

## Selected Constitutional Issues

The following is a discussion of some basic constitutional law that all local government officials should be aware of. It is not intended to be comprehensive and is only a summary intended to alert local officials of some potential pitfalls.

As expressed in other portions of the handbook, Cities and towns are part of the government that the Bill of Rights of the United States Constitution was written to protect the people from. In addition the Utah Constitution has a statement of fundamental rights that contains similar provisions to the Bill of Rights. It is important for local government officials to have knowledge of these basic rights so that they can not only protect the peoples' rights but so that they can protect themselves and their cities and towns from liability claims.

**The First Amendment** to the United States Constitution protects the right of freedom of speech. For cities and towns this issue can be found in many different areas. As a general rule, government can control to some extent the time, place, and manner of speech but never the content. Examples are that if you allow the public to speak at your council meetings, you may control the time allotted and the public's demeanor, but you cannot censor the statements. And you can have sign ordinances, but you cannot regulate what the signs say. Common free speech problem areas are regulation of public demonstrations, political sign regulations, regulation of door-to-door solicitors, and sexually oriented business. It is hard for many local officials to believe that selling vacuum cleaners door-to-door and using sex to make money may be considered freedom of speech, but they very well may be.

The First Amendment also prevents government from promoting one religious view point over another or interfering with the exercise of religion. What this means is that cities or towns should be careful about issues like city sponsored prayer. There may also be issues with zoning of religious buildings and uses. This is a very sensitive issue in Utah because of the history of the state and the dominant religion. Most local officials in Utah are members of the dominant religion. The best advice is to be very sensitive to these issues to avoid the appearance that church and local government have been commingled.

**The Fifth Amendment** of the United States Constitution prohibits government from taking private property for public use without paying compensation. Article I Section 22 of the Utah State Constitution prohibits the taking or the damage of property without compensation. These provisions are easily understood when a city or town takes property through eminent domain for some public purpose. Usually the only issue is how much compensation is appropriate. The law requires the payment of fair market value for the property taken and, if all the property is not taken, the payment of any severance damages caused by the taking of the property left in private ownership.

A more difficult issue is what the courts have described as a regulatory taking. The courts have determined that when government regulates the use of private property,

sometimes the regulations goes so far that it is the equivalent of the government taking the property. When this occurs, just the private property owner is entitled to be compensated. It can be very difficult to determine where the line is between appropriate regulation and taking. Whether a regulatory taking has occurred is an issue of fact. There is no rule that can be said to apply to all situations. You can learn from examples from published court decisions. It is clear that if the regulation takes away all uses of the property, then a taking has occurred. Courts also consider such things as whether the regulation furthers legitimate government purposes and whether the land owner's reasonable investment backed expectations of use. The determining factor is not whether the regulation affects the value of the land but how it affects the potential and actual uses of the land and the reasonable expectations of the land owner.

The Fourteenth Amendment to the Constitution is what applies the Bill of Rights to the states and therefore subdivisions of the states such as cities and towns. It is also relevant to the control of land use. This amendment, along with the Fifth Amendment, prohibits the state and local government from depriving a person of life, liberty, or property without due process of law. Due process can be either procedural or substantive.

**Procedural due process** is satisfied if the government gives notice of what it intends to do, and allows the affected persons to present the relevant facts at a hearing before an independent hearing officer or panel. Normally due process must be given before the deprivation of the life, liberty, or property. Procedural due process claims are very common and often successful. Usually all the city or town has to do however, is to repeat the process properly. Damages may incur during the period between when the process should have been done and when it is finally given. The courts will award these damages to successful claimants.

**Substantive due process** concerns issues like why a decision is made and the appropriateness of the government action. A substantive due process claim can be very similar to a regulatory taking claim. Some of the same issues are present. Does the government action further a legitimate government purpose? Were the motives of the decision makers pure? A successful substantive due process claim is rare.

The state and federal constitutions also provides that persons get **equal protection under the law**. This has been interpreted to require that people in similar situations are given similar rights and treatment under the law. Normally a person asserting that he or she has been denied equal protections must identify the group he belongs to and how that group is being treated differently by the government (sometimes call disparate treatment). However, the courts have now recognized that an individual can make an equal protection claim if he or she can show that the challenged government action was taken out of personal animus toward him or her.

Once the claimant proves disparate treatment, the issue becomes whether the government actions furthers a legitimate government purpose. The key to this determination is the amount of deference the courts give to the government decision makers. If the disparate treatment is of a group described as a suspect class, such as a class based on race, gender,

ethnicity, or religion, then the courts look at the government action with what is called strict scrutiny. The same is true if the issue involves fundamental rights such as the right to vote. The government's disparate treatment is presumed to be invalid and the government bears a very heavy burden to show that the action furthers the appropriate purposes and that there is not another way to accomplish the same results without the discrimination.

If the group discriminated against is not a suspect class or the issue does not involve fundamental rights, then the courts will give deference to the decision of the government. The courts will presume the decision of the government is okay and the claimant will have to show that the challenged regulation does not further the legitimate government purpose. This is a very heavy burden and almost never met. There are some issues that are given that the courts call an intermediate level of scrutiny. In these cases the courts do defer to the government decision, but not completely.