Advisory Opinion # 153

Parties: Coyote Development, LLC and Heber City

Issued: February 24, 2015

TOPIC CATEGORIES:

Requirements Imposed on Development

The owner of parcel identified as “privately owned open space” is not obligated to preserve that parcel as open space unless there has been a specific dedication to a public agency. Preservation of open space may be made a condition of development approval (either by ordinance or imposed by the land use authority at approval). However, simply identifying a parcel as open space is not sufficient to show that dedication was a condition of approval. Restrictions on development or on property rights must be construed in favor of the property owner. A condition that property be preserved as open space may not be implied or presumed, but must be definitely stated

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ADVISORY OPINION

Advisory Opinion Requested by:	Heber City Anthony L. Kohler, Planning Director
Local Government Entity:	Heber City
Property Owner:	Coyote Development, LLC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	February 24, 2015
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a City deny a proposed subdivision of a parcel if the developer previously retained the parcel as open space?

Summary of Advisory Opinion

Any restriction on a property right, such as the right to develop, must be construed strictly in favor of the property owner. The City has no ordinance requiring dedication of open space, and there is not a sufficient basis to conclude that open space was required as a condition of the original subdivision approval. Furthermore, there is no evidence that the City has a contractual or prescriptive right to affect or restrict development on the open space parcel. In short, there is no reason to conclude that development on the parcel in question may be restricted.

Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205.

An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Anthony Kohler, Planning Director of Heber City on October 27, 2014. A copy of that request was sent via certified mail to Coyote Development, LLC, at PO Box 189, Heber City, Utah. According to the return receipt, Coyote Development received the Request on November 3, 2014.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Heber City (Anthony Kohler, Planning Director), received by the Office of the Property Rights Ombudsman on October 27, 2014.
2. Response from Mel McQuarrie, Managing Member of Coyote Development, LLC, received December 8, 2014.
3. Submission from Robert Mills, Neighboring Property Owner, received November 12, 2014.
4. Submission from David and Tara Lundberg, Neighboring Property Owners, received December 3, 2014.
5. Submission from John and Tess Farra, Neighboring Property Owners, received December 11, 2014.
6. Additional information submitted by Heber City, received December 30, 2014.

Background

Coyote Development, LLC is the owner and developer of a subdivision, known as "Cove at Valley Hills," located in Heber City.[1] The property was annexed into the City in 1991, and several development plats have been approved, beginning in 1992. The City states that in 1994, it requested that Coyote Development remove some property from a proposed subdivision plat because it was considered too steep for development.[2] That parcel was eventually included in the plat for the "Cove at Valley Hills," identified as "Open Space owned by Coyote Development"

[1] The City states that the subdivision was also identified as "Valley Hills Phase III," and "Valley Hills Plat H", but the development is currently known as "Cove at Valley Hills."
[2] This lot was identified as "Lot 71" in a 1994 subdivision plat application.

(the "Open Space Parcel"). The minutes of the Heber City Planning Commission from August 24, 2000—when the final plat was approved—state that some "hillside areas" were declared as privately-owned open space, and identified as such on the plat.[3] The City's Planning Commission approved the final plat with no further discussion on the Open Space Parcels.[4] Since 2001, the Open Space Parcel has been exempt from property taxes.[5]

The Open Space Parcel is located on a hillside with steep slopes, although the portion proposed for development has a more gradual slope.[6] The Parcel is located above several other homes, and is accessed by a road located near the rear property lines of the neighboring homes. Coyote Development considers the Open Space Parcel as a "remnant" parcel belonging to the development company, which has never been dedicated or restricted as open space.[7] The City does not dispute that the Parcel belongs to Coyote Development, but it maintains that the developer agreed to set aside the Parcel as open space as a condition of the plat approval in 2000.[8]

For several years, the Parcel was not developed, but in 2014, Coyote Development submitted an application to divide the Parcel and develop a portion as two residential lots.[9] The City acknowledges that the proposed lots meet its minimum standards for size and dimension. Although several neighboring property owners objected, the City's Planning Commission recommended approval of the subdivision on June 26, 2014. In September, the City Council postponed a final decision on the proposed subdivision, citing questions about whether the Open Space Parcel could be developed, along with concerns about the slope of the Parcel and its impact on neighboring property owners.

Coyote Development points out that other lots in the Cove at Valley Hills have been developed with similar slopes as the Open Space Parcel, and that development on the Parcel is possible

[3] Minutes of the Heber City Planning Commission, August 24, 2000, at 2. The statement was made by Mike Johnston, from the engineering firm that completed the plats. Coyote Development's representatives attended the hearing, but offered no comments on any proposed open space.

[4] The motion to approve the final plat included conditions related to bonding for improvements, clarification of an easement, traffic sign placement, calculation of water shares, landscaping for a proposed public park, alignment of a road, and some issues related to geotechnical reports. None of the conditions concerned the Open Space Parcels (the proposed park was in a different area of the development). *See* Minutes of the Heber City Planning Commission, August 24, 2000, at 3.

[5] The materials submitted for this Opinion indicate that the Open Space Parcel qualified for the exemption because development was not feasible. The Wasatch County Assessor stated that at least five years of back taxes would be charged if the Parcel is developed.

[6] There are no specific slope restrictions in the City's development code. The area for the two proposed building lots has a 23 to 30 percent slope. Other portions of the Open Space Parcel have slopes exceeding 50 percent.

[7] It appears that the Open Space Parcel remains undisturbed in a "natural" state, with native vegetation. Neither the City nor Coyote Development stated whether the public could access the Parcel for hiking or other recreation, or whether the Parcel as actually used by the public.

[8] The City states that Coyote Development offered to dedicate the Open Space Parcel as public lands when the plat was approved in 2000, but the City declined because the Parcel was too steep for City purposes.

[9] The materials submitted for this Opinion indicate that a subdivision of the Open Space Parcel was also requested in March of 2009, but was denied by the City. It appears that the remaining portion of the Open Space Parcel will not be developed.

within the City's existing standards.[10] Furthermore, Coyote Development notes that the City has accepted other property dedicated as open space, but transferred those parcels to private owners.[11] The City counters that those properties were no longer usable as public property, and so were deeded to the owners of adjoining lots.[12] In one instance, publicly owned property that had been reserved as open space was transferred in exchange for property used for a City-owned water tank.[13]

The owners of property adjoining the Open Space Parcel oppose Coyote Development's proposed subdivision. They state that they relied upon the plat for the Cove at Valley Hills, which designates the Parcel as open space, and that the adjoining open space was part of their decision to purchase their lots.[14] From this, the homeowners argue—along with the City—that the Open Space Parcel was a condition imposed on the original subdivision plat, and so the Parcel should never be developed.[15] Finally, the homeowners state that development of the Parcel is limited due to its steep slope.

In September of 2014, the City Council postponed a final decision on the proposed subdivision, so it could request this Opinion. Specifically, the City asks the Office of the Property Rights Ombudsman to determine whether the subdivision may be denied because Coyote Development committed to provide the open space?

Analysis

I. The Open Space Parcel was Not a Condition Required for Subdivision Approval.

Because there is no indication that the City specifically required Coyote Development to reserve the Open Space Parcel, it cannot be considered a condition of subdivision approval. Local governments may impose reasonable conditions on subdivision and development approvals. *See Call v. City of West Jordan*, 606 P.2d 217, 220 (Utah 1979).[16] These conditions may be imposed

[10] The City notes that a geotechnical analysis of the Open Space Parcel was completed in 1994. The analysis concluded that development was possible, with specific recommendations for foundations, grading, and water drainage. It was not stated that a new geotechnical analysis would be needed.

[11] Coyote Development cites these examples to support its contention that "open space" designation does not prohibit future development.

[12] The City explains that the former open space parcels became part of adjoining properties, and were not used as new building lots.

[13] Neither the City nor Coyote Development offered details on the water tank negotiations. The City explains that at the time, it was determined that there was no harm to the public by transferred property originally intended as open space.

[14] The neighboring property owners state that they relied on verbal representations that Open Space Parcel would remain as open space. Coyote Development disputes that any such representation was ever made, only that the Parcel was merely identified as privately-owned open space on the subdivision plat.

[15] One property owner, Robert Mills, also opposed the subdivision proposed in 2009. He submitted a letter he wrote to the City at that time,

[16] "[A]s a prerequisite for permitting the creation of a subdivision, the City . . . [may] impose reasonable regulations." *See also Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 901 (Utah 1981)(discussing cases where local governments were authorized to impose conditions on development or plat approvals). The Land

by a local ordinance, or required by a planning commission or legislative body as part of the approval process. The City acknowledges that its ordinances do not include a requirement that any open space be reserved or dedicated as a condition of subdivision plat approval. Thus, the requirement cannot arise from an ordinance.

The City contends that the Open Space Parcel was imposed by its planning commission, and accepted by Coyote Development, when the subdivision plat was approved in August of 2000. The minutes of the City's Planning Commission meeting on August 24, 2000 include a statement from Mike Johnston that "there are some hillside areas which are declared as open space area which will be privately owned open space."[17] That, however, was the only statement made concerning open space for the Cove at Valley Hills subdivision.[18] There is no statement attributed to the property's owner regarding creation of open space.[19] The motion to recommend approval of the subdivision plat made no reference to any required open space.[20]

Since there is no express requirement that Coyote Development reserve a portion of the property as open space, the condition was not imposed as part of the approval process. Zoning ordinances and requirements on development are in derogation of an owner's property rights, and so "should be strictly construed" in favor of the property owner. *See Patterson v. Utah County*, 893 P.2d 602, 606 (Utah Ct. App. 1995).[21] Following this precept, a condition or requirement cannot be implied or presumed, but should be created by specific language. The minutes of the Planning Commission do not specifically state that Coyote Development was required to reserve a portion of its property as open space. A single sentence—which was not expressed by a property owner—is not enough to sustain the conclusion that the Open Space Parcel fulfilled a requirement of subdivision approval. Therefore, the requirement was not a condition imposed at the time of approval.

The City thus has insufficient grounds to enforce a "condition" that Coyote Development continue to preserve the Open Space Parcel and relinquish any rights to develop it.[22] While an open space requirement would have feasibly been within the City's authority in 2000, the information provided does not support a conclusion that such a condition was actually imposed.[23]

Use, Development, and Management Acts (LUDMA) allow local governments to impose conditions on subdivision plats. *See* UTAH CODE ANN. §§ 10-9a-509(1)(h) and (i); 17-27a-508(1)(h) and (i).

[17] Minutes of the Heber City Planning Commission, August 24, 2000 at 2. Mike Johnston represented an engineering firm which apparently had prepared the plats.

[18] The minutes include discussion of a proposed public park in another part of the development.

[19] Representatives of Coyote Development attended the Planning Commission hearing, but made no statement regarding open space. In addition, there is no written statement indicating that the property owner agreed to reserve open space to fulfill a condition imposed by the City.

[20] The Commission recommended that the City Council "favorably consider" accepting the proposed park. *Id.*, at 3.

[21] *Patterson* cited several decisions from other states, including an Alabama decision holding that "land use restrictions" should be strictly construed. *See Ex parte Fairhope Bd. of Adjustment & Appeals*, 567 So.2d 1353, 1354-55 (Ala. 1990). *See also Carrier v. Salt Lake County*, 2004 UT 98, ¶ 31, 104 P.3d 1208, 1217.

[22] This does not mean, however, that the City is prevented from imposing a reasonable open space requirement on future subdivision approvals.

[23] This Opinion does not examine whether reserving the entire Open Space Parcel would have been justified when the subdivision plat was approved in 2000. This Opinion merely notes that the City could have possibly required dedication or reservation of some property as open space.

Moreover, no such condition was imposed by ordinance, and the brief mention in the minutes of the Planning Commission is hardly enough to establish a condition required of approval.

II. It Does Not Appear Likely That Easement or Use Rights Were Acquired in the Open Space Parcel.

Because there has been no evidence of actual use of the Open Space Parcel by the City, the public, or neighboring property owners, it appears unlikely that any use or easement rights have been created. The materials submitted for this Opinion make no reference to any use of the Open Space Parcel by the public or even by neighboring property owners.[24] There is also no indication that Coyote Development agreed to allow any type of uses on the Parcel. Finally, no private prescriptive rights could be created, because not enough time has passed since the Parcel was established.[25]

The Parcel's label as open space on the plat is insufficient to establish an obligation that the Parcel remain unchanged in perpetuity. Plats may be amended and the features shown thereon changed. Typically, changes to a plat must be done with the consent of all parties owning an interest in the portion being changed. *See* UTAH CODE ANN. § 10-9a-608. Often an open space designation will include a dedication to the public or to an homeowner's association (HOA). In such case, the public or HOA gains an ownership interest in the property, and with it the legal ability to prevent a change. However, no such dedication is indicated for the Open Space Parcel. Coyote Development retained full ownership; it therefore retains the ability to control the destiny of the Parcel, which includes changing the parcel to something different than open space, despite it being so labeled on the Plat.

Unless it can be shown that an agreement existed between the City and Coyote Development, or that the City made some special use of the Parcel, the City has no basis to insist that it remain undeveloped. Although the neighboring property owners may enjoy the views and privacy afforded by the undeveloped property behind their homes, that alone is insufficient to guarantee that the parcel will remain in that state indefinitely.

Conclusion

Heber City simply does not have sufficient justification to prevent development on the Open Space Parcel. Any requirement restricting a property right (such as the right to develop) must be construed in favor of the property owner. The City has no ordinance requiring that property be reserved as open space, and the record of the subdivision approval from 2000 does not show that open space was imposed as a condition of approval. Finally, since there is no evidence of a specific agreement or special use, the City has no basis to restrict development. Along the same

[24] The neighbors state that the location of the Open Space Parcel near their homes was a factor in their decision to purchase their lots and build homes. Other than the view, however, there is no evidence that the Parcel was used for hiking or other recreational uses.

[25] Prescriptive easement rights may only be established after 20 years of continuous use. *See Potter v. Chadaz*, 1999 UT App 95, ¶ 17, 977 P.2d 533, 538. The Open Space Parcel was created in 2000, so less than 20 years passed before the proposed subdivision in 2014.

lines, the neighboring property owners have not demonstrated a special or unique right to restrict development.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Mayor David R. Phillips
Heber City
75 North Main Street
Heber City, Utah 84032

On this _____ Day of February, 2015, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman