Advisory Opinion #208

Parties: Kelly Hughes Construction, LLC; West Point City
Issued: February 22, 2019

TOPIC CATEGORIES:

Compliance with Mandatory Land Use Ordinances
Interpretation of Ordinances

Under the plain language of the applicable code provisions, the City must review the applicant's proposed planned development as a conditional use in the R-1 Zone. Moreover, the code allows the applicant to qualify for up to 62 lots on 20.72 acres of land, provided it can include the required amount of open space and other amenities.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By:	Kelly Hughes Construction, LLC
Local Government Entity:	West Point City
Applicant for Land Use Approval:	Kelly Hughes Construction, LLC
Type of Property:	Residential
Date of this Advisory Opinion:	February 22, 2019
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUES

1. Must the City review the developer's proposed planned development project as a conditional use, or may the City require the developer to first apply for additional zoning approvals?
2. Has the City correctly calculated the maximum number of allowable lots for a planned development under applicable City Code provisions?

SUMMARY OF ADVISORY OPINION

Under the plain language of the applicable West Point City Code, the City must review Hughes's proposed planned development as a conditional use in the R-1 Zone. Moreover, the Code allows Hughes to qualify for up to 62 lots on 20.72 acres of land, provided it can include the required amount of open space and other amenities.

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 Loyal C. Hulme, Attorney for Kelly Hughes Construction, LLC on September 14, 2018. A copy of that request was sent via certified mail to Kyle W. Laws, City Manager for West Point City, at 3200 West 300 North, West Point, UT, 84015.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Letter Requesting an Advisory Opinion submitted by Loyal Hulme, Attorney for Kelly Hughes Construction, LLC, dated September 14, 2018.
2. Reply submitted by Felshaw King, Attorney for West Point City, on October 12, 2018.
3. Response submitted by Loyal Hulme, Attorney for Kelly Hughes Construction, LLC, on October 31, 2018.
4. Response submitted by Felshaw King, Attorney for West Point City, on November 8, 2018.
5. Response submitted by Loyal Hulme, Attorney for Kelly Hughes Construction, LLC, on November 14, 2018.
6. Email response submitted by Felshaw King, Attorney for West Point City, on November 15, 2018.
7. Response submitted by Loyal Hulme, Attorney for Kelly Hughes Construction, LLC, on November 19, 2018.
8. Email response submitted by Felshaw King, Attorney for West Point City, on November 21, 2018.

BACKGROUND

On March 2, 2018, Kelly Hughes Construction, LLC ("Hughes") submitted to West Point City (the "City") a preliminary subdivision plat application along with a conditional use permit application for a planned development project in the R-1 Rural Residential Zoning District. The proposal included single family residential building lots and some shared open space. It appears that, upon receiving the applications, West Point City staff and City officials were unsure of the nature of a planned development under the West Point City Code (the "City Code"), and also unsure of how to process, review, and approve an application for a planned development in the R-1 Zone.

After some internal discussion and consultation, the City concluded that the R-1 Zone allowed planned development as a conditionally permitted use. Accordingly, on March 8, 2018, Hughes finalized submission of the preliminary plat and conditional use permit applications and paid the required fees for the applications. The City began the development review process. Between March 8, 2018 and July 19, 2019, City staff reviewed the project for compliance with the City Code and City Officials discussed the project proposal at various City meetings.

At some point in the review process, City staff determined the City had initially misinterpreted ordinances applicable to Hughes's development proposal, and that Chapter 17.35 Planned Unit Development (PUD) Overlay Zone, required an applicant to formally request a rezone applying the PUD Overlay Zone to a property before the applicant could request approval of a planned development as a conditional use. In accordance with this discovery, the City Attorney informed Hughes in a letter dated July 19, 2018, that Hughes would need to submit a rezone application for the PUD Overlay Zone before the City could further consider Hughes's preliminary plat and conditional use permit applications. Hughes disagreed with the City's interpretation of the Code, and the parties have been unable to agree on how to proceed.

On September 14, 2018, Hughes submitted to this office a Request for Advisory Opinion asking us to determine whether Hughes is entitled to consideration of its project as a conditional use under the West Point City Code. Hughes has also asked us to consider a question regarding the interpretation of density bonus requirements for planned developments under the City Code.

ANALYSIS

I. The West Point City Code Expressly Allows "Planned Development" as a Conditional Use in the R-1 Zone

Hughes argues that the West Point City Code allows "planned development" as a conditionally permitted use in the R-1 Zone. Hughes asserts that the City Code does not require Hughes to obtain a rezone applying the PUD Overlay Zone to its property and that the City is obligated to review and approve Hughes's conditional use permit application in accordance with the Code's applicable substantive provisions. The City disagrees, arguing that the Code requires Hughes to request and successfully obtain a rezone applying the PUD Overlay Zone to its property before the City may consider Hughes's conditional use permit application.

Whether the City Code requires Hughes to obtain a rezone before the City may review Hughes's development proposal as a conditionally permitted use requires application of the principles of ordinance interpretation. The Utah Land Use, Development, and Management Act (LUDMA) provides that a city must "apply the plain language"[1] of its land use ordinances to a land use application. UTAH CODE § 10-9a-306(1). LUDMA further states that if a city's ordinances do not "plainly restrict a land use application," the city must interpret and apply the ordinances "to favor the land use application." UTAH CODE § 10-9a-306(2).[2]

[1] The primary goal of interpretation is "to give effect to the legislative intent, *as evidenced by the plain language*, in light of the purpose the [ordinance] was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (emphasis added). "When the plain meaning of the [ordinance] can be discerned from its language, no other interpretive tools are needed." *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804.

[2] Stated differently, "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of…property, provisions…restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah App. 1995).

Here, the Wet Point City Code's "Table of Land Use Regulations" is the dispositive provision. *See* WEST POINT CITY CODE § 17.25.070. This table lists each of the City's base zoning districts and identifies whether particular uses are permitted, permitted as conditional uses, or not allowed. This table clearly and expressly allows "Planned Development" as a conditional use in the R-1 Zone—the zoning district applicable to Hughes's property. Consequently, and in accordance with the interpretive rules explained above, the City must review Hughes's development proposal as a conditional use permitted in that zone, ensuring it complies with provisions in the City Code governing planned development. The City may not require Hughes to obtain any additional zoning designations on its property.

The City's position, that Hughes must first request a rezone to apply the PUD Overlay zone to it property, is understandable. Chapter 17.35 of the City Code separately lays out a procedure a property owner may follow to request application of the PUD Overlay Zone to the R-1, R-2, or R-3 zones. Once the City Council approves the overlay zone and applies it to a base zoning district, the Code indicates that a property owner may then pursue approval of a planned unit development. Since the Code allows this approach, a property owner may choose to seek approval of a planned development in this manner.

However, because the City Code already permits planned development as a conditional use in the R-1 Zone, seeking application of the PUD Overlay zone to the R-1 Zone is unnecessary.[3] As explained above, the first rule of interpretation under Utah law is that the ordinance's plain language governs. Since the plain language of the applicable West Point City Code provision allows planned development as a conditional use in the R-1 Zone, the City may not require Hughes to obtain additional zoning designations before applying for a conditional use permit.

Moreover, the Utah Code states that a City must approve a conditional use "if reasonable conditions are proposed, or can be imposed, to mitigate…reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards." UTAH CODE § 10-9a-507. This means that as long as Hughes's proposed planned development complies with standards and requirements set forth in WEST POINT CITY CODE CHAPTER 17.70 governing conditional uses, and any other substantive City Code provisions applicable to planned development, the City must approve the proposal.

II. The City is Obligated to Permit the Developer's Reasonable Interpretation of Applicable Code Provisions

The density bonus question, like the question addressed above, requires employment of the principles of ordinance interpretation. The City Code, in pertinent part, provides that "[not] less than 25 percent of the gross area of the planned development shall be retained in permanent open space…for the use of the occupants of the planned development." WEST POINT CITY CODE §

[3] It is admittedly unclear why the City Code permits planned development as a conditional use in the base R-1 Zoning District, and also separately provides a means to pursue a planned development by applying the PUD Overlay Zone to a base residential district. The difference may be that West Point City Code Section 17.35.040 specifically allows attached dwellings in the Overlay Zone, while the underlying base zone in any give case may not. Regardless of this uncertainty, it is nonetheless clear and unambiguous that the R-1 Zone, by itself, allows planned development as a conditional use. Moreover, any ambiguity must be interpreted in favor of the property owner.

17.35.100(F). Elsewhere, the City Code indicates that the base residential density in the R-1 Zone is 2 lots per acre, and that City Council, "upon recommendation of the planning commission," may award a developer a "density bonus" when the developer includes certain design options, such as additional open space and other amenities, in its development proposal. For each eligible design element, the Council may award a certain percentage increase in the development's per acre residential density, up to a maximum allowed density of 3 lots per acre. *See* WEST POINT CITY CODE § 17.35.100(D).

Hughes and the City disagree over how the maximum density for a planned development should be calculated under these applicable provisions, and what the maximum allowable lots should be in this case. When Hughes submitted its request for Advisory Opinion to this office, it asserted the City had indicated early on in the review process that it would calculate the per lot density for the project based on *gross* density as opposed to *net* density[4], resulting in a total lot allowance of up to 62 residential lots on 20.72 total acres.[5] Reaching this number would depend on the developer's willingness and ability to provide the requisite amount of open space and amenities in its development proposal.

The City, however, in an August 28, 2018 letter to Hughes, explained that under its interpretation of the applicable Code provisions the City must first subtract 25 percent of the gross acreage before calculating the maximum number of allowable lots. The 25 percent number represents the minimum allowed amount of required open space for a planned development under West Point City Code § 17.35.100(F), quoted above. The City asserts it may not include the minimum 25 percent required open space in any density bonus calculations. Thus, by the City's calculations, 25 percent of 20.72 acres is 15.55 acres, and 15.54 acres x 3 lots per acre equates to a potential maximum of 47 lots, instead of the 62 lots calculated by Hughes.

The plain language of the City Code does not support the City's approach to calculating the maximum number of allowable lots. Nowhere does the Code indicate that the City should subtract the 25 percent of required open space from the gross acreage before calculating the total allowable density bonus. The Code does, however, state that the developer must retain 25 percent of the *gross area* of the planned development in open space, WEST POINT CITY CODE § 17.35.100(F), and that *gross residential density* "is determined by dividing the total number of dwelling units in a defined area by the *total acreage of all the land within the area*." WEST POINT CITY CODE § 17.10.020 (emphasis added). These provisions, read together, suggest that the residential density of a planned development should be calculated in terms of *gross area*.

Moreover, as indicated above, the City Code simply and clearly states that the base density of the R-1 Zone is 2 lots per acre, and that a developer may raise that density to 3 lots per acre by providing additional open space and amenities. Accordingly, if Hughes presents a proposal that arguably complies with the plain language of the City Code, the City must approve the proposal.

[4] The City Code defines "residential density" as the average number of dwelling units on one acre of land in a given area." The definition further explains that "[n]et residential density is determined by dividing the total number of dwelling units in a defined area by the total acreage of all parcels of land within the area that is used exclusively for residential and accessory purposes." Furthermore, it state that "[g]ross residential density is determined by dividing the total number of dwelling units in a defined area by the total acreage of all land within the area." WEST POINT CITY CODE § 17.10.020.

[5] At a density of 3 lots per acre.

The City may not impose additional "administrative interpretations" without a Code provision enabling it to do so.

Consequently, assuming Hughes can provide the required amount of additional open space and other amenities to reach the maximum density bonus of 3 lots per acre, it may qualify for up 62 total lots (20.72 acres x 3 lot per acre = 62.16 lots) in its proposed planned development project.

CONCLUSION

Under the plain language of applicable West Point City Code provisions, the City must review Hughes's proposed planned development as a conditional use in the R-1 Zone. Moreover, the Code allows Hughes to qualify for up to 62 lots on 20.72 acres of land, provided it can include the required amount of open space and other amenities.

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:

Kyle W. Laws, City Manager
West Point City
3200 West 300 North
West Point, UT 84015

On this 25th Day of February, 2019, 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.

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Office of the Property Rights Ombudsman