EMIGRATION CANYON

GREATER SALT LAKE
Municipal Services
District

File APL2023-000817

Application Summary

Request: Appeal of a planning decision that the subject property is not a "lot of record" as defined in the Emigration Canyon Code

Parcel ID: 10-20-400-002-0000

Current Zone: FR-20

Property Owner: Ryan Leick

Property Address: 1475 N. Pinecrest Canyon Rd.

Planner: Curtis Woodward

BACKGROUND

The applicant has submitted an appeal of the Planning and Development Services staff determination that his property is not considered a "lot of record" as defined in section 19.72.200 of the Emigration Canyon Municipal Code. In an email sent by Mr. Ryan Leick to Adam Long requesting a number of clarifications regarding Mr. Leick's application for agricultural land use at 1475 N. Pinecrest Canyon Road (see attachment 1). Mr. Long was acting as legal counsel to the Greater Salt Lake Municipal Services District (MSD) planning staff on Emigration Canyon planning issues. Attached to the request was a copy of a deed recorded December 21, 1888 in Book 2Q, Pages 582-583 in the office of the Salt Lake County Recorder. In the same email, Mr. Leick also requested an opportunity to seek a determination from the Office of the Property Rights Ombudsman as to whether "public access by an R.S. 2477 public right of way exists as it relates to a 'Lot of Record' under ECMT Ordinance 19.72." Subsequently, on August 20, 2022, Mr. Long replied to Mr. Leick, and reached out to the planning staff at the MSD regarding the request for determination (Attachment 2). Having the deed attached by Mr. Leick and the Salt Lake County property ownership plats as the documentation on which to rely, the Director of Planning and Development Services for the MSD, Trent Sorensen, signed a letter dated September 8, 2022, stating that the property did not meet the definition of "lot of record" based on the requirement "having frontage upon a street, a right-of-way approved by the land use hearing officer, or a right-of-way not less than twenty feet wide"(Attachment 3). Due to clerical error, the letter was not sent to Mr. Leick until December 13, 2022. In a follow-up email, Mr. Leick asked for clarification as to the reasoning behind the determination (Attachment 4).

After discussing Mr. Leick's questions internally (Attachment 4), the MSD planning staff ultimately determined it would be best to meet with Mr. Leick. This meeting took place February 24, 2023. On February 28, 2023, the appeal was submitted by Mr. Leick. At the applicant's request, the scheduling of the appeal hearing was delayed, while he sought a determination from the Office of Property Rights Ombudsman as to whether public access to the subject property exists.

ANALYSIS

Appeals of decisions administering or interpreting the zoning ordinance are covered under section 19.92.050 of the Emigration Metro Township Code:

19.92.050 Appeals

A.

1. *The applicant or any other person or entity adversely affected by a zoning decision administering or interpreting a zoning ordinance may appeal that decision by alleging that an order, requirement, decision or determination made by an official in the administration or interpretation of the zoning ordinance is arbitrary, capricious or illegal. Appeals of conditional use decisions rendered by a planning commission shall follow the review procedure outlined in Section 19.84.080 of this code.*
2. *Any officer, department, board or bureau of a Metro Township affected by the grant or refusal of a building permit or by any other decisions of the administrative officer in the administration or interpretation of the zoning ordinance may appeal any decision to the land use hearing officer.*

B. The person or entity making the appeal has the burden of marshalling the evidence and proving that the decision is arbitrary, capricious (unsupported by the evidence or facts of record), or illegal.

1. *Only zoning decisions applying the ordinance and conditional use decisions by the planning commission may be appealed to the land use hearing officer.*
2. *A person may not appeal, and the land use hearing officer may not consider, any zoning ordinance amendments.*

C. Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.

D. An appeal to the land use hearing officer must be filed at the development services division within sixty days after the order, requirement decision or determination administering or interpreting the zoning ordinance is made in writing. The appeal shall set forth with specificity the reasons or grounds for the appeal.

E. Appeals of planning commission conditional use decisions shall follow the procedures set forth in Section 19.84.080(B).

As to whether the determination was arbitrary, capricious or illegal, the planning staff submits the following reasoning behind the determination letter of September 8, 2022:

1. The definition of “lot of record” established in section 19.72.200 of the Emigration Canyon code is:

“A lot or parcel of land established in compliance with all applicable state statutes, county ordinances, and/or other legal requirements at the time of its creation and recorded in the office of the Salt Lake County recorder either as part of a recorded subdivision or as described on a deed, having frontage upon a street, a right-of-way approved by the Land use hearing officer, or a right-of-way not less than twenty feet wide.”

2. The above definition establishes a two-part test for determining whether a property is a “lot of record:”

First, it must be found that the parcel was legally established at the time of its creation in compliance with applicable laws. Based on the deed provided by Mr. Leick, it is clear that the lot was established in 1888, which is prior to the first subdivision ordinance of Salt Lake County, adopted December 17, 1952. It was also established prior to zoning being established in the Emigration Canyon in 1951. Due to the lack of planning, zoning, or subdivision laws in place at the time the parcel was established, the Planning Staff of the MSD stipulates that the property meets the first part of the test.

The second part of the test in the definition is "having frontage upon a street, a right-of-way approved by the Land use hearing officer, or a right-of-way not less than twenty feet wide." In review of this second part, the MSD planning staff considered the following:

A. Is the definition to be read as "(currently) having frontage upon a street, and right-of-way…" or as "(at the time of its creation) having frontage upon a street, right-of-way…"?

B. How do we ascertain whether the parcel has, or ever has had, "frontage upon" a street, right-of-way approved by the land use hearing officer, or a right-of-way not less than twenty feet wide?

As to question A, we considered the use of the term "lot of record" in the code for context as to intent. The four instances (other than the definition) where lots of record, are specifically mentioned in the code are: 19.12.150, 19.60.200, 19.72.060, and 19.72.130. All four references are to special exceptions or waivers to certain development restrictions that are available to lots of record. The exceptions afforded were in recognition of lots that had been previously platted, but may have some difficulty in fully complying with the current development restrictions in the code. Of the four sections of code mentioned above, 3 are specific to slope waivers, and one to stream setbacks. For example, 19.72.060 of the Emigration Canyon code allows the planning commission the discretion to allow development on property with slopes up to 40%, while the code normally prohibits development on slopes over 30%. However, the ordinance notes that all other aspects of development must conform to the code. It is clear from the code, that the intention is to allow some relief to lots that are otherwise developable, but for a one or two aspects of the code. Subsection 19.72.080.A of the Emigration Canyon code states "Motor vehicle access to a building or development site shall be by road (including private access road), street, alley, or driveway. Any road, street, alley, or driveway constructed after the enactment of this Chapter shall comply with the applicable requirements of this section." While section 19.72.080 does allow avenues of relief from certain aspects of the design of the access (such as maximum slope, percentage of road allowed to cross steep slopes) the requirement for vehicular access itself is not waivable in the code. It therefore seemed apparent that the term "having frontage upon a street, a right-of-way approved by the Land use hearing officer, or a right-of-way not less than twenty feet wide" refers to the current requirement in the 19.72.080.A for vehicular access.

As to question B, we looked at the 3 types of vehicular access mentioned: "street", "right-of-way approved by the land use hearing officer," and "right-of-way not less than twenty feet wide."

Street

"Street" is defined in section 19.04.515 of the Emigration Canyon code as "a thoroughfare which has been dedicated or abandoned to the public and accepted by proper public authority, or a thoroughfare, not less than twenty-five feet wide, which has been made public by right of use and which affords the principal means of access to abutting property." A street is therefore a public thoroughfare which has become public either through dedication or abandonment or which has been made public by right of use. Having not been provided legal documents from Mr. Leick establishing a public thoroughfare, MSD planning staff reviewed the official property ownership plats and the recorded subdivision plats on file with the Salt Lake County Recorder. None of the plats reviewed showed a street or right-of-way providing vehicular access to the subject property. Neither the Emigration Canyon Metro Township (now City of Emigration Canyon) nor Salt Lake County public works records showed a street, road, or other vehicular access being maintained by public works as "public." Field observations by MSD planning staff in response to the original land development application revealed that the closest thing to street access was a maintenance road to a well owned by the Emigration Improvement District that stops some 2000 feet short of the subject property.

Right-of-way approved by the land use hearing officer

This type of vehicular access refers to section 19.76.080 of the Emigration Canyon Code, which governs development on private rights-of-way (as opposed to public streets) which states: "Except where the requirements of this section are reduced by permit of the land use hearing officer, the minimum area for any lot fronting on a private right-of-way, at least twenty feet wide, shall be one-half acre, and the minimum distance from the center of the right-of-way to the front line of the building shall be fifty feet; except that property that cannot be subdivided as outlined in the subdivision ordinance may be developed on a private street or right-of-way in any R zone upon approval of the development services division director. Such approval shall be governed by the official policies regulating such development, as adopted by the planning commission and on file at the planning commission office."

In researching the records, we found no such approval by the land use hearing officer for a private street or right of way to access the subject property, nor would such an approval be appropriate in this situation. The language of the Code makes it clear that the land use hearing officer has authority to modify the generally-applicable requirements for a right-of-way, but that is not what Mr. Leick is asking the officer to do. Rather than asking for a variance from the requirements where a legal access right already exists but does not meet the applicable standards, Mr. Leick is asking the officer to rule that there is a right-of-way where none currently exists—and to make such a finding over the objections of the owners of the adjacent properties. Such a determination is outside the scope of power granted to a land use hearing officer.

Right-of-way not less than twenty feet wide

The deed provided by Mr. Leick with his request for determination did not include any verbiage conveying rights to a private right-of-way or easement to access the property. In reviewing the deeds to adjoining parcels, MSD planning staff found no easements or access rights-of-way to the subject property.

Utah's Prescriptive Road Statute and RS 2477

Mr. Leick appears to be arguing that his lot meets the right-of-way requirement for one of two reasons: (i) a public road to the property was created through public use or (ii) a public road was created under RS 2477. Under both of these theories, Mr. Leick has submitted evidence that may support the existence of a public road but Mr. Leick has not submitted anything approaching proof that such a road exists.

Public Use

Mr. Leick's evidence is not sufficient to establish the creation of a road through public use. Creating a road through public use requires evidence that there was (i) continuous use (ii) as a public thoroughfare (iii) for a period of 10 years. (Public Roads and Private Lands p.4, available at https://utahlanduse.org/wp-content/uploads/2022/01/Roads-Final.pdf). Further, these elements need to be established through clear and convincing evidence. *Thomson v. Condas*, 493 P.2d 639 (Utah 1972).

Mr. Leick attempts to prove road creation through field surveyors' notes and plats. Even accepting this evidence as accurate, it still does not establish continuous use by the public for a period of 10 years. The submitted materials show homesteads and a privately-owned quarry that were reached by the road. At best, this only implies at least some use by private parties with a specific interest in the road, not public use. The Utah Supreme Court has made it clear that use by a few private individuals with "special and private interests" in the road is not sufficient to establish public use. *Peterson v. Combe*, 438 P.2d 545, 546–47 (Utah 1968). The indication of a road on a map likewise does not prove continuous use for the required 10-year period. Even if the land use hearing officer had the authority to make such a determination, Mr. Leick has failed to meet the burden of clear and convincing evidence required for road creation through public use.

RS 2477

The dispute over a RS 2477 road between Mr. Leick and adjacent property owners ought to be resolved through adjudication by a court with jurisdiction over the matter. When public land passes to private ownership, as has

happened in this case, an RS 2477 claim must be brought against the private owner. Rather than asking the MSD to determine the existence of a road, Mr. Leick needs to bring this claim against the private parties disputing Mr. Leick's road claims.

Further, "a public entity cannot normally be forced to open. . . a public right-of-way that is not open. It cannot be forced to defend a public use road on behalf of the public." (Public Roads and Private Lands p.25). In other words, it is not appropriate to ask MSD to step in to a dispute between private property owners regarding the existence of a RS 2477 road and resolve the dispute. Such a determination needs to be made in a court of law between the disputing parties.

Conclusion

Having reviewed the available evidence on hand at the time, the MSD planning staff concluded that the subject property failed to meet the second part of the "lot of record" test, in that it did not have "frontage upon a street, right of way approved by the land use hearing officer, or a right of way not less than twenty feet wide." It was on this basis that the determination letter was drafted and signed.

After having received the letter, Mr. Leick presented evidence as to a historic access that had been used when the subject property was a "stone quarry." The evidence submitted by Mr. Leick is being disputed by Salt Lake City, which owns a parcel across which the claimed access road must cross. The MSD's role as the land use authority is not to resolve this dispute and make a legal determination of the parties' respective claims to title. Only a court can make such a determination.

MSD planning staff has agreed that if the dispute between Mr. Leick and Salt Lake City is resolved by the appropriate authority in Mr. Leick's favor, his request for determination as to "lot of record" status will be reconsidered.