

How Projects are Reviewed and Decisions are Made

CHAPTER 3

Before understanding the process of approval, one must grasp the difference between local *legislative* decisions and local *administrative* or *quasi-judicial* decisions¹. The Utah courts have pounded on this issue in a handful of cases over the past few decades in a whole-hearted effort to help all those in the land use arena understand it.²

Basically, the concept can be stated simply.

Legislative Actions

A legislative act is a decision made by a public vote of the city or town council or the county commission or council that results in (1) a new ordinance, (2) an amendment to an existing ordinance, (3) adoption of the general plan, (4) an amendment to the general plan, (5) amendment to the zoning map or (6) the creation of an official policy, rule, or code of general community-wide application. Only a body of elected government officials can make legislative land use decisions and only after receiving a recommendation on the proposed action from the planning commission.

These actions by local legislators are afforded great deference by the courts. The local city council or county commission has the discretion to adopt any plan, ordinance, rule, or standard as a legislative act unless it can be proven that their decision does not advance the general purpose of the state Land Use, Development, and Management Act or violates state or federal law. So long as it is “reasonably debatable” that the legislative action advances the purposes of the Act and does not violate other state or federal statutes and constitutions, it will be upheld.³

Administrative Actions

When the council, commission, planning commission, board of adjustment, appeals authority, or their staff administers and enforces a legislatively adopted plan, ordinance, rule, or standard, however, their decisions are not legislative acts. They are administrative or quasi-judicial acts, and they are not entitled to the same deference

as legislative acts. These non-legislative decisions must be supported by *substantial evidence* that must be included in a formal *record* of each decision.⁴ All actions and decisions made by staff, local executives, boards of adjustment, appeals boards, and hearing officers are administrative or quasi-judicial acts.

Administrative Actions by a Legislative Body

Many decisions by legislative bodies are not legislative at all, since they do not result in an ordinance, general plan, code, rule or policy. Decisions involving individual subdivision approvals, variances, conditional use permits, and site plans are rarely legislative.⁵ They are almost always administrative and thus must be supported by substantial evidence in the record if they are to be legal and enforceable.

What is *Legislative Discretion*?

Case Law - Harmon's v. Draper

In a case involving a local legislative decision, the company that owns Harmon's grocery stores made application to the City of Draper for permission to build one of their prototype stores at 11400 South and 700 East. The area was shown on the general plan as commercial but had been assigned a residential zone on an interim basis, an assignment which would not allow the intensive use Harmon's proposed. Although the planning staff recommended approval and the planning commission also jumped on the bandwagon, the application hit the skids before the city council.

A group of vocal neighbors, predictably concerned about the impact of a 24-hour grocery store on their rear property lines, appeared before the city council and argued against approval. In this case, the developer had done extensive studies and had its administrative "ducks in a row." The application included traffic studies, storm water management plans, landscaping schemes, and parking design. The architecture of the building was shown in detail and financial analysis was done to show what a sales tax machine the proposed businesses would be for the City of Draper.

Legislative decisions include the following made by the legislative body, which the state code refers to as imposing “land use regulations”¹²:

- Adopting or amending the general plan.
- Adopting or amending the zoning map.
- Adopting or amending the text of the land use ordinances, including the procedures and standards that relate generally to subdivisions, conditional uses, and other land use applications.
- Setting uniform, printed development standards, codes, and regulations that are applicable generally to land use within the city, as opposed to a specific development approval for one isolated application.

What is *Administrative Discretion*?

Case Law – Wadsworth v. West Jordan

As a contrast to the way legislative decisions are reviewed by the courts, consider the matter of Ralph L. Wadsworth Construction, Inc. versus West Jordan City.¹³

Wadsworth, as the property owner, appeared before the West Jordan Planning Commission to ask for a conditional use permit to allow outdoor storage at their proposed construction yard and office in an industrial park. The land was already zoned M-1, which permits light manufacturing and construction services. West Jordan zoning ordinances defined “open storage” as a conditional use requiring approval by the West Jordan Planning Commission.¹⁴

When a land use board or commission reviews a conditional use permit application it is involved in an administrative act. In this case, since the land was already zoned for outdoor storage, the issue involved limited discretion. The planning commission was only empowered to impose reasonable conditions governing the manner in which materials are to be stored outdoors. The previous legislative decision to designate outdoor storage as a conditional use allowed in the zone already settled the issue of whether or not outdoor storage was appropriate and acceptable in the zone.

In other words, the city had already covered the issue of compatibility when it provided by ordinance that outdoor storage could be allowed as a conditional use in the zone. That legislative decision to define appropriate uses in the zone would have been given great deference if the neighbors had challenged the legislative act of allowing storage use in the M-1 zone when the zoning ordinance was adopted or amended. *Having made that policy decision in legislative process, however, the city could not ignore its own conclusions as expressed in the ordinance.* How could the city state in an ordinance that open storage is appropriate and desirable if properly conditioned but then deny an application for storage with broad language saying that such uses were incompatible?

The city's inconsistency was too obvious for the court's taste and it went on to add:

Similarly, the sole evidence supporting the city council's determination that [Wadsworth's] outdoor storage "may be considered a nuisance" is the concern raised by neighboring property owners regarding potential increases in "rodent traffic" and dust. Although [the zoning ordinance] authorized the city council to deny [Wadsworth's] application if it was "deemed . . . a nuisance," the city council did not find that [Wadsworth's] storage would actually constitute a nuisance. Thus, this finding was also insufficient to justify denial of [the] conditional use application.²⁰ (emphasis added)

Noting that there are other landowners in the area with outdoor storage, the court simply could not understand where the evidence existed that would show how outdoor storage on Wadsworth's lot would be detrimental to other landowners who also have outdoor storage on their lots. In the context of administrative decisions, the lack of evidence supporting a denial is fatal to the decision if appealed to court.

Administrative decisions include the following, referred to in state code as "land use decisions"²¹:

- Subdivision approvals.
- Review of variance requests.
- Decisions interpreting the meaning of the ordinances.

- Appeals from decisions of zoning officials.
- Issuing and enforcing building permits.
- Regulation of nonconforming (grandfathered) uses.
- Any other decision that is not made by the city or town council or county council or commission. If a final land use decision is not made by the legislative body, it *must* be administrative and *cannot* be legislative.

Note that in the *Wadsworth* case, the administrative decision maker was the city council. As already stated above, just because the legislative body is making the decision does not mean that the decision is legislative. Local elected boards, councils, and commissions often act in administrative capacities when they make land use decisions.

In the alternative, if the decision maker is not the council or county commission, then the land use decision being made cannot be a legislative decision. The judgment calls made by the board of adjustment, zoning administrator, appeal authority, building inspector, and staff are always administrative or quasi-judicial and must therefore always be supported by substantial evidence when challenged.

While the planning commission may make a recommendation on a proposed change to the general plan, land use ordinances, or zoning map, its advice is not defined as a "land use decision" but is instead a recommendation to the elected officials who must make each and every final legislative decision.

Those who master this principle will have covered a lot of ground in understanding local land use procedures. It may seem somewhat clear, but it must be remembered that the trial court in *Wadsworth* agreed with West Jordan, and it took the Court of Appeals to clear up the confusion about what constitutes substantial evidence. Do not be discouraged if a local decision seems marginal and the appeal unpredictable. Even the judges do not agree on some cases, and there are few bright lines in this business.

Summary of the Essential, Fundamental Law

Legislative Acts vs. Administrative Acts

What we have covered in this chapter is so essential to one's understanding of the basics of land use law that it is summarized again:

Legislative decisions will be upheld if (1) it is reasonably debatable that they advance the purposes of land use regulation which are outlined in the Land Use, Development, and Management Acts and (2) they do not otherwise violate federal, state, or local statutes, laws, or ordinances.²²

Administrative decisions will be upheld if (1) they are supported by substantial evidence in the record of the decision and (2) do not violate federal, state, or local statutes, laws, or ordinances.²³

Substantial evidence is more than a mere "scintilla" of evidence though something less than the weight of the evidence. It is defined in state law as evidence that (1) is beyond a scintilla and (2) a reasonable mind would accept as adequate to support a conclusion.²⁴

Public clamor is not substantial evidence. An administrative decision cannot be based primarily on citizen comments at a public hearing, petitions, or social media campaigns. To constitute substantial evidence, opinions in the record should be from those with particular expertise on the subject matter which they address. For example, a real estate appraiser could comment on whether a given decision might affect the property value of nearby property, but the average citizen's opinion about property values would not constitute substantial evidence. While the public's right to speak at a hearing is protected, only the comments which meet the definition of substantial evidence gathered in the hearing process can be considered by the board, commission, or hearing officer when making the decision.

The record of a decision includes all the documents that were before the decision-maker when the decision was made, any recordings of meetings and hearings held about the matter, and the official minutes of a board or commission. In order to survive a challenge, the record of an administrative issue must include the basis for the decision so that the local appeal authority or a district court judge can understand the facts and law which were relied upon by the decision maker.²⁵ Clearly stated findings of fact and conclusions of law must be part of the record.

The law that governs a land use decision may be found in the local ordinance or in state or federal statutes or appellate court opinions. A city, town or county must follow its own ordinances. State law prevails if there are provisions that conflict with the local land use regulations. Decisions by the Utah Supreme Court and Court of

Appeals interpreting state and local statutes and ordinances and the constitutions of the State of Utah and the United States also prevail over local ordinance.

Interpretation of the relevant statutes and ordinances is needed to determine if an action is illegal. According to guidelines set forth in court opinions, a code or statute is to be interpreted.

1. Our primary goal is to evince the true intent and purpose of the Legislature (including the city council or county commission).²⁶
2. The best evidence of the legislature's intent is the plain language of the statute itself.
3. We presume that the legislature was deliberate in its choice of words and used each term advisedly and in accordance with its ordinary meaning.
4. Where a statute's language is unambiguous and provides a workable result, we need not resort to other interpretive tools, and our analysis ends.
5. However, our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation.
6. Our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole.
7. When interpreting statutory text, we presume that the expression of one term should be interpreted as the exclusion of another.
8. We will not infer substantive terms into the text that are not already there.
9. We assume, absent a contrary indication, that the legislature used each term advisedly, and
10. [We] seek to give effect to omissions in statutory language by presuming all omissions to be purposeful."²⁷

¹ While there are some distinctions between administrative decisions such as approving a subdivision application and quasi-judicial decisions, such as resolving a land use appeal, both types of decisions are reviewed in the same manner by the district court. For our purposes, both are treated here as administrative decisions.