

1994

Lyle G. Evertsen, and residents of South Ogden  
City and South Weber County, State of Utah v.  
South Ogden City Planning Commission and  
South Ogden City : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Richard L. Stine; Attorney for Defendant-Appellee; John W. Bradley; Attorney for Plaintiff-Appellee.  
David J. Jordan; Nile W. Eatmon; Stoel Rives Boley Jones & Grey; Attorneys for Appellant.

---

### Recommended Citation

Brief of Appellant, *Evertsen v. South Ogden City Planning and American Capital Development*, No. 940487 (Utah Court of Appeals, 1994).

[https://digitalcommons.law.byu.edu/byu\\_ca1/6137](https://digitalcommons.law.byu.edu/byu_ca1/6137)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

DK  
50  
A  
DOC

IN THE UTAH COURT OF APPEALS

60  
A10  
DOCKET NO. 940887  
MENT

LYLE G. EVERTSEN, AND RESIDENTS  
OF SOUTH OGDEN CITY AND  
SOUTH WEBER COUNTY, STATE OF  
UTAH,

APPEAL

Plaintiffs and Appellees,

vs.

SOUTH OGDEN CITY PLANNING  
COMMISSION & SOUTH  
OGDEN CITY,

Defendants and Appellees,

and

AMERICAN CAPITAL  
DEVELOPMENT, INC.,

Intervenor-Defendant and  
Appellant.

94-0487-CA

Case No. [REDACTED]

Priority: 15

FILED

BRIEF OF APPELLANT

MAY 5 1994

CLERK SUPREME COURT  
UTAH

Richard L. Stine  
Attorney for Defendant-Appellee  
2560 Washington Blvd. #102  
Ogden, Utah 84401

John W. Bradley  
Attorney for Plaintiff-Appellee  
2447 Kiesel Ave.  
Ogden, Utah 84401

David J. Jordan (1751)  
Nile W. Eatmon (6534)  
Stoel Rives Boley Jones & Grey  
Attorneys for Appellant  
201 South Main Street, Suite 1100  
Salt Lake City, Utah 84111-4904  
Telephone: (801) 328-3131

IN THE UTAH COURT OF APPEALS

---

LYLE G. EVERTSEN, AND RESIDENTS  
OF SOUTH OGDEN CITY AND  
SOUTH WEBER COUNTY, STATE OF  
UTAH,

Plaintiffs and Appellees,

vs.

SOUTH OGDEN CITY PLANNING  
COMMISSION & SOUTH  
OGDEN CITY,

Defendants and Appellees,

and

AMERICAN CAPITAL  
DEVELOPMENT, INC.,

Intervenor-Defendant and  
Appellant.

APPEAL

Case No. 940132

Priority: 15

---

BRIEF OF APPELLANT

---

Richard L. Stine  
Attorney for Defendant-Appellee  
2560 Washington Blvd. #102  
Ogden, Utah 84401

John W. Bradley  
Attorney for Plaintiff-Appellee  
2447 Kiesel Ave.  
Ogden, Utah 84401

David J. Jordan (1751)  
Nile W. Eatmon (6534)  
Stoel Rives Boley Jones & Grey  
Attorneys for Appellant  
201 South Main Street, Suite 1100  
Salt Lake City, Utah 84111-4904  
Telephone: (801) 328-3131

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	4
JURISDICTION . . . . .	6
ISSUES FOR REVIEW AND STANDARDS OF REVIEW . . . . .	6
DETERMINATIVE STATUTES . . . . .	8
STATEMENT OF THE CASE . . . . .	10
STATEMENT OF THE FACTS . . . . .	11
SUMMARY OF THE ARGUMENT . . . . .	19
ARGUMENT . . . . .	19
I.    The District Court Erroneously Ruled That the Evertsen Plaintiffs' Appeal of the Planning Commission's November 12, 1992 Decision Was Not Time Barred by the 15-Day Limitation Period Set Forth in the City Zoning Ordinance . . . . .	19
II.   The District Court Failed to Properly Rule That the Evertsen Plaintiffs' Challenge to the Adequacy of Notice Given for the Planning Commission's Meeting Was Time Barred By the 30-Day 'Challenge to Notice' Limitation Period Set Forth in the Utah Municipal Land Use Act . . . . .	22
III.  The District Court Failed to Properly Rule That The Evertsen Plaintiffs' Challenge to the Adequacy of Notice Given for the Planning Commission's Meeting Was Time Barred by the 'Procedural Limitation' Period Set Forth in the Utah Municipal Land Use Act . . . . .	23
IV.  The District Court Failed to Properly Rule That the Evertsen Plaintiffs' Challenge to the Adequacy of Notice Given for the Planning Commission's Meeting Was Time Barred by the Limitation Period Set Forth in the Utah Open and Public Meetings Act . . . . .	26

V.	The District Court Could Not Have Concluded That All Statutory Limitation Periods Set Forth in the City Zoning Ordinance, the Utah Municipal Land Use Act and the Utah Open and Public Meetings Act Were Inapplicable to the Evertsen Plaintiffs' suit . . . . .	27
CONCLUSION AND RELIEF SOUGHT . . . . .		30
ADDENDUM . . . . .		33

## TABLE OF AUTHORITIES

### Cases:

<u>Bolin v. City of Portales</u> , 89 N.M. 192, 548 P.2d 1210 (1976) . . . . .	24, 25
<u>Fish Hook Association, Inc. v. Grover Brothers</u> , 417 N.W.2d 692 (Minn. Ct. App. 1988) . . . . .	24, 25
<u>Hughes v. McCormick</u> , 17 Utah 2d 372, 412 P.2d 613 (1966) . . . . .	28
<u>Klinger v. Kightly</u> , 791 P.2d 868 (Utah 1990) . . . . .	6, 7
<u>Lund v. Cottonwood Meadows Co.</u> , 15 Utah 2d 305, 392 P.2d 240 (1964) . . . . .	23, 25, 26
<u>St. Germain v. Zoning Board of Appeals</u> , 35 A.D.2d 1064, 316 N.Y.S.2d 408 (Ny. Sup. Ct. 1970) . . . . .	24, 25
<u>Salt Lake County v. Murray City Redevelopment</u> , 598 P.2d 1339 (Utah 1979) . . . . .	27, 28
<u>Scharf v. BMG Corp.</u> , 700 P.2d 1068 (Utah 1985) . . . . .	6, 7
<u>Serna v. Board of County Commissioners</u> , 88 N.M. 282, 540 P.2d 212 (1975) . . . . .	24, 25
<u>W.G. Company v. Redevelopment Agency of Salt Lake City</u> , 802 P.2d 755 (Utah Ct. App. 1990) . . . . .	27, 28
<u>Wood v. Freeman</u> , 43 Misc. 2d 616, 251 N.Y.S.2d 996 (Ny. Sup. Ct. 1964) . . . . .	29
<u>Worrall v. Ogden City Fire Department</u> , 616 P.2d 598 (Utah 1980) . . . . .	27, 28

### Statutes:

Utah Code Ann. § 10-9-103(2)(c)(ii) (1993) . . . . .	6, 8, 11, 13, 15, 22
Utah Code Ann. § 10-9-1001(2) (1993) . . . . .	7, 8, 11, 13, 15, 23
Utah Code Ann. § 52-4-8 (1993) . . . . .	7, 8, 9, 11, 13, 15, 26
Utah Code Ann. § 78-2a-3(2) (1993) . . . . .	6

South Ogden City, Ut. *Zoning Ordinance* § 25-7-6 (1992) 6, 9, 10, 11, 12, 15, 18, 19, 20, 21, 22

South Ogden City, Ut. *Zoning Ordinance*, Article 7 (1992) . . . . . 9, 10, 33

Other Authorities:

Rathkopf, The Law of Planning and Zoning, § 42.04[1] (1993) . . . . . 24

## JURISDICTION

The Utah Court of Appeals has appellate jurisdiction in this matter pursuant to Section 78-2a-3(2) Utah Code Ann. 1953, as amended.

## ISSUES FOR REVIEW AND STANDARD OF REVIEW

1. Whether the District Court erred in ruling that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the South Ogden City Planning Commission's ("Planning Commission") November 12, 1992 meeting was not time barred by the 15-day limitation period set forth in section 25-7-6 of the South Ogden City Zoning Ordinance (South Ogden City, Ut., *Zoning Ordinance* § 25-7-6 (1992)). Whether a statute of limitation applies to a cause of action is a question of law, not of fact. *Klinger v. Kightly*, 791 P.2d 868, 869 (Utah 1990). When an appeal presents only questions of law, the reviewing court will review the trial court's rulings for correctness and accord them no particular deference. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

2. Whether the District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 30-day limitation period set forth in section 10-9-103(2) of the Utah Municipal Land Use Development and Management Act (Utah Code Ann. § 10-9-103(2) (1993)). Whether a statute of limitation applies to a cause of action is a question of law, not of fact. *Klinger v. Kightly*, 791 P.2d at 869. When an appeal presents only questions of law, the reviewing court will review the trial court's rulings for

correctness and accord them no particular deference. *Scharf v. BMG Corp.*, 700 P.2d at 1070.

3. Whether the District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 30-day limitation period set forth in section 10-9-1001 of the Utah Municipal Land Use Development and Management Act (Utah Code Ann. § 10-9-1001 (1993)). Whether a statute of limitation applies to a cause of action is a question of law, not of fact. *Klinger v. Kightly*, 791 P.2d at 869. When an appeal presents only questions of law, the reviewing court will review the trial court's rulings for correctness and accord them no particular deference. *Scharf v. BMG Corp.*, 700 P.2d at 1070.

4. Whether the District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 90-day limitation period set forth in section 52-4-8 of the Utah Open and Public Meetings Act (Utah Code Ann. § 52-4-8 (1993)). Whether a statute of limitation applies to a cause of action is a question of law, not of fact. *Klinger v. Kightly*, 791 P.2d at 869. When an appeal presents only questions of law, the reviewing court will review the trial court's rulings for correctness and accord them no particular deference. *Scharf v. BMG Corp.*, 700 P.2d at 1070.

## DETERMINATIVE STATUTES

Utah Code Ann. § 10-9-103(2) (1993):

- (a) A municipality meets the requirements of reasonable notice required by this chapter if it:
  - (i) posts notice of the hearing or meeting in at least three public places within the jurisdiction and publishes notice of the hearing or meeting in a newspaper of general circulation in the jurisdiction, if one is available; or
  - (ii) gives actual notice of the hearing or meeting.
- (b) A municipal legislative body may enact an ordinance establishing stricter notice requirements than those required by this subsection.
- (c)
  - (i) Proof that one of the two forms of notice authorized by this subsection was given is prima facie evidence that notice was properly given.
  - (ii) If notice given under the authority of this section is not challenged as provided in Section 10-9-1001 within 30 days from the date of the meeting for which the notice was given, the notice is considered adequate and proper.

Utah Code Ann. § 10-9-1001 (1993):

- (1) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.
- (2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.
- 3) The courts shall:
  - (a) presume that land use decisions and regulations are valid;
  - (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

Utah Code Ann. § 52-4-8 (1993):

Any final action taken in violation of Sections 52-4-3 and 52-4-6 is voidable by a court of competent jurisdiction. Suit to void final action shall be commenced within 90 days after the action except that with respect to any final action concerning

the issuance of bonds, notes, or other evidences of indebtedness suit shall be commenced within 30 days after the action.

South Ogden City, Utah, *Zoning Ordinance* § 25-7-6 (1992):

Appeal to and Review by the City Council. The decision of the Planning Commission shall not become final and effective until fifteen days after notice of that decision has been mailed or delivered to the applicant and delivered to the City Recorder for presentation to the City Council. It shall not then become final, if, prior to the expiration of that fifteen days, any interested party has appealed the same to the City Recorder or the City Council on its own motion has elected to review that decision.

The decision of the Planning Commission may be appealed by any interested party to the City Council by filing such appeal with the City Recorder within fifteen days after notice of decision is sent to the applicant. The City Council may review that decision on its own motion made within that fifteen day period.

South Ogden City, Utah, *Zoning Ordinance*, Article 7 (1992):

See Addendum, Attachment 1.

## STATEMENT OF THE CASE

On November 12, 1992, the South Ogden City Planning Commission ("Planning Commission") held a public meeting and granted Appellant American Capital Development, Inc. ("American Capital") a conditional use permit to construct an 80-unit apartment complex on real property located in South Ogden City, Utah pursuant to Article 7 of the South Ogden City Zoning Ordinance (South Ogden City, Ut. *Zoning Ordinance* §§ 25-7-1 through -8 (1992), a copy of which is annexed hereto as Attachment 1). On April 29, 1993, the Evertsen Plaintiffs filed a complaint in the Second Judicial District Court of Weber County, State of Utah (the "District Court") wherein they asked the District Court to set aside or rescind American Capital's conditional use permit. The Evertsen Plaintiffs alleged that the notice given for the Planning Commission's November 12, 1992 public meeting had been inadequate. On May 24, 1993, the District Court convened a hearing on the Evertsen Plaintiffs' complaint. After hearing arguments from the parties, the District Court ruled from the bench that the Evertsen Plaintiffs would have until May 28, 1993 to file an appeal of the Planning Commission's November 12, 1992 decision with the South Ogden City Council ("City Council"). The District Court did not enter its bench ruling. On May 28, 1993, the Evertsen Plaintiffs filed their appeal with the City Council. On October 6, 1993, American Capital timely moved the District Court to reconsider its bench ruling of May 24, 1993. On October 20, 1993, the District Court heard American Capital's motion. American Capital argued that the Evertsen Plaintiffs'

challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was (1) time barred by a 15-day limitation period set forth in Section 25-7-6 of the South Ogden City Zoning Ordinance (South Ogden City, Ut., *Zoning Ordinance* § 25-7-6 (1992)), (2) time barred by the 30 day limitation periods set forth in Section 10-9-103(2)(c)(ii) and Section 10-9-1001(2) of the Utah Municipal Land Use Development and Management Act (Utah Code Ann. §§ 10-9-101 through -1003 (1993)), and (3) time barred by a 90-day limitation period set forth in Section 52-4-8 of the Utah Open and Public Meetings Act (Utah Code Ann. §§ 52-4-1 through -9 (1993)). On October 20, 1993, the District Court convened a hearing on American Capital's motion for reconsideration and, after hearing arguments from the parties, denied the motion. On February 8, 1994, the District Court entered its October 20, 1993 bench ruling and issued an Order in which it concluded that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 decision was not time barred by the 15-day limitation period set forth in Section 25-7-6 of the South Ogden City Zoning Ordinance. The District Court's Order did not rule on the applicability of other statutory limitation periods cited by American Capital in its motion for reconsideration. This Appeal is from the Order entered by the District Court on February 8, 1994.

#### STATEMENT OF FACTS

1. On October 29, 1992, American Capital applied to the Planning Commission for a conditional use permit to construct an 80-unit apartment

housing complex on property located at approximately 5700 Wasatch Drive in South Ogden City, Utah (the "Project"). (Record Index at p. 190-191).

2. The Planning Commission placed American Capital's application for a conditional use permit on the agenda of its November 12, 1992 public meeting. (Record Index at p. 69-70).

3. The Planning Commission and the City posted notice of the November 12, 1992 Planning Commission meeting in three places within the City. (Record Index at p. 187).

4. On November 12, 1992, the Planning Commission held a public meeting and considered American Capital's application for a conditional use permit. (Record Index at p. 70). At this meeting, the Planning Commission approved American Capital's application and granted American Capital a conditional use permit to construct the Project. (Record Index at p. 267).

5. Section 25-7-6 of the South Ogden City Zoning Ordinance ("Zoning Ordinance") provides that decisions of the Planning Commission become "final and effective" if no interested party appeals the decision to the City Council within 15 days. South Ogden City, Ut., *Zoning Ordinance* § 25-7-6 (1992). The Evertsen Plaintiffs first challenged the Planning Commission's decision to grant American Capital a conditional use permit on April 29, 1993 -- 168 days after the Planning Commission had granted American Capital its conditional use permit. (Record Index at p. 267).

6. Section 10-9-103(2) of the UMLUDMA provides that public notice given for the meetings of municipal zoning authorities must be challenged within 30 days from the date of the meeting for which the notice was given; otherwise, "the notice is considered adequate and proper." Utah Code Ann. § 10-9-103(2) (1993). The Evertsen Plaintiffs first challenged the notice given for the Planning Commission's November 12, 1992 meeting on April 15, 1993 -- 154 days after the Planning Commission had granted American Capital its conditional use permit. (Record Index at p. 30).

7. Section 10-9-1001 of the UMLUDMA provides that persons who are adversely affected by a city's land use planning decisions may petition the district court to review that decision, provided they do so within 30 days of the city's decision. Utah Code Ann. § 10-9-1001(2) (1993). The Evertsen Plaintiffs first petitioned the District Court to review the Planning Commission's decision to grant American Capital a conditional use permit on April 29, 1993 -- 168 days after the Planning Commission had granted American Capital its conditional use permit. (Record Index at p. 267).

8. Section 52-4-8 of the Utah Open and Public Meetings Act ("UOPMA") provides that any suit to void the action of a public body for failure to give adequate notice of a public meeting must be commenced within 90 days. Utah Code Ann. § 52-4-8 (1993). The Evertsen Plaintiffs first brought suit against the City and the Planning Commission on April 29, 1993 -- 168 days after the

Planning Commission had granted American Capital its conditional use permit. (Record Index at p. 267).

9. On April 29, 1993, The Evertsen Plaintiffs filed a "Complaint" in the Second Judicial District Court wherein they asked the court to set aside or rescind American Capital's conditional use permit because they alleged that the notice given for the Planning Commission's November 12, 1992 meeting had been inadequate. (Record Index at p. 267). On May 6, 1993, the Evertsen Plaintiffs filed a "First Amended Complaint" asking for the same relief prayed for in its April 29, 1993 Complaint. (Record Index at p. 107).

10. On May 24, 1993, the District Court convened a hearing to hear the Evertsen Plaintiffs' Complaint. (Record Index at p. 137). After hearing arguments from the parties, the District Court ruled from the bench that the Evertsen Plaintiffs would have until May 28, 1993 to file an appeal of the Planning Commission's November 12, 1992 decision with the City Council. (Record Index at p. 138). The District Court did not enter its bench ruling at this time. (Record Index at p. 138).

11. On May 28, 1993, the Evertsen Plaintiffs filed their appeal with the City Council. (Record Index at p. 267).

12. On July 27, 1993, the City Council convened a public meeting to hear the Evertsen Plaintiffs' appeal. (Record Index at p. 267). At the conclusion of this meeting, the City Council voted to revoke American Capital's conditional use permit. (Record Index at p. 269).

13. On October 5, 1993, American Capital timely moved the District Court to reconsider its bench ruling of May 24, 1993. (Record Index at p. 269).

14. On October 20, 1993, the District Court heard American Capital's Motion for Reconsideration. (Record Index at p. 234). American Capital argued that:

a. The Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 15-day limitation period set forth in section 25-7-6 of the Zoning Ordinance. (Record Index at p. 180).

b. The Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 30-day limitation period set forth in section 10-9-103(2) of the UMLUDMA. (Record Index at p. 182).

c. The Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 30-day limitation period set forth in section 10-9-1001(2) of the UMLUDMA. (Record Index at p. 182).

d. The Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by the 90-day limitation period set forth in section 52-4-8 of the UOPMA. (Record Index at p. 183).

e. Due to the expiration of all relevant statutory limitation periods, the City Council could not have lawfully heard the Evertsen Plaintiffs' appeal on July 27, 1993. (Record Index at p. 168).

15. On October 20, 1993, the District Court ruled from the bench and denied American Capital's Motion for Reconsideration. (Record Index at p. 234).

16. On February 8, 1994, the District Court entered its October 20, 1993 bench ruling and issued an Order in which it made the following "Findings of Fact:"

a. "On November 12, 1992, the South Ogden City Planning Commission granter [sic] Intervenor-Defendant American Capital Development, Inc. ('American Capital') a conditional use permit to construct an apartment complex in South Ogden ('Project')." (Record Index at p. 268).

b. "On the 29th day of April, 1993, Plaintiffs obtained an Order prohibiting further activity by the South Ogden Planning Commission on the Project." (Record Index at p. 268).

c. "Based upon the above-referenced Order, Plaintiffs commenced legal seeking [sic] relief from the Court as follows ... [f]or an order of the Court staying all time periods of appeal to the City council [sic] from the Planning Commission, said stay running from the date of the issuance of the Conditional Use Permit forward to such applicable date that the Plaintiffs may submit a proper appeal to the City Council on the issuance of Conditional [sic] Use Permit." (Record Index at p. 268-69).

d. "Plaintiffs commence [sic] that the aforesaid legal action and [sic] assert as that principle cause that they had not received effective notice of the November 12, 1992 Planning Commission meeting." (Record Index at p. 269).

e. "On a bench ruling of May 24, 1993, this Court found that the Plaintiffs had not received effective notice of the November 12, 1992 Meeting [sic]. And this Court granted the relief request [sic] by Plaintiffs, to wit extending the time to which Plaintiffs could appeal the Planning Commission issuance [sic] of the conditions [sic] used [sic] for American Capital to the South Ogden City Council." (Record Index at p. 269).

f. "On May 28, 1993, Plaintiffs filed their appeal of the Planning Commission's issuance of the conditions [sic] used [sic] for American Capital with the South Ogden City Council." (Record Index at p. 269).

g. "On July 27, 1993, the City Council heard Plaintiffs' appeal and revoked American Capital's conditional use permit." (Record Index at p. 269).

h. "Plaintiffs, American Capital and South Ogden City all acted in reliance upon the bench ruling of the Court." (Record Index at p. 269).

i. "American Capital filed on October 5, 1993, a motion asking the Court to reconsider its bench ruling." (Record Index at p. 269).

17. The District Court's February 8, 1994 Order contained the following "Conclusions of Law:"

a. "Public notice of the Planning Commission's November 12, 1992 meeting was inadequate because the City did not give adequate notice to the effective landowners." (Record Index at p. 270).

b. "That all parties in the litigation acted in reliance upon the May 24, 1993 bench ruling of the Court. Plaintiffs [sic] challenge [sic] the adequacy of the November 12, 1992 meeting was not barred by the 15 day limitation periods [sic] set forth in §25-7-6 in the South Ogden City Zoning Ordinance." (Record Index at p. 270).

c. "NOW THEREFORE it is hereby ordered that American Capital's Motion for Reconsideration of the May 24, 1993 bench warrant [sic] is denied." (Record Index at p. 270).

## SUMMARY OF THE ARGUMENT

On April 29, 1993, the Evertsen Plaintiffs filed a district court suit challenging the notice given for the Planning Commission's November 12, 1992 meeting; this suit was filed 168 days after the November 12, 1992 Planning Commission meeting. The District Court failed to properly rule that the Evertsen Plaintiffs' suit was time barred by the 15-day limitation period set forth in the City Zoning Ordinance, the 30-day limitation periods set forth in the Utah Municipal Land Use Development and Management Act, and/or the 90-day limitation period set forth in the Utah Open and Public Meetings Act. The Evertsen Plaintiffs did not prove, nor did the District Court find, that the Evertsen Plaintiffs had been deprived of any constitutionally protected interests as a result of the action taken by the Planning Commission on November 12, 1992. Accordingly, the District Court could not have lawfully concluded that the aforementioned statutory limitation periods were inapplicable to the Evertsen Plaintiffs' suit. Therefore, the District Court committed plain error by failing to conclude that the Evertsen Plaintiffs' district court suit was time barred.

## ARGUMENT

- I. The District Court erroneously ruled that the Evertsen Plaintiffs' appeal of the Planning Commission's decision was not time barred by the 15-day appeal period set forth in the City Zoning Ordinance.**

Section 25-7-6 of the South Ogden City Zoning Ordinance provides the procedure for appeal and review of Planning Commission decisions. It requires an appeal to be filed with the City Recorder within 15 days after notice of the

Planning Commission's decision is sent to the applicant; if an appeal of a Planning Commission decision is not filed within 15 days, the Planning Commission's decision becomes "final and effective:"

Appeal to and Review by the City Council. The decision of the Planning Commission shall not become final and effective until fifteen days after notice of that decision has been mailed or delivered to the applicant and delivered to the City Recorder for presentation to the City Council. It shall not then become final if, prior to the expiration of that fifteen days, any interested party has appealed the same to the City Recorder or the City Council on its own motion has elected to review that decision.

The decision of the Planning Commission may be appealed by any interested party to the City Council by filing such appeal with the City Recorder *within fifteen days after notice of decision is sent to the applicant*. The City Council may review that decision on its own motion made within that fifteen day period.

South Ogden City, Ut., *Zoning Ordinance* § 25-7-6 (1992) (emphasis supplied).

The Utah Supreme Court enforces appellate limitation periods contained in the zoning ordinances of local governments. In *Lund v. Cottonwood Meadows Co.*, 392 P.2d 40, 41 (Utah 1964), a landowner sought to enjoin a defendant developer from building a mobile home park for which the developer had been issued a county building permit. The trial court dismissed the action because the plaintiff had not appealed the issuance of the building permit to the Salt Lake County Board of Adjustments within the 90-day appeal period prescribed by the Salt Lake County zoning ordinance<sup>1</sup> and authorized by the then applicable Utah

---

<sup>1</sup> Salt Lake County Board of Adjustment General Rules of Procedure, July 16, 1963, General Rule of Procedure III: "An appeal to the Board of Adjustments must be taken within ninety (90) days after the cause arises or the appeal will not be considered by the Board of Adjustments." *Lund v. Cottonwood Meadows Co.*, 392 P.2d at 41, n. 1.

County Land Use Development and Management Act.<sup>2</sup> *Id.* at 41-42 (citing Utah Code Ann. § 17-27-16 (1953)). The Utah Supreme Court affirmed the trial court's decision:

The 90-day limitation period [authorized by] Sec. 17-27-16 is designed to assure speedy appeal to the proper tribunal any grievance that a party may have who is adversely by a decision of an administrative agency. The evident purpose of the statute is to assure the expeditious and orderly development of a community, etc. ... But where, as in this case, the alleged violation of the ordinance arose from the administration of a zoning ordinance by an administrative officer or agency, as provided in Sec. 17-27-16, appeal from that administrative ruling should have been taken to the proper administrative tribunal, or a suit should have been commenced in the courts within the statutory period provided for in Sec. 17-27-16, which in this case is 90 days.

*Id.* at 42 (footnotes omitted).

As in *Lund*, the Evertsen Plaintiffs failed to appeal the Planning Commission's decision within the 15-day appeal period prescribed by the South Ogden City Zoning Ordinance. The Evertsen Plaintiffs first challenged the Planning Commission's November 12, 1992 decision on April 15, 1993, 154 days after the Planning Commission had issued American Capital its conditional use permit. (Record Index at p. 30). As a result, American Capital's conditional use permit became "final and effective" on November 28, 1993, pursuant to Section 25-7-6 of the South Ogden City Zoning Ordinance. South Ogden City, Ut., *Zoning*

---

<sup>2</sup> Utah Code section 17-27-16 provided that "Appeals to the board of adjustment may be taken by any person aggrieved ..., or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution . ... The time within which such appeal must be made ... shall be as specified in the general rules provided in writing by the board of county commissioners ... ." *Lund v. Cottonwood Meadows Co.*, 392 P.2d at 42, n. 2 (citing Utah Code Ann. § 17-27-16 (1953)).

*Ordinance* § 25-7-6 (1992). Because the Evertsen Plaintiffs did not ‘take’ their appeal to the proper administrative tribunal within the requisite limitation period as required by *Lund*, their appeal of the Planning Commission’s decision became time barred. Therefore, contrary to section 25-7-6 of the Zoning Ordinance and the Utah Supreme Court’s *Lund* decision, the District Court erroneously permitted Plaintiff-Appellees to appeal the Planning Commission’s November 12, 1992 decision to the City Council after the Zoning Ordinance’s 15-day appellate limitation period had expired.

**II. The District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's meeting was time barred by the 30-day ‘challenge to notice’ limitation period set forth in the UMLUDMA.**

Section 10-9-103 of the UMLUDMA provides a 30-day limitation period within which persons must challenge the adequacy of notice given for a meeting of a municipal zoning authority:

If notice given under the authority of this section is not challenged as provided in Section 10-9-1001 within 30 days from the date of the meeting for which the notice was given, the notice is considered adequate and proper.

Utah Code Ann. § 10-9-103(2)(c)(ii) (1993) (emphasis supplied). The District Court failed to properly rule that the Evertsen Plaintiffs’ April 29, 1993 challenge to the adequacy of notice given for the Planning Commission’s November 12, 1992 meeting was time barred by the UMLUDMA. By the plain language of section 10-9-103 of the UMLUDMA, the notice given for the Planning Commission’s November 12, 1992 meeting was “considered adequate and proper” on December

13, 1992 -- 31 days after the Planning Commission's November 12, 1992 meeting. The Evertsen Plaintiffs' April 29, 1993 challenge to the notice given for the November 12, 1992 Planning Commission meeting was untimely because it was brought 168 days after that meeting. Pursuant to Section 10-9-103 of the UMLUDMA and the Utah Supreme Court's *Lund* decision, no lawful basis for the Evertsen Plaintiffs' appeal existed at the time the District Court ordered the City Council to hear the Evertsen Plaintiffs' appeal. Therefore, the District Court failed to properly rule that the Evertsen Plaintiffs' appeal was time barred by the UMLUDMA.

**III. The District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's meeting was time barred by the 30-day 'procedural limitation' period set forth in the UMLUDMA.**

As noted in point II., above, section 10-9-103 of the UMLUDMA provides that challenges to the adequacy of notice given for city zoning meetings must be brought within 30 days of the meeting and within the procedural limitation period set forth in section 10-9-1001 of the UMLUDMA. Section 10-9-1001 provides, in part, that:

Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court **within 30 days after the local decision is rendered.**

Utah Code Ann. § 10-9-1001(2) (1993) (emphasis supplied). The Evertsen Plaintiffs did not petition the District Court to review the Planning Commission's decision within the 30 day 'procedural limitation' period provided for in section 10-

9-1001. The Evertsen Plaintiffs first petitioned the District Court to review the Planning Commission's decision on April 29, 1993, 168 days after the Planning Commission had issued American Capital its conditional use permit. (Record Index at p. 267). Therefore, the Evertsen Plaintiffs' April 29, 1993 suit was time barred by section 10-9-1001 of the UMLUDMA.

It is widely recognized within the zoning context that "review proceeding[s] brought after the time period prescribed by statute ha[ve] elapsed must be dismissed for lack of jurisdiction." *Rathkopf's The Law of Planning and Zoning*, § 42.04[1] at 42.14 (1993). This principle has been applied to bar late filed suits in cases strikingly similar to this case. For example, in *St. Germain v. Zoning Board of Appeals*, 316 N.Y.S.2d 408, 410 (Ny. Sup. Ct. 1970), a New York court specifically held that a trial court's extension of the statutory time for seeking review of a city's zoning decision was invalid. In *Bolin v. City of Portales*, 548 P.2d 1210, 1211-1212 (N.M. 1976), the New Mexico Supreme Court dismissed a suit challenging a city's land use decision because the suit was not filed with the district court within 30 days of the city's decision, as required by a New Mexico statute, despite the plaintiff's assertion that the notice given for the city's hearing of the matter had been inadequate. In *Serna v. Board of County Commissioners*, 540 P.2d 212, 214 (N.M. 1975), the New Mexico Supreme Court held that a petitioner's failure to file for writ of certiorari in a district court within a statutorily prescribed 30-day period, deprived the district court of jurisdiction to subsequently review a county's zoning decision. In *Fish Hook Association, Inc. v. Grover Brothers*, 417

N.W.2d 692, 694 (Minn. Ct. App. 1988), the Minnesota Court of Appeals dismissed a suit to enjoin a county's issuance of a conditional use permit to a developer of a proposed mobile home park. The *Fish Hook* plaintiffs owned residential property adjacent to the proposed mobile home park and alleged that they had not received adequate notice of the county zoning authority meeting at which the conditional use permit had been granted. *Id.* The *Fish Hook* court dismissed the suit because the plaintiffs had not brought suit to enjoin the issuance of the conditional use permit within a 30-day appellate limitation period provided for by the county zoning ordinance and a Minnesota statute. *Id.*

The Utah Supreme Court's interpretation and application of procedural limitation periods set forth in zoning statutes is consistent with the *St. Germain*, *Bolin*, *Serna*, and *Fish Hook* decisions. In *Lund v. Cottonwood Meadows Co.*, the Utah Supreme Court dismissed a suit challenging a county zoning authority's decision because the complaining party had not commenced his action in district court within the 90-day limitation period prescribed by the county's zoning ordinance and the then applicable Utah County Land Use Development and Management Act. 392 P.2d at 42. As in *Lund*, the Evertsen Plaintiffs' challenge to the adequacy of notice given for the November 12, 1992 Planning Commission meeting was brought beyond the procedural limitation period set forth in the UMLUDMA. The Evertsen Plaintiffs first challenge to the Planning Commission's November 12, 1992 decision came on April 15, 1993 -- 154 days after the November 12, 1992 decision; Plaintiff-Appellees first raised the adequacy of notice

issue in district court on April 29, 1993 -- 168 days after the November 12, 1992 decision. (Record Index at p. 267). On April 15, 1993 and on April 29, 1993, the public notice given for the Planning Commission's November 12, 1992 meeting was "considered adequate and proper" under Utah law. Utah Code Ann. § 10-9-103(2) (1993). Therefore, contrary to *Lund* and the plain language of the UMLUDMA, the District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's meeting was time barred because the Evertsen Plaintiffs filed their suit beyond the 30-day limitation periods set forth in the UMLUDMA.

**IV. The District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission's November 12, 1992 meeting was time barred by a 90-day limitation period set forth in the Utah Open and Public Meetings Act.**

Under the Utah Open and Public Meetings Act ("UOPMA"), any challenge to a city's actions based on inadequate notice must be brought within a 90-day limitation period. Utah Code Ann. § 52-4-8 (1993). Section 52-4-8 provides that

[a]ny final action taken in violation of [the public notice provisions of the UOPMA] is voidable by a court of competent jurisdiction. **Suit to void final action shall be commenced within 90 days after the action ... .**

*Id.* (emphasis supplied). The 90-day limitation period provided for in Section 52-4-8 expired on February 11, 1993. The Evertsen Plaintiffs could not have lawfully challenged the Planning Commission's November 12, 1992 decision on April 15, 1993 or on April 29, 1993 by virtue of the 90 day limitation period set forth in the UOPMA. Therefore, for the reasons expressed in *Lund*, and the other authorities

set forth in Point III., above, the District Court failed to properly rule that the Evertsen Plaintiffs' challenge to the adequacy of notice given for the Planning Commission meeting was time barred by the UOPMA.

**V. The District Court could not have concluded that the limitation periods set forth in the Zoning Ordinance, the UMLUDMA, and the UOPMA were inapplicable to the Evertsen Plaintiffs' suit.**

Under Utah law, procedural due process requires that cities provide adequate notice before taking any action that will cause an individual to be deprived of a "significant" property interest. *Worrall v. Ogden City Fire Department*, 616 P.2d 598, 601 (Utah 1980). If, for example, a city condemns a landowner's property without providing adequate notice to the landowner of the condemnation proceeding, any statutory limitation periods that would otherwise govern the landowner's ability to challenge the city's condemnation proceedings will be inapplicable to the landowner's suit. *Salt Lake County v. Murray City Redevelopment*, 598 P.2d 1339, 1356 (Utah 1979); *W.G. Company v. Redevelopment Agency of Salt Lake City*, 802 P.2d 755, 765 (Utah Ct. App. 1990). As Utah courts have carefully noted, however, this rule of law is applicable only when a city's actions have caused a "serious" derogation of an individual's property rights, or have caused an individual to be deprived of a "significant" property interest. *Salt Lake County v. Murray City Redevelopment*, 598 P.2d at 1344; *Worrall v. Ogden City Fire Department*, 616 P.2d at 601. In the present case, the District Court did not receive any evidence upon which it could have based a conclusion that the Evertsen Plaintiffs had been deprived of any such property rights or interests.

Therefore, the limitation periods set forth in the Zoning Ordinance, the UMLUDMA and the UOPMA were fully applicable to the Evertsen Plaintiffs' suit.

Unlike the plaintiffs in *Worrall*, *W.G. Company*, and *Murray City*, the Evertsen Plaintiffs failed to submit any evidence to the District Court that proved that they had been deprived of any significant property interest or had suffered any serious derogation of their property rights as a result of the City's actions. Appropriately, therefore, the District Court made no Finding of Fact that any of the Evertsen Plaintiffs had been so affected. Thus, the District Court could not have concluded that the limitation periods governing Plaintiff-Appellees' challenge to the adequacy of notice given for the Planning Commission meeting had been rendered inapplicable pursuant to the *W.G. Company* standard. The Utah Supreme Court has long recognized that a plaintiff is "out of court" if he fails to sustain his "burden, by pleading, or proffer of proof on an essential element of [his] cause of action." *Hughes v. McCormick*, 412 P.2d 613, 613 (Utah 1966). In the present case, the issue of whether the Evertsen Plaintiffs had been deprived of any significant property interest as a result of the City's actions was essential to their ability to invoke the *W.G. Company* standard, and to pursue an untimely appeal of the Planning Commission's decision. Accordingly, when the Evertsen Plaintiffs failed to meet this evidentiary burden, the District Court should have dismissed the Evertsen Plaintiff' suit.

Under facts similar to those of the present case and under a rule of law similar to that employed by the *Hughes* court, a New York appellate court so

ruled. In *Wood v. Freeman*, 251 N.Y.S.2d 996, 997 (N.Y. Sup. Ct. 1964), a city zoning authority held a public zoning meeting and granted permission to a developer to construct and operate a golf course. *Id.* Owners of property adjacent to the golf course subsequently complained that they had not been notified of the city's actions and, therefore, claimed that the city's failure to provide actual notice of the zoning meeting constituted an unlawful taking of their property without due process of law. *Id.* The *Freeman* court dismissed the adjacent property owners' suit because they "failed to show that they [had] been deprived of property without due process of law ... ." *Id.* at 998. The *Freeman* court explained that "the mere failure of [the adjacent property owners] to receive a notice of [the zoning] hearing did not deprive them of the enjoyment of their property; nor ... constitute a taking of [their] property, nor deprive them of its use and enjoyment." *Id.* Similarly, the District Court could not have concluded that the Evertsen Plaintiffs had suffered any "serious" or "substantial" deprivation of property merely because the City failed to provide them with actual notice of the November 12, 1992 Planning Commission meeting. Because the Evertsen Plaintiffs failed to prove that they had suffered a serious or substantial deprivation of property as a result of the City's actions, and because the District Court made no Finding of Fact that the Evertsen Plaintiffs had been deprived of any property interest as a result of the Planning Commission's decision, the District Court could not have concluded that the limitation periods governing the Evertsen Plaintiffs' ability to challenge the Planning Commission's decision were

inapplicable to the Evertsen Plaintiffs' suit pursuant to the *W.G. Company* standard. Therefore, the District Court failed to properly rule that the Evertsen Plaintiffs' appeal of the Planning Commission's decision was time barred by the statutory limitation periods set forth in the Zoning Ordinance, the UMLUDMA, and the UOPMA.

In summary, under the *Freeman*, *Hughes*, and *Worrall* principles, the Evertsen Plaintiffs failed to demonstrate that they were constitutionally entitled to receive actual notice of the Planning Commission's November 12, 1992 meeting; the Evertsen Plaintiffs did not prove, nor did the District Court find, that the Evertsen Plaintiffs had been deprived of any serious or significant property interest as a result of the City's actions. Therefore, the District Court could not have concluded that the statutory limitation periods set forth in the Zoning Ordinance, the UMLUDMA, and the UOPMA were inapplicable to the Evertsen Plaintiffs' suit. Consequently, the District Court should have ruled that the notice given by the City for the Planning Commission meeting was "adequate and proper" as determined by section 10-9-103 of the UMLUDMA, and that the Evertsen Plaintiffs' district court suit was time barred by the statutory limitation periods set forth in the Zoning Ordinance, the UMLUDMA, and the UOPMA. The District Court committed plain error by failing to so conclude.

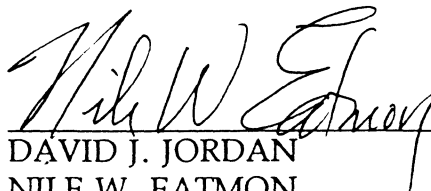
#### CONCLUSION AND RELIEF SOUGHT

American Capital is entitled to relief from the District Court's order because the District Court failed to properly rule that the Evertsen Plaintiffs'

challenge to the adequacy of notice given for the Planning Commission meeting was time barred by statutory limitation periods contained in the Zoning Ordinance, the UMLUDMA, and the UOPMA. The District Court could not have concluded that these limitation periods were inapplicable to the Evertsen Plaintiffs' suit because the Evertsen Plaintiffs failed to prove that they were deprived of a serious or significant property interest because the City failed to provide adequate notice of the November 12, 1992 Planning Commission meeting. Therefore, the District Court failed to properly rule that the Evertsen Plaintiffs' suit was time barred because all statutory limitation periods specified in the Zoning Ordinance, the UMLUDMA and the UOPMA had expired.

For the foregoing reasons, American Capital respectfully submits that this Court should grant this Appeal and direct the District Court to enter an order declaring that the Evertsen Plaintiffs' appeal was not lawfully before the City Council, and to order the City to reinstate the conditional use permit issued to American Capital by the Planning Commission on November 12, 1992.

DATED this 4th day of May, 1994.

  
\_\_\_\_\_  
DAVID J. JORDAN  
NILE W. EATMON  
STOEL RIVES BOLEY JONES & GREY  
Attorneys for Petitioner American Capital  
Development, Inc.

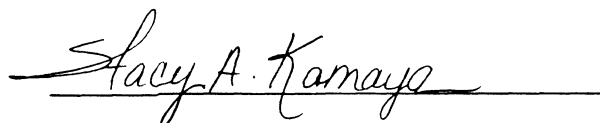
## CERTIFICATE OF SERVICE

I HEREBY certify that I caused a true and correct copy of the foregoing  
**BRIEF OF APPELLANT** to be mailed, postage prepaid, this 4th day of May, 1994  
to the following:

John Bradley  
Attorney for Lyle Evertsen and Others  
2447 Kiesel Avenue  
Ogden, Utah 84401

Steven W. Farr  
Attorney for South Ogden City  
Bamberger Square Building  
205 26th Street Suite 34  
Ogden, Utah 84401

Richard L. Stine  
Attorney for South Ogden City  
2650 Washington Blvd #102  
Ogden, Utah 84401

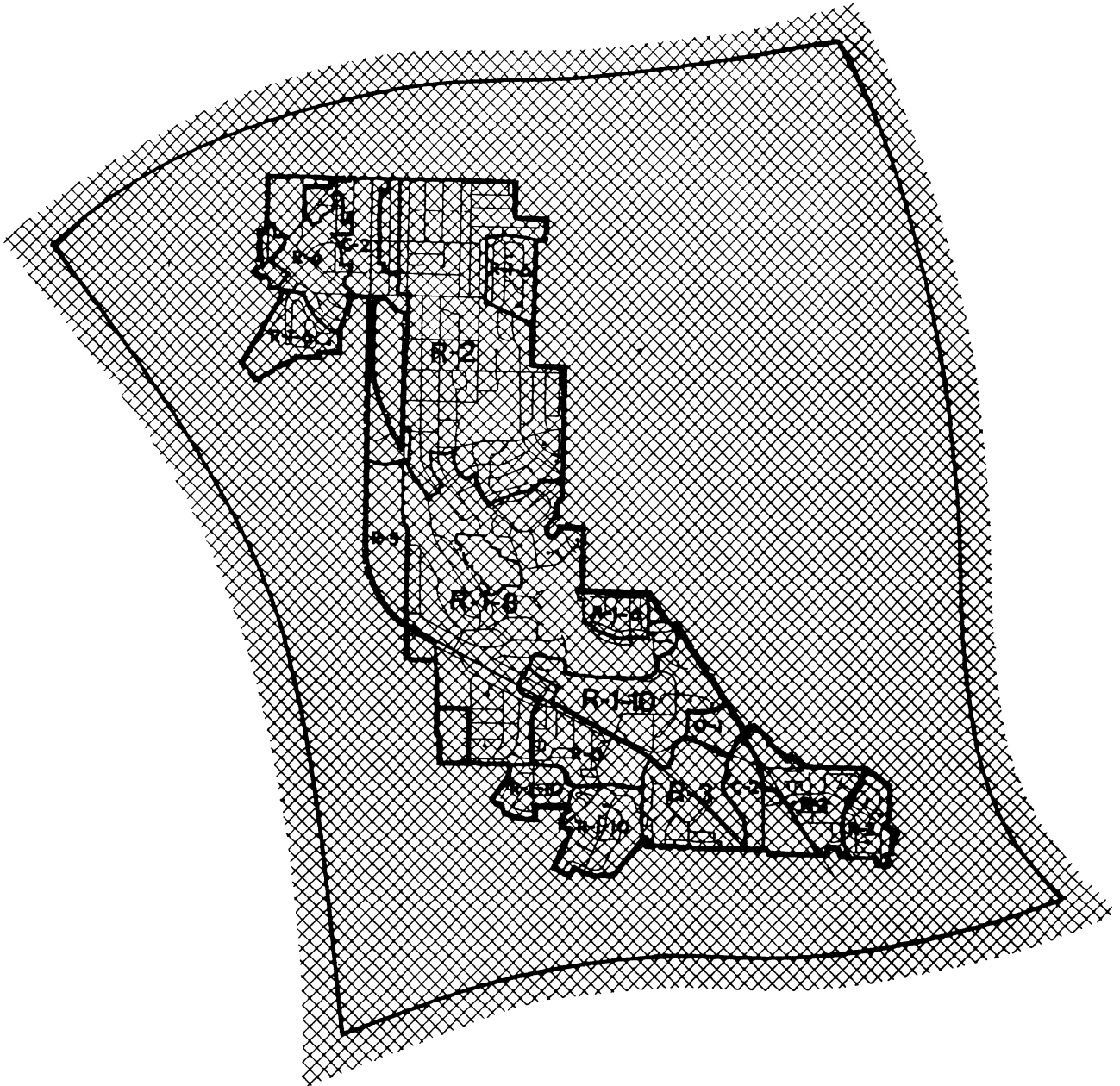
  
\_\_\_\_\_

## ADDENDUM

## **ATTACHMENT 1**

---

# **SOUTH OGDEN CITY ZONING ORDINANCE**



**ADOPTED 8 JANUARY 1980**

## ARTICLE 7

## CONDITIONAL USES

- 25-7-1. **Purpose and Intent**
- 25-7-2. **Conditional Use Permit**
- 25-7-3. **Review Procedure**
- 25-7-4. **Determination**
- 25-7-5. **Basis for Issuance of Conditional Use Permit**
- 25-7-6. **Appeal**
- 25-7-7. **Building Permit**
- 25-7-8. **Expiration**

**25-7-1. Purpose and Intent.** The purpose and intent of conditional uses is to allow in certain areas compatible integration of uses which are related to the permitted uses of the zone, but which may be suitable and desirable only in certain locations in that zone due to conditions and circumstances peculiar to that location and/or upon certain conditions which make the uses suitable and/or only if such uses are designed, laid out, and constructed on the proposed site in a particular manner.

**25-7-2. Conditional Use Permit.** A Conditional Use Permit shall be required for all uses listed as Conditional Uses in the zone regulations. A Conditional Use Permit may be revoked by the City Council after review and recommendation by the Planning Commission, upon failure to comply with the conditions imposed with the original approval of the permit.

**35-7-3. Review Procedure.**

1. Application for a Conditional Use Permit shall be made to the Planning Commission.
2. Detailed location, site and building plan shall accompany the complete application forms provided by the City. For structures in existence, only a location plan need to be provided.
3. The application together with all pertinent information shall be considered by the Planning Commission at its next regularly scheduled meeting.
4. The Planning Commission may call a specific public hearing on any application after adequate notice if it is deemed in the public interest. The Planning Commission shall take action on the application by the second meeting of the Planning Commission after the application filing date. A record of the hearing together with a decision for the denial or approval of the Conditional Use Permit with conditions of approval or reasons for denial shall be forwarded to the City Council.

- 25-7-4. **Determination.** The Planning Commission may deny or permit a Conditional Use to be located within any zone in which the particular Conditional Use is permitted. In authorizing any Conditional Use, the Planning Commission shall impose such requirements and conditions necessary for the protection of adjacent properties and the public welfare.
- 25-7-5. **Basis for Issuance of Conditional Use Permit.** The Planning Commission shall not authorize a conditional use permit unless evidence is presented to establish:
1. That the proposed use of the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the community.
  2. That such use will not, under the operation proposed, be detrimental to the health, safety and general welfare of the community, nor any part thereof, nor threaten damage to the property.
  3. That the use will be compatible with and not offensive to surrounding uses from the standpoint of building design, site layout, traffic both externally and internally, parking both externally and internally, signs, landscaping, pedestrian traffic, lighting considerations, material storage and operational characteristics, etc.
  4. That the proposed use will comply with the regulations and conditions specified in this Ordinance for such use.
  5. That the proposed use conforms to the goals, policies and governing principles and land use of the Master Plan for South Ogden.
  6. That the proposed use will not lead to the deterioration of the environment or ecology of the general area, nor will produce conditions or emit pollutants of such a type or of such a quantity so as to detrimentally affect, to any appreciable degree, public and private properties including the operation of existing uses thereon, in the immediate vicinity of the community or area as a whole.
- 25-7-6. **Appeal to and Review by the City Council.** The decision of the Planning Commission shall not become final and effective until fifteen days after notice of that decision has been mailed or delivered to the applicant and delivered to the City Recorder for presentation to the City Council. It shall not then become final if, prior to the expiration of that fifteen days, any interested party has appealed the same to the City Council by filing a written notice of appeal with the City Recorder or the City Council on its own motion has elected to review that decision.

The decision of the Planning Commission may be appealed by any interested party to the City Council by filing such appeal with the City Recorder within fifteen days after the notice of decision is sent to the applicant. The City Council may review that decision on its own motion made within that fifteen day period.