Advisory Opinion 281

Parties: David Hansen; Cedar Hills City
Issued: November 30, 2023

TOPIC CATEGORIES:

Compliance with Mandatory Land Use Ordinances
Interpretation of Ordinances

The city may lawfully restrict residential development on a lot designated on the subdivision plat as “open space” and dedicated to the public. Furthermore, the lot is zoned PF – Public Facilities which prohibits residential development which is the use sought by the owner. The lot is limited to land uses consistent with the confines of both the open space plat restriction and the PF – Public Facilities zoning ordinance.

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ADVISORY OPINION

Advisory Opinion Requested by:	David Hansen
Local Government Entity:	Cedar Hills City
Property Owner:	David Hansen
Type of Property:	Land designated as open space within residential subdivision
Date of this Advisory Opinion:	November 30, 2023
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

Issue

May a city lawfully prevent residential development on a lot designated as "open space" on the approved subdivision plat and which is zoned Public Facilities?

Summary of Advisory Opinion

The city may lawfully restrict residential development on the lot in question.

First, the subdivision plat designates the lot as "open space" and dedicates its use to the public. This restriction was clearly and unambiguously a requirement of plat approval. Such restrictions run with the land and would not be ameliorated by the later tax lien sale and quiet title action. Plat restrictions may only be removed by an approved amended plat.

Second, the lot is zoned PF – Public Facilities which prohibits residential development. This PF zoning is a valid regulation on the subject property. The zoning continues to allow permitted uses of the property that could be consistent with its platted restriction as open space, such as a cemetery or park. Zoning restrictions may only be removed by rezoning of the property.

In conclusion, the lot is limited to land uses consistent with the confines of *both* the open space plat restriction and the PF – Public Facilities zoning ordinance. To develop the property as

residential lots, an amended plat removing the open space restriction would need to be approved in addition to rezoning the property to allow residential uses.

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 Advisory Opinion submitted by Keith R Lalliss on behalf of David Hansen dated March 28, 2023.
2. Letter received from Hyrum J. Bosserman, on behalf of the City of Cedar Hills dated April 28, 2023.
3. Letter received from Keith R. Lalliss on behalf of David Hansen dated May 15, 2023.
4. Letter received from Hyrum J. Bosserman on behalf of the City of Cedar Hills dated June 9, 2023.
5. Letter received from Keith R. Lalliss on behalf of David Hansen dated July 7, 2023.
6. Email from Hyrum J. Bosserman on behalf of the City of Cedar Hills dated July 28, 2023.

Background

The parties agree on the underlying facts. In approximately 1976, Cedar Hills Development Co. and Associated Industrial Developers (Developer) developed what would be known as the Cedar Hills Subdivision. The development consisted of several phases including Plat D of the Cedar Hills Subdivision which is the focus of this Advisory Opinion (the Subdivision or Plat).

When development of the larger project was started, the property was in unincorporated Utah County. In 1977 the City of Cedar Hills incorporated (City), and final Plat approval was given by City Council in 1978.

As a condition of approval of the Subdivision Plat, the City required the Developer to dedicate streets and designate open space areas to the public. The dedicatory language on the Plat reads "dedicate the streets and other public areas as indicated hereon for the perpetual use of the public." The Subdivision Plat depicts "Oak Road" as a street and Lot 19 as "Open Space." This open space is the only public area depicted on the Plat.

Both parties agree that Lot 19 was intended to be dedicated to the City as perpetual open space or other community purposes as a condition of approval, and the recorded plat includes a dedication and acceptance of the lot. However, for some unknown reason, the county recorder or assessor did not record this transfer of ownership of Lot 19 to the City when the Plat was recorded. Because, according to the county assessor's records, Lot 19 was still held by the Developer, the County began assessing property taxes on the Lot. The Developer failed to pay the taxes owed and Utah County sold the property at a tax sale to a private individual who later sold the lot to the current

owner (Property Owner or Owner). Title to the property was granted to Property Owner by court decree quieting title in 1993. Utah County Recorder Entry No. 83769 Book 3300 Page 419.[1]

Lot 19 has remained as open space since that time and the public has used the land accordingly. Neighbors surrounding Lot 19 have submitted a letter to the City stipulating that they have regularly used and continue to use Lot 19 for recreational activities including walking, hiking, sledding, and as a play area for their children.

According to the City, a similarly situated lot designated as open space in the same Cedar Hills Subdivision – Lot 26 of Plat I – has recently been converted to common area ownership.[2]

In about 2015 the City rezoned the property to "PF – Public facilities zone." Permitted uses in this zone include uses as a cemetery, power station, water storage, major transmission lines, municipal and public works buildings and facilities, parks, and schools. The City maintains that the Property Owner has the right to seek approval for any of the uses permitted in the zone. Otherwise, the City maintains that the Owner may petition the City to have the property rezoned to residential zoning.

Both parties maintain that Utah statute prohibits an individual from owning common area open space. The City believes this could be resolved by converting the Property to common area ownership as was recently done on a similarly situated lot nearby. The Property Owner, however, asserts that the statutory prohibition means that the Property may therefore not be classified as or remain as open space, and furthermore that the prior rezoning of the Property to Public Facilities zoning extinguished the lot restriction.

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[1] Arguably, legal ownership of Lot 19 was transferred to the City when the plat was signed and recorded, even where the County Assessor did not document the transfer. *See Falula Farms v. Ludlow*, 866 P.2d 569 (Utah Ct. App. 1993). Relevant code from 1978 was not included in the record nor otherwise readily available, however, current Utah Code reflects the standard practice. Utah Code § 10-9a-607(1) (2023) reads in relevant part "a plat that is signed, dedicated, and acknowledged by each owner of record, and approved according to the procedures specified in this part, operates, when recorded, as a dedication of all public streets and other public places, and vests the fee of those parcels of land in the municipality for the public uses named or intended in the plat." In plain language, ownership of places indicated for public use is transferred to the city when the plat is recorded. However, title was quieted to the Property Owner by court decree in 1993 and ownership has not been contested in the record submitted for this Advisory Opinion, so we assume the Property Owner owns the property.

[2] According to the City, this was done in accordance with Utah Code § 10-9a-606 which "precludes ownership of common area by a person," but instead dictates that "the association holds in trust the parcels designated as common area for the owners of the other lots, units, or parcels created by plat." Apparently, because a private owner could not own common area, ownership of Lot 26 was transferred to "common area." It is not clear from the record whether this was a voluntary or forced solution. Both parties have used this section of Code to support their own arguments. The Property Owner claims this statute precludes private ownership of common area, and therefore, the land cannot remain as open space and should be privately developed as residential lots. On the other hand, the City claims the land should instead be converted to "common area" apparently owned either by a homeowner's association or the City. We do not find these arguments dispositive for two reasons. First, this section of code does not apply to Lot 19. The statute regulates "common area" that an "association owns, maintains, repairs, or administers." UTAH CODE § 57-8a-102(5). In this case, the open space was dedicated to the public via the language on the Subdivision Plat, but the county records depicted it as being owned by a private owner. Either way, Lot 19 has never been owned by a private association. Therefore, this section of code does not apply. Second, even if Lot 19 had been designated as common area to be owned by an association instead of public open space, this section of Utah Code was apparently passed in 2005, long after the subdivision in question was created and there is nothing in the statute to imply that it should be applied retroactively to mandate the transfer of ownership of property in situations such as the one at hand.

The Property Owner has suggested that the Property be rezoned residential to allow for economically productive use as residential lots, and threatened a lawsuit "to allow reasonable development of Lot 19." The Property Owner desires to develop the property as ten residential lots. To date, however, the Property Owner has not initiated a rezoning request, a plat amendment, nor a development application requesting any of the uses currently allowed in the Public Facilities zone.

In advance of spending the resources pursuing development applications, the Property Owner has requested this Advisory Opinion to answer whether the City is legally permitted to prohibit the development of Lot 19 as a residential subdivision.

Analysis

There are two potential hurdles to developing Lot 19 as residential development: (1) the Subdivision Plat designates Lot 19 as open space dedicated to the public, and (2) the current zoning does not allow residential development.

I. Lot designation as Open Space on the Plat precludes residential development.

The first hurdle in developing Lot 19 with residential lots is its designation as open space on the relevant Subdivision Plat.

The parties agree that Lot 19 was designated as open space on Plat D of the Cedar Hills Subdivision with the intention that it be used in perpetuity by the public as open space or for other community purposes. The parties agree that this was a specified condition of approval. It is not clear why, but the county assessor at the time did not update its records to reflect the transfer of Lot 19 to the public when the plat was recorded. Instead, the county assessor records indicated that ownership remained with the Developer until it was sold at a tax sale for unpaid taxes and was later purchased by the current Owner. Title to the property was perfected in the Property Owner by court decree in 1993. The Property Owner questions whether the open space use restriction applies even where the ownership of the Lot has transferred to a private citizen. We conclude that the restriction runs with the land and does not dissolve due to a change in ownership.

The Property Owner maintains that because the property is not now owned by the public, the restriction of use as "open space" should not be continued.

In response, the City maintains that Lot 19 was clearly designated and dedicated as open space. The Developer apparently failed to pay the taxes perhaps because either they understood it to be owned by the public, or because continued ownership provided no financial benefit. The original tax sale purchaser paid almost nothing for the lot, which arguably reflects its fair market value in light of the applicable restrictions. The City further maintains that the open space limitation on Lot 19 forever runs with the land, and is not altered by a change in ownership. The Owner's assertion that a change in ownership negates a restriction imposed by the Subdivision Plat is lacking support in the record. Furthermore, we are unable to locate a legal theory which supports this approach in statute or case law. Accordingly, we conclude the plat restrictions continue to apply.

The Property Owner next argues that by rezoning the property PF – Public Facilities, the property is no longer required to be held as open space. There is no evidence in the record supporting the claim that rezoning a property would erase a plat restriction. The City maintains that rezoning the property to PF – Public Facilities does not somehow override the open space limitation from the Subdivision Plat. The assertion is that subdivided properties are restricted by *both* the subdivision plat as well as the zoning code.

First, we note that Utah State Code allows local governments to impose conditions on subdivision plats. *See* UTAH CODE § 10-9a-509(1)(h). Local governments may impose permanent land use restrictions as a reasonable condition of subdivision and development approvals. *See Call v. City of West Jordan*, 606 P.2d 217, 220 (Utah 1979).[3] These conditions may be specified by local ordinance and imposed by legislative body as part of the approval process.

Next, to be approved, any proposed land use must "conform to the requirements of the applicable land use regulations, *land use decisions*, and development standards in effect when the applicant submits a complete application and pays application fees . . ." UTAH CODE § 10-9a-(1)(a)(ii) (emphasis added). In other words, any potential land use the Property Owner might now propose must conform to applicable ordinances as well as any land use decisions applicable to the property.

One type of land use decision that is applicable to this property, and must be complied with, is the prior subdivision approval creating the lot, and any "internal lot restrictions" created by that subdivision plat approval. Utah Code defines "internal lot restriction" as:

> "a platted note, platted demarcation, or *platted designation* that:
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> (a) *runs with the land*; and
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> (b)(i) *creates a restriction* that is enclosed within the perimeter of the lot described on the plat; or
>
> (ii) designates a development condition that is enclosed within the perimeter of the lot described on the plat.

UTAH CODE § 10-9a-103(27) (emphasis added). In plain English, an internal lot restriction is a plat designation that creates a restriction that runs with the land. In other words, a plat restriction would not disappear due to a change in ownership, and is currently a restriction on the use of the property.

We agree with the City's arguments on this issue. In accordance with existing laws, Lot 19 was set aside as open space as a condition of development approval when the Plat was approved.[4] The City was acting within their lawful authority to put this restriction in place. Such limitation runs with the land. The building restrictions are clearly and unambiguously labeled on the plat. Furthermore, the requirement for the land being set aside as permanent open space requirement for approval of the plat is clearly established in the record. Additionally, there is nothing to suggest that a tax lien

[3] *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 approval).

[4] The Property Owner argues that the issue at hand mimics that detailed in Advisory Opinion 153 issued by our office in February of 2015. We disagree. In that opinion, we found that "open space" parcel was a remnant parcel with little indication in the record or on the face of the plat that it was left open as a condition of approval. In that instance, the City had no ordinance requiring dedication of open space and there was not a sufficient basis to conclude that open space was required as a condition of the subdivision approval. In contrast, for the issue at hand, both parties agree that the open space was required as a condition of approval and unambiguously intended to remain open space in perpetuity as a requirement to be approved.

sale would somehow negate the restrictions. *See, for example Hayes v. Gibbs*, 110 Utah 43, 169 P.2d 781 (1946) (finding a tax lien foreclosure did not destroy restrictions on the use of the real estate which were in the purchaser's chain of title and therefore knowable); *see also Canyon Meadows Home Owners Ass'n v. Wasatch Cty.*, 2001 UT App 414, 40 P.3d 1148 (holding that an open space agreement ran with the land and was not negated by a tax lien sale). Therefore, the restriction that Lot 19 remain open space runs with the land and is enforceable against the current owner.

The Property Owner would need to seek approval of an amended plat in accordance with Utah Code § 10-9a-608 in order to use the property for any kind of land use that is not consistent with open space. The land use authority has discretion to approve or deny the plat amendment based on whether or not they find that "there is good cause for the . . . amendment;" UTAH STATE CODE § 10-9a-609(1).

In summary, the Subdivision Plat restricts the use of Lot 19 to open space and dedicates its use to the public. This open space restriction was clearly and unambiguously a requirement of plat approval that runs with the land. Therefore, the current Property Owner is restricted to uses consistent with the public open space Subdivision Plat restriction.

II. PF – Public Facilities zone does not permit residential development.

The City has established various zones and other regulations and restrictions that apply within each zone by ordinance. CEDAR HILLS CODE § 10-1-3. Lot 19 is zoned "PF – Public Facilities." The PF – Public Facilities zone allows development of a cemetery, power station, water storage facility, major transmission line, municipal and public works building and facility, park, and/or school. CEDAR HILLS CODE § 10-4J-2. Furthermore, according to the City Code, uses of land not expressly permitted within a zone are prohibited. CEDAR HILLS CODE § 10-1-11.

It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power. It is a "proper exercise of [a city's] police power" to zone property for specific uses. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90, 71 L. Ed. 303, 47 S. Ct. 114 (1926). Police power is "the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants." *Id.* The U.S. Supreme Court has further held that the valid exercise of police power includes land use regulations.

Therefore, because residential uses are not permitted in the Public Facilities zone, and such zoning ordinances are within the legitimate authority of the City, the City may lawfully prohibit residential development on Lot 19. The Owner may submit a rezoning request to change the zoning designation to one which would allow residential development. The City Council would have legislative discretion to determine whether such a rezoning is in the public interest.

We note that, in this context, *both* an amended plat removing the open space Plat limitation *and* rezoning the property to a residential zone would both be required to develop this property as residential lots.

Conclusion

The city may lawfully restrict residential development on the lot in question. First, the subdivision plat designates the lot as "open space" and dedicates its use to the public. This open space restriction was clearly and unambiguously a requirement of plat approval. Such restrictions run with the land and would not be ameliorated by the later tax lien sale. Plat restrictions may only be removed by an approved amended plat.

Second, the lot is zoned PF – Public Facilities which prohibits residential development. This PF zoning is a valid regulation on the subject property. The zoning continues to allow permitted uses of the property that could be consistent with its platted restriction as open space, such as a cemetery or park. Zoning restrictions may only be removed by rezoning of the property.

In conclusion, the lot is limited to land uses consistent with the confines of *both* the open space plat restriction and the PF – Public Facilities zoning ordinance. To develop the property as residential lots, an amended plat removing the open space restriction would need to be approved in addition to rezoning the property to a residential zone.

Jordan S. Cullimore, Lead Attorney

Office of the Property Rights Ombudsman

NOTE:

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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.

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