

**MINUTES OF LAYTON CITY
COUNCIL STRATEGIC PLANNING
WORK MEETING**

SEPTEMBER 24, 2015; 6:07 P.M.

**MAYOR AND COUNCILMEMBERS
PRESENT:**

**MAYOR BOB STEVENSON, TOM DAY, SCOTT
FREITAG AND JOY PETRO**

ABSENT:

JOYCE BROWN AND JORY FRANCIS

**PLANNING COMMISSION
MEMBERS PRESENT:**

**DAWN FITZPATRICK, WYNN HANSEN, BRETT
NILSSON, TRICIA PILNY, ROBERT VAN
DRUNEN, DANIELA HARDING AND RANDY
PULHAM**

STAFF PRESENT:

**ALEX JENSEN, GARY CRANE, BILL WRIGHT,
PETER MATSON AND TORI CAMPBELL**

The meeting was held in the Council Conference Room of the Layton City Center.

Mayor Stevenson opened the meeting and turned the time over to Staff.

**PRESENTATION – REQUIRED UTAH RISK MANAGEMENT ASSOCIATION (URMMA)
TRAINING**

Gary Crane, City Attorney, welcomed everyone to the training. He introduced Brent Bateman, Utah's Private Property Ombudsman. Gary explained how important Mr. Bateman was to the State and how he had a lot of knowledge about a variety of issues in the State. He reviewed some of the issues addressed by the Ombudsman's Office. Gary turned the time over to Mr. Bateman.

Mr. Brent Bateman expressed appreciation to Gary for the great introduction. He said land use law was one of his favorite things; he was lucky to work in a field that he loved. Mr. Bateman said every community was different and issues they faced were different. He asked the Council and Planning Commission if there were specific issues they wanted to discuss.

Mr. Bateman complimented the City on their reputation as being a well run City. He talked about difficult people that cities had to deal with. Mr. Bateman said every property owner had property rights whether they were difficult to deal with or not.

Commissioner Brett Nilsson said the Planning Commission spent a lot of time dealing with subdivisions. He said he would like to discuss the proper role of the Planning Commission in these decisions.

Mr. Bateman asked how subdivision approval worked in Layton City; did the Planning Commission give final approval or did it go to the City Council.

Staff explained that the Planning Commission made recommendations to the Council; the Council had responsibility for final approval and if there was a sensitive lands issue the Council had to give preliminary approval.

Mr. Bateman said a Planning Commission provided help to the Council for land use issues. Land use was a big issue and it was helpful to have additional eyes involved in the review process. Mr. Bateman said the entire purpose of a Planning Commission was to plan; too often he saw places where the Planning Commission was the land use authority for everything. He said too often a Planning Commission spent too much time on conditional use permits so that they never had time to plan. After a while ordinances became stale and out of date. Because Councils spent so much time on subdivision approvals they never had time to update the ordinances to reflect what they wanted in the community. Mr. Bateman said his recommendation would be to move away from that model as much as possible; there was no real reason the Planning Commission needed to be the land use authority for everything and there was no real reason the City Council needed to be the land use authority for everything. State law didn't require that. He said the City Council got to decide who the land use authority was and it was perfectly legal for the Council to indicate that they were the land use authority for subdivisions, or that the Planning Commission was the land use authority for conditional use permits, but it needed to be balanced against the role of the Planning Commission and the role of the City Council.

Mr. Bateman said the role of the Planning Commission was to plan; if they were not spending the majority of their time planning, the City needed to determine if there was a better way; if the Council was spending the majority of their time on subdivision approvals, they needed to determine if there was a better way.

Mr. Bateman explained how some cities had the City Council approval preliminary plats, but Staff gave final approval based on recommendations from the Council that were made at the preliminary approval. There were a lot less complaints from the development community because the approval process was quicker, and it freed up City Council time.

Commissioner Nilsson asked what he saw Planning Commissions planning.

Mr. Bateman said the Planning Commission needed to look at the City's ordinances as a living document. The Planning Commission should always be spending time reviewing the ordinances and how they could be made better. He said the Planning Commission should always be working on the General Plan. He saw that in most cities the General Plan was created and then it was ignored.

Mayor Stevenson said if the City put something in place 15 years ago; if that hadn't been updated or changed it was probably out of date. He said as time passed, ideas changed and what people wanted changed. Mayor Stevenson said many times there were people that didn't think the General Plan should ever be changed. He asked Mr. Bateman if he felt changes to the General Plan should come from the Planning Commission.

Mr. Bateman said it could come from three places; the Planning Commission, the City Council or a property owner that was asking for a change. He said even if the decision was to not change the General Plan; that was a discussion the Planning Commission ought to be having. Mr. Bateman said the City Council had the authority to make law and the authority to make citizens live up to the law; the laws should reflect what the citizens wanted.

Commissioner Tricia Pilny said very often people that came to Planning Commission meetings were only negative and didn't want to see change. She asked how you could get the part of the community that wanted change to come out.

Mr. Bateman said he wanted to make a distinction before he answered that question; there was a difference between legislative and administrative decisions. A legislative decision was a decision that made law; an administrative decision was a decision that applied law. With an administrative decision,

the body was not allowed to consider public clamor in the process; if it was a legislative decision they could listen to that. Mr. Bateman suggested that if the City had a lot of issues, to stop having public hearings on administrative issues; they were not required.

Councilmember Freitag asked for some examples of legislative and administrative decisions.

Mr. Bateman said legislative decisions changed the law; a decision applied to the whole town or parts of the town's zone, or anything that changed the wording in an ordinance. He said a zone change was a legislative decision or adding a new zone was a legislative decision; deciding whether or not to annex property was a legislative decision. Mr. Bateman said an administrative decision didn't change the law; someone applied for something and you determine whether or not it applied to the law; it was only applying the law.

Councilmember Freitag asked where a development agreement would fit in.

Mr. Bateman said it probably wouldn't fit in either category. He said a development agreement was a contract, but it was done under the City Council's authority.

Mr. Bateman said with an administrative decision, the only decision being made was whether or not it complied with the law. He said with an administrative decision the Council should never say, "Do we want this." That was a policy question that should be answered through a legislative decision.

Councilmember Freitag asked about the relationship between vested rights and legislative decisions. He said if a rezone came in, and a group of citizens was upset about the rezone, the Council was making a legislative decision, but at what point were the property rights established for the property owner; how did you balance what the citizens wanted and what the property owner wanted.

Councilmember Day said, along those lines, what were the rights of surrounding property owners to have the rezone or not.

Mr. Bateman said no one would ever vest in a legislative decision; there was a wealth of case law in Utah that said someone did not have a right to a particular zone. He said the City had the right to change the zoning on property at any time.

Councilmember Day asked if the City wouldn't need the owner's okay to do that.

Mr. Bateman said no.

Councilmember Petro asked Mr. Bateman to define spot zoning.

Mr. Bateman said spot zoning was when you zoned for one person, or one home. He said it was not illegal to do that. He said he wasn't recommending that the Council do that, but they could; it was not illegal. Mr. Bateman mentioned some zone change examples in other cities. He said it was a bad idea to do this, but it wasn't illegal.

Mr. Bateman reviewed the purpose of a General Plan.

Councilmember Petro asked how often a General Plan should be reviewed.

Mr. Bateman said as often as there were changes in the community. He said it should constantly be looked at.

Mr. Bateman said back to the vesting question, there was no vesting in legislative decisions because there wasn't a right in zoning; but there was vesting in administrative decisions. He said Utah had a really early vesting law; it was the earliest in the United States. Mr. Bateman said a property owner was vested as soon as they apply for something; if the application conformed to the ordinances they were immediately vested. He said the developer would have the right to continue with the development under the ordinances that were in place at that time. Mr. Bateman said that was another reason a city should always be looking at their ordinances to make sure they said what the city wanted. Once someone applied for something, even if it was something the city didn't want, if it conformed to existing ordinances the city could not stop it.

Mr. Bateman said that was what was so frustrating about referendums; for example, if the city changed the zoning and a developer applied under the new zoning, a referendum could come along and change all that zoning. What happened to those people that were vested under the new zoning? Mr. Bateman said there wasn't any case law for that yet, but he assumed it would be considered a taking, which meant that the city would be paying, even though the city wasn't the one that caused the issue, it was a group of citizens that violated other people's property rights.

Councilmember Freitag said even when a city went through its due diligence process of planning, and it faced referendum, everything vested up to that point was gone as well.

Mr. Bateman said that was the frustrating thing about referendum; the right was taken from the property owner and it would cost the cities money. He explained a bill that was adopted a couple of years ago that allowed cities to inform citizens of the cost associated with a referendum if there were property owners vested in the zone that was being challenged.

Commissioner Daniela Harding asked about the State Zoning Enabling Act regarding sensitive lands issues and landslide issues, particularly the statement of a compelling countervailing public interest.

Mr. Bateman said compelling countervailing public interest was an exception to vested rights. He said there wasn't a lot of case law relative to compelling countervailing public interest, but a landslide, that was moving down the mountain, was one; but a potential landslide, where there was a difference of opinion about whether or not it was going to move probably was not. Mr. Bateman said it had to be compelling and it had to be countervailing, and it had to be a public interest; it had to be a serious health, safety and welfare threat.

Councilmember Freitag said it had to be an actual threat, not a perceived threat, or one that had happened in the past.

Mr. Bateman said that was correct. He said that was why ordinances should be changed to reflect what the City wanted.

There was discussion about compelling countervailing public interest.

Commissioner Tricia Pilny asked who would make the final decision on a landslide issue if there were two competing geotechnical opinions.

Councilmember Day said on top of that, the Planning Commission and Council were not geotechnical experts.

Mr. Bateman said the City had to rely on experts, and there were competing experts. He said in that

situation, the City should get as many expert opinions as possible to protect themselves. Mr. Bateman said he had learned that there was no way to tell if land would slide. He said his opinion was that the law would side with the idea that if it wasn't sliding you would need to assume that it wasn't going to.

Councilmember Day said that was difficult, because when it did slide they always wanted to come back and blame the City.

Mr. Bateman mentioned the North Salt Lake slide; the city would want to make sure the due diligence was done.

Gary Crane said a lot of times it went to the type of decision that was being made. He said the standard for review of a legislative decision was different than it was for an administrative decision. Gary said the standard for a legislative decision was very low; there just needed to be a rational basis.

Mr. Bateman said if the administrative decision was based on substantial evidence on the record, the city was usually good. He said if the engineering reports were professional and met the standard of evidence, and they were substantial, the city was good.

Councilmember Freitag said what if a developer comes in and makes a proposal, but the City Council felt that there was compelling countervailing public interest, could the developer challenge that or even sue the City if they felt their engineering reports were accurate.

Mr. Bateman reiterated the difference between a legislative and an administrative decision. Because the Council had the authority to make and change law, those challenges were seldom won. With an administrative decision, it was handled differently. He said State law required a city to have an appeal authority; if someone didn't like an administrative decision, such as denial of a subdivision, that decision would be appealed to the local appeal authority. In Layton that was a Board of Adjustment; after the Board of Adjustment it could be appealed to District Court. Mr. Bateman said if someone didn't like an administrative decision, they had to go through the appeal process in the appropriate time frame.

There was discussion about the appeal process and referendums.

Councilmember Freitag said relative to vested rights, the Council often heard from surrounding property owners that it would affect their property value, it's not what they were told would happen on the property when they purchased their home, etc. They certainly had an appeal right on an administrative decision, and they could vote out the elected official that made the decision; what other rights did they have.

Mr. Bateman said in the end, neighbors rarely won an appeal of an administrative decision, unless they did a referendum.

Councilmember Freitag asked about public meetings; what were the requirements for discussions and decisions. He said recently a question came up when the Councilmembers were contacted individually by phone or email, either by a resident or a contractor; what was their responsibility to report that or make it public.

Mr. Bateman said if it was a legislative decision they should listen to every word someone wanted to say. He said it didn't have to be in a public meeting. Mr. Bateman said if it was an administrative decision, they needed to be able to tell the difference between clamor and evidence; clamor was an emotional thing that wasn't proof of anything. He said that could not be considered when making an administrative decision.

Commissioner Harding mentioned a video that was recently shown in a public meeting relative to traffic issues on Antelope Drive.

Mr. Bateman said based on the decision; that could be good evidence.

Mayor Stevenson asked how Mother Nature played into that role.

Mr. Bateman said Mother Nature was one of the conditions people had to drive in. He said those things had to be planned for.

Gary Crane said there would be evidence on both sides; there would be some engineers indicating that it could be made safe, and there would be other engineers that would state that no matter what you did, it would never be safe. Gary said the video was evidence to the fact that there was a problem, but not evidence to the fact that the problem couldn't be solved.

Councilmember Petro asked if that would be substantial evidence.

Mr. Bateman said that evidence along with other evidence could get to that.

Commissioner Robert Van Drunen said you would also have to consider if the video was of a onetime problem or was it a problem all of the time.

Gary Crane said the substantial evidence test merely provided the City with a pause; it was not conclusive in and of itself. He said it was meant to give the City an opportunity to put things on hold and look at the additional evidence. Ultimately the City would still need to make a decision as to whether or not to allow the project to proceed; it wouldn't stop a project permanently.

Mr. Bateman said the time the City would get into trouble would be if the Council made a decision that was supported by zero evidence. He discussed issues in other communities relative to substantial evidence versus public clamor.

Councilmember Freitag said relative to his earlier comment about emails and conversations with citizens; the Council should listen to citizens but reserve their thoughts and opinions until the open meeting.

Mr. Bateman said with an administrative decision, the Council was only deciding whether or not the application complied with the law. He said if citizens were saying it was something they didn't want, the Council had to disregard that. Mr. Bateman discussed ex parte communication and explained that ex parte communications were communications between one of the parties that was outside of the open meeting and the opportunity of another person having due process. He said anyone that was part of the appeal authority could not have an ex parte communication of any kind. Mr. Bateman said many would state that you should never have an ex parte communication if you were making an administrative decision.

Gary Crane asked if there was a difference between what the Planning Commission should listen to on the outside and what the City Council should listen to on the outside; was the Planning Commission charged differently than the City Council.

Mr. Bateman said there was a reason why the Planning Commission was not elected; they shouldn't be subject to the political whims of the people. They should be making the hard decisions; the decisions that were unpopular. The City Council had to make popular decisions; the Planning Commission didn't. Mr. Bateman said, if the Planning Commission was in its legislative role, they didn't make legislative

decisions, but they had a legislative role in recommending legislation. In that legislative role, their position was a lot like the Council's and they should listen to people. Mr. Bateman said State law required a public hearing for legislative decisions; the public hearing was required to be held at the Planning Commission meeting. The City Council wasn't required to have a public hearing with a legislative decision; most cities did have a public hearing, which was okay to do, but it wasn't required.

Mr. Bateman said with an administrative decision, the Planning Commission should not listen to public comment. They were going to have to make unpopular decisions on whether or not something complied with the ordinance; a lot of people were not going to like the answer if it was yes. If they were making an administrative decision based on what people said and not on the ordinance, they would get overturned.

Peter Matson, City Planner, asked how the Planning Commission would handle a conditional use permit versus a subdivision, rezone or annexation.

Mr. Bateman said there were different ways to handle it. Some places handle it by making very distinct roles. There were some places where the City Council made no administrative decisions; all of their decisions were legislative so they could always be open and listen. If the City was not going to do that, the Council needed to be well trained to know what the decision was and know what their role was when they were talking to someone at church. Mr. Bateman said some cities had different decisions being made by different bodies; staff made some decisions, and the Planning Commission made some.

Mr. Bateman said the City should make those distinctions so that people didn't get confused, or make sure that the people understood the difference so that they could always make the right call.

Councilmember Freitag said as an elected official, he hadn't been convinced that the Council should be making any administrative decisions.

Mr. Bateman said there was no requirement that the Council make any administrative decisions. He said some people would argue that the Council shouldn't be making any. Mr. Bateman said in some cities, and it worked very well, he had seen where all conditional use permits by default were decided by staff, but staff had the ability, if a certain threshold was met, to kick it up to the Planning Commission. At that point, the Planning Commission could have a public hearing. For routine conditional use permits, staff could make the decision, which was faster and easier. For complicated ones that citizens wouldn't want, it could be heard by the Planning Commission in a public hearing. The Planning Commission could also kick it up to the City Council if they wanted. This helped assure that the right decision was being heard by the right number of people.

Mr. Bateman said this alleviated the Council taking all their time to review routine things that staff could handle. He said some places allowed for staff to review minor subdivisions.

Mayor Stevenson said realistically the Council was a legislative body and set the rules. If those rules were set, the staff and Planning Commission could make the administrative decisions based on the rules set by the Council.

Mr. Bateman said that was the absolute ideal situation; take the administrative decisions out of the hands of the Council. He said he didn't know of any city that did that 100% of the time because different decisions required a different set of eyes. Mr. Bateman said if a city had that kind of system, they were not only taking care of the tough business, the Council was also free to plan.

Mayor Stevenson said it seemed that those processes had been condensed down a lot since he was on the Council a number of years ago. He said back then, the Council looked at everything that came into the

City.

Peter said that was correct.

Mayor Stevenson said relative to zoning, earlier in the meeting Mr. Bateman indicated that the City's ordinances should be changing; something that worked five years ago wasn't something that would be feasible in 15 years. He said with that, how did the City handle a situation where a developer wanted to develop something that really didn't fit into the zoning that was in place; was there a way through legislation to allow for a quick fix, without having to go back and create an entirely new zone.

Mr. Bateman said yes; there were three ways to do that depending on the situation: 1) in some cases a person could get a variance, but they were tough to get; 2) change the zoning to make it comply; or 3) through a development agreement.

Peter said relative to development agreements, the City usually used a development agreement to fill the gap when the zoning would maybe allow more than what the City really wanted to happen. The development agreement became a little more restrictive or defined. Peter said some cities would do sub-zones on a specific piece of property.

Mr. Bateman said the City could write a development agreement and pass it as an ordinance, and make the development agreement legislative so it became law applying to only one specific situation.

Peter said the development agreement couldn't allow more than what was allowed in the existing zone; or did that create a new zone.

Mr. Bateman said in a sense it recreated a zone that only applied to that situation. He said the development agreement shouldn't violate the City's own laws. Mr. Bateman said the City did have the flexibility in a development agreement to do quid pro quo.

Commissioner Wynn Hansen asked about conditional use permits and the latitude the Planning Commission had to assign conditions to a conditional use request, and recourse if the Planning Commission determined at a later date that those conditions were not being met.

Mr. Bateman said when someone brought a conditional use permit forward, there had to be evidence that there were detrimental effects and evidence that the conditions imposed would mitigate the detrimental effects, and the conditions imposed must relate to the standards in the ordinance. Mr. Bateman said a condition could not just be made up, but if there was a standard in the ordinance that related to the condition, the Planning Commission would have pretty good flexibility as to how that condition could work out. He said the City would want to make sure the standards in the ordinance for conditional use permits were always up to date and covered what the City wanted it to cover. Mr. Bateman said the standards needed to be specific so that the Planning Commission could apply those standards. If there were no standards, there could be no conditions. Mr. Bateman said if a conditional use permit was violated, the person would lose the permit.

Gary said even though the Council was a Legislative body, they needed to be careful about the commitments they made outside of a public hearing, because it would come back to bite them. He said early in his career he was told that the purpose of the Planning Commission was to enforce the ordinance; and they were an advisory group to the City Council. Gary said the Planning Commission should not be meeting with the public outside of the public hearing; they were not a political body. Their charge was very different than the Council; they didn't have an obligation to listen to the politics of a situation.

Mr. Bateman said that was absolutely right.

Bill Wright, Community and Economic Development Director, said the best way for a Planning Commissioner to deal with that would be to invite the individual to the public meeting where there was an opportunity for comment. He said that way everyone heard the comment; it was a good way to do business.

Commissioner Harding asked about recusing yourself from a meeting.

Mr. Bateman said he would advise to always be safe than sorry; be too careful. He said if someone had a personal involvement in something, or what appeared to be any type of a conflict of interest, they should bow out. Mr. Bateman said if they had ex parte communication, they should reveal them.

Mr. Bateman said that a Board of Adjustment was perfectly legal, but it was fraught with problems. He said there were better ways to do things. Mr. Bateman said a lot of cities were going to hearing officers, and were reporting great success. He said a Board of Adjustment was usually made up with laypersons and these were not really situations for a layperson. Mr. Bateman recommended the City implement a hearing officer for appeals.

Councilmember Freitag asked if that was someone that was hired or appointed.

Mr. Bateman said it could be either.

Everyone thanked Mr. Bateman for his time.

The meeting adjourned at 7:35 p.m.

Thieda Wellman, City Recorder