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Willis Lauritz Petersen, Jr, Leslee P. Christensen,
Allan D. Petersen, Kristine Petersen Smith, and
Dean b. Petersen, as trustees of the Margaret Park
Petersen Family Living Trust v. Riverton City, a
municipality of the State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT UTAH

In the Matter of Application PLZ-07-4009:

WILLIS LAURITZ PETERSEN, JR,
LESLIE P. CHRISTENSEN, ALLAN
D. PETERSEN, KRISTINE
PETERSEN SMITH, and DEAN B.
PETERSEN, as trustees of the
MARGARETT PARK PETERSEN
FAMILY LIVING TRUST.

Appellants/Petitioners,

vs.

RIVERTON CITY, a municipality of
the State of Utah,

Appellee/Defendents.

No. 20090095-SC

BRIEF OF APPELLANTS

Appeal from a Summary Judgment from the Third Judicial District Court, Salt Lake County,
Case No. 070911432,
Honorable Anthony Quinn

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ORAL ARGUMENT REQUESTED

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PARTIES TO APPEAL

All parties to this appeal are listed in the caption.

JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW, STANDARDS OF REVIEW, AND PRESERVATION BELOW

Issue 1: Did the district court err in granting summary judgment dismissing appellants Willis Lauritz Petersen, Jr., Leslee P. Christensen, Allan D. Petersen, Kristine Petersen Smith, and Dean B. Petersen, as trustees of the Margaret Park Petersen Family Living Trust's ("Petersen Family") Petition for Judicial Review of a Land Use Decision because the court did not apply the correct standard of review or misapplied the standard of review, including the following:

- A. Given the text of the Municipal Land Use Development Management Act ("LUDMA") and the due process and equal protection rights afforded by the state and federal constitutions, what is the correct standard of judicial review of a the denial by a municipality of a an application to rezone one parcel of land?
- B. Is the denial by Riverton City of the Petersen Family' application to rezone one parcel of property a legislative decision afforded broad legislative discretion or is such a decision a quasi- judicial decision subject to a higher standard of review?

- C. Does the reasonable debatable standard, codified in Utah Code Ann. § 10-9a-801(3)(b), require some record evidence supporting the Riverton City's denial of the Petersen Family's application to rezone one parcel or property?
- D. Does the reasonably debatable criteria set forth in Utah Code Ann. § 10-9a-801(3)(b) and § 10-9a-102 violate due process because it is so vague that it does not constitute any standard of review at all?

Preservation in District Court: Petitioners' Memorandum in Opposition to Riverton City's Motion for Summary Judgment (R. 320-25); oral argument on Respondent's Motion for Summary Judgment (R. 446).

Standard of Review: Summary judgment is reviewed for correctness. *Machock v. Fink*, 2006 UT 30 ¶8, 137 P.3d 779. The interpretation of a statute is an issue of law reviewed for correctness. *S. Utah Wilderness Alliance v. Automated Geographic Reference Ctr.*, 2008 UT 88 ¶13, 200 P.3d 643, 649.

Whether a statute is facially constitutional is a question of law. *Grand County v. Emery County*, 2002 UT 57 ¶ 6, 52 P.3d 1148.

Issue 2: Did the district court err in granting summary judgment in favor of Riverton City even though the record evidence shows that the decision was illegal because it was made by the same decisions makers who were seeking to buy part of the Peterson Family's land at issue and denied the Petersen Family equal protection and substantive and procedural due process?

Preservation in District Court: Petitioners' Memorandum in Opposition to Riverton City's Motion for Summary Judgment (R. 320-28); oral argument on Respondent's Motion for Summary Judgment (R. 446).

Standard of Review: Summary judgment is reviewed for correctness. *Machock v. Fink*, 2006 UT 30 ¶8, 137 P.3d 779. Whether a statute is constitutional is a question of law, which is reviewed for correctness. *Grand County v. Emery County*, 2002 UT 57 ¶6, 52 P.3d 1148.

Whether a governmental entity has acted unconstitutionally is subject to a de novo standard of review. *State v. Barzee*, 2007 UT 95 ¶35, 177 P.3d 48.

Issue 3: Did the district court err in denying the Petersen Family's request under Utah Rule of Civil Procedure 56(f).

Preservation in District Court: Motion for Continuance Pursuant to Rule 56(f) and Rule 56(f) Affidavit of Dale F. Gardiner (R. 288-298).

Standard of Review: A denial of a Rule 56(f) Motion is reviewed under an abuse of discretion standard. *Salt Lake County v. W. Dairymen Coop.*, 2002 UT 39 ¶16, 48 P.3d 910.

DETERMINATIVE PROVISIONS

Utah Code Ann. § 10-9a-102(1)

Utah Code Ann. § 10-9a-801(8)(a)(i).

United States Const. amend. 14, § 1

Utah Const. art. I, § 7

Utah Const. art. I, § 24

Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47. The Petersen Family contends that *Bradley* should be overturned based, in part, on Utah Code Ann. § 10-9a-701(3)(a)(i) (2005).

Utah R. Civ. P. 56

Utah R. Civ. P. 56(f)

Riverton City Zoning Ordinance 12-200-005

Riverton City Zoning Ordinance 12-200-010

Copies of the Determinative provision are attached as Exhibit A in the Addendum.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a summary judgment affirming Riverton City's denial of the Petersen Family's application ("Application") to rezone a 20.84-acre parcel of land ("Property"). In the Application, the Petersen Family sought a change in the zoning of their land from one-half acre lots to one-third acre lots; the same zoning granted to property across the street, on the same day that the City denied the Petersen Family's Application.

B. Course of Proceedings

The Petersen Family's request was for their property to be rezoned to the same zoning that had been granted to all recent rezone requests in the applicable municipal planning area. Even though granting the Petersen Family's rezone request was supported by the City's General Plan and the requested rezoning would have no adverse impact on traffic or the surrounding neighborhood, the Riverton City Planning Commission ("Planning Commission") recommended a denial of the request. The only stated basis for the recommendation to deny the Petersen Family's request was the Planning Commission's mistaken legal conclusion that to grant the request would constitute illegal spot zoning.

At the time the Planning Commission recommended that the Petersen Family's rezoning request be denied, it knew that the City was negotiating with the Petersen Family to purchase part of the parcel at issue for a park and/or flood control basin. The Planning

Commission knew that land zoned for one-third acre lots is worth more than land zoned for one-half acre lots.

After the Planning Commission's recommendation to deny to the Petersen Family' rezoning request, the Riverton City Council ("City Council") held a hearing on the request. The City Council was never informed as to the reason for the Planning Commission's recommendation to deny the request and the City Council was not informed that the Mayor and other City officials and employees had previously promised that the rezoning request would be granted. The City Council was aware, however, that the City was attempting to purchase a portion of the property for a park and or flood control basin.

The Peterson Family filed this case in August 2007 as a Petition for Judicial Review of a Land Use Decision ("Petition"). On appeal, the Petersen Family seeks review of Riverton City's denial of the Petersen Family's application to rezone its property from R-22 (one-half acre lots) to R-3 (one-third acre lots)

C. Disposition Below

On December 29, 2008, the district court entered Summary Judgment and Order of Dismissal by applying the following judicial standard of review:

[T]he Court notes that it has a very limited role in reviewing this challenge to the exercise of legislative discretion by the Riverton City Council on a petition for review which is subject to the highly deferential, reasonably debatable standard. The Court can only consider the record of proceedings before the City which has been provided by the City pursuant to section 10-9a-801, and it is not appropriate to permit discovery under these facts and circumstances. (R . 422-431.)

This appeal followed on Jan. 26, 2009 (R. 433-435).

D. Statement of Facts Relevant to the Issues Presented for Review

1. The Petersen Family owns a 20.84-acre parcel of property at 12175 South 3600 West in Riverton, Utah (the “Property”). (R. 2.)

2. In 2007, the Petersen Family entered into a written contract with D.R. Horton, Inc. (“D.R. Horton”) for the sale of the Property for \$5.5 million. Closing and payment were contingent upon D.R. Horton obtaining final subdivision approval for a development acceptable to it. (R. 3.)

3. The Riverton City General Plan (“General Plan”), dated February 28, 2006, designates the Property as R-3 or low density residential zoning, which permits one-third acre lots. (R. 3.)

4. In May of 2007, D.R. Horton, on behalf of the Petersen Family, submitted the Application to rezone the Property from RR-22 (one-half acre lots) to R-3 (one-third acre lots), application number PLC-07-4009. (R. 3.)

5. No one-half acre residential subdivision lots are currently being developed in Riverton. In the last three years, only two residential subdivisions with one-half acre or larger lots have been approved by the Riverton City Council. These two subdivisions are in a municipal planning subarea different than the planning area containing the Property at issue. All other developments have included one-third acre, one-quarter acre, or smaller lots. (R. 3.)

6. The Property is located in planning subarea 2 of the planning subareas within the Riverton City General Plan. Three different zoning areas are located in planning subarea 2: R-1, which permits the construction of residences on one acre lots, R-3, which permits

the construction of residences on one-third acre lots, and R-4, which permits construction of residences on one-quarter acre lots. (R. 300, 334, *See* R. 10)

7. In recent years under Riverton City's General Plan, one-third acre or smaller lots are commonplace throughout planning subarea 2. The subdivision with one-acre lots in planning subarea 2 was built in the 1960s. (R. 8, 10, 301)

8. The overall unit density for planning subarea 2 is 2.8 development units "du"s/Acre. In other words, Riverton City's General Plan calls for, on average, 2.8 residences per acre in planning subarea 2 where the Property is located. (R. 301, 334)

9. The Riverton City General Plan establishes that only five of the fourteen Planning Subareas in Riverton City average less than 3.0 development units/acre or residences per acre. Two of those five parcels are zoned for commercial developments. Only three areas in the General Plan of the entire City of Riverton have densities less than 3.0 du/Acre. The density for these areas, however, is much higher than the number reflected on Riverton City's General Plan because the labeled density does not reflect the percentage of land dedicated to roads and sidewalks. (R. 301, 334, *See* R. 8).

10. Riverton City's subdivision ordinance provides that the requirements of the General Plan are mandatory. (R. 304). The General Plan designates the property in the planning subarea at issue as medium residential. *See* General Plan – Planning Subareas. (R. 333, 334) The Land Use General Plan Maps and Zoning Map are attached as Exhibit B in the Addendum.

11. On June 14, 2007, the Planning Commission convened and held a public hearing on the Petersen Family's Application. The Planning Commission observed that

rezoning the Property from RR-22 to R-3 complies with the General Plan and that the Property has sufficient access to accommodate R-3 development. (R. 303). The transcript of the Riverton City Planning Commission hearing is attached at Exhibit “C.” (R. 337-364)

12. Consistent with the City’s promise to grant the Petersen Family’s Application, the planning commission staff explained that the City was “facilitating” the rezone application. It was explained that the difference between one acre, one-half acre and-one third acre lot zoning was that one-acre zoning allows large animals:

PLANNER AAGARD: [T]his application has been initiated by D.R. Horton [on behalf of the property owner] and not by Riverton City. But we are facilitating this application for them. ***. The purposes of both zones are single family residential uses. The main differences between the two zones are as follows: The RR-22 and R-1 zone allow large animals as a permitted use. The R-3 zone does not. The lot sizes of the RR-22 and R-1 zones are one and one-half acre. And the R-3 zone allows a minimum of 14,000 or a third-acre lot.

Riverton City ordinances do have buffering measures where property zoned for animals are adjacent to property not zoned for animals. If the rezoned R-3 is approved by the Planning Commission and the City Council, those measures will be dealt with as part of the subdivision approval. This application is to discuss only the appropriateness of the property being zoned R-3 verses RR-22.

(R. 303)

13. The Staff then explained that the application complied with the City’s General Plan, but it was not explained that pursuant to the City’s Subdivision ordinance, the General Plan’s provisions are mandatory:

This is an image of the City’s General Plan. Riverton City – or
the rezone request does comply with the City’s General Plan.

(R. 303 emphasis added)

14. Next, the City Planner improperly injected the issue of the City's anticipated purchase of a portion of the parcel at issue followed by a "horse is out of the barn" instruction to the Planning Commission to disregard the issue:

There is a separate issue regarding the eastern end of the subject property. Riverton City has been working to acquire property in that location for a storm water management facility from the property owner, and recently the Applicant. Property acquisition and price negotiations are not the responsibility of the Planning Commission to consider and therefore should not be relevant to this zoning request.

(R. 303 emphasis added)

15. The Staff ended its presentation by recommending approval:

There is access to Janice Drive on the north and the south of the subject property. As well as access to 3600 West.

Because the rezone request of the R-3 zone does comply with the City's General Plan and sufficient [animal] buffering measures exist under City ordinances, the staff is recommending approval to the request to rezone to R-3.

(R. 303 emphasis added)

16. Unfortunately, but not surprisingly, the public discussion then focused on the City's prospective purchase:

COMMISSION CHAIR BROWN: Thank you.

UNIDENTIFIED MALE: So Andy, in this case, is "C" the storm water management facility that's being brought or –

PLANNER AAGARD: Yeah. That's an area that is being negotiated for that purpose.

UNIDENTIFIED MALE: What are "B" and "A"?

PLANNER AAGARD: I believe they'll be part of it. I'm not sure why they –

UNIDENTIFIED MALE: Part of the storm water management facility?

(R. 303 emphasis added)

17. During the public comment portion of the meeting, the Planner explained that those who had animals would still have the right to raise animals:

That means if you change the zoning, but you've been keeping horses on your land that entire time, you can go right on keeping those horses on your land, regardless of how the rezone occurs. The more common term for that is you're "grandfathered" in. Any you would continue to be able to have that right to keep animals on that land so long as you continuously do so and don't abandon that use for a period of time. Usually it's a year.

COMMISSION CHAIR BROWN: What he's talking about is people who are actually on R-22s, not the rezone area.

PLANNER AAGARD: Right. I understand that. So as I understand the Applicant's question is, would the people who do have animal use rights run in danger of losing them pursuant to unforeseen complaints brought by people who are neighbors to there, who don't have animal rights. And the shortest reply is only if a rezone occurs.

And I would just like to add that even if a rezone occurs that takes away the animal use rights on paper, you still have the right to use that land as legal non-conforming use right.

PLANNER AAGARD: And I would also say – I would also add that it's highly unusual. And in fact, in ten years of doing this, I've never seen an instance where a property's animal use rights have been taken away as a result of complaints levied by late-coming neighbors. Never seen that happen. World changes, but never seen that happen.

(R. 305)

18. After traffic questions by the public and members of the Planning Commission, the City's staff explained:

CITY ATTORNEY CARTER: Recently the Planning Commission received copies of the Master Transportation Plan because it was incorporated as an element to the General Plan. And it shows the roadway west for 3600 West to accommodate future growth in this area. And those estimates for the proper roadway width is based upon the notion that this will be built out in the future and operating at capacity. And the way in which they figured out how many people will be on there will be based upon density calculations following the General Plan guidelines.

And so based upon that, the conclusion is that the 3600 West width calculation that's recommended in the Master Transportation Plan is at a certain width. And I think this is an arterial street as you mentioned.

And I also understand, although I could be corrected on this, but the net effect is that the developer would be required to dedicate along 3600 West to accommodate the roadway width in that area because it will need to be widened insofar as that stretch is concerned.

That's basically how that's handled.

(R. 308)

19. The Planning Commission recommended denial of the rezone application.

The one and only stated reason was the mistaken conclusion that to grant the application would constitute spot zoning:

COMMISSIONER HANSEN: Mr. Chairman, I'm ready to make a motion.

COMMISSION CHAIR BROWN: Thank you.

COMMISSIONER HANSEN: I make a motion that we deny PL 07-4009 to rezone the third-acre lots.

My personal opinion is that would be spot zoning. It's in the middle of R-22 and R-1. So I don't think it needs to be there.

COMMISSIONER LLOYD: I second.

COMMISSION CHAIR BROWN: Okay. We have a motion.
Do I have a second?

COMMISSIONER LLOYD: Second.

COMMISSION CHAIR BROWN: Mr. Lloyd seconds.

All those in favor?

COMMISSIONER ALLFREY: Aye.

COMMISSIONER BROWN: Aye.

COMMISSIONER HANSEN: Aye.

COMMISSIONER LLOYD: Aye.

COMMISSION CHAIR BROWN: Any opposed?

COMMISSIONER DENNEY: Aye.

COMMISSION CHAIR BROWN: Okay. Motion carries four-
to-one.

(R. 310)

20. The Petersen Family continued to pursue their Application before the City Council. (R. 312) A transcript of the City Council proceedings is attached as Exhibit D.

21. On July 10, 2007, the City Council convened and held a public hearing on the Application. (R. 4.) However, the City Council was not informed of the basis for the Planning Commission's denial recommendation. The City Council's staff also combined the Peterson Family's Application in with another application to rezone land across the street.

MR. LETHBRIDGE: This first item – and let me just point out, in case there is any confusion, there are two rezones that are being proposed by D.R. Horton. One of the east side of 3600 West and the other on the west side.

Again the Staff improperly injected the issue of the City's proposed purchase of portion of the land to be rezoned. There is a portion of this property in the northeast corner, and it's the larger parcel shown on your drawing there, that the City has been pursuing since prior to the rezone request for a regional storm drainage facility. And so while it is certainly part of the overall picture, we have been pursuing that acquisition since prior to this request for a rezone.

So we are looking at a portion of this property as a regional storm drain facility that would include property outside of just this area.

A transcript of the City Council's hearing on the Application is attached as Exhibit D.

(emphasis added). (R. 313, 366-384)

22. After a resident expressed the concern that the rezone would cause a subdivision to be connected on to Janice Drive, the City Planner explained the road would be connected regardless of the rezone:

MR. LETHBRIDGE: Yeah. Ultimately, regardless of the density of the property, there will be a road connection on Janice Drive.

(R. 314)

23. The Mayor and City Council then improperly placed the Peterson Family's application with the application across the street and told the City Council the City was looking at about 200 homes:

THE MAYOR: Okay. It would be less than 200. And worse case – and it's on both sides of 36. So 36 would be the major street that would be impacted and you'd be right in there. Yeah. Id. at 7:19-12.

(R. 316)

24. The discussion above demonstrates that City Council misapprehended the Petersen Family's Application. The Mayor stated that the Petersen Family's Application involved the potential construction of approximately 200 homes. The Application, however, involves only 20.84 acres which supports, at most, only 62 residences¹, not the 200 residences that were the subject of a separate D.R. Horton application. (R. 316)

25. After lumping the two applications together and believing that a rezone would result in 200 additional homes, the City Council returned to a discussion of its intent to purchase a portion of the Peterson Family's land at issue:

UNIDENTIFIED MALE: Show us where the detention basin is planned. Right here?

MR. LETHBRIDGE: This is the area for the proposed detention basin. So it would sit up against the canal, again kind of in that northeast corner.

UNIDENTIFIED MALE: A regional; isn't it?

MR. LETHBRIDGE: Yes. So it's not simply to accommodate the drainage for this proposed project. It would take in a much broader area.

UNIDENTIFIED MALE: Has that been donated to the City or are we buying it?

MR. LETHBRIDGE: Right now I believe we're still in negotiations to purchase it. But donation of the property was an issue raised by the Applicant as part of their proposal. But our Engineering Department had been pursuing negotiation for purchase.

...

THE MAYOR: Yeah. This is – the detention pond appears to be needed from engineering, from our Regional Storm Water

¹ 62 is an overstated number. After land is subtracted for roads and sidewalks, it is impossible to develop 62 1/3 acre lots on 20.84 acres.

Plan. And we should buy that land when we – whatever develops in there because we need it to control the water. And so either way, but – so the Council is making a decision on the zoning issue for what they feel is the best zone to put in. Yeah. Okay.

(R. 318)

26. The City Council voted unanimously to deny the Petersen Family's Application to rezone the Property. The City Council's denial of the Application resulted in the reduction in the value of the Petersen Family's property by more than approximately 50%. It also eliminated all viable economic use of the Property. (R. 4.) Simply stated, developers can't make money by developing on lots in Riverton that are one-half acre or larger. (R. 4.)

27. On the very date that the Riverton City Planning Commission recommended a denial of the Petersen Family's application to rezone its land from R-22 (one-half acre lots) to R-3 (one-third acre lots), the Planning Commission recommended rezoning property across the street to R-3. (R. 17-18.)

28. The same day that the Riverton City Council denied the Petersen Family's Application to rezone to one-third acre lots, the Riverton City Council rezoned property across the street to allow one-third acre lots. (R. 28-29. 241, 242)

SUMMARY OF ARGUMENTS

The reasonably debatable standard should not apply to decisions regarding an application for a zoning change because such decisions are quasi-judicial rather than legislative. This conclusion is supported by Section 10-9a-701 of the Utah code which

mandates that a municipal body deciding an appeal regarding a land use ordinance “shall act in a quasi-judicial manner.” Utah Code Ann. § 10-9a-701(3).

Moreover, the consideration of a one parcel rezone is more akin to an adjudicative rather than a pure legislative determination.

In addition, for the “reasonably” debatable standard to mean anything at all in the context of a one panel rezone determination, the standard must require some record evidence to support the decision. Otherwise, when the reasonably debatable standard codified in Utah Code Ann. § 10-9a-801(3)(b) is applied in conjunction with Utah Code Ann. § 10-9a-102, the reasonably debatable standard becomes no standard at all. The vagueness in Utah Code Ann. § 10-9a-102 assures that every municipal rezone decision will be upheld. Perhaps, for this reason, no municipal rezone decision has ever been overturned by a Utah appellate court.

Regardless of the standard of review applied, the City Council’s decision cannot stand because is it not supported by substantial evidence in the record and was arbitrary, capricious and illegal as the decision was based on the Planning Commission’s Erroneous Legal Conclusions and the City’s bad faith intend to drive down the value of the Property so the City could acquire a portion of it at less than fair market value.

There is factual evidence that denial of the Application violated the Petersen Family’s right to Equal Protection because the Petersen Family, as a “class of one,” was treated differently than other similarly-situated property owners based solely on the City’s bad faith intent to acquire a portion of the Property at less than fair market value for a public purpose.

Finally, there is factual evidence that the denial of the Application violated the Petersen Family's substantive and procedural due process rights because the Petersen Family had a protectable property interest which was violated by the City's failure to afford the Petersen Family a fair and impartial hearing. Consequently, at a bare minimum, the summary judgment should be reversed, and discovery allowed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RIVERTON CITY ON APPELLANTS' PETITION FOR JUDICIAL REVIEW OF A LAND USE DECISION

A. The Reasonably Debatable Standard as Articulated and Applied by the Lower Court Should Not Apply to Quasi-Judicial Decisions Regarding an Application for a Zoning Change.

Utah Code Ann. §10-9a-801(3)(c) provides that “[a] final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.” *Id.* Utah courts have held that a municipality's zoning decisions will be set aside where their actions are confiscatory, discriminatory, illegal, arbitrary or capricious. *Dowse v. Salt Lake City Corp.*, 255 P.2d 723 (Utah 1953); *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶7, 997 P.2d 321. Although all land use decisions will be upheld unless they are arbitrary, capricious or otherwise illegal,

the determination of whether a particular land use decision is arbitrary and capricious has traditionally depended on whether the decision involves the exercise of legislative, administrative, or quasi-judicial powers. When a municipality makes a land use decision as a function of its legislative powers, [it will be upheld as] not arbitrary and capricious so long as the grounds for the decision are ‘reasonably debatable.’ When a land use decision is made as an exercise of quasi-judicial powers [such as the decision of a board of adjustment], however, . . . such

decisions are not arbitrary and capricious if they are supported by 'substantial evidence.'

Bradley v. Payson City Corp., 2003 UT 16 ¶10, 70 P.3d 47 (quotations and citations omitted).

In distinguishing between legislative and administrative or quasi-judicial decisions, Utah courts have held that large-scale, generally applicable decisions such as master plans are legislative in nature and will be upheld if it is reasonably debatable that the decision is in furtherance of the general welfare, whereas special or individualized decisions are considered quasi-judicial and are held to a higher standard of review in that the decision will be upheld only if it is supported by substantial evidence in the record. *See e.g., First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990) (review of administrative evaluation of property for tax purposes); *See Xanthos v. Bd. of Adjustment*, 685 P.2d 1032, 1035 (Utah 1984) (review of a board of adjustment's denial of a zoning variance); *Wells v. Bd. of Adjustment of Salt Lake City Corp.*, 936 P.2d 1102, 1105 (Utah Ct. App. 1997) (same); *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210 n.5 (Utah Ct. App. 1998) (review of a city's administrative interpretation of its zoning ordinance) *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 604 (Utah Ct. App. 1995) (approval of a special exception to a zoning ordinance); *Davis County v. Clearfield City*, 756 P.2d 704 (Utah Ct. App. 1988) (city council's denial of conditional use permit).

Despite the fact that Utah courts have recognized the legislative versus quasi-judicial distinction, they have not applied the distinction in the context of zoning decisions. *Bradley v. Payson City Corp.*, 2003 UT 16 ¶10, 70 P.3d 47. Rather than delineating between the legislative nature of adopting a general zoning plan versus the administrative/quasi-judicial nature of an individual request for a zoning change, Utah courts have simply assumed that all

zoning decisions are legislative in nature and will be upheld if it is reasonably debatable that the zoning decision promotes the general welfare. *Id.*²

The landmark decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 255 (1926), established the “reasonably debatable” standard. In *Euclid*, the Court stated:

It must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety morals, or general welfare.

Id. at 365.

If the validity of the legislative classification for zoning purposed be fairly debatable, the legislative judgment must be allowed to control.

Id. at 388.

Through the years, the reasonably debatable standard as established in *Euclid* has been watered down to the point where courts and scholars have lamented that it amounts to no standard at all:

Some have construed the fairly debatable standard to mean that all a local government need do is hold a hearing where there is a debate to sustain the substantive validity of an action. Others claim that the fairly debatable rule is an irrebuttable presumption of validity, requiring that all a local government need do is mouth words of rationality to sustain even the most extreme regulatory actions. In either case, judicial review under the so-called fairly debatable rule is neither ‘swift nor just’ and too often is little more than a test of whether the local government staff is smart enough to invoke the correct mantra of rationality. The “anything goes” character of the fairly

² The approach followed by Utah in characterizing all zoning decisions as legislative in nature is an approach in which courts tend to focus on the type of body making the zoning decision (legislative) in characterizing those decisions as legislative, rather than focusing on the type of decision being made (general rather than applied to specific individuals).

debatable rule has undermined the integrity of planning and zoning and has promoted increasing polarization and division between the public and private sectors, ultimately contributing to the erosion of planning and zoning powers in the guise of property rights legislation. Worse still, the “anything goes” mentality has created a lack of judicial ‘incentive’ to do a ‘good’ job of planning and regulating, which has deprived public planning of the funding and political support needed to ensure that growth and development is well-planned.

Charles L. Siemon and Julie P. Kendig, *Judicial Review of Local Government Decisions: “Midnight in the Garden of Good and Evil,”* 20 Nova L. Rev. 707 (1996); see also 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); Todd W. Prall, *Comment: Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review*, 2004 B.Y.U. L. Rev. 1049 *passim* (noting the shortcomings of assuming that even individual zoning change requests are legislative in nature and suggesting a substantial evidence standard).

The commentator’s concerns have been validated by Utah Jurisprudence. No Utah Appellate Court has ever overturned a municipal rezone decision. In reality there is no judicial review, only a judicial rubber stamp of approval.

Many courts have rejected and criticized the approach in which all zoning decisions are considered legislative and therefore subject to the highly deferential reasonably debatable standard. For example, courts have expressed concerns that legislative bodies deciding whether to grant or deny a zoning change are actually acting in a judicial capacity by “applying general rule[s] or polic[ies] to specific individuals, interests, or situations.” *Fasana*

v. Bd. of County Comm'rs, 507 P.2d 23, 26-27 (Ore. 1972). The distinction between legislative and administrative or quasi-judicial decisions has its roots in the separation of powers doctrine which requires that legislative power be treated differently from judicial power. *Fasano v. Bd. of Cnty. Comm'rs*, 507 P.2d 23, 26 (Ore. 1973), *overruled on other grounds by Neuberger v. Portland*, 607 P.2d 722 (Ore. 1980). As explained by the *Fasano* court:

[W]e feel it would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life: It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government.

Id.; see also *Colclasure v. Washington County Sch. Dist. No. 48-J*, 857 P.2d 126, 131 (Ore. 1993).

In *Chrobuck v. Snohomish Cnty.*, 480 P.2d 489, 495-98 (Wash. 1971), the Supreme Court of Washington acknowledged the quasi-judicial nature of zoning decisions:

Whatever descriptive characterization may be otherwise attached to the role or function of the planning commission in zoning procedures, *e.g.* advisory, recommendatory, investigatory, administrative or legislative, it is manifest . . . that it is a public agency . . . a principle [sic] and statutory duty of which is to conduct public hearings in specified planning and zoning matters, enter findings of fact – often on the basis of disputed facts – and make recommendations with reasons assigned thereto. Certainly, in its role as a hearing and fact-finding tribunal, the planning commission's function more nearly than not partakes of the nature of an administrative, quasi-judicial proceeding.

Id.

The distinction between legislative and administrative or quasi-judicial decisions has been explained as follows:

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.

Fleming v. City of Tacoma, 502 P.2d 327, 331 (Wash. 1972) (emphasis added), *overruled on other grounds by Raynes v. Levenworth*, 821 P.2d 1204 (Wash 1992). The Idaho Supreme Court stated: “[W]e are persuaded the cases which characterize as quasi-judicial the action of a zoning body in applying general rules of policies to specific individuals, interests, or situations represent the better rule.” *Cooper v. Bd of County Comm’rs*, 614 P.2d 947, 950 (Idaho 1980); *see also Margaolis v. Dist. Ct.*, 638 P.2d 297, 302-04 (Colo. 1981) (zoning amendments decisions are not legislative); *Bd. of County Comm’rs v. Snyder*, 627 So.2d 469, 475 (Fla. 1993) (recognizing need to review zoning amendments more like adjudicative proceedings).

Utah courts have likewise expressly recognized the need for distinguishing between large-scale, generally applicable decisions that are clearly legislative in nature and those special or individualized decisions that are considered quasi-judicial. Even in the zoning context, the Utah Supreme Court has correctly noted on a number of occasions that “the passage of **general** zoning ordinances and the determination of zoning **policy** [are] properly vested in the legislative branch.” *Sandy City v. Salt Lake County*, 827 P.2d 212, 221 (Utah 1992); *Scherbel v. Salt Lake City Corp.*, 758 P.2d 897, 899 (Utah 1988). These are precisely the

type of large-scale, generally applicable decisions that are legislative in nature and should be reviewed under a reasonably debatable standard. In contrast, as expressly noted by other courts and commentators, the individual, small-scale requests for a zoning change on a particular piece of property, such as is at issue in this case, require a quasi-judicial determination and should be viewed under the substantial evidence standard. This result is consistent with Utah case law.

However, in *Bradley v. Payson City Corp.*, the Court, expressly citing to *Sandy City* and *Scherbel*, over-simplistically stated that “the enactment and amendment of zoning ordinances is fundamentally a legislative act,” without attempting to distinguish between generally applicable versus small, individual zoning decisions for purposes of determining what is legislative and what is not. 2003 UT 16 ¶11. Yet *Sandy City* and *Scherbel* simply do not support this overarching statement. Nor is it sustainable in light of the substantial Utah case law expressly distinguishing between general, large-scale ordinances and policies and the small, individualized municipal decisions. Utah courts have routinely considered these small-scale, individual decisions to be quasi-judicial in other contexts and there is no basis for ignoring that distinction in the zoning context. To the contrary, these are precisely the types of decisions for which judicial oversight is strongly needed.

B. That the Hypothetical Reasonably Debatable Standard Should Not Be Used in One Parcel Rezone Proceeding is Supported by Utah Code Ann. § 10-9a-701.

Utah Code Ann. § 10-9a-701 provides that:

- (1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide
 - (a) Requests for variances from the terms of the land use ordinances; and

(b) Appeals from decisions applying the land use ordinances.

Id. Section 10-9a-701(3) states that an appeal authority “**shall** act in a **quasi-judicial manner**” (emphasis added). Thus, section 10-9a-701(3) recognizes and codifies the notion that a body, such as the City Council in this case, acting as the City’s appeal authority, is acting in a quasi-judicial capacity and therefore should be subject to the higher, substantial evidence standard.

The function of the City Council in a one parcel rezone proceeding is substantively that of an appeal authority. Under LUDMA, and Riverton’s Zoning Ordinance, a rezone application is first submitted to the Planning Commission. But the Planning Commission only makes a recommendation. *See* Utah Code Ann. § 10-9a-503(2). But regardless of the Planning Commission’s recommendation, the City Council makes the final decision. *Id.* And in doing so, the City Council is supposed to apply the criteria found in section 12-200-010 of its land use ordinance. In short, the City Council makes a final decision in the application of its land use ordinance to a one parcel rezone application. Accordingly, Utah Code Ann. § 10-9a-701 suggests the City Council must act in a quasi-judicial manner.

C. The City’s Denial of the Petersen Family’s Rezoning Application Was Not Based On Substantial Evidence in the Record.

Utah Code Ann. § 10-9a-801(3)(c) provides that a “final decision of a land use authority or an appeal authority is valid if the decision is supported by *substantial evidence in the record*. *Id.* (emphasis added). The City’s decision to deny the Petersen Family’s Application was not based on substantial evidence in the record. The decision was not supported in any way by the evidence before the Planning Commission or in the record before the Riverton City Council. The transcript of the hearing before the Planning Commission demonstrates

that the Commission made its decision to deny the Application in spite of the following: (1) Riverton City ordinances providing for buffering measures between differently zoned areas (Planning Comm. Tr. at 4:20-21); (2) the rezone Application's compliance with the City's General Plan (*id.* at 5:4-9); (3) a recommendation by Riverton City's Planning Commission staff to approve the Application (*id.* at 5:24-6:3); (4) the City's conclusion that the Application would not disturb or alter residents' animal rights (*id.* at 8:8-9:25); (5) no need for a traffic study to determine what impact, if any, the rezoning would have on nearby traffic (15:17-18); (6) R-3 zoned property bordering the Petersen Family's Property (*id.* at 4:10-11); (7) the fact that residents' irrigation rights would be unaffected by the zoning change (*id.* at 11:17-12:11); and (8) the fact that the Property had sufficient access to support the zoning change (*id.* at 5:19-23).

In addition, the only evidence in the record that the City Council could have relied upon in denying the application was erroneous. First, the City Council considered erroneous information in its hearing by confusing D.R. Horton's application regarding a 200 residential development with the Application for the rezone of the Property. In reality, the Petersen Family's Application only would have resulted in an increase of, at most, 62 residences. Second, although there were a handful of public comments made at the hearings regarding concerns about existing animal rights and irrigation issues, those concerns were rebutted by the members of the Planning Commission and City Council themselves. They could not have been the basis for the City Council's decision. Third, although there was also some concern about traffic increasing as a result of the additional home sites, the City Council noted that traffic concerns are addressed in the subdivision application process.

Furthermore, if a mere increase in traffic from development were a sufficient basis for sustaining a zoning decision on appeal, then there would effectively be no more judicial review of zoning decisions at all. All development, no matter how small, will invariably increase traffic.

Finally, the Planning Commission's denial of the Application on the grounds that it would constitute "spot zoning" was also legally erroneous. "Under Utah's jurisprudence, spot zoning occurs when a municipality either grants a special privilege or imposes a restriction on a particular small property that is not otherwise granted or imposed on surroundings properties in the larger area." *Tolman v. Logan City*, 2007 UT App 260, ¶15, 167 P.3d 489. "Spot zoning has not occurred where there are a number of properties in the larger surrounding area holding the same privileges or restrictions as the property subject to a municipality's land use decision." *Id.* ¶16.

The Planning Commission based its denial of the Petersen Family's Application on the grounds that rezoning the Property from RR-22 to R-3 would constitute "spot zoning" as follows:

COMMISSIONER HANSEN: I make a motion that we deny PL 07-4009 to rezone the third-acre lots. My personal opinion is that would be spot zoning. It's in the middle of R-22 and R-1. So I don't think it needs to be there.

COMMISSIONER LLOYD: I second.

COMMISSION CHAIR BROWN: Okay. We have a motion.

Do I have a second?

COMMISSIONER LLOYD: Second.

Planning Commission Transcript at 23:19-24.

It is undisputed that the parcel adjoining the Property on the West is zoned R-3 Residential. In addition, Riverton City's zoning map establishes that R-3 zoned areas are common place within Planning Subarea 2, in which the Property is located.

As previously set forth, “[s]pot zoning cannot occur where there are a number of properties in the larger surrounding area holding the same privileges or restrictions as the property subject to a municipality’s land use decision.” *Tolman*, 2007 UT App 260 at ¶16. Granting the Application to rezone the Property at issue to R-3, therefore, would not have been spot zoning because the Property shared a common border with another area zoned R-3 and a number of other properties are zoned R-3 within the same Planning Subarea as the Property.

In short, the City Council did not make its decision to deny the Petersen Family’s Application based on “substantial evidence in the record.” *Id.* §10-9a-801(3)(c). The record before the City Council, as set forth above, contained no substantial evidence on which the City could deny the Petersen Family’s Application. Rather, the substantial evidence supported granting the Petersen Family’s Application.

D. The City Council’s Decision To Deny The Application Was Arbitrary and Capricious Because it Was Based On The Planning Commissions’ Erroneous Legal Conclusions and the City’s Bad-Faith Intent.

Even under the “reasonably debatable” standard, the City’s denial of the Petersen Family’s Application is not supportable. Utah Code Ann. § 10-9a-801(3)(c) provides that a final decision of land use authority or appeal authority is invalid if it is “arbitrary, capricious or illegal.” *Id.* The City Council’s decision to deny the Application was illegal, arbitrary, and capricious because it was motivated by the City’s improper intent to drive down the value of

the Petersen Family's Property in order to acquire a portion of it for a retention pond and it was based on an erroneous legal conclusion.

A decision is arbitrary or capricious if it falls outside of "limits of reasonableness or rationality." *Hilte v. Industrial Comm'n*, 766 P.2d 1089, 1091 (Utah App. 1988). A decision "without foundation in fact" is similarly considered to be arbitrary and capricious." *Stegen v. Dept. of Employment Sec.*, 751 P.2d 1160, 1162 (Utah App. 1988).

The City's decision was illegal, arbitrary, and capricious because it was based on the City's desire to drive down the value of the Petersen Family's Property in order to acquire the Property for a needed detention basin at a greatly reduced price. The record supports this contention. On the very date that the Planning Commission recommended a denial of the Petersen Family's application to rezone its land to R-3, the Planning Commission recommended rezoning of another property across the street to R-3. On the very date that the Riverton City Council denied the Petersen Family's land use application to rezone to R-3, the Riverton City Council rezoned property across the street for R-3 lots. Similarly situated property owners were, therefore, not treated similarly. Other property owners, whose property was not needed by the City for a water retention basin, were granted more favorable treatment than the Petersen Family. The only discernible reason for the disparate treatment is that the City wanted to acquire the Petersen Family's Property. Indeed, that fact figured prominently into the City's discussions leading to the denial of the Petersen Family's application.

It is arbitrary and capricious for the City to reject an application for a zoning change which meets the requirements of its ordinances and General Plan for the sole purpose of

acquiring that property for itself at a greatly reduced price or based on erroneous legal conclusions about spot zoning. Consequently, even if the “reasonably debatable” standard were to apply to the City’s denial of the Petersen Family’s Application, which it should not and does not, the City’s decision does not meet that standard.

Furthermore, to the extent that the City’s decision was based on erroneous conclusions by the Planning Commission about spot zoning or public concerns about animal rights or irrigation, it was also illegal, arbitrary, and capricious because those conclusions and concerns were without basis in law or fact. As set forth in detail above, granting the Petersen Family’s Application would not have resulted in spot zoning and would not have affected animal rights or irrigation rights. It also would not have resulted in 200 more residential units, as contended in the City Council hearings. Viewing the evidence in a light most favorable to the Petersen Family, the City’s denial of the Petersen Family’s Application was beyond the “limits of reasonableness or rationality” and “without foundation in fact,” and was therefore illegal, arbitrary, and capricious. The district court therefore improperly granted summary judgment to the City on the Petersen Family’s petition for review.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RIVERTON CITY ON THE PETERSEN FAMILY’S EQUAL PROTECTION CLAIMS

Viewing the facts in a light most favorable to the Petersen Family, the district court also erred in granting summary judgment to the City on the Petersen Family’s equal protection claims. In denying the Petersen Family’s Application, the City treated the Petersen Family differently in comparison to other similarly situated applicants for the bad

faith purpose of devaluing the Property so that the City could purchase it at a lower price for use as a diversion pond. The evidence in the record supports these allegations.

“‘[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duty constituted agents.’” *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). A claim based on equal protection can be maintained where a “class of one” alleges disparate treatment based on “totally illegitimate animus toward the plaintiff by the defendant.” *Patterson v. American Fork City*, 2003 UT 7 ¶33 (quoting *Olech v. Vill. of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 2000)).

In *Village of Willowbrook v. Olech*, the United States Supreme Court considered a case in which a couple asked a nearby village to connect their property to the municipal water supply. The village required only a 15-foot easement from the other property owners who sought to connect to the water supply but required a 33-foot easement from the couple, who had previously sued the village. In a *per curiam* opinion, the Court stated that “[o]ur cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Id.* at 563.

Utah courts have likewise held that, in the zoning context, “[e]qual protection of the law requires that similarly situated persons be treated alike.” *Gardner v. Bd. of County Comm'rs*, 2008 UT 6 ¶38, 178 P.3d 893.

A person claiming that her equal protection rights have been violated must demonstrate that she was treated differently than

another person similarly situated and that the unequal treatment was based upon an impermissible consideration, such as race, or that the selective treatment resulted from a malicious or bad faith intent.”

Id. (emphasis added). At issue in *Gardner*, as in this case, was whether the district court properly granted summary judgment dismissing a landowner’s equal protection claim arising out of a zoning decision. Noting that “there was evidence of dissimilar treatment and an allegation, with some evidentiary support, of malicious or bad faith intent on the part of county officials,” the Utah Supreme Court held that, “[w]hen the evidence is viewed in the light most favorable to the Landowners, summary judgment was not appropriate for this claim.” *Id.* ¶ 39 (emphasis added).

In this case, there is evidence of dissimilar treatment by the City and an allegation, with some evidentiary support, of malicious or bad faith intent on the part of the City. The Petersen Family was intentionally treated differently than other similarly situated individuals applying for a zoning change because of the City’s bad faith intent to lower the value of the Petersen Family’s Property in an effort to obtain the Property at less than market value for use as a detention pond. It is undisputed that the Planning Commission was aware of the City’s intention and discussed the issue at its hearing on the Petersen Family’s Application:

UNIDENTIFIED MALE: So Andy, in this case, is the “C” the storm water management facility that’s being bought or –

PLANNER AAGARD: Yeah. That’s an area that is being negotiated for that purpose.”

Planning Commission Hearing Tr. at 6:22 – 7:1. More importantly, the deliberations of the City Council at the public hearing centered almost entirely on the City’s need to acquire the Property for a detention pond.

UNIDENTIFIED MALE: Show us where the detention basin is planned. Right here?

MR. LETHBRIDGE: This is the area for the proposed detention basin. So it would sit up against the canal, again kind of in that northeast corner.

UNIDENTIFIED MALE: A regional; isn't it?

MR. LETHBRIDGE: Yes. So it's not simply to accommodate the drainage for this proposed project. It would take in a much broader area.

UNIDENTIFIED MALE: Has that been donated to the City or are we buying it?

MR. LETHBRIDGE: Right now I believe we're still in negotiations to purchase it. But donation of the property was an issue raised by the Applicant as part of their proposal. But our Engineering Department had been pursuing negotiation for purchase.

...

THE MAYOR: Yeah. This is – the detention pond appears to be needed from engineering, from our Regional Storm Water Plan. And we should buy that land when we – whatever develops in there because we need it to control the water. And so either way, but – so the Council is making a decision on the zoning issue for what they feel is the best zone to put in. Yeah. Okay.

Transcript of City Council Meeting at 15:20-17:5.

Riverton City's refusal to rezone the property pursuant to the Petersen Family's Application—after it had given verbal approval of the Application, after the Planning Commission staff had recommended approval, in light of the evidence supporting the Application, and in the absence of evidence supporting denial of the Application—shows that the City was motivated by its bad faith desire to force the value of the Property down so

that the City could purchase the Property at a lower price for the construction of the detention pond. This is an illegal basis for denying the Petersen Family's Application.

Furthermore, the General Plan establishes that 1/3 acre lots as permitted in R-3 zoning are commonplace throughout nearby property and, indeed, throughout the entire City of Riverton. The record also shows that on the very date that the Planning Commission recommended a denial of the Petersen Family's Application to rezone its land from R-22 to R-3, the Planning Commission recommended rezoning a property across the street to R-3. The same day that the Riverton City Council denied the Petersen Family's Application to rezone to R-3 lots, the Riverton City Council rezoned a different property across the street for R-3 lots. *Id.* Accordingly, the record shows that similarly situated property owners were not treated similarly and that other property owners were granted more favorable treatment than the Petersen Family.

The Petersen Family has provided evidence that it was treated different than other similarly situated property owners and that the unequal treatment was due to the City's malicious and bad faith intent to drive down the value of the Petersen Family's Property in order to acquire it for its own purposes. According to the Utah Supreme Court in *Gardner*, all that was required by the Petersen Family in response to the City's motion for summary judgment was "evidence of dissimilar treatment and an allegation, with some evidentiary support, of malicious or bad faith intent on the part of county officials." *Gardner*, 2008 UT 6 ¶39. Viewing the evidence in a light most favorable to the Petersen Family, as required, this standard was clearly met. The district court therefore erred in granting summary judgment to the City on the Petersen Family's equal protection claim.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY ON THE PETERSEN FAMILY'S DUE PROCESS CLAIMS

The City's decision is illegal and invalid because it violated the Petersen Family's due process rights as secured by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I Section 7 of the Utah Constitution. "Due process is not a rigid concept. 'Instead, due process is flexible and, being based on the concept of fairness, should afford the 'procedural protections that the given situation demands.'" *Low v. City of Monticello*, 2004 UT 90 ¶15, 103 P.3d 130 (internal citations omitted). Due process requires that a party "be given a meaningful opportunity to be heard." *State ex rel. W.S.*, 939 P.2d 196, 202 (Utah App. 1997).

The Tenth Circuit Court of Appeals has delineated the constitutional mandates of both procedural and substantive due process rights: "Procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason regardless of the procedures used to reach that decision." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). The City deprived the Petersen Family of both its procedural and substantive due process rights.

In order "to prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectable property interest." *Id.* In *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), the court held that a landowner's permitted zoning use became securely vested "when he expressly conditioned the purchase of the property on his obtaining a

favorable zoning opinion from the City and . . . expended considerable money and effort . . . petitioning the City for a variance from the specific site plan requirements.” *Id.* at 897 (emphasis added).

Property interests “are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.* at 1210 (emphasis added). Therefore, in determining whether one has a protectable property interest, the court must look to “existing rules or understandings that stem from an independent source such as state law to define the dimensions of protected property interests.” *Ripley v. Wyo. Med. Ctr., Inc.*, 559 F.3d 1119, 1121 (10th Cir. 2009) (emphasis added). “[C]onstitutionally protected property interests are created and defined by statute, ordinance, contract, implied contract and rules and understandings developed by state officials.” *Nichols v. Bd. of County Comm'rs*, 506 F.3d 962, 970 (10th Cir. 2007) (emphasis added).

A protectable property interest therefore arises “by the landowner’s substantial actions taken in reliance, to his or her detriment, on representations and affirmative actions by government” regarding the proposed future use of land. *Moreland Properties, LLC v. Thornton*, 559 F. Supp.2d 1133, 1145 (D. Colo. 2008). Expending time, money and effort to negotiate a purchase agreement for land constitutes substantial action for purposes of the protectable property interest analysis. *See id.* at 1149.

Here, as in *Nasierowski*, a protectable property interest arose in favor of the Petersen Family when the purchase of the Petersen Family’s Property was expressly conditioned on

the City's representations to D.R. Horton that the Petersen Family would obtain a favorable zoning decision from the City and in the time and effort expended in seeking the rezoning of the property. The "understandings" between the parties regarding the rezoning of the property created constitutionally protected property interests in approval of the zoning application.

Furthermore, the Petersen Family had a legitimate property interest in, and entitlement to, a fair, impartial consideration of its application under law by a governmental body that did not have an inherent, irreparable conflict of interest. State law expressly requires that municipal land use authority be exercised so as to "provide fundamental fairness in land use regulation, and to protect property values." Utah Code Ann. § 10-9a-102 (emphasis added). Zoning laws must be strictly construed in favor of the property owner because zoning ordinances are limitations on property rights and "are in derogation of property owner's common-law right to unrestricted use of property." *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207 (Utah Ct. App. 1998).

Instead of a fair and impartial hearing as required by law, the Petersen Family had its Application reviewed by a governmental body that was motivated by a bad faith intent to drive down the value of the Property that was the subject of the Application. This inherent conflict of interest impacted, and deprived the Petersen Family of, a legitimate protectable property interest in a fair hearing. By rejecting the Petersen Family's application—which complied with the City's own General Plan and ordinances as found by the Planning Commission staff—for the purpose of acquiring the Petersen Family's property for itself, the City violated state law and the Petersen Family's due process rights. The City simply

does not have discretion to reject applications which otherwise meet the requirements of its ordinances and General Plan based on its need or desire to obtain the applicant's property.

Finally, quite simply, the Petersen Family has a protectable property interest in its property. As a property owner, the Petersen Family is entitled to a fair and reasonable adjudication of a land use Application that dramatically affects the value of its property. By unfairly and unreasonably rejecting that Application, due to its ulterior motives, the City has eliminated virtually all viable economic use of the Petersen Family's Property—in violation of state and local law and in denial of due process.

The final factor in a procedural due process claim is whether “the individual [was] afforded an appropriate level of process.” *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998). As set forth in detail above, the City deprived the Petersen Family's of due process by failing to provide the Petersen Family with an impartial adjudication of its Application by decision-makers free of inherent and irremediable conflicts of interest. Although the record is replete with discussions between the City's representatives of the City's need for the Property and its desire to purchase the Property, the record does not contain so much as a single statement by the City justifying its denial of the Petersen Family's Application to change the zoning for the Property. In light of this facial, inherent conflict of interest, such actions simply cannot withstand constitutional scrutiny. The Petersen Family has alleged, with supporting evidence, that the City had a conflict of interest in reviewing the Application and denied the Petersen Family's Application in order to obtain the Property for itself. Viewing the evidence in a light most favorable to the Petersen

Family, summary judgment on the Petersen Family's procedural due process claim was clearly inappropriate.

The City actions also deprived the Petersen Family of its substantive due process rights. "When a fundamental right is not at issue, a statute will not violate substantive due process if it is rationally related to a legitimate state interest." *Gardner v. Bd. of County Comm'rs*, 2008 UT 6 ¶33. In this case, the City intentionally denied the rezoning application to injure the Petersen Family for the City's own benefit in acquiring a portion of the Property. This is simply not a legitimate state interest.

The City denied the Petersen Family's Application so that it could acquire the Property for use as a diversion pond. Thus, the Petersen Family was never given a meaningful opportunity to be heard, in violation of its procedural and substantive due process rights. This is clear from the overwhelming evidence before the Planning Commission and in the record before the Riverton City Council supporting the Application. The evidence in support of granting of the Application, the summary denial of the Application without any basis in fact or in the record, and Riverton City's undisputed intent to acquire a portion of the Property demonstrate the denial of the Petersen Family's due process rights. Viewing the evidence in a light most favorable to the Petersen Family, the district court wrongly granted summary judgment in favor of the City on the Petersen Family's due process claims.

IV. THE DISTRICT COURT ERRED IN DENYING THE PETERSEN FAMILY'S REQUEST FOR A CONTINUANCE UNDER UTAH RULE OF CIVIL PROCEDURE 56(f)

The district court erroneously denied the Petersen Family's Rule 56(f) motion based on its incorrect conclusion that Utah Code Ann. § 10-9a-801(8) limited review to the record. This section simply does not apply to federal constitutional claims. It is well established that state "statutes [cannot] abrogate constitutional rights." *See Greenway Dev. Co. v. Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000). For this reason, the Utah Court of Appeals, citing to *Greenway*, concluded that statutory notice-of-claim provisions did not apply to constitutional takings claims. *Heughs Land, L.L.C. v. Holladay City*, 2005 UT App 202 ¶11 n.1 (noting that courts have determined that state notice-of-claim laws are "inapplicable in actions alleging violations of federal as well as state constitutional rights"). Likewise, applying § 10-9a-801(8) to claims of federal constitutional violations would effectively abrogate those rights by restricting one's ability to establish such violations. This section is therefore wholly inapplicable to the constitutional equal protection and due process rights at issue in this case.

Faced with facially sufficient allegations that the City violated the Petersen Family's constitutional rights, the court must consider matters outside of the record, and discovery outside of the record is therefore appropriate and necessary. *See Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶13, 979 P.2d 332 (allowing discovery in a land use case involving alleged violations of the state and federal constitutions). The district court therefore erred in denying the Petersen Family's Rule 56(f) motion and permitting additional discovery.

The Petersen Family must be allowed to conduct written discovery and depose Riverton's Mayor, members of the Riverton Planning Commission, and members of the Riverton City Council regarding their organized and concerted efforts to devalue the Petersen Family's Property by denying the Application after expressly stating that the Application would be approved. In addition, the Petersen Family must also be permitted to depose representatives of D.R. Horton who were present at a meeting in which the City's representatives stated that they would approve the Petersen Family's Application as well as similarly situated persons who submitted applications for rezoning to Riverton City. Upon information and belief, by denying the Petersen Family's Application, Riverton City intended to devalue the Petersen Family's Property so that the City could purchase the property at a reduced price for the construction of a diversion pond. The Petersen Family is entitled to conduct discovery to prove that this action was arbitrary, capricious, confiscatory, discriminatory, and illegal, in violation of the Petersen Family's constitutional rights to equal protection and due process.

CONCLUSION

The lower court's summary judgment is founded upon an incorrect judicial standard of review or the misapplication of the Judicial Standard of Review. The reasonably debatable standard as described and applied by the lower court is no standard of review at all. Instead it is a guarantee of affirmation for every municipal rezone decision.

Moreover, there are genuine issues of whether the City's denial of the application to further its personal economic interest was illegal, denied equal protection or violated due process.

For these plain compelling reasons, the summary judgment should be reversed, and the City Municipal Land Use decision likewise be overturned, or at the very least the case remanded for trial.

DATED this 27 day of July, 2009.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: _____


Dale F. Gardiner

Scott M. Lilja

Cassie J. Medura

Nicole M. Deforge

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **BRIEF OF APPELLANTS** to be mailed, postage prepaid, this 21st day of July 2009, to the following counsel of record:

Jody K. Burnett, Esq.
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Also, a copy of the foregoing **BRIEF OF APPELLANTS** was served via hand delivery on this same date upon the following:

Mark L. Shurtleff, Esq.
Utah Attorney General
OFFICE OF THE ATTORNEY GENERAL
State Capital Complex
350 North State Street, Suite #230
P.O. Box 142320
Salt Lake City, UT 84114-2320

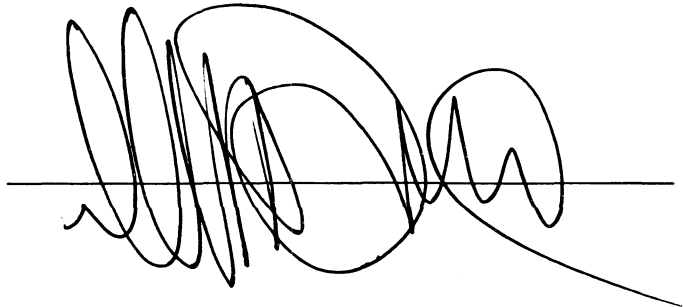
A handwritten signature in black ink, appearing to be "Mark L. Shurtleff", is written over a horizontal line. The signature is stylized with large, overlapping loops and a long, sweeping tail that extends to the right.

Exhibit A

1. The first part of the document is a list of the names of the people who were present at the meeting. The names are listed in alphabetical order.

Title/Chapter/Section:

Go To

Utah Code

Title 10 Utah Municipal Code

Chapter 9a Municipal Land Use, Development, and Management

Section 102 Purposes -- General land use authority.

10-9a-102. Purposes -- General land use authority.

(1) The purposes of this chapter are to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and nonurban development, to protect and ensure access to sunlight for solar energy devices, to provide fundamental fairness in land use regulation, and to protect property values.

(2) To accomplish the purposes of this chapter, municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

Amended by Chapter 363, 2007 General Session

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<< Previous Section (10-9a-101) Next Section (10-9a-103) >>

Title/Chapter/Section:

[Go To](#)[Utah Code](#)[Title 10](#) Utah Municipal Code[Chapter 9a](#) Municipal Land Use, Development, and Management**Section 701** Appeal authority required -- Condition precedent to judicial review -- Appeal authority duties.**10-9a-701.** Appeal authority required -- Condition precedent to judicial review -- Appeal authority duties.

(1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:

- (a) requests for variances from the terms of the land use ordinances; and
- (b) appeals from decisions applying the land use ordinances.

(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

(3) An appeal authority:

(a) shall:

- (i) act in a quasi-judicial manner; and
 - (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances;
- and

(b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

(4) By ordinance, a municipality may:

(a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;

(b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;

(c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;

(d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and

(e) provide that specified types of land use decisions may be appealed directly to the district court.

(5) If the municipality establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:

(a) notify each of its members of any meeting or hearing of the board, body, or panel;

(b) provide each of its members with the same information and access to municipal resources as any other member;

(c) convene only if a quorum of its members is present; and

(d) act only upon the vote of a majority of its convened members.

Enacted by Chapter 254, 2005 General Session

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[<< Previous Section \(10-9a-611\)](#) [Next Section \(10-9a-702\) >>](#)

Title/Chapter/Section:

Go To

Utah Code

Title 10 Utah Municipal Code

Chapter 9a Municipal Land Use, Development, and Management

Section 801 No district court review until administrative remedies exhausted -- Time for filing -- Tolling of time -- Standards governing court review -- Record on review -- Staying of decision.

10-9a-801. No district court review until administrative remedies exhausted -- Time for filing - Tolling of time -- Standards governing court review -- Record on review -- Staying of decision.

(1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

(2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.

(b) (i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the property rights ombudsman under Section **13-43-204** until 30 days after:

(A) the arbitrator issues a final award; or

(B) the property rights ombudsman issues a written statement under Subsection **13-43-204**(3)(b) declining to arbitrate or to appoint an arbitrator.

(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional taking issue that is the subject of the request for arbitration filed with the property rights ombudsman by a property owner.

(iii) A request for arbitration filed with the property rights ombudsman after the time under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

(3) (a) The courts shall:

(i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and

(ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

(4) The provisions of Subsection (2)(a) apply from the date on which the municipality takes final action on a land use application for any adversely affected third party, if the municipality conformed with the notice provisions of Part 2, Notice, or for any person who had actual notice of the pending decision.

(5) If the municipality has complied with Section **10-9a-205**, a challenge to the enactment of a land use ordinance or general plan may not be filed with the district court more than 30 days after the enactment.

(6) The petition is barred unless it is filed within 30 days after the appeal authority's decision is final.
(7) (a) The land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if

available, a true and correct transcript of its proceedings.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (7).

(8) (a) (i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.

(ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

(b) If there is no record, the court may call witnesses and take evidence.

(9) (a) The filing of a petition does not stay the decision of the land use authority or authority appeal authority, as the case may be.

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section **13-43-204**, the aggrieved party may petition the appeal authority to stay its decision.

(ii) Upon receipt of a petition to stay, the appeal authority may order its decision stayed pending district court review if the appeal authority finds it to be in the best interest of the municipality.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section **13-43-204**, the petitioner may seek an injunction staying the appeal authority's decision.

Amended by Chapter 306, 2007 General Session

Amended by Chapter 363, 2007 General Session

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[<< Previous Section \(10-9a-708\)](#) [Next Section \(10-9a-802\) >>](#)

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Title/Chapter/Section:

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[Utah Constitution / Code](#)

[Article V](#) Distribution of Powers

[Section 1](#) [Three departments of government.]

Section Section 1 [Three departments of government.]

Future Constitution (Effective upon approval of the voters)

Article V, Section 1. [Three departments of government.]


The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

No History for Constitution

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UNITED STATES CODE SERVICE

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AMENDMENTS
AMENDMENT 14**[Go to the United States Code Service Archive Directory](#)***USCS Const. Amend. 14, § 1*

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Title/Chapter/Section:

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[Utah Constitution / Code](#)

[Article I Declaration of Rights](#)

[Section 7](#) [Due process of law.]

Section Section 7 [Due process of law.]

Future Constitution (Effective upon approval of the voters)

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

No History for Constitution

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Title/Chapter/Section:

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[Utah Constitution / Code](#)

[Article I](#) Declaration of Rights

[Section 24](#) [Uniform operation of laws.]

Section Section 24 [Uniform operation of laws.]

Future Constitution (Effective upon approval of the voters)

Article I, Section 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

No History for Constitution

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Citation: 2003 ut 16

2003 UT 16, *; 70 P.3d 47, **;
472 Utah Adv. Rep. 12; 2003 Utah LEXIS 38, ***

Robert Bradley, Joyce Bradley, R. Dale Whitelock, Karma Whitelock, Louis Peterson, and Barbara Peterson, Plaintiffs and Petitioners, v. Payson City Corporation, Defendant and Respondent.

No. 20010233

SUPREME COURT OF UTAH

2003 UT 16; 70 P.3d 47; 472 Utah Adv. Rep. 12; 2003 Utah LEXIS 38

May 2, 2003, Filed

SUBSEQUENT HISTORY: [***1] Released for Publication May 20, 2003.

PRIOR HISTORY: Fourth District, Utah County. The Honorable Ray M. Harding, Jr.
Bradley v. Payson City Corp., 17 P.3d 1160, 2001 UT App 9, 2001 Utah App. LEXIS 7 (2001).

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff property owners brought suit against defendant city, alleging the city council's denials of their rezone requests were arbitrary and capricious. The trial court reversed the council's denial of one of the owners' rezone applications. On review, the Court of Appeals of Utah applied the "reasonably debatable" standard to the city's denial of the rezoning requests and reversed the trial court's decision. The owners appealed.

OVERVIEW: On review, the owners challenged the appellate court's ruling contending, inter alia, that the substantial evidence test was applicable to all municipal land use decisions, whether legislative, administrative, or quasi-judicial. The supreme court disagreed, holding that the "reasonably debatable" standard applied to legislative municipal land use decisions. Further, the city's reliance on the general plan as a basis for its decision was precisely the kind of legislative decision that should be left to the city council and undisturbed by the judiciary. The supreme court was satisfied that the city's consideration of public comments as a justification for its zoning decision reflected a reasonable judgment that properly took into account citizens' concerns. Further, the city council's decision to give greater weight to the opponents of the owners' planning expert and to deny the rezoning simply reflected the exercise of legislative policy preferences that were entirely within its discretion. Accordingly, under the reasonably debatable standard, the city did not act arbitrarily and capriciously when it acted in a legislative capacity to deny the owners' rezone application.

OUTCOME: The appellate court's decision was vacated for lack of jurisdiction to hear challenges to land use decisions by municipal governing bodies.

CORE TERMS: land use, arbitrary and capricious, municipal, rezone, substantial evidence, zoning decision, municipality, quasi-judicial, residential, debatable, planning commission, zoning, standard of review, rezoning, zone, public comments, adjudicative, industrial, ordinance, zoning change, legislative decision, public hearing, map, zoning ordinances, legislative powers, original jurisdiction, agricultural, residents, traffic, zoning classification

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HN1 When reviewing a city council's decision not to change the zoning classification of property, the court presumes that the decision is valid and determines only whether or not the decision is arbitrary, capricious, or illegal. Utah Code Ann. § 10-9-1001(3) (1999). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN2 Municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal. Indeed, municipal land use decisions as a whole are generally entitled to a great deal of deference. However, in specific cases the determination of whether a particular land use decision is arbitrary and


capricious may depend on whether the decision involves the exercise of legislative, administrative, or quasi-judicial powers. When a municipality makes a land use decision as a function of its legislative powers, such a decision is not arbitrary and capricious so long as the grounds for the decision are "reasonably debatable." When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, such decisions are not arbitrary and capricious if they are supported by "substantial evidence." [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Real Property Law](#) > [Zoning & Land Use](#) > [Ordinances](#) 


HN3 The enactment and amendment of zoning ordinances is fundamentally a legislative act. The political nature of the decision-making process underlying municipal zoning demands that the power to make such decisions be vested in persons who are publicly accountable for their choices. [More Like This Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Comprehensive Plans](#) 


HN4 Zoning decisions that are made as an exercise of legislative powers are entitled to particular deference. The exercise of zoning power is a legislative function to be exercised by the legislative bodies of the municipalities. The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie solely within that discretion. It is the policy of the court that it will avoid substituting its judgment for that of the legislative body of the municipality. Given this deferential disposition, it is the court's duty to resolve all doubts in favor of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Administrative Law](#) > [Agency Adjudication](#) > [Decisions](#) > [General Overview](#) 

[Administrative Law](#) > [Separation of Powers](#) > [Legislative Controls](#) > [General Overview](#) 


[Governments](#) > [Local Governments](#) > [Administrative Boards](#) 


HN5 Legislative zoning decisions involve the determination and enactment of zoning policies and cannot be delegated to other governmental bodies. Such decisions are distinct from administrative or quasi-judicial zoning decisions: while a municipality has the authority to formulate and implement zoning policies as an exercise of legislative power, a municipality cannot thereafter delegate some portion of that authority to a board of adjustment because a board of adjustment is a quasi-judicial body designed only to correct specific zoning errors. [More Like This Headnote](#)

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[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

HN6 The distinction between legislative and administrative or quasi-judicial municipal powers determines the proper standard of review applicable to municipal land use disputes. For legislative decisions, the court applies a highly deferential variation of the arbitrary and capricious standard and limits its review to the strict question of whether the zoning ordinance could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare. The selection of one method of solving the problem in preference to another is entirely within the discretion of the city; and does not, in and of itself, evidence an abuse of discretion. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Environmental Law](#) > [Zoning & Land Use](#) > [Conditional Use Permits & Variances](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 


HN7 For administrative or quasi-judicial land use decisions, the substantial evidence test traditionally applies. Substantial evidence is defined as that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. Thus, while municipal land use decisions in Utah are valid unless arbitrary and capricious, the specific meaning of that standard is dependent upon the nature of the land use decision at issue. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

HN8 See Utah Code Ann. § 10-9-1001(3) (1999).


[Governments](#) > [Legislation](#) > [Interpretation](#) 

HN9 When construing statutory language which is plain and unambiguous, the court does not look beyond the same to divine legislative intent. [More Like This Headnote](#)


[Administrative Law](#) > [Agency Adjudication](#) > [Decisions](#) > [General Overview](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 


HN10 The plain language of Utah Code Ann. § 10-9-1001(3) (1999) clearly states that the arbitrary and capricious standard is applicable to all municipal land use decisions. However, the statute does not address the distinct applications of the arbitrary and capricious standard to legislative, administrative, and quasi-judicial decisions that have been recognized for more than half a century. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 


HN11 A municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

HN12 In general, because a zoning classification reflects a legislative policy decision, the court will not interfere with that decision except in the most extreme cases. The guiding principle behind the court's interpretation of legislative zoning decisions is that the court will not substitute its judgment for that of the municipality. Though a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the city; and does not, in and of itself evidence an abuse of discretion. The propriety of the zoning decision need only be "reasonably debatable." [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Governments](#) > [Local Governments](#) > [Administrative Boards](#) 


[Real Property Law](#) > [Zoning & Land Use](#) > [Administrative Procedure](#) 


HN13 Public hearings and citizen comments are a legitimate source of information for city council members to consider in making legislative decisions. In reviewing the city council's decision, the court does not apply trial-like formal rules of procedure or evidence to evaluate the substance of public comments received by the city council. Rather, the court presumes that city council members will measure public comments against their own personal knowledge of the various conditions in the city that bear upon zoning decisions. A city council's ultimate decision, of course, reflects legislative preferences that are entitled to a presumption of validity. [More Like This Headnote](#)

[Real Property Law](#) > [Zoning & Land Use](#) > [General Overview](#) 

HN14 A city council is not required to receive advice from experts before making a legislative zoning decision. [More Like This Headnote](#)


[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [General Overview](#) 


[Environmental Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 


HN15 Under Utah Code Ann. § 78-2a-3 (2002), the court of appeals has original jurisdiction to hear appeals from trial court review of adjudicative proceedings of agencies of political subdivisions of the state or other local agencies. Utah Code Ann. § 78-2a-3(2)(b)(i) (2002). This provision is designed to establish a body of expertise in the court of appeals for review of such "adjudicative proceedings" under the Utah Administrative Procedures Act, Utah Code Ann. §§ 63-46b-0.5 to -22 (1997 & Supp. 2001). The Act governs all state agency actions. Utah Code Ann. § 63-46b-1(1)(a). An "adjudicative proceeding" is specifically defined as an action by a state agency under the Act. Utah Code Ann. § 63-46b-2(1)(a). The Act specifically excludes from the definition of "agency" any political subdivision of the state, or any administrative unit of a political subdivision of the state. Utah Code Ann. § 63-46b-2(1)(b). [More Like This Headnote](#)


[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [General Overview](#) 

[Environmental Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 


[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 


HN16 Utah Code Ann. § 78-2a-3 (2002) does not give the court of appeals original jurisdiction over appeals from district court review of land use decisions by the governing body of a municipality. The governing body of a municipality cannot be an agency of a political subdivision of the state under that section. Utah Code Ann. § 78-2a-3(2)(b)(i) (2002). [More Like This Headnote](#)


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[Governments](#) > [Legislation](#) > [Interpretation](#) 


HN17 When interpreting statutes, the court looks primarily to the statute's plain language. Furthermore, the court will not infer substantive provisions into a statute that are not expressly contained therein. [More Like This Headnote](#)


[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [General Overview](#) 

[Environmental Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

HN18 It is clear that there is no provision within Utah Code Ann. § 78-2a-3(2) (2002) that expressly grants the court of appeals original jurisdiction over district court review of land use decisions by local governmental entities. The supreme court has original appellate jurisdiction over such cases under Utah Code § 78-2-2(3) (j) (2003), which provides that the supreme court has jurisdiction over orders, judgments, and decrees of any court of record over which the court of appeals does not have original appellate jurisdiction. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Real Property Law](#) > [Zoning & Land Use](#) > [Judicial Review](#) 

HN19 Municipal land use decisions are presumed valid unless they are arbitrary and capricious. Whether a particular municipal land use decision is arbitrary and capricious depends upon whether the municipality has acted in a legislative, administrative, or quasi-judicial capacity. Legislative land use decisions are valid so long as they are reasonably debatable. Administrative and quasi-judicial decisions, however, continue to be

COUNSEL: Scott L. Wiggins, Mark E. Arnold, Salt Lake City, for petitioners.

Jody K. Burnett, Salt Lake City, David C. Tuckett, Payson, for respondent.

JUDGES: DURHAM, Chief Justice. Associate Chief Justice Durrant, Justice Russon, Justice Wilkins, and Judge Baldwin concur in Chief Justice Durham's opinion. **[**58]** Having recused himself, Justice Howe does not participate herein; Second District Judge Parley R. Baldwin sat.

OPINION BY: DURHAM

OPINION

[49]** *DURHAM, Chief Justice:*

INTRODUCTION

[*P1] This case arises from the decision of the Payson City Council (Payson City or City Council) to deny Plaintiffs' two applications to rezone property within Payson City (the property) from R-1-A low density residential/agricultural use to R-2-75 high density residential use. The trial court determined that Payson City's decision was arbitrary and capricious because it was not supported by "substantial evidence." The court of appeals reversed the decision of the trial court, holding that application of the "substantial evidence" standard was erroneous **[***2]** because Payson City's zoning decision was a legislative decision. *Bradley v. Payson City*, 2001 UT App 9, P28, 17 P.3d 1160. Under the court of appeals' view of the arbitrary and capricious standard, only quasi-judicial or administrative decisions are subject to the "substantial evidence" standard while legislative decisions are subject to the more deferential "reasonably debatable" standard.

BACKGROUND

[*P2] The Plaintiffs below are owners of property in Payson City zoned as R-1-A, which is a low-density residential zone. The property is located west of Interstate 15 (I-15) and is surrounded by property that is also zoned R-1-A. Some two and one-half blocks east of the property is a large area of land that is zoned R-2-75, which is the same zoning designation the Plaintiffs seek. The 1995 Payson City General Plan (General Plan), which was in effect at the time the Plaintiffs sought rezoning, forecasts primarily residential land use east of I-15 and industrial and agricultural uses for property west of I-15. While the intent of the General Plan seems to be to utilize I-15 as a natural buffer between residential and industrial uses, the Payson Planning **[***3]** Zone Map (Payson Zone Map), also adopted in 1995, does provide for some areas of residential use west of I-15.

[*P3] In January 1996, the Plaintiffs applied to rezone their property from R-1-A to R-2-75, which is a residential zoning designation that permits multiple family dwellings. During a meeting before the Payson City Planning Commission (Planning Commission) on the issue of the rezone application, the Chairperson acknowledged that because "there are already other residential developments in the surrounding area where this rezone would take place, there may not be a problem in rezoning this to R-2-75." After considering the Plaintiffs' R-2-75 rezone application, the Planning Commission Staff Report recommended that the Planning Commission recommend approval of the rezone to the Payson City Council.

[*P4] At the public hearing before the Planning Commission on Plaintiffs' rezone application, a petition signed by thirty-eight people was submitted by a neighborhood group that opposed the zoning change. In addition, thirteen individuals at the hearing expressed their opposition to the R-2-75 rezone. The public opposition voiced concerns over the adequacy of the area's **[***4]** infrastructure as well as concerns about maintaining the agricultural nature of the area, which includes using the land for raising horses. Several public comments also supported the rezone. After public comment, the Planning Commission recommended that the Payson City Council deny the R-2-75 rezone.

[*P5] The City Council then held a public hearing on the R-2-75 rezone application. The same thirty-eight signature petition was submitted to the City Council, and, subject to one or two exceptions, the same individuals appeared before the City Council as before the Planning Commission. In addition to voicing concerns about raising animals and preserving the nature of the neighborhood, other comments raised concerns about traffic levels in the area. Advocates of the application, including planning expert Jim Wilbert, expressed the area's need for low income housing. Ultimately, the City Council voted to deny the rezoning based upon the General Plan, traffic concerns, and the Planning Commission's recommendation.

[*P6] **[**50]** The Plaintiffs later submitted a second Zoning Change Application, requesting that their property be rezoned from R-1-A to R-1-9. An R-1-9 zoning is a medium-density **[***5]** residential zoning. Both the Planning Commission staff and the Planning Commission recommended approval of the R-1-9 rezone. The R-1-9 rezoning came before the City Council for public hearing on May 22, 1996. Public input included comments by representatives of businesses in the abutting industrial area. Associated Foods raised concerns that truck noise would cause residents to seek action against it. Representatives of a fruit-processing plant questioned whether residents would tolerate the noise and smell of its packing facilities. After the hearing was closed, the City Council voted to deny the R-1-9 rezoning

request.

[*P7] The Plaintiffs commenced this action by verified complaint on April 1, 1997. They alleged that the Payson City Council's denials of their rezone requests were arbitrary and capricious and that the denials constituted a taking without just compensation. Payson City filed a motion for summary judgment, requesting that the district court dismiss the complaint because the Payson City Council had acted within its legislative prerogative. The Plaintiffs responded by filing a cross-motion for summary judgment. The trial court entered a Memorandum Decision on January 22, 1999, reversing [***6] the City Council's denial of the Plaintiffs' R-2-75 rezone application, finding that the denial had no evidentiary support and was therefore arbitrary and capricious. Consequently, the district court did not address the denial of Plaintiffs' second rezone application.

[*P8] Payson City appealed the trial court's decision directly to this court, after which this court transferred the appeal to the court of appeals pursuant to Utah Rule of Appellate Procedure 44. On January 11, 2001, the court of appeals issued an opinion reversing the district court's decision, concluding that the trial court had applied the incorrect standard of review to Payson City's legislative land use decisions and that under the "reasonably debatable" standard, Payson City's denial of the rezoning requests was not arbitrary, capricious, or illegal. *Bradley*, 2001 UT App 9 at P28. The Plaintiffs then filed a petition for writ of certiorari to review the substance of the court of appeals' decision. Payson City filed a cross-petition for a writ of certiorari challenging the court of appeals' conclusion that it had original appellate jurisdiction to decide the appeal.

STANDARD OF REVIEW

[***7] [*P9] ^{HN1}When reviewing a city council's decision not to change the zoning classification of property, we presume that the decision is valid and "determine only whether or not the decision is arbitrary, capricious, or illegal." Utah Code Ann. § 10-9-1001(3) (1999). The principal issue in this case is the meaning of "arbitrary and capricious" in the context of Payson City's decision not to change the zoning classification of the Plaintiffs' property. This is a legal issue which we review for correctness. *Springville Citizens for a Better Cmty. v. City of Springville*, 1999 UT 25, P22, 979 P.2d 332.

ANALYSIS

I. APPROPRIATE STANDARD OF REVIEW GOVERNING APPEALS OF

MUNICIPAL LAND USE DECISIONS

A. Distinction Between Legislative and Administrative Actions

[*P10] This court has long recognized that ^{HN2}municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal. *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633, 636 (Utah 1961); *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704, 709 (Utah 1943). Indeed, municipal [***8] land use decisions as a whole are generally entitled to a "great deal of deference." *Springville Citizens for a Better Cmty. v. City of Springville*, 1999 UT 25, P23, 979 P.2d 332. However, in specific cases the determination of whether a particular land use decision is arbitrary and capricious has traditionally depended on whether the decision involves the exercise of legislative, administrative, or quasi-judicial powers. When a municipality makes a land use decision as a function of its legislative powers, we [***51] have held that such a decision is not arbitrary and capricious so long as the grounds for the decision are "reasonably debatable." *Marshall*, 141 P.2d at 709 (reviewing municipal zoning decision as legislative function and employing reasonably debatable standard); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998) (same). When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by "substantial evidence." *Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034-35 (Utah 1984) [***9] (reviewing board of adjustment decision as an administrative act and employing substantial evidence standard).

[*P11] There is no dispute in this case that ^{HN3}the enactment and amendment of zoning ordinances is fundamentally a legislative act. *Sandy City v. Salt Lake County*, 827 P.2d 212, 221 (Utah 1992) ("the passage of general zoning ordinances and the determination of zoning policy [are] properly vested in the legislative branch") (quoting *Scherbel v. Salt Lake City Corp.*, 758 P.2d 897, 899 (Utah 1988)). The political nature of the decision making process underlying municipal zoning demands that the power to make such decisions be vested in persons who are publicly accountable for their choices. See *Marshall*, 141 P.2d at 709 (noting that accountability for balancing competing interests in zoning decisions properly resides in the "governing body of the city").

[*P12] We have long recognized that ^{HN4}zoning decisions that are made as an exercise of legislative powers are entitled to particular deference. In *Crestview-Holladay Homeowners Ass'n. Inc. v. Engh Floral Co.*, we noted that the prior decisions of this court without [***10] exception have laid down the rule that the exercise of zoning power is a legislative function to be exercised by the legislative bodies of the municipalities. The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie solely within that discretion. It is the policy of this court as enunciated in its prior decisions that it will avoid substituting its judgment for that of the legislative body of the municipality.

545 P.2d 1150, 1152 (Utah 1976) (citing *Marshall*, 105 Utah 111, 141 P.2d 704; *Phi Kappa Iota Fraternity v. Salt Lake City*, 116 Utah 536, 212 P.2d 177 (Utah 1949); *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (Utah 1953); *Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 410 P.2d 764 (Utah 1966)). Given this deferential disposition, we have

held that it is "the court's duty to resolve all doubts in favor" of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power. Gayland, 358 P.2d at 636.

[*P13] [*11]** In light of the particular deference we accord legislative zoning decisions, we have regularly distinguished zoning decisions that are made as a function of legislative power from decisions that are made as an exercise of either administrative or quasi-judicial power. ^{HN5} Legislative zoning decisions involve the determination and enactment of zoning policies and cannot be delegated to other governmental bodies. Sandy City, 827 P.2d at 221. Such decisions are distinct from administrative or quasi-judicial zoning decisions. For example, in Sandy City, we noted that while a municipality has the authority to formulate and implement zoning policies as an exercise of legislative power, a municipality cannot thereafter delegate some portion of that authority to a board of adjustment because a board of adjustment is a quasi-judicial body designed only to correct specific zoning errors. Id. at 220-21; see also Salt Lake County Cottonwood Sanitary Dist. v. Sandy City, 879 P.2d 1379, 1383 (Utah Ct. App. 1994) (recognizing distinction between executive and legislative powers with respect to zoning decisions); Xanthos, 685 P.2d at 1034 **[***12]** (treating board of adjustment decision as an administrative act).

B. The "Reasonably Debatable" and

"Substantial Evidence" Tests

[*P14] As mentioned at the outset, our recognition of ^{HN6} the distinction between legislative and administrative or quasi-judicial municipal powers has consistently determined the proper standard of review applicable to **[**52]** municipal land use disputes. For legislative decisions, we have applied a highly deferential variation of the arbitrary and capricious standard and limited our review to the strict question of whether the zoning ordinance "could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare." Smith Inv. Co., 958 P.2d at 252 (quoting Marshall, 141 P.2d at 709); Walker v. Brigham City, 856 P.2d 347, 349 (Utah 1993) (holding that the municipality's legislative decision would be upheld unless "wholly discordant to reason and justice"); Dowse, 255 P.2d at 724 (holding that zoning could be attacked only if there was "no reasonable basis therefor"). "The selection of one method of solving the problem in preference **[***13]** to another is entirely within the discretion of the [city]; and does not, in and of itself, evidence an abuse of discretion." Phi Kappa Iota Fraternity, 212 P.2d at 181.

[*P15] ^{HN7} For administrative or quasi-judicial land use decisions, however, the substantial evidence test has traditionally applied. We have defined substantial evidence as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990) (reviewing administrative evaluation of property for tax purposes). This standard has been applied to an array of administrative and quasi-judicial land use decisions. See e.g., Xanthos, 685 P.2d at 1035 (reviewing board of adjustment's denial of a zoning variance); Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207, 210 n.5 (Utah Ct. App. 1998) (reviewing city's administrative interpretation of its zoning ordinance); Wells v. Bd. of Adjustment of Salt Lake City Corp., 936 P.2d 1102, 1105 (Utah Ct. App. 1997) (reviewing board of adjustment decision **[***14]** denying variance); Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 604 (Utah Ct. App. 1995) (reviewing trial court's finding of an arbitrary and capricious action by county in approving special exception to zoning ordinance). Thus, while municipal land use decisions in Utah are valid unless arbitrary and capricious, the specific meaning of that standard is dependent upon the nature of the land use decision at issue.

II. MEANING AND EFFECT OF UTAH CODE SECTION 10-9-1001(3) AND THE SPRINGVILLE CITIZENS CASE

[*P16] The Plaintiffs do not dispute the existence of the traditional distinction between the standard of review applicable to legislative as opposed to administrative and quasi-judicial land use decisions. Rather, they claim that since the Utah Legislature's adoption of Utah Code section 10-9-1001 and this court's decision in Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, 979 P.2d 332, the substantial evidence test is now applicable to all municipal land use decisions, whether legislative, administrative, or quasi-judicial.

[*P17] [*15]** The starting point for the Plaintiffs' "one-size-fits-all" approach to the standard of review for municipal land use decisions is the Utah Legislature's 1991 enactment of Utah Code section 10-9-1001. That provision codified the procedures for appealing municipal land use decisions. Section 10-9-1001(3) addresses the judicial standard of review for such decisions, stating:

^{HN8} (3) The courts shall:

- (a) presume that land use decisions and regulations are valid; and
- (b) determine only whether or not the decision is arbitrary and capricious, or illegal.

Utah Code Ann. § 10-9-1001(3) (1999). The Plaintiffs argue that section 10-9-1001(3) was intended to create a single standard of review for all municipal land use decisions and that it impliedly overrules this court's earlier decisions applying different interpretations of the arbitrary and capricious standard to different exercises of municipal power.

[*P18] ^{HN9} "When construing statutory language which is plain and unambiguous, we do not look beyond the same to divine legislative intent." Cole v. Jordan Sch. Dist., 899 P.2d 776, 778 (Utah 1995). ^{HN10} The plain **[***16]** language of section 10-9-1001(3) clearly states that the arbitrary and capricious standard is applicable to all municipal land use decisions. However, the statute does not address the **[**53]** distinct applications of the arbitrary and capricious

standard to legislative, administrative, and quasi-judicial decisions that we have recognized for more than half a century. In the absence of express statutory language to the contrary, we do not presume that the legislature, in enacting section 10-9-1001(3), intended to overrule the prior decisions of this court and impose a uniform interpretation of the arbitrary and capricious standard for all municipal land use decisions, regardless of whether those decisions are legislative, administrative, or quasi-judicial. See *id.* (noting that in the absence of express statutory language the court will not assume the legislature intended to overrule an earlier decision of this court when it enacted a statutory amendment).¹

FOOTNOTES

¹ The court of appeals agreed with this interpretation of section 10-9-1001(3) in *Harmon City, Inc. v. Draper City*, 2000 UT App 31, 997 P.2d 321. In upholding a city council's refusal to rezone property for a shopping center on the grounds that the city's decision was reasonably debatable, the court of appeals rejected the plaintiff's argument that section 10-9-1001(3) required the uniform application of the substantial evidence test under the arbitrary and capricious standard. After reviewing the earlier case law we have discussed in this opinion, the court concluded that the 1991 enactment of section 10-9-1001(3), which largely codifies [municipal land use case law], did not alter the deferential review of a municipality's legislative zoning classification decisions under the arbitrary and capricious standard.

Id., 2000 UT 31 P14.

*****17] [*P19]** To support their claim that section 10-9-1001(3) does indeed apply to all three kinds of municipal land use decisions, the Plaintiffs rely on our opinion in *Springville Citizens*. In that case we stated, ^{HN117} "[a] municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence." *Springville Citizens*, 1999 UT 25 at P24. The Plaintiffs interpret this language as a "sweeping statement" that the court had, "without reservation, unanimously accepted the legislature's plain language" in section 10-9-1001(3). We disagree.

[*P20] The dispute in *Springville Citizens* arose out of Springville City's approval of a planned unit development (PUD) pursuant to city ordinances. *Springville Citizens*, 1999 UT 25 at PP 1, 2. A developer sought approval of a PUD pursuant to those ordinances and the procedures contained therein. *Id.* 1999 UT 25 at P2. The plaintiff's action alleged that Springville City's approval of the PUD was arbitrary, capricious, and illegal because Springville City had failed to follow its own mandatory ordinances in approving the PUD. *Id.* 1999 UT 25 at P12.

[*P21] In holding that Springville *****18]** City's decision was not arbitrary and capricious, we did not discuss whether the decision was legislative, administrative, or quasi-judicial: we stated simply that "[a] municipality's land use decision is arbitrary and capricious if it is not supported by substantial evidence." *Id.* 1999 UT 25 at P24. The Plaintiffs read this language as announcing a uniform standard of review for *all* municipal land use decisions. Nothing in *Springville Citizens*, however, evidences this court's intent to abandon the traditional distinction between the standard of review for legislative, administrative or quasi-judicial decisions. Furthermore, nothing in *Springville Citizens* suggests, as the Plaintiffs argue, that the legislature's 1991 enactment of section 10-9-1001(3) affected our application of the arbitrary and capricious standard to different exercises of municipal power. The essence of the Plaintiffs' argument is that *Springville Citizens* overruled the cases recognizing the legislative/administrative distinction by implication.

[*P22] For its part, Payson City has tried to reconcile *Springville Citizens* with this court's prior municipal land use cases by explaining that the *****19]** decision in that case was an administrative one that required application of the substantial evidence test. Payson City argues that all of the issues we addressed in *Springville Citizens* arose from the administrative processing of the PUD application pursuant to the standards set forth in city ordinances. Specifically, they note that the court focused on the certification of drawings by an irrigation company, *Springville Citizens*, 1999 UT 25, P15, 979 P.2d 332, whether the planning commission had reviewed the final plat, engineering drawings and documents as required by city ordinance, *id.* at P16, whether modification *****54]** required by the city council to the final subdivision plat had been referred to the planning commission as required by city ordinance, *id.* 1999 UT 25 at P17, and others examples. Each of these examples prove, Payson City argues, that the focus was on compliance with procedural requirements, not with "any basic policy decisions involving the exercise of legislative discretion." A more direct explanation for our statement of the standard of review in that case, however, is found in Springville City's assertion in its brief in that case that the challenged decision was *****20]** "an administrative one" that was subject to the substantial evidence test. Brief for Appellee, at 19, *Springville Citizens for a Better Cmty. v. City of Springville*, 1999 UT 25, 979 P.2d 332 (No. 980028). Given that the municipality itself acknowledged both the administrative nature of the decision and the applicability of the heightened substantial evidence test, it is not surprising that we stated municipal land use decisions were subject to the substantial evidence test; the municipality conceded as much.

[*P23] Thus, 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 the parties and the court agreed that the challenged action was administrative and should be subject to the substantial evidence test. The absence of an acknowledgment 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. Therefore, we decline the invitation to treat *Springville Citizens* as a deviation from our traditional application *****21]** of the arbitrary and capricious standard to different types of municipal land use decisions.²

FOOTNOTES

² Relying on its earlier decision in *Harmon City*, 2000 UT App 31, 997 P.2d 321, the court of appeals in its decision below also read *Springville Citizens* as involving an administrative decision that was subject to the substantial evidence test. *Bradley*, 17 P.3d 1160, 2001 UT App 9, P15. The court noted that "*Springville Citizens* involved judicial review of an administrative proceeding governed by city ordinances that expressly limited the city's discretion over PUD approvals." *Id.* Because the decision was administrative, the court of appeals recognized that *Springville Citizens* required application of the substantial evidence test while Payson City's legislative zoning decision must be evaluated under the reasonably debatable standard. *Id.*

III. UNDER THE REASONABLY DEBATABLE STANDARD PAYSON CITY'S DENIAL OF THE PLAINTIFFS' REZONING REQUEST WAS

NOT ARBITRARY AND [***22] CAPRICIOUS

[*P24] Having concluded that the reasonably debatable standard applies to legislative municipal land use decisions, we now proceed to evaluate whether Payson City's denial of the Plaintiffs' rezoning request was arbitrary and capricious under that standard. ^{HN12} In general, because a "zoning classification reflects a legislative policy decision," we will not interfere with that decision "except in the most extreme cases." *Harmon City*, 2000 UT App 31 at P18, 997 P.2d 321. The guiding principle behind our interpretation of legislative zoning decisions is that we will not substitute our judgment for that of the municipality. *cCrestview-Holladay Homeowners Ass'n.*, 545 P.2d at 1152. Though a municipality may have a myriad of competing choices before it, "the selection of one method of solving the problem in preference to another is entirely within the discretion of the [city]; and does not, in and of itself evidence an abuse of discretion." *Phi Kappa Iota Fraternity*, 212 P.2d at 179. The propriety of the zoning decision need only be "reasonably debatable." *Marshall*, 141 P.2d at 709.

[*P25] The Plaintiffs [***23] argue that the court of appeals erred in holding that Payson City's denial of their rezoning request was not arbitrary and capricious under the reasonably debatable standard. The Plaintiffs argue that there was a general lack of evidence presented to the Payson City Council to support the reasonableness of its denial of the rezone application. The Plaintiffs further argue that the basis of Payson City's decision contradicted some record evidence supporting the zoning change. We will address each of the Plaintiffs' specific arguments in turn.

[*P26] [***55] First, the Plaintiffs argue that Payson City's zoning decision was unreasonable to the extent it was based on the General Plan's recognition of I-15 as a natural buffer between residential and industrial uses. The Plaintiffs argue that Payson City failed to consider that, unlike the General Plan, the Payson Zone Map actually provides for large areas of residential use west of I-15 and that their proposed rezoning would be consistent with the uses of neighboring properties in the zone map. This discrepancy between the General Plan and the Payson Zone Map is not conclusive evidence that Payson City's decision was arbitrary and capricious. [***24] To the contrary, Payson City's reliance on the General Plan as a basis for its decision is precisely the kind of legislative decision that should be left to the city council and undisturbed by the judiciary. 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. We evaluate only whether it was reasonably debatable that the decision reached would promote the general welfare. Payson City's reliance on the long-term policy preferences embodied in the General Plan satisfies the reasonably debatable standard.

[*P27] Additionally, the Plaintiffs assert that Payson City "almost exclusively relied on public comments" made at the public hearing before the city council as a basis for the denial of their rezoning proposal and argue that citizen opposition alone cannot be the basis for the municipality's action. *See Davis County v. Clearfield City*, 756 P.2d 704, 712 (Utah Ct. App. 1988) (applying substantial evidence test to denial of conditional use permit and holding that citizen opposition alone is an insufficient basis for denial of permit). For example, the [***25] Plaintiffs argue that Payson City relied on citizens' concerns about increased traffic as a basis for the denial of the rezone application, even though no actual evidence of traffic problems was presented other than those public comments.

[*P28] It is beyond question, however, that ^{HN13} public hearings and citizen comments are a legitimate source of information for city council members to consider in making legislative decisions. *See Harmon City*, 2000 UT App 31 at P26, 997 P.2d 321 (noting that "a city may rely on the concerns of interested citizens when performing legislative functions"). In reviewing the city council's decision, we do not apply trial-like "formal rules of procedure or evidence" to evaluate the substance of public comments received by the city council. *Gayland*, 358 P.2d at 635. Rather, we presume that city council members will measure public comments against their own personal knowledge of the various conditions in the city that bear upon zoning decisions. *See id.* at 636. A city council's ultimate decision, of course, reflects legislative preferences that are entitled to a presumption of validity. *Id.*

[*P29] Like the [***26] court of appeals in its decision below, we are satisfied that Payson City's consideration of public comments as a justification for its zoning decision reflects a reasonable judgment that properly took into account citizens' concerns.

The court of appeals cited a number of items in the record to support this conclusion:

Specifically, two businesses in the area expressed concern over the compatibility of higher density residential areas with their businesses and the neighboring industrial zones. One of the businesses submitted a letter detailing why it located in the area. This business stated it was attracted to the area because the "master plan . . . was far sighted enough to separate the industrial area from the residential area by a natural break." The business stated that it operates twenty-four hours a day with "bright dock lights, and large trucks . . . all of which would be a concern for the future residential

area that is proposed." Another businessman in the area testified that because his business was contiguous to the proposed zone change he felt he would be out of business within a year because neighboring residents would not tolerate the noise and smell from his [***27] fruit processing plant.

Bradley, 2001 UT App 9 at P23. Additionally, the court of appeals noted that many residents opposed the zoning change because they wanted to maintain the area for agricultural uses such as keeping [**56] and raising horses, which might be incompatible with high-density residential development. *Id.* 2001 UT App 9 at P26. Each of these concerns is a legitimate ground for denying the Plaintiffs' proposed zoning change. Payson City has the right to deny a zoning change request if it "has a reasonable basis to believe that it will conserve the values of other properties and encourage the most appropriate use thereof." *Smith Inv. Co.*, 958 P.2d at 255.

[*P30] Furthermore, with respect to the Plaintiffs' argument that there was no evidentiary support behind public comments about increased traffic, we simply note that ^{HN14} a city council is not required to receive advice from experts before making a legislative zoning decision. Moreover, we are not persuaded that the comments of the Plaintiffs' planning expert, Jim Wilbert, cast doubt on the reasonability of Payson City's decision. Mr. Wilbert spoke at the public hearing in favor of [***28] the zone change because it would bring affordable housing to the nearby industrial center. However, even assuming that affordable housing is an important addition to the city plan, Mr. Wilbert's comments do not directly refute the concerns raised by local business owners and other residents about the compatibility of high-density residential housing in the industrial and agricultural zones. See *Bradley*, 17 P.3d 1160, 2001 UT App 9, P27. The City Council's decision to give greater weight to Mr. Wilbert's opponents and deny the rezoning simply reflects the exercise of legislative policy preferences that are entirely within its discretion.

[*P31] Finally, the Plaintiffs challenge Payson City's reliance on the Planning Commission's negative recommendation as a basis for the rezone denial. The Plaintiffs contend that the Planning Commission's decision was predicated entirely on neighboring citizens' opposition to the proposed rezone and that reliance on such views was an unreasonable basis for the zoning decision. In light of our holding that it was reasonable for the City Council to rely on public comments in making its decision, we need not also address the reasonability of the [***29] Planning Commission's similar reliance.

IV. THE COURT OF APPEALS DOES NOT HAVE ORIGINAL APPELLATE JURISDICTION OVER CASES ARISING FROM LAND USE

DECISIONS BY LOCAL GOVERNMENTAL ENTITIES

[*P32] Payson City originally appealed the trial court's reversal of the City Council's decision to deny the Plaintiffs' rezone application directly to this court. *Bradley*, 2001 UT App 9 at P8. Pursuant to Rule 44 of the Utah Rules of Appellate Procedure, this court then transferred the appeal to the court of appeals, stating that the appeal was not within our original appellate jurisdiction. *Id.*

[*P33] ^{HN15} Under Utah Code section 78-2a-3, the court of appeals has original jurisdiction to hear appeals from trial court review of "adjudicative proceedings of agencies of political subdivisions of the state or other local agencies." Utah Code Ann. § 78-2a-3(2)(b)(i) (2002) (emphasis added). This provision is designed to establish a body of expertise in the court of appeals for review of such "adjudicative proceedings" under the Utah Administrative Procedures Act. Utah Code Ann. §§ 63-46b-0.5 [***30] to -22 (1997 & Supp. 2001). The Utah Administrative Procedures Act governs "all state agency actions." *Id.* § 63-46b-1(1)(a). An "adjudicative proceeding" is specifically defined as an action by a state agency under the Administrative Procedures Act. *Id.* § 63-46b-2(1)(a). The Act specifically *excludes* from the definition of "agency" "any political subdivision of the state, or any administrative unit of a political subdivision of the state." *Id.* § 63-46b-2(1)(b); *Davis County*, 756 P.2d at 706-07. Critically, the appeal in this case arises not from an "adjudicative proceeding," but rather from a limited judicial review of a local legislative land use decision under Utah Code section 10-9-1001. Thus, it is apparent that ^{HN16} Utah Code section 78-2a-3 does not give the court of appeals original jurisdiction over appeals from district court review of land use decisions by the governing body of a municipality. The governing body of a municipality cannot be an "agency of [a] political subdivision[] of the state" under that section. See Utah Code Ann. § 78-2a-3(2)(b)(i).

[***31] [*P34] [**57] In an attempt to resolve the confusion created by the jurisdictional statutes and our transfer of this appeal, the court of appeals nevertheless determined that "it must have jurisdiction" and stretched the meaning of section 78-2a-3 to accommodate this view. ³ *Bradley*, 2001 UT App 9 at P9. The court noted:

The supreme court, however, seems to have consistently determined that it does not have original appellate jurisdiction over zoning cases under the catch-all provision found in section 78-2-2(3)(j). Accordingly, this court must have jurisdiction. Examining section 78-2a-3, the only provision that could apply is subsection 2(b)(i) which gives this court jurisdiction over "appeals from the district court review of adjudicative proceedings of agencies of political subdivisions of the state or other local agencies" Utah Code Ann. § 78-2a-3(2)(b)(i) (1996). As Payson City's counsel noted, however, this case does not arise from an "adjudicative" proceeding, but rather a legislative proceeding. Nevertheless, in order to effectuate the supreme court's order transferring these appeals to this court, "adjudicative" must [***32] be read broadly to include both administrative and legislative proceedings of state political subdivisions and local governments. Thus, read in conjunction with section 78-2-2, governing the supreme court's jurisdiction, section 78-2a-3(2)(b)(i) confers original appellate jurisdiction to this court over this matter.

Id.

FOOTNOTES

3 While we appreciate the court of appeals' valiant attempt to account for our transfer of this case to that court, we must observe that it overlooked another possible explanation: we incorrectly transferred it to them in the first place.

[*P35] We agree with Payson City that the court of appeals' conclusion on this point is not consistent with a close reading of the statutory language. The jurisdiction of the court of appeals is defined by section 78-2a-3(2). ^{HN17} When interpreting statutes, we look primarily to the statute's plain language. *Hercules Inc. v. Utah State Tax Comm'n*, 877 P.2d 133, 136 (Utah 1994). Furthermore, we will not infer substantive provisions into **[***33]** a statute that are not expressly contained therein. *Cole v. Jordan Sch. Dist.*, 899 P.2d 776, 778. ^{HN18} It is clear that there is no provision within section 78-2a-3(2) that expressly grants the court of appeals original jurisdiction over district court review of land use decisions by local governmental entities. We therefore conclude that this court has original appellate jurisdiction over such cases under Utah Code section 78-2-2(3)(j), which provides that this court has jurisdiction over "orders, judgments, and decrees of any court of record over which the court of appeals does not have original appellate jurisdiction." Utah Code Ann. § 78-2-2(3)(j). ⁴

FOOTNOTES

⁴ The legislature might consider amending section 78-2a-3(2) to give the court of appeals original jurisdiction over municipal zoning decisions. This could be accomplished by amending section 78-2a-3(2), which currently gives the court of appeals original jurisdiction over "adjudicative proceedings of agencies of political subdivisions of the state or other local agencies" to give that court original jurisdiction over "proceedings of political subdivisions of the state or their agencies."

[*34] CONCLUSION**

[*P36] ^{HN19} Municipal land use decisions are presumed valid unless they are arbitrary and capricious. In this case, we reaffirm that whether a particular municipal land use decision is arbitrary and capricious depends upon whether the municipality has acted in a legislative, administrative, or quasi-judicial capacity. Legislative land use decisions are valid so long as they are reasonably debatable. Administrative and quasi-judicial decisions, however, continue to be subject to the substantial evidence test. Under the reasonably debatable standard, Payson City did not act arbitrarily and capriciously when it acted in a legislative capacity to deny the Plaintiffs' application to rezone their property.

[*P37] Additionally, we hold that the court of appeals does not have original jurisdiction to hear challenges to land use decisions by municipal governing bodies, and vacate the decision of the court of appeals.

[*P38] Associate Chief Justice Durrant, Justice Russon, Justice Wilkins, and Judge Baldwin concur in Chief Justice Durham's opinion.

[*P39] Having recused himself, Justice Howe does not participate herein; Second District Judge Parley R. **[***35]** Baldwin sat.

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Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

SECTION 12-200 GENERAL PROVISIONS

12-200-005	Purpose
12-200-010	Amendments
12-200-015	Qualifying Regulations
12-200-020	Sidewalk Impact Fee
12-200-025	Fire Facilities Impact Fee
12-200-030	Building
12-200-035	Streets and Right-of-Ways
12-200-040	Lot Improvements
12-200-045	Fences and Visual Obstructions
12-200-050	Conservation Value
12-200-055	Home Occupation
12-200-060	Animals and Fowl
12-200-065	Non-Conforming Building and Uses

12-200-005 PURPOSE

The general purpose of the Zoning Ordinance of Riverton City is for the promoting of the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of the City, including but not limited to: minimizing of the congestion on the streets and roads, securing safety from fire and other dangers, providing adequate light and air, classifying land uses to distribute development and utilization, protecting the local tax base, securing economy in governmental expenditures, fostering agriculture and other industries and protecting urban and non-urban development.

12-200-010 AMENDMENTS

The zoning map and use restrictions may be amended by the City Council from time to time, *but any amendment shall be first submitted to the Planning Commission for its review and comment.* No proposed amendment affecting the number, shape boundary or zoning classification of any zone shall be adopted unless the proposed zoning ordinance amendment complies with the following criteria:

1. The proposed amendment will place all property similarly situated into the same zoning classification or in complementary classification.
2. That all uses permitted under the proposed zoning amendment are in the general public interest and not merely in the interest of an individual or small group.

3. All uses permitted under the proposed zoning classifications amendment will be appropriate in the area to be included in the proposed zoning amendment.
4. The character of the neighborhood will not be adversely affected by any use permitted in the proposed zoning classifications.
5. The proposed zoning amendment is consistent with the City's Master Plan.

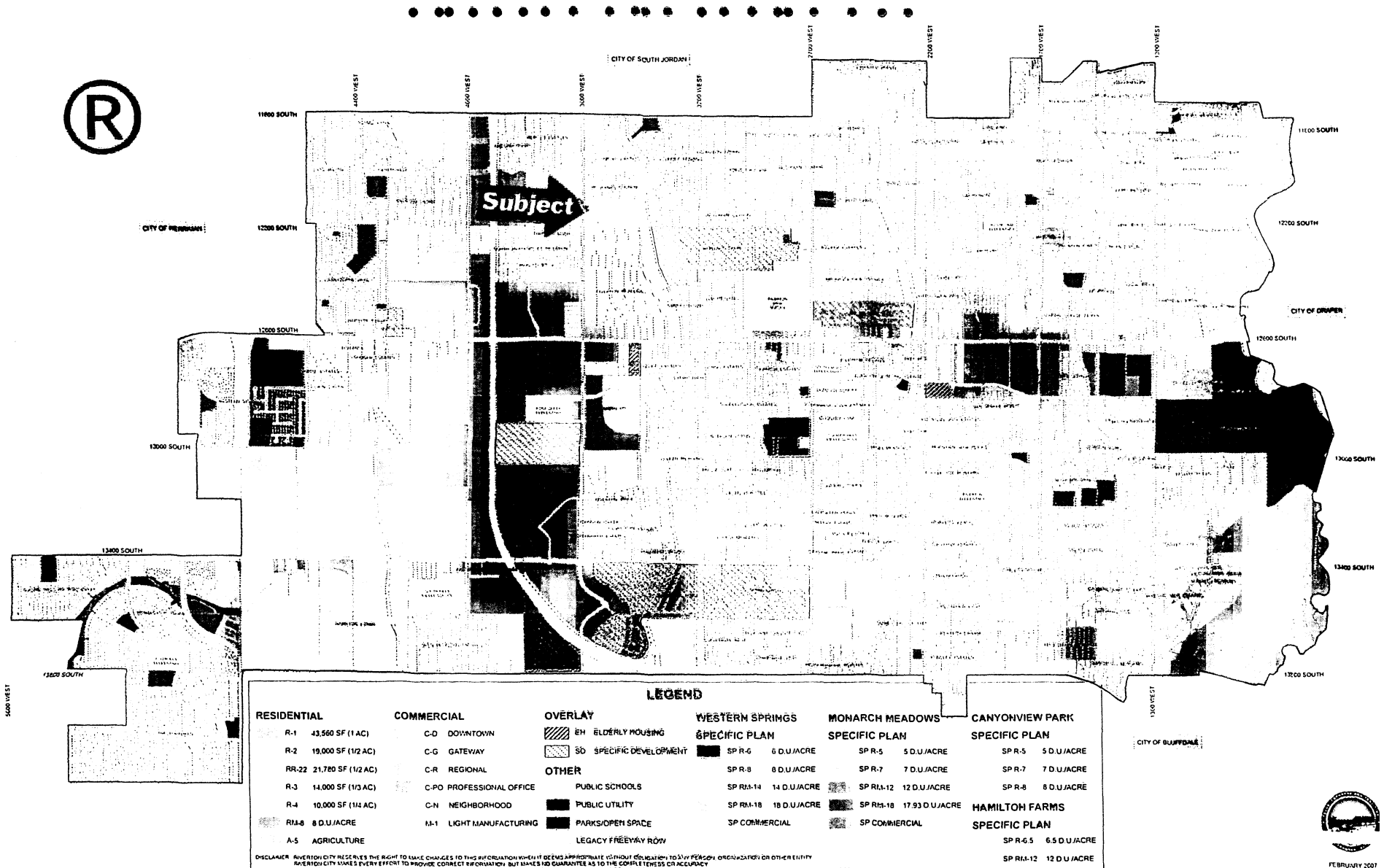
Before adopting any amendment to the zoning Ordinance the City Council shall hold a public hearing. Notice of the time and place of the hearing shall be given by at least one (1) publication in a newspaper of general circulation in the City, at least fifteen days before the hearing. The cost of publication shall be paid by the applicant for the zoning change.

On any property requested for rezoning, (except for rezoning initiated by the City to implement general planning objectives) the applicant shall be required to post the property in question with a Notification of Rezoning which states the zone classification being requested and the time and place of Public Hearing. The signs shall be obtained from the City and be posted at 500-foot intervals around the property and on all corners at least fifteen (15) days prior to the public hearing. All adjacent property owners and all owners within one-thousand (1,000) feet shall be notified (15) days prior to the date of the hearing. Mailed notification shall comply with requirements set forth by the City. Cost and responsibility of such posting and notification shall be borne by the applicant.

12-200-015 Supplementary and Qualifying Regulations

- A. Lots in Separate Ownership – Reduced Yards. The requirements of this Chapter as to minimum lot area or lot width shall not prevent the use for a single-family dwelling on any lot or parcel of land in the event that the lot or parcel of land was held in separate ownership at the time such parcel become non-conforming as to area or width.
- B. Area of Lots Including a Public Right-of-Way. Lots created prior to the adoption of local zoning regulations, having a public right-of-way included in the parcel

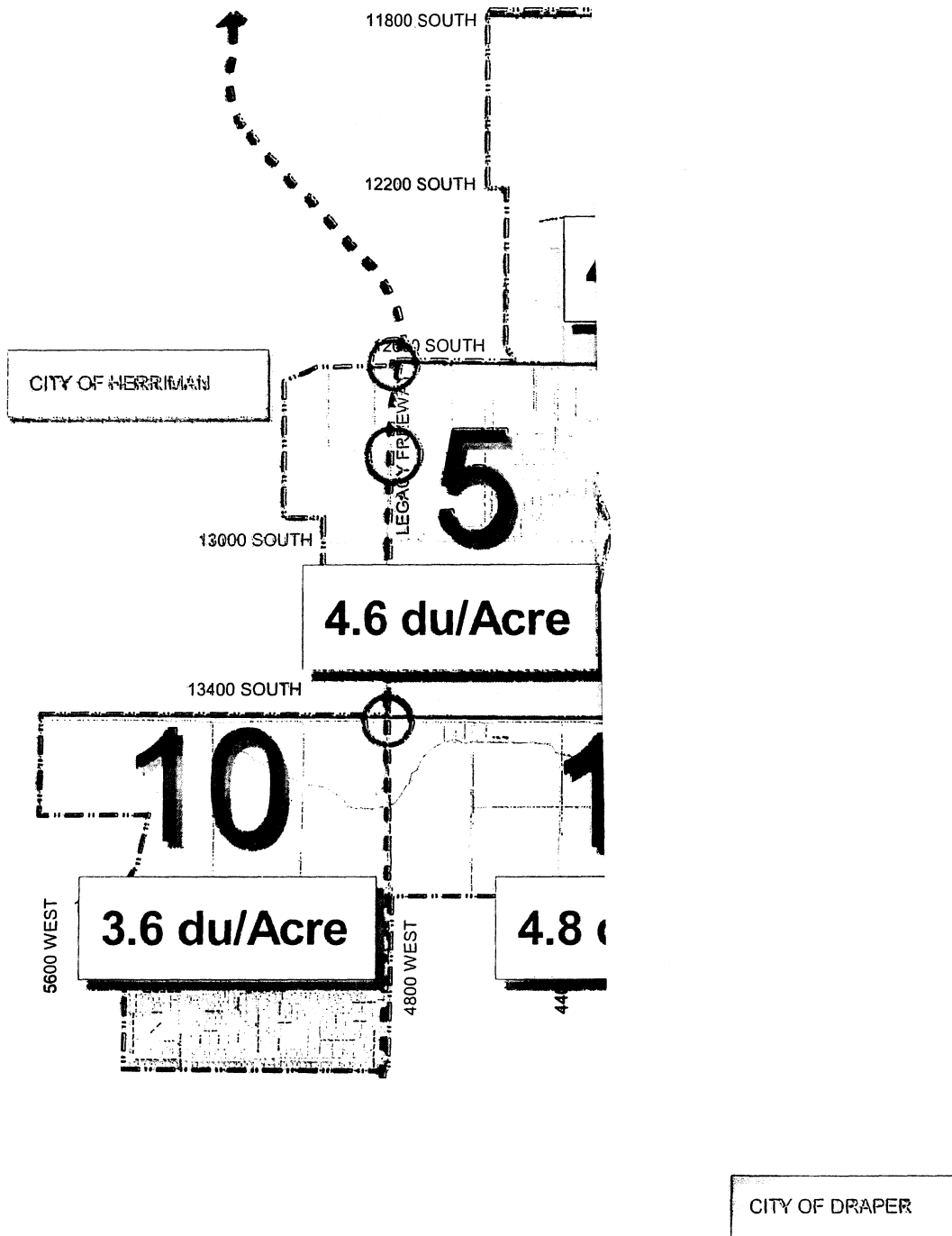
Exhibit B



GENERAL PLAN

FIGURE 2-2

PLANNING SUBAREAS



SOURCE: CITY OF RIVERTON, JULY 2000.
BRW, INC, JANUARY 2001.

RIVERTON CITY GENERAL PLAN

ADOPTED LAND USE ELEMENT



ESTATE DENSITY RESIDENTIAL
MIN 21,780 SF

LOW DENSITY RESIDENTIAL
MIN 14,000 SF

MEDIUM DENSITY RESIDENTIAL
MIN 10,000 SF

MEDIUM HIGH DENSITY RESIDENTIAL
MIN 5 - 8 DU/ACRE

HIGH DENSITY RESIDENTIAL
MIN 8 - 12 DU/ACRE

MIXED USE

COMMUNITY COMMERCIAL

REGIONAL COMMERCIAL

PROFESSIONAL OFFICE

BUSINESS PARK

LIGHT MANUFACTURING

PUBLIC/INSTITUTIONAL

OPEN SPACE/CEMETERY

PRESERVATION AREAS

Exhibit C

COPY OF TRANSCRIPT

BEFORE THE RIVERTON CITY PLANNING COMMISSION

IN THE MATTER OF:)	
)	
07-4009 D.R. HORTON EAST)	TRANSCRIPT OF
REZONE)	PROCEEDINGS
)	
Property located at 12175)	
South 3600 West from RR-22)	
to R-3)	
)	

June 14, 2007 * 7:00 p.m.

Location: Riverton City Civic Center
12830 South 1700 West
Riverton, Utah

Reporter: Kelly Fine-Jensen, RPR
Notary Public in and for the State of Utah



CITICOURT

THE REPORTING GROUP

170 South Main Street, Suite 300
Salt Lake City, Utah 84101

PH: 801.532.3441 FAX: 801.532.3414 TOLL FREE: 877.532.3441

A P P E A R A N C E S

FOR THE COMMISSION:

Larry Brown - Chair
James Allfrey
James Denney
Dennis Hansen
Langford Lloyd

FOR THE APPLICANT:

Micah Peters, D.R. Horton, Inc.

ALSO PRESENT:

City Attorney Carter
City Planner Aargard
City Planner Prestwich
City Engineer Miner
Deputy City Recorder Cutler

PUBLIC SPEAKERS:

Robert Luke
Jeff Howell
Kelly Lamhart
Lauri (Ivey) Snyder

- oOo -

P R O C E E D I N G S

COMMISSION CHAIR BROWN: Okay. Let's move onto our next item, which is another rezone, 07-4009.

And Andy --

PLANNER AAGARD: It might be appropriate to give it a few minutes.

COMMISSION CHAIR BROWN: Okay. Folks, if you would take your conversations out in the hall so we can continue our meeting.

Thank you.

Give us just a minute folks while these people get out of the room and we'll get on with our business.

Okay. Let's go ahead and we'll continue our meeting.

Sir, would you please take your seat.

Okay. Could we please have the staff report.

Hey, guys, please, we're trying to conduct our meeting.

Thank you.

PLANNER AAGARD: Okay. This is an application to rezone 20.84 acres of property located at 12175 South 3600 West. Currently zoned RR-22.

1 The Applicant is requesting to rezone to R-3.

2 Again, this application has been initiated
3 by D.R. Horton and not by Riverton City. But we are
4 facilitating this application for them.

5 The subject property is bounded on the
6 north by property that is zoned RR-22, with half-acre
7 lots.

8 The property to the south is zoned R-1.

9 The property to the east is zoned RR-22.

10 And to the west, the property is zoned R-3
11 and R-2.

12 The purpose of both zones are single
13 family residential uses. The main difference between
14 the two zones are as follows:

15 The RR-22 and R-1 zone allow large animals
16 as a permitted use. The R-3 zone does not.

17 The lot sizes of the RR-22 and R-1 zones
18 are one and one-half acre. And the R-3 zone allows a
19 minimum of 14,000 or a third-acre lot.

20 Riverton City ordinances do have buffering
21 measures where property zoned for animals are
22 adjacent to property not zoned for animals. If the
23 rezoned R-3 is approved by the Planning Commission
24 and the City Council, those measures will be dealt
25 with as part of the subdivision approval.

1 This application is to discuss only the
2 appropriateness of the property being zoned R-3
3 verses RR-22.

4 This is an image of the City's General
5 Plan. Riverton City -- or the rezone request does
6 comply with the City's General Plan. The General
7 Plan designation for this property is low density
8 residential, which requires a density per lot sizes
9 of 14,000 square foot lots.

10 There is a separate issue regarding the
11 eastern end of the subject property. Riverton City
12 has been working to acquire property in that location
13 for a storm water management facility from the
14 property owner, and recently the Applicant. Property
15 acquisition and price negotiations are not the
16 responsibility of the Planning Commission to consider
17 and therefore should not be relevant to this zoning
18 request.

19 The property does have sufficient access
20 to accommodate development under the R-3 zone. There
21 is access to Janice Drive on the north and on the
22 south of the subject property. As well as access to
23 3600 West.

24 Because the rezone request of the R-3 zone
25 does comply with the City's General Plan and

1 sufficient buffering measures exist under City
2 ordinances, the staff is recommending approval of the
3 request to rezone to R-3.

4 COMMISSION CHAIR BROWN: Thank you, Andy.

5 Is there any questions from the Commission
6 for the staff?

7 UNIDENTIFIED MALE: Andy, do you by any
8 chance have a more aerial view of this, a larger
9 cross section of this area?

10 PLANNER AAGARD: I don't.

11 UNIDENTIFIED MALE: All right. Thank you.

12 PLANNER AAGARD: There is an image that
13 again the Applicant has asked that I present to the
14 Planning Commission that does show the proposed
15 layout of this area if they were to subdivide with
16 R-3.

17 COMMISSION CHAIR BROWN: All right. Would
18 the Applicant like to come up and propose his rezone?

19 MR. PETERS: Not much to say. Pretty
20 straight R-3.

21 COMMISSION CHAIR BROWN: Thank you.

22 UNIDENTIFIED MALE: So Andy, in this case,
23 is "C" the storm water management facility that's
24 being bought or --

25 PLANNER AAGARD: Yeah. That's an area

1 that is being negotiated for that purpose.

2 UNIDENTIFIED MALE: What are "B" and "A"?

3 PLANNER AAGARD: I believe they'll be part
4 of it. I'm not sure why they --

5 UNIDENTIFIED MALE: Part of the storm
6 water management facility?

7 PLANNER AARGARD: Correction. They're
8 lots.

9 UNIDENTIFIED MALE: Okay. They're just
10 good lots because they're alphabetical.

11 COMMISSION CHAIR BROWN: Okay. Same rules
12 apply.

13 We'll go ahead and open the public
14 hearing.

15 Give us your name as you come up.

16 Is there anyone who would like to address
17 this issue?

18 MR. LUKE: Robert Luke. 3465 Jamison
19 Avenue.

20 I'm going to plead a little ignorance
21 here.

22 The difference between R-22 and R-3 is
23 purely animals? Or what's the difference?

24 COMMISSION CHAIR BROWN: Animals and lot
25 size.

1 MR. LUKE: Animals and lot size.

2 If R-3, which is no animals, goes in and
3 people start complaining about people to the north or
4 south having animals, will that ever effect our
5 animal rights?

6 You know, for like people moving next to a
7 gun range or something, you have to shut down the gun
8 range.

9 COMMISSION CHAIR BROWN: Not unless it's
10 rezoned.

11 PLANNER AAGARD: And I would even add to
12 that.

13 That even if it is rezoned and people have
14 been using their -- exercising their animal rights on
15 their property, they would have what's called a legal
16 non-conforming use right to the property. That means
17 if you change the zoning, but you've been keeping
18 horses on your land that entire time, you can go
19 right on keeping those horses on your land,
20 regardless of how the rezone occurs. The more common
21 term for that is you're "grandfathered" in. And you
22 would continue to be able to have that right to keep
23 animals on that land so long as you continuously do
24 so and don't abandon that use for a period of time.
25 Usually it's a year.

1 COMMISSION CHAIR BROWN: What he's talking
2 about is people who are actually on R-22s, not the
3 rezone area.

4 PLANNER AAGARD: Right. I understand
5 that.

6 So as I understand the Applicant's
7 question is, would the people who do have animal use
8 rights run in danger of losing them pursuant to
9 foreseen complaints brought by people who are
10 neighbors to there, who don't have animals rights.
11 And the shortest reply is only if a rezone occurs.

12 And I would just add to that that even if
13 a rezone occurs that takes away the animal use rights
14 on paper, you still have the right to use that land
15 as legal non-conforming use right. If you can
16 continually use it that way.

17 MR. LUKE: Hypothetically, let's say all
18 these homes get built this year, January 1, they
19 start complaining, you all take up a rezoning effort
20 and you change the zoning, when will we have had to
21 have had a horse there? How far back do we have to
22 go? Five years?

3 PLANNER AAGARD: Well, no. No. No. As
4 long as there is a horse there the day that the
5 rezone occurs, then you have a legal right.

1 MR. LUKE: Okay. So go out and get a
2 horse then.

3 PLANNER AAGARD: And I would also say -- I
4 would also add that it's highly unusual. And in
5 fact, in ten years of doing this, I've never seen an
6 instance where a property's animal use rights has
7 been taken away as a result of complaints levied by
8 late-coming neighbors. Never seen that happen.

9 World changes, but never seen that happen.
10 Anyway.

11 MR. HOWELL: My name is Jeff Howell. I
12 live at 12213 Janice Drive, right next to Lot A,
13 which is special there.

14 But I heard in your explanation that you
15 said there would be some kind of buffer between
16 one-acre lots and the smaller lots.

17 What do you mean by that?

18 COMMISSION CHAIR BROWN: Well, if the R-3
19 zone is approved, the City does have ordinances that
20 would require a certain type of fencing able to
21 withstand impacts from animals, that it would be
22 installed as part of the subdivision. So that is one
23 buffering measure the ordinance does provide for this
24 situation.

25 MR. HOWELL: So that's all there is to

1 that buffering, you just have to have a --

2 COMMISSION CHAIR BROWN: Exactly.

3 MR. HOWELL: Like a masonry wall or a
4 steel wall?

5 COMMISSION CHAIR BROWN: No. It doesn't
6 even have to be a masonry wall.

7 And would you please address your
8 questions to the Council, not to the staff.

9 Thank you.

10 MR. HOWELL: Thank you. I was just asking
11 him a question.

12 COMMISSION CHAIR BROWN: Buffering is a
13 six-foot fence. And it could be a vinyl fence. It
14 does not have to be a masonry fence.

15 Just so everybody knows up front. It's
16 got to be a solid fence.

17 MR. HOWELL: Okay. There is also an
18 irrigation ditch right on that line. What would
19 happen with that?

20 COMMISSION CHAIR BROWN: What's that?

21 MR. HOWELL: An irrigation ditch all the
22 way down that line, what would happen about that?

23 COMMISSION CHAIR BROWN: It either has to
24 be piped or kept in use or moved so you still have
25 access, the people who have rights to it, have access

1 to it.

2 MR. HOWELL: I don't have access I have
3 access to a different ditch, not that particular one.
4 But that's, like, right under my fence.

5 So are they just going to terminate it
6 upstream somewhere and take it somewhere else?

7 COMMISSION CHAIR BROWN: They possibly
8 could, but it has to be, like I say, either piped or
9 rerouted so it can still be used. But the people
10 still have to have the right to use the irrigation
11 out of that ditch.

12 MR. HOWELL: I have one more question.

13 If they develop it as it's shown up there,
14 are you going to put any restrictions on where they
15 have construction access? Or can you put any
16 restrictions on where they have construction access?

17 COMMISSION CHAIR BROWN: That would go
18 through the Engineering Department of the City.

19 MR. HOWELL: They could come in off of
20 3600 and not disrupt all the other neighborhoods. It
21 would be a great concern for me if they start shoving
22 all the construction traffic down Janice Drive, which
23 is now a dead end.

24 PLANNER AAGARD: Right.

25 MR. HOWELL: Bringing all that through

1 there.

2 COMMISSION CHAIR BROWN: Any more
3 questions?

4 MR. HOWELL: No.

5 COMMISSION CHAIR BROWN: Okay. Thank you.
6 Is there anyone else who would like to
7 address this issue?

8 MR. LAMHART: I live at 12082 South
9 Kenmore, which I have three-quarters of an acre right
10 there --

11 COMMISSION CHAIR BROWN: Would you state
12 your name, please.

13 MR. LAMHART: My name is Kelly Lamhart.
14 And I would like to see them leave it
15 zoned what it is only because all they're trying to
16 do is get more houses and less property. That isn't
17 what we moved out here for. That isn't what the
18 people in Riverton want is just to keep condensing,
19 keep condensing, so they can make more money on the
20 property.

1 We came out here to have horse property.
2 I think we need to stay that way. We need to stay
3 where we have less people, more land and use it for
4 what we moved out here for.

5 Thank you.

1 MS. SNYDER: Hi. My name is Ivey Snyder
2 I live at 12066 South Kenmore Circle.

3 My concern here, again, is the traffic.
4 You've got a number of main accesses onto 3600 West.
5 And right now it's two-way traffic. Two lane. I'd
6 like to see a traffic study done before any building
7 goes on.

8 Thank you.

9 COMMISSION CHAIR BROWN: Thank you.

10 Anyone else who would like to address this
11 issue?

12 (No verbal response.)

13 COMMISSION CHAIR BROWN: Okay. If not,
14 we'll go ahead and close the public hearing and bring
15 it back to the Commission.

16 COMMISSIONER LLOYD: Andy, I had one
17 question.

18 The reason we can recommend or the reason
19 the staff is recommending that this conforms for
20 third-acre downzoning, even though it's surrounded
21 mainly by half-acre zoning and larger, is because it
22 conforms to the General Plan that says medium density
23 can be third or half-acre; is that correct?

4 PLANNER AAGARD: Yes. That's one of the
5 reasons we -- we're recommending approval. And also

1 because of the fencing requirements that help to
2 buffer animal rights properties versus non-animal
3 rights properties.

4 COMMISSIONER ALLFREY: The question was
5 just brought up about a traffic study by the last
6 person here.

7 Can we get some information on traffic
8 studies that have been done in the area? Obviously
9 we're dealing with 118th South, 3600 West,
10 development on the South Jordan side being very
11 heavy, and also proposed subdivisions here. All told
12 here, we're probably talking 200 roof tops.

13 PLANNER AAGARD: Well, that's one the
14 Planning Department would have to defer to the
15 Engineering Department on.

16 ENGINEER MINER: The request was for
17 engineering information. There hasn't been a traffic
18 impact study done. So I can't speak to that.

19 COMMISSIONER ALLFREY: None in the area
20 completely around 36th and 118th?

21 ENGINEER MINER: Well, there was a traffic
22 impact study done for another item on the agenda
23 here, but it didn't address -- it didn't address this
24 property.

25 COMMISSIONER ALLFREY: The Street Master

1 Plan, which shows 3600 West via an arterial street
2 certainly took into account that the rest of the
3 properties would be feeding it?

4 ENGINEER MINER: Agreed.

5 COMMISSIONER ALLFREY: Assuming that those
6 took into consideration the arterial road, the one
7 that was done on 118th South, the other item on the
8 agenda, did that --

9 ENGINEER MINER: I'm sorry. State that
10 again, please.

11 COMMISSIONER ALLFREY: Okay. You
12 mentioned that you did a traffic study for another
13 item on the agenda for 118th and 3600 West?

14 ENGINEER MINER: Yes.

15 COMMISSIONER ALLFREY: Okay. At the time
16 that you did that study, would you have not assumed
17 that based on the plan currently under place in the
18 General Plan, that those houses would be filled in or
19 those areas would be filled in with residential
20 areas? Or would you base it on just the current
21 population?

22 ENGINEER MINER: No. The study -- the
23 purpose of the study was for the particular applicant
24 to assess their impacts and their impacts alone. You
25 know, the item that we're talking about is Item E,

1 the St. Andrew Private School. And so that traffic
2 impact study, their responsibility was to demonstrate
3 the impacts from their application.

4 COMMISSIONER ALLFREY: Thank you.

5 CITY ATTORNEY CARTER: Recently the
6 Planning Commission received copies of the Master
7 Transportation Plan because it was incorporated as an
8 element to the General Plan. And it shows the
9 roadway west for 3600 West to accommodate future
10 growth in this area. And those estimates for the
11 proper roadway width is based upon the notion that
12 this will be built out in the future and operating at
13 capacity. And the way in which they figured out how
14 many people will be on there will be based upon
15 density calculations following the General Plan
16 guidelines.

17 And so based upon that, the conclusion is
18 that the 3600 West width calculation that's
19 recommended in the Master Transportation Plan is at a
20 certain width. And I think this is an arterial
1 street as you mentioned.

2 And I also understand, although I could be
3 corrected on this, but the net effect is that the
4 developer would be required to dedicate along 3600
5 West to accommodate the roadway width in that area

1 because it will need to be widened insofar as that
2 stretch is concerned.

3 That's basically how that's handled.

4 And I'm not sure exactly how much of 3600
5 West has been widened through the rest of that area.
6 But that would probably address the immediate
7 concerns to accommodate roadway width in that area to
8 the extent they can, the developer can.

9 An added traffic study might take a look
10 at how much increase impact there would be on the
11 surrounding intersections to see if additional
12 traffic signals would be warranted as traffic empties
13 onto 3600 West from the subdivision. Something like
14 that could still be explored at the time that a
15 subdivision application were to come forward.

16 COMMISSION CHAIR BROWN: Okay. Thank you.

17 Okay. If there are no more questions, do
18 I have a motion?

19 COMMISSIONER ALLFREY: I have one more
20 question actually.

1 COMMISSIONER LLOYD: I have one more
2 question, too.

3 COMMISSION CHAIR BROWN: Go ahead. You
4 were up first.

5 COMMISSIONER LLOYD: Ryan, I just heard

1 that attorney answer. And my question is this, what
2 does the ordinance say when a new 20 acres of
3 property are developed, what requirement does a
4 developer have to see what type of a traffic impact
5 that development will place on the community legally?

6 MR. RYAN: Well, first of all, they're
7 supposed to develop in a manner that doesn't
8 interfere with the Master Transportation Plan. Okay.
9 So in this case, that would mean just taking a look
10 at the frontages of the roadway in relation to 3600
11 West. It would mean that they could not develop in a
12 manner that interferes with the future roadway width
13 projections for 3600 West. That's the first rule.
14 That's the most basic. And in a rezone, that's where
15 it's most relevant.

16 But most of the applications of how to
17 incorporate traffic and things like that come into
18 play at the time of subdivision. And the subdivision
19 standards are not immediately specific. What they do
20 require is that you don't -- the subdivision
21 standards do not create an unreasonable burden on the
22 area for traffic. And if there is an unreasonable
23 burden on the surrounding area for traffic, according
24 to the City Engineer's Standards and Guidelines, then
25 they have to put in reasonable traffic control

1 devices to mitigate that flow.

2 So in this case -- and this is not the
3 most complicated application here -- so I would say
4 in this case, those parameters would be something
5 along the lines of, should we require at the
6 intersection of 3600 West and kind of on the west
7 corner there, there would probably be a requirement
8 of a four-way intersection there. And based upon the
9 traffic flow that might be coming in and out of that
10 area, they might take a look at requiring some sort
11 of a traffic light, a four-way traffic light.

12 And that would be there just to regulate
13 how much flow comes onto 3600 West at any given
14 moment from that subdivision.

15 COMMISSIONER LLOYD: I see. So it's
16 typically up to the City staffs' professionalism and
17 experience to determine whether an applicant be
18 required to do a traffic study or not.

19 MR. RYAN: Yeah. If they -- if they --

20 COMMISSIONER LLOYD: Like Item E has been
21 required obviously. That's why we've got a traffic
22 study for the Catholic school. But we don't have one
23 for D.R. Horton on the subdivision.

24 MR. RYAN: Well, let's remember one thing
25 here, this is -- we're doing a rezone here. Right?

1 We're doing a rezone here. So there is still plenty
2 of time to require a traffic study for this
3 application.

4 COMMISSIONER LLOYD: Very good.

5 MR. RYAN: And that would probably come in
6 by way of a subdivision application at a later date.

7 A planner will take a look at these things
8 and they can intuitively gauge that a traffic study
9 will be appropriate sometimes, not in other times.
10 But there are nationwide standards, there are uniform
11 standards in place that talk about, you know, traffic
12 signal congestion and things of that affect that once
13 a certain amount of flow in the nearest vicinity
14 traffic signal is breached based upon those
15 standards, then they have to start taking a look at
16 putting in traffic signals in other area. And that's
17 where your traffic studies come in. They take a look
18 at how many cars are going to be at the nearest
19 intersection at peak traffic times. And once it
20 reaches too high of a number, they'll say, "Yep. We
21 need another traffic signal away from this area to
22 alleviate congestion in this area and slow the flow
23 going to it."

24 And that's how those things work. But --

25 COMMISSIONER LLOYD: Great. Thank you.

1 That's fine.

2 COMMISSIONER ALLFREY: Okay. My final
3 question was regarding the borders here, the two
4 properties north and south of the -- the two
5 subdivisions north and south having animal rights. I
6 think we heard from each of the neighbors that
7 testified that animal rights seemed to be an issue
8 And I think, you know, we've had this issue come
9 before us a number of times with animal rights and
10 this issue of putting them maybe in -- you know,
11 changing it from the RR-22, which permits it, to an
12 R-3, that doesn't.

13 Do we get any kind of account -- could we
14 rely on any data that would help us determine just
15 how many of these adjacent properties actually are
6 using their animal rights? Is there anything there?

7 Because it's a pretty big impact if we
8 turn it from R-22 to R-3 if everybody around it has
9 animals. I think that's a big issue.

0 CITY ATTORNEY CARTER: I can appreciate
1 the approach that you're trying to take in looking at
2 that issue. But I think that where everybody that is
3 in an RR-zoned area has animal rights, you have to
operate on the assumption that there are going to be
animals there. I mean, we just have to operate on

1 that assumption. Otherwise, you know, we'll be -- it
2 could be that a decision you make is based on the
3 idea of, well, gee, there aren't that many horses out
4 there to begin with; therefore, there is not much of
5 an impact; therefore, we'll go ahead and allow this
6 zoning to go through. Well, that's true today, but
7 it might not be true in three months or even less
8 time.

9 So we have to just operate on the
10 assumption of what are the permitted use rights for
11 these properties and plan according to what's there,
12 what they have the right to do, not what they're
13 actually doing.

14 COMMISSIONER ALLFREY: Okay. Thanks.

15 COMMISSION CHAIR BROWN: Thank you.

16 COMMISSIONER HANSEN: Mr. Chairman, I'm
17 ready to make a motion.

18 COMMISSION CHAIR BROWN: Thank you.

19 COMMISSIONER HANSEN: I make a motion that
20 we deny PL 07-4009 to rezone the third-acre lots.

21 My personal opinion is that would be spot
22 zoning. It's in the middle of R-22 and R-1. So I
23 don't think it needs to be there.

24 COMMISSIONER LLOYD: I second.

25 COMMISSION CHAIR BROWN: Okay. We have a

1 motion.

2 Do I have a second?

3 COMMISSIONER LLOYD: Second.

4 COMMISSION CHAIR BROWN: Mr. Lloyd
5 seconds.

6 All those in favor?

7 COMMISSIONER ALLFREY: Aye.

8 COMMISSIONER BROWN: Aye.

9 COMMISSIONER HANSEN: Aye.

10 COMMISSIONER LLOYD: Aye.

11 COMMISSION CHAIR BROWN: Any opposed?

12 COMMISSIONER DENNEY: Aye.

13 COMMISSION CHAIR BROWN: Okay. Motion
14 carries four-to-one.

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REPORTER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

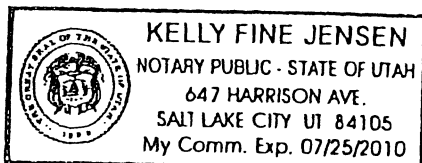
I, Kelly Fine-Jensen, Registered
Professional Reporter and Notary Public in and for
the State of Utah, do hereby certify:

That on November 10, 2007, I transcribed a
CD at the request of Riverton City;

That the testimony of all speakers was
reported by me in stenotype and thereafter
transcribed, and that a full, true, and correct
transcription of said testimony is set forth in the
preceding pages, according to my ability to hear and
understand the tape provided.

I further certify that I am not kin or
otherwise associated with any of the parties to said
cause of action and that I am not interested in the
outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this
13th day of November, 2007.



Kelly Fine-Jensen
KELLY FINE-JENSEN, RPR
Notary Public
Residing in Salt Lake County

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Exhibit D

ORIGINAL TRANSCRIPT

BEFORE THE RIVERTON CITY COUNCIL

PUBLIC HEARING: PROPOSED)	
ORDINANCE TO REZONE)	TRANSCRIPT OF
PROPERTY LOCATED AT 12175)	PROCEEDINGS
SOUTH 3600 WEST FROM RR-22)	
TO R-3)	
)	
ORDINANCE: REZONE PROPERTY)	
LOCATED AT 12175 SOUTH 3600)	
WEST FROM RR-22 TO R-3)	

July 10, 2007

Location: Riverton City Civic Center
12830 South 1700 West
Riverton, Utah

Reporter: Kelly Fine-Jensen, RPR
Notary Public in and for the State of Utah



CITICOURT

THE REPORTING GROUP

170 South Main Street, Suite 300
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P R O C E E D I N G S

THE MAYOR: Okay. We'll now move to the rezone.

And, Jason, is the presenter for staff.

MR. LETHBRIDGE: Well, this is phenomenally bad timing, but I think due to the fact that our airconditioning is chugging away, we appear to have blown a circuit somewhere. So it does not look like the projector is going to be cooperating for the next several minutes.

And -- are your screens --

THE MAYOR: Our screens are gone. Here it is. I mean, the power light is out on this. Well, it flickered there.

There. Now we're back on.

MR. LETHBRIDGE: Your screens are on?

THE MAYOR: Yeah. Yeah.

MR. LETHBRIDGE: Yeah. It's a little bit warm in here. We'll see --

THE MAYOR: Might have blown a bulb or something.

MR. LETHBRIDGE: Yeah. I'll go ahead and just go very briefly through the presentation. And then while the comments are being made, I'll see if I

1 can get the projector back up. I apologize.

2 This first item -- and let me just point
3 out, in case there is any confusion, there are two
4 rezones that are being proposed by D.R. Horton. One
5 on the east side of 3600 West and the other on the
6 west side.

7 This first item is for the property on the
8 east side of 3600 West. It's located at about 12175
9 South 3600 West. And the property -- and without the
10 presentation material, I'll try to describe a little
11 bit better -- is -- has frontage on 3600 West and
12 sits a little bit south of what is Jamison Drive and
13 the cul-de-sacs that come off of that pretty. And it
14 goes from 3600 West back east to the -- or east to
15 the canal.

6 The property is currently zoned RR-22,
7 which is a residential zoning designation. Single
8 family lots, with a minimum lot requirement of
9 one-half acre.

10 And the property does carry large animal
rights.

The property to the north is zoned RR-22.

The property to the south is zoned what we
call R-1, which is single family residential, with
one-acre lot minimum lot sizes.

1 To the east, across the canal, it is zoned
2 RR-22.

3 To the west, across 3600 West, is
4 predominantly R-3, which is third-acre, single family
5 zoning.

6 The General Plan designation for the
7 property is low density residential, which does
8 contemplate a minimum lot size of one-third acre
9 lots. Meaning a third of an acre is as small as the
10 General Plan designated for this property and for
11 this area.

12 The requested rezone is to R-3, which
13 again would change the property from a one-half acre
14 minimum lot size to a one-third acre minimum lot
15 size.

16 The Applicant submitted -- and again, this
17 is showing on the Council screen, and hopefully we
18 can get it back up here in a sec -- a proposed lot
19 layout for the property. This is submitted by them
20 just for conceptual purposes. All that we are
21 bringing before the Council tonight is a zone change.
2 So what they have shown in terms of a conceptual
3 layout for the property is not being approved
4 tonight. It's simply showing that -- how they would
5 propose to divide up the property into third-acre

1 lots.

2 There is a portion of this property in the
3 northeast corner, and it's the larger parcel shown on
4 your drawing there, that the City has been pursuing
5 since prior to the rezone request for a regional
6 storm drainage facility. And so while it is
7 certainly part of the overall picture, we have been
8 pursuing that acquisition since prior to this request
9 for a rezone.

10 So we are looking at a portion of this
11 property as a regional storm drainage facility that
12 would include property outside of just this area.

13 The Planning Commission, in their review
14 of this rezone request, recommended denial of the
15 request submitted by D.R. Horton. Essentially the
16 Planning Commission recommended that the property
17 remain at its RR-22 designation.

18 THE MAYOR: Okay. Now are there any
19 questions from Council to staff?

20 (No verbal response.)

21 THE MAYOR: Okay. Then we're looking for
22 a motion to open a public hearing.

23 COUNCIL MEMBER MARKUS: So moved.

24 THE MAYOR: Okay. Motion made by Brad.

25 COUNCIL MEMBER BRINKERHOFF: I'll second

1 the motion.

2 THE MAYOR: Seconded by Gayla.

3 Any discussion of the motion?

4 (No verbal response.)

5 THE MAYOR: All in favor of the motion,
6 say, "Aye."

7 (Chorus of "Ayes.")

8 THE MAYOR: Any opposed?

9 (No verbal response.)

10 THE MAYOR: So that was unanimous.

11 Okay. Now we're just going to -- we're
12 going to take this in segments. So this is the area
13 where we're talking about currently half-acre lots.
14 This is on the east side of 3600.

15 Is that not correct, Jason, this is on the
16 east side of 3600?

17 MR. LETHBRIDGE: That's correct. And the
18 slides will be up in just a sec.

19 THE MAYOR: Yeah. So that's the one we're
20 dealing with.

21 So if you would like to make a comment on
22 that, if you would come forth and just give us your
23 address -- or pardon me, your name. And then if you
24 would -- we will give you two minutes.

25 And if someone before you has made your

1 point, you may want to just let that stand. Because
2 the Council is interested in information that will
3 help them and not the number of comments on the same
4 point in that regard.

5 And I would say this to you, I'm not
6 trying to set this up one way or the other, but it is
7 the developer that comes in for the rezone. It is
8 not the City who is presenting this. They are
9 presenting it, but it's the developer's idea for the
10 rezone. So the Council comes trying to gather
11 information. So that's where the public comment is
12 so valuable.

13 So if there is anybody that would like to
14 come forth, and I'm sure there will be, would you
15 come up to the mic. Just give your name and then
16 share any feelings that you have.

7 Okay. Can't be shy in this group. We'll
8 move it right along.

9 MS. HESS: Giving everybody their chance.

0 My name is Brenda Hess. And I live on
1 Jamison. So I'm just north of the proposed property.

2 We've been there for about 12 years. And
3 when we first moved in, you know, we had fields
around us. It was nice and quiet. It's no longer
nice and quiet.

1 The property to the north of us was
2 changed to R-3, which increased the volume down our
3 street. And I know that if we do it to the south of
4 us, it's going to increase it even more because
5 Janice Drive will go through and we will still have
6 that increased traffic in the subdivision.

7 The Planning Commission listened to our
8 neighborhood when we came for their meeting and I'm
9 hoping that you'll do the same, to deny it.

10 Thanks.

11 THE MAYOR: Thank you.

12 Anyone else like to make a comment?

13 MR. BALLFREY: I'm Jim Ballfrey. I live
14 on Winding Creek Cove, which is part of the Midas
15 Creek development. I've been there for seven years.

16 It's about the fifth time I've been to a
17 City Council because of the rezoning. And the main
18 reason I moved out to this area was because of the
19 bigger lots. I don't want to get this changed. I'd
20 rather leave it the R-22. I don't want the more
 traffic.

 And another thing you didn't mention. Is
 Janice going to connect all the way through
 eventually on this project? If so, that's going to
 be another problem.

1 MR. LETHBRIDGE: Yeah. Ultimately,
2 regardless of the density of the property, there will
3 be a road connection on Janice Drive.

4 MR. BALLFREY: Yeah. That's going to
5 cause more traffic on Janice, which I've got to go in
6 to get to Winding Creek, which is more traffic. And
7 I don't --

8 THE MAYOR: Let me deal with that issue,
9 if I can just a moment.

10 I -- that worries me a lot. It worries me
11 a lot when you have stub roads and they do get
12 connected. Because there will be more traffic. I
13 mean, there just will be more traffic.

4 But the issue of tonight is the zone,
5 whether it be half acre or third acre, whatever the
6 zone. The issue you're raising on traffic is a site
7 plan issue. And that will come back before the
3 Council again.

1 And Jason -- Jason will work very hard
1 with the developer to look at any traffic calming we
can put in place and what we might do to help that.
It won't solve the problem because the increase in
traffic will be there.

And I have great empathy for that. Not
the current home I'm in, but my first home I was in

1 in Riverton, we had the same thing. We had a stub
2 road. And there was no traffic except those who were
3 coming into our little street and going to those
4 homes. And then when it gets opened up, we were then
5 on a road that connected in with two other
6 subdivisions and the traffic increased drastically.

7 And so you're right, it will increase.
8 But that is -- that has been put in place with the
9 General Plan, the General Traffic Plan, or Road Plan.
10 So that's in effect. And even if you had -- even if
11 you put that in five-acre lots or whatever, the City
12 has designated in those two parts of the street will
13 be connected.

14 But you're right. And so I would watch
15 for the site plan when it comes back as well and make
16 sure that we're doing all we can for traffic calming
17 at that time.

8 MR. BALLFREY: And again with that, Bill,
9 if you're going third-acre lots, of course you're
0 going to have more homes there, which means more
1 traffic.

2 THE MAYOR: That's correct. And that's a
3 good point to make. Yeah. That is a very good
4 point.

MR. BALLFREY: But to all of you, you've

1 all been voted in by the people out here. I hope you
2 all listen to us and vote our way not to let this
3 change and keep it the R-22.

4 Thank you.

5 THE MAYOR: Thank you.

6 Any other comments on this part of it?

7 MS. SNYDER: Ladies and gentlemen, thank
8 you for opening this up for public debate, or
9 discussion rather.

10 My name is Ivey Snyder. And I live in
11 Victoria Station, due north of the subject property.

12 My concern is the traffic, which you've
3 addressed, thank you very much, and the fact that it
4 will increase the number of people. We're looking at
5 what, approximately 300 homes between the two
6 developments?

7 THE MAYOR: Would that be about right,
8 Jason?

9 MR. LETHBRIDGE: I'm not sure. Again,
given where we're looking just at general density, I
haven't touched that. I don't know.

THE MAYOR: How many acres is this parcel?

MR. LETHBRIDGE: Actually, if I could
defer that question, we do have the Applicant here
and he could probably give you a much more detailed

1 indication of what their proposal is.

2 THE MAYOR: Okay. It would be less than
3 200.

4 And worse case -- and it's on both sides
5 of 36. So 36 would be the major street that would be
6 impacted and you'd be right in there. Yeah.

7 MS. SNYDER: Right. So we're looking at
8 200 homes, 200 families, approximately 400 cars,
9 unless they have teenagers. And I am concerned that
10 3600 can't accommodate that.

11 My other concern is the water. Already
2 we're having trouble with water pressure. And I
3 realize that has been addressed by extending the
4 amount of time we can water.

5 My other concern, Sandy had this same sort
6 of situation with power grids and having brown outs
7 and black outs a few years ago. And they had to have
8 the Army Corps of Engineers bring in generators so
9 that they could have enough electricity.

Thank you very much for letting me address
you.

THE MAYOR: Thank you for your comments.

Any other comments on this part of the
rezone -- or on this rezone?

(No verbal response.)

1 THE MAYOR: Okay. Seeing none, we'd look
2 for a motion to close the public hearing.

3 MR. LETHBRIDGE: Mayor, point of
4 information.

5 The Applicant has not yet been invited to
6 speak. Perhaps he would at this time.

7 THE MAYOR: Pardon me?

8 MR. LETHBRIDGE: The Applicant has not yet
9 spoken. I think they were waiting for the right
10 opportunity.

11 Would you like to speak now?

12 MR. MARTIN: Yes.

13 THE MAYOR: Yeah. Let's -- let's close
14 the public hearing and then we'll give you a chance
15 to speak as the Applicant.

6 Are we okay with --

7 COUNCIL MEMBER LEAVITT: I'll move it,
8 Mayor.

9 THE MAYOR: Okay. A motion made by Al.
0 Is there a second?

1 COUNCIL MEMBER BENTSON: I'll second that.

2 THE MAYOR: Seconded by Carma.

3 Any discussion to it?

(No verbal response.)

THE MAYOR: All in favor of the motion

1 say, "Aye."

2 (Chorus of "Ayes.")

3 THE MAYOR: Any opposed?

4 (No verbal response.)

5 THE MAYOR: Okay. Now let's have the
6 applicant come forward then and address anything that
7 he would like to to the Council. And the Council can
8 ask him any questions that they would I like to.

9 MR. MARTIN: Thanks for your time.

10 Boyd Martin, Division President, for D.R.
11 Horton Homes.

12 Just a few comments on this property here.

13 Obviously we are going for the R-3. We've
14 got R-4s kitty-corner to that. Across the street
5 there, it is zoned R-3. It doesn't affect the
6 appraisals at all. If you look at how they do
7 appraisals at this point, they wouldn't pull comps
8 off this. They'd pull comps across the street and so
9 forth. So as far as any values of homes, it wouldn't
0 change those at all.

1 Traffic, yes. It is a concern. But
2 that's handled in the traffic study. And we review
3 that. We probably will end up widening the road.
4 It's a major collector road as it is.

I think with R-22s, you probably get 15

1 lots in there, maybe 16, off the top of my head. I
2 haven't laid that out. So I'm just guesstimating.
3 We've got 38 homes on this one. So you more than
4 double it with the R-13s.

5 Let me just clarify on the lots, I ran a
6 rough calculation. Worse case, Mayor and Council, is
7 154 lots if we -- you take the 38 on this side plus
8 the -- oh, excuse me here, roughly 116 on the other
9 side, assuming you get the RM-8. So 154 total homes
10 on their, worse case scenario.

11 Other than that, I know that we are
12 working very closely with the city. If we do do this
13 project on working on the detention base and getting
14 that in, that you guys are looking for.

15 We're just excited to continue building
16 good, quality homes in Riverton.

17 So appreciate your time.

18 THE MAYOR: Thank you. Any question from
19 Council?

20 UNIDENTIFIED MALE: Just for Jason.

21 Show us where that detention basin is
22 planned. Right here?

23 MR. LETHBRIDGE: This is the area for the
24 proposed detention basin. So it would sit up against
25 the canal, again kind of in that northeast corner.

1 UNIDENTIFIED MALE: A regional; isn't it?

2 MR. LETHBRIDGE: Yes. So it's not simply
3 to accommodate the drainage for this proposed
4 project. It would take in a much broader area.

5 UNIDENTIFIED MALE: Has that been donated
6 to the City or are we buying it?

7 MR. LETHBRIDGE: Right now I believe we're
8 still in negotiations to purchase it.

9 But donation of the property was an issue
10 raised by the Applicant as part of their proposal.
11 But our Engineering Department has been pursuing
12 negotiation for purchase.

13 THE MAYOR: Why would they -- we're not
14 getting -- by "donating" -- and let's clarify this
15 before we leave kind of a cloud here.

16 We're not trying to trade density for a
17 detention pond?

18 MR. LETHBRIDGE: No. That's not been
19 anything brought forward by staff or even suggested
20 up to this point. So I know there has been a little
21 confusion on that from some of the public comment
22 we've received.

23 THE MAYOR: Yeah. This is -- the
24 detention pond appears to be needed from engineering,
25 from our Regional Storm Water Plan. And we should

1 buy that land when we -- whatever develops in there
2 because we need it to control the water. And so
3 either way, but -- so the Council is making a
4 decision on the zoning issue for what they feel is
5 the best zone to put in. Yeah. Okay.

6 UNIDENTIFIED MALE: I have a question,
7 Jason.

8 On that map, that little white piece on
9 the bottom of the map that runs north/south, that is
10 the canal; is that correct? And it runs all the way
11 along, so the canal actually separates the R-4 from
12 the R-22; is that correct?

13 MR. LETHBRIDGE: Yes. So the red line
14 that I drew along the map, that is the canal there.
15 So there is a separation between the R-4 to the east
16 and this proposed project.

17 UNIDENTIFIED MALE: And there is no bridge
18 or connection that connects that R-4 to the R-22?

19 MR. LETHBRIDGE: There is not.

0 UNIDENTIFIED MALE: Thank you.

1 MR. LETHBRIDGE: And nor would there be
2 one proposed as part of any development along here.

3 UNIDENTIFIED MALE: Thank you.

4 THE MAYOR: Okay. Any other questions
5 from Council?

1 (No verbal response.)

2 THE MAYOR: Okay. Council, then we would
3 turn to you to how you might want to deal with this.

4 COUNCIL MEMBER MARKUS: I make a motion
5 that we deny PL Number 07-4009, a request for the
6 rezoning of property at 12175 South 3600 West from
7 RR-22 to R-3.

8 COUNCIL MEMBER TINGEY: I'll second it.

9 THE MAYOR: Okay. That motion was made by
10 Brad. Seconded by Roy.

11 Any discussion to the motion?

12 (No verbal response.)

13 THE MAYOR: All in favor of the motion
14 say, "Aye."

15 (Chorus of "Ayes.")

16 THE MAYOR: Any opposed?

17 (No verbal response.)

18 THE MAYOR: Okay. So that's unanimous.
19 So that zone stays as half-acre zones so
20 that -- so that you're --

21 (Applause.)

2 THE MAYOR: Now. Now. Now. Now. We had
3 a previous mayor that would hit the gavel when those
4 kinds of things happened.

5 -o0o-

1
2 REPORTER'S CERTIFICATE

3
4 STATE OF UTAH)
5) ss.
6 COUNTY OF SALT LAKE)

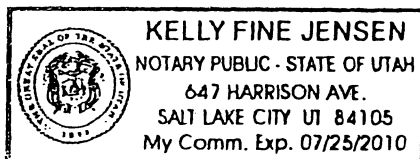
7 I, Kelly Fine-Jensen, Registered
8 Professional Reporter and Notary Public in and for
9 the State of Utah, do hereby certify:

10 That on November 10, 2007, I transcribed a
11 CD at the request of Riverton City;

12 That the testimony of all speakers was
13 reported by me in stenotype and thereafter
14 transcribed, and that a full, true, and correct
15 transcription of said testimony is set forth in the
16 preceding pages, according to my ability to hear and
17 understand the tape provided.

18 I further certify that I am not kin or
19 otherwise associated with any of the parties to said
20 cause of action and that I am not interested in the
21 outcome thereof.

22 WITNESS MY HAND AND OFFICIAL SEAL this
23 13th day of November, 2007.



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Kelly Fine-Jensen
KELLY-FINE-JENSEN, RPR
Notary Public
Residing in Salt Lake County

Exhibit E

FILED DISTRICT COURT
Third Judicial District

DEC 29 2008

SALT LAKE COUNTY

By

Deputy Clerk

JODY K BURNETT (0499)
ROBERT C. KELLER (4861)
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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

In the Matter of Application PLZ-07-4009:	:	
	:	
Willis Lauritz Petersen, Jr., Leslee P.	:	SUMMARY JUDGMENT AND
Christensen, Allan D. Petersen, Kristine Petersen	:	ORDER OF DISMISSAL
Smith, and Dean B. Petersen, as trustees of the	:	
Margarett Park Petersen Family Living Trust,	:	
	:	
Petitioners,	:	Case No. 070911432
	:	
v.	:	Judge Anthony Quinn
	:	
Riverton City,	:	
	:	
Respondent.	:	

This matter came before the above-entitled Court on December 4, 2008, the Honorable Anthony Quinn presiding, for a hearing on respondent Riverton City's Motion for Summary Judgment. Petitioners were represented by Dale F. Gardiner. Respondent Riverton City was represented by Jody K Burnett.

The Court having reviewed the legal memoranda and exhibits submitted by the parties and having considered the arguments of counsel, issued its ruling from the bench following the conclusion of the hearing on December 4, 2008. Pursuant to that ruling, respondent Riverton City's Motion for Summary Judgment is hereby granted on the basis that the Court finds there are no genuine issues as to any material facts and that the City is entitled to summary judgment as a matter of law. As grounds in support of its decision, the Court notes that it has a very limited role in reviewing this challenge to the exercise of legislative discretion by the Riverton City Council on a petition for review which is subject to the highly deferential, reasonably debatable standard. The Court can only consider the record of proceedings before the City which has been provided by the City pursuant to section 10-9a-801, and it is not appropriate to permit discovery under these facts and circumstances. The record of proceedings indicates that the application to rezone the property was consistent with the general plan, but so is the existing zoning. In addition, the property in question is surrounded on three sides by similarly zoned property.

Pursuant to the Court's ruling, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Respondent Riverton City's Motion for Summary Judgment is hereby GRANTED, and the Petition is hereby DISMISSED, with prejudice and upon the merits. All parties are to bear their own respective costs and attorney's fees.

2. The petitioners' Motion for Continuance Pursuant to Rule 56(f) is hereby denied on the basis that, as noted above, the Court's review is limited to the record under Utah law and therefore discovery is not appropriate under these facts and circumstances.

3. The petitioners' Motion for Consolidation has been rendered moot by removal of the later filed action which is the subject of that motion to Federal Court and this Order.

4. This constitutes the final order of the Court disposing all of the issues raised by the Petition and related motions that have been filed in this matter. .

DATED this 29th day of December, 2008.

BY THE COURT

By


Anthony Quinn
District Court Judge

APPROVED AS TO FORM

Dale F. Gardiner
VanCott, Bagley, Cornwall & McCarthy
Attorneys for Petitioners

150628.1

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Shari H. Sampson, being duly sworn, says that she is employed in the law offices of Williams & Hunt, attorneys for respondent City of Riverton herein; that she served the attached *proposed* SUMMARY JUDGMENT AND ORDER OF DISMISSAL in Case No. 070911432 before the Third Judicial District Court for Salt Lake County, State of Utah, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

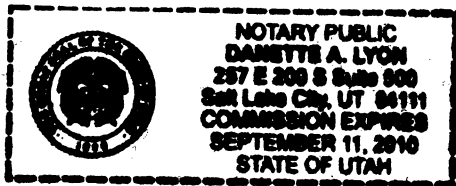
Counsel for Petitioners
Dale F. Gardiner
Van Cott, Bagley, Cornwall & McCarthy
36 S. State St., Suite 1900
Salt Lake City, Utah 84111

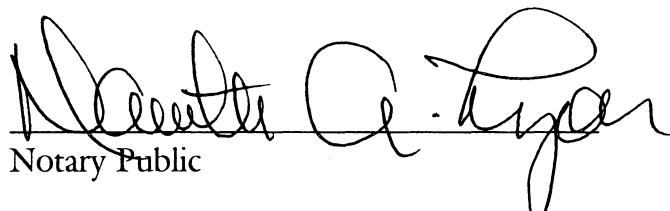
and causing the same to be mailed first class, postage prepaid, on the 22nd day of December, 2008.



Shari H. Sampson

SUBSCRIBED AND SWORN TO before me this 22nd day of December, 2008.




Notary Public