Anatomy of HB 232 Land Use Amendments
2017 UMAA Spring Conference
Jodi Hoffman
May 10, 2017

HB 232 Land Use Amendments is one of the more important land use laws enacted in the last decade. HB 232 benefitted from broad deliberation over 14 months by a 12 person drafting team of the Land Use Task Force and periodic review by the LUTF membership. The bill passed unanimously in both the House and Senate, without a single negative remark.

While the motivation for HB 232 originated from the promise of certain legislative retaliation against local land use authority, in the end, the tone and impact of HB 232 was the measured consensus product of both the development and regulatory land use communities.

The municipal perspective recognized that without clarifying the legislation, far too many communities would continue to fail at basic structural mandates of land use law and fuel consistent and persistent attacks on local land use authority. Their failures weren't just the stuff of rumors or urban legend circling the halls of the Capitol. They were verified, prolific and diverse. Whether the failure *du jour* regarded conditional uses, short term rental laws, historic districts, bee keeping, aesthetic zoning, group homes, subjective code interpretations, subdivision development standards, inspection fees, referenda or home based businesses, at the heart of each of them were two compelling truths:

1. *Most local jurisdictions are unaware of, or have failed to enact systems to ensure, fundamental distinctions between legislative and administrative decision making in the land use context.*

2. *Those distinctions should be clarified in LUDMA to help local jurisdictions understand, identify and remove deficiencies in their local land use systems and to promote accountability should those jurisdictions fail to address them.*

The bill addressed four substantive areas of land use law that provide foundation for the fundamental distinctions between legislative and administrative decision-making:

1. Form And Process Required For Regulating Land Use;
2. Scope and Limits Of Legislative Discretion;
3. Scope Of Administrative Discretion; and
4. Accountability (scope of third party review).

What follows is an overview of each issue and a dissection of HB 232 to demonstrate how the bill has addressed these issues in specific redlined language.

1. **Form and Process Required for Regulatory Enactments.**

LUDMA requires a six-step process to enact a land use ordinance: notice, public hearing, planning commission recommendation, council action, signature, and publication. However, it had not specifically addressed the potential to enforce land use regulations that were not enacted by ordinance.

Unfortunately, as it turns out, many local land use rules and regulations have not been adopted through the intended process. Many jurisdictions (more than it is comfortable to acknowledge) have simply drafted land use regulations in a non-ordinance form: policies, guidelines, standards, specifications or fees without enacting them by ordinance.

For example, often jurisdictions have delegated to their City Engineer, or their Public Works Department, the authority to establish subdivision infrastructure standards and engineering specifications—at any time,

without any public process. We found that some jurisdictions have imposed standards that have not been reduced to a written form.

Standards that set required right of way widths or public easements can and do impact the look and feel of communities and the development potential of land.

Aside from the flashing-light-obvious problems of delegated legislative authority, lack of transparency, potential for favoritism and uncoordinated planning, the practice of allowing staff to "regulate" land use has impossibly blurred the distinction between legislative and administrative decision-making. Staff is not elected. It has no legislative power.

HB 232 should help to eliminate this practice.

The term "land use ordinance" has been replaced with a broadly inclusive definition of "land use regulation":

> **10-9a-103. Definitions**
> (28) "Land use regulation":
> (a) means an ordinance, law, code, map, resolution, specification, fee, or rule that governs the use or development of land;[1]

This definition change also addressed unanticipated exactions issues that had arisen over time. The law now reads:

> **10-9a-509. Applicant's entitlement to land use application approval -- Exceptions -- Application relating to land in a high priority transportation corridor -- Municipality's requirements and limitations -- Vesting upon submission of development plan and schedule.**
> (1) (a) (i) An applicant who has filed a complete land use application, including the payment of all application fees, is entitled to substantive land use review of the land use application under the land use [~~laws~~] regulations in effect on the date that the application is complete and as further provided in this section.
> (ii) Except as provided in Subsection (1)(b), an applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use [~~maps, zoning map, a municipal specification for public improvements applicable to a subdivision or development, and an applicable land use ordinance~~] regulations in effect when a complete application is submitted and all application fees have been paid, unless:

UCA 10-9a-501 has been amended to emphasize that the local legislative body is the only entity that may enact, amend, adopt or impose a land use regulation:

> **10-9a-501. Enactment of land use regulation.**
> (1) [~~The~~] Only a legislative body may enact a land use [~~ordinances and a zoning map~~] regulation.
> (2) (a) Except as provided in Subsection (2)(b), a legislative body may enact a land use regulation only by ordinance.
> (b) A legislative body may, by ordinance or resolution, enact a land use regulation that imposes a

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[1] To avoid a ridiculous outcome, the definition of land use regulation exempts immaterial mid course specification

> (iii) a temporary revision to an engineering specification that does not materially:
> (A) increase a land use applicant's cost of development compared to the existing specification; or
> (B) impact a land use applicant's use of land.
>
> UCA 10-9a-103(28)(a)

fee.
(3) A land use regulation shall be consistent with the purposes set forth in this chapter.

Staff-adopted policies, rules, enactments, guidelines and standards are not enforceable.

Practice Tip: As of May 9, 2017, only those land use regulations that have been enacted by your council, with planning commission recommendation, will have force and effect. Most jurisdictions will need to address this aspect of HB 232 as soon as possible.

2. Scope and Limits Of Legislative Discretion

HB 232 was a triumph for local land use systems in one respect: the bill acknowledged broad local discretion to regulate land use. It reconfirmed the substantial evidence rule and the judiciary's duty to afford land use regulations broad deference, so long as the regulation is not in conflict with state and federal law.

HB 232 clarified one provision, UCA 10-9a-104, that some jurisdictions had misconstrued. The law had read that a municipality may impose stricter requirements or higher standards than are required by LUDMA. Because LUDMA is written as an enabling statute, there are very few standards or requirements in the law.

However, LUDMA certainly mandates some standards – such as conditional uses, exactions, etc. -- that cannot be circumvented.

Negotiations over this language took months. Why? At least one local jurisdiction provided the "bad story" that inspires all legislative threats to local land use. One jurisdiction had insisted that UCA 10-9a-104 allowed its land use authority to deny a conditional use permit to an applicant who had substantially mitigated all regulated impacts of the use, because the jurisdiction had adopted a "stricter requirement" than state law. Sometimes we are our own worst enemy.

The Property Rights Coalition (our opposition in the Land Use Task Force) and key legislators (including the bill sponsor) wanted the entire section deleted. Municipal team members insisted that the section remain, with modest revisions. Cooler heads prevailed.

To eliminate the awkward argument that UCA 10-9a-104 somehow trumps all of the remaining provisions in LUDMA, UCA 10-9a-104 was amended as follows:

10-9a-104. Stricter requirements or higher standards.
(1) Except as provided in Subsection (2), a municipality may enact [~~an ordinance~~] a land use regulation imposing stricter requirements or higher standards than are required by this chapter.
(2) A municipality may not impose [~~stricter requirements or higher standards than are required by:~~] a requirement or standard that conflicts with a provision of this chapter, other state law, or federal law.

3. Scope Of Administrative Discretion

Generally speaking (of course), at the ground level, where all land use issues begin, many land use authorities continue to exercise far more discretion over administrative matters than the law allows. While the land use authorities are not often challenged, their actions have been exposed. At its core, the impetus for HB 232 was a pervasive local misunderstanding of the limits of administrative discretion in the land use context. This fundamental glitch fuels the lion's share of land use appeals and has led to many avoidable land use referenda battles.

As a necessary correction in a common course of performance, HB 232 affirms that each property owner has the common law right to use their property as they see fit, unless a properly enacted land use law plainly restricts that use. HB 232 restates the common law rule that local land use restrictions must be *plainly written* to overcome the common law right of use. It was enacted to end the practice of enforcing unwritten rules or interpreting and administering unclear land use regulations.

To be fair, most local jurisdictions practice land use without adequate counsel. They rely on outdated codes. They have no meaningful access common law mandates; they eschew the expense of legal advice and the anguish of updating their land use systems.

HB 232 modified LUDMA to include the "plain language" rule as follows:

> **10-9a-306. Land use authority requirements -- Nature of land use decision.**
> (1) A land use authority shall apply the plain language of land use regulations.
> (2) If a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application.

This change is a statement of current law. It is not the end of the world and does not render unclear codes invalid. Nevertheless, it clearly informs each jurisdiction, the public and the judiciary of the limits of local discretion to "interpret" unclear language to restrict land use applications. It should inspire a substantial course correction in many jurisdictions.

Practice Tip: If your code reads something like: "the Planning Director shall interprets ambiguous provisions of this code," replace this provision with a restatement of 10-9a-306.

Codification of the plain language rule reinforces the distinction between legislative and administrative acts. Land use authorities must enforce plainly convey restrictive provisions without relying on a land use authority's "interpretation". There is no room for "legislative" discretion at the administrative level.

Councils and the public have the most trouble with this concept. That is why councils should not serve as the land use authority. It sets them up for failure in the public's eye when they cannot deny an authorized use that the public clearly abhors.

The solution for them, of course, is to enact a plain land use regulation restricting the use before an individual's property rights have vested. Even though a council has the power to enact strict land use regulations under LUDMA, often they have not. Many have preferred to rely on the mistaken belief that they can exercise legislative discretion when they implement the law. This is especially true in the conditional use context:

In 2005, the legislature limited local discretion to administer conditional use permit applications. In most circumstances, a local jurisdiction *must issue* a conditional use permit if the use is listed as conditional in the zone. However, since 2005, very few local jurisdictions revised their codes in response to the 2005 law. Many have not updated their codes to reflect 2005 revisions. They still include conditional uses in districts that they expect to deny. Their codes still tell them that they have broad discretion to deny conditional uses.

Applicants who know how to enforce their rights, or to seek assistance from the Office of Property Rights Ombudsman regularly prevailed against these systems. However, those who are not aware of their rights did not.

The simple solution for all involved is a legislative one: councils can easily revise their codes to remove uses that the Council actually expects to deny. The current administrative path to this outcome is improper.

UCA 10-9a-306 should help exorcise the belief that a jurisdiction should postpone the hard land use calls to the administrative process:

> (3) A land use decision of a land use authority is an administrative act, even if the land use authority is the legislative body.

The drafting team spent many days honing the definitions of a "land use decision", "land use application" and "land use applicant" to re-enforce the distinctions between legislative acts (land use regulations) and administrative ones (land use decisions).

A land use decision is defined as:

> (26) "Land use decision" means a final action of a land use authority or appeal authority regarding:
> (a) a land use permit;
> (b) a land use application; or
> (c) the enforcement of a land use regulation, land use permit, or development agreement.

It was important to preserve jurisdictions' virtually unlimited discretion to deny zoning requests and to avoid any claim that the "plain language" rule applied to rezone applications. The definition of "land use application" excludes applications for rezone.

A land use application is defined as:

> (24) "Land use application":
> (a) means an application that is:
> (i) required by a [~~municipality's land use ordinance.~~] municipality; and
> (ii) submitted by a land use applicant to obtain a land use decision; and
> (b) does not mean an application to enact, amend, or repeal a land use regulation.

A land use applicant is defined as:

> (23) "Land use applicant" means a property owner, or the property owner's designee, who submits a land use application regarding the property owner's land.

The definition of "land use regulation" specifically excludes a "land use decision"

> (ii) a land use decision of the legislative body acting as the land use authority, even if the decision is expressed in a resolution or ordinance;
> UCA 10-9a-103(28)

4. Accountability

HB 232 clarified the scope and nature of third party review to assure transparency and accountability.

The law amends an appeal authority's scope of review of factual matters under both de novo review (no deference) and review on the record (substantial evidence). It also requires the appeal authority to enforce the plain language rule.

10-9a-707 reads:

10-9a-707. Scope of review of factual matters on appeal -- Appeal authority requirements.

(1) A municipality may, by ordinance, designate the [~~standard~~] scope of review of factual matters for appeals of land use authority decisions.
(2) If the municipality fails to designate a [~~standard~~] scope of review of factual matters, the appeal authority shall review the matter de novo, without deference to the land use authority's determination of factual matters.
(3) If the scope of review of factual matters is on the record, the appeal authority shall determine whether the record on appeal includes substantial evidence for each essential finding of fact.
(4) The appeal authority shall:
(a) determine the correctness of [~~a decision of~~] the land use [~~authority in its~~] authority's interpretation and application of [~~a~~] the plain meaning of the land use [~~ordinance.~~] regulations; and
(b) interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application.
(5) An appeal authority's land use decision is a quasi-judicial act, even if the appeal authority is the legislative body.
[~~(4)~~] (6) Only [~~those decisions~~] a decision in which a land use authority has applied a land use [~~ordinance~~] regulation to a particular land use application, person, or parcel may be appealed to an appeal authority.

HB 232 further sharpened important distinctions between judicial review of land use decisions and judicial review of land use regulations. Both actions are still entitled to a presumption of validity. The substantial evidence rule remains in tact.

Land use regulations will be upheld if it is reasonably debatable that the law complies with LUDMA and is not otherwise preempted by state or federal law.

Land use decisions will be reviewed for "correctness"—both in the local jurisdiction's interpretation of the law and its compliance with controlling law. The courts had been perennially confused with the prior language in UCA 10-9a-801. The prior language merged and muddled legislative and administrative concepts, which validated developers' claims that courts would not hold jurisdictions accountable under the law.

Here are the redlined amendments to 10-9a-801, as enrolled:

10-9a-801. No district court review until administrative remedies exhausted -- Time for filing -- Tolling of time -- Standards governing court review -- Record on review -- Staying of decision.
(1) No person may challenge in district court a [~~municipality's~~] land use decision [~~made under this chapter, or under a regulation made under authority of this chapter,~~] until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.

(3) (a) [~~The courts~~] A court shall:
(i) presume that a [~~decision, ordinance, or~~] land use regulation [~~made~~] properly enacted under the authority of this chapter is valid; and
(ii) determine only whether [~~or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.~~]:
[~~(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.~~]
[~~(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.~~]
[~~(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.~~]

(A) the land use regulation is expressly preempted by, or was enacted contrary to, state or federal law; and
(B) it is reasonably debatable that the land use regulation is consistent with this chapter.
(b) A court shall:
(i) presume that a final decision of a land use authority or an appeal authority is valid; and
(ii) uphold the decision unless the decision is:
(A) arbitrary and capricious; or
(B) illegal.
(c) (i) A decision is arbitrary and capricious unless the decision is supported by substantial evidence in the record.
(ii) A decision is illegal if the decision is:
(A) based on an incorrect interpretation of a land use regulation; or
(B) contrary to law