

I.

The Legal Perspective of Plat and Subdivision Law

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Developers know that before the first survey stake is driven or before the first concrete is poured they can make a profit by applying for and receiving land use entitlements. Each approved zoning change, conditional use permit, site plan approval, plat or variance can enhance the value of the land and return a handsome profit. The developer that knows how to successfully apply for entitlements, knows his or her rights under the law the law, and knows how to work with staff and elected officials in obtaining entitlements is the developer that will be successful and profitable.

City and county planning professionals and elected officials also understand that entitlements mean profit to the developer. This can mean that political influence, “good ol boy” networks, and in rare cases unethical practices. However, most city and county planning officials are genuinely committed to professionalism and integrity in the process. But, these officials receive pressure from many different sources and may have a very different definition of what constitutes a successful development than does the developer/builder. The purpose of this paper and this seminar is to help developers and others know their rights under the law and to offer practical solutions to potential development problems in obtaining valuable land use entitlements.

A. The 2005 Repeal and Reenactment of the Municipal Land Use Development and Management Act

The state has delegated land use regulatory authority to municipalities and counties in “The Municipal Land Use Development and Management Act” (§ 10-9a-101 of the Utah Code) and “The County Land Use Development and Management Act” (§ 17-27a-101 of the Utah Code). These enabling acts were substantially rewritten in the 2005 legislature and some of the more significant changes are noted in these materials. These enabling acts set forth the basic framework of law for land development, including subdivisions, and municipalities enact local ordinances to build upon the enabling statutes.

The experienced developer will recognize the need to become familiar with both the enabling statutes and local ordinances in addition to subdivision requirements. Local ordinances can vary widely in procedure and substance. Many local governments have very detailed ordinances that may result in a six month or more approval process. On the other hand small communities that are suddenly faced with an unexpected growth spurt may be caught with inadequate ordinances and may be completely unprepared to handle large subdivision or other entitlement applications. Fortunately, familiarization with local ordinances has become much more practical as many communities have posted their local development codes online. The Utah enabling statutes can be found online at www.leg.state.ut.us.

1. Planning Commission and the Subdivision Ordinance

To understand subdivision approval it is necessary to understand the functions of the planning commission. The planning commission is created by the local legislative body and is required for the exercise of zoning powers. Utah Code Ann. §§ 10-9a-301, 17-27a-301.

The Act gives the following powers and duties to the planning Commission:
The planning commission shall make a recommendation to the legislative body for:

- (1) a general plan and amendments to the general plan;
- (2) land use ordinances, zoning maps, official maps, and amendments;
- (3) an appropriate delegation of power to at least one designated land use authority to hear and act on a land use application;
- (4) an appropriate delegation of power to at least one appeal authority to hear and act on an appeal from a decision of the land use authority; and
- (5) application processes that:
 - (a) may include a designation of routine land use matters that, upon application and proper notice, will receive informal streamlined review and action if the application is uncontested; and
 - (b) shall protect the right of each:
 - (i) applicant and third party to require formal consideration of any application by a land use authority;
 - (ii) applicant, adversely affected party, or municipal officer or employee to appeal a land use authority's decision to a separate appeal authority; and
 - (iii) participant to be heard in each public hearing on a contested application.

The act also gives the Planning Commission the duty to “prepare and recommend a proposed subdivision ordinance to the legislative body that regulates the subdivision of land in the municipality” but the code sets forth this duty in the Subdivision Section.

To understand whether a particular transfer of property or change in boundaries of property is governed by the subdivision requirements of the enabling acts or the provisions of the local municipalities it is important to understand the definition of “subdivision”. Obviously, if what the property owner is trying to accomplish doesn’t meet the definition of “subdivision” then the transaction or boundary change does not fall under the state subdivision requirements or under the local zoning requirements. Hence, the property owner should examine, as a threshold question, whether his particular proposed transaction or boundary change meets the definition of “subdivision” set forth in §§ 10-9a-103(36) and 17-27a-103(39) of the Utah Code.

2. When is a Plat Required

A plat is required when property is subdivided. (10-9a-603; 17-26a-603) However, land is not subdivided unless it meets the definition of a subdivision.

10-9a-603. Plat required when land is subdivided -- Approval of plat -- Recording plat.

- (1) Unless exempt under Section **10-9a-605** or excluded from the definition of subdivision under Subsection **10-9a-103**(36), whenever any land is laid out and platted, the owner of the land shall provide an accurate plat that describes or specifies:
 - (a) a name or designation of the subdivision that is distinct from any plat already recorded in the county recorder's office;
 - (b) the boundaries, course, and dimensions of all of the parcels of ground divided, by their boundaries, course, and extent, whether the owner proposes that any parcel of ground is intended to be used as a street or for any other public use, and whether any such area is reserved or proposed for dedication for a public purpose;
 - (c) the lot or unit reference, block or building reference, street or site address, street name or coordinate address, acreage or square footage for all parcels, units, or lots, and length and width of the blocks and lots intended for sale; and
 - (d) every existing right-of-way and easement grant of record for underground facilities, as defined in Section **54-8a-2**, and for other utility facilities.
- (2) Subject to Subsections (3), (4), and (5), if the plat conforms to the municipality's ordinances and this part and has been approved by the culinary water authority and the sanitary sewer authority, the municipality shall approve the plat.
- (3) The municipality may withhold an otherwise valid plat approval until the owner of the land provides the legislative body with a tax clearance indicating that all taxes, interest, and penalties owing on the land have been paid.
- (4)
 - (a) The owner of the land shall acknowledge the plat before an officer authorized by law to take the acknowledgement of conveyances of real estate and shall obtain the signature of each individual designated by the municipality.
 - (b) The surveyor making the plat shall certify that the surveyor:
 - (i) holds a license in accordance with Title 58, Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act;
 - (ii) has completed a survey of the property described on the plat in accordance with Section **17-23-17** and has verified all measurements; and
 - (iii) has placed monuments as represented on the plat.
 - (c) As applicable, the owner or operator of the underground and utility facilities shall approve the:
 - (i) boundary, course, dimensions, and intended use of the right-of-way and easement grants of record;
 - (ii) location of existing underground and utility facilities; and
 - (iii) conditions or restrictions governing the location of the facilities

within the right-of-way, and easement grants of records, and utility facilities within the subdivision.

- (5) (a) After the plat has been acknowledged, certified, and approved, the owner of the land shall, within the time period designated by ordinance, record the plat in the county recorder's office in the county in which the lands platted and laid out are situated.
- (b) An owner's failure to record a plat within the time period designated by ordinance renders the plat voidable.

The definition of a subdivision is set forth in the definitions section of the Act, Section 10-9a-103 (36). This Section deserves careful scrutiny.

(36) (a) "Subdivision" means any land that is divided, resubdivided or proposed to be divided into two or more lots, parcels, sites, units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either on the installment plan or upon any and all other plans, terms, and conditions.

(b) "Subdivision" includes:

- (i) the division or development of land whether by deed, metes and bounds description, devise and testacy, map, plat, or other recorded instrument; and
- (ii) except as provided in Subsection (36)(c), divisions of land for residential and nonresidential uses, including land used or to be used for commercial, agricultural, and industrial purposes.

(c) "Subdivision" does not include:

- (i) a bona fide division or partition of agricultural land for the purpose of joining one of the resulting separate parcels to a contiguous parcel of unsubdivided agricultural land, if neither the resulting combined parcel nor the parcel remaining from the division or partition violates an applicable land use ordinance;
- (ii) a recorded agreement between owners of adjoining unsubdivided properties adjusting their mutual boundary if:
 - (A) no new lot is created; and
 - (B) the adjustment does not violate applicable land use ordinances;
- (iii) a recorded document, executed by the owner of record:
 - (A) revising the legal description of more than one contiguous unsubdivided parcel of property into one legal description encompassing all such parcels of property; or
 - (B) joining a subdivided parcel of property to another parcel of property that has not been subdivided, if the joinder does not violate applicable land use ordinances; or
- (iv) a recorded agreement between owners of adjoining subdivided

properties adjusting their mutual boundary if:

(A) no new dwelling lot or housing unit will result from the adjustment; and

(B) the adjustment will not violate any applicable land use ordinance.

Under Utah law “subdivision” means “any land that is divided, re-subdivided or proposed to be divided into two or more lots, parcels, sites, units, plots or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either on the installment plan or upon any and all other plans, terms and conditions.” A subdivision does not include a division “of agricultural land for the purpose of joining one of the resulting separate parcels to a contiguous parcel of unsubdivided agricultural land.” It also does not include a recorded agreement between property owners adjusting boundaries so long as no new lot is created. It does not include “the revision of a “legal description of more than one contiguous parcel of property into one legal description encompassing all such parcels of property.” Finally, it does not include “the joining of a subdivided parcel of property to another parcel of property that has not been subdivided.” Id.

Except in rare circumstances proposed subdivisions must be accurately mapped on a plat. The plat requirements are set forth in §§ 10-9a-601 and 17-27a-601 of the Utah Code. Most often the plat will be prepared by a certified engineer who will be thoroughly familiar with the requirements. Sections 10-9a-604 and 17-27a-604 set forth the required subdivision approval procedure. These sections indicate that “a person may not submit a plat of a subdivision to the county recorder’s office for recording unless a recommendation has been received from the planning commission and” has been approved by the legislative body or a

designated representative of the legislative body. This provision appears deceptively simple. The actual process, as more fully set forth in local ordinances, is much more complicated.

Most municipalities and every county have enacted subdivision ordinances. While there is variation from community to community, there are common features that can be found in most ordinances that will govern the procedure by which subdivisions are reviewed, approved, permitted and amended. Common provisions include requirement of planning commission approval with criminal penalties for noncompliance, a description of different types of subdivisions, an outline of review procedures, rules governing restrictive covenants, preliminary and final subdivision plat requirements and provisions for modification of approved plats.

The following section from the West Jordan City Development Code is typical of Utah Municipal Ordinances in its requirements for approval of subdivisions:

It is unlawful and punishable as a Class B Misdemeanor for any person to sell or exchange or offer to sell or exchange any subdivision of a larger tract or parcel of land which has not been approved according to the provisions of this part or exempted per state statutes. It is also unlawful and punishable as a Class B Misdemeanor for any person to record for building purposes in the office of the county recorder any subdivision of land unless approved according to the provisions of this part or exempted per state statutes. This applies to all properties regardless of land use designation.

West Jordan Municipal Code, § 88-3-202.

Many municipal codes will divide subdivision types into "major subdivisions" (perhaps 10 lots or more) and "minor subdivisions" with different levels of scrutiny required by both staff and planning commission. For instance West Jordan requires both preliminary and final plat review by the planning commission for major subdivisions, whereas only staff need review the final plat for minor subdivisions. West Jordan Municipal Code, 88-3-305. Salt Lake City, on

the other hand, defines a minor subdivision as one with 30 or fewer lots with frontage on a previously dedicated street. Salt Lake City Code, 20.08.210.

Approval of a subdivision from first application will generally involve at least the following:

1. Initial Conference with planning staff;
2. Submission of application and plat;
3. Submittal for preliminary plat approval to planning commission;
4. Formal approval of final plat by planning commission or staff;
5. City Engineer Review; and,
6. City Attorney Review.

All of this, of course, varies in substance and order from community to community. Furthermore, other approvals may be necessary before even getting to subdivision approval. The property may need to be annexed, master planned or rezoned. Consultation with planning staff is essential from the outset.

Although working with staff is essential, keep in mind that a positive recommendation from staff does not assure approval. In the case of *Wright Development v. City of Wellsville*, 608 P.2d 232 (Utah 1980), the city council had overruled the decision of the city engineer and the planning commission, which had approved a preliminary subdivision plat showing a six inch water line to connect with the city water system. The City Council required the installation of an eight-inch water line as a condition to final plat approval. The developer requested the District Court issue an order requiring the city council to approve the proposed subdivision plat, arguing that it had a right to rely upon the actions of the city engineer and the planning

commission, and that the only prerogative the city council had was the ministerial act of approving the subdivision plat. The court, ruled that the responsibility for making the final and controlling decisions as to growth and management of the city belonged to the city council. In this regard they also ruled that what is done by the city engineer and by the planning commission are but preliminary and are to be regarded as advisory to the governing body.

3. Exemptions

10-9a-605. Exemptions from plat requirement.

- (1) Notwithstanding Sections **10-9a-603** and **10-9a-604**, the land use authority may approve a subdivision of ten lots or less without a plat, by certifying in writing that:
 - (a) the municipality has provided notice as required by ordinance; and
 - (b) the proposed subdivision:
 - (i) is not traversed by the mapped lines of a proposed street as shown in the general plan and does not require the dedication of any land for street or other public purposes;
 - (ii) has been approved by the culinary water authority and the sanitary sewer authority;
 - (iii) is located in a zoned area; and
 - (iv) conforms to all applicable land use ordinances or has properly received a variance from the requirements of an otherwise conflicting and applicable land use ordinance.
- (2) (a) Subject to Subsection (1), a lot or parcel resulting from a division of agricultural land is exempt from the plat requirements of Section **10-9a-603** if the lot or parcel:
 - (i) qualifies as land in agricultural use under Section **59-2-502**;
 - (ii) meets the minimum size requirement of applicable land use ordinances; and
 - (iii) is not used and will not be used for any nonagricultural purpose.(b) The boundaries of each lot or parcel exempted under Subsection (1) shall be graphically illustrated on a record of survey map that, after receiving the same approvals as are required for a plat under Section **10-9a-604**, shall be recorded with the county recorder.
(c) If a lot or parcel exempted under Subsection (2)(a) is used for a nonagricultural purpose, the municipality may require the lot or parcel to comply with the requirements of Section **10-9a-603**.
- (3) (a) Documents recorded in the county recorder's office that divide property by a metes and bounds description do not create an approved subdivision allowed by this part unless the land use authority's certificate of written approval

required by Subsection (1) is attached to the document.

(b) The absence of the certificate or written approval required by Subsection (1) does not affect the validity of a recorded document

(c) A document which does not meet the requirements of Subsection (1) may be corrected by the recording of an affidavit to which the required certificate or written approval is attached in accordance with Section **57-3-106**.

4. Common Area Parcels

10-9a-606. Common area parcels on a plat -- No separate ownership -- Ownership interest equally divided among other parcels on plat and included in description of other parcels.

(1) A parcel designated as common area on a plat recorded in compliance with this part may not be separately owned or conveyed independent of the other parcels created by the plat.

(2) The ownership interest in a parcel described in Subsection (1) shall:

(a) for purposes of assessment, be divided equally among all parcels created by the plat, unless a different division of interest for assessment purposes is indicated on the plat or an accompanying recorded document; and

(b) be considered to be included in the description of each instrument describing a parcel on the plat by its identifying plat number, even if the common area interest is not explicitly stated in the instrument.

Section 10-9a-606(2)(a) provides for equal assessments of divided parcels. Hence, unless the plat specifically indicates otherwise, the separate parcels will be assessed equally, even if one parcel is twice as large as another.

5. When an Applicant is Entitled to Approval

10-9a-509. When a land use applicant is entitled to approval -- Exception -- Municipality may not impose unexpressed requirements -- Municipality required to comply with land use ordinances.

(1) (a) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid, unless:

(i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or

- (ii) in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.
- (b) The municipality shall process an application without regard to proceedings initiated to amend the municipality's ordinances if:
 - (i) 180 days have passed since the proceedings were initiated; and
 - (ii) the proceedings have not resulted in an enactment that prohibits approval of the application as submitted.
- (c) An application for a land use approval is considered submitted and complete when the application is provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid.
- (d) The continuing validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence.
- (e) A municipality may not impose on a holder of an issued land use permit a requirement that is not expressed:
 - (i) in the land use permit or in documents on which the land use permit is based; or
 - (ii) in this chapter or the municipality's ordinances.
- (f) A municipality may not withhold issuance of a certificate of occupancy because of an applicant's failure to comply with a requirement that is not expressed:
 - (i) in the building permit or in documents on which the building permit is based; or
 - (ii) in this chapter or the municipality's ordinances.
- (2) A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances.
- (3) Each municipality shall process and render a decision on each land use application with reasonable diligence.

This Section of the Code is one of the more interesting and important additions to the Act made as part of the 2005 recodification. It embraces the rule regarding vesting of a land use application first set forth in *Western Land Equities v. Logan City*, 617 P.2d 388 (Utah 1980). In that case the court held:

[The competing interests of the developer and the City] are best accommodated in our view by adopting the rule that an applicant is

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

The *Western Land Equities* holding, which had long been relied upon by both local governments and developers was thrown into confusion by the Utah Supreme Court decision of *Patterson v. American Fork City*, 67 P.3d 466. In that case the Plaintiff brought claims under the Equal Protection and Due Process clauses of the United States Constitution claiming they were entitled to development approval under the *Western Land Equities* decision. The court rejected this saying:

Pattersons argue that they have a legitimate claim of entitlement to approval of their development projects that satisfies § 1983's first hurdle. To support their claim, Pattersons cite our opinion in *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980), a case involving the retroactive application of zoning laws, also described as an issue of "zoning estoppel." Id. At 391. Pattersons rely solely on the following language from that opinion: "An applicant is entitled to ...approval if his proposed development meets the zoning requirements in existence at the time of his application." Id. at 396. This edited quotation misrepresents the holding of that case....*Western Land Equities* has no application here. Pattersons' complaints do not arise from a complete inability to develop any particular subdivision, but from ongoing disagreements with the City concerning the costs and design details associated with already-approved subdivisions. While Pattersons have set out a long list of complaints with the City, nowhere in their brief do they allege that any of their development projects was blocked by a retroactive application of an amended zoning ordinance. Nothing in *Western Land Equities* suggests that the "entitlement" to a building permit in the face of an amended zoning ordinance would extend beyond the facts in that case.

This language led to such a state of confusion that the court enacted Section 10-9a-509

of the Utah Code cited at the outset of this section. This section of the code enthrones once again the holding of Western Land Equities and addresses moratoriums and other issues dealing with vesting of rights to a subdivision and other entitlements. The Section also contains a protection for developers by prohibiting municipalities and counties from delaying action on permit applications for more than 180 days.

Another important protection is included in subsection (e). This provision states that a municipality may not impose upon a permit holder requirements that are not expressed in the permit itself, or in the municipal ordinances or in state law. For example, in one recent situation a city refused to issue a building permit unless the developer agreed to a “no basement” policy in the subdivision. The city had nothing in its ordinances restricting basements and a development agreement signed by the parties said nothing about a basement restriction. The city ultimately relented in part because of the language of subsection (e).

6. Dedication of Streets

10-9a-607. Dedication of streets and other public places.

(1) Plats, when made, acknowledged, and recorded according to the procedures specified in this part, operate as a dedication of all streets and other public places, and vest the fee of those parcels of land in the municipality for the public for the uses named or intended in those plats.

(2) The dedication established by this section does not impose liability upon the municipality for streets and other public places that are dedicated in this manner but are unimproved.

7. Land Use Authority and the Appeal Process

Section 10-9a-103(14) of the code defines the term “Land Use Authority” as “a person, board, commission, agency, or other legislative body designated by the local legislative body to act upon a land use application.”

Section 10-9a-701 with respect to municipalities and Section 17-27a-701 with respect to counties sets forth the appeal process for denied land use permits. In these sections, each municipality and county adopting a land use ordinance is required to establish one or more appeal authorities to hear and decide requests for variances and appeals from decisions applying the land use ordinance. Appeal to the appeal authority is a condition precedent to judicial review and each effected person is required to timely and specifically challenge a land use authority's decision in accordance with the local ordinance.

Great caution should be taken to make sure that an appeal is timely. Different municipalities have enacted different ordinances setting forth different amounts of time in which an appeal is required. The most common time is ten days. Most cities and counties have deliberately set this appeal period on a short time frame in the hopes that most people will not appeal in time. The short appeal periods are quite unfortunate because often, the appeal period can actually run before the minutes of a land use authority have even been issued. For example, if the planning commission is the land use authority that has denied the application, the city's ordinances may set up the city council as the appeal authority. The applicant may have ten days in which to appeal the planning commission decision. The ten days will usually expire before the planning commission has even issued minutes of its proceedings. Unfortunately, some cities will look at the appeal that has been filed and tailor the minutes of the appeal authority to refute the assertions of the appeal. My personal attempts to get the law changed at the last legislative session were unsuccessful.

Appeal authorities are required to “act in a quasi judicial manner” and are to serve as the final arbiter of issues involving the interpretation or application of land use ordinances. By requiring the appeal authority to act in a “quasi judicial” manner, the clear implication is that some form of due process is required. At the minimum, this means that minutes should be taken, and the decision should be based upon actual evidence in the record and not based upon public clamor.

This section of the Code also indicates that a county or a municipality may require an adversely affected party to present on appeal every theory of relief that it can raise in District Court. Most municipalities and counties have not yet enacted such an ordinance. However, an appellant should still try to raise every theory upon which it is going to rely at the District Court before the appeal authority. Sometimes this is very difficult because some of the issues to be raised before the District Court may involve complex constitutional and legal issues that the appeal authority is not trained to hear. Nevertheless, the applicant would be well advised to preserve his record to assure that a full and fair appeal can be made to the District Court. In my experience, very few appeal authorities are willing to overturn or to even question the decision of the local land use authority. The bias is too strong, the connections are too strong, and the developer is viewed as an outsider or a greedy person wishing to destroy the peaceful country lifestyle of the local small town environment.

B. Leading Cases and Recent Developments

Recent Developments:

1. Cases:

A. Washington County Conservancy District v. Keystone Conversions, 103 P.3d 686 (Utah 2004).

This important impact fee case has not received the attention it probably deserves. It is the first case in which the Supreme Court has addressed the issue of whether a water availability fee constitutes an impact fee under § 11-36-102 of the Utah Code. This section states that an impact fee is “a payment of money imposed upon development activity as a condition of development approval.” Section 11-36-102(3) defines “development activity” as “any construction or expansion of a building structure or use, any change in use of a building or structure, or any changes in the use of land that creates additional demand and need for public facilities.” The statutes contemplate that if an entity with the power to permit or prevent certain development activities imposes a fee as a condition of proceeding with development in order to fund public facilities and services that will be necessitated by the development, that entity must justify the imposition of the fee.

The Impact Fees Act requires an entity imposing an impact fee to prepare a “Capital Facilities Plan” identifying the “demands placed upon existing public facilities by new development activity” and “the proposed means by which the local political subdivision will meet those demands.” In the Washington County case, the developer sought a ruling that the Washington County Water Conservancy District was subject to the Impact Fee Act and could not impose the water connection fee without the required analysis. The Supreme Court held that the Water District did not have any authority to give “development approval” for purposes of the Impact Fees Act. Development approval is defined as “any written authorization from a local political subdivision that authorizes the commencement of development activity.” In this

case, the developer did not need the Water District’s approval to commence development activity. While the developer may have found it wise, necessary, helpful, and economically prudent to obtain water from the Conservancy District, the Conservancy District did not have the power to issue written authorization for the commencement of development activity and, therefore, was not subject to the Impact Fee Act.

B. *Caster v. West Valley City*, 29 P.3d 22 (Utah 2001).

An auto wrecking yard sat for years unused. The Utah Supreme Court ruled that the nonconforming use had not been abandoned where five or six cars had been stored on the property for 10 or 15 years, even though human activity was at a minimum.

C. *Anderson v. Provo City Corporation*, 108 P.3d 701 (Utah 2005).

In this case, homeowners challenged a newly enacted zoning ordinance that prohibited non-resident homeowners from leasing “accessory” apartments located in the University District near Brigham Young University. A group of non-resident homeowners brought suit challenging the ordinance and argued that:

1. The ordinance exceeded Provo City’s legislative authority by regulating land ownership rather than land use;
2. Violated the equal protection guarantees of the United States and Utah Constitutions;
3. Was an invalid restraint on alienation of property, and;
4. Unconstitutionally burdened the right to travel.

The Court held that the ordinance is a valid exercise of the City’s regulatory powers and rejected the notion that placing an owner occupancy condition on accessory dwelling use

constituted an impermissible regulation of “ownership.” The Court held that the City may use ownership restrictions as a method of land use so long as the ownership restriction is reasonably based upon a stated legitimate land use objective. The Court held “the restriction here does not prevent non-occupying owners from renting their houses for single family residential use; it merely prevents such owners from engaging in the supplemental activity of renting accessory dwellings-an activity that would not be permitted at all in the absence of the ordinance. Because the restriction serves to control only this supplemental use while not interfering with any owner’s use of his primary residence, we believe the restriction is reasonably related to the underlying purposes of Provo’s Land Use regulation.” The Court therefore held that the ordinance constituted valid land use regulations within the zoning power of the Provo City Municipal Council.

With respect to equal protection, the Court recognized that the “ordinance does distinguish between homeowners on the basis of whether they occupy their residence or not.” The Court further acknowledged that the resulting two classes, occupying and non-occupying owners, are treated differently, the former allowed to engage in the supplementary use of renting accessory dwellings and the later prohibited from doing so unless one of the stated exceptions applies.” Nevertheless the Court concluded, “we uphold the [ordinance] because we conclude that the disparity in treatment is reasonably justified by the Provo City Municipal Council’s stated objective of balancing the city’s competing interest in accommodating student housing need and in preserving the character of single family residential neighborhoods.”

With respect to the owners’ argument that the restriction was an improper restraint on alienation, the Court ruled that because the owners could still rent their primary residence, the

ordinance did not constitute an unreasonable restraint on alienability.

2. Recent Developments

During the 2006 legislative session the Utah Realtors Association was one of a number of groups advocating for SB170, a bill that would have changed municipal land-use law significantly to the advantage of developers and property owners. Some of its more notable provisions:

Lots of comments rolling in on SB170. Some of the more outrageous provisions:

Eliminates the ability of a county or municipality to enact stricter requirements for any section of the land use statute. In other words, what's in the code is it—nothing more, nothing less.

Requires local governments to designate a streamlined process for routine land use matters. Currently this is an option, not a requirement.

Removes aesthetics from the list of considerations that may be included in preparation of the general plan, as well as issues related to congestion, and to sprawl.

Eliminates the provision that a general plan may consider regulation of the use of land on hillsides.

Limits legislative acts to only three: enacting the general plan; enacting a zoning map for the entire jurisdiction; and a comprehensive rezone affecting at least 25 percent of the land area of the jurisdiction. All other land use decisions would become administrative acts.

Provides that when zoning issues are considered, the legislative body must consider the request of the landowners and adopt changes that conform to the landowner's request as closely as practicable.

Limits what applications for preliminary subdivision plat approval must include—the bill gets specific about the items to be submitted and reviewed.

Prohibits denial of an application on technical or scientific grounds if the applicant provides expert testimony to support approval and there is no equivalent expert testimony to support disapproval.