
SPANISH FORK

PLANNING COMMISSION AGENDA

WEDNESDAY, JANUARY 7, 2004

PLANNING COMMISSIONERS	6:30 P.M.	AGENDA REVIEW
	7:00 P.M.	1. SELECTION OF NEW CHAIRMAN AND ASSISTANT CHAIRMAN
DAVID LEWIS CHAIRMAN		2. PRELIMINARY ACTIVITIES
THORA SHAW ASST. CHAIRMAN		A. PLEDGE OF ALLEGIANCE
		B. MINUTES: DECEMBER 3, 2003
THAD JENSEN		3. STAFF REPORTS
TED SCOTT		A. SPANISH FIELDS PRELIMINARY PLAT
PAUL BRADFORD		Applicant: Fieldstone Homes
		Zoned: R-1-9 and R-1-12
		950 West 100 South
CHRIS WADSWORTH CITY COUNCIL REP.		4. OTHER BUSINESS
		A. TRAINING SESSION
		B. DISCUSSION ON WINDMILL ORDINANCE COMMITTEE
		1. COMMITTEE MEMBERS
		2. MEETING TIMES
		3. MEETING PLACE
		5. ADJOURN

The public is invited to participate in all Planning Commission Meetings. If you need special accommodations to participate in the meeting, please contact the City Manager's Office at (801) 798-5000.

**SPANISH FORK CITY
PLANNING COMMISSION
STAFF REPORT**



To:	Planning Commission	Zoning:	R-1-9, R-1-12
From:	Emil Pierson, City Planner	Property Size:	114.9 acres
Date:	January 7, 2004	# Lots/Units:	411
Subject:	Spanish Fields Preliminary Plat	Units/Acre	3.57
Location:	650 West 100 South		

Background

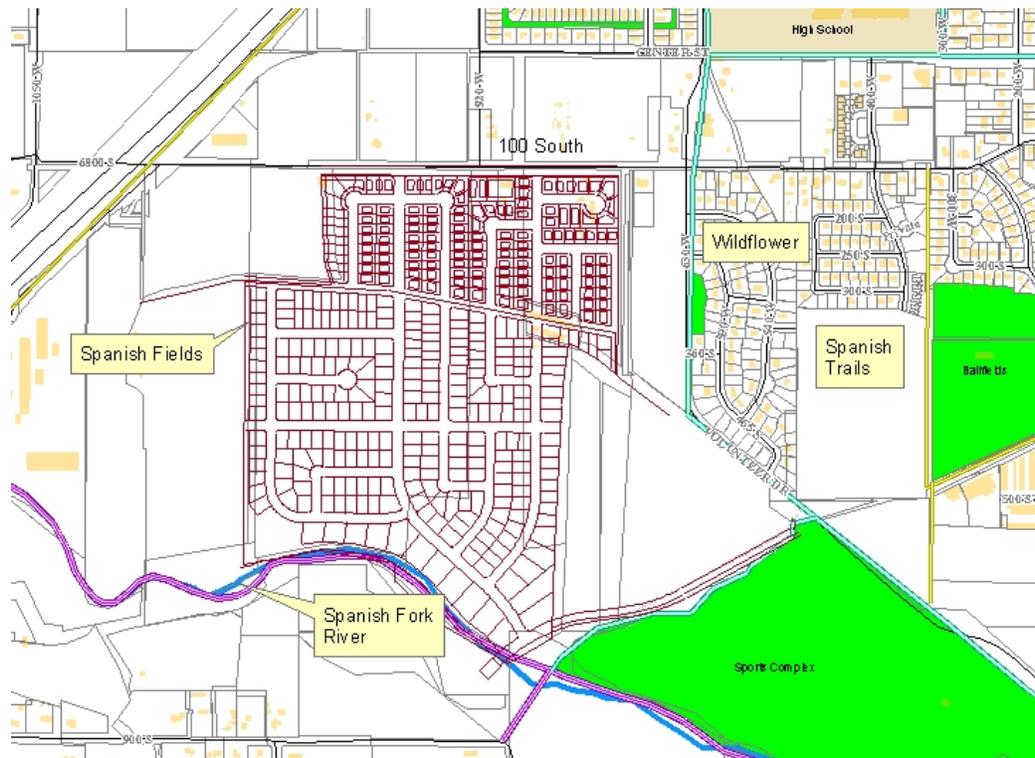
The applicant(s), Fieldstone Homes (Mike Stewart), is requesting preliminary plat approval in order to develop a 411 lot subdivision. The property is shown in the General Plan as Residential 3.5-5 u/a and Residential 1-2.5 u/a. The property is 114.9 acres in size and is currently being farmed. To the north is 100 South and fields. To the east is property owned by Lew Christensen. To the south is Spanish Fork River and to the west is property owned by Thomas's and the Finch's. The annexation of this area was approved by the City Council on December 16th.

Analysis

The applicant is proposing 412 total lots of which 411 lots are planned single family homes. (see attached packet)

Lot Sizes

The single family lots range from 6,000 to 37,810 square feet with most of the lots exceeding 7,000 square feet.



Access:

Access into the subdivision is shown from 100 South and a future 66 foot right-of-way coming from Volunteer Drive. There is a 66 foot collector road going north/south and also east/west in the subdivision going through the project. The developer is also required to participate in the construction of a vehicle and pedestrian bridge across the river.

Traffic study – a traffic study was completed by the developer and a summary is attached for your review.

Density

The General Plan designates this property as Residential 3.5-5.0 and 1-2.5 units to the acre. The developer is proposing this subdivision at 3.57 u/a. If the developer does not want to do the Master Planned Development (MPD) concept he would be required to have all of the lots over 9,000 and 12,000 square feet respectively. The developer, on the other hand, has decided to do a MPD and include lots under the required lot sizes.

Amenities:

As per the annexation agreement the developer is proposing a number of amenities like paying the school and Spanish Fork share of the bridge cost, the development of the 50 and 30 foot trails, the construction of the pavilion, and the construction of the trail head and new road coming from Volunteer Drive. (see packet for more details).

General Plan – Findings of Facts

#1

The Spanish Field Preliminary Plat follows and supports the General Plan by meeting the following Goals and Policies:

General Land Use Goals and Policies

Goal One: To maintain the high quality physical and social environment in Spanish Fork.

Policies:

- Require new development to respect the character of the surrounding area.
- Require that all implementing ordinances (i.e., zoning and subdivision regulations) be consistent with the General Plan.
- Allow development to occur only in areas where adequate streets, public facilities, and services exist or where the developer will provide them

Residential Policies:

Goal One: To provide high quality, stable residential neighborhoods.

Policies:

- Encourage the creation of neighborhood or homeowners' associations to help maintain the quality of neighborhoods.
- Design local streets in residential areas with discontinuous patterns to discourage through traffic.

Goal Two: To provide a range of housing types and price levels in all areas of the City.

Policies:

- Allow a variety of lot sizes and housing types in all "Urban Residential" areas.
- Allow residential development projects that provide superior design features and amenities to be developed at the high end of the density ranges as shown on the General Plan Map.

Goal Three: To ensure that adequate open space, buffering, and landscaped areas are provided in new

developments.

Policies:

- Develop an overall landscape concept for all common areas of the project including, entries, street plantings, reverse frontage streets, and park and retention areas.
- Select plant materials that are suited for their proposed use.
- Install street landscaping in significant lengths to develop the desired character and maintain continuity in the project.
- Provide for water conservation in landscape design; locate consumptive vegetation, such as lawns in visible and usable places.
- Develop parks within ½ mile of all residences.
- Provide high quality, durable walls or fences along arterial streets.

Transportation Goals and Policies

Goal One: Provide a safe, convenient, and efficient system for transporting both people and goods.

Policies:

- Develop intersections to obtain Level of Service C or better during peak-hour traffic periods. Reduce the intensity of proposed projects or require traffic improvements to maintain or achieve Level of Service C or better.
- Require new developments to have or to develop appropriate access for the intensity of the development.
- Obtain needed street rights-of-way through property dedication when subdivisions, conditional use permits, rezonings, or design review plans are approved.
- Base street system planning on traffic generated from planned uses. Changes in planned uses are to be accompanied by an analysis of traffic impacts created by those land use changes and what improvements are needed to deal with these impacts.
- Design sidewalks along new streets to be set back from the traveled roadway, thereby providing a safer walking area.
- Design local residential streets with discontinuous patterns to discourage through traffic.
- Discourage partial width streets (half streets) for new, local streets.

Goal Two: Provide pleasant, safe, and functional non-motorized transportation routes.

Policies:

- Prepare a more extensive bikeway and trails plan that identifies which parts of the system should be paths, routes, or lanes, and what types of non-motorized transportation should occur in each area. Develop detailed design guidelines for each component of the system.
- Require pedestrian walkways between sidewalks along public streets and developments adjacent to those streets. Pedestrians should not have to use driveways or parking lots as the only access points to buildings.

Development Review Committee

The Development Review Committee reviewed this request at their December 31, 2003 meeting.

Draft Minutes from December 31st:

Mr. Stewart reviewed the Spanish Fields Development Packet prepared by Fieldstone Homes. They will be deeding property with phase 2 or 3, and it will not be part of the annexation agreement. The packet included information concerning the annexation agreement, improvements along 100 South, including the wall, connecting road to Volunteer Dr., and the trail system. He said fieldstone is prepared to increase elevations around the river as directed by city staff.

Mr. Baker said erosion is a substantial concern to staff. Mr. Oyler requested a statement from Fieldstone stating the banks of the river of adequately rip rapped. Mr. Thompson said Mr. Heap requested the developer obtain a study from a qualified engineer approving the rip rap.

Mr. Stewart reviewed the plans for the trailhead park and the house design and plotting. Mr. Oyler said the park should have proper signage concerning proper use of the parking lot, etc.

Mr. Pierson requested the house design details also include square footage of the main level in second story homes and the exteriors are to be constructed of at least 50 percent brick or stone. Superior design and materials are consistent with master plan developments. He said the Planning Commission will require developments to have the look and feel of a neighborhood. Also, plotting of similar homes are to be at least 120 feet apart and side entry garages on corner lots are strongly encouraged.

Mr. Baker will provide Fieldstone with the original Annexation Agreement today, however, the agreement with Thomas's is being prepared. Mr. Oyler said the annexation will need to be completed before the subdivision will be approved. He also said the Hill property will need a right-of-way. Mr. Baker said the city is required to obtain the right-of-way from the Hills. Mr. Stewart said phases 1 and 2 will be submitted together and the right-of-way is required with phase 2. All improvements along 100 South will be completed along with phases 1 and 2. Mr. Nielson asked Mr. Magleby for the legal description of the Hill property to obtain the right-of-way. The Hill property required is around one acre. Mr. Thompson said the city has a boundary line agreement south of the development near or on the Hughes property.

Mr. Robinson has determined the location of the pavilion and will provide details to the developer. Mr. Thompson said the canal will need to be moved and/or piped. Mr. Magleby said they are not moving the canal. He said it is out of the right-of-way. Mr. Thompson said it will need to be reviewed.

Mr. Oyler asked if the cement of the sidewalk is covered under the trail grant. Mr. Thompson said yes the cement of the sidewalk is covered under the trail grant. Mr. Oyler said the value of the sidewalk should be put toward improvements along the river.

Mr. Pierson reviewed the density bonus allowances. Adjustments were made. Mr. Nielson said he has the utility issues worked out. Mr. Magely said he has been unable to receive any commitments from Strawberry Electric. Also, he still needs to coordinate the electric design with Jeff Foster. Mr. Bagley reviewed the electric design requirements. Mr. Pierson asked Fieldstone to get with Jeff Foster as soon as possible.

Mr. Baker made the following findings:

1. The Preliminary Plat Meets the General Plan and the Zoning by developing mixed lot sizes,
2. Amenities to be provided as reviewed.

Mr. Baker made a **motion** to recommend approval of the Spanish Fields Preliminary Plat subject to the following condition(s):

1. Install a masonry wall with 2" caliper trees and tree gates on 100 South,
2. Along with development of Phase I a payment is to be made to Spanish Fork City and Nebo School District portions of the proposed bridge to Spanish Fork City and construction of the park pavilion similar to the existing Veteran's Pavilion,
3. Construct a connector road from the proposed bridge location to Volunteer Dr.,
4. Install the Spanish Fork River Trail and Pedestrian/Equestrian trail along the west property boundary as per the Spanish Fork City Parks and Recreation Department,
5. Construct a trailhead park adjacent to the Spanish Fork River Trail as per the Spanish Fork City Parks and Recreation Department,
6. Construct the Spanish Fields Project as per the preliminary plan document packet,
7. The developer is to provide an engineering study of the stability of the existing river rip rap,
8. Submit to the city the covenants, codes, and restrictions for the development,
9. The developer is to sign off on all house plans in the development,
10. Provide the city with a clear title report prior to submitting the final plat,
11. Meet all of the city construction and development standards,
12. The developer of the Galt, Boatman, Murphy properties are to participate in the cost of constructing the pedestrian/vehicle bridge over the Spanish Fork River, to the percent indicated by the updated traffic study,
13. A traffic study be completed for this development and other surrounding development areas which will be determined by the traffic engineer,
14. No duplicate homes are to be constructed within 120 feet of each other,

15. Receive approval of the electrical design for the development from Jeff Foster of the Electrical Department,
16. Construct all homes with at least 50 percent stone, brick, or masonry surface,
17. Side entry garages are strongly recommended on homes located on corner lots, especially on 66-foot right-of-ways,
18. The project contain a total of 411 units as contained in the development packet,
19. Irrigation ditches in the development be piped or eliminated,
20. Electric service from the Strawberry Service District Line be brought in as directed by Jeff Foster of the Electrical Department,
21. Provide a letter of approval from the Irrigation Company,
22. Cost of the sidewalk from Volunteer Drive to the east end of the development be paid directly to the city in compliance with the trail grant.

Mr. Oyler **seconded**, and the motion **passed** with a unanimous vote.

RECOMMENDATION

Approve

Make the motion to Approve the Spanish Fields Preliminary Plat located at 650 West 100 South subject to the following condition(s):

1. Install a masonry wall with 2" caliper trees and tree gates on 100 South,
2. Along with development of Phase I a payment is to be made to Spanish Fork City and Nebo School District portions of the proposed bridge to Spanish Fork City and construction of the park pavilion similar to the existing Veteran's Pavilion,
3. Construct a connector road from the proposed bridge location to Volunteer Dr.,
4. Install the Spanish Fork River Trail and Pedestrian/Equestrian trail along the west property boundary as per the Spanish Fork City Parks and Recreation Department,
5. Construct a trailhead park adjacent to the Spanish Fork River Trail as per the Spanish Fork City Parks and Recreation Department,
6. Construct the Spanish Fields Project as per the preliminary plan document packet,
7. The developer is to provide an engineering study of the stability of the existing river rip rap,
8. Submit to the city the covenants, codes, and restrictions for the development,
9. The developer is to sign off on all house plans in the development,
10. Provide the city with a clear title report prior to submitting the final plat,
11. Meet all of the City Construction and Development Standards,
12. The developer of the Galt, Boatman, Murphy properties are to participate in the cost of constructing the pedestrian/vehicle bridge over the Spanish Fork River, to the percent indicated by the updated traffic study,
13. A traffic study be completed for this development and other surrounding development areas which will be determined by the traffic engineer,
14. No duplicate homes are to be constructed within 120 feet of each other,
15. Receive approval of the electrical design for the development from Jeff Foster of the Electrical Department,
16. Construct 50% of the homes with some stone, brick, or masonry surface,
17. Side entry garages are strongly recommended on homes located on corner lots, especially on 66-foot right-of-ways,
18. The project contain a total of 411 units as contained in the development packet,
19. Irrigation ditches in the development be piped or eliminated and provide a letter of

- approval from the Irrigation Company,
20. Electric service from the Strawberry Service District Line be brought in as directed by Jeff Foster of the Electrical Department,
 21. Cost of the sidewalk from Volunteer Drive to the east end of the development be paid directly to the city in compliance with the trail grant.

Deny

Make a motion to Deny the Spanish Fields Preliminary Plat located at 650 West 100 South for the follow reason(s):

Table

Make a motion to Table the Spanish Fields Preliminary Plat located at 650 West 100 South for the following reason(s):

Robin's Nest Map



1 inch equals 618.8 feet

Legend

Roads

-  Other Roads
-  Not Paved
-  Paved
-  Rivers
-  Schools
-  Buildings
-  LineMeasurements
-  Biesinger_Subdiv
-  RobinsNest_2ndVersion
-  SpanishFields

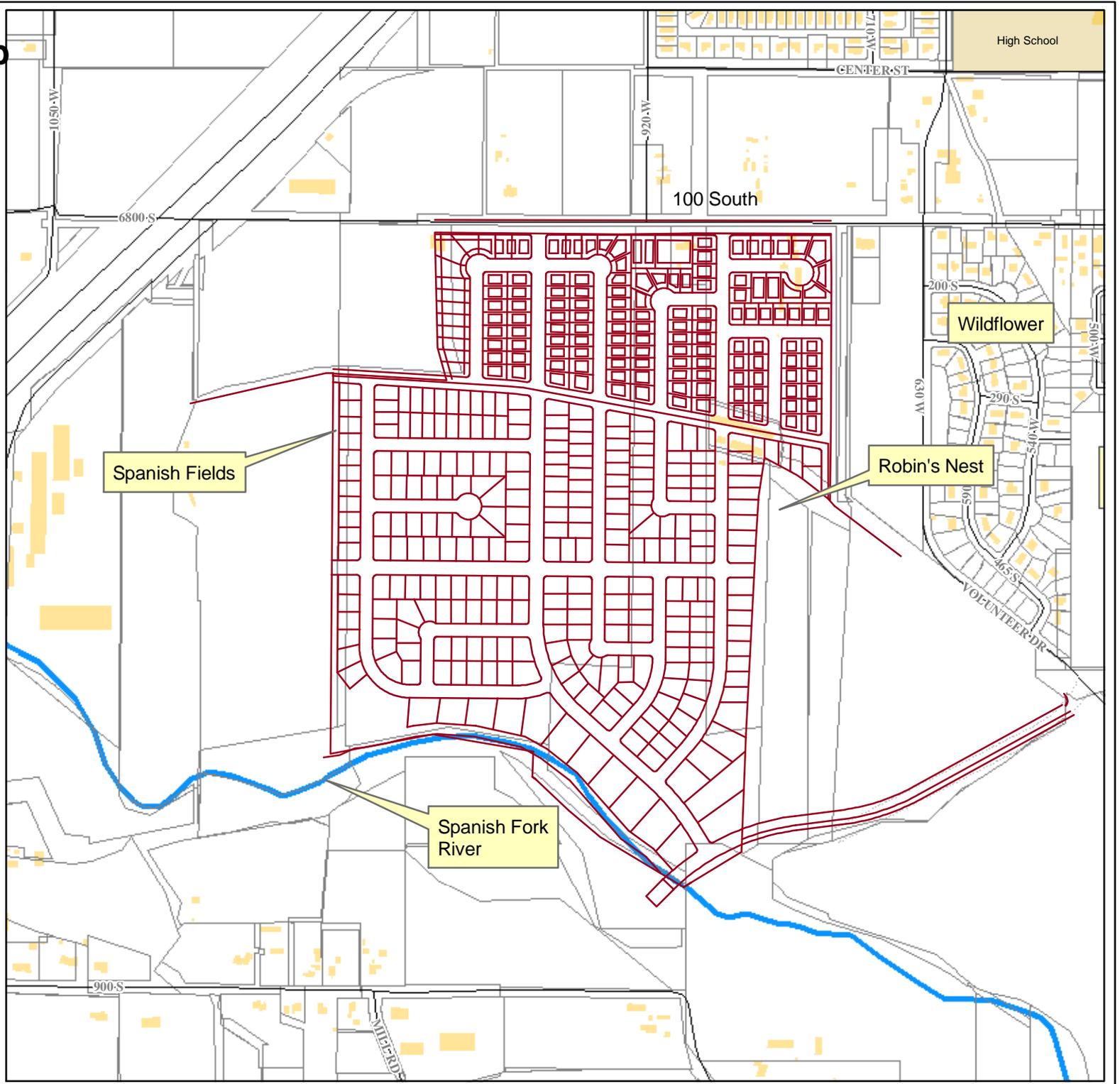
January 6, 2004



Geographic Information Systems

Spanish Fork City GIS
40 South Main Street
Spanish Fork, UT 84660
(801) 798-5000

Disclaimer: Spanish Fork City makes no warranty with respect to the accuracy, completeness, or usefulness of these maps. Spanish Fork City assumes no liability for direct, indirect, special, or consequential damages resulting from the use or misuse of these maps or any of the information contained herein. Portions may be copied for incidental uses, but may not be resold.



The Planning Commission

Training Materials

Purpose (Z.O. 17.12.1. C):

The Planning Commission is created to provide analysis and recommendations to the City Council related to the City's General Plan, zoning ordinance, subdivisions, and capital facilities plans.

Organization (Z.O 17.12.1. C):

The Planning Commission consist of 6 members, one to be designated form one of its own members by the City Council, and 5 to be appointed by the Mayor with the consent of the Council from among qualified residents of Spanish Fork. Members shall be selected without respect to political affiliations, and shall serve without compensation except for reasonable expenses. Each member shall be appointed for a term of 5 years or until his/her successor is appointed, and may not serve full successive terms.

Power and Duties (Z.O 17.12.1. C):

The Planning Commission shall have the following powers and perform the following duties in accordance with the requirements of the Utah Code:

1. Prepare and recommend a general plan and amendments to the general plan to the City Council.
2. Recommend zoning ordinances and maps, and amendments to zoning ordinances and maps to the City Council
3. Recommend subdivisions regulations and amendments to those regulations, and review and make recommendations on proposed subdivisions to the City Council.
4. Hear and decide on the approval or denial of conditions use permits. (Appeal to City Council)
5. Review and recommend the City's Capital Facilities Plans to the City Council
6. Exercise any other powers that are delegated to it by the City Council.

“Political” Responsibilities (ULCT)

1. To represent the public good
2. To strike balance between individual property rights and the public good
3. To allow citizens to have an active role in the planning processes of their community
4. To ensure that planning is done in a reasonable and legal fashion
5. To protect Constitutional rights such as “due process”, and fair and equal treatment

Ethics:

1. Keeping an open mind and being willing to hear from and consider many points of view
2. Avoiding “inside information” either on the giving or receiving end
3. Avoid using the “personal” experiences as your only point of reference in making decisions
4. Assuring that meetings are conducted in such a way that allows for all citizens to participate and have an equal voice
5. Remembering that as an official commissioner of the city, you are representing and, thereby, helping to establish the credibility of city government.

What is Expected:

1. To have fun and learn about the City and its residents and base your decisions that way
2. To become educated in many different areas including city planning
2. To read all reports and supporting material (be prepared and know what you are saying)
3. Act professional at all times and treat everyone with respect (developers, residents, staff and each other)
4. Know the Zoning Ordinance and General Plan (know the code and where to find information)
5. Ask questions of staff, developers, and residents (know the whole story prior to making an educated decision)
6. Drive around and see best practices in Spanish Fork, in other Utah communities and in other states (take pictures of good and bad examples).
7. **Remember who you represent:** you and your family, the city (including the Mayor, Council and staff), and **ALL** residents (past, current, and future) of Spanish Fork City
8. Smile you are on TV and people watch channel 17: please talk clearly into the microphone, watch what you say, and dress accordingly.

What is the City Planner's Job (17.12.010 A)?

The city planner is responsible for:

1. Administration and interpretation of the Zoning Ordinance, including clarification of the intent, and review of land uses described and included in a zoning district.
2. Enforcement of the zoning ordinance
3. Preparing application guidelines, forms, and administration procedures.
4. Additional details of certain responsibilities may be provided in other sections of the ordinance. All decisions and interpretations of the City Planner may be appealed to the Board of Adjustment in accordance with the procedure described in Chapter 17.12.060.

Essential Functions of the City Planner

Develops, implements, evaluates and revises division policies, practices, priorities, methods and procedures in order to improve efficiency and effectiveness of planning functions. Serves as administrative advisor and liaison to city council, planning boards and commissions; receives directives, implements options and strategies; coordinates personnel and resources as needed to accomplish projects and programs.

Prepares meeting agendas, participates in public meetings and hearings as needed to solicit public response and to keep informed of policy and project options. Educates the public through media, reports, public meetings and presentations.

Maintains on-going comprehensive planning processes and procedures. Identifies alternatives for converting policy ideas into action plans affecting city development, expansion, transportation and related public programs.

Directs or conducts feasibility studies. Prepares a variety of reports related to project progress. Reviews and updates ordinances affecting planning, zoning, signage, land use, development, business license and related departmental areas; coordinates projects with other departments or governmental agencies; conducts public meetings to determine public policy preferences and establish policies and goals. Reviews and amends city master plan based upon established goals and policies.

Identify sources for alternative funding related to special projects; applies for grants, implements administrative processes as needed to comply with grant conditions; monitors grant compliance to assure effective working relationships with funding agencies.

Meets with public, developers, entrepreneurs, and contractors. Discusses planning, zoning, and development issues. Interprets information in city ordinances pertaining to department responsibilities. Reviews site plans, conditional use permits, re-zoning applications, etc. Distributes plans to various city personnel for review and input. Assists city manager with economic development. Prepares site information packets, conducts special

projects, distributes information, works closely with industries, keeps statistics up to date, conducts related studies.

What is the Development Review Committee (DRC)(17.12.010 B)?

Purpose: The DRC is create to provide technical review, analysis, and recommendations to the Planning Commission and City Council related to the City’s General Plan, zoning ordinance, subdivisions, capital facilities plans, and site plans.

Organization: The DRC consists of the public works director (Richard Heap), assistant public works director (Richard Nielson), utility superintendent (Marvin Banks), electric superintendent (Jeff Foster), city manager (Dave Oyler), city attorney (Junior Baker), public safety director (Dee Rosenbaum), and building official (Doug Shorts). Non-voting members include representatives from: post office, natural gas, telephone, cable tv, and others.

Powers and duties: The DRC has the following powers and perform the following duties:

1. Review and approve design review plans (site plans for commercial developments)
2. review and approve final subdivision plats
3. Review and make recommendations to the planning commission on preliminary plats (subdivisions), conditional use permits, non-conforming uses expansions, and amendments to the zoning ordinance and map.
4. Other such functions as may be assigned by the City Council by resolution, ordinance or directive.

The General Plan - What is in it?

The Spanish Fork City General Plan consists of:

- **Background and existing conditions** (history, physical conditions, population)
- **Community Facilities and Services Plan** (water, sanitary sewer, electric, stormwater, police, fire, ambulance, school, recreational and parks, library)
- **Land Use Element** (issues, existing conditions and trends, general land use goals and polices, environmental policies, residential polices, commercial goals and policies, and industrial/employment policies)
- **Design Review** (issues, existing conditions, general design review goals and policies)
- **Land Use Map Designations** (environmentally sensitive issues, residential land uses, commercial land uses, industrial/employment land uses)
- **Circulation Element** (street classification system, street maintenance and level of service standards, future maintenance and reconstruction projects, signalization, bicycle and trail facilities, and goals and policies)
- **Moderate Income Housing Element**

It is made up of Goals and Policies in a sense it is a vision or direction that the city would like to head in the future. Like all plans it is flexible and changing.

History of Spanish Fork City’s General Plans

- 1968-1985, 1982, 1996, Current Plan April 15, 2003

Zoning Ordinance

- The Zoning Ordinance is the tool to implement the General Plan
- The ZO is the rules or guidelines that must be followed. It allows for a solid foundation and an even playing field for all involved. The city planner interprets and enforces the ordinance.

THE CITY COUNCIL, PLANNING COMMISSION AND THE BOARD OF ADJUSTMENT

State law establishes the law as far as cities and towns are concerned. The Utah State Code calls for municipalities to establish three “official” bodies to deal with land use issues. The most obvious of which is **the legislative body** that is either the **City Council** or the town board. Their primary responsibility in land use is to set policies (the general plan) and to enact ordinances (the zoning and subdivision ordinances) that will control, to at least some extent, development and land use within municipal boundaries. The elected members of the city council or town board have the final say on land use matters except for those designated to the board of adjustment.

The Planning Commission is an advisory board to the city council. They are established by city/town ordinance and are now required by state law. The number of members and length of terms is set by each municipal ordinance. The state law does require that they meet at least once a month. Their meeting date, time, and place should be published once a year and, like the legislative body, they are subject to the open meetings law. (Utah Code §52-4-1) The planning commission is responsible for the creation of the General Plan, the Zoning Ordinance, and the Subdivision Ordinance. Once they have agreed by a majority vote, the document is passed on to the legislative body for final approval. They also deal with amendments to any of these documents and usually with conditional uses.

It should be noted that while the state law requires that the Planning Commission deal with all of these issues before they are given to the city council or town board for final approval, the legislative body has the final say. In other words, the council is required to get the planning commission’s advice, but it is not required to take that advice. The Planning Commission is always an advisory board; every decision they make either automatically goes to the legislative body or can be appealed to either the city council or, in rare occasions, to the Board of Adjustments. While the Planning Commission can recommend an ordinance or an amendment to an existing ordinance, it does not become law until the legislative body takes the appropriate action.

A municipality is usually well served when a Planning Commission and a council work in harmony with one another. A lot of time and energy can be saved if both bodies have the same vision of the community and are able to make sound decisions based on that common vision. However, we all know that it does not always work that way.

The Board of Adjustment is the third body within a municipality that deals with land use. This body usually has the greatest need for training and is the body most likely to be sued. Without going into detail, remember that the responsibilities of the board of adjustment, according to state law, are **Administrative Appeals, Special Exceptions, and Variances**. The city/town can also assign the board to hear nonconforming uses and appeals of conditional uses. They are not required to meet except as needed but it is important that any question that is the responsibility the board not be sent elsewhere. Variances, for example, will never be heard by either the planning commission or by the city council or town board. This board is not an advisory board. A decision of the board of adjustment is appealed only to the district court, never to the city council or the mayor. All three bodies are bound by the law. The law that governs a city/town consists of federal and constitutional law, state law, and municipal ordinances. A legislative body, through due process, is able to delete, add, or amend municipal law as long as it does not conflict with state and federal law. Nevertheless, it does not have the right to ignore or modify the law on a case-by-case basis. (A recent court case in Utah stated that close enough wasn’t good enough, and required that the city council respect its own laws.)

Even though the Board of Adjustment has the power to grant variances, their ability to do so is governed by very narrowly defined law. The board that grants variances without acknowledging the five criteria the law establishes, is acting illegally.

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance.

2. There are special circumstances attached to the property that do not generally apply to other properties in the same district.
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district.
4. The variance will not substantially affect the general plan and will not be contrary to the public interest.
5. The spirit of the zoning ordinance is observed and substantial justice done.

The Utah Supreme Court decision of Chamber v. Smithfield City (714 P2d 1133) contains the standards of case law for granting variances, including no self-created hardships, no grant of special privilege, and the limited use of variances. This means that if the variance request is self-created then the *Board needs* to deny the request.

Planning Resources

- City Staff – Emil Pierson planner@spanishfork.org
- Conferences (Utah Planning and ULCT)
- Planning and Zoning Administration in Utah (Book)
- American Planning Association Magazine “PLANNING”
- Utah League of Cities and Towns (ULCT) www.ulct.org/index.html
- Utah State Code - www.le.state.ut.us/~code/TITLE10/TITLE10.htm
- American Planning Association – www.planning.org
- Planning Commissioners Journal www.plannersweb.com
- Planning Website www.planetizen.com/
- National Association of Home Builders www.nahb.org/
- Urban Planning Portal <http://www.cyburbia.org/>
- Planners Network <http://www.plannersnetwork.org/>
- Urban Institute <http://www.urban.org/>

What is a Taking? - Craig M. Call, Esq. - Private Property Ombudsman for Utah by Sydney Fannesbeck, ULCT

". . . Nor shall private property be taken for a public use without just compensation"
Fifth Amendment to the U.S. Constitution

"Private property shall not be taken or damaged for public use without just compensation."
Article I, Section 22, Utah Constitution.

A **taking** occurs when private property is so impacted by a government action that compensation is due to the property owner, but no compensation or inadequate compensation is offered.

Generally, a taking occurs when one property owner or a relatively few property owners are forced to bear a significant burden so that the public in general or a relatively large number of property owners can receive a benefit.

It comes down to an issue of fairness: who should bear the burden in a given instance: A single property owner or the public in general?

Private property protections are part of the **Bill of Rights**, guaranteed to each individual citizen as a safeguard against excessive actions by a majority of citizens against an individual or a minority. Property rights, just like other safeguards in the Bill of Rights, represent a basic principle of our democracy.

Basic Elements of a Taking:

***An Intentional Action: To Occupy, Damage, or Interfere With Protected Private Property
By a Government Entity or a Private Entity Acting Under Government Authority
For a Public Purpose Without the Payment of Just Compensation***

Types of Takings:

1. **Occupation of the property.** By the government or someone acting with government authority such as a utility or a contractor working for the government.
 - Widening a road or waterway without payment for the extra private land needed.
 - Placing a cable box on the outside of an apartment building against the wishes of the property owner.
 - Allowing flood waters to occupy private property repeatedly or permanently.
 - Requiring the landowner to endure continual trespass or public access on private lands.

2. **Coercion or heavy-handed negotiations.** Where the property is needed for a road, a park, or other legitimate public purpose, but a donation is forced or illegal methods are used to acquire title without paying fully the just compensation due.
 - "Low-ball" appraisals.
 - Threats to sue and pay no consideration if the proposed offer is not accepted.
 - Trading work for the property that the government is obligated to do anyway.
 - Failure to offer the amount of the government's own appraisal.

3. **Intentional "Damaging"**. Where some government action interferes with a fundamental property right and causes permanent and intentional harm to the property that is unique and significant.
 - Severe airport noise impacts.
 - Loss of reasonable access.
 - Blocking air, light and view across a public street abutting the property.
 - Making the property unmarketable, such as by precondemnation activity that unreasonably denies an owner the opportunity to sell the property.

4. **Regulations that Destroy all Use**. When government regulations such as zoning, environmental restrictions, access limits or other rules permanently eliminate any viable economic use of the entirety of a parcel of property. (Note: this is a categorical taking when it occurs. The amount paid for property, the value of the property before or after the loss of use, or the reasonable expectations of the property owner when the property was purchased are irrelevant.)
 - Not allowing any building at all on a seacoast lot.
 - Not allowing grazing on land that has no other viable use.
 - Not allowing reasonable access to property.
 - Overlapping open space, ridge line, slope, setback and minimum frontage standards that together make a lot unbuildable.

5. **Regulations and Decisions that Fail to Substantially Advance a Legitimate Public Purpose**. When government purposes are illegal. When there is no logical, debatable, or reasonable public purpose to be served by the government action. When limitations on property do not further the stated purpose for which they are supposedly enacted or applied.
 - When land is down-zoned or development is denied on lands the city wishes to acquire.
 - When a conditional use permit is denied to keep out manufactured homes, which are legally protected under state law.
 - If a local ordinance prohibited business franchises, rentals or the sale of property.

6. **Revoking a vested right**. Once a property owner has invested in land and established a vested right to a particular use, the government may not revoke the right and interfere with reasonable expectations that are backed by substantial investment.
 - To attempt to rezone property for a lower density once a subdivision plat has been submitted in complete form. (An application must be reviewed based on the law that was in place when the application was submitted.)
 - To deny a subdivision approval or other permit that meets all of the standards of an ordinance which provides no discretion to deny.

7. **Exacting unfair conditions on development**. To demand improvements to public facilities or other development conditions that exceed the burden that a given project will place on the public facilities (which are not "roughly proportionate") or which do not further a legitimate public purpose.
 - To require a homeowner to donate land for a four lane road when her residential use is adequately served by a two lane road.
 - To make a developer oversize utilities beyond the needs of his own development.
 - To require a developer and/or the lot purchasers to provide off-site utilities and pay impact fees as well, thus charging twice for the same improvements.

Temporary Takings: A taking need not last forever to be compensable. If an action originally intended to be or otherwise potentially permanent is later revoked, the government entity can be responsible for compensation for a temporary taking.

Generally not a Taking:

1. **Reducing the economic return from private property.** The protection is that some economic use remain after a regulation is imposed, not that the highest and best use remains or that the maximum profit will be realized.
2. **Reasonable delays in process.** Local governments have broad rights to impose careful, deliberate review processes based on the need to promote the health, safety and welfare of the community. Delays must advance a legitimate state interest. Broad deference is given to local governments in this area, and it is very difficult to establish that delays are unreasonable.
3. **Down zoning and limiting density before a right to a specific use has vested.** When land use regulations are appropriate and adopted with due process and strict adherence to state law, they would rarely create a general taking of property.
4. **Requirements of adequate public facilities.** Even if property is rendered valueless, reasonable standards for septic tanks, water purity, adequate access for emergency equipment, etc. will be upheld as constitutional. Must be based on appropriate ordinances and substantially advance a legitimate state interest in safety, health and welfare.
5. **Elimination of Nuisances.** No one has a constitutional right to violate state laws related to trash, odors, sanitation, fire hazards, etc. The ordinance must be clear and reasonable, with appropriate methods of appeal from decisions by code compliance officers. Cities cannot enforce ordinances they have not adopted, but if appropriate formalities are respected, nuisances can be abated without breaching a constitutional standard.
6. **Negligence by Government.** A taking must be intentional. Mistakes, mismanagement, and other such actions are not takings, but may be recoverable under tort law if allowed by the Government Immunity Act.
7. **Emergency Actions.** Police damage in preventing a robbery; injury to property in flood management during severe run-off; etc.
8. **Criminal Seizures.** Ordinances allowing seizure of property used in criminal activity have been upheld - even immediate confiscation - if due process appeals can be heard later on whether seizure was appropriate.

Remedies for a taking: "Just Compensation"

1. **Value of the property taken.** If the property is land, usually based on a per square foot appraisal for similar property in the same market.
2. **Consequential Damages.** If not all the property is taken, then additional costs can be due to cure damages to improvements such as fences, landscaping, etc. on the remainder not taken where those damages result from the taking of the portion of the property that was taken or the project for which it was taken.
3. **Severance Damages.** Lost market value to the remainder of the property if not all the property is taken. Value of non-economic remnants or lost utility or marketability of remaining property.
4. **Temporary occupancy.** Usually interest due on the value of property occupied during a project or while regulations limit or eliminate legitimate uses.
5. **Interest.** Due from the date that the property was "taken" until just compensation is paid.

Costs of Court. Nominal amount of fees paid to the court to hear takings claims.

Damages not awarded in "takings" cases:

1. **Legal fees.** Attorneys are paid by the parties, not by the government, even if the government loses. Exception: Actions under 42 USC 1983 - the federal civil rights act, which may be brought in a state court.
2. **Expert witnesses and evidence.** (Except under Utah law where a second appraisal can be ordered at the government expense by a mediator or arbitrator operating under the private property ombudsman statute)
3. **Speculative losses.** Lost profits, business relocation (except as provided by statute), good will, and other speculative losses.

Other Causes of Action - Due Process:

1. **Injunctions.** Not available for a takings claim, but can be awarded over due process. If the municipality has not afforded required hearings, notice or other formalities, they will have to start over again. Read the ordinance.
2. **Writs of Mandamus.** Not available for a takings claim. Difficult to directly force the municipality to rezone, annex, etc. Easier to force some administrative process, such as issuing a building permit or subdivision approval.

Statutes of Limitation:

1. Thirty Days to appeal a municipal land use decision
2. Four Years to file an action under 42 USC 1983 - violation of federal civil rights law.
3. Seven Years (perhaps) to file a taking claim. Some attorneys contend that a federal case that set this statute of limitations period was in error.
4. Some actions that constitute a taking are considered ongoing, so that every flood, for example, is a new cause of action and triggers a new period during which suit can be filed.
5. Governmental Immunity Act. The procedural requirements of the Immunity Act are probably not applicable to takings claims. Utah attorneys disagree, however, so conform to the Immunity Act if possible. Act says before a claim can be made against a municipality, the plaintiff must file a notice of claim within one year of the date the claim arose; must file suit and post a bond within one year of any response by the municipality or, if there is no response, within a year plus 90 days of the date the notice of claim was presented to the municipality.
6. To be clear, file the land use appeal within 30 days; file the notice of claim within 90 days; and file a complaint for just compensation within a year.

Resolving the "Takings" dispute:

These are not mutually exclusive and a given case may involve all of the following:

1. **Internal, informal procedures:** Asking the planning director, legislative body or other administrative staff to review the decisions of a government official.
2. **Internal, formal procedures:** Building Inspection Board of Appeals; Board of Adjustment; Legislative Body such as City Council or County Commission where specified by ordinance as an appeals body. Local "takings" appeals procedure, if available. Impact fees appeals procedure, if available.

3. **Mediation/Arbitration:** Three options - the parties agree to alternative dispute resolution on terms they negotiate; the property owner asks the Private Property Ombudsman to assist; or the new impact fees arbitration procedures are triggered.
4. **Legal Action.** Court review of a land use decision or other government action alleged to be a "taking" after internal appeals are exhausted.

Appendix A

Relevant Statutes

Utah Statutes:

Arbitration Act. 78-31a-1 et seq. Describes minimum procedures for arbitration.

Constitutional Takings Issues. 63-90a-1 et seq. Requires municipalities, counties, special districts, school districts and other governmental entities to adopt takings guidelines and a taking appeals procedure.

County board of adjustment decisions. 17-27-708. Review by court or arbitration through private property ombudsman.

County Land Use Appeals. 17-27-1001. Review by court or arbitration through private property ombudsman.

Eminent Domain. 78-34-1 et seq. Procedures and just compensation for condemnation cases.

Eminent Domain Dispute Resolution. 78-34-21. Dispute resolution in condemnation cases.

Governmental Immunity Act. 63-30-10.5. Waiver of immunity for takings. Specifies that compensation for a taking is the same as for condemnation.

Impact Fees. 11-36-401. Challenges - Appeals by arbitration, local appeals procedure, or court action.

Municipal board of adjustment decisions. 10-9-708. Review by court or arbitration through private property ombudsman.

Municipal land use decision appeals. 10-9-1001. Review by court or arbitration through private property ombudsman.

Private Property Ombudsman. 63-34-13. Defines mediation/arbitration procedures available through the office of the ombudsman.

Private Property Protection Act. 63-90-1 et seq. Requires state agencies to adopt guidelines to avoid takings. Specifies that agencies are to do "assessments" of actions with takings implications.

Relocation Assistance. 57-12-1 et seq. Requires all government entities to provide relocation assistance to displaced residents, businesses and farms. Minimum standards for land acquisition include negotiation, appraisal, notice before displacement, avoiding coercion, etc.

Federal Statutes:

Apply to all UDOT or state funded highway activities and those of any state or local government entity using federal funds. (Airport expansions, HUD related redevelopment, etc.)

Uniform Relocation Assistance and Real Property Acquisition Policies Act. 42 U.S.C. 4601

Federal Rules enforcing the Uniform Act are found at 49 CFR 24.

Appendix B

Relevant Case Summaries

Summaries of Significant U.S. Cases:

City of Monterrey v. Del Monte Dunes, _____ U.S. _____, 119 S.Ct. 1624, 1999 WL 320798 (May 24, 1999)

Developer had 37 acres of reclaimed beachfront property which had previously been an oil tank farm. The applicable zoning allowed as many as 1000 residential units, but in five succeeding applications for approval of development, the city had imposed increasingly onerous restrictions and the developer had reduced the number to a few hundred. The project was still denied, citing environmental, aesthetic and traffic concerns. After hearing the matter, a jury awarded the property owner \$1.45 million in damages for an unconstitutional taking of the property. The U.S. Supreme Court held that the question of whether a government denial has eliminated all economically viable use or fails to advance a legitimate public purpose can be properly decided by a jury, whose judgement can be substituted for that of the local city council as to whether a land use regulation is legal. The jury verdict was upheld. Since the matter was decided under §1983 of the Civil Rights Act of 1871, attorney's fees and costs will be recoverable from the City of Monterrey.

Dolan v. City of Tigard, 114 S.Ct. 2309; 512 U.S. 374 (1994).

In order to proceed with expansion of a hardware store, property owner was required to dedicate to the city a portion of her property which fell within 100 year flood plain as well as the adjoining 15 feet for a bike path. The Court struck down the requirements, stating that the same result in terms of flood control could have been achieved with a lesser burden on the landowner by merely barring development on the flood plain. The bike path requirement, according to the Court, failed to establish a reasonable relationship between the burden of the proposed development (increased traffic) and the required exaction. There was no quantified proof that traffic to a hardware store created a need for a bike path. The municipality has the burden of proof to establish that the benefit to the public of the required public facilities has a "rough proportionality" to the burden created by the proposed private development.

Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886; 505 U.S. 1003 (1992)

Under state statute, a recreation lot owner was forbidden to build houses on the beach. A lower court finding had established that he had been "deprived of any reasonable economic use of the lots" and that they were "valueless". No further enquiry is necessary if property is physically invaded or if all economically viable use of the property is denied. The Court acknowledged that

all property is held under an "implied limitation" that newly enacted laws and regulations may restrict its use, but also held that government could not "subsequently eliminate all economically valuable use" of property without compensating the owner. To avoid a taking, a state would have had to identify background principles of nuisance and property law which would prohibit the owner from developing the property.

Hodel v. Irving, 481 U.S. 704 (1987).

Federal law dealt with Sioux Indian lands that had been fractionated into very small parcels that were economically unuseable. Law stated that if an undivided interest in property represented less than 2% of tract's acreage and produced less than \$100 income in preceding year, it would revert to the tribe. The Court held that if the normal takings balancing tests were used, the statute might be found constitutional, but to interfere with the right to devise property to the owner's family was to interfere with one of the most essential rights of ownership, and therefore was unconstitutional.

Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987).

A taking was found where a building permit was conditioned on the land owner granting public access along his beach. The Court held that there must exist an "essential nexus" between a legitimate state interest sought to be furthered and the condition imposed. In this case, the requirement to allow access between public beaches on either side of the property "utterly fail(ed)" to advance the stated public purpose of providing views of the beach, reducing psychological barriers to using public beaches, and reducing beach congestion.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

A church camp was useless for the period during which a flood control ordinance was in place. The ordinance was withdrawn, and the city claimed no taking had therefore occurred. The Court held that compensation must be paid for the period when the property was valueless. The holding was limited to the facts presented and did "not deal with normal delays in obtaining building permits, changes in zoning ordinances, variances and the like . . ."

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

A Pennsylvania statute limited the amount of coal that could be mined underground by requiring that the surface of mined land must remain stable. Property owner claimed a taking of the "support" coal. Although the mining process did not constitute a legal "nuisance", the state could regulate it because the regulations have a "reciprocity of advantage". While burdening everyone to some extent, the rules benefited everyone greatly. The court held that although a total loss of value in the "support" portion of the coal deposits was caused by the regulation, the total value of the coal deposits was not, and therefore no taking occurred.

Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982).

An apartment owner was required to allow a local cable company to place its cable on her property. The Court held that any such interference with a fundamental property right, such as the right to exclude others from the property or the right to avoid having something permanently placed on the property, is a taking and the owner is entitled to compensation, even if in only a nominal amount.

Penn Central Transp. Co. v. City of New York, 98 S.Ct. 2646 (1978).

The owner of Grand Central Terminal in New York City was denied the right to build an office tower over the terminal, even though no physical change would have been made in the terminal building itself. No taking occurred. The Court held that takings cases involve "essentially ad hoc, factual inquiries" and a balancing of several factors must be accomplished to determine whether a government action resulted in a taking. Among the factors are the owners "reasonable investment-backed expectations", the economic impact of the state action, and its character.

The Court also held that even though the regulation involved deprived the owner of all of its "air rights", no taking was found. "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."

Finally, the Court found that since the law allowed continued use of the property as a terminal and allowed a reasonable return on the owner's investment, the interference of the law did not require compensation. It was not clear that some other project would not be approved that could expand the economic return on the terminal operation and the regulations also provided that air rights were transferable to other parcels owned by Penn Central. Using the balancing test described by the Court, the burdens of the regulations, even though they were applied to scattered historic buildings, did not rise to the level of a taking.

Summaries of Significant Utah Takings Cases:

Smith Investment Company v. Sandy City, 958 P.2d 245, 342 Utah Adv. Rep. 10, 1998 Utah App. LEXIS 30 (1998)

City downzoned a portion of a commercial tract to residential uses. Landowner sued under constitutional protections against deprivation of property without due process of law and for just compensation for a taking. The court rejected a challenge to the Sandy zoning ordinance, stating that the property owner bears a heavy burden to attack the ordinance since of the courts strong reluctance to overturn a legislative act by a municipality. Any doubts are to be resolved in favor of the ordinance's constitutionality. In order to prove a violation of substantive due process, a property owner must show that the ordinance does not rationally promote the public health, safety or general welfare. If an ordinance could promote the general welfare or even if it is reasonably debatable that it is in the interest of the general welfare, it will be upheld. The city's purposes to prevent undue concentrations of business, to stabilize adjoining neighborhoods and avoid blight, and to provide safe and efficient traffic circulation were adequate, even though the result of the downzoning was a dramatic reduction in the value of the affected property. The fact that land value was substantially diminished (43% of its value) does not alone prove that the regulation is arbitrary and capricious. Such losses generally are deemed to be simply the uncompensated burden one must accept to live in an ordered society. This opinion includes an excellent overview of due process and takings law in Utah.

Strawberry Elec. Serv. Dist. v. Spanish Fork City, 918 P.2d 870, 29. Utah Adv. Rep. 11 (1996)

City must pay just compensation to a previous exclusive provider of electrical service, which would include the fair market value of the facilities the previous provider used to service the annexed area, as well as lost and stranded facilities and severance. Compensation would not include payment for future profits, unless utility had an exclusive license or franchise. Since city had commenced service prior to providing compensation, it must also pay the value of the lost customer base the utility suffered while the city provided power before paying just compensation.

The city's provision of electrical service in the utility's service area provided an ongoing violation of the takings clause, so the statute of limitations was not tolled, and suit could have been filed at any time.

Bagford v. Ephraim City, 904 P.2d 1095, 275 Utah Adv. Rep.10 (1995)

City did not "take" existing garbage service when it began to charge all residents for new city garbage service whether residents used it or not. Existing operator could continue, even though residents using it would pay twice. Business had no right to expect that city would never compete against it. "The kinds of property subject to the (eminent domain) right are practically unlimited." Discussion of what constitutes "property".

Walker v. Brigham City, 856 P.2d 347, 215 Utah Adv. Rep.17 (1993)

Plaintiff Walker disputed the transfer of profits from city utility to city's general funds, claiming among other causes of action a "taking" of private property (part of the utility fees paid by customers) for public use in the general fund. The court held that there was no protectable property interest in reasonable utility rates. The court did determine that the city's rates in this case could not be held unreasonable.

Bennion v. ANR Production Co., 819 P.2d 343, 172 Utah Adv.Rep.3 (1991)

Drilling regulations can prohibit mineral owner from drilling on his property where owner has the opportunity to participate in production from a unit well. Not a "taking".

Cornish Town v. Koller, 817 P.2d 305, 166 Utah Adv. Rep.3 (1991)

Property owner disputed value of lands condemned for protection of springs that were city water supply and also disputed restrictions placed on balance of property against fertilizer, grazing and residences. Government must pay for a "taking" even if the "taking" is later undone by government action. Valuation will be for period "taking" was in effect. In this case, the owner continued to farm after the ordinance prohibited it, so no "taking" occurred. A regulatory "taking" would require a denial of all uses of their property. (U.S. Supreme Court cases cited) Almost all zoning decisions have some economic impact on property values. Mere diminution in property value is insufficient to meet the burden of demonstrating a "taking" by regulation.

Farmer's New World Life Ins. v. Bountiful City, 803 P.2d 1241 (1990)

Owner of commercial mall sued city and others for physical damage to property as a result of allegedly faulty culvert. "Severance damages" may be recoverable where property not actually "taken" is damaged by the construction or use of an improvement. Generally all unavoidable and necessary injuries arising out of the proper construction of a public use which directly affect the market value of the abutting property may be considered when calculating damages. Damages that violate the "takings" clause must be physical and permanent, continuous or recurring.

These damages to the mall were not, however, protected by the "takings" clause, since the injury was alleged to be from negligence. Injuries due to negligence, if recoverable, are controlled by the statutes related to sovereign immunity and tort law, not the "takings" clause.

Colman v. Utah State Land Board 795 P.2d 622, 132 Utah Adv. Rep. 3 (1990)

State of Utah breached the Southern Pacific Causeway in Great Salt Lake in order to mitigate damage from rising lake waters, but the act caused damage to an underwater channel that Colman used to extract minerals from brine deep in the lake. Court held that the channel, even though an easement or leasehold, is protected property.

The constitutional protection against taking or damaging property is self-executing, and no special legislation is needed to create that protection, nor can legislation declaring public immunity diminish that protection.

In some cases there is no "taking" where property is destroyed by a government entity to prevent imminent catastrophe, loss of life or destruction of property, but the permanent appropriation of private property cannot be justified under the power to address an emergency.

Hamblin v. City of Clearfield, 795 P.2d 1133, 139 Utah Adv. Rep. 3 (1990)

City approved a subdivision uphill from property owner's land. Surface water flooded land and owner sued for compensation for permanent damage and decrease in market value of home. Owner has raised a valid question of "takings" law and can sue for compensation.

Three D Corp. v. Salt Lake City, 752 P.2d 1321, 80 Utah Adv. Rep. 28 (1988)

City installed curb, reducing the number of available parking spaces in front of land owner's business, but did not actually do any work on his property. The court held that a "taking" had occurred when essential parking spaces were lost.

Court established three general principles when dealing with government actions that do not involve a physical "taking": 1) where reasonable access is denied, a "taking" occurs. 2) where access is simply interfered with, but reasonable access remains, there is no "taking". 3) where a substantial right is impaired or otherwise peculiar injury occurs and substantial devaluation results, there is a "taking".

Katsos v. Salt Lake City Corporation, 624 F.Supp. 100 (U.S. Dist. Ct. Utah, 1986)

Landowners brought suit alleging "taking" of their land by overflights near airport. Held: Flights so low and frequent as to constitute direct, immediate and substantial interference with enjoyment of owner's land created a taking. High noise and vibration levels interfere with substantial rights of property owners. Diminution in property value, standing alone, does not establish a taking. Increasing intensity of interference can create new cause of action and allow action where previous interference began beyond seven year statute of limitations time frame.

Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (1981)

Sudividers challenged validity of water connection and park improvement fees. Fees are not unconstitutional if they are reasonable. Facts of each case determine reasonability. If reasonable, the relative burdens of the fees should be equalized between the new development and the existing municipality as a whole. Seven part guideline given for determination of reasonable water fee. Calculations must be disclosed. Park fees are reasonable if burden of paying them approximates demonstrable benefit of resulting recreational or flood control facilities.

Sweetwater Properties v. Town of Alta, 622 P.2d 1178 (1981)

The filing of a policy declaration of moratorium is not a "taking".

Call v. City of West Jordan, 606 P.2d 217 (1979); 614 P.2d 1257 (1980)

Subdivider objected to ordinance requiring it give 7% of land for subdivision, or equivalent cash, to city for parks and flood control. Such an ordinance, if reasonably designed and carried out, is a proper form of planning for the good of the community. The fees collected from a subdivision, however, must be used to benefit that subdivision, although the benefits may go beyond it as well.

Provo City Corp. v. Knudsen, 558 P.2d 1332 (1977)

Provo sued owner in eminent domain to acquire land near airport. Owner demanded severance damages for land not acquired, but "damaged" by proximity to airport. Held: "this constitutes a real and substantial "taking" of part of this property, just as effectively as if a part thereof has been severed physically, and this is a "taking".

Utah State Road Commission v. Miva, 526 P.2d 926 (1974)

A viaduct was built which obstructed the owner's view and decreased the value of his property. A compensable "taking" was found, since the owner of land abutting a street possesses an easement for light and view that may not be taken without compensation.

Bailey Serv. & Supply Corp. v. State of Utah, 533 P.2d 882 (1973)

Road commission built viaduct that directly interfered with property owner's access to his warehouse, eliminating access by tractor trailers. Held: Interference not enough to constitute a "taking". There was no claim of diminished value, but only inconvenience to the existing use.

State ex. Re. Rd. Comm'n v. Williams, 52 P.2d 548, 22 Utah 2d 301 (1969)

Owner of land taken by eminent domain for I-15 right-of-way had his ranch split into two portions, isolated by the interstate. The measure of damages in this matter was not just the replacement value of the isolated land, but the difference in value of the ranch operations as a whole before and after the "taking".

State Rd. Comm'n v. Utah Sugar Co., 448 P.2d 901, 22 Utah 2d 77 (1968)

Company claimed severance damages after state created a limited access highway beside company's canal system and made access to canals more circuitous and inconvenient. No severance damages were due. Landowners are entitled to reasonable access, not necessarily the most convenient access.

Gibbons and Reed Co. v. North Salt Lake City, 431 P.2d 559, 19 Utah 329 (1967)

Owner challenged zoning ordinance that prohibited preexisting uses as a sand and gravel operation. Held that ordinance was invalid; some provisions were prohibitory rather than regulatory; and it had been unequally enforced. To deny existing use was confiscatory and city did not meet burden of proving need for ordinance to protect public safety.

Board of Ed. of Logan City School Dist. v. Croft 373 P.2d 697, 13 Utah 2d 310 (1962)

School board acquired rear and side of Croft home for Junior High School. Held: No compensation due for "damage" to remainder of property because there was no injury which would have been actionable at common law, nor any physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property in excess of that sustained

by the public generally. A "taking" requires a definite physical injury cognizable to the senses with a perceptible effect on the present market value.

Boskovich v. Midvale City Corp., 243 P.2d 435, 121 Utah 445 (1952)

Alley abutting school yard was closed by city ordinance and school enclosed half of alley into schoolyard, thus ending vehicle access for neighbors. Neighbor held to have had a private easement across alleyway, and the loss of access was a "taking".

State ex Rel. State Road Commission v. District Court, Fourth Judicial District, 94 Utah 384, 78 P.2d 502 (1937).

State road commission was building an overpass adjacent to landowners' property which would interfere with light, air, view and access to land. Held: "any substantial interference with private property which destroys or materially lessens its value, or by which the owners' right to its use and enjoyment is in any substantial degree abridged or destroyed, is in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed".

"It is clear that the framers of the Constitution did not intend to give the rights granted by section 22, and then leave the citizens powerless to enforce such rights. We hold this to be so whether the injury complained of . . . is considered to be a 'taking' of property or a 'damaging' of property".

"The framers of the fundamental law, after much debate and careful consideration of the hardship of the old rule which allowed compensation only in the case of a taking of property, wrote into the Constitution a provision by which we think they intended to guarantee to the landowner whose property is damaged just compensation with the same certainty as to the landowner whose property is physically taken".

"Much argument might be devoted to the question whether there is involved in this case a 'taking' or a 'damaging' of property. Almost countless decisions of courts might be cited on either side of the question. We believe, however, that in incorporating in the Constitution a provision requiring just compensation for property damaged for public use, it was intended to put an end to such controversy and to protect the damaged property equally with the property owner whose land was physically entered upon."

Bountiful City v. DeLuca, 77 Utah 107, 292 P.194 (1930)

Regulatory takings case. City prohibited livestock within 300 feet of stream and owner claimed a

"taking" of that portion of his land, which was only useful as pasture. Held: a "taking" had occurred. Police powers may not be so exercised as to infringe upon or evade constitutionally protected rights. The state may without compensation regulate and restrain the use of private property when the health, safety, morals or welfare of the public requires or demands it. The enjoyment of some individual rights in property or the loss of convenience may be affected, but so long as there is no confiscation, destruction or deprivation of property there is no "taking". There is also no "taking" if the property affected is injurious, obnoxious, or a menace to public health or safety or morals or general welfare.

Croft v Millard County Drainage District No.1 59 Utah 121, 202 P. 539 (1921)

Operators of irrigation canals were responsible for damage to landowners crops and production from operation of drainage ditches. Even the state itself, when acting within the scope of its sovereign powers, cannot take or damage private property for public use without making just compensation to the person to whom the property belongs. This is a fundamental law of the commonwealth, binding upon every department of the state government. It is the duty of the courts to give it full force and effect whenever it is properly invoked by one claiming its protection, even as against the sovereign power of the state.

Lund v. Salt Lake County, 58 Utah 546, 200 P. 510 (1921)

Waters flushed through reservoir system to clean it carried pollutants to trout farm and killed the fish. Owner sued for compensation. Held: Injuries cognizable at common law or in equity are generally not covered by constitutional provisions. This was not a "taking" law, but an act of negligence.

Salt Lake City v. Young, 45 Utah 349, 145 P. 1047 (1915)

Defendant allowed horses to graze near city water supply in violation of city ordinance. Held: ordinance requiring owner to suffer some reasonable inconvenience in order to safeguard a large municipality's water supply does not constitute a "taking". In this case, the city did not prohibit grazing in a specific land area, unlike the city in the DeLuca case, above.

"a landowner cannot complain because he is inconvenience in the use of his property, where such inconvenience arises out of the proper enforcement of a police power to protect his public health, and where such enforcement does not amount to a taking or destruction of his property."

Twenty-Second Corporation of Church of Jesus Christ of Latter-Day Saints v. Oregon Short Line R.R. 36 Utah 238, 103 P. 243 (1909)

Church was built near, but not adjacent to, railroad with one track. Eventually railroad grew to 14 tracks and intensity of operations increased greatly. Takings claim was filed over noise and disruption to church services. Held: there was no "taking". "To bring the case within the damage clause of the Constitution, there must be some physical interference with the property itself or with some easement which constitutes an appurtenant thereto".

Stockdale v. Rio Grande Western Ry. Co. 28 Utah 201, 77 P 849 (1904)

Action over damage to property by proximity to planned new railroad line. Held: Landowner adjacent to a proposed railroad track is entitled to compensation for damage due to anticipated noise and interference with peaceful use. A party whose property is about to be specially damaged in any substantial degree for public use has the same rights and is given the same remedies for the protection of his property from the threatened injury as would have been accorded him if his property was actually taken and appropriated for such use. No recovery can be had for losses and inconveniences which are suffered in common with the general public.

Dooly Block v. Salt Lake Rapid Transit Co. 9 Utah 31, 33 P. 229 (1893)

Damage due for total occupancy of street by proposed streetcar tracks, public utilities and a proposed railroad that interfered with normal flow of traffic in business district. The right of access, light and air constitute principal values of property. The right of the grantee to their use is precisely the same as the right to the property itself. They are property which the owners cannot be deprived without compensation.

Other Recent Utah Cases of Interest in Land Use and Open Government:

Brown v. Sandy City Bd. of Adjustments, 339 Utah Adv. Rep. 13, 957 P.2d 207, 1998 Utah App. LEXIS 19

Homeowners had been renting single family residences for overnight occupancy. Sandy zoning officials and the Board of Adjustment determined that this use violated the zoning ordinance and sought to prohibit it. The city contended that the use was not allowed by the ordinance and was therefore illegal. The court held that the use was not specifically prohibited by the ordinance and was therefore legal, quoting Patterson v. Utah County Bd of Adjustment 893 P.2d 602,606 (Utah Ct. App. 1995) "Zoning ordinances are to be strictly construed against the municipality because they are in derogation of a property owner's common-law right to unrestricted use of his property." The Board of Adjustment is not to give staff decisions any deference, but is to simply determine if the staff interpretation of the ordinance is correct.

Peterson v. South Salt Lake City, 378 Utah Adv. Rep. 27, 1999 UT 93 (1999)

Owner of sexually oriented business was denied right to use existing business license in new location and to locate in on a parcel of land which was less than 600 feet from another SOB. Court ruled that the ordinance prohibited transfer of license, which was not specific enough to prohibit moving license to new location. Evidence at trial indicated intent was to prohibit transfer of ownership, not location. "We decline to read into the city's . . . ordinance what the drafters failed to include in it." Absent more specificity, the 600 foot rule was also to be construed liberally in favor of property owner, so measurement of more than 600 feet between buildings with SOB's was sufficient to allow the land use, even though the property lines were closer than 600 feet. The activity proscribed was basically centered within the building, so absent specific wording stating that the measurement was from the property line, the distance between buildings would be the measure. If the city does not set a specific standard, then the court will set the standard based on the ends sought to be accomplished by the ordinance. The court will look to the method employed by the city to determine its reasonableness and whether it has been consistently applied. Summary judgment by the trial court that the city could prohibit the move was overruled.

Hugoe v. Woods Cross City, 379 Utah Adv. Rep. 15, No. 981502-CA

Property owner claimed non-conforming use for truck and trailer parking and transfer in industrial zone. City claimed the

business office was not on land under dispute so use was not established and no site plan had been filed Court ruled use was part of core business of company and that a site plan was not needed to establish the use under the ordinance. Patterson rule of liberal construction of zoning ordinances in favor of property owner was cited.

Home Builders v. City of American Fork, 361 Utah Adv. Rep. 46, 973 P.2d 425, 1999 Utah LEXIS 7 (1999)

The specific criteria outlined in the Banberry case are applicable to impact fees, but each city councilmember need not personally evaluate each criteria. Reliance on staff to develop a fee structure that meets the criteria is appropriate, and a fee adopted that is later shown to meet the criteria will be upheld. The general presumption of validity for municipal legislative acts applies.

Home Builders v. City of North Logan, 1999 Utah LEXIS 97 (1999)

Impact fee ordinances are considered by the courts as are other city legislative acts, with a presumption of validity. While a city must produce evidence that its impact fees are based on compliance with the relevant state statutes and case law, anyone challenging the fees must set forth specific facts showing that the fees are unreasonable.

Springville Citizens v. Springville, 365 Utah Adv. Rep. 23, 1999 Utah LEXIS 28 (1999)

After the city approved a Planned Unit Development, Springville Citizens sued the city claiming that specific requirements of the zoning ordinance were not complied with. Actions of the Planning Commission did not comply with the ordinance and therefore the eventual approval of the PUD by the City Council was illegal. Although a municipality's land use decisions are entitled to a great deal of deference, a city must follow all the requirements of its own ordinances in order for its actions to be legal. "Substantial compliance" is not sufficient when specific procedures are mandated by state or local law. In order to recover, however, those challenging city actions must also show that they were prejudiced by the action.

Graham v. Davis County Solid Waste Dist, 368 Utah Adv. Rep. 19, 1999 Utah App. LEXIS 79 (1999)

GRAMA request by Graham produced a bill from the District of \$280 for necessary research and compilation of the records requested. An agency may not charge for a request if the agency is only required to retrieve documents from a readily available source and provide them for inspection. Fees may be assessed where the agency must extract materials from a larger document and compile them in a different form. The government bears the burden of establishing necessity and should offer the requestor the option of searching for and retrieving the information himself unless that option is impossible. The agency may not impose a fee if the requestor could have done the work of compilation himself and the agency did not allow him to do so.

For More Information:

This material is provided as a public service by the office of the Private Property Ombudsman. His role in state government is to advise private property owners, government officials and citizens about constitutional property rights.

Among the services offered are mediation and arbitration of disputes related to private property and educational workshops and seminars on property rights.

Please contact Craig Call, the private property ombudsman, with questions, suggestions or comments on these materials. He can be reached at the Dept. of Natural Resources, 1594 West North Temple, P.O. Box 145610, Salt Lake City, UT 84114. Telephone: (801) 537-3455. Facsimile: (801) 538-7315. The e-mail address is: nradm.ccall@state.ut.us.

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