

Advisory Opinion #216

Parties: Michael Halls; Kaysville City

Issued: October 11, 2019

TOPIC CATEGORIES:

Compliance with Land Use Ordinances
Interpretation of Ordinances
Subdivision Plat Approval

Projects within the city's Planned Residential Unit Development Overlay Zone may be developed at higher densities than allowed in the underlying zone, as long as a measured amount of common open space is provided. A subdivision plat could be designed such that detention basins and areas within the front setback meet all of the code requirements for common open space. Thus, by the plain meaning of the ordinance, either may be included in common open space calculations.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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: Michael Halls
Local Government Entity: Kaysville City
Applicant for Land Use Approval: Subdivision Plat
Type of Property: Residential
Date of this Advisory Opinion: October 11, 2019
Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUE

May Kaysville City include detention basins and areas within front setbacks in common open space calculations?

SUMMARY OF ADVISORY OPINION

Projects within the Planned Residential Unit Development Overlay Zone in Kaysville, Utah may be developed at higher densities than allowed in the underlying zone, as long as a measured amount of common open space is provided. A subdivision plat could be designed such that detention basins and areas within the front setback meet all of the Code requirements for common open space. Thus, by the plain meaning of the ordinance, either may be included in common open space calculations.

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 Michael Halls on July 9, 2019. A copy of that request was sent via certified mail to Maria Devereaux, City Recorder, City of Kaysville, 23 East Center Street, Kaysville, Utah 84037 on July 11, 2019.

EVIDENCE

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

1. Request for an Advisory Opinion, submitted by Michael Halls on July 9, 2019.
2. Letter submitted by Lyle Gibson, Community Development Director, Kaysville City, on July 30, 2019.

BACKGROUND

Ovation Homes is seeking plat approval for a 5.74 acre active adult community near 1955 West and 200 North in Kaysville, Utah. The subject property is within the Planned Residential Unit Development Overlay Zone (commonly referred to as "PRUD"). Projects within PRUD may be developed at higher densities than allowed in the underlying zone as long as a measured amount of common open space is provided. The required open space is calculated according to a set formula¹ and once platted, must be burdened with a permanent Neighborhood Open Space Easement granted to Kaysville City to ensure the common open space remains open.²

According to the submissions, the development proposed by Ovation Homes takes advantage of this density bonus in exchange for providing an estimated 25,000 square feet of common open space. A large percentage of this common open space is provided via a minimally improved detention basin required by another section of the Code. The submissions do not indicate how the remaining common open space areas are improved.

Michael Halls lives near the proposed development and objects to the quality of the common open space proposed. He mentions that neighboring developments include walking trails and playground equipment in their common open space. He notes a lack of evidence establishing that the detention basin open space would be "useable to all owners" and "easily accessible therefrom" as required by Kaysville City Code.³ He also questions whether the proposed common open space meets the intended purpose of the zoning classification, which includes preserving "meaningful open space, conservation areas, and lands such as wetlands, steep slopes, and unique vegetation."⁴

¹ "The minimum common open space required shall be determined by dividing the minimum lot size allowed in the underlying zoning district by the average lot size in the plat and then multiplying the result (quotient) by ten percent (10%), then multiplying the product by the total area of the subdivision." KAYSVILLE MUNICIPAL CODE § 17-34-7(1)(f).

² *Id.*

³ *Id.*

⁴ *Id.*

Furthermore, according to the record, the City Engineer has opined that in addition to the detention basin, the areas within the front setback (*i.e.* front yards) could be included in common open space calculations.

Mr. Halls has requested this Advisory Opinion to determine if the otherwise unimproved detention basin and front setback area may be included in the common open space calculations for projects developed under the Planned Residential Unit Development Overlay Zone.

ANALYSIS

Ordinance interpretation requires application of the canons of statutory construction.⁵ An analysis of the plain language of the ordinance always comes first,⁶ with the primary goal “to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.”⁷ If the plain language of an ordinance is sufficiently clear, the analysis ends there.⁸

Note that meaning must be given to words which are missing as well as those included. It must be presumed “that each term included in the ordinance was used advisedly”⁹ and “[o]missions in statutory language should be taken note of and given effect.”¹⁰

It is also important to recognize that zoning ordinances should be strictly construed in favor of the property owner, since such ordinances are in derogation of an owner’s use of land.¹¹

While “common open space” is not specifically defined, the Kaysville City Code (hereafter, the “Code”) includes the following requirements:

- The common open space must be “usable and accessible by all owners.”¹²
- Similarly, the Code stipulates that “[t]he open space . . . should be located adjacent to all dwelling units or easily accessible therefrom”¹³
- “No streets, driveways, or residential parking areas may be included as part of the required common open space.”¹⁴
- “The required common open space may include natural areas, and/or areas totally designed and landscaped.”¹⁵
- “Any open space that is not common open space cannot be used to fulfill the common open space requirements.”¹⁶

⁵ *Foutz v. City of South Jordan*, 2004 UT 75, ¶8.

⁶ *Carrier v. Salt Lake County*, 2004 UT 98 ¶30.

⁷ *Foutz*, 2004 UT 75, ¶11.

⁸ *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8.

⁹ *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 602, 606 (Utah Ct. App. 1995).

¹⁰ *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14.

¹¹ *Carrier*, 2004 UT 98 ¶31.

¹² KAYSVILLE MUNICIPAL CODE § 17-34-7(1)(f).

¹³ KAYSVILLE MUNICIPAL CODE § 17-34-7(1)(c).

¹⁴ KAYSVILLE MUNICIPAL CODE § 17-34-7(1)(f).

¹⁵ *Id.*

¹⁶ *Id.*

- “A Neighborhood Open Space Easement on and over the common open space shall be granted to Kaysville City concurrent with recording of the final plat. The easement will provide that the common open space remains open.”¹⁷
- “The easement shall allow for landscape maintenance and construction of recreational structures as long as not more than thirty percent (30%) of the open space is covered by such structures.”¹⁸

In summary, the Code provides that the common open space must be accessible to the residences, may be left natural or be landscaped, have no more than thirty percent (30%) devoted to recreational structures, must be permanently dedicated to common or public use, and cannot include driveways and parking areas. As currently depicted in the record, the detention basin appears to meet the Code requirements for common open space.

Likewise, the subdivision could be designed such that the areas within the front setbacks similarly met the necessary requirements for common open space. To qualify, the areas within the front yard setbacks must be commonly owned, burdened with a permanent Neighborhood Open Space Easement, and be “usable and accessible to all owners,”¹⁹ rather than the private property of the individual lot owners. If this is done, commonly held open space in front yards would be permanently owned and controlled by the HOA, and usable by all residents, and would qualify as common open space.

Note that the Code includes a list of areas which *cannot* be included in the common open space. The Code states that “[n]o streets, driveways, or residential parking areas may be included as part of the required common space.” Recall that “[o]missions in statutory language should be taken note of and given effect,”²⁰ In this case, neither detention basins nor front setbacks are included in the list of areas which *cannot* be included in common open space. This lack of prohibition equates to permission unless prohibited elsewhere.

Mr. Halls further argues that language in the purpose statement of PRUD precludes detention basins and front setbacks from being common open space. He points to language that states one purpose of PRUD is to provide “meaningful open spaces, conservation areas, or sensitive lands.”²¹ He argues that using detention basins and front yard setbacks as common open space does not meet this standard. However, purpose statements are not substantive parts of an ordinance. The Utah Supreme Court explained that “a statement of legislative purpose . . . is nothing more than a statement of policy which confers no substantive rights.”²² In other words, a purpose statement does not establish rights or limit activities. A purpose statement may “provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute.”²³

¹⁷ KAYSVILLE MUNICIPAL CODE § 17-34-7(1)(g).

¹⁸ *Id.*

¹⁹ KAYSVILLE MUNICIPAL CODE § 17-34-7.

²⁰ *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14.

²¹ KAYSVILLE MUNICIPAL CODE § 17-34-1.

²² *Price Development Co. v. Orem City*, 2000 UT 26, ¶ 23, 995 P.2d 1237, 1247.

²³ *Id.*

Furthermore, the quoted terms expressed in the purpose section are not enforceable because they are not based upon objective, measureable standards. Requirements for development imposed by local government must be based upon objective, measureable facts, and “denial of a permit is arbitrary when the reasons are without sufficient factual basis.”²⁴ In this case, the Code provides no way to objectively measure or enforce the vague ideal of “meaningful” as applied to open space, conservation areas, or sensitive lands.

Mr. Halls also argues that the detention basin is mandated by another section of the Code and should not do double duty as common open space. The relevant section of Code requires that where cul-de-sacs are provided and “surface water drains into the turnaround due to the grade of the street, necessary catch basins and drainage systems and easements shall be provided.”²⁵ There is nothing in this section, nor the section requiring common open space, to suggest an area cannot be designated both as a detention basin and common open space.

In summary, there is nothing in the Code which would prevent the proposed detention basin and front setback areas from being included in common open space. Both areas can meet the criteria established in the Code and are not otherwise excluded. As depicted in the record, the detention basin does not include driveways, streets, or parking areas, may be landscaped or left natural, does not include a recreational structure which covers more than thirty percent (30%) of the area, and could be dedicated to common or public use, all as required by the Code. Furthermore, the development could be designed such that areas within the front setback could similarly meet all of the Code requirements for common open space. Thus, by the plain meaning of the ordinances, either detention basins and/or commonly owned front setback areas may be included in common open space calculations.

CONCLUSION

Detention basins and commonly owned areas within front setbacks may be included in common open space calculations for projects developed under the Planned Residential Unit Development Overlay Zone in Kaysville, Utah. Projects within this overlay zone may be developed at higher densities than allowed in the underlying zone, as long as a measured amount of common open space is provided. As depicted in the record, the detention basin appears to meet all of the Code requirements for common open space. The subdivision could be designed such that the areas within the front setbacks similarly meet the necessary requirements. Thus, by the plain meaning of the ordinance, either may be included in common open space calculations.

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

²⁴ *Davis County v. Clearfield*, 756 P.2d 704, 711 (Utah Ct. App. 1988).

²⁵ KAYSVILLE MUNICIPAL CODE § 19-52-2(3).

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 § 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:

Maria Devereaux
Kaysville City Recorder
23 East Center Street
Kaysville, Utah 84037

On this _____ day of October, 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.

Office of the Property Rights Ombudsman