

Land Use Decision-making

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The Ombudsman's Office

(Generally): Ombudsman ('äm- бүdz-mən):

A government-appointed individual tasked with investigating and helping to resolve citizen complaints against the government

Utah Property Rights Ombudsman:

- Created by the Utah Legislature in 1997.
- An independent, neutral state agency. Housed in the Utah Department of Commerce.
- The role of the Office is to safeguard the property rights of the citizens of Utah. The Office assists citizens and government agencies in understanding and complying with property rights laws, resolves disputes, and advocates fairness and balance when private rights conflict with public needs.
- **Website:** propertyrights.utah.gov

Roles of the Property Rights Ombudsman

Mediate/Arbitrate

*Takings &
Eminent Domain
Disputes
(condemning entities)*

Provide Advisory Opinions

*Land Use & Development
Issues*

Educate

*Answer questions
Website & publications
Seminars & Trainings*

Coordinate Statewide Training

*Land Use Training Fund Grants;
Statewide Land Use Training
Director*

Foundations of Property Rights in Utah's Constitution

Article I - Declaration of Rights

Inherent Right to Property (Article I, Section 1)

"All persons have the inherent and inalienable right...to acquire, possess and protect property."

Due Process of Law (Article I, Section 7)

"No person shall be deprived of...property, without due process of law."

Takings Clause (Article I, Section 22)

"Private property shall not be taken or damaged for public use without just compensation."

Uniform Operation of Laws (Article I, Section 24)

"All laws of a general nature shall have uniform operation."

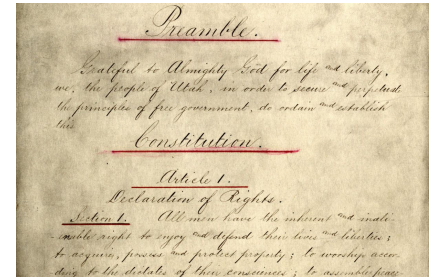
Fundamental Principles (Article I, Section 27)

"Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

Land Use Decision-making often involves a "Balancing Act"

Property rights are strongly protected and exist in balance with the government's inherent police power—the authority to regulate for the health, safety, morals, and general welfare of the public.

- *Property Rights* balanced with the *Public Interest*
- *Transparency* balanced with *Efficiency*



Elected and Appointed Citizen Planners

(Council Member, Planning Commissioner
or Member of Appeal Authority Panel)

*Write Rules
Set Agenda
Conduct Discussion
Make Decision
Control Development*

Professional Planners

(Zoning Administrator, Staff Planner, Consultant,
Director of Community Development)

*Coach
Facilitate
Explain Rules
Initiate Process*

Neighbors / Third Parties

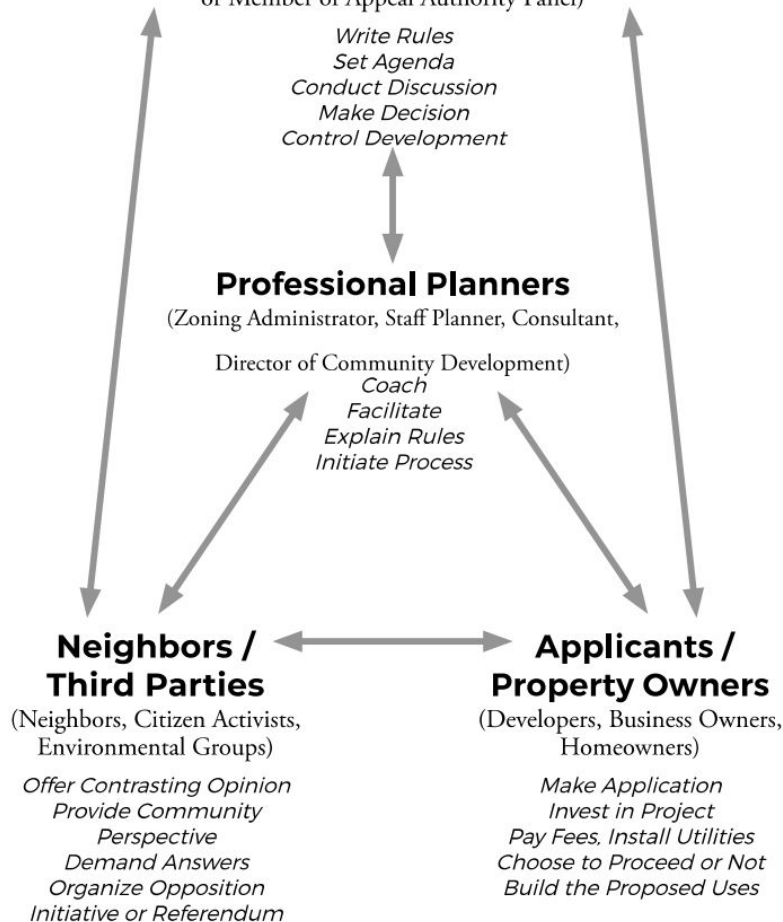
(Neighbors, Citizen Activists,
Environmental Groups)

*Offer Contrasting Opinion
Provide Community
Perspective
Demand Answers
Organize Opposition
Initiative or Referendum*

Applicants / Property Owners

(Developers, Business Owners,
Homeowners)

*Make Application
Invest in Project
Pay Fees, Install Utilities
Choose to Proceed or Not
Build the Proposed Uses*



Legislative vs Administrative Decision-making

How Much Flexibility Does the Government Have?



** A larger development and an associated development agreement may be either administrative or legislative, depending on whether broad issues of public policy are involved.*

NOTE: This is a gross oversimplification of a complex subject, for purposes of illustration and discussion only. Much of the discretion afforded a local government entity is defined by the ordinances of that entity, which can vary from municipality to municipality.

Legislative vs Administrative Decision-making

Legislative decisions generally involve making laws of general applicability, and are based on the weighing of broad, competing policy considerations.

Typical Legislative Decisions

- Adoption & amendment of the general plan
- Enactment & amendment of land use ordinances and development standards
- Enactment of a zone map & approval of a zone change
- Annexation decisions
- *Some types of* development agreements

Legal Standard of Review

1. Decision must be consistent with applicable state and federal law (cannot be illegal)
2. It must be “reasonably debatable” that the decision could advance the general welfare or public interest



Considerations When Making Legislative Decisions

- Local legislative decisions may not violate applicable state or federal law
- If it is “reasonably debatable” that the decision is consistent with the public interest, a court will uphold the decision as legal
- The legislative body should attempt to strike an appropriate balance between the public interest and private property rights, where the two conflict or may simply not align



Considerations When Making Legislative Decisions

Role of the Public in Legislative Decisions

The legislative body should take into consideration input from the public, property owners, and other interested parties, including preferences and opinions. It is up to the legislative body to determine how much weight to give to any preference or opinion

The legislative body may also receive input from the public for the purpose of gathering facts and evidence to support its conclusions and its decision



What Does Legislative Discretion Look Like?

Harmons v. Draper City

- Harmon's made application to build a grocery store in Draper
- General plan identified as commercial. Current zoning was residential.
- Harmon's sought a zone change to allow the use.
- Staff recommended approval.
- At the City Council meeting, nearby neighbors protested.



What Does Legislative Discretion Look Like?

- Developer's application included:
 - Traffic studies
 - Stormwater management plan
 - Landscaping plan
 - Parking design
 - Detailed architectural drawing
 - A financial analysis showing the business would produce sales tax for the city
- None of this appeased the neighbor's concerns; City Council voted to deny the application.
- Harmon's sued in district court and lost.
- Appealed to the Utah Court of Appeals



What Does Legislative Discretion Look Like?

“Harmon presented ample information to the city council that would have justified Harmon's requested change in zoning classification. However, in attacking the city's action, Harmon's burden was not to show that the city council had no reason to deny Harmon's application.... Rather, the burden was on Harmon to show that the city's decision to preserve the status quo...*could not promote the general welfare.*”

“Although Harmon presented evidence to support the position that the proposed rezone was reasonable, the city council, upon the record before it, could have reasonably concluded that use of the property for residential purposes consistent with the current zoning status was entirely appropriate.”

What Does Legislative Discretion Look Like?

"It is a legislative body's prerogative to determine public policy, a judicial body's job to interpret the policy, and an administrative body's job to enforce the policy. Establishing zoning classifications reflects a legislative policy decision with which courts will not interfere except in the most extreme cases. Indeed, we have found no Utah case, nor a case from any other jurisdiction, in which a zoning classification was reversed on grounds that it was arbitrary and capricious."

"In performing their duty *it is both their privilege and obligation to take into consideration their own knowledge of such matters and also to gather available pertinent information from all possible sources* and give consideration to it in making their determination."

Legislative vs Administrative Decision-making

How Much Flexibility Does the Government Have?



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Legislative vs Administrative Decision-making

Administrative decisions generally involve applying existing codes to a particular development proposal, based on individual facts and circumstances.

Typical Administrative Decisions

- Subdivisions
- Conditional use permit
- Site plan
- Building Permit
- Variances
- *Maybe* development agreements

Legal Standard of Review

1. Decision must be consistent with relevant state and federal law, local ordinances, and any vested rights (cannot be illegal)
2. Regarding factual determinations, the decision must be supported with substantial evidence



Considerations When Making Administrative Decisions

- The land use authority must apply the “plain language” of land use regulations to a land use application
 - Where a regulation “does not plainly restrict the land use application,” or could reasonably be read to support different interpretations, the land use authority must interpret and apply the regulation to “favor” the proposals in the land use application
- Where the land use authority must draw inferences or conclusions from a set of facts, or when the land use regulation gives discretion to the land use authority to make decisions subject to applicable standards or criteria, the land use authority must support its decision with “substantial evidence”
 - Evidence, as a general matter, must be factual, credible, relevant, independent, and expert or otherwise credible
 - Substantial evidence is evidence that “a reasonable mind would accept as adequate to support a conclusion”



Considerations When Making Administrative Decisions

Role of the Public in Administrative Decisions

The land use authority may *not* rely on public opinion or preferences when making an administrative decision

The land use authority may receive input from the public for the purpose of gathering facts and evidence to support its conclusions and its decision



What Does Administrative Discretion Look Like?

Wadsworth v. West Jordan City

- Wadsworth requested a conditional use permit to allow outdoor storage at its proposed construction yard and office in an industrial park
- Land already zoned M-1; open storage was an allowed conditional use.
- The law only allowed the planning commission to impose reasonable conditions governing the manner in which materials could be stored outdoors.



What Does Administrative Discretion Look Like?

- The planning commission could deny the application, in the administrative context, only if it could show by substantial evidence in the record that the negative aspects of outdoor storage on the particular parcel could not be mitigated because of special characteristics of the parcel.
- In a public meeting, neighboring businesses and landowners expressed concerns that open storage would “induce rodent traffic” and create dust problems.
- Planning commission denied the application; Wadsworth appealed to the City Council, which also denied.



What Does Administrative Discretion Look Like?

City Council's Findings:

1. The city has made significant investment in bringing a Dannon facility to the area and the attributes which attracted Dannon to the area need to be maintained. Outdoor storage is detrimental to the area, making the area less attractive and injurious to the goals of the city.
2. Outdoor storage may be considered a nuisance to neighboring property owners.
3. Outdoor storage would encompass the majority of the parcel. The area and intensity of outdoor storage are much different than that of neighboring property owners.
4. Outdoor storage is detrimental to the existing and future businesses in the area and is not harmonious with the goals of the city.

What Does Administrative Discretion Look Like?

On Appeal, the Court of Appeals determined the decision was not supported by “substantial evidence in the record.”

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

“Similarly, the sole evidence supporting the City Council’s determination that appellants’ outdoor storage ‘may be considered . . . a nuisance’ are the concerns raised by the neighboring property owners regarding potential increases in ‘rodent traffic’ and dust. Although [the city ordinance] authorized the City Council to deny [Wadsworth’s] application if it was ‘deemed . . . a nuisance,’ the City Council *did not find that appellants’ storage would actually constitute a nuisance*. Thus, this finding was also insufficient to justify denial of appellants’ conditional use application.”

Common Legal Issues in Land Use

Zone Changes	Public Meeting vs Public Hearing	Subdivisions
Vested Rights	Exactions	Public Input vs “Clamor”
Nonconforming Uses	Conditional Use Permits	Accessory Dwelling Units
Impact Fees	Appeals	Short-term Rentals
Annexation	Development Agreements	Roads & Trails

Appeals

Appeal of a Legislative Decision

- A challenge to the enactment of a land use regulation must be filed in district court within 30 days of the enactment
- A court will review whether:
 - the land use regulation is “expressly preempted by” or “was enacted contrary to” state or federal law.
 - It is “reasonably debatable” that the regulation promotes the public interest and the purposes of state law.



The “political” option: Referendum

The Role of the Appeal Authority

The Appeal Authority's role is to hear and decide appeals from decisions applying the land use ordinances

Appropriate parties may appeal land use decisions to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

See Utah Code § 10-9a-703(1)

"Adversely Affected Party." Someone other than the land use applicant who:

- Owns property *adjoining* the property that is the subject of the dispute, or
- Will *"suffer a damage different in kind than, or an injury distinct from, that of the general community"* as a result of the decision



Decisions Applying the Land Use Ordinance

General Considerations

- All parties involved are entitled to due process
- The individual appealing the decision has the burden of proving error



Decisions Applying the Land Use Ordinance

Two primary matters to consider when reviewing whether a decision is proper:

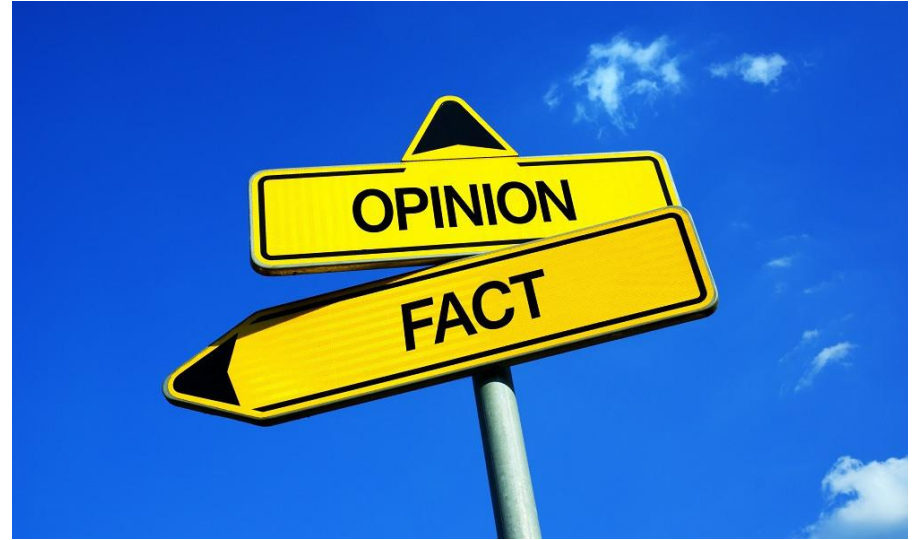
- Were factual matters and/or disputes decided correctly?
- Is the code being correctly interpreted?



Decisions Applying the Land Use Ordinance

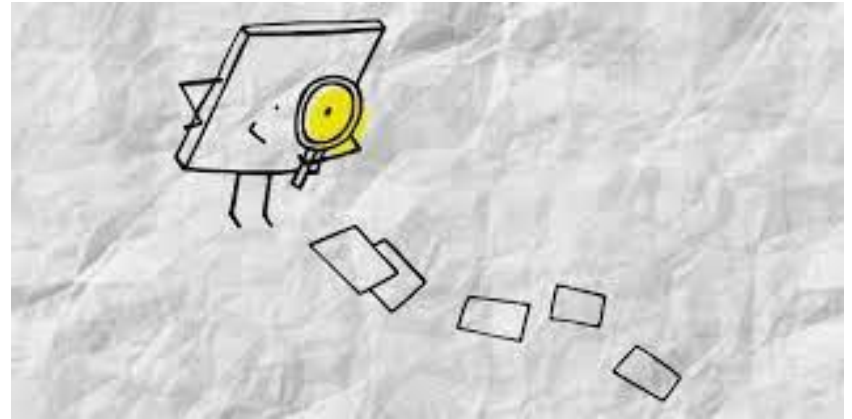
Factual Matters

- When the decision maker is tasked with making a factual determination or resolving a disputed fact, the decision-makers finding must be supported by “substantial evidence in the record.”
- “De novo” Review
 - No deference to the land use authority’s determination of factual matters
 - Consider the persuasiveness and credibility of both sides



Substantial Evidence

- “Substantial evidence” is evidence that a reasonable mind would accept as adequate to support a conclusion.
- Substantial evidence includes within its meaning the requirement "that localities must provide reasons" when they make adjudicative determinations.



Decisions Applying the Land Use Ordinance

Interpretation of the language of the Ordinance

- Review the land use authority's decision for "correctness"
- Understand and follow principles of interpretation



Principles Governing Ordinance Interpretation

- Start with the **plain language** of the provision. When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.
- Sometimes, the statutory text may not be “plain” when read in isolation, but it may become so in light of its linguistic, structural, and statutory **context**.
- Ordinances should be construed in a manner that renders all parts of the ordinance **relevant and meaningful**, and a correct reading should not impose an **unreasonable and unworkable construction**, or render some part of a provision nonsensical or absurd.
- Zoning ordinances should be **strictly construed in favor of allowing a property owner’s desired use**, since such ordinances are in derogation of an owner’s common law right to the unrestricted use of land.

Vested Rights

Vested Rights

"A property owner should be able to plan for developing his property in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream."

"It is incumbent upon a city...to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of current city officials for that of their predecessors."

Western Land Equities v. Logan, 617 P.2d 388 (Utah 1980)



Vested Rights

An applicant who has submitted a complete land use application..., including the payment of all application fees, is entitled to substantive review of the application under the land use regulations:

- (A) in effect on the date that the application is complete; and
- (B) applicable to the application or to the information shown on the application.

Utah Code 10-9a-509



Exceptions to the Vested Rights Rule

Once the application substantively complies with all the requirements in the local ordinance, the application is entitled to approval, *unless*:

1. Approval would jeopardize a compelling, countervailing public interest, or
2. A pending ordinance had been initiated, in the manner provided by local ordinance, prior to submission of the application that may affect the application
 - a. The city then has 180 days from the initiation of the pending ordinance to enact something



Conditional Uses

Permitted and Conditional Uses

A permitted use is:

- A specific activity or land use that is allowed within a particular zoning district without requiring any special approval or permit beyond adhering to adopted zoning regulations.
- Often referred to as a “by-right” use.

A conditional use is:

- A land use that has unique characteristics or negative effects that may not be compatible in an area without conditions to mitigate or eliminate the detrimental impacts.
- A local government may designate certain uses as “conditional” to ensure “reasonably anticipated detrimental effects are fairly mitigated.”
- The Utah State Statutes governing conditional uses are found at § 10-9a-507 (for cities and towns) and § 17-27a-506 (for counties).



Examples of Typical Conditional Uses

- Airports
- Religious uses
- Recreational facilities
- Gas stations
- Landfills
- Gun clubs
- Junkyards
- Dog kennels
- Gravel pits



Compliance with Objective Standards

“A municipality may adopt a land use ordinance that includes conditional uses and provisions for conditional uses that require compliance with objective standards set forth in an applicable ordinance.” Utah Code § 10-9a-507.

- The local ordinance may require that conditional uses comply with **“objective standards set forth in an applicable ordinance.”**

General difference between a rule and a standard:

- Rule: the consequences are triggered once we know the facts
 - Example: Structure shall be no more than 35 feet in height
- Standard: requires analysis of and a judgment about the facts
 - The use will not have an adverse on street service levels and/or traffic patterns

Examples of Standards that May Address Potential Detrimental Effects

- Impacts to street service levels and/or traffic patterns
- Impacts on adequacy of utility systems and service delivery
- Impacts on connectivity and pedestrian/bicyclist safety
- Impacts related to unreasonable or atypical noise, odors, and other environmental impacts such as dust, fumes, smoke, vibrations, chemicals, toxins, heat, etc.
- Impacts related to hours of operation
- Impacts related to signs or exterior lighting and compatibility
- Impacts related to provision of emergency services



Support Conditions with Substantial Evidence in the Record

Decision-making Steps

1. Identify “reasonably anticipated detrimental effects of the proposed use” in light of the code’s applicable standards and based on the evidence available.
2. Formulate “reasonable conditions” to **mitigate** the reasonably anticipated detrimental effects in accordance with applicable standards.
3. State any proposed/imposed conditions *in the record*. Support the conditions with factual findings, evidence, and legal conclusions. Show the basis for the decision.
 - Decision makers “must provide reasons when they make [administrative] decisions.”
 - The decision maker must “disclose the steps by which” it reaches its ultimate factual conclusions.
 - “Substantial evidence review requires that the grounds upon which the administrative agency acted be clearly disclosed.”
 - “An administrative agency must make findings of fact and conclusions of law that are adequately detailed.”
 - “The failure of an agency to make adequate findings of fact in material issues renders its findings ‘arbitrary and capricious’....”

Denial of a Conditional Use Permit

“If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the land use authority may deny the conditional use.”

Utah Code § 17-27a-506.



Exactions

Exactions on Development

What is an Exaction?

A mandatory contribution required by a governmental entity as a condition of approval for a development application.

May include:

1. Dedication of property
2. Construction and dedication of public improvements
3. Money payments (includes impact fees)



The Rough Proportionality Test

This test is intended to ensure an exaction is reasonable and that development pays for its own impacts, but no more.

For an exaction to be valid, the imposed condition or requirement must:

1. Serve a legitimate government function related to serving the development;
2. Provide a solution to a problem that the impacts of the proposed development creates; and
3. Cost the developer about the same as it would cost the local government to address the impact itself.

See Utah Code Ann. § 10-9a-508(1).



Finding the Right Balance

It starts with following the City ordinances and development standards.

RED FLAG: If a requirement in the code, *when applied to a specific development proposal*, requires the property owner to address impacts beyond their own, then it is likely unlawful.



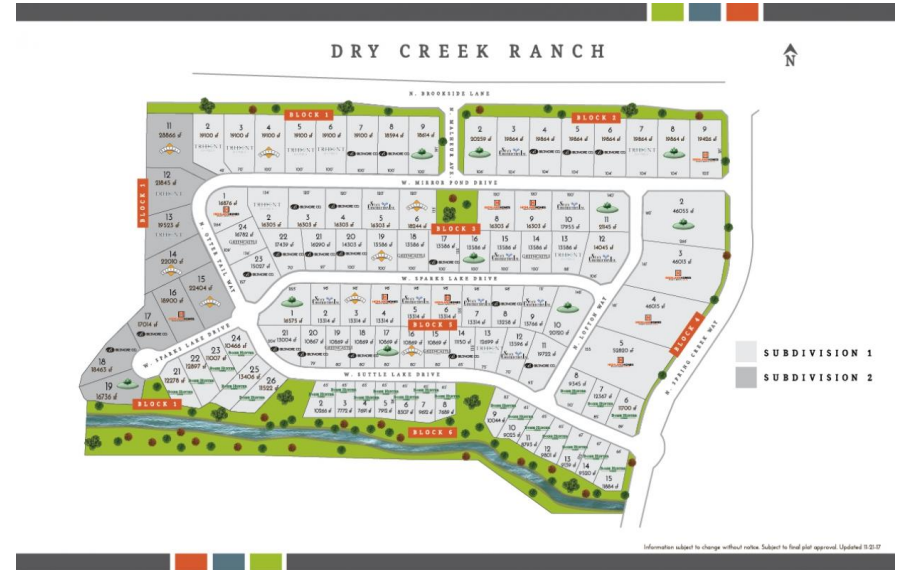
Tools for Thinking about Rough Proportionality

System Improvement or Project Improvement?

A *system improvement* is generally understood to be a public facility that is intended to provide services to larger regions of the community or to the community at large

A *project improvement* is generally understood to be an improvement planned and designed to provide services primarily to the proposed development, and that is necessary for the use and convenience of the future users in the proposed development

*Pro Tip - if the facility is identified in the city's capital facilities plan, it is likely a system improvement



Tools for Thinking about Rough Proportionality

System Improvement or Project Improvement?

Requiring a developer to build improvements that will clearly serve only, or at least primarily, the proposed development, typically satisfies the rough proportionality test, and is lawful

Requiring the developer to bear the burden of constructing a system improvement that will benefit and serve a larger region, or the community as a whole, likely violates the rough proportionality test, and is unlawful



Tools for Thinking about Rough Proportionality

The “Yardstick” Standard

If each lot constructed a half-width road, along with all the typical improvements that go with that portion of the road, then theoretically each property owner would bear its fair share.

Not a categorical rule, just a useful baseline or starting point when trying to decide whether the city is requiring too much.

For instance, this standard doesn't consider the lot's fair-share impact on “system improvements”.



Impact Fees

Impact Fees

- “A payment of money imposed upon new development as a condition of development approval to mitigate the impact of the new development on public infrastructure.”
- Intended to capture an individual development’s fair share contribution of impact on needed system improvements
- **Impact Fee Facilities Plan**
 - (Capital Facilities Plan)
- **Impact Fee Analysis**



Challenges to Impact Fees

- Each impact fee enactment must contain a provision allowing for adjustment of the fee “based upon studies & data submitted by the developer.”
- Credits & offsets for:
 - Dedication of land for a system improvement
 - Installation of a system improvement



Development Agreements

Why use a development agreement?

For Developers:

- **Regulatory Certainty:** Mitigates the risk that rules will change mid-project.
- **Secures Vested Rights:** Creates a durable, long-term legal right to build according to the approved plan.
- **Enables Financing:** The predictability provided is essential for securing capital for large investments.

For Municipalities:

- **Flexibility:** Allows for negotiation of project-specific standards not found in general zoning.
- **Secure Public Benefits:** A tool to obtain parks, trails, affordable housing, or enhanced architectural design.
- **Manage Impacts:** Provides a detailed plan for infrastructure to support large-scale projects.



A few use-case scenarios

- **Master Planned Developments and Phased Developments**
 - Large scale projects often involving a mix of housing types, commercial uses, and open space that require customized standards for density, setbacks, and infrastructure
- **Affordable & Moderate-Income Housing**
 - Grant developers incentives in exchange for commitments to construct affordable or moderate income housing units
- **Complex Infrastructure Needs**
 - Projects that require construction of significant amenities, off-site infrastructure, etc.
- **Annexations**
 - Outline anticipated zoning and development standards, and the provision of public services.



Prohibitions on what a development agreement can do

A Development Agreement May Not:

- Limit the municipalities authority to enact future land use regulations
- Require a municipality to change the zoning designation of an area of land in the future

In short, a development agreement may not bind future legislative decision-making. But they *can* do just about anything else the parties *agree* to



Legislative vs Administrative Agreements

Legislative Agreements

A development agreement may include use and development standards that differ from the applicable zoning district *if the legislative body approves the development agreement the same way it approves a land use regulation.*

Administrative Agreements

Agreements that simply implement existing land use regulations do not require legislative approval.

Examples

- An agreement that formalizes the phasing schedule for a project that is already a permitted use
- An agreement that details the precise timing for the construction of public improvements that are already required by the code



When may a local government *require* a development agreement?

A municipality ***may require*** a development agreement if the applicant has applied for a legislative or discretionary approval.

A municipality ***may not require*** a development agreement when:

- The development proposal otherwise complies with applicable statutes and ordinances
- The development is a permitted use
- The municipality's land use regulations otherwise establish all applicable standards for development of the land



Typical Provisions of a Development Agreement

- **Parties & Property Description:** Clearly identifies who is bound and what land is covered.
- **Master Plan:** Incorporates the detailed map and text defining the project layout. This becomes the basis for vested rights.
- **Specific Development Standards:** Custom rules for setbacks, height, landscaping, architectural style, etc.
- **Infrastructure Obligations:** Details the roads, water lines, and sewers the developer will build and any land or water the developer will dedicate.
- **Timing & Phasing:** Links infrastructure construction to project phases and timelines.
- **Reimbursement/Pioneering:** Provides for the “pioneering” developer to be reimbursed for the construction of oversized or off-site infrastructure (sewer trunk lines; arterial roads, etc) that will benefit not only the project but also future development on neighboring properties.



Variances

The Appeal Authority may grant a variance only if:

- (i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
- (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
- (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
- (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
- (v) the spirit of the land use ordinance is observed and substantial justice done.

Unreasonable hardship may not be self-imposed or economic, and must be “peculiar” to the property.

Special circumstances must relate to the hardship and must deprive the property of privileges others in the same zone enjoy.

