

**FILED**  
**KANE COUNTY**

OCT 26 2011

*NR* Clerk  
**SIXTH DISTRICT COURT**

**DISTRICT COURT, STATE OF UTAH**  
**COUNTY OF KANE**  
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Kanab, Utah 84741  
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**TAXPAYER ASSOCIATION OF KANE  
COUNTY,**

Plaintiff,  
vs.

**CITY OF KANAB, a Utah Municipal  
Corporation,**

Defendant.

**MEMORANDUM DECISION AND  
ORDER ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT**

Case No. **110600048**

Assigned Judge: **Wallace A. Lee**

Defendant filed a Motion for Summary Judgment. Plaintiff responded and filed a cross motion for summary judgment. The motions have both been fully briefed. The Court heard oral argument on 22 September 2011. The motions are now ready for decision.

**DECISION**

Defendant's motion should be GRANTED. Plaintiff's motion should be DENIED.

**ANALYSIS**

The Court begins its analysis with Defendant's Motion for Summary Judgment because resolution of that motion affects the Court's decision on Plaintiff's motion.

Defendant's motion is properly supported by reference to the record. The burden now

shifts to Plaintiff as the nonmoving party to present evidence sufficient to establish a genuine issue of material fact. *Shaw Resources Limited v. Pruitt, Gushee & Backtell*, 142 P.3d 560, 565 (Ut. App. 2006), quoting *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, P31, 54 P.3d 1054.

Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Utah Rules of Civil Procedure, Rule 56(c). There is no genuine issue as to any material fact when “on the basis of the facts in the record, reasonable minds could [not] differ” in the conclusion. *Sanns v. Butterfield Ford*, 94 P.3d 301, 304 (Utah App. 2004), citing *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982).

Plaintiff disputes only one of Defendant’s eighteen statements of material fact. Plaintiff disputes that Defendant published adequate, timely notice of the city council meeting of 9 November 2010.<sup>1</sup> The Court must consider this dispute to determine whether it adequately frames a genuine issue of material fact for trial.

In Paragraph 15 of Defendant’s Statement of Material Fact, Defendant claims “[o]n November 8, 2010, the City posted notice specifically describing the property’s location and an agenda on the Utah Public Notice Website and its own website, and stating that on November 9,

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<sup>1</sup>Though Plaintiff does not challenge any other factual statements propounded by Defendant. Plaintiff does repeatedly challenge the legality of the notices given by Defendant, and the lack of public hearings before the city council. However, these are all legal issues which the Court can decide by reference to the applicable statutory provisions.

2010, the city council would consider the application for a zone change.”

The Court finds Plaintiff’s answer is largely non-responsive to the facts in Defendant’s statement in Paragraph 15. Plaintiff does point to a date stamp on the notice which indicates the agenda was edited on 9 November 2010, less than 24 hours before the scheduled meeting. Therefore, Plaintiff claims the notice was inadequate and defective. Defendant counters that there were many items listed on the agenda, and there is no evidence the edit concerned the proposed zone change.

The Court finds Plaintiff’s concern about the timeliness of notice insufficient to create a genuine issue of material fact. The Court finds Plaintiff has offered no evidence to support its assertion. Therefore, the Court considers this fact undisputed. The Court notes that “[t]he nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.” *Waddoups v. Amalgamated Sugar Co.*, 54 P.3d 1054,1063 (Utah 2002).

In addition, Section 10-9a-209, Utah Code Annotated requires that “[i]f notice given under authority of this part is not challenged under Section 10-9a-801 within 30 days after the meeting or action for which notice is given, the notice is considered adequate and proper.” Because there was no timely challenge to the notice in this case under Section 10-9a-801, the Court must

conclude the notice was adequate as a matter of law.<sup>2</sup>

On this basis, the Court concludes there is no genuine issue of material fact. The Court next considers whether Defendant is entitled to judgment as a matter of law.

This determination largely revolves around whether Plaintiff's Petition in this Court was timely. There is no dispute that Plaintiff appeals from the decisions of the Kanab City Council approving Viresco Energy's Applications for General Plan Amendment and Zone Change. The parties agree on the following timeline:

1. On 26 October 2010, the city council unanimously voted to approve the Application for General Plan Amendment.
2. On 9 November 2010, the city council unanimously voted to approve the Application for Zone Change.
3. On 7 March 2011, Plaintiff filed its Notice of Appeal with the Kanab City Appeals Officer.
4. On 16 March 2011, the Kanab City Appeals Officer issued his ruling dismissing Plaintiff's appeal.
5. On 15 April 2011, Plaintiff filed its Petition for Review with this Court.

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<sup>2</sup>Plaintiff suggests the Equitable Discovery Rule tolled the applicable statutes of limitation in this case. The Court acknowledges that in an appropriate case, this rule may create a genuine issue of material fact. The operation and applicability of the Equitable Discovery Rule in this case is analyzed below.

Section 10-9a-801(2)(a), Utah Code Annotated, requires that “[a]ny person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.”

Thus, if the final local land use decision at issue is the ruling of the Kanab City Appeals Officer, then Plaintiff’s Petition, which was filed less than 30 days after the ruling, was timely and should be considered.

However, if the final local land use decisions at issue in this case are the city council’s decisions of 26 October and 9 November, 2010, then Plaintiff’s Petition was not timely because it was filed considerably more than 30 days after those decisions. If this is the case, then Defendant is entitled to judgment as a matter of law, and the Court may not consider Plaintiff’s appeal.

Thus, the Court’s task is to determine when the local land use decisions in this case became final. That determination requires the Court to decide whether the decisions of the city council approving the amendment to the general plan and the zone change were decisions which were subject to administrative appeal or whether appeal from those decisions had to be made directly to this Court. The decision turns on whether the decisions of the city council can be fairly characterized as legislative or administrative.

Defendant insists the decisions were both final, legislative land use decisions which actually modified and amended the general plan and zoning map, rather than administering or

interpreting a land use ordinance or applying it to a particular person, or parcel. Therefore, Defendant insists administrative remedies were already exhausted, the appeal authority had no jurisdiction, and any substantive challenge to either decision had to be taken directly to the district court as provided Utah Code Annotated Section 10-9a-801(2)(a).

Plaintiff disagrees and claims it was required to exhaust its administrative remedies before the appeal authority, advancing the creative argument that Defendant's decisions were administrative rather than legislative because (1) Defendant "administered and processed" two applications to change the zoning on a single parcel of property; (2) the planning commission "applied its land use ordinance" to the applications and made findings to support its recommendations which the city council subsequently approved; and (3) the appeal authority reviewed the notice of appeal and merely determined Plaintiff's appeal was untimely. Therefore, "by implication" the appeal authority "must have concluded" he had jurisdiction and the decisions were administrative rather than legislative. Further, because Defendant failed to challenge the implied conclusion of the appeal authority, it is now precluded from doing so by "collateral attack" in Defendant's Motion for Summary Judgment.

After careful consideration, the Court agrees with Defendant. The decisions in this case are legislative decisions which had to be appealed directly to this Court and were not subject to administrative appeal.

As an initial matter, the Court notes that Section 10-9a-701(1), Utah Code Annotated

establishes the jurisdiction of a city's appeal authority, and narrows the scope of decisions which come within the jurisdiction of the appeal authority. According to Section 10-9a-701(1), the appeal authority may hear and decide only: "(a) requests for variances from the terms of the land use ordinances; (b) appeals from decisions applying the *land use ordinances*; and (c) appeals from a fee charged in accordance with Section 10-9a-510." [Emphasis by the Court].

Plaintiff does not seek review of a variance request or a fee charged. Therefore, the focus must be on appeals from decisions applying the land use ordinances.

Section 10-9a-103(24), Utah Code Annotated defines the term "land use ordinance" as "a planning, zoning, development, or subdivision ordinance of the municipality, *but does not include the general plan.*" (Emphasis by the Court).

Because the general plan is not a land use ordinance, the Court concludes the city council's decision to approve an amendment to the general plan is, by definition, not an administrative decision which can be appealed to the appeal authority. Therefore, the city council's decision approving the amendment to the general plan became a final local land use decision on 26 October 2010. Because Plaintiff did not file its Petition within 30 days of that decision, its Petition was not timely.

With regard to the decision approving the Application for Zone Change, the Court notes the request approved by the city council was to "amend the Kanab City Zoning Map by reclassifying the property at issue." This is not a decision administering, processing, interpreting

or applying the land use ordinance as Plaintiff claims. Rather, it is a decision modifying or amending it. On this basis, the decision is a legislative rather than administrative decision.

Indeed, the Utah Supreme Court in *Bradley v. Payson City Corp.*, 70 P.3d 47 (Utah 2003), held “the enactment and amendment of zoning ordinances is fundamentally a legislative act,” noting “[t]he prior decisions of this court without exception have laid down the rule that the exercise of zoning power is a legislative function to be exercised by the legislative bodies of the municipalities. The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie solely within that discretion.” *Id.*, at 51.

In fact, in a prior decision, the Supreme Court went even farther in drawing a distinction between legislative and administrative functions. In *Sandy City v. Salt Lake County*, 827 P.2d 212 (Utah 1992), the Supreme Court held that “[appeal authorities] are powerless to act on questions of zoning or rezoning.” *Id.*, at 219. This is because “[an appeal authority] can tailor a zoning or rezoning ordinance to specific, unforeseen circumstances, but they lack the authority to determine zoning classifications of their own accord.” *Id.*, at 220. Therefore, “the passage of general zoning ordinances and the determination of zoning policy [are] properly vested in the legislative branch,” and “[a]s legislative functions, the powers of zoning and rezoning cannot be delegated to a quasi-judicial body such as a[n] [appeal authority].” *Id.*, at 221.

On this basis, the Court is convinced the decision of the city council in this case was a legislative act which could not be considered by the appeal authority. Thus, the decision of the

city council on the Application for Zone Change became a final local land use decision on 9 November 2010. Because Plaintiff did not file its Petition within 30 days of that decision, its Petition was not timely.

The Court also agrees with Defendant that the appeal authority in this case lacked jurisdiction to consider Plaintiff's appeal. Therefore any decision of the appeal authority is of no legal force or effect, and Plaintiff cannot rely on any "implied conclusion" of the appeal authority as legal justification for the delay in filing its Petition in this case.

Finally, the Court must consider Plaintiff's argument that its untimely filing was justified by the Equitable Discovery Rule.

In Utah, there are "two situations that can support the application of the equitable discovery rule: first, where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and second, where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." *Ottens v. McNeil*, 239 P.3d 308, 326 (Ut. App 2010)

In this case, Plaintiff claims application of the Equitable Discovery Rule under both the concealment and exceptional circumstances versions of the rule.

Before either of these versions of the rule can be applied, the party seeking relief from the statute of limitations must make an initial showing that the party "did not know and could not

reasonably have discovered the facts underlying the cause of action in time to commence an action within [the limitations period].” *Id.*

This threshold showing is a question of fact. *Id.* Therefore, in the context of Defendant’s Motion for Summary Judgment, the Court must determine whether this question of fact presents a genuine issue of material fact for trial.

In support of its effort to establish that it did not know and could not reasonably have discovered the facts underlying the cause of action in time to file its Petition before expiration of the statute of limitations, Plaintiff offers the Affidavit of Sky Chaney.<sup>3</sup> Plaintiff does not dispute the facts in the Chaney affidavit. Therefore, the Court finds there is no genuine issue of material fact on this issue.

The Court’s task is now to carefully consider the statements in the Chaney affidavit to see whether they are sufficient to establish the required threshold showing. The Court is convinced they are not sufficient, even if all the facts in the Chaney affidavit are accepted as completely true.

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<sup>3</sup>Plaintiff also references its efforts to obtain the zoning applications and other documents through a GRAMA request. Defendant does not dispute these facts, but claims they are not material to the Court’s decision because they fall outside the official record of proceedings subject to this appeal. Defendant is correct. The Court’s analysis on appeal is limited to review of the official record. Nevertheless, the Court finds the Chaney affidavit and facts concerning Plaintiff’s GRAMA efforts are important to a determination of whether the Equitable Discovery Rule should be applied in this case. Therefore, even though they are outside the official record, the Court has determined to give them consideration.

First, Plaintiff is an association of taxpayers. The fact that Chaney may personally have lacked knowledge about the nature of the zoning approvals at issue does not account for the other 475 members of the association.

Second, the Chaney affidavit fails to offer any explanation about why it took members of the association until 3 January 2011, nearly two months after the city council's decision approving the zone change, to discover facts which form the basis for Plaintiff's claims. Indeed, the affidavit fails to explain how the association made the discoveries which apparently prompted the hiring of counsel and led to the GRAMA request.

Similarly, despite the alleged deficiencies in Defendant's notices, the Chaney affidavit makes no effort to explain why at least one of the "more than 475 members" of the association, whose mission is to "represent the interests of the taxpayers of Kane County, Utah," and who "implement [that] mission [by] [monitoring and participating] in proceedings before the Kanab City Council and Kanab Planning Commission" could not have reasonably discovered the facts underlying the cause of action in this case in time to commence an action within the limitations period simply by attending one of the two open public hearings before the planning commission or one of the two open public meetings of the city council.

As the Utah appellate courts have repeatedly admonished, "[m]ere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period," and "the doctrine of

equitable tolling should not be used simply to rescue litigants who have inexcusably and unreasonably slept on their rights, but rather to prevent the expiration of claims to litigants who, through no fault of their own, have been unable to assert their rights within the limitations period.” *Russell Packard Dev. v. Carson*, 108 P.3d 741, 746 (Utah 2005). See also, *Ottens*, 239 P.3d 308 at 329 (Ut. App 2010) .

Plaintiff has simply failed to convince the Court, as threshold matter, that it did not know and through the exercise of ordinary due diligence, could not reasonably have discovered the facts underlying its cause of action in time to commence an action within the limitations period.

The Court finds the Municipal Land Use, Development, and Management Act (MLUDMA) does not require a city to give notice which explicitly and comprehensively describes the complete nature of zoning proceedings. The law requires only notice of the date, time and location of public meetings, and expects concerned citizens to exercise some minimal due diligence to acquire more information about the nature of the proceedings.

To require more than this would be very cumbersome, costly and time consuming for local governments. In this case, the Court finds Plaintiffs had adequate notice of the zoning proceedings at issue, but assumed these proceedings were not important enough to attend the meetings or follow up with further inquiry. Therefore, as a matter of law, the Court finds the Equitable Discovery Rule should not be applied in this case to toll the applicable statute of limitations.

Nevertheless, even if the threshold showing had been made, the Court does not find Defendant was engaged in any concealment or misleading conduct. The Court has carefully examined all of the notices posted and published by Defendant in this case, and finds that although they may not contain the explicit, comprehensive detail urged by Plaintiff, they all comply with the notice requirements of Utah Code Annotated Sections 10-9a-204 and 205, were not misleading and adequately inform the public about the proposed amendment of the general plan and zone change.<sup>4</sup>

In addition, Defendant's consideration of the applications in this case were not made in closed executive sessions, but in open public hearings and public meetings. The Court simply cannot see how Defendant attempted to conceal or mislead the public. Furthermore, because none of the notices were timely challenged under Utah Code Annotated Section 10-9a-209, the Court is required to consider them adequate and proper in all respects.

Similarly, the Court has carefully reviewed the applicable provisions of MLUDMA and finds nothing which requires a city council to hold a public hearing before amending a city's general plan and before enacting a zone change. Furthermore, the Court finds no legal

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<sup>4</sup>Plaintiff insists that had Viresco Energy been listed as owner of the project, it would have been more vigilant in opposing the applications. This may be. Nevertheless, as noted above, the statute does not require that the true owner or applicant or nature of the proposed land use be listed in a notice, only the date, time and place of the hearing or meeting. This imparts actual or at least constructive notice of applications for land use decisions to the public and places the burden upon the public to make further inquiry.

requirement that a city comply with boilerplate language in a printed application. Finally, the Court finds nothing in the law which would require Defendant to “publicly distribute or disseminate” the zoning applications at issue.

Ultimately, the Court also finds nothing in the undisputed facts that convinces the Court this case presents exceptional circumstances or that application of the general rule would be irrational or unjust. It is true, the legislature has chosen a relatively short limitations period during which the public may challenge land use decisions. The Court must assume the legislature did so advisedly, and that cases of this nature were anticipated. On the other hand, the legislature has also gone to great lengths to ensure proper public notice and a fair opportunity for the public to be heard in opposition to land use decisions.

As noted above, the Court finds Defendant complied with all the notice and hearing requirements of the law. Further, the Court finds that though Plaintiff, as an association of concerned citizens, is sincere and well meaning in its efforts, it was certainly not vigilant enough when it came to monitoring the land use decisions in this case. There is simply nothing exceptional about the circumstances of this case. Therefore, the balancing test weighs against Plaintiff, and the Court concludes, as a matter of law, that this is not an appropriate case in which to apply the Equitable Discovery Rule.

As a result, the Court finds Plaintiff’s Petition was not timely and should not be considered. Therefore, the Court does not consider Plaintiff’s cross motion for summary

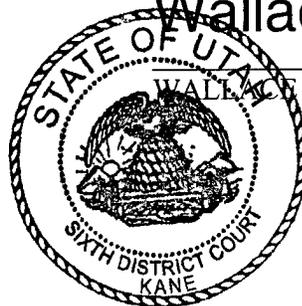
judgment, and it is DENIED. Plaintiff's untimely Petition should be DISMISSED with prejudice.

**CONCLUSION AND ORDER**

Defendant's Motion for Summary Judgment is GRANTED. Plaintiff's cross motion for summary judgment is DENIED. The Petition in this case is DISMISSED with prejudice. The parties shall each bear their own costs and attorneys fees.

This Memorandum Decision and Order is entered upon motion. This is a final Order and Judgment. This decision disposes of all of Plaintiff's claims against Defendant. No additional order is necessary or required.

DATED this 26 October, 2011.



**Wallace A. Lee**

WALLACE A. LEE, Judge

Digitally signed by Wallace A. Lee  
DN: cn=Wallace A. Lee, c=US, o=Sixth District Court,  
email=wlee@email.utcourts.gov  
Reason: I am approving this document  
Date: 2011.10.26 11:21:59 -06'00'

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110600048 by the method and on the date specified.

MAIL: MATTHEW F HAFEN 192 E 200 N 3RD FLR ST GEORGE, UT 84770

MAIL: ROBERT C KELLER 257 E 200 S STE 500 POB 45678 SALT LAKE CITY  
UT 84145-5678

~~MAIL: JEFFREY N STARKEY 192 E 200 N 3RD FLR ST GEORGE UT 84770~~

MAIL: JOHN M BARTH PO BOX 409 HYGIENE CO 80533

Date: Oct 27, 2011

Nolly Ramsay  
Deputy Court Clerk