

Conditional Uses

Jordan Cullimore

Lead Attorney

Office of the Property Rights Ombudsman

(801) 530-6391

jcullimore@utah.gov

The Ombudsman's Office

(Generally): Ombudsman ('äm- būdz-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

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*

Conditional Uses

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
- *Maybe* 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

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 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



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
- *Maybe* 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

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 and discretionary decision-making, the decision must be supported with substantial evidence in the record

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



Considerations When Making Administrative Decisions

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 have a factual basis, be credible, and be relevant
- Evidence does not include “speculation” or “conjecture”
- 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



Permitted vs Conditional Use

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



Additional Considerations for Conditional Uses (compared with Permitted Uses)

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 § 10-20-506.

General difference between a standard and a rule:

- 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
- Rule: the consequences are triggered once we know the facts
 - Example: Structure shall be no more than 35 feet in height



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



Compliance with Objective Standards

Objective Standards require a degree of specificity

- The standards must not be so general as to allow unchecked discretion by the decision-maker. (Too general = Arbitrary)
 - Unchecked discretion: “Will not adversely affect the public interest.”
 - Objective standard: “Will not adversely affect street service levels and/or traffic patterns.”

Note: Do your CUP standards address potential impacts of unusual land uses?



Reasonable Conditions

“A land use authority shall approve a conditional use if **reasonable conditions** are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.” Utah Code § 10-20-506.

Decision-making Steps

1. Identify a “reasonably anticipated detrimental effects” of the proposed use.
2. Does the ordinance have a standard governing the anticipated effect?
3. Impose a “reasonable condition” to **mitigate** the detrimental effect.

Note: “The requirement...to reasonably mitigate anticipated detrimental effects of the...use does not require **elimination** of the detrimental effects.”

Examples of Standards that May Address Potential Detrimental Effects

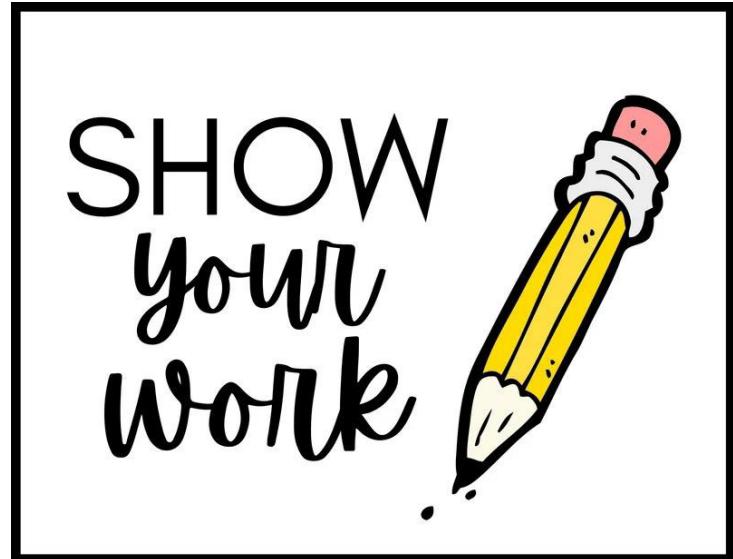
- Impacts to street service levels and/or traffic patterns
- Impacts on adequacy of utility systems and service delivery
- Impacts on connectivity and pedestrian/bicyclist safety
- Impacts related to unreasonable or atypical noise, odors, and other environmental impacts such as dust, fumes, smoke, vibrations, 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 a “reasonably anticipated detrimental effects” of the proposed use.
2. Does the ordinance have a standard governing the anticipated effect?
3. Impose a “reasonable condition” to mitigate the detrimental effect.
4. State the condition ***in the record***. Support the condition 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.
 - “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.

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.



Wadsworth v. West Jordan City

- 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.



Wadsworth v. West Jordan City

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.

Wadsworth v. West Jordan City

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.”

A Couple “Best Practices”

- Should the land use authority hold a public hearing on a proposed conditional use permit?
- Conditional uses vs permitted uses with carefully tailored “design standards.”

14.34.510 Design Standards for Recreational Vehicle and Boat Sales Lots.



(1) *Purpose.* The standards in this Section address the impacts that are unique to recreational vehicle and boat sales lots where permitted.

(2) *Required Yards and Landscaping.* Refer to the specific requirements of the applicable zone in which the use is located. The applicant shall submit a landscaping plan as part of the project plan approval process pursuant to Section 15.03.310, Provo City Code. Staff must approve the plan before implementation.

(3) *Walls and Fences.*

(a) *Street Frontage.* A decorative metal fence of at least two (2) feet in height but no more than six (6) feet in height shall be included in the landscaping buffer and shall be located within five (5) feet of the adjacent parking or display area to prevent parking or display in the required landscaping buffer.

(b) *Side and Rear Lot Lines.* Decorative metal fencing or decorative walls and landscaping on side or rear lot lines will be required where necessary as determined by the Planning Commission or its designee to prevent visual impacts on neighboring businesses, residential uses, and the streetscape.

(c) *Chain link fencing.* is not permitted. The location of all fences shall be included on the landscaping plan required under Section 15.03.310, Provo City Code.

(4) *Vehicle Display Area.* The vehicle display area shall be limited to that area on site remaining after compliance with all parking and landscape requirements.

(5) *Storage of Vehicles.* Inventory vehicles shall be stored on paved surfaces. Long-term storage of noninventory vehicles shall be prohibited in the FC1 and SC3 zones.

(6) *Vehicle Servicing and Maintenance.* Servicing and maintenance of vehicles shall be allowed under the following conditions:

(a) All vehicle repair shall be conducted indoors. Any outdoor storage of repair materials shall meet outdoor storage requirements.

(b) If recreational vehicle and boat washing areas are provided, drainage systems shall comply with requirements set forth by the Public Works Department.

(7) *Bay Door Location.* No bay door within one hundred (100) feet of residential or public open space or right-of-way shall orient towards the residential/public space unless there is an intervening building between the bay door and the residential/public space.

(8) *Parking.* Parking must be provided according to the following ratios:

(a) Sales: one (1) space per eight hundred (800) square feet of enclosed floor area and one (1) space per five thousand (5,000) square feet of open sales area.

(b) Service: four (4) spaces per service bay.

(9) *Lighting.* Parking lot lighting and lighting on structures or signs shall be designed to minimize excessive glare and light trespass onto neighboring properties, and shall comply with the development regulations for

Jordan Cullimore

Lead Attorney/Director

Office of the Property Rights Ombudsman

(801) 530-6391

jcullimore@utah.gov

propertyrights.utah.gov

Common Legal Issues in Land Use

Legislative/Administrative Decisions	Role of the Planning Commission	Subdivisions
Vested Rights	Exactions	Public Input vs “Clamor”
Nonconforming Uses	Conditional Use Permits	Zone Changes
Impact Fees	Adequate public facilities for development	Short-term Rentals/ADUs
Annexation	Development Agreements	Roads & Trails

