision approval."²⁴⁴

The use of moratoria has been upheld generally.²⁴⁵ But exceptions exist where the development rights of a landowner have vested. In *Western Land Equities, Inc. v. City of Logan*,²⁴⁶ the Utah high court held that "an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest."²⁴⁷ Moreover, the United States Supreme Court has held that if

240. See generally Osborne M. Reynolds, Jr., *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 WASH. U. J. URB. & CONTEMP. L. 99, 109 (1988); see also *Art Neon Co. v. City & County of Denver*, 488 F.2d 118, 121 (10th Cir. 1973) (holding reasonable amortization scheme does not require payment of compensation); *City of Los Angeles v. Gage*, 274 P.2d 34, 44 (Cal. App. 1954) (holding reasonable amortization of nonconforming uses valid and not a taking). But see *PA Northwestern Distribs., Inc. v. Zoning Hearing Bd. of Moon*, 584 A.2d 1372, 1376 (Pa. 1991) ("[T]he amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution.").

241. UTAH CODE ANN. §§ 10-9-408(2)(b) and (c), 17-27-407(2)(b) and (c) (Supp. 1994).

242. *Id.* §§ 10-9-404(1) (1992), 17-27-404(1).

243. *Id.* §§ 10-9-404(2), 17-27-404(2).

244. *Id.* § 10-9-404(1)(b) (emphasis added); see also *id.* § 17-27-404(1)(b).

245. See, e.g., *Metro Realty v. County of El Dorado*, 35 Cal. Rptr. 480 (1963); *Mang v. County of Santa Barbara*, 5 Cal. Rptr. 724 (1960).

246. 617 P.2d 388 (Utah 1980).

247. *Id.* at 396; see also *Stucker v. Summit County*, 870 P.2d 283 (Utah Ct. App. 1994) (landowner's use rights did not vest with approval of subdivision plat).

zoning regulations "deny a landowner all use of his property," even temporarily, the landowner may have a cause of action for compensation.²⁴⁸

The use of temporary regulations may focus on fast-rising problems. That being so, it was probably intended that temporary regulations could be adopted without obtaining the recommendation of a planning commission. But the enabling acts do not waive that recommendation²⁴⁹ and, indeed, are explicit that an amendment to the text or map of a zoning ordinance first requires referral to the planning commission.²⁵⁰

Proposed Legislative Change. It was probably intended that temporary regulations could be adopted without obtaining the recommendation of the planning commission. Both acts should thus be explicitly amended to provide.²⁵¹

K. Residences for the Elderly and the Handicapped, Generally

1. Ordinances must be adopted

The enabling acts provide special protection for residential facilities for the elderly and the handicapped. Implicit in this protection is the assumption that cities and counties, under pressure from antagonistic residents,²⁵² may not voluntarily authorize the use of these facilities. Thus, the enabling acts provide that each city and county "*shall* adopt ordinances" that permit the use of facilities for the elderly and the handicapped which meet standards that are stated in or allowed by the enabling acts.²⁵³ In addition, if the zoning ordinance fails to

248. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987) ("Temporary takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.").

249. UTAH CODE ANN. §§ 10-9-404 (1992), 17-27-404 (Supp. 1994).

250. *Id.* §§ 10-9-403(1)(b) (1992), 17-27-403(1)(b) (1991).

251. Specifically, UTAH CODE ANN. §§ 10-9-404(1)(a) and 17-27-404(1)(a) should be amended to read as follows:

(1)(a) The legislative body may, with[~~out~~] a public hearing but without a recommendation from the planning commission, enact ordinances establishing temporary zoning regulations for any part or all of the area within the [municipality/county] if:

252. See, e.g., *Bangerter v. Orem City Corp.*, 797 F. Supp. 918, 920 (D. Utah 1992) ("Disparaging comments [related to a facility for the handicapped were] allegedly made by residents at . . . public hearings.").

253. UTAH CODE ANN. §§ 10-9-502(1), -504(2) (1992), 17-27-502(1), -504(2) (1991) (emphasis added).

permit the facility use, the city or county must permit it on the authority of the enabling act.²⁵⁴ Moreover, the enabling acts require that city and county ordinances "shall prohibit discrimination against elderly persons [and handicapped persons²⁵⁵] and against residential facilities for elderly persons [and handicapped persons²⁵⁶]." ²⁵⁷

2. *Review limited*

The enabling acts are explicit that, in deciding to grant or deny an application for a residential facility, a "[municipality/county] may decide only whether or not the residential facility . . . conforms to ordinances adopted by the [municipality/county] under this part [which addresses residential facilities]." ²⁵⁸ Indeed, "[i]f the [municipality/county] determines that the residential facility . . . complies with the ordinances, it shall grant the requested permit to that facility." ²⁵⁹

3. *Elderly as a "family"*

Another statutory restriction on the ability of a city or county to limit the occupancy of residences by the elderly relates to the definition of a family used in the city or county zoning ordinance. The enabling acts provide that "[t]he requirements of this section [facilities in single-family districts] that a residential facility for elderly persons obtain a conditional use permit or other permit *do not apply if the facility meets the requirements of existing zoning ordinances that allow a specified number of unrelated persons to live together.*" ²⁶⁰ Thus, for example, in Provo City, a family is defined, inter alia, as "two or more persons all related by blood within five degrees of consanguinity, by marriage or adoption." ²⁶¹ Accordingly, if two elderly men choose to live in Provo City in a residence in a single-family district, they meet the "family" definition, and special qualifications related to their age status cannot be imposed.

254. *Id.* §§ 10-9-503(3), 17-27-503(3).

255. *Id.* §§ 10-9-604(5), 17-27-604(5).

256. *Id.*

257. *Id.* §§ 10-9-504(5), 17-27-504(5).

258. *Id.* §§ 10-9-503(1)(a), 17-27-503(1)(a).

259. *Id.* §§ 10-9-503(1)(b), 17-27-503(1)(b).

260. *Id.* §§ 10-9-504(6), 17-27-504(6) (emphasis added).

261. PROVO, UTAH, PROVO CITY ORDINANCES § 14.06.020 (1993).

L. Residential Facilities for the Elderly

1. The facility

Residential facilities for the elderly have two components: the facility and the elderly residents who live in the facility. Focusing on the residence itself, four statutory standards must be met by all residential facilities for elderly persons: (1) the facility "may not operate as a business"²⁶²; (2) the facility must "be owned by one of the residents or by an immediate family member of one of the residents or be a facility for which the title has been placed in trust for a resident"²⁶³; (3) the facility must "be consistent with existing zoning of the desired location"²⁶⁴; and, (4) the facility must "be occupied on a 24-hour-per-day basis by eight or fewer elderly persons in a family-type arrangement."²⁶⁵

2. The facility as a permitted use

In all zoning districts, residential facilities for elderly persons must be a *permitted use*, except in zoning districts "zoned to permit exclusively single-family dwellings," where such facilities may be a *conditional use*.²⁶⁶ If the proposed facility is a *permitted use*, meaning it is located in a zoning district which is not limited exclusively to single-family dwellings, the local zoning ordinance *may* only require compliance with the following: (1) the facility must meet all applicable zoning, health, safety, and building codes²⁶⁷; (2) the facility must include "adequate off-street parking space"²⁶⁸; (3) the facility must "be capable of use as a residential facility for elderly persons without structural or landscaping alterations that would change the structure's residential character"²⁶⁹; and, (4) the facility may not "be established within three-quarters mile of another residential facility for elderly persons or residential facility for handicapped persons."²⁷⁰

262. UTAH CODE ANN. §§ 10-9-501(1)(a) (1992), 17-27-501(1)(a) (Supp. 1994).

263. *Id.* §§ 10-9-501(1)(b)(i), 17-27-501(1)(b)(i).

264. *Id.* §§ 10-9-501(1)(b)(ii), 17-27-501(1)(b)(ii).

265. *Id.* §§ 10-9-501(1)(b)(iii), 17-27-501(1)(b)(iii).

266. Compare *id.* §§ 10-9-502(1), 17-27-502(1) with *id.* §§ 10-9-504(2), 17-27-504(2).

267. *Id.* §§ 10-9-502(2)(a) (1992), 17-27-502(2)(a) (1991).

268. *Id.* §§ 10-9-502(2)(b), 17-27-502(2)(b).

269. *Id.* §§ 10-9-502(2)(c), 17-27-502(2)(c).

270. *Id.* §§ 10-9-502(2)(d), 17-27-502(2)(d).

3. *The facility as a conditional use*

On the other hand, if the facility will be located in a residential district which is limited exclusively to single-family dwellings, it may be classified as a *conditional use* instead of a *permitted use*. If the facility is allowed as a conditional use, the following apply: (1) the facility must meet all applicable zoning, health, safety and building codes²⁷¹; (2) the facility must "be capable of use as a residential facility for elderly persons without structural or landscaping alterations that would change the structure's residential character"²⁷²; (3) the facility must meet local criteria for such a residential facility for the elderly²⁷³; and (4) the facility may not "be established within three-quarters mile of another residential facility for elderly persons or residential facility for handicapped persons."²⁷⁴

4. *The elderly resident*

The second component in residential facilities for the elderly are the elderly themselves. An "elderly" person is a person "60 years old or older, who desires or needs to live with other elderly persons in a group setting, but who is capable of living independently."²⁷⁵ In all cases, whether the use is permitted or conditional, two additional qualifications for the elderly residents exist: (1) "no person being treated for alcoholism or drug abuse [may] be placed in a residential facility for elderly persons"²⁷⁶; and, (2) "placement in a residential facility for elderly persons [must] be on a strictly voluntary basis and not a part of, or in lieu of, confinement, rehabilitation, or treatment in a correctional facility."²⁷⁷

M. *Residential Facilities for Handicapped Persons*

1. *The facility*

The statutory framework for residential facilities for the handicapped is similar in form to that for residential facilities

271. *Id.* §§ 10-9-504(2)(a), 17-27-504(2)(a).

272. *Id.* §§ 10-9-504(2)(b), 17-27-504(2)(b).

273. *Id.* §§ 10-9-504(2)(c), 17-27-504(2)(c).

274. *Id.* §§ 10-9-504(3), 17-27-504(3).

275. *Id.* §§ 10-9-103(1)(e) (1992), 17-27-103(1)(e) (Supp. 1994).

276. *Id.* §§ 10-9-502(2)(e) (1992), 17-27-502(2)(e) (1991); *see also id.* §§ 10-9-504(1)(a), 17-27-504(1)(a).

277. *Id.* §§ 10-9-502(2)(f), -504(1)(b), 17-27-502(2)(f), -504(1)(b).

for the elderly. In relation to residential facilities for the handicapped, there are two components: the facility and the handicapped residents of the facility. Focusing first on the facility, four statutory standards must be met by all residential facilities for the handicapped: (1) the facility must "be consistent with existing zoning of the desired location"²⁷⁸; (2) the facility must "be occupied on a 24-hour-per-day basis by eight or fewer handicapped persons in a family-type arrangement under the supervision of a house family or manager"²⁷⁹; (3) the facility must "conform to all applicable standards and requirements of the Department of Human Services"²⁸⁰; and, (4) the facility must "be operated by or operated under contract with [the Department of Human Services]."²⁸¹

2. *The facility as a permitted use*

In all zoning districts, residential facilities for handicapped persons must be a *permitted use*, except in zoning districts "zoned to permit exclusively single-family dwellings,"²⁸² where such facilities may be a *conditional use*.²⁸³ If the proposed facility is a *permitted use*, meaning it is located in a zoning district which is *not* limited exclusively to single-family dwellings, the local zoning ordinance *may* require compliance only with the following: (1) the facility must meet all applicable building, safety, and health codes²⁸⁴; (2) "the operator of the facility [must] provide assurances that the residents of the facility will be properly supervised on a 24-hour basis"²⁸⁵; (3) "the operator of the facility [must] establish a municipal/[county] advisory committee through which all complaints and concerns of neighbors may be addressed"²⁸⁶; (4) "the operator of the facility [must] provide adequate off-street parking space"²⁸⁷; (5) the facility must "be capable of use as a residential facility for handicapped persons without structural or landscaping alterations that would change the structure's residen-

278. *Id.* §§ 10-9-601(1), 17-27-601(1).

279. *Id.* §§ 10-9-601(2)(a), 17-27-601(2)(a).

280. *Id.* §§ 10-9-601(2)(b), 17-27-601(2)(b).

281. *Id.* §§ 10-9-601(2)(c), 17-27-601(2)(c).

282. *Id.* §§ 10-9-602(1), 17-27-602(1).

283. *Id.* §§ 10-9-604(2), 17-27-604(2).

284. *Id.* §§ 10-9-602(2)(a), 17-27-602(2)(a).

285. *Id.* §§ 10-9-602(2)(b), 17-27-602(2)(b).

286. *Id.* §§ 10-9-602(2)(c), 17-27-602(2)(c).

287. *Id.* §§ 10-9-602(2)(d), 17-27-602(2)(d).

tial character"²⁸⁸; and, (6) the facility may not "be established . . . within three-quarters mile of another residential facility for handicapped persons."²⁸⁹

3. *The facility as a conditional use*

On the other hand, if the facility will be located in a residential district which is limited exclusively to single-family dwellings, it may be classified as a *conditional use* instead of a *permitted use*. If the facility is allowed as a conditional use, the following apply: (1) the facility must meet all applicable health, safety, and building codes²⁹⁰; (2) the facility must be "capable of use as a residential facility for handicapped persons without structural or landscaping alterations that would change the structure's residential character"²⁹¹; (3) the facility must meet local criteria for such a residential facility for the handicapped²⁹²; and, (4) the facility may not "be established . . . within three-quarters mile of another residential facility for handicapped persons."²⁹³

4. *The handicapped resident*

The second component in residential facilities for the handicapped are the handicapped themselves. A handicapped person is one who:

- (i) has a severe, chronic disability attributable to a mental or physical impairment or to a combination of mental and physical impairments, that is likely to continue indefinitely and that results in a substantial functional limitation in three or more of the following areas of major life activity: (A) self-care; (B) receptive and expressive language; (C) learning; (D) mobility; (E) self-direction; (F) capacity for independent living; and (G) economic self-sufficiency; and (ii) requires a combination or sequence of special interdisciplinary or generic care, treatment or other services that are individually planned and coordinated to allow the person to function in, and contribute to, a residential neighborhood.²⁹⁴

288. *Id.* §§ 10-9-602(2)(e), 17-27-602(2)(e).

289. *Id.* §§ 10-9-602(2)(f), 17-27-602(2)(f).

290. *Id.* §§ 10-9-604(2)(a), 17-27-604(2)(a).

291. *Id.* §§ 10-9-604(2)(b), 17-27-604(2)(b).

292. *Id.* §§ 10-9-604(2)(c), 17-27-604(2)(c).

293. *Id.* §§ 10-9-604(3), 17-27-604(3).

294. *Id.* § 10-9-103(1)(g) (1992); see also *id.* § 17-27-103(1)(g) (Supp. 1994).

In all cases, whether the use is permitted or conditional, there are three additional qualifications directed at handicapped residents: (1) "no person being treated for alcoholism or drug abuse [may] be placed in a residential facility for handicapped persons"²⁹⁵; (2) "no person who is violent [may] be placed in a residential facility for handicapped persons"²⁹⁶; and, (3) "placement in a residential facility for handicapped persons [shall] be on a strictly voluntary basis and not a part of, or in lieu of, confinement, rehabilitation, or treatment in a correctional facility."²⁹⁷

IV. SUBDIVISION REGULATION

The legislative body of any [municipality/county] may enact a subdivision ordinance requiring that a subdivision plat comply with the provisions of the subdivision ordinance and be approved as required by this part.²⁹⁸

A. Definition of a Subdivision

In *cities*, a "subdivision" is comprehensively defined as *any* division of land into two or more lots or parcels.²⁹⁹ This same general definition is also used in *counties*, except that the following are not included as a subdivision: "a bona fide division or partition of *agricultural* land for agricultural purposes or of *commercial, manufacturing, or industrial* land for commercial, manufacturing, or industrial purposes."³⁰⁰ This difference in definitions means that, in *cities*, all divisions of land into two or more parcels are subject to the city subdivision ordinance, even if the land will be used for agricultural, commercial, manufacturing, or industrial purposes; but, in *counties*, divisions of land into two or more parcels for agricultural, commercial, manufacturing or industrial purposes are not subject to the county subdivision ordinance.

In *counties*, the exception from subdivision control for divisions of land, ostensibly for agricultural, commercial, manufacturing or industrial purposes, is problematic. For example, if

295. *Id.* §§ 10-9-604(1)(a), -602(2)(g) (1992), 17-27-604(1)(a), -602(2)(g) (1991).

296. *Id.* §§ 10-9-604(1)(b), -602(2)(h), 17-27-604(1)(b), -602(2)(h).

297. *Id.* §§ 10-9-602(2)(i), -604(1)(c), 17-27-602(2)(i), -604(1)(c).

298. *Id.* §§ 10-9-801, 17-27-801.

299. *Id.* §§ 10-9-103(1)(q) (1992), 17-27-103(1)(q) (Supp. 1994).

300. *Id.* § 17-27-103(1)(q)(iii) (emphasis added).

the local zoning ordinance provides no further definition on what constitutes a "bona fide" division of land for *agricultural purposes*, zoning officials may be hard pressed to enforce any minimum acreage requirement.³⁰¹ In addition, even when the zoning ordinance does provide a minimum acreage standard, those standards may vary widely. For example, a zoning regulation described in *Thurston v. Cache County*³⁰² imposed a 10-acre minimum for agricultural parcels, while a zoning regulation described in *Morgan County v. Stephens*³⁰³ imposed a 100-acre minimum.³⁰⁴

A rational basis exists for exempting divisions of relatively large parcels of agricultural land from the control of county subdivision ordinances because continued use of land for genuinely agricultural purposes does not normally create new land use problems. But that is not true for commercial, manufacturing, industrial land, or agricultural land in relatively small parcels, because land divided for such purposes is likely to create needs in relation to transportation, sewer, water, power, and the like. It follows that subdivisions of land which are likely to create such needs should be required to respond to the county zoning ordinance.

Proposed Legislative Change. Divisions of land for commercial, manufacturing, or industrial purposes, or into relatively small parcels for agricultural purposes will normally generate increased demands related to transportation, sewer, water, power, and the like. The county act should be amended to make such divisions of land subject to a county subdivision ordinance.³⁰⁵

301. For example, as a legal advisor to county zoning officials, the author was asked for opinions describing how small certain parcels of land could be and still be for "bona fide agricultural purposes" if a division of land was for a "trout farm," or in another case, a "hydroponic farm."

302. 626 P.2d 440, 442 (Utah 1981).

303. 520 P.2d 1340, 1340 (Utah 1974).

304. An issue raised but not resolved in *Morgan County* is whether the statutory exemption from subdivision ordinance control of divisions of land for bona fide agricultural purposes preempted legislative attempts by a county to *define* the minimum size of bona fide agricultural parcels. Under the new county act, however, it may be argued that the provisions of § 17-27-104(1) eliminate the preemption issue by expressly permitting the zoning ordinance to impose a stricter standard in the form of minimum parcel sizes.

305. Specifically, UTAH CODE ANN. § 17-27-103(1)(q)(iii) (definitions) should be amended as follows:

(iii) "Subdivision" does not include a bona fide division or partition of agricultural land for agricultural purposes (~~or of commercial, manufacturing,~~

B. *Enactment of a Subdivision Ordinance*

A proposed subdivision ordinance is prepared by the planning commission, then recommended to and enacted by the legislative body.³⁰⁶ Each of those bodies must hold public hearings after giving public notice.³⁰⁷ Amendments to the subdivision ordinance follow the same procedure.³⁰⁸

C. *Content of a Subdivision Ordinance*

Although both enabling acts empower city and county legislative bodies to enact a "subdivision ordinance," neither act mandates what such an ordinance shall or shall not include. In practice, however, a typical subdivision ordinance may include the following regulations: (1) subdividing procedures; (2) plat requirements; (3) street and easement requirements; (4) building lot requirements; (5) grading and slope requirements; and, (6) compliance with subdivision-related exactions.³⁰⁹

A variety of exactions³¹⁰ will often be included in, or associated with, a subdivision ordinance, consisting of connection fees,³¹¹ impact fees,³¹² dedications of land,³¹³ and fees in lieu of dedications of land,³¹⁴ each of which is discussed below. With regard to enforcement, this association of exactions with plat approval is a matter of administrative convenience because zoning ordinances may make compliance with the exactions a condition of plat approval.³¹⁵

~~or industrial land for commercial, manufacturing, or industrial purposes].~~
Provided, however, that a division or partition of land resulting in one or more parcels of land which is less than 25 acres in size is a subdivision.

306. UTAH CODE ANN. §§ 10-9-402(1) (1992), 17-27-402(1) (Supp. 1994).

307. *Id.* §§ 10-9-802, 17-27-802.

308. *Id.* §§ 10-9-803(2) (1992), 17-27-803(2) (1991).

309. *See, e.g.*, PROVO, UTAH, PROVO CITY ORDINANCES § 15.01 (1993).

310. *See generally* Michael J. Mazuran, *Evolution of Real Estate Development Exactions in Utah*, UTAH BAR J., Aug.-Sept. 1990, at 11.

311. *See generally* PROVO, UTAH, PROVO CITY ORDINANCES § 10.03.250 (1993).

312. *See generally* Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 J. URB. & CONTEMP. L. 55 (1990).

313. *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979) (ordinance required subdividers to dedicate land or pay fees in lieu of dedications).

314. *Id.*

315. UTAH CODE ANN. §§ 10-9-801 (1992), 17-27-801 (1991).

1. Connection fees

The Utah courts have approved the collection of sewer and water connection fees as part of the process of approving subdivision plats. Specifically, in *Home Builders Ass'n v. Provo City*,³¹⁶ the Utah Supreme Court held that a city may charge a reasonable sewer connection fee for the purpose of enlarging and improving a sewer system.³¹⁷ In *Banberry Development Corp. v. South Jordan City*,³¹⁸ payment of sewer and water connection fees was required as a condition to final subdivision plat approval. However, the court imposed a seven-part test to ensure that "newly developed properties" do not "bear more than their equitable share of the capital costs in relation to benefits conferred."³¹⁹ Thus, in *Patterson v. Alpine City*,³²⁰ a connection fee schedule with incentives for early payment was invalidated because the incentive amounts were not reasonably connected to the cost of constructing, maintaining, and operating the subject sewer system.³²¹

2. Impact fees

The Utah Supreme Court has validated the collection of impact fees through the subdivision approval process, so long as there is a relationship between the fees and the subdivision. In 1979 in *Call v. City of West Jordan*,³²² the first of three opinions by the same name, the court approved as a valid exercise of police power an exaction "which requires that subdividers dedicate 7 percent of the land to the city, or pay the equivalent of that value in cash, to be used for flood control and/or parks and recreation facilities."³²³ In the second of the three *Call* opinions,³²⁴ the court on rehearing augmented its first decision by requiring that the development must generate the needs on which the land/fee exaction is based and that, in

316. 503 P.2d 451 (Utah 1972).

317. *Id.*; see also *Rupp v. Grantsville City*, 610 P.2d 338 (Utah 1980) (validating increased sewer fees to pay all capital costs of sewer system).

318. 631 P.2d 899 (Utah 1981).

319. *Id.* at 903; see *Lafferty v. Payson City*, 642 P.2d 376 (Utah 1982) (noting case remanded to take evidence ensuring compliance with the seven-part *Banberry* test).

320. 663 P.2d 95 (Utah 1983).

321. *Id.* at 97.

322. 606 P.2d 217 (Utah 1979).

323. *Id.* at 218.

324. 614 P.2d 1257 (Utah 1980).

response, the land/fee exaction must be used to benefit the subdivision.³²⁵

3. *Dedications of land*

The first two *Call* decisions upheld subdivision related requirements for the payment of a fee or a dedication of land. Those decisions are thus a precedent for land dedications as a precondition to subdivision approval. However, a 1987 United States Supreme Court decision, *Nollan v. California Coastal Commission*,³²⁶ emphasized, as do the *Call* decisions, that the dedication of land cannot be required unless there is a nexus between the required dedication and the burdens created by the proposed development. The holding in *Nollan* was reemphasized in *Dolan v. City of Tigard*,³²⁷ in which the nation's high Court stressed that there must be a "reasonable relationship" between the nature and extent of the impact of the development and the land dedication that was demanded.³²⁸

D. *Approval of Subdivision Plats*

A county recorder cannot "file or record" a subdivision plat until it has been approved by the city or county legislative body or by an official designated by ordinance. Neither the legislative body nor an official designated by the legislative body may approve a subdivision plat until the planning commission gives its recommendation.³²⁹

1. *Council-mayor form of government*

The rule above, that the *legislative body* may approve a subdivision plat, may not apply to cities operating under an optional council-mayor form of government. This conclusion grows out of the decision of the court of appeals in *Salt Lake County Cottonwood Sanitary District v. Sandy City*.³³⁰ In *Sandy City*, the issue was whether the municipal council (operating under a

325. *Id.* at 1259.

326. 483 U.S. 825 (1987).

327. 114 S. Ct. 2309, 2319 (1994).

328. *Id.* at 2319 (endorsing the "reasonable relationship" test of many state courts but declining to adopt the test formally because of semantics. "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment.>").

329. UTAH CODE ANN. §§ 10-9-805(1) (1992), 17-27-805 (Supp. 1994).

330. 879 P.2d 1379 (Utah Ct. App. 1994).

council-mayor form of government) could authorize itself—and not the board of adjustment—to act as an appellate body with respect to conditional use permit approvals. On the face of things, it appeared that the municipal council could exercise that authority because the applicable statute provided that the board of adjustment would make such decisions, “*unless* the legislative body of the municipality by ordinance has designated *another body* as the appellate body for those matters.”³³¹

But the court of appeals disagreed with the Sandy City procedure on separation of powers grounds. Citing *Martindale v. Anderson*,³³² which held that the council-mayor form of government “is a true separation of powers form of government,”³³³ and *Scherbel v. Salt Lake City Corp.*,³³⁴ which held that “the authority to resolve zoning disputes is properly an executive function rather than a legislative one,”³³⁵ the court of appeals held that the municipal council could not authorize itself to hear conditional use permit appeals.³³⁶

The reasoning in *Sandy City* seems to apply to the approval of subdivision plats. Although section 10-3-1219.5 provides that “the council [in a council-mayor form of government] shall, by ordinance, provide for the manner in which . . . subdivisions . . . are approved, disapproved or otherwise regulated,”³³⁷ it is nevertheless true, as held in *Martindale v. Anderson*, that the approval of subdivision plats is “a function of the *executive branch*.”³³⁸ Thus, a municipal council, in an optional council-mayor form of government, may provide for the manner in which subdivision plats will be approved, as long as it does not authorize itself to perform that function in violation of separation of powers principles.

331. UTAH CODE ANN. § 10-9-8 (1953) (repealed 1991). This provision was re-codified in 1991 in a slightly different form (not changing the substance of the provision). UTAH CODE ANN. § 10-9-704(2) (1992); see *Salt Lake County Cottonwood Sanitary Dist.*, 879 P.2d at 1383 & n.5.

332. 581 P.2d 1022 (Utah 1978).

333. *Id.* at 1027.

334. 758 P.2d 897 (Utah 1988).

335. *Id.* at 899.

336. *Id.* at 901.

337. UTAH CODE ANN. § 10-3-1219.5 (1992).

338. *Martindale*, 581 P.2d at 1028 (emphasis added).

2. General principles

Where the zoning ordinance gives the *city council* (in cities not operating under an optional council-mayor form of government) the power to approve a subdivision plat, the Utah Supreme Court in *Wright Development v. City of Wellsville*³³⁹ held that "approvals" by the city engineer and the planning commission are advisory only, and mandamus will not lie to compel the city council to approve a plat.³⁴⁰ Moreover, the courts will not interfere with the decision to approve or not to approve a subdivision plat "unless the determination made is in violation of substantial rights, or is so totally discordant to reason and justice that its action must be deemed capricious and arbitrary."³⁴¹ In addition, by statute the legislative body may refuse to approve a subdivision plan or plat that fails to make adequate provision for solar energy devices.³⁴²

3. Approvals

The refusal to approve a subdivision plat cannot be capricious or arbitrary. Utah's high court in *Western Land Equities, Inc. v. City of Logan*³⁴³ held that an applicant was entitled to a building permit or subdivision approval based on zoning existing at the time of the application unless there was a "compelling, countervailing public interest" to the contrary, or unless at the time of the application the city or county had initiated zone changes.³⁴⁴ Once a subdivision plat has been approved, the court held in *Wood v. North Salt Lake*³⁴⁵ on due process grounds that a city cannot by ordinance unilaterally demand amendments to the plat and refuse to issue building permits until there is compliance with those amendments.³⁴⁶

E. Amendment of Subdivision Plats

The enabling acts provide a statutory mechanism by which an established subdivision plat may be amended for "good

339. 608 P.2d 232 (Utah 1980).

340. *Id.* at 233.

341. *Id.* at 234.

342. UTAH CODE ANN. § 10-9-901(2) (1992).

343. 617 P.2d 388 (Utah 1980). For a discussion of "vested" rights, see *infra* part V.M.

344. *Western Land Equities*, 617 P.2d at 396.

345. 390 P.2d 858 (Utah 1964).

346. *Id.* at 860.

cause”³⁴⁷ after notice.³⁴⁸ This provision in the new enabling acts cures a problem under the old subdivision statutes which did not provide a practical mechanism for plat amendment.³⁴⁹ The lack of a statutory amendment process may have been the cause of attempts, such as the one in *Wood*,³⁵⁰ in which the city attempted to effectively “amend” a plat by ordinance and not by plat amendment procedures.

F. Official Map

Somewhat related to subdivision plats and exactions associated with the approval and filing of subdivision plats is the “official map.” An official map should not be confused with the map which accompanies the text of the zoning ordinance and shows the zoning classification (e.g., residential, commercial, industrial, etc.) which applies to land in a city or a county.

Prior to 1991, the city and county enabling acts contemplated the adoption of an official map in addition to the adoption of a master plan.³⁵¹ The official map showed the location of existing and *future* roads. Without a formal “taking” (or the payment of compensation), the pre-1991 acts empowered a legislative body to place significant restraints on the development of land over which it proposed to build a road.³⁵² The Utah State Legislature had this “official [road] map”³⁵³ in mind when it enacted both the city act and the county act in 1991.³⁵⁴

Keeping in mind the distinction between an official map and the zoning map, the code now provides that cities and counties “may not adopt an official map.”³⁵⁵ Moreover, “[a]n official map adopted under the previous [city or county] enabling statute” cannot be used to compel a landowner to dedicate land or to compel a city or county to acquire land.³⁵⁶ To

347. UTAH CODE ANN. §§ 10-9-810 (1992), 17-27-810 (1991).

348. *Id.* §§ 10-9-809, 17-27-809.

349. *Id.* § 57-5-7 (1953) (repealed 1991) (holding that the application to amend a subdivision plat required approval of all owners of land in the plat and the owners of land along streets associated with the plat).

350. 390 P.2d 858, 858 (Utah 1964).

351. UTAH CODE ANN. §§ 10-9-23, 17-27-7 (1953) (repealed 1991).

352. *Id.*

353. *Compare id.* §§ 10-9-24, 17-27-7 (1953) (repealed 1991) *with id.* §§ 10-9-306(2)(a) and (3) (1992), 17-27-306(2)(a) and (3) (Supp. 1994).

354. *Id.*

355. *Id.* §§ 10-9-306(1) (1992), 17-27-306(1) (Supp. 1994).

356. *Id.* §§ 10-9-306(2)(a), 17-27-306(2)(a).

avoid any misunderstanding, the 1991 enabling acts explicitly provide that “[a]n official map may not be used to unconstitutionally prohibit the development of property designated for eventual use as a public street.”³⁵⁷

V. ZONING ENFORCEMENT

A [municipality/county] or any owner of real estate within the [municipality/county] . . . may, in addition to other remedies provided by law, institute . . . injunctions, mandamus, abatement, or any other appropriate actions . . . [or] proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.³⁵⁸

A. Government Enforcement

Cities and counties may initiate civil actions to enforce the zoning enabling acts, and ordinances adopted pursuant thereto, “in addition to other remedies provided by law.”³⁵⁹ These legal actions may include the following remedies: (1) “injunctions, mandamus, abatement, or any other appropriate actions”³⁶⁰; or, (2) “proceedings to prevent, enjoin, abate, or remove the unlawful building, use or act.”³⁶¹

B. Injunction by Government

Historically, a civil remedy commonly sought by cities and counties has been an injunction: *Provo City v. Claudin*³⁶² was a successful claim for an injunction preventing the establishment of a funeral home in a residential district; *Clinton City v. Patterson*³⁶³ was an unsuccessful claim for an injunction preventing the use of land as a livestock feedlot; *Morgan County v. Stephens*³⁶⁴ was a successful claim for an injunction preventing the sale of unsubdivided land for nonagricultural purposes; *Salt Lake County v. Kartchner*³⁶⁵ was an unsuccessful claim

357. *Id.* §§ 10-9-306(3), 17-27-306(3).

358. *Id.* §§ 10-9-1002(1)(a)(i), (ii) (1992), 17-27-1002(1)(a)(i), (ii) (1991).

359. *Id.* §§ 10-9-1002(1)(a), 17-27-1002(1)(a).

360. *Id.* §§ 10-9-1002(1)(a)(i), 17-27-1002(1)(a)(i).

361. *Id.* §§ 10-9-1002(1)(a)(ii), 17-27-1002(1)(a)(ii).

362. 63 P.2d 570 (Utah 1936).

363. 433 P.2d 7 (Utah 1967).

364. 520 P.2d 1340 (Utah 1974).

365. 552 P.2d 136 (Utah 1976).

for a mandatory injunction compelling the removal of a carport; *Fillmore City v. Reeve*³⁶⁶ was an unsuccessful claim to abate and enjoin the keeping of pigs, cattle, and horses; *Utah County v. Young*³⁶⁷ was a successful claim to enjoin a commercial use in an agricultural district; and, *Utah County v. Baxter*³⁶⁸ was a successful claim for an injunction to prevent a commercial use in a noncommercial zone.

In *Baxter*, the Utah Supreme Court explained the policy that allows a local government to obtain an injunction to prohibit violation of its zoning laws:

Generally, injunctive relief is available only when intervention of a court of equity is essential to protect against "irreparable injury"; hence, where the remedy at law is adequate, an injunction will not lie. Under our zoning statute, however, injunctive relief is available as an *alternative* to criminal prosecution. This is based on the assumption that zoning offenses are inherently different from other violations of law, and that enforcement officers should be empowered to seek civil redress rather than to proceed in every case by criminal prosecution.³⁶⁹

In *Baxter*, the court quoted *City of New Orleans v. Liberty Shop*,³⁷⁰ explaining the public interests that an injunction is intended to protect:

An injunction should not be issued to prevent the commission of a crime, if the only reason for preventing it is that it is a crime. However, if the wrong complained of is injurious to property interests or civil rights, or if it is a public nuisance, either in the opinion of the court or in virtue of a statute or an ordinance making it a nuisance, the fact that it is also a violation of a criminal statute or ordinance does not take away the authority of a court of civil jurisdiction to prevent the injury or abate the nuisance.³⁷¹

366. 571 P.2d 1316 (Utah 1977).

367. 615 P.2d 1265 (Utah 1980).

368. 635 P.2d 61 (Utah 1981).

369. *Id.* at 64.

370. 101 So. 798 (La. 1924).

371. *Id.* at 798, quoted in *Baxter*, 635 P.2d at 64.

C. Presumption of Validity

Administrative actions granting or denying permission to engage in a land use are presumed to be valid. In *Cottonwood Heights Citizens Ass'n v. Board of Commissioners of Salt Lake County*,³⁷² a county commission authorized construction of an apartment complex after having denied that permission to a previous owner. Sustaining the action of the county commission, the Utah Supreme Court stated:

Due to the complexity of factors involved in the matter of zoning, as in other fields where courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility (the Commission) have specialized knowledge in that field. Accordingly, they should be allowed a comparatively wide latitude of discretion; and their actions endowed with a presumption of correctness and validity which the courts should not interfere with unless it is shown that there is no reasonable basis to justify the action taken.³⁷³

Notwithstanding a general assumption of validity, an action by government to enforce an ordinance may be defeated by a showing that adoption of the ordinance did not meet procedural requirements.³⁷⁴

D. Defenses

If local government initiates legal action to enforce its zoning ordinance, the defendant may respond by raising a number of issues which, in a loose sense, may be classified as "defenses." The list of such defenses includes: (1) a claim that the zoning authority has lost the legal right to enforce its ordinances because of simple delay, which may be incorporated in a formal claim of laches³⁷⁵; (2) a claim that the zoning authority has engaged in an act or omission which estops it from enforcing its zoning ordinance³⁷⁶; or, (3) a claim that the subject use is a lawful nonconforming use.³⁷⁷

372. 593 P.2d 138 (Utah 1979).

373. *Id.* at 140.

374. *Call v. City of W. Jordan*, 727 P.2d 180, 183 (Utah 1986) ("Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid.").

375. See discussion *infra* part V.E.

376. See discussion *infra* part V.F.

377. See discussion *infra* part V.G.

E. Inaction/Laches

The Utah Supreme Court in *Salt Lake County v. Kartchner*³⁷⁸ held that "[o]rdinarily a municipality is not precluded from enforcing its zoning regulations, when its officers have remained inactive in the face of . . . violations."³⁷⁹ However, in *Kartchner*, inaction nevertheless precluded a county from enforcing a setback requirement where its inaction in relation to several other homeowners had become discriminatory.³⁸⁰ Later, the court in *Provo City v. Hansen*³⁸¹ held it was permissible for a city or county to use a complaint system in which an enforcement action is initiated when prompted by a citizen complaint, so long as the result is not discriminatory.³⁸² If the defendant claims laches, the court in *Baxter* maintained, "laches is a defense which must be affirmatively pleaded."³⁸³

F. Estoppel

Estoppel is a defense sometimes raised by a defendant in an attempt to prevent a city or county from enforcing its zoning ordinance. In six cases the Utah courts have commented on the use of estoppel in opposition to a zoning enforcement action.

1. Estoppel cases

In *Morrison v. Horne*,³⁸⁴ the plaintiff claimed the right to construct a service station in a residential district, in part because the county assessor had incorrectly "listed and assessed it as commercial property."³⁸⁵ Refusing the plaintiff's estoppel claim, the Utah Supreme Court outlined its philosophy with respect to such claims:

As to estoppel: It would be unreasonable and unrealistic to conclude that a clerk or a ministerial officer having no authority to do so, could bind the county to a variation of a

378. 552 P.2d 136 (Utah 1976).

379. *Id.* at 138.

380. *Id.* at 140.

381. 585 P.2d 461 (Utah 1978).

382. *Id.* at 462.

383. *Utah County v. Baxter*, 635 P.2d 61, 65 (Utah 1981). The court reiterated, "[t]he defense was never asserted in defendant's answer nor at trial, and hence, we do not address it on appeal." *Id.*

384. 363 P.2d 1113 (Utah 1961).

385. *Id.* at 1113.

zoning ordinance duly passed, to which everyone has notice by its passage and publication, because a ministerial employee erred in characterizing the type of property.³⁸⁶

Nevertheless, in *Salt Lake County v. Kartchner*,³⁸⁷ the Utah Supreme Court approved the use of estoppel under circumstances where a carport was ten feet in violation of a 30-foot front yard setback. Noting "at least six similar violations of the setback ordinance within the vicinity of defendant's property,"³⁸⁸ the Utah Supreme Court reversed the trial court and held the county was estopped from enforcing the setback because of "[t]he discriminatory manner in which the ordinance has been enforced."³⁸⁹ But shortly thereafter, in *Provo City v. Hansen*,³⁹⁰ the court was faced with a law student who rented his house to as many as eleven other single students in violation of occupancy requirements. The student claimed he was justified under *Kartchner* because other unresolved occupancy violations existed in the vicinity. The Utah Supreme Court held that "no discriminatory enforcement" had been proved by the defendant because "the record is clear that a zoning violation complaint triggered enforcement action in every case discussed at trial."³⁹¹

In *Utah County v. Young*,³⁹² the trial court granted an injunction preventing the defendant from conducting a commercial auction business in an agricultural zone. The defendant cited *Kartchner* and claimed that the county was estopped because the county building inspector, noting plumbing and wiring suitable for a commercial building, did not warn the defendant that a commercial use would be unlawful in his new building.³⁹³ Contrary to the defendant's position, an advisory jury found that the defendant *knew*, when he obtained his building permit, that current zoning prohibited commercial uses.³⁹⁴ The court concluded that the defendant acted with knowledge of the zoning restrictions and was not misled by the building inspector, and "as a matter of law, estoppel may not

386. *Id.* at 1114.

387. 552 P.2d 136 (Utah 1976).

388. *Id.* at 140.

389. *Id.*

390. 585 P.2d 461 (Utah 1978).

391. *Id.* at 463.

392. 615 P.2d 1265 (Utah 1980).

393. *Id.* at 1266.

394. *Id.*

be used as [a] defense by one who has acted fraudulently, or in bad faith, or *with knowledge*.”³⁹⁵

In *Utah County v. Baxter*,³⁹⁶ the defendant expanded a nonconforming use from one building to two buildings and thereafter claimed that the county had acquiesced in her action by issuing certain permits. The record was ambiguous about the extent to which county personnel knew of the expanded uses, but the court nevertheless denied the claim of estoppel because the defendant admitted she had “[not] been misled by the county or its employees.”³⁹⁷

In *Town of Alta v. Ben Hame Corp.*,³⁹⁸ the defendant claimed, inter alia, that Alta was estopped from enforcing a single-family residential classification which would prohibit its commercial lodging operation. On three occasions after construction of the subject residence, the town clerk erroneously issued the defendant a business license to operate a “lodging facility,” and it was this conduct that was the basis of the estoppel claim.³⁹⁹ However, factually, it was clear that the residence was constructed before the business licenses were issued, so the court of appeals concluded the defendant “[had] shown neither an act or omission by Alta justifying good faith reliance nor a substantial detrimental change in [defendant’s] position in reliance on Alta’s acts.”⁴⁰⁰ Moreover, “failure to enforce zoning for a time does not forfeit the power to enforce.”⁴⁰¹

2. Estoppel principles

In the aforementioned estoppel claims, only *Kartchner* was successful. But the decision in that case may be limited to its facts because the opinion does not articulate its controlling principles. Indeed, since *Kartchner*, Utah’s high court has been unwilling to recognize a similar situation even though, under similar facts, it had the chance two years later in *Hansen*. Instead, the court has established criteria for an estoppel claim which make it debatable whether *Kartchner* will be repeated.

395. *Id.* at 1267.

396. 635 P.2d 61 (Utah 1981).

397. *Id.* at 65.

398. 836 P.2d 797 (Utah Ct. App. 1992).

399. *Id.* at 800.

400. *Id.* at 803.

401. *Id.*

The following discussion delineates the controlling principles established by the court.

a. *Exceptional circumstances.* "Estoppel, waiver or laches ordinarily do not constitute a defense to a suit for injunctive relief against alleged violations of the zoning laws, unless the circumstances are exceptional."⁴⁰²

b. *Act or omission.* To invoke estoppel there must be "an act or omission upon which [the defendant] could rely in good faith in making substantial changes in position or incurring extensive expenses."⁴⁰³

c. *An act.* If the claimed estoppel is based upon reliance on an affirmative act by the zoning authority, "[t]he action . . . must be of a clear, definite and affirmative nature."⁴⁰⁴

d. *An omission.* If the claimed estoppel is based upon reliance on an omission by the zoning authority, "omission means a negligent or culpable omission where the party failing to act was under a duty to do so. Silence or inaction will not operate to work an estoppel."⁴⁰⁵

e. *Reliance.* "The focus of zoning estoppel is primarily upon the conduct and interests of the property owner. The main inquiry is whether there has been *substantial reliance* by the owner on governmental actions."⁴⁰⁶ In the context of reliance: (a) the claiming party "has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted"⁴⁰⁷; and, (b) "as a matter of law, estoppel may not be used as [a] defense by one who has acted fraudulently, or in bad faith, or *with knowledge*."⁴⁰⁸

402. 8A EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 25.349 (rev. vol. 1965), *quoted in Kartchner*, 552 P.2d at 138; *see also Ben Hame Corp.*, 836 P.2d at 803; *Young*, 615 P.2d at 1267 ("In *Kartchner*, this court ruled that under exceptional circumstances, estoppel, waiver, or laches may constitute a defense to a suit for relief against alleged violations of zoning laws.")

403. *Ben Hame Corp.*, 836 P.2d at 803; *Young*, 615 P.2d at 1267.

404. *Young*, 615 P.2d at 1267; *see also Ben Hame Corp.*, 836 P.2d at 803.

405. *Young*, 615 P.2d at 1267-68; *see also Ben Hame Corp.*, 836 P.2d at 803.

406. *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 391 (Utah 1980) (emphasis added).

407. *Young*, 615 P.2d at 1268.

408. *Id.* at 1267.

G. Nonconforming Use

In a zoning enforcement action a defendant may defend by claiming that his or her use may continue as a lawful nonconforming use.⁴⁰⁹ The Utah Supreme Court held in *Morrison v. Horne*⁴¹⁰ that this burden is on the claimant.⁴¹¹ But if the claimant succeeds in proving the existence of the nonconforming use, the court held in *Fillmore City v. Reeve*⁴¹² that "when the non-conforming use is established, the burden of proof is reversed. It is then on the city to prove that the defendant violated the zoning ordinance by exceeding his established non-conforming use."⁴¹³

H. Private Actions

In contrast to civil enforcement actions brought by cities and counties, there are more than thirty reported Utah cases in which private parties have brought suit against government or other private parties in relation to zoning issues. The enabling acts expressly empower cities and counties to withhold building permits as a means of enforcing their zoning ordinances.⁴¹⁴ Historically, the exercise of this power has meant that the remedy most commonly sought by private plaintiffs is a writ of mandamus.⁴¹⁵ By means of this remedy, private parties have sought court orders compelling government officials to issue building permits,⁴¹⁶ approve subdivision plats,⁴¹⁷ or approve conditional use permits.⁴¹⁸

409. For a further discussion of nonconforming uses, see *supra* part III.I; *infra* part VI.J.

410. 363 P.2d 1113 (Utah 1961).

411. *Id.* at 1114; see also *Fillmore City v. Reeve*, 571 P.2d 1316, 1318 (Utah 1977); *State v. Holt's Estate*, 381 P.2d 724, 725 (Utah 1963) ("In that case [*Morrison v. Horne*], we determined that the burden of proving the right to a non-conforming use of property . . . was on the property owner.").

412. 571 P.2d 1316 (Utah 1977).

413. *Id.* at 1318.

414. UTAH CODE ANN. §§ 10-9-1002(2) (1992), 17-27-1002(2) (1991).

415. See discussion *infra* part V.I.

416. See discussion *infra* part V.I.

417. See discussion *infra* part V.I.

418. See discussion *infra* part V.I.

I. *Mandamus*

1. *Mandamus cases*

Utah's courts have handed down several decisions in which private parties have attempted to employ a writ of mandamus: in *Morrison v. Horne*,⁴¹⁹ the Utah Supreme Court refused mandamus to issue a building permit for a service station because a claimed nonconforming use could not be proved; in *Wood v. North Salt Lake*,⁴²⁰ mandamus compelling the issuance of a building permit was granted in the face of a city demand that an existing subdivision plat should be amended; in *Crist v. Mapleton City*,⁴²¹ mandamus to issue a building permit was refused because the correct remedy was an appeal (and not mandamus); in *Crist v. Bishop*,⁴²² mandamus compelled the issuance of a permit on the grounds that use of the word "school" in the zoning ordinance text included a residential school for troubled boys; in *Herr v. Salt Lake County*,⁴²³ mandamus compelled the issuance of a conditional use permit because the county commission did not act to reverse a decision of the planning commission within the time provided in the zoning ordinance; in *Seal v. Mapleton City*,⁴²⁴ mandamus compelling the approval of a proposed subdivision plat was refused because the decision was within the reasonable discretion of the city; and, in *Wright Development, Inc. v. City of Wellsville*,⁴²⁵ a developer was likewise refused mandamus compelling approval of a proposed subdivision plat because that decision was within the reasonable discretion of the city.

Additionally, in *Western Land Equities, Inc. v. City of Logan*,⁴²⁶ the court held that the plaintiff was entitled to an order requiring Logan to approve a subdivision plat because its right thereto had vested; in *Levie v. Sevier County*,⁴²⁷ a subdivider was refused mandamus compelling the approval of a subdivision plat because he failed to exhaust his administrative

419. 363 P.2d 1113 (Utah 1961).

420. 390 P.2d 858 (Utah 1964).

421. 497 P.2d 633 (Utah 1972).

422. 520 P.2d 196 (Utah 1974).

423. 525 P.2d 728 (Utah 1974).

424. 598 P.2d 1346 (Utah 1979).

425. 608 P.2d 232 (Utah 1980).

426. 617 P.2d 388 (Utah 1980).

427. 617 P.2d 331 (Utah 1980).

remedies; in *Thurston v. Cache County*,⁴²⁸ mandamus compelling the approval of a conditional use permit was refused because the matter was within the discretion of the county planning commission; in *Wilson v. Manning*,⁴²⁹ mandamus to compel application of the initiative process to rezoning ordinances was denied; in *Merrihew v. Salt Lake County Planning and Zoning Commission*,⁴³⁰ an order of the trial court granting mandamus compelling the issuance of a building permit was reversed because the plaintiff failed to exhaust his administrative remedies; in *Hatch v. Utah County Planning Department*,⁴³¹ extraordinary relief compelling the issuance of a building permit was likewise refused because the plaintiff had failed to exhaust his administrative remedies; in *Scherbel v. Salt Lake City Corp.*,⁴³² mandamus to approve a condominium project was refused because the board of adjustment (in a council-mayor form of government) did not make the final administrative decision to deny the project; in *Davis County v. Clearfield City*,⁴³³ an extraordinary writ (mandamus) was issued, compelling the approval of a conditional use permit which the city had arbitrarily and capriciously denied; and in *Salt Lake County Cottonwood Sanitary District v. Sandy City*,⁴³⁴ an extraordinary writ (mandamus) was granted to compel the issuance of a conditional use permit because the city council (in a council-mayor form of government) improperly reserved to itself the power to hear conditional use appeals.

2. *Mandamus principles*

The holdings in the foregoing mandamus actions may be summarized as follows:

a. *Mandamus as a substitute for an appeal.* Mandamus may not be used as a substitute for an appeal; moreover, if mandamus is improperly substituted for an appeal,⁴³⁵ the action will be dismissed for failure to exhaust

428. 626 P.2d 440 (Utah 1981).

429. 657 P.2d 251 (Utah 1982).

430. 659 P.2d 1065 (Utah 1983).

431. 685 P.2d 550 (Utah 1984).

432. 758 P.2d 897 (Utah 1988).

433. 756 P.2d 704 (Utah Ct. App. 1988).

434. 879 P.2d 1379 (Utah Ct. App. 1994).

435. See generally *Davis County v. Clearfield City*, 756 P.2d 704 (Utah 1988); *Crist v. Mapleton City*, 497 P.2d 633 (Utah 1972). For a further discussion of mandamus as a substitute for an appeal, see *infra* part VII.G.

administrative remedies.⁴³⁶ On the other hand, nothing in these holdings prevents the use of mandamus, in association with an appeal, for the purpose of compelling official action if an appeal is resolved in favor of the appellant.⁴³⁷

b. *Mandamus versus local discretion.* The courts will not substitute their judgment for that of government officials and compel the approval of building permits, subdivision plats, or conditional use permits, so long as there is a reasonable factual basis for the local decision.⁴³⁸ But if there is not a reasonable factual basis for the local decision, or if it is based on unacceptable criteria, the courts will use mandamus to compel the correct action.⁴³⁹

c. *Mandamus to compel an initiative or referendum.* With certain exceptions, mandamus will not issue to compel use of the initiative process in relation to a rezoning.⁴⁴⁰

d. *Mandamus to follow local procedure.* Local governments must obey the procedural requirements of their own zoning ordinance, and mandamus may issue to correct official conduct in violation thereof.⁴⁴¹

J. Injunction by Private Party

In contrast to the remedy of mandamus, which is used to compel public officials to perform nondiscretionary functions, the remedy of injunction has been used by private parties to prevent action by other private parties. In some instances, the remedy of injunction has been used to prevent public officials from performing unlawful acts.

436. See generally *Hatch v. Utah County Planning Dep't*, 685 P.2d 550 (Utah 1984); *Merrihew v. Salt Lake County Planning & Zoning Comm'n*, 659 P.2d 1065 (Utah 1983); *Crist v. Bishop*, 520 P.2d 196 (Utah 1974).

437. The only objection to mandamus in the context of zoning administration is its use as a *substitute* for an appeal. *E.g.*, *Crist v. Mapleton City*, 497 P.2d 633, 634 (Utah 1972). Absent that flaw—substituting mandamus for an appeal—nothing in the reported cases precludes the use of mandamus. *E.g.*, *Hatch*, 685 P.2d at 550.

438. See generally *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981); *Wright Dev. Inc. v. City of Wellsville*, 608 P.2d 232 (Utah 1980); *Seal v. Mapleton City*, 598 P.2d 1346 (Utah 1979).

439. See generally *Wood v. North Salt Lake*, 390 P.2d 858 (Utah 1964); *Davis County v. Clearfield City*, 756 P.2d 704 (Utah Ct. App. 1988).

440. See *supra* text accompanying note 178 for a discussion related to the use of initiatives and referenda.

441. See generally *Herr v. Salt Lake County*, 525 P.2d 728 (Utah 1974); *Wood v. North Salt Lake*, 390 P.2d 858 (Utah 1964).

1. Injunction cases

In *Benjamin v. Lietz*,⁴⁴² the Utah Supreme Court issued an injunction to prevent a nuisance (the operation of a sawmill at unreasonable times), even though the sawmill operation did not violate zoning regulations; in *Judkins v. Fronk*,⁴⁴³ an injunction prevented the construction of a service station, notwithstanding the Ogden City Board of Commissioners had granted a building permit; in *Lund v. Cottonwood Meadows Co.*,⁴⁴⁴ an injunction preventing the construction of a mobile trailer park was refused on the grounds that the plaintiffs had failed to exercise their administrative remedies; and, in *Swenson v. Salt Lake City*,⁴⁴⁵ an injunction was granted preventing enforcement of an order of the board of adjustment that a carport be removed.

Additionally, in *Tolman v. Salt Lake County*,⁴⁴⁶ a temporary injunction was granted preventing the enforcement of a rezoning because of defects in giving proper public notice; in *Padjen v. Shipley*,⁴⁴⁷ an injunction preventing the keeping of dogs in a pen or run was refused because the same was not prohibited by the zoning ordinance; in *Call v. City of West Jordan*,⁴⁴⁸ subdividers were refused injunctive relief protecting them from the terms of a subdivision ordinance which required them to donate land or money to the city as a condition of project approval; in *Harris v. Springville City*,⁴⁴⁹ an injunction was granted preventing a commercial operation in a residential district; and, in *Chambers v. Smithfield City*,⁴⁵⁰ an injunction was granted prohibiting the exercise of a variance granted by the city for which the applicant was not qualified.

2. Injunction principles

The holdings in the foregoing injunction actions may be summarized as follows:

442. 211 P.2d 449 (Utah 1949).

443. 234 P.2d 849 (Utah 1951).

444. 392 P.2d 40 (Utah 1964).

445. 398 P.2d 879 (Utah 1965).

446. 437 P.2d 442 (Utah 1968).

447. 553 P.2d 938 (Utah 1976).

448. 606 P.2d 217 (Utah 1979).

449. 712 P.2d 188 (Utah 1984).

450. 714 P.2d 1133 (Utah 1986).

a. Injunction by a private party against a private party. A private party having standing⁴⁵¹ may obtain an injunction preventing another private party from acting in violation of a zoning ordinance.⁴⁵²

b. Injunction as a substitute for an appeal. Injunctive relief may not be used as a substitute for an appeal; and, if injunctive relief is improperly substituted for an appeal, the action will be dismissed for failure to exhaust administrative remedies.⁴⁵³ On the other hand, nothing in these holdings precludes the use of injunctive relief, in association with an appeal, for the purpose of preventing violation of a zoning ordinance if an appeal is resolved in favor of the appellant.

c. Injunction to prevent enforcement. An injunction may be used to prevent incorrect enforcement of zoning ordinances⁴⁵⁴ and to prevent the enforcement of zoning ordinances which are invalidly enacted.⁴⁵⁵

d. Injunction to prevent a nuisance. An injunction may be used to prevent a nuisance even though the use is otherwise generally permitted by the zoning ordinance.⁴⁵⁶

K. Declaratory Judgment

In three reported cases, a private party has pleaded the Utah declaratory judgment statute. In all three of these cases the plaintiff was unsuccessful on the merits. In *Phi Kappa Iota Fraternity v. Salt Lake City*,⁴⁵⁷ a declaratory judgment action unsuccessfully challenged the validity of a zoning regulation which restricted fraternity and sorority houses to an area near the University of Utah; in *Naylor v. Salt Lake City Corp.*,⁴⁵⁸ a declaratory judgment action unsuccessfully challenged a rezoning on the grounds that it was capricious and arbitrary; and, in *Buhler v. Stone*,⁴⁵⁹ a declaratory judgment action unsuccessful-

451. For a discussion of standing, see *infra* text accompanying note 460.

452. *Harris*, 712 P.2d at 191.

453. *Lund v. Cottonwood Meadows Co.*, 392 P.2d 40, 42 (Utah 1964).

454. *Call v. City of W. Jordan*, 606 P.2d 217 (Utah 1979); *Padjen v. Shipley*, 553 P.2d 938 (Utah 1976).

455. *Call v. City of W. Jordan*, 727 P.2d 180 (Utah 1986); *Tolman v. Salt Lake County*, 437 P.2d 442 (Utah 1968).

456. *Benjamin v. Lietz*, 211 P.2d 449 (Utah 1949).

457. 212 P.2d 177 (Utah 1949).

458. 410 P.2d 764 (Utah 1966).

459. 533 P.2d 292 (Utah 1975).

fully challenged, on grounds of vagueness, a regulation requiring that property be kept in a clean and sightly condition.

L. Standing

By statute, a municipality, county, county attorney, or "any owner of real estate"⁴⁶⁰ may bring an action to enforce the acts or ordinances enacted pursuant to those acts. If the action is for injunctive relief, the acts provide that a municipality or a county "need only establish the violation to obtain the injunction."⁴⁶¹ However, in *Harris v. Springville City*,⁴⁶² Utah's high court held that, for a *private* party to obtain relief by enforcing the terms of a zoning ordinance, there must be a demonstration of standing, and standing is jurisdictional.⁴⁶³ Standing requires that the plaintiffs demonstrate an adverse interest, and, in the words of the *Harris* court, "that they [have] suffered some injury peculiar to their own property or at least more substantial than that suffered by the community at large."⁴⁶⁴

M. Vested Rights

At what point can government no longer "change its mind" in relation to uses which may be allowed? The phrase "vested right" focuses on the moment when government can no longer change its mind and the landowner concurrently has a fixed or vested right to government approval for his or her project.

In 1974, the Utah Supreme Court decided *Contracts Funding & Mortgage Exchange v. Maynes*,⁴⁶⁵ in which a property owner applied to Salt Lake County for a building permit to construct a mobile home park on what was then unzoned property. The county delayed the application until it could zone the property and then denied the application.⁴⁶⁶ The court held that the landowner's rights were determined at the time he made his application, and because a mobile home park was permitted (or at least not prohibited) *at the time of application*,

460. UTAH CODE ANN. §§ 10-9-1002(1)(a) (1992), 17-27-1002(1)(a) (1991).

461. *Id.* §§ 10-9-1002(1)(b), 17-27-1002(1)(b).

462. 712 P.2d 188 (Utah 1984).

463. *Id.* at 190.

464. *Id.* at 191; *see also* Padjen v. Shipley, 553 P.2d 938, 939 (Utah 1976).

465. 527 P.2d 1073 (Utah 1974).

466. *Id.* at 1073-74.

a permit should be issued if there were no defects in the application.⁴⁶⁷

The inflexibility of the *Contracts Funding* decision was softened in 1980 when the Utah Supreme Court decided *Western Land Equities, Inc. v. City of Logan*.⁴⁶⁸ In *Western Land Equities*, the court held that the claim of a landowner to a permit or approval based upon current zoning should be balanced against: (1) "compelling, countervailing public interest[s]"⁴⁶⁹; and, (2) the existence, if any, of pending proceedings to change zoning requirements.⁴⁷⁰ The court held:

[A]n applicant is entitled to a building permit or subdivision approval *if his proposed development meets the zoning requirements* in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest. Furthermore, *if a city or county has initiated proceedings* to amend its zoning ordinances, a landowner who subsequently makes application for a permit is not entitled to rely on the original zoning classification.⁴⁷¹

The *Western Land Equities* decision was reaffirmed in 1994 in *Stucker v. Summit County*.⁴⁷² In *Stucker*, the plaintiff purchased a lot in a subdivision which was originally platted in 1964. The Utah Court of Appeals held that the uses to which the lot could be applied were those in effect when the application was made for a building permit in 1990, not those in effect when the subdivision plat was approved in 1964.⁴⁷³ The court stated:

467. *Id.* at 1074 (where the holding was clear but the basis for it was not clearly articulated. However, the court did state: "The presumption in this case is in favor of the applicant's right, with incidental, but serious constitutional and other problems posed by the facts here as to due process, impairment of the obligation of contracts, scope of sovereign authority, etc.").

468. 617 P.2d 388 (Utah 1980).

469. *Id.* at 396.

470. *Id.*

471. *Id.* (emphasis added); see also *Scherbel v. Salt Lake City Corp.*, 758 P.2d 897, 900-01 (Utah 1988) (holding that because plaintiff's application was defective and because a zone change was pending at the time of the plaintiff's application, the plaintiff failed both of the *Western Land Equities* tests and was not entitled to a building permit).

472. 870 P.2d 283 (Utah Ct. App. 1994).

473. The *Stucker* decision bears a superficial resemblance to *Wood v. North Salt Lake*, 390 P.2d 858 (Utah 1964), but in *Wood*, the city was indirectly attempting to amend subdivision plat boundaries by a zoning ordinance text amendment, whereas in *Stucker*, only the uses within the subdivision plat were affected.

Accordingly, pursuant to the *Western Land* decision, the Stuckers' application for a building permit in 1990 fixed the 1985 Code as the governing ordinance, not the 1977 Code. Thus, the Stuckers have no claim of a vested right under the 1977 Code because they did not apply for a building permit during the period when the 1977 Code applied.⁴⁷⁴

N. Other Remedies

As discussed above, remedies available in a zoning enforcement action include injunctions, mandamus, or abatement for the purpose of preventing or removing the unlawful building or use.⁴⁷⁵ Concerning these remedies, "[w]hen a municipal corporation seeks vindication of public rights by injunction, in a court of equity, it is on the same footing as any private person or corporation."⁴⁷⁶ In addition, a structure in violation of a zoning ordinance may be ordered removed,⁴⁷⁷ and a municipality may enforce its zoning ordinance by withholding building permits.⁴⁷⁸ Moreover, the legislative body may choose to enforce its zoning ordinance by the use of civil penalties.⁴⁷⁹ Criminal violations of the zoning ordinance are punishable as class C misdemeanors.⁴⁸⁰

VI. BOARD OF ADJUSTMENT

[A board of adjustment's] functions are limited to making adjustments under the ordinances in order that they will not be as the law of the Medes and the Persians.⁴⁸¹

A. Creation

In cities and counties, a board of adjustment is required as a condition to the exercise of zoning powers.⁴⁸² A city board

474. *Stucker*, 870 P.2d at 286.

475. UTAH CODE ANN. §§ 10-9-1002(1)(a) (1992), 17-27-1002(1)(a) (1991).

476. *Salt Lake County v. Kartchner*, 552 P.2d 136, 138-39 (Utah 1976).

477. *Hargraves v. Young*, 280 P.2d 974, 975 (Utah 1955) (ordering carport constructed in violation of sideyard requirements to be removed).

478. UTAH CODE ANN. § 10-9-1002(2) (1992).

479. *Id.* § 10-9-1003(1), (2)(b).

480. *Id.* § 10-9-1003(2)(a).

481. *Provo City v. Claudin*, 63 P.2d 570, 574 (Utah 1936).

482. UTAH CODE ANN. §§ 10-9-701(1) (1992), 17-27-701(1) (Supp. 1994).

consists of five members,⁴⁸³ whereas a *county* board has either three or five.⁴⁸⁴ The literal statutory language for county boards is "three to five members,"⁴⁸⁵ but voting requirements are given only for three- and five-member boards,⁴⁸⁶ implying that an odd number of members is intended.

Proposed Legislative Change. There is no apparent reason for a county board of adjustment to have "three to five" members while a city board of adjustment has five members. The acts should be made uniform by amending the county act to provide that a county board of adjustment shall have five members.⁴⁸⁷

Members of *city* boards serve staggered⁴⁸⁸ terms of five years,⁴⁸⁹ whereas members of *county* boards serve whatever term length is prescribed in the county zoning ordinance.⁴⁹⁰ Earlier statutory provisions that required or limited service on city and county boards of adjustment by a member of the planning commission have been repealed.⁴⁹¹

Proposed Legislative Change. There is no apparent reason to require members of a city board of adjustment to serve a term of five years while members of a county board of adjustment serve the term length prescribed in the county zoning ordinance. The acts should be made uniform by amending the city act to provide that members of a city board of adjustment

483. *Id.* § 10-9-701(2)(a).

484. *Id.* § 17-27-701(2)(a)(i) (Supp. 1994).

485. *Id.* § 17-27-701(2)(a)(i) (emphasis added).

486. *Id.* § 17-27-702(5).

487. Specifically, UTAH CODE ANN. § 17-27-701(2)(a) should be amended as follows:

(2)(b) The board of adjustment shall consist of [~~three to~~] five members and whatever alternate members that the chief executive officer considers appropriate.

488. UTAH CODE ANN. § 10-9-701(2)(c) (1992).

489. *Id.* § 10-9-701(2)(b).

490. *Id.* § 17-27-701(2)(b) (Supp. 1994).

491. Compare Planning, ch. 15, sec. 1, § 15-8-96, 1949 Utah Laws 20, 21-22 (repealed 1991) and Board of Adjustment Amendments, ch. 124, sec. 2, § 10-9-7, 1987 Utah Laws 684, 685 (repealed 1991) (outlining city requirements relating to planning commission members serving on a board of adjustment) and Zoning and Planning Commission, ch. 23, § 15, 1941 Utah Laws 29, 33 (repealed 1991) (outlining county requirements relating to planning commission members serving on a board of adjustment) with Planning and Zoning Revisions, ch. 235, secs. 33, 86, §§ 10-9-701, 17-27-701, 1991 Utah Laws 873, 883, 896 (outlining city and county requirements relating to members of a board of adjustment).

shall serve the term length prescribed in the city zoning ordinance.⁴⁹²

Alternate members may be appointed in cities and counties in whatever number "the chief executive officer considers appropriate."⁴⁹³ In both cities and counties, the legislative body is required to adopt rules regulating the service of alternate members,⁴⁹⁴ with the limitation that "[n]o more than two alternate members may sit at any meeting of the board of adjustment at one time."⁴⁹⁵ If this limitation (no more than two alternate members may sit at one time) is intended to ensure a majority of regular board members at any meeting, it will succeed in cities but may not in counties, because counties may elect to use a three-member board instead of the five-member board that cities must use.

In cities and counties, appointment of board members, including alternates, is made by the chief executive officer, with the advice and consent of the legislative body.⁴⁹⁶ The chief executive officer may remove any member for cause, based on written charges,⁴⁹⁷ with a public hearing at the member's demand.⁴⁹⁸ If an appointment is made to fill a vacancy, the appointee serves for the balance of the unfinished term.⁴⁹⁹ In addition, an administrative officer may be appointed to "decide routine and uncontested matters before the board of adjustment."⁵⁰⁰

In cities, the chief executive officer is the mayor, unless there is a city manager,⁵⁰¹ in which event the city manager appoints board members. In counties, the chief executive officer is the county commissioner, unless the county has adopted an

492. Specifically, UTAH CODE ANN. § 10-9-701(2)(b) should be amended as follows:

(b) The chief executive officer shall appoint the members and alternate members with the advice and consent of the legislative body for a term [of five years] established by ordinance.

493. UTAH CODE ANN. §§ 10-9-701(2)(a) (1992), 17-27-701(2)(a)(i) (Supp. 1994).

494. *Id.* §§ 10-9-701(3)(b), 17-27-701(3)(b).

495. *Id.* §§ 10-9-701(3)(a), 17-27-701(3)(a).

496. *Id.* §§ 10-9-701(2)(b), 17-27-701(2)(c).

497. *Id.* §§ 10-9-701(4)(a), 17-27-701(4)(a).

498. *Id.* §§ 10-9-701(4)(b), 17-27-701(4)(b).

499. *Id.* §§ 10-9-701(5)(b), 17-27-701(5)(b).

500. *Id.* §§ 10-9-705, 17-27-705.

501. *Id.* § 10-9-103(1)(b).

alternative form of government, in which event appointments are made by the official who exercises executive powers.⁵⁰²

B. Meetings and Records

In cities and counties, board members are empowered to organize and elect a chair.⁵⁰³ In addition, they may adopt rules which are not inconsistent with their zoning ordinance.⁵⁰⁴ The board meets at the call of the chair or as the board otherwise determines.⁵⁰⁵ The chair, or acting chair, may administer oaths and compel the attendance of witnesses.⁵⁰⁶ Board members may be compensated on a per diem basis for their service.⁵⁰⁷

1. Open meetings

In cities and counties, "[a]ll meetings" of a board of adjustment must comply with the requirements of the Open and Public Meetings law.⁵⁰⁸ That law prohibits closed meetings by a public body,⁵⁰⁹ with statutory exceptions not generally applicable to the business of a board of adjustment.⁵¹⁰ As a matter of practice, it is not uncommon for the business of a board to be subdivided into three different parts: (1) a private "pre-meeting" in which staff review the public meeting agenda with board members and educate them with respect to issues on which they may be required to make a decision; (2) a general public meeting in which evidence and public comment are received in relation to issues before the board; and, (3) a private meeting of the board in which evidence and law are discussed and decisions made.⁵¹¹ Contrary to some of this practice, Utah Supreme Court decisions require all but the last of these meetings to be open to the public.

502. *Id.* § 17-27-103(1)(b) (Supp. 1994).

503. *Id.* §§ 10-9-702(1)(a) (1992), 17-27-702(1)(a) (Supp. 1994).

504. *Id.* §§ 10-9-702(1)(b), 17-27-702(1)(b).

505. *Id.* §§ 10-9-702(2), 17-27-702(2).

506. *Id.* §§ 10-9-702(3), 17-27-702(3).

507. *Id.* §§ 10-9-702(7), 17-27-702(7).

508. *Id.* §§ 10-9-702(4)(a), 17-27-702(4)(a) (emphasis added).

509. *Id.* § 52-4-3 (1989).

510. *Id.* § 52-4-5(1).

511. See, e.g., *Davis County v. Clearfield City*, 756 P.2d 704 (Utah Ct. App. 1988).

In *Common Cause of Utah v. Utah Public Service Commission*,⁵¹² the Utah Supreme Court applied the open meeting requirement to the Utah Public Service Commission and noted that some of the business of the commission is judicial in nature. In some things, "the Commission hears and determines issues which are disputed between competing and protesting [parties]," and, in resolving those issues, "the Commission is required by law to operate very much in the same manner as courts."⁵¹³ Specifically, in such "judicial" matters the commission "is empowered to conduct hearings, administer oaths, compel attendance of witnesses, obtain depositions and the production of documents. Its decisions are required to be supported by written findings."⁵¹⁴ Those matters which are thus judicial in nature, the court said, have an "information obtaining" phase and a "decision making" phase.⁵¹⁵ As to the "decision making" phase, the court recognized an implied exemption from the open meetings requirements.⁵¹⁶

In *Andrews v. Utah Board of Pardons*,⁵¹⁷ when confronted with a claim that a meeting of the Utah Board of Pardons should have been open to the public, the court applied its holding in *Common Cause* in a straightforward manner:

[T]he Board proceedings to date consisted not of information gathering, but of deliberations over the petition for a new commutation hearing, deliberations that included a review of the full public commutation hearing held in 1989. If this is the case, these proceedings would be of a *judicial nature* and exempt from the provisions of the [Open and Public Meetings] statute.⁵¹⁸

The statutory exceptions in the Open and Public Meetings law do not authorize holding a private "pre-meeting" before a public board meeting.⁵¹⁹ By their nature such meetings are informational and not judicial, and, thus, there is no exemption in the *Common Cause* holding. To the contrary, in *Davis Coun-*

512. 598 P.2d 1312 (Utah 1979).

513. *Id.* at 1314.

514. *Id.*

515. *Id.* at 1315.

516. *Id.*

517. 836 P.2d 790 (Utah 1992).

518. *Id.* at 792-93 (emphasis added).

519. UTAH CODE ANN. § 52-4-5(1) (1989).

ty v. Clearfield City,⁵²⁰ the Utah Court of Appeals condemned "the secretive nature and lack of any record or minutes" of pre-meetings.⁵²¹

Meetings of a board of adjustment for the purpose of receiving evidence and public comment must obviously be open to the public; nonetheless, the board may thereafter retire to deliberate privately. As to private deliberations, a board of adjustment, like the Public Service Commission in *Common Cause*, must in judicial fashion decide issues between competing parties.⁵²² It follows that a board of adjustment is exempt from the open meeting requirement when deliberating.

2. Records

The records of a board of adjustment must be kept in the office of the board.⁵²³ In addition, "[a]ll records in the office of the board of adjustment are public records"⁵²⁴; under the provisions of the Government Records Access and Management Act, any person may examine and copy public records.⁵²⁵

C. General Function

In *Provo City v. Claudin*,⁵²⁶ the Utah Supreme Court declared that the purpose of a board of adjustment is to make adjustments under a zoning ordinance, with the objective "to make the [zoning] ordinance pliable enough so as not to militate against the public welfare."⁵²⁷ However, in *Claudin*, and later in *Walton v. Tracy Loan and Trust Co.*,⁵²⁸ the court cautioned that a board of adjustment is an *administrative* body and its actions are limited by the terms of the zoning ordinance enacted by the legislative body.⁵²⁹ Since *Walton*, the Utah

520. 756 P.2d 704 (Utah Ct. App. 1988) (decided on other grounds).

521. *Id.* at 709.

522. *E.g.*, UTAH CODE ANN. §§ 10-9-703 (1992), 17-27-703 (Supp. 1994).

523. *Id.* §§ 10-9-702(4)(d), 17-27-702(4)(d).

524. *Id.* §§ 10-9-702(4)(e), 17-27-702(4)(e) (emphasis added).

525. *Id.* § 63-2-201(1) (1993) ("Every person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours . . .").

526. 63 P.2d 570 (Utah 1936).

527. *Id.* at 574.

528. 92 P.2d 724 (Utah 1939).

529. *Id.* at 728 ("The board of zoning appeals (board of adjustment) is entrusted with the duty of enforcing the provisions of the ordinance; it is an administrative body, without a vestige of legislative power."); see also *Claudin*, 63 P.2d at 574.

courts have been consistent in holding that the work of a board of adjustment is administrative in nature and not legislative. In *Scherbel v. Salt Lake City Corp.*,⁵³⁰ the Utah Supreme Court reiterated this point when it stated, "we hold that the authority to resolve zoning disputes is properly an *executive* function rather than a legislative one."⁵³¹ Similarly, the court of appeals in *Salt Lake County Cottonwood Sanitary District v. Sandy City* held: "we conclude that the hearing of conditional use permit appeals is an executive function and not a legislative function."⁵³²

D. Legislative Body Versus Board of Adjustment

The statutory proposition that a board of adjustment may make final decisions in matters of zoning administration has been contested by local legislative bodies wishing to reserve that power to themselves. Thus, there is a tendency for a local legislative body to enact a zoning ordinance which purports to grant powers of zoning administration to the legislative body which, by statute, are the business of the board of adjustment.

Chronologically, the seminal decision was a *county* case, *Thurston v. Cache County*,⁵³³ in which the Utah Supreme Court approved a zoning ordinance procedure wherein conditional use permit appeals went from the planning commission to the county commission, and not to the board of adjustment.⁵³⁴ The county enabling act then in force provided that the county commission "*may* provide that the board of adjustment *may* . . . make special exceptions."⁵³⁵ The court held the discretionary form of this language gave the county a choice whether to vest special exception (conditional use⁵³⁶) appeals in the board of adjustment or elsewhere.⁵³⁷ However, in all of the *city* cases which followed, the result differed for a variety of reasons.

530. 758 P.2d 897 (Utah 1988).

531. *Id.* at 899 (emphasis added).

532. 879 P.2d 1379 (Utah Ct. App. 1994).

533. 626 P.2d 440 (Utah 1981).

534. *Id.* at 444-47.

535. UTAH CODE ANN. § 17-27-15 (1953) (repealed 1991) (emphasis added).

536. For a discussion of special exceptions and conditional uses, see *supra* parts III.G-H.

537. *Thurston*, 626 P.2d at 446.

The first *city* case on this issue was *Chambers v. Smithfield City*,⁵³⁸ in which the zoning ordinance gave the city council final authority to grant *variances*, like the county commission did with special exceptions (conditional uses) in *Thurston*. But the *city* enabling act then in force provided that the board of adjustment *shall* have the power to authorize variances.⁵³⁹ The Utah Supreme Court held that the mandatory form of this language required that only the board of adjustment, and not the city council, had authority to grant variances.⁵⁴⁰

The next *city* case was *Scherbel v. Salt Lake City Corp.*⁵⁴¹ Factually, *Scherbel* was like *Thurston* (a county decision) to the extent that, in both cases, the local zoning ordinance purported to give jurisdiction over special exceptions (conditional use permits) to the legislative body and not to the board of adjustment. But the two cases were different for two reasons: first, Salt Lake City operated under an optional council-mayor form of government, and, second, the *county* enabling act then in force allowed discretion with respect to special exception (conditional use permit) jurisdiction,⁵⁴² but the *city* enabling act then in force did not.⁵⁴³ The *Scherbel* court focused on both differences and invalidated the procedure which allowed the Salt Lake City municipal council to hear and decide special exceptions.

Specifically, the *Scherbel* court noted its holding in *Martindale v. Anderson*, that resolving zoning disputes is an executive function,⁵⁴⁴ and ruled that a municipal council handling such matters violated the concept of a separation of powers.⁵⁴⁵ In addition, the Court held that its reasoning in *Chambers* applied to special exceptions as well as to variances. That is, the city enabling act provided that "[t]he board of adjustment *shall* have [the power to hear and decide special exceptions]," and the mandatory form of this language vested

538. 714 P.2d 1133 (Utah 1986).

539. UTAH CODE ANN. § 10-9-12 (1953) (repealed 1991).

540. *Chambers*, 714 P.2d at 1137.

541. 758 P.2d 897 (Utah 1988).

542. UTAH CODE ANN. § 17-27-16(2) (1953) (repealed 1991).

543. *Id.* § 10-9-12(2) (1953) (repealed 1991).

544. *Scherbel*, 758 P.2d at 899 (noting *Martindale v. Anderson*, 581 P.2d 1022, 1027 (Utah 1978)).

545. *Id.* "As in *Martindale*, we hold that the authority to resolve zoning disputes is properly an executive function rather than a legislative one." *Id.*

only the board of adjustment, and not the municipal council, with authority to hear and decide special exceptions.⁵⁴⁶

The result was the same in *Davis County v. Clearfield City*,⁵⁴⁷ an opinion by the court of appeals which was handed down only ten days after the opinion of the Utah Supreme Court in *Scherbel*. The Clearfield City zoning ordinance required that conditional use decisions by the planning commission be appealed to the city council and not to the board of adjustment. Although Clearfield City was not operating under the Optional Forms of Government Act, the court disapproved the procedure, applying the *Chambers* and *Scherbel* reasoning, which stated that the mandatory language of the city enabling act permitted only a board of adjustment to hear and decide zoning appeals related to conditional uses.⁵⁴⁸

The most recent of these cases, *Salt Lake County Cottonwood Sanitary District v. Sandy City*,⁵⁴⁹ focuses on statutory language that originated as a 1989 amendment to the Utah Municipal Code. The Utah Municipal Code provided that "[a]ppeals from decisions of the planning and zoning commission regarding conditional use permits shall be heard by the board of adjustment *unless the legislative body of the municipality by ordinance has designated another body as the appellate body for those matters*."⁵⁵⁰ Drawing on this language (that the legislative body may designate a body other than the board of adjustment to hear conditional use permit appeals), the Sandy City zoning ordinance vested in the municipal council (operating in a council-mayor form of government) the power to hear appeals from conditional use permit decisions. But again, the Utah Court of Appeals disagreed, focusing on the holding established in *Martindale* that a legislative body operating under The Optional Forms of Government Act cannot perform executive functions of zoning administration. That principle, declared the court, requires an interpretation of sec-

546. *Id.* "However, in *Chambers*, we explained that 'the statutory provisions regarding county boards of adjustment are entirely different from those concerning city boards of adjustment.'" *Id.* n.4; see *Chambers*, 714 P.2d at 1137.

547. 756 P.2d 704 (Utah Ct. App. 1988).

548. *Scherbel*, 758 P.2d at 899.

549. 879 P.2d 1379 (Utah Ct. App. 1994).

550. UTAH CODE ANN. § 10-9-8(3) (1989) (emphasis added). This provision was recodified in substantially the same form in the Municipal Land Use Development and Management Act as UTAH CODE ANN. §§ 10-9-407(2) and 10-9-704(2). See *infra* part VI.H.1 for further discussion of these provisions.

tion 10-9-8(3) that the chosen appellate body be one outside the legislative branch of government.⁵⁵¹

E. Board of Adjustment Jurisdiction

Against a backdrop of the jurisdictional struggle between boards of adjustment and legislative bodies, the new enabling acts provide that a legislative body *may* choose in several matters whether decisions will be made by a board of adjustment or by another body, which is usually the legislative body itself. The matters of zoning administration over which a board of adjustment must have, or may be given, jurisdiction in a zoning ordinance include: (a) appeals from zoning decisions; (b) special exceptions; (c) conditional use permits; (d) variances; and, (e) nonconforming uses.

F. Zoning Appeals

The first class of issues over which city and county boards of adjustment have jurisdiction may be referred to as zoning appeals. A board of adjustment in cities and counties has exclusive jurisdiction in these matters because the enabling acts provide that a board of adjustment "*shall* hear and decide" controversies which are "appeals from zoning decisions *applying* the zoning ordinance."⁵⁵² Zoning decisions which may be appealed include orders, requirements, decisions, or determinations made by zoning officials in administering or interpreting the zoning ordinance.⁵⁵³

Curiously, however, a *county* board of adjustment may *not* "interpret the zoning *maps* and pass upon disputed questions of lot lines, district boundary lines, or similar questions" (not to be confused with the power to interpret the *text* of a zoning ordinance), unless so authorized by the legislative body.⁵⁵⁴

Proposed Legislative Change. There is no apparent reason why a county board of adjustment should require special authorization to "interpret the zoning maps and pass upon disputed questions of lot lines, district boundary lines, or similar questions,"⁵⁵⁵ while city boards of adjustment have

551. *Salt Lake County Cottonwood Sanitary Dist.*, 879 P.2d at 1383 n.5.

552. UTAH CODE ANN. §§ 10-9-703(1) (1992), 17-27-703(1) (Supp. 1994) (emphasis added).

553. *Id.* §§ 10-9-704(1)(a)(i), 17-27-704(1)(a)(i).

554. *Id.* § 17-27-703(3) (emphasis added).

555. *Id.* § 17-27-703(3).

no such limitation. The county act should be amended to repeal this limitation.⁵⁵⁶

Zoning decisions may be appealed by persons affected thereby⁵⁵⁷ and by officers and subdivisions of the city or county.⁵⁵⁸ The time within which to appeal a zoning decision to a board of adjustment is "a reasonable time," which is fixed in the zoning ordinance.⁵⁵⁹

Proposed Legislative Change. The zoning ordinance establishes the time within which to appeal to a board of adjustment; but some zoning ordinances are in disrepair and may fail to so provide. To avoid jurisdictional problems, the enabling acts should provide a time period for appeal to be used if the zoning ordinance does not provide such a time period.⁵⁶⁰

The former *city* enabling act specified in detail: with whom a notice of appeal should be filed and the content of that notice;⁵⁶¹ the staying of a zoning decision by a board of adjustment pending a decision on the merits;⁵⁶² the transmittal of records;⁵⁶³ notice to parties in interest and the general

556. Specifically, UTAH CODE ANN. § 17-27-703(3) should be repealed.

557. UTAH CODE ANN. §§ 10-9-704(1)(a)(i) (1992), 17-27-704(1)(a)(i) (Supp. 1994).

558. *Id.* §§ 10-9-704(1)(b), 17-27-704(1)(b).

559. *Id.* §§ 10-9-704(1)(a)(ii), 17-27-704(1)(a)(ii).

560. Specifically, UTAH CODE ANN. §§ 10-9-704(1)(a)(ii) and 17-27-704(1)(a)(ii) should both be amended as follows:

(ii) The legislative body shall enact an ordinance establishing a reasonable time for appeal to the board of decisions administering or interpreting a zoning ordinance. If the legislative body does not so provide, the time for appeal shall be ten (10) days from the date the decision is rendered.

561. UTAH CODE ANN. § 10-9-9 (1953) (repealed 1991).

562. *Id.* § 10-9-10 (1953) (repealed 1991). In the original city enabling act, an administrative appeal automatically stayed all proceedings unless the administrative officer (because of "imminent peril to life or property") requested otherwise, in which event the appellant could request a restraining order from the board or a district court. This procedure was not changed until 1991. *Compare* Cities to Regulate Size of Buildings, Use of Land, Etc., ch. 119, § 7, 1925 Utah Laws 240, 242-44 (repealed 1991) *with* Planning and Zoning Revisions, ch. 235, sec. 36, § 10-9-704, 1991 Utah Laws 873, 884. The county enabling acts contained no provisions related to a stay of proceedings, but, in general, permitted a county commission to establish procedures related to appeals. *Compare* Zoning and Planning Commission, ch. 23, § 16, 1941 Utah Laws 29, 33-34 (repealed 1991) *with* Planning and Zoning Revisions, ch. 235, sec. 89, § 17-27-704, 1991 Utah Laws 873, 897.

563. UTAH CODE ANN. § 10-9-9 (1953) (repealed 1991).

public;⁵⁶⁴ the obligation of the board to make a timely decision;⁵⁶⁵ and, appearances by agents or attorneys.⁵⁶⁶ In contrast, the former *county* enabling act gave no guidance with respect to these details and provided instead that they would be resolved in "general rules" provided by the county commission or in "supplemental rules of procedure" adopted by the board of adjustment itself.⁵⁶⁷

The present enabling acts adopt the county approach regarding these issues, and in cities and counties such are now left to local discretion in the zoning ordinance or the rules of the board.⁵⁶⁸ On the other hand, new mandatory procedural provisions have been adopted in both enabling acts which: provide that the appellant has the burden of proving the existence of error⁵⁶⁹; limit subject matter jurisdiction to decisions applying a zoning ordinance⁵⁷⁰; prohibit consideration by a board of adjustment of zoning ordinance amendments⁵⁷¹; and, prohibit a board of adjustment from waiving or modifying zoning ordinance requirements.⁵⁷²

For a *city* board, the concurring vote of *three* out of five members is required to reverse an administrative decision.⁵⁷³ For a *county* board, however, a vote of *four* out of five members for a five-member board, and a unanimous vote of three members for a three-member board, is required to reverse an administrative decision.⁵⁷⁴

Proposed Legislative Change. There is no apparent reason why the voting requirements should differ between cities (three out of five votes to reverse) and counties (four out of five votes to reverse). Majority-rule (three out of five votes) is traditional, and the county act should be so amended to pro-

564. *Id.* § 10-9-11 (1953) (repealed 1991).

565. *Id.*

566. *Id.*

567. *Id.* § 17-27-16 (1953) (repealed 1991).

568. *Id.* §§ 10-9-702(1)(b) (1992), 17-27-702(1)(b) (Supp. 1994).

569. *Id.* §§ 10-9-704(3), 17-27-704(2) (1992).

570. *Id.* §§ 10-9-704(4)(a), 17-27-704(3)(a).

571. *Id.* §§ 10-9-704(4)(b), 17-27-704(3)(b).

572. *Id.* §§ 10-9-704(5), 17-27-704(4).

573. *Id.* § 10-9-702(5).

574. *Id.* § 17-27-702(5) (Supp. 1994).

vide.⁵⁷⁵ (It is recommended elsewhere that counties should have only five-member boards of adjustment.⁵⁷⁶)

G. Special Exceptions

In both cities and counties, the jurisdiction of a board of adjustment over "special exceptions"⁵⁷⁷ is described in the following language: (1) *Sections 10-9-703(1)(b) and 17-27-703(1)(b)*: "[t]he board of adjustment *shall* hear and decide . . . special exceptions to the terms of the zoning ordinance"⁵⁷⁸; (2) *Sections 10-9-706(1)(b) and 17-27-706(1)(b)*: "[i]n enacting the zoning ordinance, the legislative body *may* . . . grant jurisdiction to the board of adjustment to hear and decide some or all special exceptions"⁵⁷⁹; and, (3) *Sections 10-9-706(2) and 17-27-706(2)*: "[t]he board of adjustment *may* hear and decide special exceptions only if authorized to do so by the zoning ordinance"⁵⁸⁰

On their face, these three provisions are inconsistent.⁵⁸¹

575. Specifically, UTAH CODE ANN. § 17-27-702(5) should be amended as follows:

~~[(5) In order to reverse any order, requirement, decision, or determination of any administrative official or agency or to decide in favor of the appellant, there must be a concurring vote of:~~

~~(a) four members for a five member board of adjustment; or
(b) three members for a three member board of adjustment.]~~

(5) The concurring vote of three members of the board of adjustment is necessary to reverse any order, requirement, decision, or determination of any administrative official or agency or to decide in favor of the appellant.

The proposed language is taken from UTAH CODE ANN. § 10-9-702(5) (1992).

576. See discussion *supra* part VI.A.

577. See *supra* text accompanying note 225 for a discussion on the meaning of the term "special exception."

578. UTAH CODE ANN. §§ 10-9-703(1)(b) (1992), 17-27-703(1)(b) (Supp. 1994) (emphasis added).

579. *Id.* §§ 10-9-706(1)(b), 17-27-706(1)(b) (emphasis added).

580. *Id.* §§ 10-9-706(2), 17-27-706(2) (emphasis added).

581. It may be possible to reconcile these provisions by reference to the city enabling provisions which preceded them. From 1925 to 1991, the city enabling act provided that a "board of adjustment *shall* have the following power: . . . (2) To hear and decide special exceptions to the terms of the ordinance *upon which such board is required to pass under such ordinance.*" *Id.* § 10-9-12(2) (1953) (repealed 1991) (emphasis added). In short, a board of adjustment *shall* have jurisdiction to hear and decide special exceptions to the extent that such is *permitted* by the terms of the zoning ordinance. *By straining*, it is possible to find the same meaning in the present sections. Thus, § 703(1)(b) may be read to provide that a board of adjustment *shall* hear and decide special exceptions as the legislative body *may* permit, as provided in §§ 706(1)(b) and 706(2). But this interpretation stretches the

Section 703(1) provides that a board of adjustment *shall* have jurisdiction over special exceptions, but sections 706(1) and 706(2) provide that a board of adjustment *may* have that jurisdiction if the legislative body so provides.

Proposed Legislative Change. There is a conflict in the statutory provisions conferring board of adjustment jurisdiction over "special exceptions." Both acts should be amended to give the legislative body discretion to determine the extent of the board of adjustment's jurisdiction over "special exceptions."⁵⁸²

H. Conditional Use Permits

1. Conditional use permits in cities

The city enabling act handles board of adjustment jurisdiction over conditional use permits differently than does the county enabling act. The jurisdiction of a *city* board of adjustment in relation to conditional use permits is stated in three different sections: (1) *Section 10-9-407(2)*: "[t]he board of adjustments has jurisdiction to decide appeals of the *approval or denial* of conditional use permits unless the legislative body has enacted an ordinance designating another *body* as the appellate body for those appeals."⁵⁸³; (2) *Section 10-9-704(2)*: "[t]he board of adjustment shall hear and decide appeals from *planning commission decisions* regarding conditional use permits unless the zoning ordinance designates another *body* to hear conditional use permit appeals."⁵⁸⁴; and, (3) *Section 10-9-706(3)*: "[t]he legislative body may provide that conditional use permits be treated as *special exceptions* in the zoning ordinance."⁵⁸⁵

2. The planning commission assumption

With the enactment of the sections quoted above, the state legislature obviously assumed that in all cities a conditional use permit will initially be approved or denied by the planning

plain meaning of § 703(1)(b) almost beyond the breaking point.

582. For a specific proposal to revise the enabling acts in relation to board of adjustment jurisdiction over "special exceptions," see discussion *infra* note 598 and accompanying text.

583. UTAH CODE ANN. § 10-9-407(2) (1992) (emphasis added).

584. *Id.* § 10-9-704(2) (emphasis added).

585. *Id.* § 10-9-706(3) (emphasis added).

commission. Examples of this procedure (conditional use permits being first approved or denied by the planning commission) are described in *Davis County v. Clearfield City*⁵⁸⁶ and *Scherbel v. Salt Lake City Corp.*⁵⁸⁷ Assuming original action by the planning commission, the real question addressed by the quoted sections is what body will thereafter hear conditional use permit appeals from the planning commission. The clear answer of the quoted sections is that the local legislative body can choose the body it wants; although, in practical terms, the two obvious choices are the board of adjustment or the legislative body itself.

3. *The Orem City example*

But the assumption that conditional use permits will *always* be issued *first* by the planning commission is incorrect. Consider, for example, a city such as Orem, Utah: the terms of the zoning ordinance allow the planning commission only to *recommend* the approval or denial of a conditional use permit, after which the official decision to approve or deny is *made by the city council*.⁵⁸⁸ In relation to Orem's conditional use structure, the three sections quoted above wreak procedural havoc.

When section 407(2) is applied to an administrative structure such as that in Orem, the result is that section 407(2) requires that the board of adjustment (or some other *body* designated by the city council) review the decisions of the city council. This is objectionable because it places the legislative body (the author of the zoning ordinance and the creator of the board of adjustment) in a subordinate position in relation to the administration of conditional use permits. Indeed, in *Thurston v. Cache County*,⁵⁸⁹ when the Utah Supreme Court heard the argument that a board of adjustment must review permits issued by the county commission, the court mildly ridiculed the argument by saying that "[p]laintiffs' interpretation . . . imposes a curious administrative paradox."⁵⁹⁰

Neither the language of section 704(2) nor the language of section 706(3) will rescue a city like Orem from the "curious administrative paradox" created by the convergence of the city

586. 756 P.2d 704 (Utah Ct. App. 1988).

587. 758 P.2d 897 (Utah 1988).

588. OREM, UTAH, OREM CITY CODE § 22-4-3 (1990).

589. 626 P.2d 440 (Utah 1981).

590. *Id.* at 446.

council's desire to originally issue conditional use permits and the requirements of section 407(2). Section 704(2) offers no help because by its terms it applies to "appeals from *planning commission* decisions,"⁵⁹¹ not city council decisions. Moreover, section 706(3) offers no help because it simply allows conditional use permits to be treated as special exceptions, in which event the permit could be issued by the board of adjustment, without city council involvement.

4. *Conditional use permits in counties*

With respect to the administrative process for conditional use permits in counties, there is no counterpart to either the troublesome section 10-9-407(2) or to section 10-9-704(2).⁵⁹² The lack of statutory guidance for counties in relation to granting or denying conditional use permits means that a county legislative body is constrained only by the normal bounds of legislative discretion in the structure of its conditional use permit process.⁵⁹³ Counties do, however, have a counterpart to section 10-9-706(3),⁵⁹⁴ which provides that conditional use permits *may* be treated as special exceptions in the zoning ordinance; in other words, they may be directly issued by the board of adjustment.

Proposed Legislative Change. There are three statutory problems which come together at this point: (1) in cities, the statutory conflict concerning board of adjustment jurisdiction over "special exceptions"⁵⁹⁵; (2) in cities, the statutory assumption that all conditional use permits will first be granted by a planning commission⁵⁹⁶; and, (3) in counties, the lack of statutory guidance with respect to conditional use permit appeals.⁵⁹⁷ These three problems should be resolved: (1) in cities and counties, by giving the legislative body discretion to decide whether special exception (conditional use permit) appeals will be handled by the board of adjustment or another

591. UTAH CODE ANN. § 10-9-704(2) (1992) (emphasis added).

592. Compare *id.* §§ 10-9-407(2), -704(2) (1992) with *id.* §§ 17-27-406 (1991), -704 (Supp. 1994).

593. See generally *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980) (Counties have "independent authority" to pass ordinances providing for public safety, health, morals, and welfare.).

594. UTAH CODE ANN. § 17-27-706(3) (Supp. 1994).

595. See discussion *supra* part VI.G.

596. See discussion *supra* part VI.H.2.

597. See *supra* the discussion in this immediate section.

body; and, (2) in cities and counties, by allowing the legislative body the discretion to create alternative special exception (conditional use permit) approval procedures.⁵⁹⁸

I. Variances

The enabling acts provide that a "board of adjustment shall hear and decide . . . variances from the terms of the zoning ordinance."⁵⁹⁹ The acts also provide that a person desiring a variance "may apply to the board of adjustment."⁶⁰⁰ There are no provisions to the contrary, with the result that a board of adjustment has exclusive jurisdiction to grant variances. This is consistent with the decision of the Utah Supreme Court in *Chambers v. Smithfield City*,⁶⁰¹ holding that under the former city enabling statute, a city board of adjustment has exclusive jurisdiction to grant variances, which power cannot be vested in a city council.⁶⁰²

There are specific conditions prerequisite to granting a variance. In summary form, those conditions include the following, all of which must be met:

598. Specifically, the following legislative changes should be made:

1. For a proposed legislative change providing that "a conditional use is a type of special exception," see *supra* note 230 and accompanying text.

2. UTAH CODE ANN. § 10-9-407(2) should be repealed.

3. UTAH CODE ANN. §§ 10-9-703 and 17-27-703 should be amended as follows:

(1) Unless the legislative body (in any form of local government*) otherwise provides, t[F]he board of adjustment shall hear and decide:

(a) appeals from zoning decisions applying the zoning ordinance; and

(b) special exceptions to the terms of the zoning ordinance (including conditional use permits).]; and

~~-(c) variances from the terms of the zoning ordinance.]~~

(2) Unless the legislative body (in any form of local government*) otherwise provides, t[F]he board of adjustment may make determinations regarding the existence, expansion, or modification of nonconforming uses [if that authority is delegated to them by the legislative body].

(3) The board of adjustment shall hear and decide variances from the terms of the zoning ordinance.

(* The phrase "in any form of local government" should be deleted if it is determined that legislative bodies in optional forms of government should not participate in zoning administration.)

4. UTAH CODE ANN. § 10-9-704(2) should be repealed.

5. UTAH CODE ANN. §§ 10-9-706 and 17-27-706 should be repealed.

599. UTAH CODE ANN. §§ 10-9-703(1)(c) (1992), 17-27-703(1)(c) (Supp. 1994).

600. *Id.* §§ 10-9-707(1), 17-27-707(1).

601. 714 P.2d 1133 (Utah 1986).

602. *Id.* at 1136.

1. *Unreasonable hardship*

A variance may be granted if literal enforcement of the zoning ordinance would cause the applicant an unreasonable hardship.⁶⁰³ The hardship must be located on or associated with the property,⁶⁰⁴ come from conditions peculiar to the property and not conditions general to the neighborhood,⁶⁰⁵ and cannot be self-imposed or economic.⁶⁰⁶

2. *Special circumstances*

A variance may be granted if special circumstances attach to the property which do not apply to other properties in the same district.⁶⁰⁷ The special circumstances must relate to the hardship complained of⁶⁰⁸ and deprive the property of privileges granted to other properties in the same district.⁶⁰⁹

3. *Property rights*

The granting of a variance must be "essential to the enjoyment of a substantial property right possessed by other property in the same district."⁶¹⁰

4. *General plan and public interest*

Granting a variance may not substantially affect the general plan and may not be contrary to the public interest.⁶¹¹

603. UTAH CODE ANN. §§ 10-9-707(2)(a)(i) (1992), 17-27-707(2)(a)(i) (Supp. 1994).

604. *Id.* §§ 10-9-707(2)(b)(i)(A), 17-27-707(2)(b)(i)(A).

605. *Id.* §§ 10-9-707(2)(b)(i)(B), 17-27-707(2)(b)(i)(B).

606. *Id.* §§ 10-9-707(2)(b)(ii), 17-27-707(2)(b)(ii). "Economic hardship" apparently refers to revenues which may be lost if a variance is not granted. *See, e.g.,* Otto v. Steinhilber, 24 N.E.2d 851, 852 (N.Y. 1939) (holding a variance allowing a property owner to locate part of a roller skating rink on property zoned residential was improper because it did not meet the three elements constituting unnecessary hardship).

607. UTAH CODE ANN. §§ 10-9-707(2)(a)(ii) (1992), 17-27-707(2)(a)(ii) (Supp. 1994).

608. *Id.* §§ 10-9-707(2)(c)(i), 17-27-707(2)(c)(i).

609. *Id.* §§ 10-9-707(2)(c)(ii), 17-27-707(2)(c)(ii).

610. *Id.* §§ 10-9-707(2)(a)(iii), 17-27-707(2)(a)(iii).

611. *Id.* §§ 10-9-707(2)(a)(iv), 17-27-707(2)(a)(iv).

5. *Spirit of ordinance and substantial justice*

In granting a variance, the spirit of the zoning ordinance must be observed and substantial justice done.⁶¹²

6. *Example of a variance*

These statutory conditions are not otherwise explained. Their apparent meaning may be illustrated by a simple example in which a small stream traverses a parcel of property. The property owner is generally entitled to a building permit to construct a residence, but placement of the residence caused by the location of the stream causes a violation of sideyard requirements. A variance from enforcement of the sideyard requirements will, if granted, allow the applicant to construct a residence.

The following is a discussion of the above requirements as they relate to the example: (1) *Unreasonable hardship*: literal enforcement of the sideyard requirements will unreasonably prevent issuance of a building permit because sideyard requirements cannot be met. The hardship is located on the property and comes from a problem peculiar to the property and not the general neighborhood. The hardship is not self-imposed, and is not economic; (2) *Special circumstances*: a stream causing a sideyard violation is a problem only on this parcel of property, and it is this circumstance which prevents issuance of a building permit. Other lots in the same district qualify for a building permit; (3) *Property rights*: if a variance is not granted, the applicant will not receive a building permit, which is a privilege enjoyed by other property in the district; (4) *General plan and public interest*: the granting of a variance will not adversely affect the general plan or the public interest because the general plan and the existing zone favor the construction of residences in the district; and, (5) *Spirit of ordinance and substantial justice*: the spirit of the zoning ordinance is observed because construction of a residence is permitted according to the general intent of the zoning ordinance. Substantial justice is accomplished because the applicant is treated consistently with the treatment of others in the same district.

612. *Id.* §§ 10-9-707(2)(a)(v), 17-27-707(2)(a)(v).

7. *Supporting evidence and other provisions*

The acts provide that "[t]he applicant shall bear the burden of proving that all of the conditions justifying a variance have been met."⁶¹³ It has been held that a decision granting a variance will not be sustained on appeal if there is not substantial evidence in the record to support it.⁶¹⁴ In *Chambers v. Smithfield City*,⁶¹⁵ the Utah Supreme Court overturned the grant of a variance to build a house on a .67-acre lot in a one-acre zone. According to the court, "[t]here is simply no evidence in the record to support any one of the Board's findings. In fact, what evidence exists tends only to support a denial of the variance."⁶¹⁶

In *Xanthos v. Board of Adjustment of Salt Lake City*,⁶¹⁷ the Utah Supreme Court used the following language in overturning the grant of a variance:

It is not enough to show that the property for which the variance is requested is different in some way from the property surrounding it. Each piece of property is unique. What must be shown by the applicant for the variance is that the property itself contains some special circumstance that relates to the hardship complained of and that granting a variance to take this into account would not substantially affect the zoning plan. Respondent has failed to meet this burden.

The evidence adduced does not support respondent's claim of special circumstance. The property is neither unusual topographically or by shape, nor is there anything extraordinary about the piece of property itself. Simply having an old building on land upon which a new building has been constructed does not constitute special circumstances.⁶¹⁸

The acts also provide that variances "run with the land,"⁶¹⁹ and that conditions may be attached to the grant of a variance.⁶²⁰ Moreover, the acts provide that a "use variance" cannot be granted.⁶²¹

613. *Id.* §§ 10-9-707(3), 17-27-707(3).

614. *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1038 (Utah 1984).

615. 714 P.2d 1133 (Utah 1986).

616. *Id.* at 1135.

617. 685 P.2d at 1032.

618. *Id.* at 1036.

619. UTAH CODE ANN. §§ 10-9-707(4) (1992), 17-27-707(4) (Supp. 1994).

620. *Id.* §§ 10-9-707(6), 17-27-707(6).

621. *Id.* §§ 10-9-707(5), 17-27-707(5).

A 'use' variance, as the term implies, is one which permits a use of land other than those prescribed by the zoning regulations. Thus, a variance which permits a commercial use in a residential district, or which permits a multiple dwelling in a district limited to single-family homes, is a use variance.⁶²²

The variance described in the example above—a stream crossing a residential building lot⁶²³—is not a "use" variance; the applicant was asking for a permit to build a residence in a district zoned residential. The variance related only to sideyard requirements.

J. Nonconforming Uses

The acts provide that "[t]he board of adjustment may make determinations regarding the existence, expansion, or modification of nonconforming uses *if that authority is delegated to them by the legislative body.*"⁶²⁴ The acts do not explicitly state what body will handle nonconforming use issues if a board of adjustment does not. But the phrase—"delegated to them by the legislative body"—suggests that such issues be resolved by the legislative body, if not by a board of adjustment. However, in a city operating under the Optional Forms of Government Act, such an interpretation is prevented by the holding in *Salt Lake County Cottonwood Sanitary District v. Sandy City*.⁶²⁵ This holding prohibits, on separation of powers grounds, a municipal council from performing administrative functions.⁶²⁶

Proposed Legislative Change. Many local zoning ordinances are in disrepair, and if a local zoning ordinance does not authorize the board of adjustment to handle nonconforming use issues, a jurisdictional ambiguity results. To minimize ambiguity, the presumption should be changed, giving the board of adjustment jurisdiction over nonconforming uses, unless the legislative body provides otherwise.⁶²⁷

622. 83 AM. JUR. 2D *Zoning and Planning* § 836 (1992).

623. See discussion *supra* part VI.1.6.

624. UTAH CODE ANN. §§ 10-9-703(2) (1992), 17-27-703(2) (Supp. 1994) (emphasis added).

625. 879 P.2d 1379 (Utah Ct. App. 1994).

626. *Id.* at 1382-83.

627. Specifically, UTAH CODE ANN. §§ 10-9-703(2) and 17-27-703(2) should be amended as follows:

Three Utah cases deal with nonconforming uses, each holding that the burden of proving the right to a nonconforming use is on the person claiming it.⁶²⁸ The first case, *Morrison v. Horne*,⁶²⁹ was a demand for a building permit to construct a service station in a residential zone. Although the property had previously been used commercially when it was in a commercial zone, evidence showed that the commercial use had been discontinued for five years. The zoning ordinance allowed a discontinuance for no more than one year. The court held against the landowner on the basis that he had failed to meet his burden of proof that the commercial use had been lawfully established and continuously maintained.⁶³⁰

The same rule was applied in *State v. Holt's Estate*,⁶³¹ in which landowners claimed that their property should be valued as commercial for purposes of eminent domain. The property, however, was zoned residential. The court held that the landowners had the burden of proving the continuation of a nonconforming use. Where, as here, the property had not been used commercially for more than twelve years, the court cited its holding in *Morrison* and held that the landowners had failed to meet their burden of proving a continuation of the nonconforming use.⁶³²

In *Fillmore City v. Reeve*,⁶³³ however, the evidence confirmed that the landowners had met their burden of proof by continuously keeping livestock (pigs, cattle, and horses) in what had become a residential district that did not allow that use, and that this activity did not constitute a nuisance. Under these facts, the court held against the city because the city had failed to meet its burden of proof. The court stated, "when the non-conforming use is established, the burden of proof is reversed. It is then on the city to prove that the defendant violat-

(2) Unless otherwise determined by the legislative body, [T]he board of adjustment may make determinations regarding the existence, expansion, or modification of nonconforming uses [~~if that authority is delegated to them by the legislative body~~].

628. A fourth case, *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559, 564 (Utah 1967), discussed issues related to nonconforming uses but was ultimately decided on other grounds.

629. 363 P.2d 1113 (Utah 1961).

630. *Id.* at 1114.

631. 381 P.2d 724 (Utah 1963).

632. *Id.* at 725.

633. 571 P.2d 1316 (Utah 1977).

ed the zoning ordinance by exceeding his established non-conforming use.”⁶³⁴

VII. APPEALS TO THE COURT

In the case at hand, the district judge undertook to weigh anew the underlying factual considerations. While there may have been some evidence in the record to support the trial judge’s findings, it was not his prerogative to weigh the evidence anew. His role was limited to determining whether there was evidence in the record to support the Board of Adjustment’s action.⁶³⁵

A. “Any Decision”

In cities and counties, “[a]ny person adversely affected by *any decision* made in the exercise of the provisions of this chapter [the city and county enabling acts] may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.”⁶³⁶ This language is broad enough to cover appeals from all decisions of a board of adjustment,⁶³⁷ as well as appeals from decisions of other bodies such as a legislative body granting or denying a conditional use permit.⁶³⁸ Enabling provisions relating to subdivisions are included in the chapters comprising the city and county enabling acts,⁶³⁹ and thus the right of appeal also applies to subdivision issues.

Proposed Legislative Change. In each enabling act there are two sections dealing with the subject matter of appeals, resulting in possibilities for confusion. (For example, UTAH CODE ANN. section 10-9-708(3) provides for appeal within 30 days after the “decision is *final*.” In possible contrast is UTAH CODE ANN. section 10-9-1001(2) which provides for appeal within 30 days after the “decision is *rendered*.”) Depending on

634. *Id.* at 1318.

635. 685 P.2d 1032, 1035 (Utah 1984).

636. UTAH CODE ANN. §§ 10-9-1001(2) (1992), 17-27-1001(2) (1991) (emphasis added).

637. Parallel (and redundant) provisions are found in UTAH CODE ANN. §§ 10-9-708 (1992), 17-27-708 (1991).

638. Decisions regarding conditional use permits are made in the exercise of the provisions of the Utah Code in Chapter 9, Title 10, as well as in Chapter 27, Title 17. UTAH CODE ANN. §§ 10-9-407 (1992), 17-27-406 (Supp. 1994).

639. *Id.* §§ 10-9-801 (1992), 17-27-801 (1991).

the context, duplicative language like this can cause needless confusion. The duplicative sections should be combined and possible inconsistencies reconciled.⁶⁴⁰

640. Specifically, UTAH CODE ANN. § 10-9-708 should be combined with and numbered as UTAH CODE ANN. § 10-9-1001; and, UTAH CODE ANN. § 17-27-708 should be combined with and numbered as UTAH CODE ANN. § 17-27-1001, as follows:

~~[10-9-708/17-27-708. District court review of board of adjustment decision.~~

~~(1) Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision.~~

~~(2) In the petition, the plaintiff may only allege that the board of adjustment's decision was arbitrary, capricious, or illegal.~~

~~(3) The petition is barred unless it is filed within 30 days after the board of adjustment's decision is final.~~

~~(4)(a) The board of adjustment shall 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.~~

~~(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.~~

~~(5)(a)(i) If there is a record, the district court's review is limited to the record provided by the board of adjustment.~~

~~(ii) The court may not accept or consider any evidence outside the board of adjustment's record unless that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment.~~

~~(b) If there is no record, the court may call witnesses and take evidence.~~

~~(6) The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.~~

~~(7)(a) The filing of a petition does not stay the decision of the board of adjustment.~~

~~(b)(i) Before filing the petition, the aggrieved party may petition the board of adjustment to stay its decision.~~

~~(ii) Upon receipt of a petition to stay, the board of adjustment may order its decision stayed pending district court review if the board of adjustment finds it to be in the best interest of the municipality.~~

~~(iii) After the petition is filed the petitioner may seek an injunction staying the board of adjustment's decision.]~~

UTAH CODE ANN. §§ 10-9-708 and 17-27-708 should be amended as follows:

10-9-1001/17-27-708. Appeals.*

~~[(2)]~~ (1) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

~~[(1)]~~ (2) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.

(3) In the petition, the plaintiff may only allege that the board of adjustment's decision was arbitrary, capricious, or illegal.

~~[(2)]~~ (4) The courts shall:

The scope of the “any decision” language makes it an improvement over the language of the former city enabling act, which provided for appeals to the courts from “any decision of the board of adjustment.”⁶⁴¹ The latter language was troublesome because it could be interpreted, as it was in *Davis County v. Clearfield City*,⁶⁴² to provide that appeals to the courts could be taken *only from decisions of a board of adjustment*. Thus, the court of appeals viewed the Clearfield City zoning ordinance, which fixed the city council, and not the board of adjustments, as the appellate body for conditional uses, as contrary to the enabling act then in force. According to the court of appeals, “[w]here a route of review is provided by a state stat-

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- (a) presume that land use decisions and regulations are valid; and
 - (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

(5) The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.

(6)(a) The board of adjustment shall 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.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.

(7)(a)(i) If there is a record, the district court's review is limited to the record provided by the board of adjustment.

(ii) The court may not accept or consider any evidence outside the board of adjustment's record unless that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment.

(b) If there is no record, the court may call witnesses and take evidence.

(8)(a) The filing of a petition does not stay the decision of the board of adjustment.

(b)(i) Before filing the petition, the aggrieved party may petition the board of adjustment to stay its decision.

(ii) Upon receipt of a petition to stay, the board of adjustment may order its decision stayed pending district court review if the board of adjustment finds it to be in the best interest of the municipality.

(iii) After the petition is filed the petitioner may seek an injunction staying the board of adjustment's decision.

(* All of the provisions of §§ 10-9-708 and 17-27-708 are moved unchanged into the section above, except for subsections (1) and (3) of §§ 10-9-708 and 17-27-708, which are deleted.)

641. UTAH CODE ANN. § 10-9-15 (1953) (repealed 1991) (emphasis added). In relation to the present enabling acts, compare *id.* §§ 10-9-708(1) (1992), 17-27-708(1) (1991) (“[a]ny person adversely affected by any decision of a board of adjustment”) with *id.* §§ 10-9-1001(2), 17-27-1001(2) (“[a]ny person adversely affected by any decision”).

642. 756 P.2d 704 (Utah Ct. App. 1988).

ute, a municipality lacks the power to alter that scheme."⁶⁴³ Moreover, the Clearfield City zoning ordinance (allowing appeals from a board of adjustment or a city council) was invalid because it "fail[ed] to provide for final review of zoning matters by a board of adjustment . . . and endeavor[ed] to vest the City Council with the final determination of conditional use permits."⁶⁴⁴

B. "Any Person Adversely Affected"

The city and county enabling acts provide that "any person adversely affected" by any decision may appeal to the courts.⁶⁴⁵ This language does not appear any different in substance from the language of the former enabling acts which allowed "any person aggrieved" to appeal to the courts.⁶⁴⁶ In *Lund v. Cottonwood Meadows Co.*,⁶⁴⁷ the Utah Supreme Court quoted *O'Connor v. Board of Zoning Appeals*,⁶⁴⁸ a 1953 Connecticut decision, to explain when a person is *aggrieved* within the meaning of the former enabling acts:

Any landowner or resident within [the] city whose situation is such that [a] decision of [the] planning board may adversely affect him in [the] use of property owned or occupied by him in some manner within [the] scope or purposes of the zoning ordinance would be "aggrieved" within [the] statute giving any person aggrieved [a] right of appeal from [the] board's decision.⁶⁴⁹

C. Scope of Appeal

On appeal, the scope of the remedy in cities and counties is that the district court may "determine only whether or not the decision is arbitrary, capricious, or illegal."⁶⁵⁰ The acts pro-

643. *Id.* at 707.

644. *Id.* at 708. For a discussion of the correct remedy to be followed by a plaintiff where the structure of administrative appeals violates the enabling acts, see discussion *infra* part VII.G.2.

645. UTAH CODE ANN. §§ 10-9-1001(2) (1992), 17-27-1001(2) (1991) (emphasis added).

646. *Id.* §§ 10-9-9(1), 17-27-16 (1953) (repealed 1991) (emphasis added).

647. 392 P.2d 40 (Utah 1964).

648. 98 A.2d 515 (Conn. 1953).

649. *Id.* at 581, quoted in *Lund*, 392 P.2d at 42.

650. UTAH CODE ANN. §§ 10-9-1001(3)(b) (1992), 17-27-1001(3)(b) (1991).

vide that "[t]he courts shall . . . presume that land use decisions and regulations are valid."⁶⁵¹ This language appears to be a legislative reaffirmation of the decision of the Utah Supreme Court in *Xanthos v. Board of Adjustment of Salt Lake City*.⁶⁵²

The earlier city enabling act allowed the appealing party "a plenary action for relief."⁶⁵³ Mr. Xanthos, who had been refused a variance, persuaded the trial judge that this language permitted him a trial *de novo* in relation to which "the court has the same power as the board of adjustment to review the facts."⁶⁵⁴ The Utah Supreme Court disagreed and reversed the trial court, holding that "the role of the district court in reviewing the Board of Adjustment's decision is to determine whether the action taken was so unreasonable as to be arbitrary and capricious."⁶⁵⁵ The court held that "it was not [the trial court judge's] prerogative to weigh the evidence anew. His role was limited to determining whether there was evidence in the record to support the Board of Adjustment's action."⁶⁵⁶

D. Procedure

A zoning appeal is made by filing "a petition for review of the decision with the district court within 30 days after the local decision is rendered."⁶⁵⁷ The enabling acts provide that "[d]ecisions of the *board of adjustment* become effective at the meeting in which the decision is made, unless a different time is designated in the board's rules or at the time the decision is made."⁶⁵⁸ In relation to zoning appeals, it has been held that the Utah Administrative Procedures Act⁶⁵⁹ "applies only to state and not to local agencies."⁶⁶⁰

E. Administrative Remedies

Although "any decision" may be appealed to the courts, the city and county acts explicitly provide that decisions cannot be

651. *Id.* §§ 10-9-1001(3)(a), 17-27-1001(3)(a).

652. 685 P.2d 1032 (Utah 1984).

653. UTAH CODE ANN. § 10-9-15 (1953) (repealed 1991).

654. *Xanthos*, 685 P.2d at 1033.

655. *Id.* at 1034-35.

656. *Id.* at 1035.

657. UTAH CODE ANN. §§ 10-9-1001(2) (1992), 17-27-1001(2) (1991).

658. *Id.* §§ 10-9-702(6) (1992), 17-27-702(6) (Supp. 1994) (emphasis added).

659. *Id.* §§ 63-46b-1 to -22 (Supp. 1994).

660. *Davis County v. Clearfield City*, 756 P.2d 704, 706 (Utah Ct. App. 1988).

challenged in the courts "until [the appellant] has exhausted his administrative remedies."⁶⁶¹ In this context, the administrative remedy referred to is an administrative appeal to the board of adjustment, unless another body is designated for that purpose.⁶⁶²

In earlier years, the rule of exhaustion of administrative remedies was not consistently applied or stated in the absolute terms that it is described above. For example, in *Smith v. Barrett*,⁶⁶³ a plaintiff who was denied a building permit by the Logan city commission appealed directly to the courts and not to the board of adjustment, without a procedural challenge. Similarly, in *Lund v. Cottonwood Meadows Co.*,⁶⁶⁴ the Utah Supreme Court held that, in the alternative, the rights of an appellant were such that an "appeal from that administrative ruling [the issuance of a building permit] should have been taken to the proper administrative tribunal, or a suit should have been commenced in the courts within the statutory period."⁶⁶⁵

However, by at least 1979, the requirement that administrative remedies be exhausted was viewed more strictly. In *Seal v. Mapleton City*,⁶⁶⁶ the Utah Supreme Court affirmed the refusal to approve a subdivision plat on substantive grounds noting, however, that "this matter could properly have been disposed of on procedural grounds [inter alia, failure to exhaust the administrative remedy of appeal to the board of adjustment]."⁶⁶⁷ Thereafter, in three cases, appeals to the courts were dismissed for failure to exhaust administrative remedies. In *Levie v. Sevier County*,⁶⁶⁸ a subdivision plat was rejected by the county commission, and the landowner responded by appealing directly to the courts. Citing its decisions in *Lund* and *Seal*, the Utah Supreme Court affirmed dismissal of the complaint on the grounds that "[t]his Court has previously

661. UTAH CODE ANN. §§ 10-9-1001(1) (1992); see also *id.* § 17-27-1001(1) (1991).

662. *Id.* §§ 10-9-704 (1992), 17-27-704 (Supp. 1994).

663. 20 P.2d 864 (Utah 1933).

664. 392 P.2d 40 (Utah 1964).

665. *Id.* at 42 (emphasis added).

666. 598 P.2d 1346 (Utah 1979).

667. *Id.* at 1347.

668. 617 P.2d 331 (Utah 1980).

held that administrative remedies must first be exhausted before mandamus will lie.⁶⁶⁹

In *Merrihew v. Salt Lake County Planning and Zoning Commission*,⁶⁷⁰ the petitioner appealed the refusal of the planning commission to issue a building permit directly to the courts and not to the board of adjustment. The response of the Utah Supreme Court was to dismiss the petitioner's mandamus claim on the grounds that he had failed to exhaust his administrative remedy of appeal to the board of adjustment.⁶⁷¹ The result was the same in *Hatch v. Utah County Planning Department*,⁶⁷² in which Utah's high court, citing *Merrihew*, dismissed the plaintiff's claim for an extraordinary writ because he failed to appeal the refusal to grant a building permit to the board of adjustment.⁶⁷³

F. Record on Appeal

As noted above, the role of a district court in a zoning appeal is to determine whether there is "evidence in the record" to support the administrative decision below.⁶⁷⁴ Thus, the existence of an adequate administrative record is critical. However, the only statutory requirements with respect to the administrative record are that a board of adjustment is required to keep minutes showing the vote of its members and "records of its examinations and other official actions."⁶⁷⁵ In addition, the board "may, but is not required to, have its proceedings contemporaneously transcribed by a court reporter or a tape recorder [sic]."⁶⁷⁶

There is, accordingly, no guarantee that the administrative record will be adequate, and thus the decision in *Xanthos* focused, inter alia, on the course to be followed if it is not. The *Xanthos* court referred to an administrative hearing it had reviewed in *Denver & Rio Grande Western R.R. v. Central Weber*

669. *Id.* at 332.

670. 659 P.2d 1065 (Utah 1983).

671. *Id.* at 1067.

672. 685 P.2d 550 (Utah 1984).

673. *Id.* at 551.

674. *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1035 (Utah 1984).

675. UTAH CODE ANN. §§ 10-9-702(4)(b)(ii) (1992), 17-27-702(4)(b)(ii) (Supp. 1994).

676. *Id.* §§ 10-9-702(4)(c), 17-27-702(4)(c).

Sewer Improvement District,⁶⁷⁷ wherein it stated, "where there was nothing to review, the reviewing court must be allowed to get at the facts."⁶⁷⁸ The *Xanthos* court noted that in the instant case there was no record of the proceedings before the board of adjustment and consequently permitted the following alternative:

Since there is no record of the proceedings, due process would be denied if the district court could not get at the facts. Therefore, the court must be allowed to take its own evidence and need not necessarily be limited to the evidence presented before the Board of Adjustment. This does not mean that the hearing in the district court should be a retrial on the merits, or that the district court can substitute its judgment for that of the Board.⁶⁷⁹

In *Davis County v. Clearfield City*,⁶⁸⁰ although presented with an "extensive" record, the trial court nevertheless received additional testimony. The court was concerned about both a "secretive" and unreported "pre-meeting" of the city council, and the refusal of the planning commission to support its decision with formal findings.⁶⁸¹ The court of appeals found no conflict with the holding in *Xanthos*, and observed in a footnote:

We note that in taking additional evidence and making its detailed findings, the trial court made a fair and disciplined effort to understand the basis for the city's decision. In no sense did it venture beyond its role as the court was said to have done in *Xanthos* and decide the case "according to [its] notion of what was in the best interests of the citizens" of Clearfield City.⁶⁸²

677. 287 P.2d 884 (Utah 1955).

678. *Xanthos*, 685 P.2d at 1034.

679. *Id.* at 1034.

680. 756 P.2d 704 (Utah Ct. App. 1988).

681. *Id.* at 709-10.

682. *Id.* at 710 n.7; see also *Sandy City v. Salt Lake County*, 794 P.2d 482, 486 (Utah Ct. App. 1990).

G. *Extraordinary Relief (Mandamus)*

1. *Petition for review*

Historically it has been common for plaintiffs to “appeal” administrative zoning decisions to the courts by petitioning for issuance of a writ of mandamus,⁶⁸³ but it is now clear that the correct remedy is the filing of a petition for review. Thus, both enabling acts require that the remedy for “any person adversely affected by any decision” made in the exercise of provisions of the enabling acts is “a petition for review of the decision with the district court.”⁶⁸⁴

The requirement that a petition for review, and not a writ of mandamus, is the proper remedy on appeal is a statutory reaffirmation of the holding of the Utah Supreme Court in *Crist v. Mapleton City*.⁶⁸⁵ In that case, the city council and the board of adjustment both refused to authorize a building permit, and the plaintiff responded by filing a petition for a writ of mandamus in the district court. On appeal, the Utah Supreme Court noted that the enabling act then in force permitted an appeal from the administrative decision in the form of “a plenary action for relief,”⁶⁸⁶ which action for relief the plaintiff had ignored. The consequence, the court held, was that,

By ignoring a plain, speedy, and adequate remedy at law, the plaintiffs placed themselves out of reach of the extraordinary writ of mandamus. A writ of mandamus is not a substitute for and cannot be used in civil proceedings to serve the purpose of appeal, certiorari, or writ of error.⁶⁸⁷

2. *Proper use of mandamus*

There may be instances where extraordinary relief in the form of a writ of mandamus may be used. For example, in *Davis County v. Clearfield City*,⁶⁸⁸ the zoning ordinance improperly permitted the city council to hear appeals relating to the grant or denial of a conditional use permit. The result was

683. For examples of this practice, see discussion *supra* part V.I.1.

684. UTAH CODE ANN. §§ 10-9-1001(2) (1992), 17-27-1001(2) (1991).

685. 497 P.2d 633 (Utah 1972).

686. UTAH CODE ANN. § 10-9-15 (1953) (repealed 1991).

687. *Crist*, 497 P.2d at 634.

688. 756 P.2d 704 (Utah Ct. App. 1988).

that the applicant could no longer appeal from "any decision of the board of adjustment"⁶⁸⁹ as the former enabling statute contemplated. Under these facts, the courts approved the plaintiff's use of "extraordinary relief" pursuant to Rule 65B of the Utah Rules of Civil Procedure:

Clearfield City cannot be heard to complain about the inappropriateness of the county's choice of procedure for obtaining judicial review [Rule 65B] in light of its own, flawed conditional use permit procedures. Simply put, Clearfield City imposed on the county a procedure inconsistent with that envisioned in the enabling act. Having done so, it cannot insist on the method of district court review envisioned in that act.⁶⁹⁰

The *Clearfield City* scenario repeated itself in *Salt Lake County Cottonwood Sanitary District v. Sandy City*,⁶⁹¹ in which the city council (operating under the optional council-mayor form of government) violated separation of powers requirements by appointing itself to hear conditional use permit appeals. Because the administrative process was flawed, the case proceeded without objection as a claim for extraordinary relief.⁶⁹²

H. Interpretation

A final matter faced by the courts is the interpretation of words or phrases from local zoning ordinances. The judiciary in these decisions has held that words in a zoning ordinance should be interpreted by giving them their common meaning.⁶⁹³ Words or phrases which the courts have interpreted include the following: "public semi-public buildings,"⁶⁹⁴ "occupied trailer house or mobile home,"⁶⁹⁵ "feed lot,"⁶⁹⁶ and "school."⁶⁹⁷

689. UTAH CODE ANN. § 10-9-15 (1953) (repealed 1991) (emphasis added).

690. *Davis County v. Clearfield City*, 756 P.2d at 708.

691. 879 P.2d 1379 (Utah Ct. App. 1994).

692. *Id.* at 1380.

693. *Clinton City v. Patterson*, 433 P.2d 7, 9 (Utah 1967).

694. *Provo City v. Claudin*, 63 P.2d 570, 573 (Utah 1936).

695. *Salem City v. Farnsworth*, 753 P.2d 514, 515 (Utah Ct. App. 1988) (emphasis added).

696. *Patterson*, 433 P.2d at 9.

697. *Crist v. Mapleton City*, 497 P.2d 633 (Utah 1972).

VIII. CONCLUSION

The Senate floor debates indicate that the legislature correctly interpreted our case law⁶⁹⁸

A. *Accomplishments of the Enabling Acts*

Adoption by the legislature of the Municipal Land Use Development and Management Act and the County Land Use Development and Management Act was a major step forward. Adoption of these acts accomplished at least the following: (1) the former enabling statutes were comprehensively reorganized and placed in a logical order; (2) the enabling statutes for cities and counties were placed in similar language and format; and, (3) many (but certainly not all) obsolete provisions of the previous enabling acts were eliminated.⁶⁹⁹

B. *Proposals for Legislative Change*

However, some flaws exist in the new acts, many of which were simply carried from the old enabling statutes into the new enabling statutes. Whatever their origin, these flaws—which have been described throughout this article under the heading of *Proposed Legislative Change*—should be corrected. In summary form, the enabling acts should be amended to incorporate the following sixteen proposals: (1) a planning commission is required⁷⁰⁰; (2) a county zoning ordinance may determine the number and terms of planning commission members⁷⁰¹; (3) the term of office for a county planning commission chair is not limited to one year⁷⁰²; (4) a general plan must be adopted before a zoning ordinance is adopted⁷⁰³; (5) a planning commission must hold hearings on the zoning ordinance it will propose to the legislative body⁷⁰⁴; (6) initiatives and referenda⁷⁰⁵

698. *Citizen's Awareness Now v. Marakis*, 873 P.2d 1117, 1122 n.2 (Utah 1994).

699. For example, the obsolete "official map" was eliminated. See *supra* text accompanying note 355.

700. See discussion *supra* part II.A.

701. See discussion *supra* part II.B.

702. See discussion *supra* part II.C.

703. See discussion *supra* part II.E.1.

704. See discussion *supra* part III.E.

705. The provisions on initiatives and referenda are located in Title 20, Chapter 11 of the Utah Code and are technically not part of the enabling acts. See

may be used to rezone where (i) the change is a material change in zoning policy, (ii) the complexity of the proposal is such that the average voter can easily understand it, and (iii) the voting process will not unreasonably interfere with the efficient operation of the government body; and, (7) a "conditional use permit" is defined as a type of "special exception."⁷⁰⁶

In addition, (8) temporary zoning regulations may be adopted without obtaining the recommendation of the planning commission⁷⁰⁷; (9) divisions of land for commercial, manufacturing, or industrial purposes, or into relatively small parcels for agricultural purposes, should be made subject to the county subdivision ordinance⁷⁰⁸; (10) a county board of adjustment should have five members⁷⁰⁹; (11) members of a city board of adjustment should serve a length of term prescribed in the zoning ordinance⁷¹⁰; (12) a county board of adjustment should be entitled to interpret the zoning maps without special authorization in the zoning ordinance⁷¹¹; (13) the time to appeal to a board of adjustment should be ten days unless the zoning ordinance provides otherwise⁷¹²; (14) action by a county board of adjustment to reverse an administrative decision should require the affirmative vote of three out of five members⁷¹³; (15) unless the legislative body otherwise provides, the board of adjustment should have jurisdiction to hear (i) zoning appeals, (ii) special exceptions (including conditional use permits), (iii) nonconforming use issues, and, (iv) the board of adjustment should have exclusive jurisdiction to grant variances⁷¹⁴; and, (16) duplicative provisions describing appeals to the courts should be combined and reconciled.⁷¹⁵

generally discussion *supra* part III.F.

706. See discussion *supra* part III.H.

707. See discussion *supra* part III.J.

708. See discussion *supra* part IV.A.

709. See discussion *supra* part VI.A.

710. See discussion *supra* part VI.A.

711. See discussion *supra* part VI.F.

712. See discussion *supra* part VI.F.

713. See discussion *supra* part VI.F.

714. See discussion *supra* part VI.I-J.

715. See discussion *supra* part VII.A.