

# Permit Freedom: Reducing Regulation in Everyday Life

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## SUMMARY

You can't make it far in life without the government insisting you apply for a permit. Because these processes are so common, they should be governed by consistent and reasonable guidelines.

Unfortunately, many local and state governments have permit granting processes that are unclear and unreasonable. When this is the case, those applying for permits can find it nearly impossible to attain the permissions and approvals they need.

The departments and governments that issue permits are numerous and diverse. Conse-

quently, the respective permitting processes and policies will vary. However, there are a few basic guidelines and standards that should apply to each process.

The approval or denial of a permit should be determined based on clear requirements and criteria. After a complete application is submitted, a decision should be made subject to a specific timeline set forth in advance. In the case that an applicant feels their permit was wrongfully denied, an appeal process should be in place to allow for an independent judicial review.

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Utahns have the right to reasonable, consistent, and clear rules governing how, when, and to whom permits will be granted.

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In 2016, a Layton resident named Chad built a \$12,000 shed in his backyard. Before embarking on the project, Chad approached the city to obtain approval for the project. Unfortunately, the process was lengthy, frustrating, and confusing.

The city initially told Chad that his building would have to be at least 20 feet from the street to be permitted. After he had started the project, built a retaining wall, and laid a cement pad, the city informed him that the building actually had to be 20 feet from the property line — a standard that differed from the original instructions and which his cement pad now violated.<sup>1</sup>

The constant confusion and poor communication, the several applications, and the appeals all culminated in a process that stretched over a couple years.

Unfortunately, this experience is not a unique one. Local and state governments require that permits be obtained for a wide range of activities. While appropriate in some respects, permit requirements can become an excessively burdensome threat to personal freedom and property rights if they are not bound by certain guidelines.

The requirement to obtain a permit prior to engaging in an activity undermines a basic conception of freedom — being able to go about your life free of restriction. Yet, permits are required for all sorts of random and benign activities.

Some of the many activities that require a permit in Utah include: animal ownership, home additions, electrical installation, burning yard waste, large gatherings, business ownership, and even having a security system.

## Unintended Consequences of Permitting

All permitting is inconvenient. While some permits contribute to the public good of health and safety, poorly administered permitting can cause harmful, unintended consequences. When regulations governing certain activities are highly burdensome, people are either disincentivized from doing them or incentivized to do them illegally.

In the first instance, a person might plan a home project that would raise their own and the surrounding property values but forgo the project because of the cumbersome permit requirements. In cases like this, activities that would be beneficial to an individual and a community might be sabotaged by poorly administered permit requirements.

In the second instance, a person might be planning a potentially dangerous construction project and decide to circumvent the regulations and proceed with their plans. In these instances, those undertaking high-risk activities might opt to evade the appropriate approval and safeguards that protect the health and safety of the people involved.

Whatever the case, it is in the interest of both the government and the individual to make the permitting process clear and simple.

## The Role of Permits

There is a compelling case for permit requirements when they actually protect the health and safety of the community. When an activity poses a significant risk of irreversible harm to others, it is reasonable to put measures in place to preempt that harm. This should be the extent of the role that permits play.

Permits should not, however, function as prohibitive measures that keep people from engaging in the regulated activity. If something is so harmful or problematic that a government wants to prevent it, elected officials should enact laws that do just that. Requiring permits that are exclusionary or purposefully difficult to obtain is an ineffective tactic that undermines the purpose of appropriate permits and ultimately encourages people to ignore government regulations.

Permits should also not function as a revenue generator. Some permit fees and requirements are so burdensome that their only apparent purpose is to raise money for the granting entity. This practice is tantamount to charging people for their freedoms.

Not only is this an affront to the principles upon which our country was founded, but it is also bad policy.

First, it is a volatile form of revenue generation which could cease at any time. On top of that, it further incentivizes people to avoid the process of obtaining a permit, which accomplishes little other than making criminals of those who cannot afford or wish to avoid the associated costs.

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Further, permits should not function as an arm of protectionism. Some especially difficult permitting processes require those wishing to start a new business to seek the permission of other companies in the industry. These laws are built to ensure that an innovator must obtain a Certificate of Need (CON), basically requiring those within the existing industry to agree that they want more competitors.<sup>2</sup>

These laws stifle innovation and are based on the assumption that the government or the producers should be the ones determining if there is a market need for a product or service. In reality, no one can decide that other than the consumers.

In short, permit requirements should be limited to protecting the health and safety of society. In some cases, this is appropriately accomplished. In other cases, burdensome permits and inefficient processes instead cause delays and confusion. In a worst-case scenario, this can constitute a threat to constitutional freedoms.

## Permits and the Court

The idea of permission prior to action is not new. During the British rule over the American colonies, subjects of the Crown were sometimes required to obtain a permit before publishing a book or expressing their political or religious opinions. This requirement was referred to as prior restraint.<sup>3</sup>

The issue of prior restraint has been extensively addressed by the U.S. Supreme Court, whose decisions have created a body of case law that suggests that prior restraints are not illegal or unconstitutional



so long as they function within the bounds of certain guidelines.

In *Southeastern Promotions, Ltd. v. Conrad*, for example, a promoter of theatrical productions was required to request permission to perform a certain play in a community space.<sup>4</sup> The request was denied and delayed which led the court to articulate an important limitation on any system of prior restraint.

The Supreme Court found that “a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards.” One of the safeguards a prior restraint must conform to is that “any restraint prior to judicial review can be imposed only for a specified brief period, and only for the purpose of preserving the status quo.”<sup>5</sup>

This means if a requirement for a permit keeps you from doing something, it can only do so for a brief period of time. If you must wait on a permit to engage in an action, the timeline for when that

permit will be granted must be brief and specified.

In *Joseph Burstyn, Inc. v. Wilson*, certain provisions of the New York Education Law forbade the commercial showing of any motion picture film without a license.<sup>6</sup> The problem was that the law also authorized denial of a license based on a censor’s conclusion that a film is “sacrilegious.”

What is and is not “sacrilegious” is a subjective question which leaves the decision-making power up to the license-issuer. The Court found this unacceptable, stating that “New York cannot vest in a censor such unlimited restraining control over motion pictures as that involved in the broad requirement that they not be ‘sacrilegious.’”<sup>7</sup>

Because such ambiguous and broad language can unfairly favor the license-issuer, it should not be considered a legitimate requirement.

This decision affirms that any permit requirements must have clear and

unambiguous language detailing what is and is not acceptable. Permitting requirements that include language like “good cause” or “reasonable” are unpredictable. Such language can subject applicants to approval or denial based on the whim of the government interpreter.

In *Freedman v. Maryland*, an applicant was convicted for showing a movie without submitting an application to the Maryland State Board of Censors for approval and permission.<sup>8</sup> In this case the Court ruled that in order to reject a permit application, the applicant must have the opportunity to seek an independent judicial review.

This decision means that when a permit application is denied, an appeal process involving a judicial review of the permit decision must be afforded.

These decisions, along with several others, constitute a body of case law which requires that any system

of prior restraint conform to three guiding principles.<sup>9</sup> First, the criteria for a permit approval must be clear and unambiguous. Second, there must be a timeline governing when a decision is made. Lastly, an appeal process must exist.

These cases generally deal with the expression of an individual’s First Amendment rights, raising the question of whether or not these requirements should apply to other areas of activity. The answer is a resounding yes.

In *Staub v. City of Baxley*, the appellant was convicted for soliciting membership for a labor union in the homes of employees because of a city ordinance which stated that a person may not solicit citizens of the city to become dues-paying members of a group without first obtaining a permit from the Mayor and Council of that town.<sup>10</sup>

In that Court decision, it was held that an ordinance which “makes

the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon . . . a permit or license must conform to certain procedural safeguards, or else that law will qualify as an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”<sup>11</sup>

Additional case law also makes clear that these guidelines must extend to any permitting process governing constitutionally protected activities. It is consistent and reasonable to extend these guidelines to any and all permitting processes. Doing so guarantees individuals a fair, consistent permitting process and protects local governments and agencies from expensive lawsuits.

## Improving the Permitting Process

The solution is not to outlaw permits outright, but to set reasonable and informed guidelines to govern how permits are administered. The following guidelines should be put in place to ensure that the permitting process is clear, consistent, and proper. By instituting these policies, permit granting entities are protected from unintentionally infringing on an applicant’s rights and permit applicants are guaranteed a reliable, fair process.

### Clear Criteria

First, there should be clear criteria that explains upon what condition a permit will be granted or denied. Unclear requirements or language will, at best, confuse applicants and, at worst, allow government employees to pick and choose based on their preferences or political pressure.



The importance of clear criteria can be seen in the case of one Utah homeowner who was planning to route power to their already-existing cabin in Salt Lake County. The requirements to obtain the permit necessary to do this were confusing and elaborate, but the applicant did their best to follow all of the apparent rules—even when this meant individually documenting every tree on their property. After their attempts to decipher the unclear criteria, their plans were denied.

The justification given for the denial was confusing and inconsistent, but because there were no clear instructions to begin with, it was difficult to argue with. The applicant had no solid ground upon which to make their case.

When entities that require permits are not required to include clear and consistent criteria in the permitting process, it can work to the detriment of the applicant. The process can become unnecessarily confusing, and an applicant might invest time and money toward meeting the standards only to find out that their interpretation of those standards was not what was meant.

On the other end, if the criteria for whether a permit will or will not be granted is confusing enough, a government employee is freely able to deny that permit. None of this makes for a well ordered society where essential freedoms are protected.

Just as the Court determined that what is “sacrilegious” is too vague a standard for granting permits, all permit requirements should be clear and concise so that, regardless of who is interpreting them, all parties understand what is required.

## Explicit Deadline

Second, any entity requiring a permit should be held to a specific timeline that governs when a permit will or will not be issued. Without a deadline governing the decision, a permit application can be indefinitely put off until it has been effectively denied. In some cases, a timeline may not be as important. In other cases, every second that passes without a decision can mean lost income or opportunity for the applicant. In all cases, a clear deadline should be in place.

adding some drywall, and finalizing all the necessary requirements for a legal accessory apartment, they applied for permission from the city to rent out the portion of their home. Then they waited for several months without hearing from the city. Of course, they followed up with the city but they were passed around to different employees, each insisting that what was required for the next step was not their job.

The process of converting their basement into an apartment proved almost impossible for this couple all because of a government

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In 2019, a young couple living in Utah County had finally saved enough money to purchase their first home. Not only was it in a location they loved, but the layout perfectly accommodated their plans to convert the basement into an accessory apartment. Even better, the property fit all the legal requirements and was zoned to allow for a legal accessory apartment. Their creative approach would take some extra work up front, but in the long run, it would allow them to afford their monthly mortgage payment.

As it turned out, the manual labor required to convert the space would not be the most difficult part of the project. After putting in the kitchen,

requirement to obtain a permission for their plans.

In this case, the problem with the permit was the lack of a deadline. Because there was no timeline, the couple spent months waiting to hear back from the city and losing rental income by the month. If there is no deadline to hold localities accountable, they can effectively deny permit applications by putting off the decision indefinitely without recourse or consequence.

As a rule, decisions about a permit should be made within 30 days from when a complete application is submitted. In certain cases, this deadline may need to be extended due to the layers of approval that are

required. In other cases, federal or state statutes already govern when a decision must be made. In every case though, a specific deadline must be set so that applicants know what to expect and granting entities can be held accountable. A failure by the government to respond should be a presumptive approval for the applicant.

### **Opportunity for Redress**

If a permit applicant feels their application was wrongfully denied, they should be guaranteed the ability to challenge that decision. When permit-granting entities have the only and say in any decision, there are no meaningful checks on that power. Decisions on permit applications will be more honestly and effectively made if entities know they can be held accountable for the decision.

For several years, a Utah man and his wife were renting out a travel trailer from their one-acre backyard. In an effort to be compliant with the law, they applied for a business permit. Upon filing their application, the county took their \$100 application fee and then rejected the application with no clear reasoning for why the decision was made.

At that point, they were out of options. Their request had been denied and there was no opportunity for redress. The decision was final and there was nothing they could do.

That finality grants the government unchecked power to regulate and prohibit activities indirectly via the permitting process. That's why any permitting process must have an appeal process in place so that the decision can face a judicial review. That way, if a permit is denied, that decision is subject to a second opinion.

### **Conclusion**

These proposals may seem very simple, and they are. In many cases, government entities already strive to operate by these guidelines in their permitting efforts, and that is to be applauded. However, the inconsistent approaches across the state suggests the need for a statewide standard.

Every Utahn should be guaranteed these simple protections when required to apply for a permit. Having processes that are clear and consistent with court rulings will make for a more efficient and effective permitting process.

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## **Summary**

The Utah Legislature should enact law which guarantees that the process of obtaining a permit conforms to the guidelines articulated by the Supreme Court of the United States. These guidelines provide a clear and consistent process for applicants and protect government entities from unintentionally contradicting court precedent. The language on the following page will accomplish these goals by establishing some simple standards by which local governments shall adhere.

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## PROPOSAL: FAIR & CONSISTENT PERMIT PROCESSES

- (1) A government entity that requires a permit shall include in the permit application the criteria that the entity uses to determine whether to grant the permit to an applicant.
  - (a) The criteria described in Subsection (1)(a) shall be:
    - (i) documented on the permit application;
    - (ii) accessible to the applicant prior to completing the application, including on the entity's website where possible; and
    - (iii) stated in clear and unambiguous language.
- (2) Within 30 days after the day on which an applicant submits a permit application to a government entity, the entity shall:
  - (a) make a final determination on a permit application; and
  - (b) notify the applicant of the final determination.
- (3) If a government entity denies an application for a permit, the entity shall:
  - (a) notify the applicant in writing of the reasons for the denial; and
  - (b) give the applicant an opportunity to challenge the denial through an administrative appeal process established by the entity.

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### Endnotes

1. Mark Shenefelt, "After building shed, Layton man faces criminal charges, ordered to tear it down," *Standard-Examiner*, November 10, 2016.
2. Timothy Sandefur, "Permit Freedom," Arizona: Goldwater Institute.
3. Michael I. Myerson, "The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and The Separation of Powers," *Indiana Law Review* 23 (2001): 295-342.
4. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–61 (1975).
5. *Ibid.*
6. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 531 (1952).
7. *Ibid.*
8. *Freedman v. Maryland*, 380 U.S. 51, 57-60 (1965).
9. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70–71 (1963); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 225-26 (1990).
10. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).
11. *Ibid.*

PUBLIC POLICY BRIEF

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FREQUENT  
RECURRENCE  
===== TO =====  
FUNDAMENTAL  
PRINCIPLES IS  
ESSENTIAL  
===== TO =====  
THE SECURITY  
===== OF =====  
INDIVIDUAL  
RIGHTS

UTAH CONSTITUTION  
ARTICLE I, SEC 27