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(CONTRACT) ZONING BY AGREEMENT IN UTAH

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LAND USE

~~(Contract)~~ Zoning by Agreement in Utah

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There has been a growing trend by municipalities and counties in Utah in recent years to conduct and approve rezones by what I'll characterize as agreement, or even as by... contract!

Now hold on – I can hear the gasps from many of you reading this, to say the word that shall not be uttered (kind of like *spot zoning!!*) – but it's probably not nearly what you may think. To quote Inigo Montoya from the movie *The Princess Bride*, "you keep using that word. I do not think it means what you think it means."

When an owner seeks to rezone property in Utah, local officials in many jurisdictions now often seek to limit what the owner can do on the property, and what standards need to be followed, by more strictly limiting what is allowed than the "by right" uses and standards in the zone itself. This approach seems to fly in the face of the traditional practice that when a property has been designated with a given zone, the owner can do whatever is allowed in that zone.

These rezones by agreement, or condition, or contract, are often done in reaction to objections from neighbors who don't like what is being proposed, or who sometimes say they are okay with this particular development, but if it doesn't pan out, the owner can do a bunch of other things allowed in the new zone that they don't like.

States around the country have opined on contract zoning for several decades, and the range of rulings are all over the map, from completely illegal to it's okay so long as the public welfare is served. Utah courts have not considered contract zoning – or conditional zoning or zoning by agreement, as it has been alternately called – until this year.

In January, the Utah Court of Appeals issued an opinion in Wallingford v. Moab City. This case dealt with a proposed development of state trust lands that was strongly opposed by residents and environmental groups, which played out over a period of several years and a couple of legal actions. In the situation ruled on by the Court this January, the city allowed for substantial modifications to the original approved plan. The key issue revolved around a provision in the city's land use code which stipulated that any major modifications to approved plans must go through a public hearing first. Minor modifications could be approved by staff.

Initially, city officials deemed the proposed plan modifications to be major and thus require a hearing. After threats from the developer to pull the property from city jurisdiction if required to follow the stipulated process, the city entered into closed-door negotiations. The result was to shift some of the agreed-upon improvement costs and responsibilities onto the developer, in return for deeming the plan changes as "minor" and thus not needing public hearing and reconsideration. These changes were memorialized in a new development agreement, which was subsequently approved by the city council by a one-vote margin.

Citizens opposed filed legal action. The district court ruled in favor of the city, citing its ability to enter into contracts, among other reasons. Upon review by the Utah Court of Appeals, the district court ruling was overturned and the action taken by the city deemed to be invalid.

The rationale of the Appeals Court rested substantially on the "illegal" nature of contract zoning, but then the court softened that stance and instead noted the ability to make these kinds of changes by agreement, but indicated that they must follow the rules for land use actions.

The Utah Court of Appeals took a decidedly "against" stance to this kind of action by the definition of contract zoning it used, and its comment upon it.

The practice of contracting around municipal zoning requirements is known as "contract zoning." See 1 Am. Law Zoning § 9.21 (5th ed. 2008) (stating that "contract zoning is present where a local government contracts away its zoning power or obligates itself by advance contract to provide a particular zoning for the benefit of a private landowner.) The court goes on to say that contract zoning is illegal "...because a municipality's adoption of land use rules and restrictions is an exercise of its police power, it must exercise that police power for the general welfare of all of its citizens and not by contract with any particular landowner. ... (Z)oning is inherently an exercise of the State's police power, and ... a "municipality's exercise of its police power to serve the common good and general welfare of all its citizens may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts".

The Court then clearly says:

We find the reasoning of these cases persuasive, and conclude that the City, by adopting the ZSA (zoning settlement agreement) without a public hearing, committed an unlawful act of contract zoning.

But the Utah Court then goes on to say that there is a second consideration in contract zoning. It cites cases in Florida and New Mexico to articulate this rationale:

"(T)he legislative power to enact and amend zoning regulations requires due process, notice, and hearings," and "by binding itself to enact the requested ordinance . . . the municipality bypasses the hearing phase of the legislative process."

"By making a promise to zone before a zoning hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public's comments on that action."

The Court seems to lean toward the idea that the process for making a case-specific change to the adopted ordinance of Moab City (whether a proposed modification of an approved plan was major or minor) was a legislative act, akin to amending the code, and as such it should follow the procedures stipulated in state code for such actions.

The City certainly has the power to enter into and adopt contracts like the ZSA, and nothing in this opinion should be construed to the contrary. See Dacy, 845 P.2d at 797–98 (noting that not all contract zoning is illegal, and that a municipality can enter into contracts that do

not "commit [the municipality] to any specified action before the zoning hearing," and do not "circumvent statutory procedures or compromise the rights of affected persons"). But it must hold a public hearing before it does so, and must allow members of the public, including Citizens, to be heard on the matter.

So what it sounds like to me, as I intended when I quoted Inigo Montoya, is that the court seems to be saying, contract zoning is illegal! Except it isn't, if you follow the process for a land use legislative action.

Former state property rights ombudsman Brent Bateman puts it this way: "*contract zoning* is illegal. *Zoning by contract* is not. The difference comes in which word comes first. If the contract tries to change zoning administratively, no good. If the zoning is done through a contract, following the legislative process, that is fine."

A subsequent district court case, Walker v. Tooele County, which deals with another settlement agreement, this one between Tooele County and a gravel pit owner, after citing much of the Utah Court of Appeals decision, said:

"Regardless of the characterization, an agreement with a private party to amend zoning or to grant a non-conforming use, by contract and outside of the legislative process, is contract zoning."

The implication from this, and other language in the ruling, seems to imply that if the settlement agreement (or contracting) process follows the rules for land use actions, it is thereby not illegal contract zoning.

What this all says to me, bottom line, is that zoning by agreement (or contract!) is okay as long as the proposed agreements/contracts go through the same process as that required for a rezone or land use ordinance amendment – public hearing before the planning commission, recommendation by the PC, and subsequent action by the governing body.

As a side note, land use professionals in Utah have long recognized that our court judges are often weak in the arcana of land use law and process. That was borne out again in the Tooele court ruling, where the judge noted that in the history of the gravel pit property, at one point a rezone to allow the gravel operation was sought. The planning commission recommended against the rezone. The rezone proposal was ultimately withdrawn before action could be taken by the county commission, but the judge noted that after the recommendation (she called it a "decision") by the planning commission, the county commission would then have considered an "appeal" of the PC decision and should use quasi-judicial procedures. Whoops! Not correct at all! But this mischaracterization was not of substance in the case. Hope she gets it right for the next time she gets a land use issue.

So, it appears that conducting rezones through agreement which limits and specifies what can and can't be done on the subject properties, is okay in Utah as long as the land use legislative procedures are followed. Just don't call it contract zoning!

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