ZONING / LAND USE LAW

A. The Power to Zone: Who Has It, What Does It Cover, Where Does It Stop?

1. County Authority

The power to zone is a power granted by the legislature. Counties do not have inherent power regarding any matter. The Unites States Supreme Court addressed this issue in Wyoming:

> Counties . . . are . . . created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides . . . . They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Comm'rs of Laramie County v. Comm'rs of Albany County, 92 U.S. 307, 308 (1875).

Further, the Court stated that when a legislature grants authority to a local government, the state retains full power over the inhabitants of the district. Powers granted to a local government can be enlarged, modified or diminished at any time, without their consent, or even without notice. "They are but subdivisions of state, deriving even their existence from the legislature." Id. at 309. [1]

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See also Pedro/Aspen, Ltd. v. Board of County Comm'rs for Natrona County, Wyoming, 94 P.3d 412 (Wyo. 2004); Ford v. Bd. of Comm'rs of Converse County, 924 P.2d 91 (Wyo. 1996); Gueke v. Bd. of County Comm'rs for Teton County, 728 P.2d 167 (Wyo. 1986); Haddenham v. Bd. of County Comm'rs of Carbon County, 679 P.2d 429 (Wyo. 1984) (Gueke and Haddenham overruled by Dunnegan v. Laramie County, 852 P.2d 1138); State v. Bd. of County Comm'rs of Johnson County, 642 P.2d 456 (Wyo. 1982); Schoeller v. Bd. of County Comm'rs of Park County, 568 P.2d

In 1941, the Wyoming Supreme Court adopted "Dillon's rule" regarding local government authority in Wyoming:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted by express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; Third, those essential to the accomplishment of the declared objects and purposes not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. DILLON ON MUNICIPAL CORP., 5th Ed.

Whipps v. Town of Greybull, 109 P.2d 805, 807 (Wyo. 1941) (quoting and adopting Dillon's rule).

Neither the Wyoming Constitution,[2] nor the statutes providing for the general powers and duties of counties include authority for zoning.[3]

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869 (Wyo. 1977); Probasco v. Sikes, 307 P.2d 817 (Wyo. 1957); Blumenthal v. City of Cheyenne, 186 P.2d 556 (Wyo. 1947); Stewart et al. v. City of Cheyenne, 154 P.2d 355 (Wyo. 1944); Whipps v. Town of Greybull, 109 P.2d 805 (Wyo. 1941); Hyde v. Bd. of Comm'rs of Converse County, 31 P.2d 75 (Wyo. 1934).

[2] Wyo. Const. Art. 12 §§ 1-5

[3] Those powers, contained in Wyo. Stat. § 18-2-101 (1977), include:

(a) Each organized county in the state is a body corporate and politic. The powers of the county shall be exercised by a board of county commissioners which may:

(i) Sue and be sued;

(ii) Purchase property for the use of the county and acquire real property at tax sales, as provided by law;

(iii) Sell or convey property owned by the county, when it is in the best interests of the county;

(iv) Make contracts and perform other acts relating to the property and concerns of the county in the exercise of its corporate or administrative powers;

(v) Exercise other powers as provided by law.

(Emphasis added).

However, the Wyoming legislature has given the counties a broad grant[4] of zoning authority. Wyo. Stat. §§ 18-5-201 through 18-5-208.

a. County Planning Commissions,[5] Wyo. Stat. §§ 18-5-101 through 18-5-107

(i.) **18-5-101. Definition of "unincorporated".**

As used in Wyo. Stat. §§ 18-5-101 through 18-5-107, the word "unincorporated" means situated outside of cities and towns and when used with "territory" or "areas" it means territory or areas which are one (1) mile from the limits of a town or city having a population two thousand (2,000) or less, two (2) miles for the limits of a town or city having a population 2,000 and three thousand (3,000), and three (3) miles from a city having a population of 3,000 or over.

(ii.) **18-5-102. Powers of County Commissioners.**

Each board of county commissioners may provide for the physical development of the unincorporated territory within the county by zoning all or any part of the unincorporated territory.[6]

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[4] See Crouthamel v. Bd. of Albany County Comm'rs, 951 P.2d 835, 837 (Wyo. 1998) (citing Ford v. Bd. of County Comm'rs of Converse County, 924 P.2d 91, 95 (Wyo. 1996)).

[5] The Wyoming Supreme Court found that Wyo. Stat. §§ 18-5-106 through18-5-107 are separate and distinct from Wyo. Stat. §§ 18-5-201 through 18-5-208. Thus, the narrow definition of "unincorporated area" found in § 18-5-101 does not apply to §§ 18-5-201 through 18-5-208. Carter v. Bd. Laramie County Comm'rs, 518 P.2d 142, 144 (Wyo 1974).

[6] "Unincorporated territory" is narrowly defined by Wyo. Stat. § 18-5-101. The grant of zoning authority found in Wyo. Stat.§§ 18-5-101 through 18-5-107 is narrow. Thus, the primary zoning

(iii.) **18-5-103. Appointment of planning commission; composition; powers and duties.**

a). The county must appoint a planning commission to utilize the powers conferred by Wyo. Stat. §§18-5-101 through 18-5-107.

b). The chairman of the board of commissioners is an ex officio member of the planning commission.

c). The other members of the commission shall be owners of real property in the unincorporated area.

d). The mayors or the their designees of incorporated cities shall be members.

e). The planning commission is to propose district boundaries, and hold hearings.

f). The planning commission shall use all information, maps, experts, and other material that they can get from other agencies without cost.

(iv.) **18-5-104. Duties of county commissioners; election to establish districts.**

a). The county commissioners shall establish rules for creating and modifying districts.

b). An election shall be held prior to creation of a district. The election may not be held until after the public notice have been followed. The notice shall

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authority comes from Wyo. Stat. §§ 18-5-201 through 18-5-208. See Carter v. Bd. of County Comm'rs of Laramie County, 518 P.2d 142 (Wyo. 1974).

be published weekly for four weeks in a newspaper published in the county.

(v.) **18-5-105. Purpose of zoning; regulation of sanitary facilities; division of county into zones; building permits required.**

a). The purpose of zoning is to conserve and promote the public health, safety and welfare. The board is to provide for regulation of **sanitary facilities** defined as domestic water supplies, sewage disposal, rodent and insect control and the storage, collection and disposal of garbage and refuse.

b). The board of commissioners shall divide the unincorporated territory into zones and shall regulate the erection, construction, reconstruction, alteration and uses of sanitary facilities to meet the minimum requirements of the public health authority having jurisdiction in the area.

c). It is unlawful to erect, construct, reconstruct, alter or change the sanitary facilities of any building or other structure without a building permit. The permit will not be issued unless the plans for the sanitary facilities fully conform to all regulations then in effect. No permit shall be issued for structures in areas not adequately served by water or sewerage systems until the proposed sanitary

facilities have been approved by the public health authority having jurisdiction in the area.

(vi.) **18-5-106. Appeal provisions.**

This section provides for appeals to the county, district court and supreme court.

(vii.) **18-5-107. Violation of provision.**

The proper local authorities, in addition to remedies prescribed by local regulation, may institute any appropriate legal action to prevent or abate any violation of the statute or regulation.

b. Planning and Zoning Commission, Wyo. Stat. §§ 18-5-201 through 18-5-208

(i.) **18-5-201. Authority of county commissioners; inapplicability to incorporated cities and towns and mineral resources.**

a). The purpose of the statute is to promote the public health, safety, morals and general welfare, the county may regulate and restrict the location and use of buildings and structures.

b). The county is granted the authority to condition use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other uses in the "unincorporated area"[7] of the

[7] As stated above, the Wyoming Supreme Court rejected the argument that the term "unincorporated

county. The zoning authority is limited to controlling the use and occupancy of land. It cannot be used to regulate the subdivision of land. Pedro/Aspen, Ltd. v. Board of County Comm'rs for Natrona County, Wyoming, 2004 WY 84, 94 P.3d 412. The Wyoming Subdivision Act, Wyo. Stat. § 18-5-303 contains several exemptions to the subdivision authority. The zoning authority may not be used in a manner that makes those exemptions meaningless. Id. The court will avoid construing a statute so as to render a portion of it meaningless. Id.

c). This provision does not contravene any zoning authority of any incorporated city or town.

d). No zoning resolution shall prevent any use or occupancy reasonably necessary for the extraction or production of the mineral resources in or under any lands subject thereto.

Wyo. Stat. § 18-5-201 provides a broad grant of authority to the county commissioners to

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area"should have the same meaning as given by the legislature in Wyo. Stat. § 18-5-101. A different outcome in that case would have significantly limited zoning authority. Carter, 518 P.2d at 144.

control land use.[8] However, the statute must be construed in light of the doctrine that a county's action must be expressly authorized or necessarily implied from the statute.[9] Because zoning ordinances are in derogation of the common law and they operate to deprive property owners of a use that would otherwise be lawful, the general rule is to construe zoning ordinances strictly in favor of the property owner.[10]

The court has also held that Wyo. Stat. § 18-5-201 implies the power to temporarily freeze land uses and that a freeze resolution[11] may be enacted without notice and a hearing.

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"The legislature has granted broad power to the counties to regulate the unincorporated lands within their respective jurisdictions." Bd of County Comm'rs of Teton County v. Crow, 65 P.3d 720, 726 (Wyo 2003); Crouthamel v. Bd. of Albany County Comm'rs, 951 P.2d 835, 837 (Wyo. 1998).

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Ford v. Bd. of County Comm'rs of Converse County, 924 P.3d 91, 95 (Wyo. 1996). Zoning is defined as the "process that a community employs to legally control the use which may be made of property and the physical configuration of development upon the tracts of land located within its jurisdiction." Id.; citing Patrick J. Rohan, ZONING AND LAND USE CONTROLS, § 1.02[1](1991). However, this broad authority is limited to the regulation and control of the use of land. Id.

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Snake River Brewing Co. v. Town of Jackson, 39 P.2d 397 (Wyo. 2002). However, compare to Carter, 518 P.2d at 144, where the court construed the term "unincorporated area" found in Wyo. Stat. § 18-5-201. Even though the term is narrowly defined by the legislature in Wyo. Stat. § 18-5-101, the Carter court declined to apply the definition of "unincorporated area" in Wyo. Stat. § 18-5-201. Id. Further, the court did not attempt to square it's ruling with the principle that doubts as to the extent of zoning authority should be settled in favor of free use of land. Carter, 518 P.2d at 144.

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A freeze resolution is an ordinance that temporarily freezes all development and maintains the status quo, pending the completion of a comprehensive plan. Schoeller v. Bd. of County Comm'rs of Park

Schoeller v. Bd. of County Comm'rs of Park County, 568 P.2d 869, 879 (Wyo. 1977). The resolution may initially continue only for a length of time which affords an opportunity to provide notice and a hearing. Id. The court also found that after notice and a hearing, a freeze resolution may be continued for a reasonable time, but that five years was not reasonable. Id at 879.[12]

The prohibition against preventing any use or occupancy reasonably necessary for the production of mineral does not apply to sand, gravel, rock and limestone. Rivers Springs Ltd. Liab. Co. v. Bd. of County Comm'rs of Teton County, 899 P.2d 1329 (Wyo. 1995). Therefore, a county may limit or prohibit those uses through a zoning ordinance unless the use is grandfathered.[13]

(ii.) **18-5-202. Planning and Zoning commission; composition; residency requirements, terms and removal of members; vacancies; rules; records;**

County, 568 P.2d 869, 879 (Wyo. 1977).

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See also Ford, 924 P.2d at 96 (finding that a temporary freeze resolution lasting 18 years was invalid).

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A grandfathered use is a nonconforming use that existed lawfully at the time the zoning regulation was passed. River Springs Ltd. Liab. Co. v. Bd. of County Comm'rs of the County of Teton, 899 P.2d 1329,1334 (Wyo. 1995). The court went on to state that if a county permits the production of sand, gravel, rock, or limestone, or must do so because the use was a preexisting use, then the regulations of these activities is accomplished by the Department of Environmental Quality ("DEQ"). However, if the DEQ does not regulate those activities, they may be regulated by the county in a way that does not conflict with state regulation. Id. at 1337.

meetings to be public; secretary; preparation and amendments; purpose; certifications and hearing; amendments.

a). Each commission may by resolution create and establish a planning and zoning commission. The commission shall be composed of five members, at least three of whom shall reside in the unincorporated areas of the county.

b). Three members shall constitute a quorum for the transaction of business. All meetings, records and accounts of the commission shall be public. The county clerk serves as secretary to the commission.

c). The planning and zoning commission may prepare and amend a comprehensive plan and certify the plan to the board of county commissioners. The planning and zoning commission shall hold at least one public hearing. Notice of the time and place of hearing shall be published in at least one local paper at least thirty days prior to the hearing.

d). Any person may petition the planning and zoning commission to amend any zoning plan adopted under these provisions.

e). The board of county commissioners shall hold at least one public hearing prior to adopting the recommendations of the planning and zoning

commission. Notice shall be published in a newspaper of general circulation at least fourteen days prior to the hearing. After a hearing, the board of county commissioners shall vote on the recommendation.

No planning or zoning recommendation shall be adopted unless a majority of the board votes in favor thereof.

While planning and zoning are similar concepts the terms are not interchangeable. Ford, 924 P.2d at 94.[14] A comprehensive plan is generally a prerequisite for the adoption of zoning resolutions, but the county plan has no regulatory authority. The actual control of land can only be exercised through a zoning ordinance. Id at 95.

Local governments should closely follow the procedures that are specified by statute. When the

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As noted by the court in Ford, "land use planning" means the process which guides the growth and development of an area and assures the best and wisest use of that area's resources now and in the future. Ford, 924 P.2d at 94. "Zoning" means a form of regulatory control granted to local government which may be used to guide and to develop specific allowable land use. Id. at 94 citing Wyo. Stat. § 9-8-102(a)(vi), (xvi) (1995).

statutory delegation of power to a local governmental entity specifies a procedure to be followed in the exercise of that power, the procedure becomes a condition of the grant. Schoeller, 568 P.2d at 869.

In Hoke v. Moyer, 865 P.2d 624 (Wyo. 1993), the Court reversed a zoning change granted by Teton County. The County's decision increased the residence density from six acres per dwelling to three acres per dwelling. Id. The County argued, that under it's regulations, the facts of the case did not require public notice and a hearing. Id. The Supreme Court disagreed, stating that the Teton County regulations did require public notice and a hearing. Id. Specifically, the court found that the action was subject to the notice and hearing requirements of Wyo. Stat. § 18-5-202(c). Hoke v. Moyer, 865 P2d 624 (Wyo. 1993).

In Crouthamel v. Bd. of Albany County Comm'rs, 951 P.2d 835 (Wyo. 1998), the Court held that a temporary freeze resolution was void *ab initio* because the county had not followed the proper

procedures. The recommendation for the freeze was received by the county commission directly from the planning and zoning staff as opposed to coming from the planning and zoning commission. Id. Thus, the required hearing pursuant to statute before the planning and zoning commission was omitted. Id. at 838.

Compliance with the "statutory requirements of notice and hearing does not always satisfy constitutional requirements of due process." Laughter v. Bd. of County Comm'rs for Sweetwater County, 110 P.3d 875, 885 (Wyo. 2005) (quoting Pfeil v. Amax Coal West, Inc., 908 P.2d 956, 961 (Wyo. 1995)). To satisfy procedural due process, there must be "reasonable notice and a meaningful opportunity to be heard." Id. at 885-86. "The reasonableness of notice is determined by the circumstances, including the nature of the proceeding and the character of the rights to be affected." Id. at 886. Where the case involves a public hearing on planning and zoning resolutions, the court has found a published notice that sets forth in general terms the issues to be discussed is

sufficient. Id.

(iii.) **18-5-203. Certificate required to locate buildings or use land within zoning resolution; issuance and denial; appeal upon denial.**

a). It is unlawful to locate, erect, construct, reconstruct, enlarge, change, maintain or use any building or use any land with in any area included in a zoning resolution without first obtaining a zoning certificate from the board of county commissioners.

b). No zoning certificate shall be issued unless the plans for the proposed building, structure or use fully comply with the zoning regulations.[15]

c). The board of county commissioners shall act promptly on any application and shall grant certificates when the proposed construction or use complies with the zoning resolution.

d). The board shall specify reasons for denial.

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This provision begs the question of whether a county has the authority to grant a variance. In Ford, 924 P.2d 91, while addressing a separate issue, the court stated that the board of county commissioners is strictly bound by the zoning regulations. Further, the court found that if the proposed use does not comply with the regulations, the board of county commissioners cannot issue a certificate. Id. at 95. In comparison, in Sheridan Race Car Assn. v. Rice Ranch, 864 P.2d 30 (Wyo. 1993), the issue of whether the commissioners had authority to issue a variance was not litigated. Id. Rather, the issue was the revocation of a variance. The court found the variance could be revoked. Id. In dicta, the court stated that a variance could be granted pursuant to Wyo. Stat. § 18-5-201 if doing so would promote the public health, safety, morals and general welfare. Id. at 33. The court failed to reconcile its statement with the provision in Wyo. Stat. § 18-5-203 which states that ". . . no zoning certificate shall be issued unless the plans for the proposed building, structure or use fully comply with the zoning regulations then in effect." Id.

e). The decision of the board of county commissioners may be reviewed by the district court and by the supreme court upon appeal in the same manner as appeals from city zoning decisions.

(iv.) **18-5-204. Continuing violation.**

Each day of continued violation of a zoning ordinance is a separate offense.

(v.) **18-5-205. Enforcement by injunction, mandamus or abatement; appeal**.

Zoning resolutions are enforceable by injunction, mandamus or abatement in addition to other remedies provided by law.

As a general rule, latches and estoppel will not bar the county from seeking an injunction to enforcing a zoning ordinance. Thompson v. Bd. of Comm'rs of Sublette County, 34 P.3d 278 (Wyo. 2001). Additionally, a county need not show irreparable injury in order to obtain an injunction. Bd. of Comm'rs of Teton County v. Crow, 131 P.3d 988, 993 (Wyo. 2006). Nonetheless, the district court's decision to grant or deny an injunction is still governed by equitable principles, and the district court must make specific findings balancing the equities. Id. at 993-94.

A writ of mandamus is available to a private party if the action sought is ministerial and clearly defined. However, a mandamus is not appropriate if there is an adequate remedy at law, and a writ of mandamus cannot be invoked as a substitute for the appeals process. State ex rel. Epp v. Mayor, 894 P.2d 590 (1995).

(vi.) **18-5-206. Penalty for violation.**

A violation of §§ 18-5-201 through 18-5-204 is punishable by a fine of not more $750 for each offense.

Imposition of a fine is mandatory, and the district court must impose a fine for each day the violation continues. Bd. of Comm'rs of Teton County v. Crow, 131 P.3d 988, 994 (Wyo. 2006).

(vii.) **18-5-207. Continuation of existing uses; effect of alteration or addition; future use after discontinuation of nonconforming use.**

a). A zoning resolution may not prohibit a use that was occurring at the time the resolution was passed.

b). It is not necessary to obtain a permit to continue a grandfathered use.

c). The alteration or addition to an existing use may be regulated or prohibited.

d). If the nonconforming or grandfathered use is

discontinued, any future use is governed by the applicable zoning regulation.

A lawful use that exists at the time a zoning ordinance is passed is called a non-conforming use. These uses are allowed to continue under the grandfather exception. River Springs, 899 P.2d 1329, 1334 (Wyo. 2005). The right to continue a grandfathered use is a vested right protected by statute and by both the federal and state constitutions. Snake River Brewing, 39 P.3d at 403.[16] However, there is no protection for a use that is merely contemplated. Snake River Venture v. Bd. of County Comm'rs of Teton County, 616 P.2d 744, 751 (Wyo. 1980).[17]

A certificate is not necessary to continue a grandfathered use. Crouthamel, 951 P.2d at 838. In Crouthamel, a nonconforming use began while invalid regulations were in place. Id. The use was later discontinued for a time as a result of an injunction which relied on the invalid

16 However, because nonconforming uses thwart public policy, the right to continue a nonconforming use is narrowly construed. Snake River Brewing, 39 P.3d at 403.

17 But see, Croxton v. Bd. of County Comm'rs of Natrona County, 644 P.2d 780 (Wyo. 1982). In Croxton, a land owner had commenced construction of a campground and related uses. Id. Before the project was completed, the board passed a zoning ordinance that disallowed the intended use. Id. The Wyoming Supreme Court found that the building that were already constructed were grandfathered. Id. The court further found that the use of the land for a campground was not a major change in use. Id.

regulation. Id. Eventually, the county passed a valid zoning ordinance. Id. However, the court ruled that the valid ordinance could not prohibit the use because it was not passed until after the use had began. Id. at 840.

An unlawfully approved zoning certificate does not create a vested right. However, if the party receiving the certificate has reasonably made substantial expenditures or otherwise substantially relied on the certificate, the use may be grandfathered. Id.[18]

A grandfathered use may continue until it is abandoned. River Springs, 899 P.2d at 1334. Abandonment requires an affirmative act demonstrating an intent to abandon. Id. However, a county can prescribe that non-use for a certain period creates a rebuttable presumption of intent to abandon. Snake River Brewing, 39 P.2d at 404 (citing River Springs, 899 P.2d at 1335).

In River Springs, 899 P.2d 1329 (Wyo. 1995), the county

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See also, Ebzery v. City of Sheridan, 982 P.2d 1251 (Wyo. 1999). In Ebzery, the city granted a variance to build a fence. Id. The decision to grant the variance was appealed by affected parties. Id. In spite of the pending appeal, the party receiving the variance constructed the fence. Id. The court held that the variance was invalid. Id. A variance that is under appeal is not a vested property right. Id. Further, it is unreasonable to make expenditures in reliance upon variance that is under appeal. Id.

attempted to prohibit a limestone quarry that had existed since 1949. For many years, the quarry had existed with minimal activity and the county ordinance stated that a grandfathered use was abandoned if the use ceased for one year or more. Id. The court found that the use was not abandoned because minimal use is not the same as cessation. Id. The court also held that there was no affirmative act indicating an intent to abandon. Id. at 1335.

(viii.) **18-5-208. Coordination of planning efforts with federal agencies.**

a). Counties who have adopted a comprehensive plan may participate in efforts to coordinate with federal agencies regarding federal land use planning pursuant to applicable federal law.

b). Congress has granted local governments the limited right to participate in federal land planning. 43 U.S.C. § 1712. Failure by a federal agency to coordinate with local land use plans may render federal actions invalid. Unita County v. Norton, No. 00-482 (D. Utah Oct. 26, 2001).

(ix.) **Coordination of Planning Efforts Between Counties and Cities/Towns**

a). All local governments (cities, towns, and counties)

are required to develop land use plans within their jurisdictions pursuant to the procedures outlined in Wyo. Stat. § 15-1-601 et seq. and § 18-5-201 et seq.. Wyo. Stat. § 9-8-301, § 9-8-302(a). A local land use plan is "any written statement of land use policies, goals and objectives adopted by local governments. Such plans shall relate to an explanation of the methods for implementation, however, these plans shall not require any provisions for zoning." Wyo. Stat. § 9-8-102(a)(ix).

b). In developing local land use plans, the local governments within each city, town and county may cooperate in the development of land use plans; however, this cooperation must be done in accordance with the Wyoming Joint Powers Act, Wyo. Stat. §§ 16-1-102 through 16-1-109. Wyo. Stat. § 9-8-302(b).

c). The Wyoming Joint Powers Act requires that any cooperative agreement between cities/towns and the county be approved by each governing body, submitted and approved by the Wyoming attorney general, and filed with the keeper of records for the cities/towns and counties.

Where a county attempts to enter into a common land use

plan with a city or town, but fails to do so, it has the authority to adopt a unilateral land use plan. Laughter v. Bd. of County Comm'rs for Sweetwater County, 110 P.3d 875, 883 (Wyo. 2005). The fact that a city or town later adopts the plan and begins to enforce the plan's provisions within its municipal boundaries will "not automatically convert the [p]lan into a joint powers agreement under the [Wyoming Joint Powers Act]." Id. at 883-84.

2. City Authority

Similar to counties, the authority of cities[19] is subject to Dillon's rule and other presumptions limiting municipal authority.[20] The Wyoming Constitution provides greater authority to cities than counties.[21] The Wyoming Supreme Court has observed that the powers of a county are usually more restricted that those of a municipal corporation. Schoeller, 568 P.2d at 875. Thus, relative to counties, the authority of cities to zone is less dependant on legislative enactments.

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Cities and towns are not the same in all respects. However, the zoning statutes do not differentiate between the two. See generally, Wyo. Stat. §§15-1-601 through 15-1-611. Thus, for the purposes of this outline, the term "cities" refers to cities and towns.

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Comm'rs of Laramie County v. Comm'rs of Albany County, 92 U.S. 307 (1875); Whipps v. Town of Greybull, 109 P.2d 805, 807 (Wyo. 1941).

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Cities and towns are empowered to determine their local affairs and government. The powers and authority granted to cities and towns is to be liberally construed in order to provide the largest measure of self-government to cities and towns. Wyo Const. Art. 13 § 1. This grant of authority is often referred to as the "home rule" amendment. Laramie Citizens For Good Gov't. v. City of Laramie 617 P.2d 474 (Wyo. 1980).

a. City Zoning Authority Wyo. Stat. §§ 15-1-601 through 15-1-611

(i.) **15-1-601. Regulations; scope and purpose; uniformity within authorized districts; made in accordance with comprehensive land plans; objectives.**

a). The statute provides broad authority for a city to regulate the use of buildings, structures and land, including height, size of yards, density and the amount of land that may be occupied.

b). The city may be divided into districts. The regulations may differ among districts but must be uniform within districts regarding each class of buildings.

c). All regulations shall be made in accordance with a comprehensive plan and designed to:

Lessen congestion in the streets;

Secure safety from fire and other dangers;

Promote health and general welfare;

Provide adequate light and air;

Prevent the overcrowding of land;

Facilitate adequate provisions for transportation, water sewerage, schools, parks and other public requirements.

d). Regulations shall be made with reasonable consideration of the character of the district, and encouraging the

> most appropriate use of land, rehabilitating and maintaining historic properties, but no regulation made to carry out the purpose of this paragraph is valid to the extent it constitutes an unconstitutional taking without compensation.

In Wyoming, municipal corporations are creatures of the legislature and thereby subject to statutory control. Ahearn v. Town of Wheatland, 39 P.3d 409, 413 (Wyo. 2002). Wyoming cities have the authority to enact zoning ordinances. Id. Zoning ordinances provide control over land use within a neighborhood and are part of a comprehensive plan for community development. Id.

Zoning is a planning tool that must be used in accordance with a comprehensive plan. Snake River Brewing, 39 P.3d at 403. The comprehensive plan is a policy statement; the zoning ordinances are what have the force and effect of law. Id. Under the comprehensive planning statutes, a city develops a master plan for the future growth and development of the city. Ahearn, 39 P.3d at 414.

Because zoning ordinances are in derogation of the common law and they deprive property owners of a land

uses that would otherwise be lawful, the general rule is to construe zoning ordinances strictly in favor of the property owner. Snake River Brewing, 39 P.3d at 404. However, the zoning authority granted to cities is clearly broad. Laramie Citizens For Good Gov't. v. City of Laramie 617 P.2d 474 (Wyo. 1980). A municipality may regulate property usage without paying compensation, so long as the purpose of the regulation is to protect the public health, safety, morals and general welfare, and the means used to implement the regulation are reasonable. Sun Ridge Dev. v. City of Cheyenne, 787 P.2d 583 (Wyo. 1990).[22]

There is no precise test available to determine reasonableness. Snake River Brewing, 39 P.3d at 407. The courts often compare the gain or benefit to the public with the seriousness of the injury or loss to the property owner.[23] Id. The test has also been stated as whether the action would destroy the value of improvements or businesses built up over the years or cause serious financial

22 For example, the court has held that the right and duty to approve a plat necessarily implies the right to set reasonable and just prerequisites to bring the plat into conformity with the area. Prudential Trust Co. v. City of Laramie, 492 P.2d 971, 974 (Wyo. 1972).

23 The test has also been stated as whether the action would destroy the value of "substantial improvements or businesses built up over the years [or] cause serious financial harm to the property owner." Snake River Brewing, 39 P.3d at 407 quoting People v. Miller, 106 N.E.2d 34, 36 (NY 1952).

harm to the property owner. Id.

As with counties, nonconforming uses that legally exist at the time the ordinance is passed are grandfathered as vested rights. Snake River Brewing, 39 P.3d at 403.[24] Further, a grandfathered use may continue as long as the use itself exists. Id. The use can be lost through abandonment, which requires an affirmative act showing intent to abandon, or by non-use for a prescribed period of time. An ordinance that provides for the loss of the right upon non-use for a specified period eliminates the need to prove intent to abandon.

In Snake River Brewing, 39 P.3d 397 (Wyo. 2002), the Town of Jackson passed an ordinance that addressed parking issues. Businesses that did not have sufficient on site parking were required to lease spaces off site or a pay a fee in-lieu-of parking. Id. One company, Snake River Brewing, elected to lease off cite parking spaces. Id. The

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24 Unlike the statutes which govern county zoning, the statutes that govern city zoning do not expressly provide that existing uses are grandfathered. However, with respect to cities, the courts have adopted the view that existing uses are vested rights. Ebzery, 982 P.2d at 1257. Once the use is recognized as a vested right, it is protected by the state and federal constitutions and Wyo. Stat. § 15-1-601, which renders invalid any municipal zoning regulation that constitutes an unconstitutional taking without compensation. One could question the need for the statute given that it does not apply until an ordinance has been shown to be unconstitutional. However, at that point, it does not matter what the statute says.

company then proceeded to make substantial investments in its business. Id. Subsequently, the city changed the ordinance and eliminated the election to pay a fee-in-lieu of parking. Id. Then, Snake River lost the lease to the off site parking spaces. Id. The city claimed that the option to pay the parking fee had been abandoned because Snake River had failed to use it for more then 12 months. Id. The court held that the choice between leased spaces and the fee is a vested right as long as the primary use continues. Id. Thus, the choice of paying the fee or leasing spaces was not a one time election. Id. Rather, it was a continuing choice as long as the primary use was available. Id.

(ii.) **15-1-602. Regulations; powers of governing body; public hearing; notice.**

a). The governing body shall specify how the regulations and district boundaries are to be determined, enforced, amended or changed.

b). No regulation is effective until after a public hearing.

c). Notice of hearing must be published in a local paper at least 15 days prior to hearing.

(iii.) **15-1-603. Protest of change; hearing and notice.**

a). A change in the regulations, restrictions or district

boundaries may be initiated by:

i A petition signed by 20% or more of the lot owners included in the change.

ii A petition signed by 20% or more of the owners of lots that are within 140 feet of the area to be changed.

If a change is protested, it will not become effective unless approved by 3/4 of all the members of the governing body.

b). The notice and hearing requirements for changes are the same as for Wyo. Stat. § 15-1-602.

(iv.) **15-1-604. Zoning commission; appointment; duties.**

a). The mayor, with approval from the governing body, shall appoint a commission.

b). The zoning commission shall recommend district boundaries and appropriate regulations.

c). After a public hearing, the zoning commission shall submit the recommendations to the governing body.

(v.) **15-1-605. Board of adjustment; appointment; composition.**

a). The mayor, with consent of the governing body, may appoint a board of adjustment. The board

shall have at least five, but not more than seven, members.

b.) The city planning commission may be appointed as the board of adjustment.[25]

(vi.) **15-1-606. Board of adjustment; procedures; records.**

a). The chairman of the board of adjustment may compel the attendance of witnesses and administer oaths.

b). All board meetings are open to the public.

c). The board shall keep minutes of each meeting, and shall record the vote of each member on each question presented.

d). All minutes are public records and shall be on file in the board's office.

(vii.) **15-1-607. Board of adjustment; appeals to board; procedure; stay of proceedings.**

a). Any aggrieved party may appeal a decision made by the board of adjustment.

b). Appeals are to be take within a reasonable time as provided by rules of the board.

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The planning commission is not the zoning commission authorized pursuant to Wyo. Stat.§ 15-1-604. Rather, the planning commission is authorized pursuant to Wyo. Stat. §§15-1-501 through 15-1-512. The matters addressed by the planning commission are often intertwined with the duties of the zoning commission.

c). The appeal shall be filed with the officer from whom the appeal is taken.

d). The officer from whom the appeal is taken shall immediately submit the entire record of the appealed decision to the board of adjustment.

e). An appeal stays the proceeding unless the authorized officer certifies that a stay would cause imminent peril to life or property.

f). If the decision is not stayed, the petitioner may seek a restraining order from the district court.

While the board has the authority to set a time for appeal, if the period set by the board is unreasonably short as applied to a particular case, the statutory requirement that the appeal be reasonable will govern. State ex rel. Baker v. Strange, 960 P.2d 1016, 1017 (Wyo. 1998).[26] In Strange, a building inspector issued a building permit which did not conform to the zoning ordinance. Id. The zoning ordinance, pursuant to Wyo. Stat. § 15-1-607(a), specified a ten day appeal period. Id. However, the neighbors who were adversely affected by the illegal act, were not aware of

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The justification for this rule is that the authority of a city to adopt a zoning ordinance is limited by state statute, and the grant of authority to adopt zoning laws does not permit the local governing bodies to override the state law and the policies supporting it. City of Green River v. Debernardi Constr. Co., 816 P.2d 1287 (Wyo. 1991).

the decision until after the ten day appeal period had expired. Id. Thus, they sought a writ of mandamus directing the city official to withdraw the building permit rather then attempting to administratively appeal. Id.

The Strange court did not strike down the ten day appeal period. Id. However, the court did find that the appeal period was unreasonable under the circumstances. Id. Thus, the ten day appeal period was preempted by the Wyo. Stat. § 15-1-607(a). Id. The court also ruled that the petitioner should have appealed within a reasonable time after the ten day appeal period. Id. Thus, the court dismissed the case on the grounds that the petitioners had failed to exhaust their administrative remedies. Finally, the court stated that a writ of mandamus is not an appropriate remedy when a plain and adequate remedy of law is available. Id.

(viii.) **15-1-608. Board of adjustment; powers and duties; vote required.**

a). The board shall:

i. Hear and decide:

A). Appeals from decisions or actions of the officer charged with the enforcement of any ordinance

adopted pursuant to Wyo. Stat. §§ 15-1-601 through 15-1-611 (the city zoning statutes).

B). All other matters properly before the board.

ii. Fix a reasonable time of hearing an appeal.

A). Provide adequate notice to the public and parties in interest.

B). Decide the appeal within a reasonable time.

C). Allow any person to appear in person or by an agent or attorney.

iii. Adopt rules in accordance with any ordinance adopted pursuant to this article.

b). The board has the power to:

i. Hear and decide requests for exemptions.

ii. Adjust the strict application (variance) of the ordinance if the strict application would deprive the owner of the reasonable use of the building involved.

iii. No adjustment in the strict application of any provision of an ordinance may be granted unless:

A). There are special circumstances

peculiar to the land or building at issue that do not apply generally to land or buildings in the neighborhood.

B). The special circumstances are not the results of actions taken by the applicant subsequent to the adoption of the ordinance.

C). The adjustment granted is necessary for the reasonable use of the land or building and the adjustment is the minimum that will accomplish that purpose.

D). The granting of the adjustment is in harmony with the purposes and intent of the ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

E). The special circumstances or conditions, along with all other required findings must be fully described in the board's decision.

iv. Grant exceptions and variances if an illegal construction or

a nonconforming building or use has existed for at least 5 years in violation of an ordinance and the city has not taken steps toward enforcement.

v. The board may reverse or affirm, in whole or in part, decisions of the administrative officer. However, the board may not act in a manner that exceeds the power or authority of the administrative officer from whom the appeal is taken.

c). A majority vote of the board is required to:

i. Reverse any order, requirement, decision or determination of any administrative official.

ii. To decide in favor of any application.

iii. To grant any exception or variance from an ordinance.

When a board grants a variance, the board must find the following: 1) that a strict application of the regulation would deprive the applicant of the reasonable use of the land or building; and 2) the granting of the stay is necessary for the reasonable use thereof, and the adjustment as granted is the minimum adjustment that will accomplish that purpose. Ebzery, 982 P.2d at 1254.

A decision to grant a variance must be supported by substantial evidence. Juroszek v. City of Sheridan Bd. of Adjustment, 948 P.2d 1370, 1373 (Wyo. 1997). The courts will overturn a variance when the board fails to fully document its findings of fact and rationale in support of the variance. Id; Ebzery, 982 P.2d at 1251.

In Ebzery, 982 P.2d 1251, the court held that a variance issued under a mistake of fact confers no vested right. The court further held that it is unreasonable for a party to rely on a variance when the party knows the variance is under appeal. Id.

The board of adjustment may overrule the decision of a city official with a majority vote of the board. A rule requiring more than a majority vote is invalid. Furthermore, a rule allowing the city council to override a decision made by the board of adjustment is illegal. Cook v. Zoning Bd. of Adjustment for the City of Laramie, 776 P.2d 181, 186 (Wyo. 1989).

(ix.) **15-1-609. Board of adjustment; review of**

decisions.

The decision of the Board may be reviewed by the district court pursuant to W. R. A. P. 12.

(x.) **15-1-610. Authorization to prevent violations.**

a). In the event of any violation of this article or any ordinance adopted pursuant to this article, the city may, in addition to other remedies, take action to prevent;

i. The violation.

ii. The occupancy or use of the building, structure or land.

iii. Any illegal use or act in or about the premises.

(xi.) **15-1-611. Higher standard governs conflicts.**

If the regulations made under this article conflict with any statutes or local ordinances or other regulations, the statutes, ordinances or regulations imposing the higher standards govern.

3. Other Statutes Affecting Zoning

a. School Buildings

If a school district owns a building that meets the statutory requirements for the school district to use the building to educate students and the building was previously used for that purpose, neither municipal nor county zoning requirements can be

construed or applied so as to prevent the district from using the building as a school building or to require the district to modify the building as a condition for using the building to educate students. Wyo. Stat. § 21-15-115(a).

b. Firearm Businesses

"Zoning and other ordinances which are designed for the purpose of restricting or prohibiting the sale, purchase, transfer or manufacture of firearms or ammunition as a method of regulating firearms or ammunition" are in conflict with the Wyoming statute which only allows such matters to be regulated by the state. Wyo. Stat. 21 6-8-401(a). However, this "section shall not affect zoning or other ordinances which encompass firearms businesses along with other businesses." Id.

c. Feedlots

Feedlot operators must comply with the applicable zoning requirements in place when the feedlot began operation. Wyo. Stat. § 11-39-104(b). For feedlots that began operating before June 1, 1977, zoning requirements in effect on June 1, 1977 apply to those feedlots. Wyo. Stat. § 11-39-104(c). A county zoning requirement does not apply for twenty years to feedlots that were operating before the effective date of the zoning requirement. Wyo. Stat. § 11-39-104(d). City zoning requirements apply to feedlots located in an incorporated area subject to that city's regulations on June 1, 1977, regardless of the date the feedlot

began operation. Wyo. Stat. § 11-39-104(e). Feedlots that become located within a city by virtue of incorporation or annexation after June 1, 1977 are not subject to the city's zoning requirements for twenty years after the effective date of the incorporation or annexation. Wyo. Stat. § 11-39-104(f).

d. Airports

Incorporated municipalities and counties may restrict the size and height of buildings and the height of other structures located within one-half mile of an airport owned or controlled by the municipality or county. A municipality or county may zone airspace beyond the one-half mile boundary, within the same county, "to assure aircraft reasonable safety for visual and instrument approach and departure." However, that right is limited to the "geographical limits of the current applicable approach zone established by the federal aviation administration for the particular airport and in no case shall the right to zone extend beyond six (6) nautical miles along the approach path from the end of the instrument runway." Wyo. Stat. § 10-5-301(a).

e. Public bodies have the authority to zone or rezone public projects. Wyo. Stat. § 15-10-113(a)(iv).

f. Municipalities and public bodies may zone or rezone to make exceptions for building regulations for urban renewal projects. Wyo. Stat. § 15-9-113(a)(xv), § 15-9-131(a)(ix).

B. Constitutional Issues: Property Rights v. Police Power

1. Police Power

The police power can be generally described as a government's ability to regulate private activities and property usage without compensation as a means of promoting and protecting the public health, safety, morals and general welfare. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 726 (Wyo.1985). "Police powers are an essential attribute of the state as sovereign and cannot be bargained or contracted away." Sun Ridge Dev., Inc. v. City of Cheyenne, 787 P.2d 583, 589 (Wyo.1990). Zoning is a particular exercise of the police power. Cheyenne Airport Bd., 707 P.2d at 726. "It involves the division of land into zones and within these zones the regulation of both the nature of land usage and the physical dimensions of these uses, including height setbacks and minimum area." Id.

2. Validity of Police Power

a. Authority to regulate

A local government's exercise of police power through zoning is an infringement on property rights because it operates to deprive property owners of a use that would otherwise be lawful. Because of this infringement, there are limitations on a local government's exercise of its zoning powers. First, the zoning must be authorized. Cheyenne Airport Bd., 707 P.2d at 726. Local governments are creatures of the state and need a specific delegation of power. Id. Counties, cities, and towns have specific delegations from the State of Wyoming to regulate the use of lands

within their respective jurisdictions. See W.S. §§ 18-5-201 and 15-1-601 through 15-1-611. Such regulations must, however, be in the promotion of the health, safety, morals and general welfare of the citizens of the respective governmental entities. Id.; see also Laughter v. Bd. of County Comm'rs for Sweetwater County, 110 P.3d 875, 887 (Wyo. 2005) (stating that a county may only impose permit conditions in a conditional use permit that "are designed to promote the health, safety, and welfare of its inhabitants").

b. Constitutional limitations

Both the United States and Wyoming constitutions place limits on the exercise of a local government's police powers. Constitutional limitations on police power can come in the form of due process violations, or the uncompensated taking of private property.

c. Substantive due process

"Both the United States Constitution and the Wyoming Constitution impose due process limitations on the exercises of the police powers." Cheyenne Airport Bd. v. Rogers, 707 P.2d at 726; Bd. of County Comm'rs of Teton County v. Crow, 65 P.3d 720, 727 (Wyo. 2003). The Fifth and Fourteenth Amendments to the United States Constitution, and Art. 1, § 6 of the Wyoming Constitution assert that no person shall be deprived of life, liberty or property without due process of law. In general, Wyoming has, in zoning cases, interpreted its due process provision in a manner parallel to the federal provisions. Laughter v. Bd. of County

Comm'rs for Sweetwater County, 110 P.3d 875, 887 (Wyo. 2005) (citing Bd. of County Comm'rs of Teton County v. Teton County Youth Services, Inc., 652 P.2d 400, 414 (Wyo.1982)).

The constitutional standard of substantive due process demands that a police power regulation must promote a legitimate public objective with reasonable means. Id. at 887-88; see also Bd. of County Comm'rs of Teton County v. Crow, 65 P.3d 720, 729 (Wyo. 2003). In other words, the matter must be a proper subject of regulation, and the means used to implement the regulation must be reasonable. Sun Ridge Development, Inc. v. City of Cheyenne, 787 P.2d at 589. In zoning cases, since there are no suspect criteria or fundamental interests involved, a court will inquire only as to whether the regulation is of debatable reasonableness. Cheyenne Airport Bd., 707 P.2d at 727. If the court perceives that the legislature had some arguable basis for choosing the end and the means, it will sustain the regulation at least as to compliance with substantive due process. Id. "Only when a regulation amounts to an arbitrary deprivation of regulatees' property will it be deemed to violate the dictates of substantive due process." Id. Additionally, the "substantive component of the due process clause is violated by governmental action only where such action is so arbitrary as to shock the conscience." Laughter, 100 P.3d at 891.

d. Uncompensated Taking

There are many issues involved in takings cases. Below is a brief overview of just a few.

(i.) **General Principles**

The Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The Takings Clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Chicago, B. & O. R. Co. v. Chicago, 166 U.S. 226 (1897)). The Wyoming Constitution contains a similar limitation on the appropriation of private property by the government. Wyo. Const. Art. 1, § 33. One of the principal purposes of the Takings Clause is to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. See Dolan v. City of Tigard, 512 U.S. 374, 382 (1994). "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

(ii.) **Types of Takings**

The Takings Clause can be violated either by direct

government appropriation of property without just compensation, or by government regulation that interferes with a property owner's use of the property to the extent that it accomplishes the same result as a direct appropriation. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005). Where a plaintiff does not complain of a physical occupation, a plaintiff must rely on the claim that if a "regulation goes too far [then] it will be recognized as a taking." Marshall v. Bd. of County Comm'rs for Johnson County, Wyoming, 912 F. Supp. 1456, 1472 (D. Wyo. 1996); see also Swartz v. Beach, 229 F. Supp. 2d 1239, 1262 (D. Wyo. 2002). Under the Fifth Amendment, a regulation is deemed a *per se* taking of property where it requires the landowner to suffer a permanent physical occupation or deprives the landowner of all economically viable use of her property. Lingle, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)). Outside of these two categories (and a special category regarding development exactions, discussed in Part C.2, infra), the courts generally apply an ad hoc inquiry to determine whether there has been a taking. Id. at 538; see also Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The Wyoming

Supreme Court has held that this "essentially ad hoc, factual inquiry" involves a balancing of public and private interests. Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 730-31 (Wyo. 1985). Under this balancing approach, the substantiality of the public interest for the regulation is compared with the impact of the regulation upon the individual's private property rights. See id.

(iii.) **Compensation for Partial Takings**

In a regulatory takings case not involving any physical occupation, the starting point for the court's analysis is "whether there has been a total taking of the entire parcel." Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002). The government cannot avoid its duty to compensate a landowner for a categorical taking of his property "on the premise that the landowner is left with a token interest." Palazzolo, 533 U.S. at 631. While a landowner may not be able to establish a total taking because the property retains more than a token economically beneficial use, the United States Supreme Court has recognized that a noncategorical taking may still have occurred. Id. at 632 (holding that the landowner could not establish a categorical taking because the property retained $200,000 in value but remanding the case to the state court to determine if a taking had still

occurred); Tahoe-Sierra Preservation Council, 535 U.S. at 327 (stating that partial regulatory takings are examined using a number of factors). "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." Id. at 617.

(iv.) **Post-Regulation Acquisition of Title**

A landowner cannot be barred from asserting a takings claim by "the mere fact that title was acquired after the effective date of the state-imposed restriction." Palazzolo, 533 U.S. at 630. "[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of passage of title." Id. at 629-30. However, post-regulation acquisition of the property may be a factor the court considers in determining whether there has been a regulatory taking. See id. at 633 (O'Connor, J., concurring) (stating that the "regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonable of those [investment-backed] expectations);

Rith Energy, Inc. v. United States, 270 F.3d 1347, 1350-51 (Fed. Cir. 2001).

(v.) **Ripeness**

While a "landowner may not establish a taking before a land- use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation," the government cannot "burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." Palazzolo, 533 U.S. at 620-21.

C. **Types of Land Use Disputes**:

There are numerous types of zoning disputes. The following examples were chosen because they relate to the topics discussed herein. The first type of dispute, control of subdivision through zoning authority, goes directly to the scope of authority granted to a county under the Zoning Act. The second type of dispute, the validity of development exactions, addresses the constitutional limits placed upon the exercise of police powers. The final example, grandfathered and vested rights, goes to the equitable limits placed upon this power.

1. Zoning to Control Subdivision Counties are given direct control over the division of land within their jurisdictions by the Wyoming Real Estate Subdivisions Act, W.S. §§ 18-5-301 through 18-5-315. The Subdivisions Act provides, in part, that:

> The regulation and control of the subdivision of land in the unincorporated areas in each county is vested in the board of county commissioners of the county in which the land is located. . . .

W.S. § 18-5-301. The Subdivision Act further provides that "[n]othing in this article shall contravene or limit the authority of any county to regulate and control the subdivision of land pursuant to [its zoning authority]." Id. The Act then goes on to outline, in great detail, the minimum requirements that must be met when land is subdivided. W.S. § 18-5-306. Specifically exempted from the mandates of the Subdivision Act are divisions of land resulting in parcels of land thirty-five (35) acres or larger. W.S. § 18-5-303(b).

Relying on the last sentence of W.S. § 18-5-301, counties have gone around the Subdivision Act and attempted to control the division of large tracts of land (i.e., parcels thirty-five (35) acres or larger) through their zoning authority. These attempts to control such divisions have been both direct and indirect. For example, Natrona County passed a zoning resolution that directly controlled divisions of land creating parcels thirty-five (35) to eighty (80) acres in size. See, Chapter IX of Natrona County Zoning Resolution, Major Land Subdivisions. Carbon County, on the other hand, passed an ordinance regulating parcel subdivisions through significant density requirements. In an August 2000 amendment to its zoning resolution, Carbon County imposed a 640 acre minimum lot size requirement in most of the unincorporated areas. See Carbon County Zoning Resolution of 2003, Ch. IV, § 4.2.d(1)a. The stated purpose for the minimum lot size requirement was to prevent "wildcat" large parcel

subdivisions.

The actions taken by Natrona and Carbon counties require an assessment of the authority granted counties under the zoning regulations to control the division of land within their jurisdiction. The first attempt to answer this question was made by the Wyoming Attorney General. In an opinion issued in 1979, the Attorney General concluded that the Zoning Act did not grant counties the authority to regulate and control the subdivision of land by direct controls such as those found in the Subdivisions Act. Wyo. Atty. Gen. Op. 79-35 (Dec. 18, 1979). Rather, the Zoning Act granted power to control the use of land, thereby indirectly controlling the division of land. Id.

The Wyoming Supreme Court addressed the issue in Snake River Venture v. Bd. of County Comm'rs, Teton County, 616 P.2d 744 (Wyo.1980). In Snake River Venture, the Wyoming Supreme Court, *sua sponte*, questioned the validity of an amendment to the Teton County subdivision regulations. The challenged amendment placed a density requirement on lots shown on subdivision plats. The Supreme Court held that the amendment was a valid exercise of the authority granted Teton County under its zoning authority. Id.

At first blush, it would appear that the holding in Snake River Venture was consistent with the Attorney General's opinion regarding a county's

subdivision authority under the Zoning Act. The density requirement being challenged in Snake River Venture was not a direct control of the division of land such as that found in the Subdivisions Act. Rather, it was a control of the use of land that had an indirect impact on land division.

Statements made by the Supreme Court in Snake River Venture have, however, confused the issue regarding a county's subdivision authority under the Zoning Act. In *dicta*, the Supreme Court stated that the authority granted a county under the Zoning Act delegated whatever police power was "necessary to promulgate a subdivision, zoning or planning ordinance." Id. at 752. This statement appears to imply that counties can exercise direct control over the division of land within their jurisdiction under the authority granted pursuant to W.S. §§ 18-5-201 through 18-5-208. Snake River Venture was a 3-2 decision with a strongly worded dissent.

In subsequent decisions, the Wyoming Supreme Court appears to have substantially limited the reach of Snake River Venture. In Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo.1985), the Supreme Court specifically defined zoning as a particular exercise of police power that involved "the division of land into zones and within these zones the regulation of both the nature of land usage and the physical dimensions of these uses." Id. Nowhere in this definition can one find the authority to regulate the division of land. In Ford v. Bd. of County Comm'rs of

Converse County, 924 P.2d 91, 95 (Wyo.1996), the Supreme Court, citing Snake River Venture, held that although the authority to zone is broad, it is limited to zoning. The Court in Ford v. Bd. of County Comm'rs of Converse County defined zoning as a "form of regulatory control granted to local governments which may be used to guide and develop specific land use." Id. at 94. As with the definition in Cheyenne Airport Board, the definition in Ford did not include regulating the division of land.

It is important to note that in Ford, the Supreme Court refused to equate zoning with planning. In Snake River Venture, the Court had implied that the zoning authority was one in the same with planning authority. In 2004, the Court held that zoning governs the use of land, not the subdivision of land. Pedro/Aspen, Ltd. v. Board of Comm'rs of Natrona County, 94 P.3d 412, 419 (Wyo. 2004). Furthermore, the counties have no authority to prevent the subdivision of land beyond that granted in the Subdivisions Act under the guise of exercising its zoning authority. Id. at 419-20.

2. Exactions

A popular form of land use regulation is the development exaction. A development exaction is a condition placed upon a landowner that requires the landowner to give up a property right, either in the form of a dedication of land or a payment in lieu thereof, in exchange for receiving a development permit. Generally, exactions are used by local governments to address community needs such as open space, parks, and affordable

housing.

“The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: [n]or shall private property be taken for public use, without just compensation.’” Dolan v. City of Tigard, 512 U.S. 374, 383-84 (1994). The Wyoming Constitution contains a similar limitation on the appropriation of private property by the government. Wyo. Const. Art. I, §33. “One of the principle purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” Dolan v. City of Tigard, 512 U.S. at 384.

Obviously, if a local government simply requested an exaction of property, or a payment in lieu thereof, from a landowner, such request would be a taking within the meaning of the United States and Wyoming constitutions. The United States Supreme Court has held, however, that because of the discretionary nature of development permits, a local government can request an exaction as a condition of granting the permit, even if the exaction would otherwise violate the Takings Clause.

Despite the Supreme Court’s acceptance, requested exactions can, nevertheless, violate the Takings Clause and be held invalid. A condition imposed upon a proposed development which requires a dedication of land can be violative of the Takings Clause, and be unconstitutional, if

there is no "essential nexus" between the required condition and the impact that the proposed development will have on a legitimate governmental interest, and if the required condition is not "roughly proportional" to the proposed development's impact. See Nollan v. California Coastal Comm., 483 U.S. 825 (1987); Dolan, 512 U.S. 374. The heightened scrutiny set forth by the Supreme Court in Nollan and Dolan has been extended to conditions which require payments in lieu of land dedications. See Ehrlich v. City of Culver City, 911 P.2d 429, 447 (Cal. 1996) (on remand from the Supreme Court, Ehrlich v. City of Culver City, 512 U.S. 1231). The Wyoming Supreme Court has adopted the principle set forth by the U.S. Supreme Court in Nollan/Dolan. See Coulter v. City of Rawlins, 662 P.2d 888, 903 (Wyo.1983) (holding that the City of Rawlins could require a payment of a sum in lieu of a land park-land dedication in order to lessen the impact and pressure on park facilities caused by the proposed development).

Nollan/Dolan heightened scrutiny first requires that an "essential nexus" be established between the required condition and the proposed development. At a minimum, there must be some connection between the condition and the proposed development's projected impact. See Nollan, 483 U.S. at 837. Essentially, the condition imposed has to be in response to the impacts. The "roughly proportional" test requires a determination that the degree of exactions demanded by the permit condition bears the required relationship to the projected impact of the

proposed development. Dolan v. City of Tigard, 512 U.S. at 388. "Rough proportionality" ensures that the "price" of the government permit is not significantly higher than the social harm caused by the proposed development.

No precise mathematical calculation is required to determine "rough proportionality." However, the government must make some ***individualized*** determination that the required dedication is related both in nature and extent to the impact of the proposed development. Id. 512 U.S. at 391. Both the "essential nexus" and "rough proportionality" tests must be me. If either one of these tests is not satisfied, the requested exaction will be considered unconstitutional and invalid.

3. Grandfathered and Vested Rights A county's ability to control subdivision through its zoning authority addressed the scope of authority delegated to a county by the State. The ability to request property exactions in exchange for a development permit deals with constitutional limitations on a government's zoning authority. Grandfathered and vested rights addresses equitable limitations on this authority.

Under Wyoming law, a lawful use that exists at the time a zoning ordinance is passed is called a non-conforming use. These uses are allowed to continue under the grandfather exception. River Springs Ltd. Liab. Co. v. Bd. of County Comm'rs of the County of Teton, 899 P.2d 1329, 1334 (Wyo.1995). The right to continue a grandfathered use is a vested

right protected by statute and by both the federal and state constitutions. Snake River Brewing Co. v. Town of Jackson, 39 P.3d at 403.

A certificate is not necessary to continue a grandfathered use. Crouthamel v. Bd. of Albany County Comm'rs, 951 P.2d at 838. In Crouthamel, a nonconforming use began while invalid regulations were in place. Id. The use was later discontinued for a time as a result of an injunction which relied on the invalid regulation. Eventually, the county passed a valid zoning ordinance. The court ruled that the valid ordinance could not prohibit the use because it was not passed until after the use had begun. Id.

A grandfathered use may continue until it is abandoned. River Springs Ltd. Liab. Co. v. Teton County, 899 P.2d at 1334. Abandonment requires an affirmative act demonstrating an intent to abandon. Id. However, a county can prescribe that non-use for a certain period creates a rebuttable presumption of intent to abandon. Snake River Brewing v. Town of Jackson, 39 P.3d at 404.

In River Springs, the county attempted to prohibit a limestone quarry that had existed since 1949. For many years, the quarry had existed with minimal activity and the county ordinance stated that a grandfathered use was abandoned if the use ceased for more than one year. River Springs Ltd. Liab. Co. v. Teton County, 899 P.2d at 1329. The court found that the

use was not abandoned because minimal use is not the same as cessation. Id. The court also held that there was no affirmative act indicating an intent to abandon. Id.

The concept of vested rights differs from grand fathered uses in that the use protected under a vested right has not been established. The vested rights doctrine protects a use that has been approved or authorized, but has not yet been completed. "The concept of vested rights 'is a judicial construct designed to provide individual relief in zoning cases involving egregious statutory or bureaucratic inequities.'" Ebzery v. City of Sheridan, 982 P.2d 1251, 1257 (Wyo.1999) (quoting Highland Park Country Club v. Zoning Bd. of Adjustment, 506 A.2d 887, 891 (Pa. 1986)). Mere possession of a building permit does not, in and of itself, confer vested rights upon the recipient. Snake River Venture v. Teton County, 616 P.2d 744, 750 (Wyo.1980). A property owner has no vested interest in a development which is merely contemplated. Id. at 751. However, where valid approval has been followed by substantial construction or irrevocable contractual commitments, a vested right does accrue and the doctrine of equitable estoppel denies the county the authority to revoke, rescind approval or outlaw the activity. Id. at 750.

The Wyoming Supreme Court has not specifically addressed the precise conditions under which expenditures or commitments create a vested right. Ebzery v. City of Sheridan, 982 P.2d at 1257. Other jurisdictions

have, however, addressed the issue, and the general rule is that a vested right accrues if the developer incurs substantial expenses preparing for construction in good faith reliance upon some act or omission of the zoning authority. See, e.g., Life of the Land, Inc. v. City and County of Honolulu, 592 P.2d 26 (Hawaii 1979); North Georgia Mountain Crisis Network, Inc. v. City of Blue Ridge, 546 S.E.2d 850 (Ga. Ct. App. 2001) (stating that where a landowner makes a substantial change in position by expenditures in reliance upon an existing ordinance and assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued).

The holding in Life of Land, Inc. v. City and County of Honolulu is particularly instructive. In Life of Land, the developer received "official assurance" that its proposed construction met zoning requirements, and had obtained initial approval from county officials for the project. In reliance upon these "official assurances," the developer incurred expenditures in excess of $800,000.00, most of which were on planning and design for the project. Before final action was taken on the developer's permit application, a lawsuit was filed to halt the project. The Hawaii Supreme Court refused to stop the project, holding that the developer had acquired a vested right in the project by reason of the substantial expenditures made in reliance upon the implicit assurances by the county that if the conditions imposed by the council were met, a building permit would be issued.

D. The Land Use Dispute: Appeal Process

1. Administrative Review

a. Counties

Subject to the requirement that **administrative remedies be exhausted** and in the absence of any statutory or common-law provision precluding or limiting judicial review, **any person aggrieved or adversely affected in fact** by a final decision of an agency in a contested case, or by other **agency action or inaction**, or **any person affected in fact** by a rule adopted by an agency, **is entitled to judicial review** in the district court for the county in which the administrative action or inaction was taken, or in which any real property affected by the administrative action or inaction is located, or if no real property is involved, in the district court for the county in which the party aggrieved or adversely affected by the administrative action or inaction resides or has its principal place of business. W.S. § 16-3-114.

Therefore, under the statute you may file an action in district court:

(i.) After a contested case hearing under the Wyoming Administrative Procedures Act ("WAPA") §§ 16-3-107 through 16-3-112.

(ii.) After an agency action or inaction.

(iii.) After you have been affected in fact by a rule adopted by

the agency.

"Agency" is defined as "any authority, bureau, board, commission, department, division, officer or employee of the state, a county, city or town or other political subdivision of the state, **except the governing body of a city or town**, the state legislature, the University of Wyoming and the judiciary." Wyo. Stat. § 16-3-101(b)(i). Boards of county commissioners are agencies. See Holding's Little America v. Bd. of County Comm'rs of Laramie County, 670 P.2d 699 (Wyo. 1983). A town or city council is not an agency. See Foster's Inc. v. City of Laramie, 718 P.2d 868, 872 (Wyo. 1986); City of Evanston v. Whirl Inn, Inc., 647 P.2d 1378 (Wyo. 1982).

All agencies are required to prepare and file rules setting forth informal and formal procedures in contested cases. Wyo. Stat. § 16-3-102, § 16-3-104. A contested case hearing is not available if the facts to be adjudicated are legislative in nature. See, e.g., Scarlett v. Town Council, Town of Jackson, Teton County, 463 P.2d 26, 29 (Wyo. 1969) (holding that annexation procedures are not covered by the WAPA because they are legislative in nature and do not "resolve legal rights, duties, or privileges.").

In Frankel v. Teton County, 39 P.3d 420 (Wyo. 2002), the Wyoming Supreme Court held that if a party is entitled to a

contested case hearing, the agency must, through its regulations, inform the party of such an entitlement. Id. at 424. The Frankel decision also mandated that a contested case hearing be held as a trial-type hearing pursuant to the WAPA. The Wyoming Supreme Court also strongly suggested that "matters as important as the approval or disapproval of the use of a person's property" are the type of proceedings in which there would be an entitlement to a contested case hearing. Id.

If challenging the validity of a regulation(s), you do not have to exhaust administrative remedies prior to filing a court action. See Ford v. Board of County Comm'rs of Converse County, 924 P.2d 91, 93 (Wyo. 1996). In Ford, the plaintiff wanted to develop his property and requested a permit to operate a fireworks stand. Id. At the time, Converse County had a land use plan but had not adopted any zoning regulations. Id. at 92. The County planner asked Ford to add to his application and remit a fee. Id. at 93. Ford failed to do this and opened his fireworks stand. Id. Ford then filed a declaratory action in state district court to determine whether the regulations in the land use plan prohibited his commercial use of the property. Id. The County argued that Ford had neglected to exhaust his administrative remedies. Id. The Wyoming Supreme Court disagreed, stating that "Ford was not required to exhaust his administrative remedies because he was

challenging the validity of the regulations." Id. Further, the Court stated that "a declaratory judgment action is generally available when the party who is bringing the action asserts issues which only the courts have the authority to decide; i.e., the validity and constitutionality of administrative rules." Id. The Court went on to find that a land use plan could not be substituted for zoning and without comprehensive zoning the County had no grounds to control the use of Ford's land. Id. at 95; see also Cheyenne Airport Bd. v. Rogers, 707 P.2d 717 (Wyo. 1985) (plaintiff filed a declaratory action in district court challenging the constitutionality of a municipal airport zoning ordinance).

If your client is a property owner challenging a determination by the planning commission or county commission regarding his property, it may behoove you to go through a contested case hearing first. Check the county's procedures and see how to appeal the decision of the county planning board or the county commissioners. Each county will have a different procedure. In Bd. of County Comm'rs of Teton County v. Teton County Youth Services, Inc., 652 P.2d 400 (Wyo. 1982), after the case had gone to the district court and received an opinion, the Supreme Court remanded the case back to the agency level for a contested case hearing to develop a record. Therefore, having a contested case hearing at the outset may be more economical in the long run.

Appeal of administrative actions is governed by Rule 12 of Wyoming Rules of Appellate Procedure in accordance with the WAPA. See Bd. of County Comm'rs v. Teton County Youth Services, Inc., 652 P.2d 400 (Wyo. 1982).

b. Cities

The mayor is to create a Zoning Board of Adjustment. See Wyo. Stat. § 15-1-605. The Zoning Board hears appeals from "[a]ny aggrieved person or any officer, department, board or bureau of the city or town affected by any decision of the administrative officer." Wyo. Stat. § 15-1-607. Pursuant to Wyo. Stat. § 15-1-608, the Zoning Board is to hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article The decision of the Zoning Board can be appealed to the district court pursuant to Rule 12 of the Wyoming Rules of Appellate Procedure. See Wyo. Stat. § 15-1-609.

1. Judicial Review

a. Counties

Pursuant to Wyoming Statute 16-3-114(c) a reviewing court shall:

[D]ecide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following

determinations the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

(i.) Compel agency action unlawfully withheld or unreasonably delayed;

(ii.) Hold unlawful and set aside agency action, findings and conclusions found to be:

a). Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

b). Contrary to constitutional right, power, privilege or immunity;

c). In excess of statutory jurisdiction, authority or limitations or lacking statutory right;

d). Without observance of procedure required by law; or

e). Unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.

Only a person, not an agency, can seek judicial review of an administrative decision. The person must be aggrieved or adversely affected in fact by the administrative decision. See Roe v. Bd. of County Comm'rs of Campbell County, 997 P.2d 1021, 1023 (Wyo. 2000); see also Jolley v State Loan & Inv. Bd., 38 P.3d 1073, 1076 (Wyo. 2002). This includes a landowner affected by

another landowner's zoning change. See Hoke v. Moyer, 865 P.2d 624 (Wyo. 1993).

The reviewing court will give the agency's findings of fact the same deference as a trial court. See State ex rel. Wyo. Workers' Comp. Div. v. Harris, 931 P.2d 255, 258 (Wyo. 1997). Therefore, the findings will not be set aside unless the agency committed an error of law or the decision is not supported by substantial evidence. See Heiss v. City of Casper Planning & Zoning Comm'n, 941 P.2d 27, 29 (Wyo. 1997).

b. Cities

The decision of the Zoning Board will not be reviewed by the district court de novo or any further evidence taken. See Williams v. Zoning Adjustment Bd. of the City of Laramie, 383 P.2d 730, 732 (Wyo. 1963). Zoning decisions must be supported by substantial evidence. See Ebzery v. City of Sheridan, 982 P.2d 1251 (Wyo. 1999).

2. Making a Record

Do it right the first time - In re Conflicting Application for Wyoming Agr. Lease No. 1-7027, 972 P.2d 586 (Wyo.1999).

In the above mentioned case, the plaintiff filed an administrative appeal of a

decision by the Office of State Lands and Investments and went through a contested case hearing before the Board of Land Commissioners. Id. Following an adverse decision, the plaintiff filed a Petition for Review in the district court challenging the constitutionality of the statute at issue. Id. However, the plaintiff failed to raise the constitutional claim in the administrative appeal below. Id. The district court certified the case to the Wyoming Supreme Court which in turn dismissed it because the constitutional issue was not raised at the administrative level. Id. at 587. The Supreme Court's reasoning was that even though the agency could not have ruled on the constitutional issue, the issue had to be raised prior to filing a Petition for Review in district court. Id. The Court did state, however, that the appropriate action to challenge the constitutionality of a statute was a declaratory judgment action. Id. at 587-88. Although the opinion is somewhat unclear, the plaintiff could have gone straight to district court with a declaratory action rather than filing a Petition for Review which was dismissed.

An agency action is considered arbitrary and an abuse of discretion if taken without sufficient facts. See Holding's Little America v. Bd. of County Comm'rs of Laramie County, 670 P.2d 699, 704 (Wyo. 1983). Therefore, the agency should keep a good record of how it made its determination with minutes, a recording of meeting(s), etc. If there is a particular statute or regulation involved, the agency must consider every factor in the statute or regulation and be able to show the court evidence

that it did so.

4. Burden of Proof

a. Counties

The burden of proving the agency acted arbitrarily is on the complainant. See Wyoming Bancorporation v. Bonham, 527 P.2d 432 (Wyo. 1974); In Re Workers Compensation Claim of Shryack, 3 P.3d 850 (Wyo. 2000).

b. Cities

"[D]ecisions of zoning boards of adjustment as to exceptions and variations are regarded as presumptively fair, reasonable and correct; and the burden is upon those complaining thereof to show that the board acted improperly." Williams v. Zoning Bd. of Adjustment for the City of Laramie, 383 P.2d 730, 733 (Wyo. 1963). "The party attacking the agency's decision has the burden of proving that the decision was not supported by substantial evidence." Juroszek v. City of Sheridan Bd. of Adjustment, 948 P.2d 1370, 1372 (Wyo. 1997).

5. Legislative vs. Administrative Action

"The board of county commissioners is an agency as defined by the Wyoming Administrative Procedures Act § 16-3-101(b)(i)." Holding's Little America v. Bd. of County Comm'rs of Laramie County, 670 P.2d 699 (Wyo. 1983). Therefore, its actions come under the WAPA unless the action is statutorily exempt. See id. at 702. One of those exemptions is legislative actions or hearings. See § 16-3-101(b)(i).

The WAPA does not apply to legislative actions or hearings. "Legislative action produces a general rule or policy which applies to a general class of individuals, interests, or situations. Judicial or adjudicatory functions apply generally to identifiable persons and specific situations." Holding's Little America, 670 P.2d at 702 (citing 1 Am.Jur.2d Administrative Law § 164). Examples:

Legislative:

annexation proceedings - See Scarlett v. Town Council, Town of Jackson,Teton County, 463 P.2d 26 (Wyo. 1969).

zoning classifications - See McGann v. City Council of the City of Laramie, 581 P.2d 1104 (Wyo. 1978). In McGann, property owners adjacent to an area that was re-zoned brought an action to determine if the action of the city council was legislative or judicial in nature. The Wyoming Supreme Court found that a "zoning law or ordinance, or an amendment thereto" was a legislative act, and, therefore, not subject to review under the WAPA. Id. at 1105.

School unification proceedings - See Lund v. Schrader, 492 P.2d 202 (Wyo. 1971).

Thus, if the action is considered legislative, judicial review

under the WAPA is unavailable. See Holding's Little America, 670 P.2d at 702.