
MEMORANDUM

DATE: October 1, 2004

TO: Council Members

FROM: Janice Jardine
Land Use Policy Analyst

SUBJECT: Open Space Lands Program Ordinance

Cc: Rocky Fluhart, Sam Guevara, DJ Baxter, Lisa Romney, Steve Fawcett, Dan Mule, Linda Cordova, Rick Graham, Kevin Bergstrom, LeRoy Hooton, Jeff Niermeyer, Tim Campbell, Steve Domino, Ed Rutan, Lynn Pace, Lee Martinez, David Dobbins, Louis Zunguze, Brent Wilde, Doug Wheelwright

File Location: Open Space - Open Space Trust Fund and Advisory Board

POTENTIAL OPTIONS:

- A. Advance the ordinance forward for Council action.
 - B. Request outside legal counsel review of the proposed ordinance prior to Council action.
 - C. Identify specific findings of fact required for sale of open space to be included in the ordinance.
 - D. Request that the Board identify specific findings of fact and provide a recommendation to the Council for a future amendment to the ordinance.
 - E. Any combination of the above.
 - F. Other options identified by Council Members.
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Please find attached a new draft ordinance with changes from the Council's discussion in July (shown in revision format) and revised text for the section dealing with removal of lands from the program (prepared by the Attorney's office.) (In order to remain consistent with the Open Space bond language and the consultant's recommendation to use the term "open land" rather than "open space", the Attorney's office recommended using the term "open space land" throughout the document.)

On July 8, 2004, the Council reviewed suggested changes to the proposed draft Open Space Lands Trust Fund and Advisory Board Ordinance. The Council asked for follow-up in two areas, and the Planning Director has since requested follow-up in a third area:

- 1. The extent to which the Council may be involved in the disposition of City-owned property. (Council)
- 2. The options for ensuring that land acquired using open space funding are properly protected. (Council)
- 3. Additional clarification on the definition of Open Space Land (Planning Director)

In regard to the definition of Open Space Land, the Planning Director has provided additional information explaining the rationale for requesting that the Council change the proposed definition. Please see the attached email document for details. The Director notes that "neighborhood parks compatible

with low-impact use" identified in the Open Space Land definition needs some clarification in order to eliminate the potential for confusion. He suggests:

1. Define "low-impact use", or
2. Emphasize that the Definition Section should identify that the City is interested in acquiring predominantly open and undeveloped land for any of the uses identified in the Open Space Land definition.

In regard to the extent to which the Council may be involved in the disposition of City-owned property, Lynn Pace in the City Attorney's office provided a legal opinion. Please see the attached memo for details. Council staff contacted Mr. John Martinez regarding this issue. Mr. Martinez confirmed Mr. Pace's opinion that State Statute does not allow for a Council vote on the disposition of City property.

It is staff's understanding that while the Council cannot vote on the final disposition of property, the Council can set clear policy expectations and spell out a public process. In keeping with that, staff requested that the City Attorney's Office prepare a draft that includes a number of procedural requirements to ensure public notification and maximum opportunity for public input. In addition, the draft ordinance language requires a 6-month waiting period to ensure that no sale of open space is completed without maximum deliberation and an opportunity to explore alternatives to the proposed sale or transfer. The City Attorney's office has spelled out a mandatory procedure that includes the following. (Please see the proposed text for specific details.)

1. A written proposal for any sale or transfer of open space land signed by the Mayor.
 - a. Description of the property
 - b. Purpose of the proposed sale or transfer
 - c. Proposed purchaser
 - d. Purchase price
 - e. Anticipated future use
 - f. Anticipated zoning change to be requested
 - g. Statement by the Mayor explaining why the sale/transfer is in the best interest of the City
2. Holding a public hearing before the Mayor and the City Council.
3. Publication of public notice of the public hearing
 - a. For two successive weeks beginning at least 30-days prior to the hearing
 - b. In a newspaper of general circulation in the city
 - c. In a portion of the newspaper other than legal notices and classified advertisements sections
4. Posting signs (2 feet by 3 feet) on the property providing information regarding the public hearing at least 30-days prior to the hearing.
5. Mailed written notice to all property owners within 1000 feet at least 30-days prior to the hearing.
6. Notices must include language to indicate:
 - a. The Mayor is proposing to sell or transfer open space land owned by the City.
 - b. Location
 - c. Sale amount
 - d. Proposed buyer
 - e. Proposed future use
7. No sale or transfer may occur until at least 6-months after the hearing to provide an opportunity to explore alternatives to the proposed sale or transfer.

If the Council wishes to add further requirements, Council Members could include in the ordinance specific "findings of fact" to be provided by the Administration in addition to the procedure outlined by the City Attorney's office. Or, the Council could consider including an additional item under "Duties of the Board" authorizing the Board to identify findings of fact to be provided by the Administration and recommend said finding to the Council for a future amendment to the ordinance.

In regard to the desire to ensure that open space purchased with the bond funding is protected, the Attorney's Office has drafted language as follows, and has indicated that the Council could set more specific requirements as a condition of appropriating funds for specific parcels, similar to the way in which Housing Trust Fund loans are approved by the Council:

Sec. 2.88.040 – Creation of Fund. (pg. 4)

- C. Expenditures from the Fund shall be used for the sole purpose of acquisition and/or protection of Open Space Lands. The appropriation of any amounts from the Fund for the acquisition of land shall be conditioned upon granting a restrictive covenant or conservation easement in favor of a qualified public or non-profit land conservation entity, in a form sufficient to ensure that any land acquired shall be protected and preserved as open space in perpetuity.

Jardine, Janice

From: Zunguze, Louis
Sent: Thursday, September 16, 2004 5:56 PM
To: Jardine, Janice
Cc: Gust-Jenson, Cindy; Dobbins, David; Martinez, Lee
Subject: RE: OS Ord
Categories: Program/Policy

JJ:

The draft ordinance is now significantly much better. I think you did a good job in pulling together all the comments made at various meetings. The result is that, the ordinance now has a lot more substance and cohesion. The one comment that I have, this time round, relates to Section 2.88.020 Definitions.

Subsection A, under the Definitions Section, defines the term "Open Land" and then proceeds to outline the various uses (1-6) associated with that definition. My concern is that use 5 (neighborhood parks compatible with low-impact use) is typically developed to some degree and, as such, it seems to contradict the main definition of "Open Land" which talks about land in a predominantly open and undeveloped condition. The question that could be asked is - what types of neighborhood parks would qualify to be considered "Open Land"?

One way to address that apparent contradiction is to define "low-impact use" so that it comes close to meeting the definition of "Open Land". Alternatively (particularly, given Council member Lambert's need to include parks in this equation) we could emphasize that the Definitions Section should be read to mean that the City is interested in acquiring predominantly open and undeveloped land for the purposes of using it for any of the following uses (1-6). Either way, there needs to be some clarification in order to eliminate the potential for confusion,

Hope you can follow my logic, if I have confused matters, please let me know.

Thanks,

Louis

From: Jardine, Janice
Sent: Thursday, September 09, 2004 6:18 PM
To: Zunguze, Louis
Cc: Gust-Jenson, Cindy; Dobbins, David; Martinez, Lee
Subject: OS Ord

Louis,

Here is the latest draft of the Open Land Trust Ordinance. We would need any written information by next Thursday, Sept. 16th.

Thanks
 JJ

9/28/2004

LYNN H. PACE
DEPUTY CITY ATTORNEY

SALT LAKE CITY CORPORATION

LAW DEPARTMENT

ROSS C. ANDERSON
MAYOR
EDWIN P. RUTAN,
CITY ATTORNEY

MEMORANDUM

TO: Rocky Fluhart
Lisa Romney
Cindy Gust-Jensen
✓ Janice Jardine

FROM: Lynn H. Pace *LHP*

DATE: July 19, 2004

SUBJECT: Proposed Open Space Lands Ordinance

You had requested a legal opinion as to the legality of certain language in the proposed Open Lands Ordinance which was intended to provide additional protection for open space properties. (See e-mail message from Lisa Romney dated July 12, 2004, attached hereto.)

The original language proposed by the City Council provided that open space property could not be sold or otherwise transferred unless there was a prior affirmative vote of at least 5 members of the City Council. In my comments on this proposal, I questioned that language. Apparently at the City Council briefing held on July 8, 2004, the City Council requested a legal opinion as to this issue.

As you are aware, Salt Lake City has adopted the optional form of government with the executive powers vested in the Mayor and the legislative powers vested in the City Council. In the landmark case of Martindale v. Anderson, 582 P.2d 1022 (Utah 1978), the Utah Supreme Court discussed at length the respective powers and duties of each branch of government. In its discussion, the Court specifically noted that the optional form of government was modeled after the Federal Government with separate executive and legislative powers. In the course of its discussion, the Court made the following statements:

[W]e cannot agree with the conclusion that the executive powers of the municipality are to be in some way shared....

When the Act is read in its entirety, and each provision thereof is read in context with all of the others, and when viewed in the light of the legislative history of municipal government in Utah, we are compelled to conclude that it in fact provides for the absolute separation of executive and legislative powers. A fortiori, the 1977 modifications of the Act specifically vest the whole of the executive powers in the Mayor and only the legislative powers in the Council....

Simply stated, legislative powers are policy *making* powers, while executive powers are policy *execution* powers.

Id. at 1027 (emphasis in original).

More importantly, one of the specific issues dealt with in the Martindale decision was the extent of the Mayor's power to manage city property, including the purchase and sale thereof. In discussing that specific issue, the Utah Supreme Court stated:

The policy-making powers reserved to the Council clearly do not encompass decisions to buy or sell property or to otherwise manage it. On the contrary, those policy making powers only pertain to its authority to prescribe by ordinance the general rules to be followed by the executive branch in exercising its powers of property management. We consequently hold that the management of city property, including its sale and purchase, is an executive function reserved to the Mayor.

Id.

The Legislature confirmed the Court's holding in Martindale when it enacted Section 10-3-1219.5 in 1979:

"In the council-mayor form of government, the council shall, by ordinance, provide for the *manner* in which: (1) municipal property is bought, sold, traded, encumbered, or otherwise transferred. . . ."

(Emphasis added).

Thus, both the case law and the state statute addressing the powers and duties in the optional form of government clearly and explicitly indicate that the power to buy and sell real property is an executive function reserved to the Mayor.

In addition to defining that authority, Utah Courts have also indicated that the authority reserved to the legislative and executive branches, respectively, cannot be shared or delegated. In Salt Lake County Cottonwood Sanitary District v. Sandy City, 879 P.2d 1379 (Utah 1994), the Court indicated that "as a legislative function cannot be properly delegated to an executive body, an executive function... cannot be delegated to a legislative body." Id. at 1382, citing Sandy City v. Salt Lake County, 827 P.2d 212 (Utah 1992).

In light of these court decisions, it is clear that in the Mayor-Council form of government, as adopted by Salt Lake City, the power to buy and sell real property is an executive function reserved to the Mayor.

The e-mail message I received also inquired as to other options for protecting open space areas from future sale or development. It would be difficult to identify all of the possible methods for protecting open space properties in this memorandum. Perhaps it would be more helpful to schedule a meeting to discuss and explore those possibilities.

If you have any further questions or wish to discuss this matter further, please let me know.

Attachment

cc: Louis Zunguze
Ed Rutan