

Appeal Authorities Annual Convention 2015

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Introduction and Overview

- Zoning is a blunt instrument.
- People make mistakes.



Appeal
Authority
Powers and
Responsibilities

Enabling legislation for Land Use in Utah

Title 10, Chapter 9a
Land Use Development and Management
Act

le.utah.gov



Land Use Tools

General Plan

“A practical vision
for the future”

Sets roots for the zoning code



Zoning / Land Use Code

“Where the rubber
meets the road”

Detailed specifics

Creation:

1. Planning Commission creates, holds a public hearing and recommends to the Council
2. Council Approves, modifies/denies



“Land Use Authority”

A person, board, commission, agency, or other body **designated** by the local legislative body to **act** upon a land use application.

*From permit
counter
employee
to City Council
Staff
Planning
Commission*

Creation:

1. Planning Commission recommends to Council
2. Council takes final action and appoints

“Appeal Authority”

Title 10 Chapter 9a Section 301

A person, board, commission, agency, or other body designated by ordinance to decide an **appeal** of a decision of a land use application or a **variance** from the land use code.

Can be one person, or a board, or share with another jurisdiction

Creation:

1. Planning Commission recommends to Council
2. Council takes final action and appoints





What Hat Do You Wear?



	<u>LEGISLATIVE</u>	<u>ADMINISTRATIVE</u>	<u>QUASI- JUDICIAL</u>
Characteristics	Very Broad Authority <u>and Public Input</u>	Much More Restrictive <u>Limited or no input</u>	Very Restricted <u>Input restricted to parties in case</u>
	<ul style="list-style-type: none"> Creates new law Allows for citizen input as basis of decision Based on vision and goal setting Use of judgment 	<ul style="list-style-type: none"> Enforces the current law and makes reference to it in a decision Bound by the law rather than public opinion Does not create or “bend” the law <ul style="list-style-type: none"> The application of the law to a specific situation 	<ul style="list-style-type: none"> Based on established state law Looks for errors made in the process Not a judgmental decision Public input for information only
Responsible Body	<u>Land Use Authority (ies)</u> <ul style="list-style-type: none"> Planning Commission* City Council/Town Board <p>*Acts as an advisory board to the legislative body</p>	<u>Land Use Authority (ies)</u> <ul style="list-style-type: none"> Planning Commission City Council Mayor Board of Adjustment Enforcement Officer 	<u>Appeal Authorities</u> <ul style="list-style-type: none"> As designated <u>Courts</u>
Land Use Actions	<ul style="list-style-type: none"> General Plan Zoning Ordinance Subdivision Ordinance All Municipal Ordinances Creation and Amendments Annexation Policy Plan 	<ul style="list-style-type: none"> Building Permit Approval Subdivision Approval Conditional Uses Variances 	<ul style="list-style-type: none"> Appeals



Quasi-Judicial Functions

1. The decision-maker is neutral and unbiased.
2. Conclusions of law are based on relevant statutes, ordinances, and case law that are identified in the record.
3. Findings of fact are based on substantial evidence included in the record of the proceedings and nothing else.
4. There are no “ex parte” contacts or political pressure.
5. Public clamor is irrelevant to the decision.



Due Process of Law

1. The decision-maker must be impartial.
2. Each party has adequate notice of the proceedings.
3. Each party has a fair opportunity to present evidence and argument to the decision-maker.
4. All law and evidence to be considered is made available to each party in a manner that allows each party to review and respond to it.
5. Those providing evidence as witnesses should be available for questions (informal cross examination) and establish their qualification



Flexibility

1. An appeal authority may be one person.
2. There is no reference to the “Board of Adjustment” in state statute.
3. Appeal authorities need not hold public hearings, but if they are a board they must respect the open meetings act.
4. Appeals boards may deliberate in a closed meeting.
5. An appeal authority must respect due process, but can be very flexible in its procedures.
6. Appeal authority personnel need not live in the jurisdiction.



10-9a-702.

State provides mechanism to vary the rules of your land use ordinances

The state sets the five criteria.
All five must be met.

Very rare that all five are met

What is a Variance?

- A variance is a modification of a zoning requirement made necessary because some unique aspect of a parcel makes the requirement burdensome or unfair.
- Variances may be granted to adjust such zoning standards as setbacks or height limitations. The Utah Code authorizes local governments to grant variances.
- The variance mechanism allows a local government to have a zoning ordinance which applies to all properties, while providing the flexibility to adjust the zoning regulations when necessary.

When is a Variance Granted?

The application will be heard by the local government's "appeal authority," which may grant a variance if it finds that:

10-9a-702.

1. Unnecessary Hardship

The unreasonable hardship may not be self-imposed or purely economic, and must arise from conditions unique to the property.

2. Special Circumstances Attached to the Property

3. Substantial Property Right

4. Consistent with Public Interest & General Plan

5. Spirit Observed, Justice Done



All **5** criteria must be found in favor of the variance in order for it to be valid.



The Finite Five

1. “Unreasonable Hardship”

An “unreasonable hardship” refers to difficulty in complying with a zoning ordinance because of circumstances unique to the property. The hardship must relate to the property and not to conditions general to the area. A hardship may not be self-imposed or solely economic. A variance is not necessary if compliance is possible, even if the property owner has to alter desired plans.

2. “Special Circumstances”

“Special circumstances” refers to physical conditions unique to the property which relate to the hardship, and make compliance difficult or impossible. Special circumstances do not include self-imposed conditions, or economic concerns.



3. “Enjoyment of a Substantial Property Right”

- It is necessary for the variance to relate to a substantial property right enjoyed by other nearby properties that would not be fully available unless the variance were granted. The right must be one enjoyed or available to nearby properties. A variance should not be granted to establish a property rights that would not be available in the same area.

4. “Consistent with Public Interest & General Plan” &

5. “Spirit of the Zoning Ordinance Observed and Justice Done”

- A variance is not an “escape clause” allowing an owner to disregard zoning regulations, but is rather a mechanism to adjust zoning requirements when necessary, so that all property owners may be treated with fairness. The health, safety, and welfare of the public, as expressed in local zoning ordinance should be promoted and preserved.



Cases on Variances:

Save Our Canyons v. Board of Adjustment of Salt Lake County

Discusses criteria for variance

Xanthus v. Salt Lake City Board of Adjustment

–Each parcel is unique, and property owner must show special circumstances that relate to the hardship complained of....

- **Mitigation**

The appeal authority may require conditions which mitigate the effects of a variance.

- **Appeal of a Decision on a Variance**

A decision granting or denying a variance may be appealed to a district court.

- **What if a Variance is Not Granted?**

The denial could be appealed, or the project could be modified so that it complies with the zoning ordinance. The property owner could also suggest that the zoning ordinance be amended.



Appeals

10-9a-701.

Municipality sets standard of review-
“De Novo” or “On the Record”

Applicant has the burden of proving that the Land Use Authority has erred.

Impartial decision makers

- **DUE PROCESS**
- No public hearing required.

Who has standing to appeal?



Appeals

1. Land use ordinances must provide for an appeal authority or refer appeals to the district court.
2. May not require repeated appeals – one decision, one appeal.
3. A decision must be final before it can be appealed.
4. A decision is final when it is made by a land use authority and reduced to writing.
5. No one making the decision to be appealed can serve on the appeal authority.
6. There is usually no appeal from the appeal authority except to go to court.



There is no requirement that the Board (of Adjustments) give any deference to the administrator or executive official making the determination.

Brown v. Sandy City Board of Adjustments



Board of Adjustment vs Hearing Officer

- Traditional Method to Consider Appeals and Variances
- Most Common Appeal Authority Across Utah
- Roots in 1926 Standard Enabling Act (US Dept. of Commerce)
- Incorporates Community Residents into Review Process
- Function as *Quasi-Judicial* Decision Makers



Board of Adjustment vs Hearing Officer

- Emerging Option for Some Jurisdictions
- Incorporates Use of Professionally-Trained Individuals
- Roots in Burgeoning Use of Administrative Law Judges
- Distances Appeals Process from Public Clamor & “Civilian” Decision Makers
- Remains a *Quasi-Judicial* Process

