SNOW CHRISTENSEN & MARTINEAU

For More Information Contact:
Dani N. Cepernich
dnc@scmlaw.com

Nathanael J. Mitchell
njm@scmlaw.com

.

LAND USE: PEAKS AND VALLEYS
March 29, 2023

CONDEMNATION/EMINENT DOMAIN LITIGATION

***Salt Lake City v. Kunz*, 2020 UT App 139**

In 2007, the municipality initiated eminent domain proceedings for an avigation easement near a small regional airport. After approximately eleven years of litigation and exclusion of the property owner's primary expert on damages, the owner moved for judgment as a matter of law, arguing that the municipality failed to comply with statutory prerequisites to an eminent domain action.

The trial court granted the motion, and the court of appeals affirmed, emphasizing the importance of strict compliance with the statutory preconditions and holding: "Many of the same authorities that dictated a strict construction of statutes regarding substantive rights like section 78B-6-504 also teach that showing prejudice is unnecessary when a substantive right is at issue." *Id.* ¶ 37.

H.B. 206 – Airport Land Use Amendments

Amending portions of LUDMA, CLUDMA, and Title 27, H.B. 206 "amends definitions related to airport influence areas and airport overlay zones" and contains specific provisions designed to encourage political subdivisions to adopt land use regulations that protect airports, including adopting overlay zones. If none has been adopted by December 31, 2024, the statute takes effect for the airport influence area.

***Cardiff Wales LLC v. Washington County School District*, 2022 UT 19**

In this dispute arising out of an alleged violation of a statutory right of first refusal, the supreme court held: "The court of appeals correctly held that property is not sold under a "threat of condemnation" unless the government entity specifically authorizes the use of eminent domain. The court of appeals erred, however, when it concluded that a government entity must approve the filing of an eminent domain complaint to specifically authorize the use of condemnation." *Id.* ¶ 41. The decision left intact the importance of demonstrating "threat of eminent domain," but left open the possibility that such a requirement may be met by something other than a formal action approving the filing of an eminent domain lawsuit.

42 U.S.C. § 1983: LAND USE ISSUES

***David v. Midway City*, 2021 WL 6930939 (D. Utah 2021)**

A disgruntled landowner, who owned a bed and breakfast in Midway, sued the City and County asserting several claims under 42 U.S.C. § 1983. The claims included an equal protection, due process, and inverse condemnation and regulatory takings claim against the City based on the conditions imposed with the approval of a conditional use permit for the B&B as well as snowplowing on the property. The Court granted summary judgment in favor of the City on each of these claims. Several of the claims were barred in whole or in part by the applicable statute of limitations. The plaintiff had failed to produce evidence to support a class-of-one equal protection

claim based on either the issuance of the CUP or snowplowing. The conditions imposed with the CUP did not constitute a regulatory taking. And, the snowplowing, which occurred primarily within the City street, did not constitute a taking.

***Bruce v. Ogden City Corp.*, 2022 WL 17225677 (D. Utah 2022)**

A property owner brought claims under 42 U.S.C. § 1983 against the City and its Mayor based on the City's downzoning of property from two-family residential to single-family residential, an order to have units in a building remain unoccupied, and an order to have a duplex on the property demolished. The claims included an inverse condemnation claim, procedural due process claim, and substantive due process claim. The district court granted summary judgment in favor of the City and the Mayor. The demolition order did not deprive the property of all economically beneficial use and did not constitute a taking under *Penn Central*. The Mayor's role as arbiter of the order did not violate the property owner's procedural due process rights. And, the City's conduct was not conscience-shocking.

***Nash v. Grantsville*, Case No. 2:12-cv-692 (D. Utah)**

This ongoing case involves a substantive due process claim and class-of-one equal protection claim based on the City Council's denial of a subdivision application by a developer who was under contract to purchase the property at issue.

BILLBOARDS & FIRST AMENDMENT

***Austin v. Reagan Nat'l Advertising of Austin*, LLC, 142 S. Ct. 1464 (2022)**

"A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. Reed does not require the application of strict scrutiny to this kind of location-based regulation." *Id.* at 1472-73 (holding prohibition on digitizing off-premises signs, but not on-premises signs, was content-neutral and subject to intermediate scrutiny).

***Reagan Outdoor Advertising v. Salt Lake City Corp.*, 2021 WL 409788 (D. Utah 2021)**

Discussing the market-participant doctrine and reach of procedural due process, the district court dismissed federal constitutional claims asserted against the city arising out of a rezoning that allegedly prevented the plaintiff from utilizing billboard credits.

SECTION 801 REVIEW

***Fuja v. Woodland Hills*, 2022 UT App 140**

The Fujas sent demand letters to Woodland Hills complaining about a building permit issued to their neighbors. Not receiving a response, the Fujas appealed the City's lack of response to the Board of Appeals, which rejected their appeal because a city's inaction was not a reviewable land use decision, and it was otherwise untimely based on the building permit being issued long before the appeal. The district court affirmed as did the court of appeals, holding that **inaction did not**

amount to an appealable "land use *decision*" pursuant to Utah Code § 10-9a-802. The only land use decision at issue – the issuance of the initial building permit – was unreviewable as time-barred.

***Northern San Juan County Coalition v. San Juan County*, 2023 UT App 12**

Reversing a dismissal based on standing and administrative exhaustion, the court of appeals held that (a) the association's standing could be demonstrated through an agency relationship between the association and the party filing the appeal; (b) a letter satisfied the appeal requirements, even though the letter did not reference an appeal or request a hearing; (c) the time to appeal ran from receipt of a GRAMA response, and (d) the Coalition had associational standing to pursue claims on appeal.

***Tooele County v. Erda Community Assoc.*, 2022 UT App 123**

The Erda Community Association sought judicial review of the preliminary approval of two planned unit development conditional use permits. Approximately 125 residents had appealed those preliminary approvals to the County's appeal authority; the Association, however, was not one of the appellants. The district court denied the County's motion to dismiss for lack of jurisdiction based on the failure to exhaust administrative remedies. On appeal, the Court of Appeals affirmed the district court's holding that the exhaustion requirement was personal, and the Association could not rely on the residents' appeals under something like the doctrine of associational standing. **The Court went on to reverse the district court's holding that one or more of the exceptions to the exhaustion requirement applies, narrowly construing those exceptions.** The opinion includes a footnote questioning whether the judicially-created exceptions apply to a statute, like LUDMA, that contains no exceptions.

***Northern Monticello Alliance, LLC v. San Juan* County**

2022 UT 10

"The court of appeals erred when it held that NMA had a due process right to participate in the revocation hearing granted by CLUDMA and the San Juan County Zoning Ordinance. We reverse its decision and remand the case to the court of appeals for further consideration of any remaining issues properly raised before it." *Id.* ¶ 41 (distinguishing between right to appeal and right to participate in hearing before the planning commission, while rejecting claim that specific mitigating conditions of CUP provided adjacent owners with protected interest).

2023 UT App 18

"The district court erred in granting summary judgment to Appellees because only the Planning Commission was authorized to take evidence and find facts in this case, and the Planning Commission's failure to produce adequate written findings was a fatal flaw that rendered the Remand Decision arbitrary and capricious. The relevant statutes are clear that the scope of review on appeal—for both the district court and the County Commission—was restricted to the record and to the factual findings made by the Planning Commission; in other words, the Planning Commission is the only entity in this process that was authorized to take evidence and make factual findings. Because the Planning Commission never made factual findings, the County Commission could not properly review them. Therefore, its decision, which upheld the Planning Commission's decision, was inherently

arbitrary and capricious." *Id.* ¶ 17 (relying on Utah Code § 17-27a-801(3) and local ordinance).

***Wallingford v. Moab City*, 2020 UT App 12**

This appeal arose from a lawsuit filed by a group of citizens challenging Moab City's modification of a previously approved land development project. The City initially classified the modification as "major changes" which required a public hearing under a local ordinance, but later entered into a contract with the developer and SITLA whereby the City agreed to treat the modifications as "minor changes" that would not require a public hearing. **The court of appeals held that this was unlawful "contract zoning," and that the City could not enter into this contract without first holding a public hearing**. Accordingly, the court reversed the district court's order granting summary judgment to the City and remanded the matter for further proceedings.

INITIATIVES & REFERENDA

***Croft v. Morgan County*, 2021 UT 46**

"The district court erred in its interpretation of section 602.8(4)(a) and in its conclusion that it lacked jurisdiction. We conclude that rule 19 of the Utah Rules of Appellate Procedure informs our interpretation of the statute. Specifically, we hold that sponsors are 'prohibited from pursuing' an extraordinary writ in the Supreme Court under section 602.8(4)(a) when they cannot satisfy rule 19's requirements. Appellants could not do so here and thus appropriately raised their challenge in the district court." *Id.* ¶ 2.

***Smith v. Zook*, 2021 UT 10**

"The sponsors of the referendum petition … went to great lengths to procure voter support for their challenge to the Nibley City ordinance. And they did so at a time of great challenge—as reflected in the terms of Executive Order 2020-14. The petition for extraordinary writ, moreover, raised some important legal questions at the intersection of the Election Code and Executive Order 2020-14. We thus commend the sponsors for their diligent efforts. But we reverse the decision granting the sponsors' motion for summary judgment because we conclude that the sponsors' referendum packet fell short of fulfilling the requirements of the Election Code—even as altered by the executive order." *Id.* ¶¶ 37-38.

***Matthews v. Tooele County*, Case No. 200301717 (3d Jud. Dist. Ct. Utah)**

This ongoing case involves interpretation of what constitutes a "land use law" within the Election Code. The county maintains that an ordinance amending the official zoning map and rezoning several parcels of land was subject to the signature threshold for land use laws, while the referendum sponsors contended that it should not qualify as a land use law under the *Mouty* decision. The district court adopted the county's position.

H.B. 38 – Initiative and Referendum Modifications & S.B. 199 – Local Land Use Amendments

H.B. 38 amends provisions relating to initiatives and referenda in an effort to clarify and create consistency. From a land use perspective, the more interesting change may be S.B. 199, which

disallowed referral of referendum to voters of land use laws that pass by unanimous vote of the local legislative body.

SHORT TERM RENTALS

***South Weber City v. Cobblestone Resort*, 2022 UT App 63**

South Weber City filed suit under Utah Code 10-9a-802, seeking to enjoin a violation of its recently-enacted short-term rental ordinance and obtain a declaration that short-term rental of the property at issue was not a legal nonconforming use that was not subject to that ordinance**. The Court of Appeals affirmed the district court's grant of the injunction, holding that use of the property for short-term rentals was not a legal nonconforming use.** Such use did not fall within any of the previously-permitted uses for the Agricultural zone. The zone allowed for "dwelling, one-family." But, "dwelling" was defined as a "building designed and used for residential purposes including one-, two-, three- or four- family units, but not including apartments, boarding houses, hotels, lodging houses or tourist courts." "Boarding house" was defined as a "building used for the purpose of providing meals or lodging, or both meals and lodging for pay or compensation of any kind for three (3) or more persons." Use of the property for short-term rentals fell within that exclusion to the permitted use. The Court additionally held the district court did not err in rejecting the property owner's equitable arguments.

OPRO Opinion 257: Christensen

Owners of property in unincorporated Washington County sought an opinion as to whether their use of a single-family dwelling as a short-term rental was historically permitted in the County's Forest Residential Zone prior to the County enacting certain restrictions on such rentals, such that it is a legal nonconforming use exempt from the current short-term rental ordinance. Short-term rental of the property to "single families" fell within the County's permitted use of "single-family dwellings for year-round use." The County's definition of "residential use" included "overnight use." The short-term rental use of the property did not fall within any of the conditional uses for the zone. As a result, the short-term rental was a legal nonconforming use not subject to the current ordinance.

OPRO Opinion 258: Morris

This advisory opinion addressed a virtually identical issue as in Opinion 257, involving the same Washington County Forest Residential Zone. Again, the short-term rental had been a permitted use prior to the recent short-term rental ordinances. This opinion addressed an additional issue: whether the fact that the owners did not have a business license for the short-term rental of their property precluded it from being a legal nonconforming use. The advisory opinion concludes that it did not; "except where explicitly incorporated into applicable land use regulations, a failure to comply with other requirements unrelated to zoning, such as business license requirements, does not preclude a determination that a land use was legally established."

FAIR HOUSING LITIGATION & INVESTIGATIONS

***Etna v. Holliday City*, 2020 WL 1236439 (D. Utah 2020)**

Rejecting a fair housing claim based upon a claim of constructive denial, the district court held: "The City Code permits no more than four unrelated individuals and their minor children, if any, to live together in a single housekeeping unit. However, residential facilities for persons with disabilities already receive some preferential treatment under the City Code, because the maximum

number of residents increases to six unrelated people. The additional accommodation that Plaintiffs asked for is not "necessary" to create a level playing field or to ensure that people with disabilities receive the same housing opportunities as everyone else; instead, the requested accommodation would grant the disabled residents of Square One's facility a group housing opportunity not available to anyone else in that particular zone." *Id.* at *3.

***FSC Communities HOA*, Case No. 20210698-CA**

This ongoing appeal arises out of an association's denial of a request to maintain eight chickens in a residential subdivision that prohibited chickens and limited the number of household pets to two. The district court rejected arguments about the reasonableness and necessity of the chickens and held that an eleven-week period of silence sufficed to establish constructive denial. On appeal, the parties offer the court of appeals conflicting views of the standard for demonstrating constructive denial.

EXACTIONS AND FEES

***Utah Sage, Inc. v. Pleasant Grove City*, 2023 UT 2**

The Utah Supreme Court held that the municipality had broad statutory authority to enact a transportation utility fee. The trial court incorrectly determined that the TUF should be classified as a fee, based upon the mere fact it benefited others beyond those paying the fee. Because the trial court did not reach the issue, the court remanded for a determination of the reasonableness of the fee under the *V-1 Oil* test.

S.B. 158 - Local Government Water Amendments

S.B. 158 modifies the requirements and standards for a local government to determine the size of exaction for water rights based on state adopted standards or on five years of historic water use data, and authorizes smaller cities and counties to adopt drinking water source protection zones.

OPRO Opinion 249: Auburn Hills, LLC

"Hyrum City's requirements for certain road dedications is an illegal exaction where the City simply requires the dedications pursuant to its development standards without basing the imposition on an individualized determination of impact. Moreover, where the purpose for the City's exactions appear to primarily be to serve future development needs according to desired city planning, the developer is being required to pay for impacts beyond its own and to bear burdens which should be borne by the public at large, in violation of the developer's constitutional rights."

OPRO Opinion 251: Bluth

"Where a water company, in addition to providing these types of water services, also acts in additional capacities, including as a homeowners association, it is only subject to CLUDMA and the Impact Fee Act as it relates to the water services it provides, and not any other private function. Since the fee here in question is not actually an impact fee, it is not subject to the requirements of the Impact Fee Act. One would need to look to other sources of law to determine the water company's authority to impose the fee. This question is therefore outside the scope of this opinion."

OPRO Opinion 253: Maddox

> "In this case, the Maddoxes have applied to Highland City for the creation of two building lots, only one of which will accommodate a new dwelling. Accordingly, the City may only impose a requirement to build road and utility facilities to the extent that such a requirement offsets the impacts of the proposed development. Since the parties agree that the proposed development does not need the road and utility connections the City seeks to require the Maddoxes to construct, the City may not impose the requirement as the exaction would be excessive."

LAND USE LEGISLATION

H.B. 406 – Land Use, Development, and Management Act Modifications

H.B. 406 modifies some provisions of the annexation code, particularly the definition of rural real property; clarifies applicability of "moratorium" provisions; clarifies use of development agreements; establishes uniform statewide standards for residential roadways; and limits use of completion warranties and assurances for landscaping to only that on public land or to be turned over to the public.

S.B. 43 – Public Notice Requirements

S.B. 43 creates three new standardized classes of requirements for notifications of public meetings/documents/actions and specifies the class of notification required for different land use actions.

S.B. 174 – Local Land Use and Development Revisions

S.B. 174 modifies the prioritization and penalties for reporting on Moderate Income Housing Plan compliance and progress; modifies provisions for Internal Accessory Dwelling Units; establishes a uniform process for review and approval of subdivision plats, and effective date; and makes some modifications to lot line adjustment process.

MISCELLANEOUS OPRO ADVISORY OPINIONS

Compliance with Land Use Ordinances

OPRO Opinion 250: Bracken

> "The 75-foot building setback required by the Weber County stream corridor ordinance applies to naturally occurring, year-round streams. The watercourse running along the rear property line of the subject property is manmade and conveys water only a few months of the year. Furthermore, while the Stream Map does offer a conflicting depiction of "stream," such ambiguity is interpreted in favor of the property owner. Therefore, according to the plain language of the county ordinance defining a 'stream,' the 75-foot building setback does not apply to the watercourse in this case."

OPRO Opinion 252: Haslem

> "In this case, the record of the Planning Commission's decision to amend rather than revoke the Conditional Use Permit for the cement batch plant includes evidence that the three documented violations of operating trucks outside the permitted hours of operation were minor and not overly burdensome to the neighboring properties. Furthermore, the

decision is supported by evidence relating to additional complaints such as on-going dust control measures, dead vegetation being replaced in the screening berm, and whether or how trucks which may be speeding could be controlled. A court will uphold the County's decision to amend rather than revoke the Conditional Use Permit unless the decision was arbitrary and capricious or illegal. The Planning Commission's decision to amend the Conditional Use Permit was supported by evidence in the record, and therefore, not arbitrary and capricious. A reasonable mind could support the conclusion to amend the Conditional Use Permit rather than revoke it. Furthermore, the appropriate statutes and ordinances were followed in making that decision, and it was not otherwise illegal. Therefore, the Uintah County Planning Commission did not err when it decided to amend rather than revoke the Conditional Use Permit for the cement batch plant."

OPRO Opinion 255: Belnap

"The City has adopted an ordinance requiring property owners seeking to build a 'dwelling, main building, or permanent accessory building' within an easement to secure an easement agreement as a condition to receiving a building permit. The property owner in question has requested a building permit for a retaining wall and a fence within a public utility easement. Because fences and retaining walls are not a 'dwelling, main building, or [a] permanent accessory building' the relevant ordinance does not apply. Accordingly, the City may not lawfully require the property owner to secure an easement agreement as a condition of receiving the requested building permit."

OPRO Opinion 256: Packer

"A land use authority is not in a position to adjudicate quiet title disputes, which is the realm of the court, and must generally approve land use applications that are compliant with applicable land use regulations. The City's ordinances required preliminary plats to depict existing easements, which includes both those recorded as well as those claimed by use. Similarly, final plats are to adhere to the same standards as preliminary plats, and require existing easements to be clearly labeled and identified."

"In response to a proposed subdivision, a neighboring landowner raised a claim for two easements that would be impacted by the anticipated development. The City approved the subdivision and the lots as proposed, but imposed conditions that the plat depict the claimed easements as "disputed easement areas," together with plat notes describing the disputed nature of the easements. Because the City's ordinances merely required the depiction of claimed easements, but did not affirmatively prohibit approval of the subdivision, the City's decision approving the subdivision on these conditions was proper, and appropriately refrained from opining on a privatswe property dispute."

Vested Rights

OPRO Opinion 254: Ivins

"Vested rights apply to regulations applicable to a land use application or to the information shown on the submitted application. A subdivision approval creates developable lots. Typically, and assuming there isn't a binding development agreement detailing otherwise, particular structures for those lots are subsequently reviewed for approval in separate building permit applications, which are pursued on their own timeline—up to even years later."

"Design standards applicable to a particular structure vest at the time of a building permit application, not the underlying subdivision approval, except as otherwise provided by agreement or state law. Additionally, unless otherwise directed by local ordinances or development agreement, building permit approval is subject only to the city's applicable land use ordinances, and not to any conflicting CC&R's that may separately govern the development of property by private agreement."