

# MEMO

**TO:** Cohoctah Township  
**FROM:** Michael D. Homier  
**DATE:** June 22, 2023  
**RE:** Open Space Question **Subject to Attorney Client Privilege**

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The Township has requested our opinion regarding its Open Space and Rural Preservation Development Ordinance (the Ordinance), Section 16.50 of the Township Code of Ordinances. In particular, the Township asked whether the owner of a parcel containing a home in an open space district may “deed back the equitable use of the open space to the main parcel owner.” In other words, the Township asked “whether an owner of an open space parcel can relinquish their rights to the open space to another parcel owner in the open space development.” We believe that the answer is generally no.

Section A of the Ordinance provides as follows:

The intent of the Open Space and Rural Preservation Development District is to permit residential development that results in an enhanced living environment through the preservation of open space. The provisions set forth in this Section offer an alternative to traditional subdivisions and encourage innovative and livable housing environments through both permanent dedication of open space and a planned reduction of individual lot area requirements. The Open Space and Rural Preservation Development District is established as an overlay district in those districts in the Township that allow single-family residential housing as a permitted principal use and therefore is not permissible in the MHR, LI, and NSC Districts. The Open Space and Rural Preservation Development District is also not allowed in the S Settlement District.

Section C of the Ordinance provides, in part, as follows:

The regulations set forth herein are intended to preserve a traditional rural character to the land use pattern in the Township through the creation of small residential nodes contrasting with open space and less intensive land uses. This Section is not intended as a device for ignoring the zoning regulations of the Township, the standards set forth herein, or the planning concepts upon which the Zoning Ordinance has been based. The regulations are intended to result in a specific development substantially consistent with Zoning Ordinance standards and the Township Comprehensive Plan.

Section 16.50(D)(4) provides as follows:

The proposed development shall maintain a minimum 50 percent of the gross area of the site as dedicated open space as a separate parcel *held in common ownership*, with evidence of a plan for perpetually preserving the open space. Documents shall be presented and ultimately approved by the Township Planning Commission that bind all successors and future owners in fee title to open space commitments made as a part of the proposal. [Emphasis added.]

The Ordinance also provides that “[a]n Open Space and Rural Preservation Development shall maintain a minimum of 50 percent of the gross area of the site as dedicated open space held in common ownership.” Section 16.50(F)(3)(a).

Open spaces “shall be set aside by the developer through an irrevocable conveyance or covenant appurtenant to the open space[.]” Section 16.50(F)(3)(d)(4). “Such conveyance shall...ensure that all residents have access to the open space for use of the open space and prohibit interfering with the use of the open space by residents and their guests.” *Id.*

Any property owner who fails to maintain an approved site design shall be deemed in violation of the use provisions of the Zoning Ordinance and shall be subject to the appropriate action to obtain compliance with the Zoning Ordinance. Each and every property owner shall also be responsible for insuring the open space is maintained in accordance with the approved final plan or be subject to the appropriate action to obtain compliance with the Zoning Ordinance. [Section 16.50(G)(5)].

We believe that specific provisions within the Ordinance and its overall structure express an intent to require that the dedicated open space area remain in common ownership. An equitable owner of the designated open space relinquishing their rights to the open space would defeat the intent of the Ordinance. “Common ownership” would not exist in the open space, and multiple sections of the Ordinance would be violated. Therefore, we do not believe that the owner of one of the residential lots may sell their equitable rights to the open space back to the legal owner of the open space.

This interpretation is bolstered by the existence of an exception that is explicitly enumerated in the Ordinance. The exception, Section 16.50(D)(5), provides as follows:

*Limited Division Option.* For a property owner of at least ten acres, who desires to retain ownership and control of the dedicated open space, an option is available to allow for the retention of ownership and control rather than allowing all division owners the right to use the dedicated open space. This option is available only if the property owner agrees to apply for a division or divisions that would result in the creation of no more than a total

of two single-family homes. The property owner would still be required to create a division for the dedicated open space but the open space could continue to be owned by the property owner subject to compliance with the requirements otherwise imposed herein upon the dedicated open space.

Here, it appears that there are only two single-family homes in the district. At this time, we do not know if the property is (or was) at least 10 acres. But assuming that it is and that the original site plan for the district did not call for the main property owner to maintain control of the open space (because such is not the case currently), the main property owner could apply for changes or revisions to the approved plan by submitting a request to the Planning Commission, subject to the requirements of Section 16.50(J).

Please let me know if you have any additional questions.

MDH:KTB

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