BYU Law Review

Volume 2004 | Issue 3 Article 6

9-1-2004

Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review

Todd W. Prall

Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review

I. INTRODUCTION

During the late 1990s, the City of Payson, Utah, received several applications to rezone portions of the west side of the interstate corridor to accommodate medium-density and high-density housing[1] in accordance with Payson City's comprehensive plan[2]—a plan that outlines the general goals and vision of the city's future development.[3] Payson City denied the applications without providing any basis justifying its decision.[4] The landowners involved in both proceedings filed suit against Payson City, and the trial court reversed Payson City's decision because it had "no evidentiary support other than popular opinion."[5] On appeal, the court of appeals held that no factual basis or evidence supporting the city's

1. One of the applications proposed that the zoning ordinance for several pieces of property be amended changing them from an R-1-A zone (low-density residential and agricultural use) to an R-1-9 zone (medium-density residential). Bradley v. Payson City Corp., 17 P.3d 1160, 1163 (Utah Ct. App. 2001), *vacated by* 70 P.3d 47 (Utah 2003). The other suggested a zoning change from R-1-A (low-density residential and agricultural use) to R-2-75 (high-density, multifamily residential) on another set of properties. *Id.* at 1162.

2. *Id.* at 1162 (noting that the City's comprehensive plan specifically encouraged a "mixture of residential densities, including low, medium, and high density housing"); *but see id.* ("The General Plan for Payson City identifies mostly residential land use east of I-15 and industrial and agricultural property west of I-15.").

3. *See infra* Part II.B.2.

4. While the City Council made no record of the reasoning for their decisions, popular opposition to the applications was expressed at both public hearings. During one of the public hearings, "neighboring businesses expressed concern that the existing industrial use of neighboring property would be incompatible with a change to higher density residential zoning." *Bradley*, 17 P.3d at 1163. Specifically, neighboring businesses "feared that new residents would seek action to prevent its trucks from operating twenty-four hours a day." *Id.* The Payson City Planning Commission received a petition signed by thirty-eight property owners in the area opposing the other proposal. *Id.* at 1162. Opponents to the proposal expressed concern over "maintaining the agricultural nature of the area . . . and also concerns over infrastructure" including traffic. *Id.* Advocates "expressed the need the area had for low income housing." *Id.*

5. *Id.* at 1163.

denial of the rezoning petition was required because as a legislative proceeding, the decision need only be reasonably debatable.[6]

While the character of the hearings was not in dispute, the legislative nature of the public hearings was less than obvious. The Payson City Council basically heard arguments from two groups of people: those whose properties would be affected negatively by the zoning change and those whose property would be affected positively. At heart, the city council made an adjudication of individual property owners' rights and bowed to popular opinion. Such a decision completely ignored the important principles of effective planning and the due process rights of property owners.

Although zoning amendments have many characteristics that reflect adjudicative rather than legislative decision-making, most courts view such city council decisions as legislative actions requiring great deference.[7] Such light judicial review allows municipalities to sacrifice the due process and property rights of certain individuals to the private interests of other individuals under the guise of public interest and legislative power.[8] It also leads to poor planning, leaving cities with a mess of ad hoc zoning based on individual developer petitions and plans.[9]

Since land use regulation first became a cognizable form of state police power in the early part of the last century,[10] the judiciary has reviewed local land use decisions[11] in order to ensure compliance with state statutes, due process, and property rights. In reviewing

6. *Id*. at 1165. Traditionally, Utah courts had reviewed land use decisions based on one of two standards. Courts applied a substantial evidence standard for decisions deemed to be administrative or adjudicative and a reasonably debatable standard for those decisions deemed to be legislative. *See infra* Part III.A.

7. *See, e.g.*, Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 568–69 (Cal. 1980); Toso v. City of Santa Barbara, 162 Cal. Rptr. 210, 214 (Cal. Ct. App. 1980); Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670, 677 (Colo. 1982); Harmon City, Inc. v. Draper City, 997 P.2d 321, 326 (Utah Ct. App. 2000).

8. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 841–42 (1983) (noting many scholars' concern over whether "the traditional legislative reasonableness standard is inadequate to assure fairness and due consideration" in small zoning changes).

9. *Id*. at 841.

10. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389–91 (1926).

11. This Comment refers to decisions involving zoning, variances, conditional use permits, and special use permits, and other similar decisions as "land use decisions." The term "land use decisions," as used herein, does not include general community or comprehensive plans.

these decisions, courts became aware of the importance of maintaining legislative deference without compromising adjudicative legitimacy. In striking this balance, courts have created a maze of jurisprudence aimed at developing a system of meaningful review for local adjudicative decisions while maintaining deference to legislative decisions.[12] Recognizing that the difference between legislative and adjudicative decisions is subtle, courts have developed two separate tests to help determine what category a land use decision falls into. Also, many courts have strived to maintain high deference to legislative land use decisions,[13] while a few courts have restricted legislative deference based on a justifiable fear of irrational and unsubstantiated local land use decisions that are heavily influenced by particular groups or constituencies and rarely promote the central goals of community planning.[14]

While partially based on practical concerns, the legislative/adjudicative distinction is also based upon the principled separation of powers doctrine, which mandates that legislative power be treated differently from adjudicative power.[15] Because separation of powers is often strained and vague at the local level,[16] some scholars have attempted to rework these principles so as to better apply them to local government.[17] Few scholars, however, have

12. Most state courts raise the standard of review when reviewing local government adjudicative activities from a "fairly debatable" or "reasonably debatable" legislative standard, *see, e.g.*, *Village of Euclid*, 272 U.S. at 388; Marshall v. Salt Lake City, 141 P.2d 704, 709 (Utah 1943) ("If a [legislative zoning] classification is *reasonably doubtful*, the judgment of the court will not be substituted for the judgment of the city.") (emphasis added); *Harmon City*, 997 P.2d at 324, to a substantial evidence standard, *see, e.g.*, Xanthos v. Bd. of Adjustment, 685 P.2d 1032, 1035 (Utah 1984) (holding that the record must indicate a "reasonable basis" for the decision); *cf.* Dolan v. City of Tigard, 512 U.S. 374, 390–91 (1994) (explaining that a raised standard of review is appropriate for adjudicative decisions as opposed to legislative ones in context of constitutional review of land regulations).

13. *See, e.g.*, Bradley v. Payson City Corp., 70 P.3d 47, 49 (Utah 2003); *Harmon City*, 997 P.2d at 326.

14. *See* Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 29–30 (Or. 1973).

15. Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 STETSON L. REV. 627, 632 (1996) (noting that the distinction between legislative, executive, and judicial authority "is vital for the proper determination of the type and scope of judicial review").

16. *See, e.g.*, Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 257–66 (2000) (claiming that the distinction runs into "practical difficulties" because the local government structure does not fit "under strict separation of powers principles").

17. *See, e.g.*, Lincoln, *supra* note 15, at 647–52 (suggesting basing the distinction on the "structure" of the decision making process).

examined the possibility of abandoning the distinction and developing one standard of review for land use decisions[18] and limiting pure legislative power in local land use to the development of a general or comprehensive plan.[19] In 1999, the Utah Supreme Court arguably suggested such a standard of review in *Springville Citizens for a Better Community v. City of Springville*,[20] spurring a debate in the lower courts.[21] Although the Utah Supreme Court later clarified that it did not address the single standard issue in *Springville Citizens* because the parties conceded the issue,[22] the lower court debate not only developed a reasonable statutory interpretation favoring a single standard of review but also illustrated the many unnecessary problems and complications courts face in crafting a rule for distinguishing local legislative action from adjudicative action.

This Comment contends that all Utah land use decisions, whether they are adopting or amending zoning ordinances, variances, or special use permits, should be reviewed under a uniform standard that requires local governments to provide substantial evidence in support of their decision. Although the statutory arguments will not apply to all states, this Comment also contends that every state, whether through the courts or the legislature, should consider a uniform standard of review for land use decisions. Making the legislative/adjudicative distinction for the purpose of reviewing land use decisions has become difficult, unpredictable, and unwieldy. However, a single standard of review can resolve the current difficulties and still strike the proper balance between legislative deference, effective planning, and due process. This single standard should apply to all routine land use decisions with the exception of the development of a comprehensive general plan. Specifically, courts should apply a standard of review that determines

18. *See* Rose, *supra* note 8, at 846 (explaining that "piecemeal local land decisions should not be classed as either 'legislative' or 'judicial'").

19. *See infra* Part IV.B–C.

20. 979 P.2d 332, 336 (Utah 1999); *but see* Bradley v. Payson City Corp., 70 P.3d 47, 54 (2003) (holding that *Springville Citizens* did not suggest a single standard of review). For an explanation of how *Springville Citizens* arguably suggests a single standard of review, see Part III.

21. *See* Bradley v. Payson City Corp., 17 P.3d 1160, 1164 (Utah Ct. App. 2001), *vacated by* 70 P.3d 47 (Utah 2003); Harmon City, Inc. v. Draper City, 997 P.2d 321, 326 (Utah Ct. App. 2000).

22. Bradley v. Payson City Corp., 70 P.3d 47, 54 (Utah 2003).

whether land use decisions comply with the mandates of the municipality's comprehensive plan. The standard should resemble the substantial evidence standard traditionally used to review adjudicative decisions. If courts require municipalities to use their comprehensive plans in making land use decisions, municipalities are more likely to make effective planning decisions and avoid irrational, ad hoc decisions based on immediate public opinion.

In making these contentions, this Comment will focus on Utah's statutory construction and case law and examine the policies behind the legislative/adjudicative distinction. Part II of this Comment will outline the basic zoning processes and analyze the traditional methods for distinguishing between legislative and adjudicative land use decisions for the purposes of judicial review. Part III will present Utah land use law, the confusing nature of the legislative/adjudicative distinction in Utah, and the debate over a uniform standard of review. Part IV will further explain the policy behind setting a uniform standard of review for land use decisions, including the problems the traditional tests have in distinguishing between local legislative and adjudicative actions and the application of traditional notions of separation of powers and delegation to state and local government schemes. Part V will conclude that a single standard of review for land use decisions—whether adopting or amending a zoning ordinance[23] or granting special use permits and variances[24]—will create a clearer line between local legislative and adjudicative power, promote more meaningful planning processes, protect individual property and due process rights, and better account for the nature of local government.[25]

II. BACKGROUND: THE BASICS OF ZONING AND JUDICIAL REVIEW

Understanding the problems courts have faced in developing proper standards of review for local land use decisions requires a basic understanding of the zoning and land use system developed in the United States, including the basic provisions of state legislation

23. *See infra* Part II.A.1-2.

24. *See infra* Part II.A.3.

25. Before proceeding, note that the terms administrative and adjudicative have slightly different meanings in that some administrative activities are not adjudicative, such as rulemaking. Courts, however, often use the terms synonymously. This Comment will generally use the term adjudicative because it more precisely defines the issue; however, there will be no attempt to change the terminology of the cases cited herein.

that grant local government zoning power, the general form of zoning ordinances, the typical proceedings and actions used in local land use planning, and the development of a legislative/adjudicative distinction for determining the level of judicial review for land use decisions. The central piece in this is a state's enabling legislation that authorizes local governments to develop local land use laws. Most states have at one time or other another adopted the Standard State Zoning Enabling Act (SZEA or the Act)—a uniform act developed by the Department of Commerce.[26] All of the basic land use concepts including zoning ordinances, other land use controls, and judicial review hinge on the application of state enabling legislation that has, for the most part, mirrored the SZEA in some form or other.

A. The SZEA: A Typical Model for State Enabling Legislation

The SZEA grants broad powers to municipalities such as cities, counties, and other local authorities to develop land use regulations "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community"[27] and to deal with a variety of specifically enumerated community planning problems.[28]

26. STANDARD STATE ZONING ENABLING ACT (1926), *reprinted in* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 36–39 (3d ed. 1999). The SZEA has been the model for state zoning enabling legislation for nearly a century. The United States Department of Commerce issued an initial draft of the SZEA in 1922, and four years later, nineteen states had used it to draft their own statutes. 1 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 2.21 (4th ed. 1996). Eventually, the act was adopted by all fifty states; it is still in effect, with some variation, in forty-seven states. 1 NORMAN WILLIAMS JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 19:1 (2003).

27. STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 1; *see, e.g.*, UTAH CODE ANN. § 10-9-102 (2003). The Act specifically grants municipalities power:

> to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes[;]
>
> . . . [and to] divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act.

STANDARD STATE ZONING ENABLING ACT, *supra* note 26, §§ 1–2.

28. STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 3. Specifically, section 3 suggests that the regulations and restrictions should be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. *Id.* The regulations should also "be made with reasonable consideration . . . to the character of the district . . . with a view to

The Act creates two distinct methods for meeting its broad goals. First, it gives local legislative bodies power to adopt a zoning ordinance.[29] The typical zoning ordinance generally contains textual definitions and land use regulations accompanied by a map of the municipality specifying how those definitions apply to individual districts.[30] The map divides the municipality into various districts usually consisting of residential, commercial, and industrial areas.[31] The text includes standards and regulations for each district, administrative provisions, and procedures for amending the ordinance and granting exceptions.[32]

Second, The Act requires the municipalities to appoint a board of adjustments in order to "make special exceptions to . . . the [zoning] ordinance in harmony with its general purpose and intent . . . in appropriate cases and subject to appropriate conditions and safeguards."[33] The special exceptions a board of adjustments may grant include variances, special use permits, conditional use permits, or nonconformities, all of which have slightly different purposes but are generally granted under similar adjudicative processes.[34]

From the power granted under state enabling statutes modeled after the SZEA, local governments make three types of land use decisions: decisions made by the legislative body to adopt a zoning ordinance; decisions by the legislative body to amend the zoning ordinance; and decisions by the board of adjustment (which is sometimes also the legislative body acting in a different capacity) to grant variations from the ordinance in the form of variances, special

conserving the value of buildings and encouraging the most appropriate use of land throughout [the] municipality." *Id.* The Utah Code contains similar language. *See* UTAH CODE ANN. § 10-9-102.

29. The Act allows local governments to "provide for the manner in which regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed" except that regulations shall only be effective "after a public hearing." STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 4. Utah includes similar language in its statement of purpose, UTAH CODE ANN. § 10-9-102 (2003), and incorporates it into the actual grant of power by authorizing municipalities to "enact a zoning ordinance establishing regulations for land use and development that furthers the intent of this chapter." *Id.* § 10-9-401.

30. CALLIES, *supra* note 26, at 39.

31. *Id.*

32. *See id.*

33. STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 7; *see, e.g.*, UTAH CODE ANN. §§ 10-9-407, -701 to -708.

34. *See infra* Part II.A.3.

use permits, or conditional use permits. Local governments have also developed innovative land use schemes that integrate these types of decisions.

1. Adopting the zoning ordinance

There are two steps to adopting a zoning ordinance under the SZEA. First, an appointed zoning commission issues a preliminary plan "recommend[ing] the boundaries of the various original districts and appropriate regulations to be enforced," holds public hearings on that plan, and issues a final report that includes a recommendation for the plan's adoption as a zoning ordinance to the local legislative body.[35] Second, the legislative body holds its own public hearings and then makes a final decision to adopt or reject the plan.[36]

2. Amending the zoning ordinance

The SZEA treats amendments of zoning ordinances in a manner similar to the adoption of a zoning ordinance except that the standard act does expressly request that local governments develop specific procedures for amending a zoning ordinance.[37] However, there are two practical distinctions between an amendment and the adoption of an ordinance. First, amendments sometimes are very small and often seem more like variances and special or conditional use permits. Second, states often develop innovative methods for amending the zoning map. An example of a commonly used zoning amendment scheme is the floating zone.[38] The floating zone is a method municipalities may use to create mixed use zones for purposes such as industrial parks, affordable housing,[39] and planned unit developments.[40] To create a floating zone, the legislative body specifically defines a zone for the desired uses but does not place the zone on the zoning map until after a developer recommends a

35. STANDARD STATE ZONING ENABLING ACT, *supra* note 26, §§ 4, 6.

36. *Id.*

37. *Id.* § 4.

38. 2 YOUNG, *supra* note 26, §§ 11.05–.06.

39. CALLIES, *supra* note 26, at 76.

40. 2 YOUNG, *supra* note 26, § 11.07. Planned unit developments are a plat of mixed uses usually including several residential uses, commercial uses, and open space. *See infra* Part II.A.4.

specific location.[41] The zone thus "floats" until a developer proposes a project that includes the specified uses and recommends a location for the project. After it approves the developer's proposal, the legislative body amends the map to permanently fix the proposed zone.[42]

3. Variances and special or conditional use permits

Variances and special or conditional use permits are designated exceptions to the general zoning standards in a zoning district. They are generally used for "problem uses . . . that are difficult to locate anywhere of right"[43] or uses that are "troublesome even in districts where they logically belong"[44] Common examples are public utility installations, halfway houses, churches, and certain types of commercial uses within designated residential zones.[45]

The SZEA has a complex set of procedural requirements for approving variances and special or conditional use permits. The SZEA delegates these decisions to approve such permits to an appointed board of adjustments. The process requires appropriate standards and safeguards to be set up by the local zoning ordinance, mandates the board of adjustments to create a complete record, and provides a means of judicial review.[46] Municipalities often develop their own procedures in addition to those found within their enabling act. The criteria for variances and conditional use permits are usually part of the zoning ordinance. Municipalities usually identify districts where these special and problem uses might be acceptable under certain circumstances.

4. Innovative land use schemes: the planned unit development

The planned unit development (PUD) is a carefully planned plat that mixes multiple uses such as residential and commercial.[47] It allows local zoning commissions and legislative bodies to review developer plans for mixed-use zones. Local governments use two

41. 1 WILLIAMS & TAYLOR, *supra* note 26, § 29:1.
42. 2 YOUNG, *supra* note 26, § 11.08.
43. CALLIES, *supra* note 26, at 83.
44. 2 YOUNG, *supra* note 26, § 9.18.
45. CALLIES, *supra* note 26, at 83.
46. STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 7.
47. 2 YOUNG, *supra* note 26, § 11.12.

different methods to approve or develop PUDs. Some municipalities use the floating zone, which involves designating areas of a zoning map in which a PUD might be appropriate and actually mapping the zone only after a specific PUD is approved.[48] As mentioned above,[49] this procedure is essentially equivalent to a zoning amendment. Other municipalities use the variance or special use permit method that designates zones where such a use might be permissible under certain circumstances and allows developers to apply for special permits to develop a PUD within a specified zone.[50]

B. Judicial Review of Land Use Decisions

Because of the differences among each type of land use decision, including the various procedural requirements, the number of people affected, and the varied statutory purposes, courts have applied differing standards of review based on the type of decision being reviewed. When challenged, courts review zoning ordinances based on their compliance with the enabling statute, which often requires compliance with a comprehensive plan,[51] their own administrative requirements, and whether it is "fairly" or "reasonably" debatable that the ordinance meets the purposes of the enabling statute.[52] Courts review variances, special or conditional use permits, and other similar decisions based on the procedures and standards provided by the zoning ordinance and ensuring that the complete record before the board of adjustments offers sufficient or substantial evidence for the board's decision.[53]

However, courts have struggled to develop workable standards of review for land use decisions that lie between adopting a zoning ordinance and creating variances and exceptions to the ordinance:

48. *Id.* §§ 11.15–.17.

49. *See supra* Part II.A.2.

50. 2 YOUNG, *supra* note 26, § 11.18.

51. Although state enabling statutes vary in some of their specifics, "nearly all states require that zoning take place in accordance with [a] comprehensive plan." Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 454 (2002).

52. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). The central purpose of the SZEA is to "promote health, safety, morals, or the general welfare of the community." STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 1; *see* Marshall v. Salt Lake City, 141 P.2d 704, 705–06 (Utah 1943) (holding that the zoning ordinance could be upheld "if it is reasonably debatable that it is in the interest of the general welfare").

53. *See, e.g.*, Xanthos v. Bd. of Adjustment, 685 P.2d 1032, 1035 (Utah 1984).

zoning amendments. Courts have also been inconsistent in encouraging planning that is consistent with a comprehensive plan. As this Comment will show, these two issues are correlative.

1. Standards of review

State courts have traditionally made distinctions between adjudicative and legislative activities for the purpose of reviewing local land use decisions. Courts show greater deference to legislative proceedings under a "fairly" or "reasonably debatable" standard,[54] and they subject adjudicative proceedings to higher scrutiny under a "substantial evidence" standard.[55]

The natural division between the way courts treat the review of legislative and adjudicative decisions is based on a longstanding concern over balancing appropriate legislative deference with legitimate adjudicative review. Because most enabling statutes grant municipalities a general legislative power to adopt zoning ordinances, courts often feel it necessary to give the local legislative bodies deference. However, enabling legislation also contains procedural safeguards and specifically designated purposes that are more characteristic of adjudicative proceedings and give courts an opportunity to review proceeding records and apply a more stringent standard of review.

This legislative/adjudicative distinction represents the courts' attempts to balance two opposing policies: due process and efficiency. One scholar explained:

> [L]ocal governments and their officials have an interest in maintaining a manageable local zoning process which is not so cumbersome and time-consuming that it overtaxes the resources and capabilities of local decision-making bodies. This interest is of special concern to small local governments with limited staffs and financial resources. . . . [P]roperty owners and other affected

54. *See, e.g.*, *Vill. of Euclid*, 272 U.S. at 388; Harmon City, Inc. v. Draper City, 997 P.2d 321, 324 (Utah Ct. App. 2000); *see also Marshall*, 141 P.2d at 709 ("If a [legislative zoning] classification is *reasonably doubtful*, the judgment of the court will not be substituted for the judgment of the city." (emphasis added) (citing Wippler v. Hohn, 110 S.W.2d 409 (Mo. 1937))).

55. *See, e.g.*, *Xanthos*, 685 P.2d at 1035; s*ee also* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 405 (2d ed. 2000); *cf.* Dolan v. City of Tigard, 512 U.S. 374, 390–91 (1994) (explaining that a raised standard of review is appropriate for adjudicative decisions as opposed to legislative ones).

> citizens have a strong interest in a rational local decision-making process that affords fair treatment and due process and produces decisions based on previously established policies and standards rather than the undue political influence of a particular applicant, industry or constituency. On the other hand, these same groups have an interest in ensuring that the zoning process does not become so judicialized that effective participation requires the employment of lawyers and other professionals for even the most routine rezoning application.[56]

While local governments are always vying for more efficiency, property owners and other interested parties are concerned with both due process and predictability in order to manage their own costs in promoting their interests with respect to land use regulation.

Traditionally, courts have viewed the distinction along adjudicative and legislative lines as furthering these policy concerns. Adjudicative proceedings typically have a more complete record,[57] involve preconceived standards and factors for making decisions,[58] and deal more directly with individual petitioner rights allowing courts to carefully examine the record and determine the correctness of the decision. Legislative actions generally create and develop standards based on broad policy concerns and factors that often affect broader groups of people making it difficult for courts to weigh individual rights or carefully scrutinize the decision based on well defined criteria.[59]

State courts have developed two competing analyses to distinguish legislative activities from adjudicative or quasi-judicial

56. Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the* Snyder *Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 243, 278–79 (1994), *quoted in* ELLICKSON & BEEN, *supra* note 55, at 405.

57. *See* LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 43 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) (explaining that courts consider whether a decision was "based on the record supported by reasons and findings of fact").

58. For example, a board of adjustments only grants variances and special use permits when the petitioner meets the specific standards and criteria created by the zoning ordinance. *See supra* Part II.A.2.

59. Again, this distinction is heavily concerned with providing due process in individual disputes while allowing democracy to work in broader policy implications. *See* LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE, *supra* note 57, at 40 ("The due process clause requires minimal standards of fairness in administrative and quasi-judicial decision-making in land use regulation. These procedural requirements of the due process clause do not apply to legislative decision-making.").

activities: formal and functional.[60] The majority has adopted a formal analysis, which bases the distinction between legislative and adjudicative on the identity of the decision-making body and the type of proceeding, while the minority has adopted a functional approach, which bases the distinction on the results of the local government action. Under either approach, most courts view the adoption of a zoning ordinance as legislative and the granting of variances and special permits as adjudicative. The different analyses, however, create different and sometimes unpredictable outcomes for zoning amendments and other innovative land use schemes, such as PUDs. While the formal approach classifies zoning amendments as legislative, the functional approach often classifies them as adjudicative. Each formulation lends itself more to one of the competing policies—efficiency or due process. Formal distinctions tend to provide for greater efficiency, while functional distinctions are aimed more at due process protections.

a. The formal approach and the case for efficiency. A majority of states have adopted a formal approach to the legislative/adjudicative distinction.[61] The formal approach accords greater deference to local land use decisions and promotes efficient use of local government resources. Under the formal approach, courts distinguish between legislative and adjudicative acts based on the decision-making body[62] or, if necessary, the type of proceeding involved. The adoption or amendment of a zoning ordinance is legislative under the formal approach because it is an action of the legislative body. Meanwhile, the grant of variances and use permits is adjudicative because they are acts performed by administrative bodies like a board of adjustments. Formalist jurisdictions recognize that many municipal legislative bodies often act as the board of adjustments and must broaden their analysis to the type of proceeding to determine whether the act is

60. Reznik, *supra* note 16, at 257–58.

61. *See* Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (noting that the majority of jurisdictions follow the formal approach and find that zoning amendments are always legislative acts); Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 NOVA L. REV. 707, 729–30 (1996) (noting that the functional approach was always a minority approach used in ten to fifteen jurisdictions at its peak).

62. Lincoln, *supra* note 15, at 645; *see* Reznik, *supra* note 16, at 258.

legislative or adjudicative in those cases.[63] Ultimately, this approach grants more deference to local government decisions because it allows local governments to determine whether a particular decision is adjudicative or legislative by choosing which process to employ to make the decision.

California zoning law provides an excellent example of the formal approach. In *Arnel Development Co. v. City of Costa Mesa*, the California Supreme Court held that zoning amendments were always legislative acts, regardless of the "size of parcel affected," and were thus subject to the initiative process.[64] Within its discussion, the *Arnel Development* court noted the vast amount of precedent that carefully divided legislative and adjudicative acts without regard to the size of the area affected.[65] The court cited, as an example, *Toso v. City of Santa Barbara,*[66] in which a California appellate court explained:

> Although, a decision granting a variance, a conditional use permit, or an exception to use is an administrative act, a decision on an application for rezoning is a legislative act. Rezoning is accomplished by amendment of a zoning ordinance and by the same procedure as the original enactment, and a city council's act in amending a zoning ordinance to exclude previously included property is a legislative and not administrative act.[67]

The formal approach looks at the type of proceeding and the type of body making the decision rather than at the actual effect of the zoning change.

States that make formal distinctions ignore practical similarities between different types of municipal land use actions. For example, in *Toso*, the court determined that the granting of a petition to amend the zoning ordinance was a legislative act because it involved amending the zoning ordinance and was accomplished by "the same procedure as the original enactment" of the zoning ordinance regardless of the size of the amendment.[68] However, many small

63. *See* Davis County v. Clearfield, 756 P.2d 704, 712 (Utah Ct. App. 1988) (holding a city council's denial of a special use permit, a decision traditionally made by an administrative board, must have a "factual basis in the record").

64. 620 P.2d 565, 566–67 (Cal. 1980).

65. *Id.* at 568–70.

66. 162 Cal. Rptr. 210 (Cal. Ct. App. 1980).

67. *Id.* at 214 (citations omitted).

68. *Id.*

zoning amendments have almost no distinction from special use permits or variances—traditional adjudicative acts[69]—at a practical level, but, as demonstrated by the California courts, the amendments are given deference under the formal approach because they involve an amendment to an ordinance enacted by the legislative body.

There are two advantages underlying the formal method. First, the formal approach offers flexibility to local governments in land use decisions and keeps the judiciary from getting deeply involved in broad policy disputes involving the proper use of land within municipalities. Formal lines of distinction enable a local body to "choose its poison" in that the body can often accomplish the same end through either (1) a variance or special use permit or (2) a zoning amendment. While zoning amendments have their limits,[70] local governing bodies maintain a great deal of discretion when courts must consider, void of context, whether the decisions satisfy the "reasonably debatable" standard. Second, the formal approach creates a clear line that makes it easy for judges to determine the proper standard of review and allows parties to predict how a court will rule. A formal line generally makes it easier for local governments to make land use decisions quickly and to avoid the costs of creating reasoned decisions and findings for judicial review.[71] While this is efficient for the short term, such decisions often lead to inefficient long-term planning.

b. The functional approach and the protection of due process. The functional approach distinguishes between legislative and adjudicative activities based on the size of the area and the number of people immediately affected by the decision rather than the nature

69. *See* CALLIES, *supra* note 26, at 83–100 (explaining the procedures used for special use permits and variances); 2 YOUNG, *supra* note 26, § 9.18.

70. Even jurisdictions that maintain a formal distinction between legislative and adjudicative activities consider some zoning amendments to be impermissible spot zoning. *See generally* 1 WILLIAMS & TAYLOR, *supra*, note 26, § 28 (explaining the nebulous tests and issues surrounding illegal spot zoning and its relation to enforcing the language of enabling statutes).

71. In the context of constitutional law, courts have often applied a similar rule in making separation of powers determinations based on basically the same policy. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987) (explaining that "[f]ormalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, *and that broader 'policy' concerns should not play a role in legal decisions*" (emphasis added)).

of the proceeding or the decision-making body. This approach focuses on results rather than procedures. For practical purposes, it expands the types of land use decisions subject to the adjudicative "substantial evidence" standard of review to the detriment of legislative deference, and it most directly affects the classification of zoning amendments.

The functional approach was first developed in *Fasano v. Board of County Commissioners*.[72] In *Fasano*, the Board of County Commissioners approved the rezoning of thirty-two acres of land from a single-family residential zone to a planned residential zone to allow the construction of a mobile home park.[73] The Commissioners based their approval of the rezoning on a floating zone contained in the zoning ordinance that created "a zone classification authorized for future use but not placed on the zoning map until its use at a particular location [was] approved."[74] While floating zones would be considered a legislative act by courts following the formal approach, the *Fasano* court treated it as an adjudicative act by requiring the Commission to meet a specified burden of proof. Despite the Commission's statement that the "change allows for 'increased densities and different types of housing to meet the needs of urbanization over that allowed by the existing zoning,'"[75] the Oregon Supreme Court held that the Commission did not meet its burden of proof to show that the rezoning was "in conformance with the comprehensive plan."[76]

In creating this higher standard of review, the court recognized the increased burden on local governments resulting from a less flexible zoning process.[77] The court, however, explained, "having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared."[78] The court

72. 507 P.2d 23 (Or. 1973). *See* Rose, *supra* note 8, at 852–53 (citing *Fasano* as the prime example of the functional approach).

73. *Fasano*, 507 P.2d at 25.

74. *Id*.

75. *Id*.

76. *Id*. at 28.

77. *Id*. at 29 (noting that "by placing the burden of . . . proof upon the [county] . . . , we may lay the court open to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely").

78. *Id*. at 30.

was concerned that legislative bodies making small zoning amendments were actually acting in a judicial capacity by applying "'general rule[s] or polic[ies] to specific individuals, interests, or situations.'"[79] Because of the adjudicative nature of small zoning amendments, the *Fasano* court felt the formal rule did not draw the proper line between local legislative and adjudicative decisions.

The court emphasized the importance of distinguishing between the adoption of ordinances that establish "general policies without regard to a specific piece of property" and "a determination [of] whether the permissible use of a specific piece of property should be changed."[80] The *Fasano* court held that this determination must be based on the results of the local government's decision rather than on the type of decision-making body.

Several other courts have adopted similar reasoning. One year before *Fasano*, the Supreme Court of Washington explained:

> Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, . . . the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.[81]

The Idaho Supreme Court also declared: "We are persuaded the cases which characterize as quasi-judicial the action of a zoning body in applying general rules or policies to specific individuals, interests, or situations represent the better rule."[82]

79. *Id*. at 26–27 (quoting Michael S. Holman, Comment, *Zoning Amendments: The Product of Judicial or Quasi-judicial Action*, 33 OHIO ST. L.J. 130, 137 (1972)).

80. *Id*. at 26. Ironically, this policy is at the heart of all legislative/adjudicative distinctions, including the formal approach. The core reason that almost all courts, regardless of the approach they use, defer to legislative acts is because legislative bodies generally make important broad policy decisions that are inappropriate for courts to make. *See supra* notes 57–59 and accompanying text.

81. Fleming v. City of Tacoma, 502 P.2d 327, 331 (Wash. 1972), *overruled by* Raynes v. Leavenworth, 821 P.2d 1204 (Wash. 1992).

82. Cooper v. Bd. of County Comm'rs, 614 P.2d 947, 950 (Idaho 1980); *see also* Margolis v. Dist. Court, 638 P.2d 297 (Colo. 1981) (declaring that while zoning was subject to the referendum process as a legislative act, zoning amendments were not legislative and thus not subject to the referendum process); Bd. of County Comm'rs v. Snyder, 627 So. 2d 469

These courts recognized the unique nature of zoning amendments—they almost always deal with individual pieces of property and individual interests. Under a formal approach, decisions to amend zoning requirements are categorized as legislative and given broad deference. However, recognizing that due process rights were being ignored under the formal approach, many courts decided that when laws are applied to individual interests and situations, courts should categorize the decisions as adjudicative and raise the standard of review in examining the specific evidence on the record. Though the approach appears to have such distinct advantages, the functional approach proved to be unpopular.[83]

c. The delegation test: an alternative approach based on separation of powers. One scholar has suggested replacing both the formal and the functional tests with a delegation test to distinguish between legislative and adjudicative acts at the local level.[84] Under the delegation test, if a land use decision is authorized by an ordinance that outlines fixed procedures and standards, then it is an adjudicative action.[85] If, on the other hand, the decision is based on inherent legislative power, i.e., the police power, the decision is legislative. This approach is based on the idea that almost all administrative activities are delegated from a branch of government that constitutionally or inherently has the power to make such decisions. Because a local governing body may delegate administrative authority to itself, at times it can act as an administrative board rather than a legislative body.[86] As posed here, this test has some similarities with the formal approach because, like the formal approach, the delegation test considers the nature of the decision-making process and determines whether an ordinance requires adherence to fixed procedures or not. However, while the

(Fla. 1993) (holding that the legislature recognized a need to review zoning amendments more like adjudicative proceedings by passing the Growth Management Act); Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978).

83. Between ten and fifteen states have adopted the *Fasano* standard. *See* Siemon & Kendig, *supra* note 61, at 729–30. Eventually, however, the movement faded. *Id.* Part of the reason for this decline might be the unpredictable nature of the test. *See infra* Part IV.A.2. For other rationales behind the wane of the functional approach embodied in *Fasano*, see Siemon & Kendig, *supra* note 61, at 731–34.

84. Lincoln, *supra* note 15, at 647–50.

85. *Id.* at 649.

86. *Id.* at 648.

formal approach first evaluates the decision-making body and only evaluates the type of proceeding when necessary, the delegation approach focuses primarily on the proceeding. The delegation test does properly take into consideration important separation of powers principles, but may not take the philosophy far enough.[87]

2. The comprehensive plan

Central to the question of judicial review is the definition of the comprehensive plan. There is a strong correlation between the method a court uses in determining the standard of review (formal or functional), the ultimate standard of review (reasonably debatable or substantial evidence), and the weight a court gives the comprehensive plan. The comprehensive plan is a type of mythical creature; namely, courts have never quite determined exactly what it is.[88] Ideally, a comprehensive plan would be an independent document that defines a community's large-scale and long-term planning and development goals. But, "few states 'plan' by means of a document labeled the 'comprehensive plan.'"[89] Applying the substantial evidence standard tends to emphasize the importance of a distinct comprehensive plan. Conversely, applying the reasonably debatable standard treats the requirement more casually.

Over the last three quarters of a century, courts have developed three general approaches to defining the comprehensive plan. Professor Sullivan describes the three approaches as follows:

> 1. The "unitary" view, which considers the zoning map or ordinance as the only important document and as the "comprehensive plan" . . . ;
>
> 2. The "planning factor" view that a local plan, if it exists, is a factor to consider in weighing the validity of a land-use action; or

87. *See infra* Part IV.C.

88. Sullivan & Richter, *supra* note 51, at 453–54 (noting that the term "comprehensive plan" was not defined in the SZEA, "and a lack of definition has caused continual confusion for local planners and the courts").

89. *Id.*

3. The "planning mandate" view that the local plan is a separate and dispositive document weighing the validity of a land-use action.[90]

The first approach, which the majority of courts have adopted,[91] basically equates the zoning ordinance itself with the comprehensive plan.[92] Such an approach requires the zoning ordinance, as the only physical evidence of a comprehensive plan, to be reasonable, that is, "fairly debatable," and requires the ordinance to cover the entire municipality.[93]

The second approach applies a list of factors to determine whether the ordinance or individual decision fits into the "all-encompassing" whole.[94] On a practical level, however, the approach yields similar results to the first approach because the only document that courts have to construct factors from is the zoning ordinance.

The third approach is unique because it requires the municipality to create a distinct document with which all other ordinances and regulations must accord. The existence of such a document is a prerequisite to valid zoning.[95] While this approach has recently become popular, its popularity is the result of more explicit statutory schemes rather than judicial initiative.[96]

Because the functional approach expands the use of the substantial evidence standard of review, it tends to put greater emphasis on the comprehensive plan.[97] One scholar has called the

90. Edward J. Sullivan, *The Evolving Role of the Comprehensive Plan*, 32 URB. LAW. 813, 813 (2000).

91. *Id*. at 815.

92. *Id*. at 814 (explaining that under the "unitary" view, "zoning is planning").

93. Elsewhere, Sullivan has explained that this approach defines "comprehensive in terms of addressing an entire geographic area." Sullivan & Richter, *supra* note 51, at 453 (citing Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1159 (1955)).

94. *Id*. at 453–54.

95. At the time the SZEA was enacted with its comprehensive plan requirement, it was "widely assumed" that municipalities would carefully set their goals far in advance and that a general plan would be developed. Rose, *supra* note 8, at 848–49. Courts, however, have generally not made the comprehensive plan a prerequisite for valid zoning unless specifically required by statute. 1 YOUNG, *supra* note 26, § 5.04. Yet, the requirement found in most statutes that zoning comply with a comprehensive plan would clearly gain more bite if courts interpreted it to require a distinct plan as a prerequisite for valid zoning. *See infra* Part IV.B.

96. *See* 1 YOUNG, *supra* note 26, § 5.04.

97. Cases in which a land use decision is classified as adjudicative rely heavily on a comprehensive plan. *See, e.g.*, Cooper v. Bd. of County Comm'rs, 614 P.2d 947, 951–52 (Idaho 1980) (resolving an issue on rehearing concerning whether to apply the comprehensive

trend represented by *Fasano* "plan jurisprudence"[98] because classifying more land use decisions as adjudicative increases the importance and relevance of the comprehensive plan to a greater number of decisions. She also suggests that courts have chosen to adopt the *Fasano* rule not only out of a concern for protecting individual property rights, but also because small zoning amendments "are hard to control" and courts want to give effect to the purposes of the enabling legislation by enforcing "conformity to a plan."[99]

This observation recognizes an additional policy concern that the *Fasano* rule addresses: effective, meaningful planning. Municipalities whose decisions are reviewed under the reasonably debatable standard, which practically ignores the concept of a distinct comprehensive plan other than the zoning ordinance itself, often engage in "piecemeal" planning that results in "ad hoc responses to individual development proposals."[100] Quick responses to immediate local concerns tend to ignore regional, long-term planning problems. Cognizant planning and public interest also get drowned in the sea of local private interests. One scholar explains:

> [T]he arbitrariness standard cannot really control small changes. It is too broad to treat seriously the fairness claims of the individual property owners with interests at stake in piecemeal changes, and it fails to account for the cumulative effect of many nonarbitrary decisions that seem to shave away, in salami slices, any larger concepts underlying the original, more general land regulations.[101]

Courts that use the formal approach restrict the use of the substantial evidence standard and apply the reasonably debatable standard more often tend to place less weight on the comprehensive

plan in effect at the time of the original challenge or the current comprehensive plan); Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 28 (Or. 1973) (requiring the county commission to prove "that the change is in conformance with the comprehensive plan"); Fleming v. City of Tacoma, 502 P.2d 327, 331 (Wash. 1972) (noting that zoning amendments must be in accordance with the "comprehensive plan and the zoning code"), *overruled in part by* Raynes v. City of Leavenworth, 821 P.2d 1204 (Wash. 1992). Cases in which the land use decision is classified as legislative only occasionally mention a comprehensive plan in passing and do not give it much weight. S*ee, e.g.*, *infra* note 116 (outlining Utah law as an example of the formal approach).

98. Rose, *supra* note 8, at 848.

99. *Id.*

100. *Id.* at 849.

101. *Id.* at 842.

plan because the reasonably debatable standard does not allow courts to carefully examine compliance with a comprehensive plan. However, even the *Fasano* rule, which changes only certain zoning amendments based on their size and scope, leaves many land use decisions under the reasonably debatable standard of review and thus, to some degree, still deemphasizes the importance of the comprehensive plan in those decisions.

III. DIFFICULTIES IN MAKING THE LEGISLATIVE/ADJUDICATIVE DISTINCTION CASE STUDY: UTAH LAW

Utah law is illustrative of the problems the distinction between legislative and adjudicative land use decisions create for judicial review. Utah courts have adopted the formal approach, but they, like some other jurisdictions, have also applied functionalist doctrines at times, which has led to mixed and confusing results.

A. Utah's Formal Approach

Traditionally, Utah has applied a formal legislative/adjudicative dichotomy to determine the proper standard of review in land use cases. Such a dichotomy avoided analyzing the results of local land use decisions and focused solely on the nature of the decision-making body and the decision-making proceedings.

In early land use litigation, Utah, like most courts at the time, recognized original zoning acts and zoning amendments as legislative and applied the traditional "fairly debatable" standard to legislative decisions on review. In *Marshall v. Salt Lake City*, citizens challenged the city's original zoning ordinance that divided the city into districts and only allowed specific uses in each district.[102] The court adopted the standard of review for legislative actions, declaring that the zoning ordinance could be upheld "if it is reasonably debatable that it is in the interest of the general welfare."[103] Utah courts continued this trend in later decisions that reviewed zoning amendments. For example, in both *Dowse v. Salt Lake City Corp.*[104] and *Gayland v. Salt Lake County*,[105] the Utah Supreme Court

102. 141 P.2d 704, 705–06 (Utah 1943).

103. *Id.* at 709.

104. 255 P.2d 723 (Utah 1953).

105. 358 P.2d 633 (Utah 1961).

analyzed local legislative bodies'[106] refusal to amend the zoning ordinance to change certain parcels of land from residential use to commercial use at the request of developers. The court declared that the rezoning involved was a legislative action that was "endowed with a presumption of validity"[108] and only required a "reasonable basis"[109] for the decision.

Utah courts have adhered to formal distinctions and classified decisions made by administrative bodies as adjudicative. In *Xanthos v. Board of Adjustment*,[110] the court declared that when reviewing an administrative board's determination, courts must determine "whether there was evidence in the record to support the . . . action."[111] This standard has been expanded to apply to city councils and legislative bodies when they act in adjudicative roles. In *Davis County v. Clearfield City*,[112] the court of appeals reviewed a city council's denial of a conditional use permit and declared that the denial could only be upheld if there was a "factual basis in the record."[113] Later, when a landowner argued that this case supported the contention that the decisions of a local legislative body must meet the substantial evidence standard, the same court rejected the argument because the case involved a legislative zoning amendment while "the *Davis County* opinion . . . address[ed] the denial of a conditional use permit, . . . an administrative proceeding reviewed under the substantial evidence standard."[114]

Accordingly, Utah follows a traditional formal approach to making the distinction between legislative and adjudicative proceedings. The Utah formal approach promotes legislative deference over concerns of planning legitimacy.[115] Although many Utah courts applying the "reasonably debatable" standard have

106. *Gayland* involved a county planning commission, 358 P.2d at 634, while *Dowse* involved a city council, 255 P.2d at 723.

107. *See Gayland*, 358 P.2d at 634–35; *Dowse*, 255 P.2d at 723–24.

108. *Gayland*, 358 P.2d at 636.

109. *Dowse*, 255 P.2d at 724.

110. 685 P.2d 1032 (Utah 1984).

111. *Id.* at 1035.

112. 756 P.2d 704 (Utah Ct. App. 1988).

113. *Id.* at 712.

114. Bradley v. Payson City Corp., 17 P.3d 1160, 1166 (Utah Ct. App. 2001), *vacated by* 70 P.3d 47 (Utah 2003).

115. For a discussion of the general policies behind the formal approach, see Part II.B.1.a.

noted the comprehensive plan in setting out the controversy before the court, they have rarely relied on conformance with the comprehensive plan in making their decisions.[116] Nevertheless, in some cases, the Utah Supreme Court subordinated legislative deference to acquiesce to planning concerns.[117] The court, however, used functional policies in the process muddling the law for legislative/adjudicative distinctions.

B. Muddying the Waters: Referendums and Land Use in Utah

The Utah Supreme Court has altered its doctrinal course away from its formalist underpinnings by adopting a rationale reminiscent of functional approach opinions when determining whether or not referendums apply to the adoption of zoning amendments.[118] The Court appears to want to recognize the dangers that public pressure creates for local land use without recognizing that such pressure is inherent in all land use decisions.

In *Wilson v. Manning*, the Fruit Heights City Council adopted an amendment to the zoning ordinance that rezoned ten acres of land from residential to commercial to allow the construction of a shopping center.[119] Nearby homeowners submitted "a timely referendum petition containing the required number of verified signatures, but the City Council refused to allow the petition to be submitted to a referendum vote."[120] The Homeowners sought a writ

116. *See, e.g.*, *Bradley*, 70 P.3d at 55 ("It is not up to the court to determine whether Payson City made the right decision or the best decision in relying on the General Plan rather than the Payson Zone Map."); Gibbons & Reed Co. v. N. Salt Lake City, 431 P.2d 559, 562 (Utah 1967) (giving lip service to the term "comprehensive plan" and then not referring to any sort of general or comprehensive plan in making a decision); Harmon City, Inc. v. Draper City, 997 P.2d 321, 322–23 (Utah Ct. App. 2000) (finding that the denial of a zoning change that complied with the conceived notions of the city's general plan was valid under a reasonably debatable standard).

117. *See* Wilson v. Manning, 657 P.2d 251, 253–54 (Utah 1982); Bird v. Sorenson, 394 P.2d 808, 808 (Utah 1964).

118. A referendum is a procedural method that grants a veto-like power to the individual voters of a state. The Utah Constitution allows "a fraction of the voters of any legal subdivision of the state . . . '[to] 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.'" *Wilson*, 657 P.2d at 251 (quoting UTAH CONST. art. VI, § 1 and citing UTAH CODE ANN. § 20-11-21 (1953)).

119. *Id.* at 252.

120. *Id.*

of mandamus to compel a referendum vote, which was eventually appealed to the Utah Supreme Court.[121]

The supreme court determined that zoning amendments were administrative in character and thus not subject to referendum. The court noted that precedent limited the referendum process "'to the acts of the governing body performed in the execution of its function as a "lawmaking" body.' That is, the referendum statute was meant '*to apply only to laws, ordinances, resolutions or motions which are legislative in character*.'"[122] The court held that because referendums were a legislative power, they did not apply to zoning amendments, which were often administrative. In so holding, the court appealed to the policy of effective city management and planning: "the importance of professional expertise and community-wide perspective in zoning matters, given effect in common requirements for public hearings, planning commission recommendations, and the establishment of comprehensive plans, weighs against the piecemeal changes that can result from allowing voters to veto zoning actions by referenda."[123] The court did acknowledge, however, that not all zoning amendments are administrative because "[s]ome 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 . . .'implementing the comprehensive plan and adjusting it to current conditions.'"[124]

The reasoning of the court echoes the sentiments expressed by proponents of the functional approach.[125] The *Wilson* test for determining whether zoning amendments are broad enough to be legislative is reminiscent of the results test employed under the functional approach because a determination of whether or not a zoning amendment is significantly broad to amount to a new law rather than a small change must be based on the size and scope of

121. *Id*.

122. *Id*. (quoting Keigley v. Bench, 89 P.2d 480, 483 (Utah 1939)).

123. *Id*. The court also noted that "'[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.'" *Id*. at 254 (quoting Bird v. Sorenson, 394 P.2d 808, 808 (Utah 1964)).

124. *Id*. (citing *Bird*, 394 P.2d at 808).

125. *See* Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973); *see also supra* Part II.B.1.b.

the amendment rather than the type of decision-making body.[126] In fact, the only case the court cited in support of its position was a Washington case touting the functional approach.[127]

The Utah Supreme Court's sudden concern with compliance with a comprehensive plan and implementation of sound planning methods marks a departure from the policies underlying formal distinctions applied in Utah in all other land use decisions outside of referendums.[128] While treating referendums and initiatives differently is not unique to Utah,[129] courts treating them differently have adopted a functional approach.[130] Utah, however, has attempted to recognize the negative consequences that referendums could have on the land use planning process while refusing to recognize that the same consequences arise in all types of local land use decisions due to the significant influence that small groups and public passion can have on local legislative bodies.[131]

C. Changes in the Statutory Background

In 1991, the Utah legislature modified the state zoning enabling act. The current code follows the SZEA in most regards with two significant differences. First, the Utah legislature added a specific standard of review provision for appeals. In reviewing land use decisions, "[t]he courts shall: (a) presume that land use decisions and

126. *See supra* Part II.B.1.b.

127. *Wilson*, 657 P.2d at 254 (citing Leonard v. City of Bothell, 557 P.2d 1306 (Wash. 1976)).

128. *See id.* at 254–55 (Howe, J., dissenting) (arguing that *Bird*, 394 P.2d at 808, should be overruled "because it is out of harmony with all other Utah cases on the subject, conflicts with pertinent statutes and has created an unexplainable dichotomy in our law"). Utah courts have also determined that voter initiatives could not be used to make zoning changes. Dewey v. Doxey-Layton Realty Co., 277 P.2d 805, 808 (Utah 1954). The classification of zoning amendments as administrative for the purpose of voter initiatives is a departure from those states adhering to the formal distinction. *See, e.g.*, Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980); Merritt v. City of Pleasanton, 107 Cal. Rptr. 2d 675 (Cal. Ct. App. 2001). For further discussion of Utah's formal approach, see *supra* Part III.A.

129. *See* Margolis v. Dist. Court of County of Arapahoe, 638 P.2d 297, 305 (Colo. 1981) (declaring zoning amendments legislative as applied to referendums and voter initiatives, but quasi-judicial in other contexts).

130. *See* Jafay v. Bd. of County Comm'rs, 848 P.2d 892, 897–98 (Colo. 1993) (surveying previous law and noting that the distinction between legislative and quasi-judicial acts depended upon factors such as the impact of the decision on the public and whether or not it only affected a small group of people).

131. For a discussion of the types of influences that can sway a local legislative body, see *infra* Part IV.C.

regulations are valid; and (b) determine only whether or not the decision is arbitrary, capricious, or illegal."[132] Interestingly, there is no explicit legislative/adjudicative dichotomy for the standard of review in the new statutory scheme. Second, the statute does not explicitly require that zoning ordinances be in accordance with a comprehensive plan. The statute, however, does implicitly require compliance with a comprehensive plan. The statute requires each municipality to develop a "general plan"[133] and then grants municipalities official power to "enact a zoning ordinance establishing regulations for land use and development that furthers the intent of this chapter."[134] Implicitly, if the chapter requires the creation of a general plan and zoning regulations must further the intent of the chapter, then zoning regulations should conform to the general plan. Otherwise, the general plan requirement will not be enforced.[135] Although Utah courts often refer to the comprehensive plan when determining the reasonableness of a decision, it is only done in passing and rarely impacts the ruling.[136]

D. Springville Citizens for a Better Community v. City of Springville *and the Absence of a Legislative/Adjudicative Distinction*

Springville Citizens for a Better Community v. City of Springville was the first Utah Supreme Court case to interpret the standard of review provisions of this amended statute.[137] In *Springville Citizens*, the court failed to note how this new statutory standard of review affected the traditional legislative/adjudicative dichotomy.

In 1999, a Springville City resident appealed a challenge to the city's approval of a PUD to the Utah Supreme Court. The court did not analyze whether approval of a PUD via a zoning amendment was a legislative or adjudicative action;[138] however, the court unequivocally explained that a PUD was subject to a "substantial evidence" standard of review, the standard generally required for adjudicative proceedings.[139]

132. UTAH CODE ANN. § 10-9-1001(3) (2003).
133. *Id.* § 10-9-301.
134. *Id.* § 10-9-401.
135. For more on this argument, see *infra* Part IV.B.
136. *See supra* note 116.
137. 979 P.2d 332 (Utah 1999).
138. *Id.* at 336–37.
139. *Id.* at 336.

The Springville City zoning ordinance contained a floating zone that designated several regions in which the city would allow a PUD. After the city council approved a PUD, the council was required to pass an ordinance "amend[ing] the City's zoning map" to account for the location of the PUD.[140] The PUD approval process required "applicants to submit numerous documents" for the city planning commission and the city council to review before making an initial approval of the PUD plans subject to the petitioner/developer meeting additional requirements and conditions for final approval.[141]

In the case of *Springville Citizens*, the city failed to follow the procedure outlined in the city ordinance.[142] Plaintiffs challenged the decision to approve the PUD plan under two statutory theories: first, that the decision was "arbitrary and capricious"—the new statutory standard[143]—and second, that the decision was illegal.[144] The case turned on the fact that the city failed to follow its own ordinance and was thus illegal.

Even though the court could have rested on the illegality issue, it decided also to dedicate some analysis to the first issue—whether the city's decision was arbitrary and capricious. The court explained the arbitrary and capricious standard as follows:

> A municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence. In evaluating the City's decision under this standard, we review the evidence in the record to ensure that the City proceeded within the limits of fairness and acted in good faith. We also determine whether, in light of the evidence before the City, a reasonable mind could reach the same

140. *Id*. at 334. Although the Springville City statute does not label its ordinance this way, the method is basically the same as the floating zone method. *See* 2 YOUNG, *supra* note 26, §§ 11.15–.17. The other commonly used method involves using a special permit or exception, *see id*. § 11.18, which is generally considered administrative because it does not amend the zoning ordinance but grants an exception to the zoning ordinance based on a list of factors. *See supra* Part II.A.3.

141. *Springville Citizens*, 979 P.2d at 333.

142. *Id*. at 335. Specifically, the city council failed to have the location and use of irrigation ditches certified, the planning commission failed to make a specific recommendation regarding the ordinance, and the city council failed to submit suggested modifications to the planning commission. *Id*.

143. *See* UTAH CODE ANN. § 10-9-1001(3)(b) (2002).

144. *Springville Citizens*, 979 P.2d at 336.

> conclusion as the City. We do not, however, weigh the evidence anew or substitute our judgment for that of the municipality.[145]

As noted above, Utah courts had developed different standards for legislative and adjudicative local land use decisions.[146] Strangely, in applying the substantial evidence standard, the court never addressed whether the proceeding was legislative or adjudicative. Instead, the court, in applying the substantial evidence standard, apparently presumed the approval of a PUD to be an administrative proceeding, a presumption that is hardly self-evident.[147] The decision being reviewed was the city council's approval of an amendment to the zoning map, not a conditional use permit or variance typical of a city council's adjudicatory responsibilities.[148] On the other hand, the administrative procedures and required factors described in the Springville City ordinance make the process appear to be more adjudicative in nature. Thus, because the supreme court did not address a seemingly close question of law as to whether or not a PUD approval is legislative or adjudicative, the court appeared either to have abandoned the formal approach to the legislative/adjudicative distinction by determining a zoning amendment that allows a PUD to be adjudicative, or to have

145. *Id*. at 336–37 (citations omitted).

146. *See supra* Part III.A.

147. Although *Bradley v. Payson City Corp*., 70 P.3d 47, 53–54 (Utah 2003), later pointed out that the issue was not properly raised and was basically conceded by the parties, the fact that a large number of state courts applying the formal approach have declared PUD approvals similar to the PUD approval in this case as adjudicative indicates that it was a close question of law that will eventually demand the attention of the court. *See, e.g*., Stokes v. City of Mishawaka, 441 N.E.2d 24, 29 (Ind. Ct. App. 1982) (classifying a city council's decision to approve an application to zone land for PUD as legislative); State *ex rel.* Helujon, Ltd. v. Jefferson County, 964 S.W.2d 531, 535–36 (Mo. Ct. App. 1998) (stating that approval of a PUD classification is a legislative zoning decision); Todd Mart, Inc. v. Town Bd., 370 N.Y.S.2d 683, 689 (N.Y. App. Div. 1975) (noting that "[a] majority of . . . jurisdictions [considering this question] hold that the secondary determination, whether to approve a particular planned unit development district, is a legislative function exercised by the local zoning authority"); Harrison v. City of Kettering, No. 12728, 1991 WL 208408, at * 2, (Ohio App. 2d Oct. 8, 1991) ("[A]pproval of a PUD plan is a legislative activity.") (emphasis omitted); Lutz v. City of Longview, 520 P.2d 1374, 1376 (Wash. 1974) (stating, in analyzing the legal effect of approving a PUD for a certain parcel of land, that "[t]he authorities are clear that such a change in permitted uses is a rezone or amendment of the zoning ordinance[;] '[t]he end product is, of course, an amendment to the zoning ordinance which reclassifies the land in question'") (citation omitted). All of these cases were cited by the dissent in Harmon City, Inc. v. Draper City, 997 P.2d 321, 334 (Utah Ct. App. 2001) (Jackson, J., dissenting).

148. *See supra* Part III.A.

abandoned the legislative distinction altogether in favor of a single standard of review.

E. The Debate in the Court of Appeals over the Meaning of Springville Citizens*:* Harmon City, Inc. v. Draper City *and* Bradley v. Payson City Corp.

The supreme court's failure to properly address the nature of PUD review spurred a lively debate within the Utah Court of Appeals concerning the legislative/adjudicative distinction. Ultimately, the court of appeals, over strong dissent, created a difficult legal formula that appears to blend the formal and functional approaches together.

After the *Springville Citizens* decision, two cases forced the Utah Court of Appeals to deal with the strange absence of a legislative/adjudicative distinction in *Springville Citizens*: *Bradley v. Payson City Corporation*[149] and *Harmon City, Inc. v. Draper City*.[150] Both cases dealt with the denial of small zoning amendments, and both proponents of the zoning amendments alleged that the court improperly used the reasonably debatable standard of review.[151] In both cases, the Utah Court of Appeals offered essentially the same analysis.[152]

In *Harmon City*, the court of appeals reviewed Utah's law outlining the state's adherence to the formal approach to legislative/adjudicative distinctions and held that the new statutory language did not eliminate that dichotomy.[153] Specifically, the court declared that the current Utah statute, which simply states all land use decisions have a "presumption of validity" unless they are "arbitrary and capricious,"[154] did not change the judicially developed legislative/adjudicative distinction.[155] The court echoed the separation of powers doctrine when it explained that "the distinction

149. 17 P.3d 1160 (Utah Ct. App. 2001), *vacated*, 70 P.3d 47 (Utah 2003).

150. 997 P.2d 321 (Utah 2000).

151. *Bradley*, 17 P.3d at 1165; *Harmon City*, 997 P.2d at 323.

152. In fact, *Bradley* essentially adopted the analysis of *Harmon City*. *Bradley*, 17 P.3d at 1165 (noting that the court of appeals is "not at liberty to overrule [its] prior holding") (citation omitted). This Comment focuses mostly on *Harmon City* because the case provides a more thorough legal analysis.

153. *See supra* Part III.A.

154. UTAH CODE ANN. § 10-9-1001(3) (2003); s*ee supra* Part III.C.

155. *Harmon City*, 997 P.2d at 324–26.

between a municipality's legislative and administrative functions rests on an important principle: it is a legislative body's prerogative to determine public policy, a judicial body's job to interpret the policy, and an administrative body's job to enforce the policy."[156] The court then fell back on Utah's formal roots when it said, "[e]stablishing zoning classifications reflects a legislative policy decision with which courts will not interfere except in the most extreme cases."[157]

The court attempted to distinguish *Springville Citizens* by declaring that the local land use decision at issue in that case was adjudicative rather than legislative despite the fact that it involved an amendment to the zoning ordinance. The court first claimed that in making such a broad declaration regarding the substantial evidence standard of review for a PUD zoning amendment, the *Springville Citizens* court could not have intended "to abandon [previous] case law."[158] To support this claim, the court noted that in *Springville Citizens* "the discretion of the city council and planning commission [was limited] by requiring them to consider evidence in particular documents when they made their respective decisions."[159] The *Harmon City* court also believed that the PUD approval at issue in *Springville Citizens* was not a zoning amendment. Referring to an obscure reference made by the district court, the court argued that the area was zoned previously to allow PUDs.[160] However, the procedure Springville City followed was essentially the application of the floating zone approach to the creation of PUDs, which invites treatment under the formal approach as a legislative action, not an adjudicative action as the court of appeals found.[161]

In the *Harmon City* dissent, Judge Jackson developed an argument for a single standard of review and demonstrated several weaknesses in the majority opinion. Judge Jackson argued that the Utah legislature "enacted a one-size-fits-all standard of review for 'municipal[] land use decisions when it passed Section 10-9-1001"

156. *Id*. at 326.

157. *Id*.

158. *Id*.

159. *Id*. at 327.

160. *Id*. at 326 n.11 (noting that the district court in *Springville Citizens* had mentioned that a portion of the tract at issue was zoned so that only PUDs could be placed on the land, making it unnecessary for a zoning amendment because no other type of development could occur there).

161. *See supra* Part II.A.4.

in 1991.[162] Section 10-9-1001 of the Utah Code clearly explains: "The courts shall: (a) presume that land use decisions and regulations are valid; and (b) determine only whether or not the decision is arbitrary, capricious, or illegal."[163] Judge Jackson further contended that *Springville Citizens* had already interpreted this statute as standing for a single standard of review. He explained:

> The supreme court took this broad language at face value in *Springville Citizens*, in not questioning whether the Legislature may have intended two different standards of review to arise from that single standard. The supreme court did not distinguish between city councils' administrative and legislative functions in *Springville Citizens*. Instead, the court accepted the Legislature's plain language without reservation . . . .[164]

Judge Jackson argued that the supreme court made a clear interpretation of the new statute that superceded the prior common law, and thus it was inappropriate for the court of appeals to consider the common law that established two separate standards of review.[165]

Judge Jackson also noted problems within the way in which the majority distinguished *Harmon City* from *Springville Citizens*. Judge Jackson argued that the *Harmon City* majority improperly distinguished *Springville Citizens* on the grounds that the supreme court decision was solely a review of procedure. *Springville Citizens* involved two distinct analyses. The *Springville Citizens* court first applied the adjudicative substantial evidence standard when determining whether the city council's approval was arbitrary and capricious.[166] Then, the court separately examined the procedure outlined by the Springville City ordinance to determine whether the process was illegal.[167] Thus, as Judge Jackson correctly pointed out, because *Springville Citizens* addressed both the procedural illegality and the substantive evidence supporting the PUD approval, it was inappropriate for the majority to distinguish it on the grounds that it dealt exclusively with a procedural question.[168]

162. *Harmon City*, 997 P.2d at 331 (Jackson, J., dissenting) (first alteration in original).

163. UTAH CODE ANN. § 10-9-1001 (2003).

164. *Harmon City*, 997 P.2d at 331–32 (Jackson, J., dissenting).

165. *Id.* at 332 (Jackson, J., dissenting).

166. Springville Citizens for a Better Cmty. v. City of Springville, 979 P.2d 332, 336–37 (Utah 1999).

167. *Id.* at 337–38.

168. *Harmon City*, 997 P.2d at 334 (Jackson, J., dissenting).

Furthermore, the majority's decision to label a PUD approval as an adjudicative action was an incorrect application of Utah law. As Judge Jackson argued, most jurisdictions addressing the issue have held or implied that a PUD approval was legislative.[169] Judge Jackson also reasoned that *Springville Citizens* ruled that PUD approvals were legislative by pointing to the fact that the supreme court had specifically distinguished final PUD approvals from other administrative acts that should have been appealed to the board of adjustments.[170] Specifically, the court in *Springville Citizens* reasoned "that certain City actions *apart from the final [PUD] approval* were appealable to the board of adjustments . . . ."[171] Judge Jackson concluded: "Thus, the supreme court [declared] that final PUD approval was not an administrative council action appealable to a board of adjustment . . . [sanctioning] the district court's ruling that the final PUD approval was legislative."[172]

When the *Harmon City* majority arguments concerning PUDs are viewed side by side with Judge Jackson's dissent, it is clear that the majority employed the functional approach rather than the formal approach in determining that the PUD approval was adjudicative. The court ignored the label given to the PUD approval process by Springville City and determined the nature of the decision by the final effect it had. According to *Springville Citizens* and Judge Jackson, the Springville City ordinance clearly contemplates that a PUD approval will result in a zoning amendment.[173] The majority ignored this formal factor and determined that it had the same effect as a special use or conditional use permit proceeding.[174]

The parties in *Harmon City* did not appeal the decision of the court of appeals, but the issue of the proper standard of review for

169. *Id.* at 332 (Jackson, J., dissenting) (citing Stokes v. City of Mishawaka, 441 N.E.2d 24, 28 (Ind. Ct. App. 1982); State *ex rel.* Helujon, Ltd. v. Jefferson County, 964 S.W.2d 531, 535–36 (Mo. Ct. App. 1998)); Todd Mart, Inc. v. Town Bd., 370 N.Y.S.2d 683, 689 (N.Y. App. Div. 1975); Harrison v. City of Deterring, No. 12728, 1991 WL 208408, at *2, 1991 Ohio App. LEXIS 4911 (Oct. 8, 1991); Lutz v. City of Longview, 520 P.2d 1374, 1376 (Wash. 1974)).

170. *Id.* at 333 (Jackson, J., dissenting).

171. *Id.* (Jackson, J., dissenting) (quoting *Springville Citizens*, 979 P.2d at 332).

172. *Id.* (Jackson, J., dissenting).

173. *Id.* (Jackson, J., dissenting) (citing SPRINGVILLE, UTAH, CODE §§ 11-4-304, -202).

174. *See id.* at 327 n.11.

small zoning amendments arose again.[175] In *Bradley*, the same court reached the same result and over Judge Jackson's same dissent.[176] However, this time the Utah Supreme Court granted certiorari and affirmed the Utah Court of Appeals' ruling that *Springville Citizens* did not create a single standard of review.[177] The court reasoned that *Springville Citizens* did not address the question of the nature of a PUD proceeding because both parties stipulated that it was an adjudicative proceeding.[178] The court also affirmed the lower court's interpretation of the Utah Code and held that the legislature's enactment of section 10-9-1001(3) did not change the traditional common-law distinction between adjudicative and legislative action by adopting a single arbitrary and capricious standard.[179] The court then cited language from Springville City's brief in support of the adjudicative classification. Specifically, the court noted that Springville City had asserted within its brief "that the challenged decision was 'an administrative one' that was subject to the substantial evidence test."[180] Therefore, the court declared,

> what the Plaintiffs describe as a "sweeping statement" of a new "one-size-fits-all" standard of review in *Springville Citizens* was nothing more than a recognition that both parties and the court agreed that the challenged action was administrative and should be subject to the substantial evidence test. The absence of an acknowledgement of the distinction between legislative and administrative decisions in *Springville Citizens* stemmed solely from the fact that the standard of review was not a contested issue in that case.[181]

Because the supreme court in *Bradley* essentially claimed that both parties acceded to the adjudicative nature of the PUD approval in *Springville Citizens*, it refused to address substantively whether a city council's approval of a PUD that results in a zoning amendment is legislative or adjudicative in nature. This enabled the court to skirt

175. *See* Bradley v. Payson City Corp., 17 P.3d 1160 (Utah Ct. App. 2001), *vacated by* 70 P.3d 47 (Utah 2003).

176. *Id.* at 1168.

177. Bradley v. Payson City Corp., 70 P.3d 47, 53 (Utah 2003).

178. *Id.* at 54.

179. *Id.* at 52–53.

180. *Id.* at 54.

181. *Id.*

the issue and avoid the conflict that such a ruling would have with Utah's formalist approach to legislative/adjudicative distinctions.

Even if *Bradley*'s reading of *Springville Citizens* is accurate, *Bradley* failed to properly address the issue that was not addressed by the *Springville Citizens* court. *Bradley* also failed to determine the proper method of distinguishing between legislative and adjudicative activities in the close cases involving PUDs and other innovative land use schemes. Furthermore, the court did not address the policies that support a single standard of review.

Despite the fact that the statute may be interpreted to maintain the complex legislative/adjudicative dichotomy, Judge Jackson's dissents identified the real possibility of interpreting the statute in a way that facilitates a uniform standard of review. The following Part explores the positive effects that such a standard would have not only on Utah law but on state law in general and why such a standard is preferable to the legislative/adjudicative dichotomy.

IV. SUPPORT FOR A SINGLE STANDARD: POLICIES NOT MENTIONED BY THE UTAH SUPREME COURT OR COURT OF APPEALS

Neither the Utah Supreme Court nor the Utah Court of Appeals mentioned any of the policy considerations supporting a single standard of review for land use decisions. The legislative/adjudicative dichotomy in land use decisions has failed leaving courts with either unworkable rules on the one hand, or unpredictable results, on the other. Neither the formal or functional approaches properly account for the policy concerns of legislative deference, planning legitimacy, and due process. A single standard of review is a viable alternative to the traditional legislative/adjudicative division because it allows for proper legislative deference, creates a better atmosphere for local governments to engage in meaningful and effective large-scale and long-term planning, and properly protects due process. It promotes the proper use of a distinct comprehensive plan and illustrates a clear understanding of how separation of powers and delegation principles apply to local governments. The only decisions made by local governments that should be accorded legislative deference in the

land use arena are those made to develop a large-scale and long-term comprehensive plan.[182]

A. The Failures of Formal and Functional Distinctions

Although formal and functional approaches inherently have different application difficulties, neither approach fully accounts for the policy concerns of legislative deference, planning legitimacy, and due process protection. Both approaches are based on factors that become variable and meaningless when considered in relation to the policies underlying the legislative/adjudicative distinction[183] and both have become unpredictable in their application.

1. The limits of labels: formal approach failures

The formal approach allows local governments to choose the standard by which a local government's land use decisions will be reviewed based on how local ordinances "label" the decisions. This can give too much deference to adjudicative decisions and too little to certain legislative decisions. As one scholar explained, "The formal approach is unsatisfactory because it would allow a legislative body to gain additional deference for its administrative decisions simply by providing that they be adopted by ordinance."[184]

The application of the formal approach to PUD approvals exemplifies this problem. PUD plans can be approved through either a floating zone method or special use permit method,[185] but both methods essentially accomplish the same end result through differing labels. However, when applying the formal approach to these procedures, one is legislative, while the other is adjudicative. Both methods require those interested in developing a PUD to petition

182. As used herein, the term "land use decisions" includes all zoning decisions, amendments, and special and conditional use permits and excludes the creation and adoption of a comprehensive plan. *See supra* note 11. Thus, suggesting that the line between legislative and adjudicative decisions be moved so that it lies between all general land use decisions and the comprehensive plan supports the general proposition that there should be no legislative/adjudicative distinction for purpose of standard of review in land use decisions. The rule resembles a beach at high tide. There is still a line dividing the sea from the land, but no longer a line dividing the beach into two.

183. These policies include the important balance between legislative deference and adjudicative legitimacy and the balance between due process and government efficiency. *See supra* Part II.B.

184. Lincoln, *supra* note 15, at 646.

185. *See supra* Part II.A.4.

the planning commission and fulfill certain requirements, including submitting plans that address a number of different factors.[186] Both methods also require that the area previously be zoned for PUDs either by creating a floating zone or by allowing a permitted exception.[187] The only difference between the two methods is that under the floating zone method, the legislative body must amend the zoning map,[188] while a board of adjustments simply grants a special use permits as an exception to the zoning map.[189]

The application of the formal approach to PUDs in other jurisdictions further illustrates the confusion concerning whether PUD approvals are legislative or adjudicative.[190] The PUD example illustrates how easy it is for the factors inherent in the formal approach become meaningless in determining whether a local land use decision deserves the deference due a truly legislative act.

2. The impracticalities of the functional approach

The functional approach also suffers from various flaws.[191] The problems with this approach include the following: it focuses on the end result, it places too much emphasis on the facts of the case, and it does not take into account the local government structure or the state statutes granting the local government's authority.

Focusing on the size of the area and the number of landowners affected ignores the larger picture of how and why land use decisions are made. For example, the Oregon courts developed a two-prong test to determine whether a municipal action is adjudicative. The courts consider factors such as "the size of the area affected" and "the number of landowners affected.[192] These factors are extremely fact-specific and can cause courts to get lost in the facts and forget the legal doctrines that led to the *Fasano* rule. As a result, Oregon

186. *See* 2 YOUNG, *supra* note 26, § 11.15–17.

187. *See supra* Part II.A.4.

188. *See* 2 YOUNG, *supra* note 26, § 11.15–17; *see also supra* Part II.A.4.

189. *See* 2 YOUNG, *supra* note 26, § 11.19.

190. *See supra* note 147 and accompanying text.

191. *See, e.g.*, Scott H. Parker & John E. Schwab, *Forecast: Cloudy but Clearing—Land Use Remedies in Oregon*, 15 WILLAMETTE L. REV. 245, 256 (1978–79).

192. *Id.*

court decisions have become unpredictable and unconcerned with the purpose underlying the land use decision.[193]

The functional approach "ignores significant and perhaps appropriate distinctions between legislative and administrative action that may have been established by the constitution, the state legislature or within the local framework."[194] For example, "one would not term a special act of the legislature [as anything] other than legislative simply because it applied to a particular jurisdiction or person."[195] Because of the fact that local governing bodies often take on the role of legislators, adjudicators, and administrators at different times, making a determination about what role they are playing based on the number of people affected by the decision is not reasonable. Some adjudicative activities affect large amounts of people, such as class action suits, while some legislation only affects a few, such as laws regulating sexually oriented businesses. Therefore, the number of people affected is not a reliable indicator of the legislative or adjudicative nature of a land use decision. This conflict with the separation of powers doctrine is probably one of the reasons few states have adopted the functional approach.[196]

B. A Single Standard of Review Promotes Effective Planning and Better Utilization of the Comprehensive Plan

The SZEA requires that zoning laws be "made in accordance with a comprehensive plan."[197] Developing a single substantial evidence standard of review for all land use decisions, except for legislative actions creating a comprehensive plan, places more emphasis on the importance of having and using a distinct and separate comprehensive plan. This will encourage local governing bodies to engage in more carefully organized planning.

193. *Compare* S. of Sunnyside Neighborhood League v. Bd. of Comm'rs, 569 P.2d 1063, 1068 (Or. 1977) (declaring a comprehensive plan amendment affecting sixty-five acres but only one owner a quasi-judicial decision), *with* Parelius v. Lake Oswego, 539 P.2d 1123, 1124 (Or. Ct. App. 1975) (declaring a zoning amendment affecting 72.9 acres with "numerous" owners a legislative decision). Both of these cases were cited in Parker & Schwab, *supra* note 191, at 257–58.

194. Lincoln, *supra* note 15, at 647.

195. *Id*. at 646–47.

196. *See supra* note 83.

197. STANDARD STATE ZONING ENABLING ACT, *supra* note 26, § 3.

The comprehensive plan has been interpreted three ways for judicial review: as the entire zoning scheme, limiting the court's ability to scrutinize the land use decision; as a factor to be weighed as part of review; and as a distinct document with which land use decisions must comply.[198] Because the first two schemes do not allow a court to properly scrutinize the municipal decision, the third interpretation most effectively promotes meaningful, effective planning and prevents the ad hoc and piecemeal planning schemes that plague many local zoning decisions.[199] Unless municipalities are required to create a distinct comprehensive planning document, courts have little choice but to uphold a municipal body's land use decisions unless they are not reasonably debatable, which opens the door for individual private interests and small factions to control the planning process.[200] A distinct comprehensive plan provides the necessary criteria to enable courts to review land use decisions applying a substantial evidence standard. By requiring compliance with a designated plan, a court can more properly weigh the effects of land use changes.

C. A Uniform Standard of Review Illustrates a More Correct Understanding of the Separation of Powers Doctrine and the Principle of Delegation at the Local Level

By drawing the legislative/adjudicative line between the comprehensive plan and all other zoning and land use decisions, courts would display a proper understanding of separation of powers and delegation principles at the local level. Furthermore, this line would reflect a better understanding of the differences between delegated power and actual legislative power and account for the administrative nature of a large portion of local government.

The principle of delegation embodies the separation of powers doctrine that one branch cannot delegate power to another branch without creating limiting standards and guidelines to that power.[201] Delegation is important when dealing with the integrated structure

198. *See supra* Part II.B.2.

199. *See supra* Part II.B.2.

200. *See supra* Part II.B.2.

201. *See* Lincoln, *supra* note 15, at 648 ("[V]alid delegations of power come from legislation that directs an administrative body or actor to either act or refrain from acting with regard to some issue or policy based on established standards and/or procedures.").

of local governments because of blurred lines between legislative, executive, and judicial power.[202] In many ways, local governments act like federal administrative agencies in that they make, adjudicate, and enforce the law. In light of the unique nature of local government, the method of distinguishing between legislative and adjudicative acts based on whether or not the power was delegated by another ordinance (even if that delegation is to and from the same governing body) fails to distinguish itself from the formal approach.[203] However, if the delegation test is taken a step further, it may become a viable alternative for developing a standard of review for land use decisions.

Nearly all state statutes delegate zoning power to local governments and establish specific guidelines and procedures for the use of this power. Also, nearly all zoning enabling legislation contains provisions creating specific fixed procedures for many types of land use decisions including variances, special use permits, and zoning amendments.[204] Even the original enactment of land use restrictions and a zoning map have procedural requirements including a public hearing and compliance with a comprehensive or general plan.[205] If taken to its logical conclusion, the delegation test would consider all land use decisions for which the enabling act outlines fixed procedures as adjudicative and administrative activity. Since all zoning, zoning amendments, special use permits, variances, and similar actions contain at least some fixed procedural requirements and standards, they would be viewed as adjudicative and subject to the substantial evidence standard of review. Under this model, the creation of a comprehensive plan would be the only action viewed as purely legislative. Consistent with the delegation principle, courts can safely draw the line between state authorized legislative power and state legislative delegation, that is, between the development of a comprehensive plan and the enactment of zoning ordinances, zoning amendments, and other decisions in furtherance of that plan to determine the standard of review. This idea is

202. *See* Reznik, *supra* note 16, at 260 ("Local governments do not exhibit, nor must they follow, strict notions of separation of powers requiring independent legislative, executive, and judicial branches with distinct roles.").

203. *See supra* Part II.B.1.c.

204. *See supra* Part II.A.2–.3.

205. *See supra* Part II.A.1.

grounded in the central policies echoed in the *Fasano* opinion,[206] but it creates a test which is much more predictable and easy to apply.

The administrative nature of municipal government can be understood more clearly through a basic understanding of the doctrine of separation of powers, checks and balances, and Federalism.[207] James Madison outlined two factors that allowed legislative bodies to avoid unjust decisions. First, legislative bodies of a "sufficient size and variety . . . would contain such a variety of interests that no one 'faction' could tyrannize the others."[208] And second, the legislature would "assure[] due consideration of the public interest: the clash of multiple interests prevents hasty and ill-considered decisions and forces the legislators to take the time to reflect on the true public welfare."[209] As one scholar explains, this need for power to be spread out in large legislative bodies reveals problems inherent in local legislative power:

> A legislative body drawn from too small or too homogeneous a constituency may be dominated by a single interest or faction. Factional domination may take varying forms. One is sheer corruption, made possible in smaller representative bodies because a limited number of persons have influence which must be bought. Another possibility is domination by a few who are perceived by others as the powerful. The decisions of these few can affect many within the community; others must curry their favor, and even larger interests find difficulty in organizing against their "cabals." Finally, and perhaps most feared by Madison, is the factional domination created by a popular "passion"—sometimes a sudden whim, sometimes a longstanding prejudice—that carries a majority before it. Under any of these various forms of factional domination, all of which are far more likely to occur in a smaller legislature than in a larger one, a dominant group may subject others to sudden destruction or to permanent political disability.[210]

The nature of local governments makes them much more susceptible to all of these problems and warrants treating them more

206. *See supra* Part II.B.1.b.

207. *See* Rose, *supra* note 8, at 853–56.

208. *Id.* at 854 (citing THE FEDERALIST NO. 10, at 63–65 (James Madison) (J. Cooke ed., 1961)).

209. *Id.* at 854–55 (citing HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 195–96 (1967)).

210. *Id.* at 855 (citations omitted).

like administrative bodies because the protections of representative government often do not work as well at the local level. Identifying all land use decisions as administrative in nature would remedy this inadequacy.

This same scholar, however, argues that the unique nature of local government merits checks other than judicial review. For example, she suggests that rather than higher court review, local government decisions can be checked by the doctrines of "voice" and "exit," or the opportunity to participate in local government decisions and the option to leave the area if participation in ineffective.[211] Local populace has often exercised these two options to make government more responsive to their needs and to place a check on the power of local government.[212]

However, relying on the local populace by itself to check the municipal planning process is inadequate. The local populace is often shortsighted and fails to understand the consequences of many planning decisions.[213] Thus, it is still important for the judiciary to scrutinize local planning decisions so that proper planning techniques can be used and individual interests do not take out slices of the public interest pie one sliver at a time.[214]

Although a single standard of review requiring proof of substantial compliance with a comprehensive plan may appear more costly and time consuming for small governments, the future of city planning demands that local governing bodies pay careful attention to their planning decisions. The extra effort a single standard would require will reap rewards in the long run because it will prevent a piecemeal approach to planning that would allow private interests and factions to influence or to drive land use decisions. Without requiring courts to employ substantial evidence of compliance with a comprehensive plan as part of meaningful judicial review of land use decisions, local planning bodies are too susceptible to the immediate influence of private interests, factions, and popular sentiments that subordinate the promotion of healthy development and growth, due process, and public interest.

211. *Id.* at 883.

212. *See id.* at 883–86 (explaining the historical use of "voice" and "exit" at the local level of government).

213. This is the reason for the concern many courts have for allowing land use decisions to be made by referendum or initiative. *See supra* Part III.B.

214. *See supra* text accompanying notes 100–01.

V. CONCLUSION

Courts and even state legislatures need not be afraid of expanding the scope of judicial review for land use decisions. While local legislative bodies should be able to plot out their own long-term goals and community needs for land use in comprehensive plans, they will often need the scrutiny of the courts to prevent the whims, passions, and selfish interests of individual citizens from dominating local planning decisions and to protect individual citizens from overbearing land controls. Zoning enabling legislation should be construed, whenever possible, to allow courts to exercise a standard of review that will further protect property rights from intrusive government control and insulate government land use planning from popular passion.

Todd W. Prall