

**PARK CITY PLANNING COMMISSION
WORK SESSION MINUTES
JANUARY 14, 2015**

PRESENT: Chair Nann Worel, Melissa Band, Steve Joyce, John Phillips, Adam Strachan, Doug Thimm, Thomas Eddington, Polly Samuels McLean, Assistant City Attorney

Commissioner Preston Campbell was excused.

WORK SESSION ITEMS

Legal Training on Conditional Use Permits and recent developments in Land Use Law.

Brent Bateman, the State Property Rights Ombudsman conducted the training. Mr. Bateman stated that he is an attorney and his job is to resolve disputes. He works for the State of Utah and they are a non-partisan office. They are in the business of trying to keep the citizens of Utah and the governments in the State from being in lawsuits together. Mr. Bateman outlined the process for trying to resolve disputes. One step in the process is to provide training to keep everyone on the same page. Mr. Bateman stated that he has been with the State Ombudsman's Office for eight years and he practices land use law all day, every day.

Mr. Bateman stated that the goal this evening was to have land use discussions and to make the discussions as pertinent and helpful as possible. He had a slide with a series of topics and asked the Planning Commission to choose the ones they wanted to talk about.

The discussion started with "Jerks". Mr. Bateman remarked that Jerks was a message he typically needs to give in less sophisticate places; however, he would discuss it this evening. Mr. Bateman stated that quite often he receives calls from people who have nothing good to say about their city. They call them horrible jerks and how they are crooks who should be put in jail. Once Mr. Bateman begins asking questions, it becomes clear who the real Jerk is. Mr. Bateman remarked that there are people like that in every town and most are people he would prefer not to talk to. However, in his conversation with a "jerk", he finds that the person has agitated everyone in the City so much that the City will no longer work with him. Mr. Bateman stated that the real message in this circumstance is that the jerks have property rights, too, and they should be treated like everyone else and given the same consideration.

The next topic was Public Clamor. Mr. Bateman asked the Planning Commission if they were comfortable with the difference between legislative and administrative decision. He tells people that every time they make a decision they should know what kind of decision it is. He understood that in Park City the City Council is the Land Use Authority for Subdivisions, which is unusual. He also understood that the Planning Commission is the

Land Use Authority for conditional uses. Assistant City Attorney McLean explained that some conditional uses are approved at the Staff level. The distinction is made in the Land Management Code. Director Eddington clarified that certain conditional uses are administrative CUPs approved by Staff, and the other CUPs are approved by the Planning Commission. Mr. Bateman thought that was a good process. He stated that in the past he used to advise governments not to hold a public hearing for a conditional use; however, he no longer thinks that way. Mr. Bateman informed the Planning Commission that there is no requirement in State Statute that requires the Planning Commission to hold a public hearing when deciding a conditional use. He explained that he used to discourage public hearings because of public clamor. When making an administrative decision, they are not allowed to consider public clamor as a basis for the decision. A legislative decision is a policy decision made by the City Council and a public hearing is required because public clamor should be considered in making the policy decision.

Mr. Bateman remarked that instead of advising people not to hold a public hearing for conditional uses, he suggests that they do exactly what Park City does. It does not make sense to have a public hearing for every conditional use because some are routine and should be handled by Staff. Other conditional uses should have public input so people have the opportunity to make their comments and the Planning Commission can listen to what they have to say. Every once in a while someone making comment may provide evidence that the Planning Commission can use. Arbitrary, capricious and legal is the standard for making an administrative decision. Something can be determined to be arbitrary and capricious if it lacks substantial evidence on the record. If they make a decision in line with substantial evidence on the record, their decision would be upheld. Mr. Bateman emphasized that it has to be evidence. Public clamor is opinion and not evidence.

Commissioner Strachan asked Mr. Bateman to give examples of evidence vs. public clamor. Mr. Bateman referred to a case Wadsworth vs. West Jordan. In that case Wadsworth Construction wanted to build a storage facility next door to Dannon Yogurt in West Jordan. Dannon Yogurt and others citizens attended the public hearing and made comments such as outdoor storage attracts mice and raises dust. West Jordan City found in favor of Dannon Yogurt and denied the conditional use permit. When it went to court, the courts determined that there was no evidence in the record to show that the building materials Wadsworth wanted to store would attract mice or raise dust.

Commissioner Strachan noted that a lot of people will tell the Planning Commission that the house next to their friend had the same impact and how their friend's house was affected because of this impact. If the Planning Commission approves this conditional use permit application which involves the same impact, the same thing will happen to their house. Commissioner Strachan asked if that type of comment would border evidence or public clamor. Mr. Bateman replied that it is public clamor. He noted that the most

common public clamor is someone saying that approving an application will reduce the value of their house. That person must provide measureable evidence to support their claim. One example of evidence might be an appraiser who could substantiate that it happened in a similar circumstance and the property value was reduced. The evidence must be relevant and measurable.

Commissioner Strachan asked about situations where the applicant submits a geo-tech report indicating that the project is safe and there would be no erosion problems. It is difficult for the Planning Commission to say the geo-tech report is not valid when they do not have the means to have a geo-tech person support or dispute the applicant's report. Commissioner Phillips remarked that if the geo-tech is licensed through the State the report should be accurate. Commissioner Strachan pointed out that licensed geo-tech experts could have differing opinions. In those circumstances, he believed the record is that there is proof-positive that it is okay. It may not be okay, but there is no evidence to dispute it.

Mr. Bateman explained that if a geo-tech expert submits his study and shows that it will not slide, that is considered evidence. However, they need to remember that the standard is substantial evidence on the record, which is different from a preponderance of the evidence. Preponderance of the evidence means more evidence than not. The courts require substantial evidence on the record and that means more than a scintilla of evidence. If they have evidence to support their decision it will be upheld, even though there may be more evidence to the contrary.

Commissioner Thimm referred the previous example of losing property value if a house is built to a certain height. He asked if the height fully complies with all of the Codes and Guidelines but several appraisers agree that property value would be lost, whether the Planning Commission would have a basis to approve the application based on full compliance with Code. Mr. Bateman remarked that the short answer is that the Planning Commission could still approve the application. He noted that if someone objects to a CUP because it would damage the value of their house, that is public clamor and the Commissioner should disregard it. If the next person makes the same claim and provides proof that their property value would be damaged, they have evidence. The Planning Commission could consider that evidence, but they do not need to make their decision on that basis alone, unless the ordinance says that they would never make a decision that would reduce property values. Mr. Bateman remarked that the Planning Commission is not in the realm of subjectivity and the only question is whether or not it complies. Subjective decisions that require judgment and what they want for the town are legislative policy decisions made by the City Council. The Planning Commission is involved in the legislative process by making a recommendation to the City Council, but the Council ultimately makes the final decision. Under State law, the City Council is the only body allowed to make those decisions. Administrative decisions are objective and focus on Code compliance.

Commissioner Strachan wanted to know their recourse if a project does not comply with the purpose statements. Mr. Bateman replied that he has a problem with purpose statements. Commissioner Strachan clarified that he was talking about purpose statements codified in the LMC; not the General Plan. Mr. Bateman reiterated that the whole point of administrative decisions is to be objective. People need to know that if they comply with the law, they are able to do what they want with their land. That is the balance of property rights. Zoning is a major exception to base property rights. The zoning law allows restricting some of what people can do with their land by imposing zoning requirements and ordinances. That is not considered a taking because it is permitted; however, the ability to do that is very limited. If they intend to restrict something, the zoning requirements must be outlined in the ordinance. Mr. Bateman stated that zoning is required in order to have an ordered society and for the communities to look and feel a certain way. However, property rights and zoning requirements need to be kept in balance. Every time they enforce a restriction they are doing an exception to a person's right to do what they want with their property. The City needs to be clear on what a person is allowed to do with their property. Again, those are policy decisions made by the City Council and incorporated into the ordinance. Mr. Bateman stated that if it is in the ordinance and the applicant complies, they get to do it without exception because it is not a judgment call.

Commissioner Strachan used the example of the purpose statement saying to reduce the cut and fill in order to reduce the environmental impacts. Mr. Bateman believed Commissioner Strachan was talking about what the State refers to as standards. The standards are the goals for the community and they are included in the ordinance. As long as they are measurable, in his opinion they are fine. Commissioner Strachan asked how the Planning Commission could tell an applicant that the amount of cut and fill they were proposing to excavate on the site is excessive. Mr. Bateman replied that 90% of their decisions are objective based on compliance. Commissioner Strachan's question falls in the remaining 10%. He stated that a certain amount of judgment needs to be involved, but it has to be related to a specific standard. The standard has to be measurable or reasonable, but if the application does not meet the standard then the Planning Commission can impose a condition to mitigate the impacts. Mr. Bateman emphasized that the imposed condition must relate to a standard in the ordinance. He clarified that the standard could be mitigated but not eliminated. The decision to impose the condition would be upheld as long as long as it is supported by evidence.

Commissioner Strachan asked if there were any impacts that could not be mitigated. Mr. Bateman stated that in eight years as the Ombudsman he has never seen what he would consider to be a justifiable denial of a conditional use permit. He noted that conditional use permits should be extremely hard to deny. If something is listed as a conditional use, policy has already been set to allow it in town. In order to deny a conditional use permit, the Planning Commission must find by substantial evidence that there is no way to impose conditions to mitigate the detrimental effects.

Director Eddington noted that nightly rentals are allowed in most zones and certain resulting issues are hard to mitigate. He asked Mr. Bateman if taking nightly rentals out of a zoning district in terms of a CUP would be possible and whether it would be considered downzoning. Mr. Bateman replied that downzoning is legal and it can be done at any time. He pointed out that the Planning Commission could make that recommendation, but the legislative decision is made by the City Council as policy. Director Eddington asked if there were specific criteria to justify downzoning. Mr. Bateman answered no. He stated that the standard for downzoning is different than the standards that require substantial evidence on the record. The standard for zoning and all legislative decisions is that it is reasonably debatable and it is in the best interest of the community. If it is reasonably debatable it will be upheld. Mr. Bateman was unaware of any case in the entire United States where an arbitrary and capricious downzoning decision has been overturned. However, there is a limit so it does not go too far. Going too far becomes a taking.

Assistant City Attorney McLean continued with the example of nightly rentals. If a neighbor witnesses that there are more cars parked at a nightly rental than what was allowed in the conditions of the CUP, is that observation enough evidence or would they need something more. Mr. Bateman replied that it would be weak evidence, but it would probably be enough to rely on. Using the same example, Commissioner Band assumed that the parking issue would have to be mitigated but it would not be enough to revoke the CUP.

Mr. Bateman stated that the danger in this discussion was thinking that there was any kind of precedent. He noted that there is never a precedent unless it is a discrimination claim based on a protective class. Mr. Bateman clarified that just because one house gets to do something does not mean every house gets the same thing.

Commissioner Band noted that Mr. Bateman previously said that there were no good reasons to deny a CUP. Mr. Bateman clarified that if one house does it because they complied with the ordinance, and the next house also complies, it needs to be clear that the reason for allowing something is based on compliance with the ordinance and not because of precedent.

Assistant City Attorney McLean asked at what point the Planning Commission suggests the mitigation versus a point where the impacts are so great that the Planning Commission can deny the CUP until the applicants comes back with proper mitigation. Mr. Bateman stated that conditional uses are a multiple step process and substantial evidence on the record applies to every step. The detrimental effects are the first things to be determined and it must be supported by substantial evidence. The second step is to determine the standards because they have to have standards to relate to the conditions. Once the standards are identified, the conditions are determined to mitigate the standards. Mr. Bateman stated that it only works if both parties work together. The City imposes the

conditions but they do not design the house. However, it starts with the City because they have to identify the detrimental effects and the standards for the conditions.

Commissioner Strachan believed that in the end the scales of justice are on the side of the applicant and not the City. Mr. Bateman understood Commissioner Strachan's position and he did not disagree because it goes back to personal property rights. There are standards of legal interpretation that circle back to "all things being considered equal", and the property owner wins because they have the base underlying right to do what they want with their land. On the other hand, the City can put whatever it wants in the ordinance. Mr. Bateman stated that if they were spending too much time on judgment call issues, he would suggest that they specify what they want in the ordinance. Mr. Bateman pointed out that the primary role of the Planning Commission is to plan. Their job is to be involved in the legislative process by creating the General Plan and working on ordinances to provide the best recommendation to the City Council to create policy. Mr. Bateman stated that Land Use is so important that the State Legislature created Planning Commissions to help the City Council. In his experience, most Planning Commissions throughout the State spend more time on conditional uses and very little time on land use planning, and that is not how it is supposed to work. Mr. Bateman reiterated that the scales are tipped towards the property owner, but the City has a tremendous amount of discretion as to what to put in the Code.

Commissioner Strachan remarked that a major problem is plat amendments where the only standard is good cause. He personally finds that standard to be unhelpful. Commissioner Strachan stated that when the plat is amended a certain footprint is granted and the owners can build whatever they want within that footprint. He asked if there were different and better standards for plat amendments. Mr. Bateman stated that a plat amendment is the only land use decision that has the good cause standard. He clarified that State Statute requires that good cause be the standard for plat amendments. Commissioner Strachan asked Mr. Bateman for his thoughts on the standard. Mr. Bateman replied that he is uncomfortable with subjectivity, particularly on these types of decisions. However, a plat amendment is a little different than other decisions because it changes something into something. He was unsure whether it justifies the standard of good cause, but it is State law and it cannot be changed.

Commissioner Thimm asked if there was a definition of good cause. Commissioner Strachan pointed out that there is a definition in the LMC but it was not helpful. Mr. Bateman suggested that the Planning Commission ask the Planners to draft a better definition for good cause. Commissioner Band asked if State law defines good cause. Mr. Bateman answered no, which is why the City could come up with its own definition of good cause as long as it does not go too far. He clarified that every rule must relate to healthy, safety and welfare. The burden is on the applicant to show that the ordinance goes too far.

Chair Worel asked if State law legislates aesthetics for compatibility in Historic Districts. Mr. Bateman answered no. The State allows for Historic Districts to exist, but the State does not dictate how they should work. They leave that discretion to the individual cities.

Assistant City Attorney McLean noted that when Salt Lake had the issue regarding the Harvard/Yale historic district, the State Legislature stepped in because they had gone too far. It was not a legal decision by the courts. Mr. Bateman stated that in his personal opinion it is a travesty when that happens. He believes that if the State gives local control they should keep the control local so each city can decide their own destiny. Mr. Bateman clarified that it was only his personal opinion, but he has testified before the State Legislature and expressed his opinion. Mr. Bateman stated that having the legislature step in was less frightening than a referendum, which is where the citizens petition to overturn a decision. It is difficult but it can be done. In the last two years multiple communities have succeeded in overturning local legislative decisions.

Chair Worel asked if the movie studio could have been stopped if the citizens had put together a referendum. Mr. Bateman stated that it has to be a legislative decision. Since an annexation is a legislative decision, the citizens could have petitioned to stop the annexation. Commissioner Joyce did not believe that would have stopped the movie studio because the County had already decided to let them build the studio. The annexation was a way for Park City to be involved. Commissioner Strachan pointed out that the citizens could have done a referendum on the County. Planner Astorga disagreed because it would have been an administrative process through the County rather than a legislative decision.

Mr. Bateman stated that a referendum is a complicated process. The number of signatures required for the petition depends on how many people voted in that District in the last election. It is based on percentages. Mr. Bateman explained the process for starting a referendum. The voting numbers can be obtained through the County Clerk to determine the number of signatures required for the referendum.

Mr. Bateman reiterated that when working on legislative issues, the question in their mind should always be whether or not it goes too far. Going too far is always a taking. They should also keep in mind that a referendum is possible if they make an unpopular decision.

Chair Worel asked Mr. Bateman to explain an exaction. Mr. Bateman used the example of the City allowing a subdivision in exchange for widening the road or putting in some type of infrastructure. An exaction is asking someone to spend money or to do something as a condition of development approval. Mr. Bateman stated that it can legally be done, but within the limit that it has to be roughly proportional to the impact being created by the development.

Director Eddington asked if it was possible to have an impact fee for affordable housing. Mr. Bateman answered no. He stated that there are only eight items that allow an impact fee; parks, sanitary sewer, water, public safety and other infrastructure issues. Affordable housing is not on the list. Mr. Bateman commented on a recent trend to require affordable housing. If the affordable housing was not built, the developer had to do a payment-in lieu for affordable housing. He remarked that the collective wisdom was that it was not legal because it is a taking. Mr. Bateman pointed out that having it in an ordinance does not make it legal.

Commissioner Strachan explained that houses in Park City are not small bungalows. They are 10,000 square foot monster mansions that create a service sector need. Mr. Bateman clarified that the problem is not requiring affordable housing. The problem is taking the fee-in-lieu. Commissioner Band felt that a fee-in-lieu would mitigate the problem because taking the fee now enables the City to purchase land in the future where they can build affordable housing. She was unsure of the exact issue with taking a fee-in-lieu. Mr. Bateman stated that building affordable housing solves the problem. Taking money does not solve the problem, and too often the money banked never goes to build affordable housing. Building affordable housing solves the immediate problem being created by the development. Mr. Bateman stated that many cities and towns were doing a fee-in-lieu, but very few still do it.

Commissioner Thimm understood that the ordinance is still legal if it says that 10% of the housing must be affordable. Mr. Bateman had no problem with that being in the ordinance. Commissioner Strachan asked if they could require the developer to build the affordable housing before building the home. Mr. Bateman believed they would have that discretion. Director Eddington clarified that the only issue was taking the fee-in-lieu for both residential and commercial development. Mr. Bateman reminded them that he was only speaking theoretically based on his experience and knowledge; and not on solid law. So far there have been no legal cases to reference. Commissioner Strachan pointed out that State Statute commands providing affordable housing. Mr. Bateman stated that it would still not protect them from a lawsuit. If a similar case came across his desk he would probably not decide in favor of the City, even with the information he gave them this evening.

Assistant City Attorney McLean believed the City needed to have that discussion because the Legal Department had looked into it and their interpretation was that it was legal as long as they offered a proportional alternative. They could not just require a fee-in-lieu, but if they give the developer the opportunity to build the affordable housing or the option of paying a fee-in-lieu, the fee-in-lieu would be appropriate. Mr. Bateman stated that if the pay-in-lieu money is not actually used to provide affordable housing, it is not appropriate. Ms. McLean agreed that the money would have to be used for affordable housing. Mr. Bateman believed the City would have an argument as long as they could demonstrate that

the money is used for affordable housing. However, he still believed there could be problems. He offered to have that discussion with the City. Ms. McLean clarified that any in-lieu money for affordable housing goes directly into the affordable housing fund. Commissioner Band asked if the money sits in the fund or if it actually goes to build affordable housing. Ms. McLean cited examples where the City has used the money to build affordable housing projects. Commissioner Strachan did not believe they were keeping up with the rate of the increasing impact, because the need for affordable housing was outstretching the money being spent. Commissioner Joyce stated that if the need is increasing faster than the money collected, the solution would be to increase the amount of the in-lieu-fee. Commissioner Strachan believed that more money was going into the fund than was coming out based on the number of affordable housing projects that were built. He suggested that they revisit the idea of the fee-in-lieu system in general.

Mr. Bateman discussed sign regulations. He stated that the City has the ability to regulate signs, but it can never regulate content. In addition, all signs must have the same regulation in terms of height, width, lighting, etc. He remarked that signs become a bigger issue during the political season. Mr. Bateman noted that the State Election Code only allows the candidate or the City to remove political signs, even if they are placed illegally. A property owner also has the right to remove a political sign if it is placed on their property. Mr. Bateman stated that the City is not limited on the regulations they can make, but the same rules must apply to all signs; both private and commercial.

Chair Worel asked if anything regulates sign content. She used pornographic content as an example. Mr. Bateman stated that other laws could regulate content, such as the obscenity law. However, someone who advertises their adult business is not considered an obscenity and they could probably place the sign wherever they wanted, including next to an elementary school.

Assistant City Attorney McLean asked Mr. Bateman what he thought would be “hot button” items during the 2015 legislative session. Mr. Bateman stated that the question that keeps coming up is the issue of surety bonds and bonding. He cited examples of some of the issues such as bonding for private improvements that do not benefit the public. Changing the bonding amount was also a primary topic. Mr. Bateman noted that every year there is legislation regarding impact fees; however, for the first time in 15 years no changes to the impact fees were being proposed.

Director Eddington understood that the City could use eminent domain for roads but not for trails. Mr. Bateman replied that this was correct. He noted that someone tried to do eminent domain for a trail on private property, but the property owner was well-connected with the legislature and the law was changed. Commissioner Strachan asked if the City could do proportional exactions for trails. Mr. Bateman answered yes, as long as it is proportional. He pointed out that eminent domain could also be done for a sidewalk that

does not already exist. Commissioner Band asked if the exaction is determined by the City or whether it is negotiated. Mr. Bateman stated that the City could ask for the exaction they want as long as it is proportional. As a mediator, he knows that what is important to one person is never important to another person. If people would just talk to each other they could probably all get what they wanted. In most cases, someone could give up something unimportant to get something they really want. He always encourages people to talk to one another and to negotiate.

The Work Session was adjourned.