Advisory Opinion 280

Parties: Ryan Leick / Greater Salt Lake Municipal Services District

Issued: December 28, 2023

TOPIC CATEGORIES:

Compliance with Land use Regulations

Interpretation of Ordinances

The local land use approval process is not the proper forum for resolving title disputes. However, Emigration Canyon's ordinances make certain slope regulation waivers available to "lots of record," which, as defined, requires frontage on a right-of-way. Where a landowner sought a determination of whether they qualified as a "lot of record" via a disputed and unadjudicated right-of-way claim over adjoining property, the MSD necessarily had to make a factual determination whether a right-of-way exists for purposes of applying its ordinance.

A land use decision is supported by substantial evidence if it provides the reasoned explanation of the basis of its decision, and a reasonable mind could reach the same conclusion. A party's dispute of a right-of-way claim is itself a fact that may be relied on in making a factual conclusion of whether a right-of-way exists. The MSD's decision that the applicant's property did not qualify as a "lot-of-record" is supportable by substantial evidence as a reasonable mind could agree that no right-of-way exists in fact where the unadjudicated right-of-way claim is disputed by the adjoining landowner, and no information was produced showing that the right-of-way had been claimed by a highway authority.

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ADVISORY OPINION (AMENDED)[1]

Advisory Opinion Requested By:	Ryan Leick
Local Government Entity:	Greater Salt Lake Municipal Services District
Applicant for Land Use Approval:	Ryan Leick
Type of Property:	Agricultural
Date of this Advisory Opinion:	December 28, 2023
Opinion Authored By:	Richard Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

Did the Municipal Services District err in its determination that the property in question is not considered a "lot of record" for purposes of a waiver to slope regulations?

SUMMARY OF ADVISORY OPINION

The owner of landlocked property up Emigration Canyon sought development approval of certain accessory structures in furtherance of a permitted agricultural use, but certain slope regulations in local ordinances widely prohibited development unless a waiver was granted. The ordinance allows for waivers for "lots of record," for which "frontage on a right-of-way" was one of the required elements. The land use authority was therefore required to make a finding of whether a right-of-way existed to provide access to the property as a factual matter in order to determine whether the property was a lot of record.

[1] An advisory opinion in this matter was initially issued on November 30, 2023. In response to a request by Mr. Leick, our Office has decided to issue this amended opinion to revise some statements in the opinion that pertain to the factual information that was in the record before the MSD for consideration. These revisions are made after consulting with the other involved parties, and do not affect the original opinion's analysis or conclusion.

An administrative land use decision must be supported by substantial evidence, and a failure to make findings renders a decision arbitrary and capricious. A decision is supported by substantial evidence if the authority provides an explanation of its reasoning, and, considering all the evidence in the record, both favorable and contrary, a reasonable mind could reach the same conclusion as the agency. However, the local land use approval process is not the proper forum for determining title, ownership, rights or interest of parties to real property. That a party contests the property interests at issue in a land use proposal is, itself, a fact that the authority may consider in support of its conclusion. Material issues of fact resulting from disputed property interests may therefore be a basis for denying an application.

While the Municipal Service District's decision, as issued, was arbitrary and capricious because it provided no reasoned explanation for the basis of its decision, the District has since provided some reasoning to support the decision—which is that the District did not find a public road existed where the applicant's claim of a public road was contested by an affected adjoining property owner, had not been shown to be claimed by any purported highway authority, and had not been adjudicated by a court with authority to quiet title. This reasoning satisfies the substantial evidence standard in support of a decision to deny the lot of record determination as a reasonable mind could reach the same conclusion.

EVIDENCE

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

1. Request for Advisory Opinion submitted by Ryan Leick, on March 9, 2022.
2. Email response from Adam S. Long, on behalf of Emigration Canyon Metro Township and SLCO Municipal Services District, on May 18, 2022.
3. Email response from Ryan Leick on May 23, 2022.
4. Amended Request for Advisory Opinion, submitted by Ryan Leick, on March 27, 2023.
5. Letter from Adam S. Long, on behalf of the Municipal Services District, on May 17, 2023.
6. Letter from Ryan Leick on June 1, 2023.
7. Letter from Adam S. Long on June 8, 2023.
8. Letter from Mark Kittrell, on behalf of Salt Lake City Department of Public Utilities, on October 27, 2023.
9. Letter from Ryan Leick on October 31, 2023.

BACKGROUND

Ryan Leick owns a 40-acre parcel up Emigration Canyon, located at the SE 1/4 of the SE 1/4 of Section 20, Township 1 North, Range 2 East, Salt Lake Basin and Meridian. The property is zoned Forestry & Recreation FR-20 and subject to the Foothills and Canyons Overlay Zone (FCOZ) of the Emigration Canyon Metro Township Code of Ordinances (Township Code).

According to Mr. Leick, due to surrounding geography, the property can only be accessed by an unimproved dirt jeep trail known as "Freeze Creek Trail" that originates from Pioneer Creek Road, and which traverses over property owned by Salt Lake City (SLC). Mr. Leick alleges that the trail

was constructed at some point prior to December of 1881, at a time when all property in the surrounding area was in the public domain. Mr. Leick alleges that the trail was an established public road prior to SLC's acquisition of its property by deed in 1907.

Mr. Leick engaged in discussions with Salt Lake County's Greater Salt Lake Municipal Service District (MSD)—who acts as the land use authority for Emigration Canyon Metro Township—for his intention to build a shed or similar structure in furtherance of a permitted agricultural use. While the MSD determined that no building permit would be required for the proposed agricultural accessory structure under the Forestry & Recreation zoning, it concluded that the property is also subject to the Foothill & Canyons Overlay Zone, which widely prohibit land disturbance or development activity to protect steep slopes and imposes certain grade requirements for roads. However, the Township Code also allows for a waiver of slope protection standards for "Lots of Record."[2] Mr. Leick asked for a "lot of record" determination in order to qualify for waivers under the FCOZ regulations in furtherance of his development plans for the property. The MSD treated Mr. Leick's correspondence on the matter as a formal application, which we assume included all previous correspondence on Mr. Leick's initial agricultural permit as part of the record.

One of the requirements for a lot of record is that the property "have frontage on a . . . right-of-way."[3] Mr. Leick claimed that his property qualifies as having frontage on a right-of-way due to the "Freeze Creek Trail," which he asserts constitutes an established public right-of-way according to both Utah statute, section 72-5-104 (Utah's prescriptive road statute), and federal Revised Statute 2477 from Section 8 of the Mining Act of 1866 (R.S. 2477).

In response to Mr. Leick's initial agricultural use application, SLC's Department of Public Utilities had opposed any efforts by Mr. Leick to obtain land use or development permits on his property as it disputed that Mr. Leick had any right to traverse the SLC's parcel to access his land. There was also no information produced that the alleged right-of-way had been claimed as a public road by any entity that would be the relevant highway authority.[4] The MSD issued a letter determining that Mr. Leick did not qualify as a lot of record.

Mr. Leick sought to appeal the MSD's lot determination on the grounds that he could establish that he had legal access to his property by an established public right-of-way that predates SLC's ownership of its property according to federal and state law. Mr. Leick has requested an advisory opinion as to whether the MSD erred in its determination that his property is not a lot of record.

ANALYSIS

I. Ombudsman's Jurisdiction for an Advisory Opinion.

As a threshold matter, both the MSD and SLC's Department of Public Utilities responded to Mr. Leick's Advisory Opinion request, and argued that the Ombudsman's Office did not have

[2] *See* EMIGRATION CANYON METRO TOWNSHIP CODE OF ORDINANCES (ECMTCO) §19.12.150.
[3] *Id.* §19.72.200.
[4] *See* UTAH CODE § 72-5-104(8)(4) (the dedication and abandonment under Utah's prescriptive road statute creates a right-of-way held by the state or a local highway authority in accordance with Sections 72-3-102, 72-3-103, 72-3-104, 72-3-105, and 72-5-103).

jurisdiction to render an opinion on Mr. Leick's access claims, alleging the issue did not fall under one of the topics authorized by state statute. The Property Rights Ombudsman Act provides that a written advisory opinion may be requested to determine compliance with specific, listed sections of Utah Code that are primarily found within the Municipal and County Land Use Development and Management Acts, and Utah's Impact Fees Act. See, UTAH CODE § 13-43-205(1).

SLC argues that Mr. Leick has asked the Ombudsman to issue an opinion on whether he has access across SLC's property based on Section 72-5-104 of Utah's Transportation Code (Utah's "prescriptive road" statute), and federal Revised Statute 2477 from Section 8 of the Mining Act of 1866 (R.S. 2477), neither of which are included in the Property Rights Ombudsman Act's list of sections of statute available for an advisory opinion.

We disagree that the Ombudsman's Office does not have jurisdiction over Mr. Leick's request. While it is true that the statutes cited as the basis upon which Mr. Leick has claimed that he has an established access right are not topics for which an advisory opinion may be requested, the overall the context of Mr. Leick's proceedings with the MSD falls squarely under our authority. Mr. Leick has alleged he has adequate access to meet the elements of a "lot of record" under Emigration Canyon's Municipal Code in order for MSD to make a determination of the applicability of the Code's development restrictions to Mr. Leick's property. The MSD's determination in that matter falls under the authority of the Ombudsman's Office to provide an advisory opinion. In other words, Mr. Leick is a "land use applicant"[5] who has requested that the MSD, as the designated "land use authority,"[6] render a "land use decision"[7] by "apply[ing] the plain language of [its] land use regulations." UTAH CODE § 10-9a-306.

As mentioned, the Property Rights Ombudsman Act allows for an advisory opinion to be requested to determine compliance with certain sections of the Municipal Land Use, Development, and Management Act, specifically, "Sections 10-9a-507 through 10-9a-511." *Id.* § 13-43-205(1)(a)(i). Sections 10-9a-509 and 10-9a-509.5, in particular, apply to any land use application that is submitted by a land use applicant to obtain a land use decision from a land use authority. Namely, these sections provide that "[e]ach land use authority shall substantively review a [land use application] and shall approve or deny each application with reasonable diligence," *id.* § 10-9a-509.5(2)(a), and that in doing so, a "municipality is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations." *Id.* § 10-9a-509(2).

The Township Code provides that for properties in the Forestry & Recreation zones and also located in the Foothills & Canyons Overlay Zone, such as the property in question, "the planning commission may waive grade requirements for streets/roads and slope protection requirements for *lots of record* . . . provided the conditions and criteria set forth in [ordinance] are satisfied." EMIGRATION CANYON METRO TOWNSHIP CODE OF ORDINANCES (ECMTCO) §19.12.150 (emphasis added).

[5] *See Id.* § 10-9a-103(28).
[6] *Id.* § 10-9a-103(30).
[7] *Id.* § 10-9a-103(31).

As such, Mr. Leick's request for a "lot of record" determination is a "land use decision" on a "land use application" rendered by the MSD as the "land use authority," and therefore is an appropriate topic for an Advisory Opinion.

II. MSD's Determination Letter, as Issued, Was Not Supported by Substantial Evidence as it Provided No Explanation for the Basis of its Decision, Requiring the Matter to be Reconsidered in Order to Make Required Findings.

As stated, the Township Code generally prohibits development activity in the Foothill & Canyons Overlay Zone, but allows for certain waivers of grade and slope protection requirements for "lots of record." ECMTCO §19.12.150. For the purpose of the overlay regulations, the Township Code defines "Lot of Record" as "[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*." *Id*. § 19.72.200 (emphasis added).

Where the Code's provisions have made the "frontage on . . . a right-of-way" a required element of a "lot of record" determination, the Township has, by the terms of its ordinance, taken it upon itself under certain circumstances to determine whether a right-of-way exists for purposes of its regulations.

This is an administrative decision, and our task, then, is to determine whether the MSD has correctly "[applied] the plain language of land use regulations," UTAH CODE § 10-9a-306, or else rendered a decision that is "arbitrary and capricious" as being "not supported by substantial evidence in the record," or is otherwise "illegal" as "based on an incorrect interpretation of a land use regulation[,] [in conflict] with the authority granted by this title[,] or . . . contrary to law" in accordance with state statute *Id.* § 10-9a-801(3)(c).

Administrative land use decisions must be supported by substantial evidence. *Staker v. Town of Springdale*, 2020 UT App 174, ¶ 24. This includes a requirement to "make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review . . . and inform the parties of the basis of the administrative agency's decision such that the parties knew why the agency ruled the way it did, [and] afford the parties notice of what they would need to challenge on appeal." *Id*, at ¶ 40 (cleaned up).

A failure to produce any findings, generally, is a "fatal flaw" that renders a decision arbitrary and capricious, *N. Monticello All. LLC v. San Juan Cty.*, 2023 UT App 18, ¶ 17, and which inevitably requires the matter to be reconsidered by the land use authority to be done correctly. *See*, UTAH CODE § 10-9a-801(3)(d).

In the case at hand, the MSD made its determination that the property was not a lot of record without explanation. The entirety of the MSD's determination on the issue, as stated in the September 8, 2022 letter, is as follows:

> *Mr. Leick,*
>
> *I am writing in response to your request for a determination as to whether your property at 1475 Pinecrest Canyon Road (parcel ID: 10-20-400-002-0000) is considered a "lot of record" as defined in chapter 19.72 of the Emigration Canyon Metro Township code of ordinances. According to the section 19.72.200 of the ECMT code, a lot of record 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." Based on the definition, the property in question is not considered a lot of record.*

(underline emphasis in original).

While the underlined portion of the cited provision may allow an inference as to which required element of "lot of record" the MSD had specifically determined had not been met (i.e., right-of-way frontage), the letter itself otherwise provides no findings or explanation of the basis of MSD's decision so as to allow Mr. Leick to know "why the agency ruled the way it did," or "notice of what [he] would need to challenge on appeal." *Staker*, 2020 UT App 174 ¶ 40.

The decision, as issued, was therefore arbitrary and capricious and would typically require reconsideration. However, apart from the decision letter, MSD has since provided an explanation for its decision in responding to Mr. Leick's advisory opinion request. So as the purpose of an advisory opinion is to serve as a "quasi-mediation tool," *Checketts v. Providence City*, 2018 UT App 48, ¶ 28, to help the parties resolve their dispute to avoid further proceedings, we will address the reasoning provided by MSD in its submissions to this office to hopefully address the substantive issue of the lot of record determination.

III. Disputed Property Interests May Present Material Issues of Fact that May be a Supportable Basis for Denial.

Utah law has not directly addressed a municipality's obligation to consider property disputes raised in response to a land use proposal, but the concept that the land use approval process is not the appropriate venue to resolve quiet title disputes has been well articulated in some other states.[8]

Here, the MSD's role as the land use authority is not to make a legal determination of the parties' respective claims to title. Rather, the MSD's role is limited to simply a factual determination that

[8] *See, e.g., Borough of Braddock v. Allegheny County Planning Department*, 687 A.2d 407 (Pa. Cmwlth. 1996) (a zoning board is an inappropriate vehicle to deal with complex issues of title, which the opposing parties should resolve by a quiet title action); *see also, Cybulski v. Planning & Zoning Comm'n*, 43 Conn. App. 105, 110, 682 A.2d 1073, 1076 (1996) (planning commission does not have the authority to determine whether a claimed right-of-way is a public highway, since that conclusion can be made only by a judicial authority in a quiet title action); *c.f., Clermont Terrace Site Plan & Zoning Permit Approvals*, 2006 Vt. Envtl. LEXIS 73, *10 (once an applicant has put forth some evidence on their interest and right in the property proposed for development, any further claims to title, or claims attacking the same, must be presented to the appropriate Superior Court for adjudication).

a "right-of-way" exists as a material factual element of the Code's defined "lot of record." So, while the determination that a public right-of-way exists may be a legal conclusion as it relates to the respective property interests of Mr. Leick and SLC as claimants to title in dispute, when it comes to the MSD's purposes, that determination is simply a factual conclusion in support of its "lot of record" determination.

Mr. Leick argues that a formal adjudication is not necessary in order for the MSD to recognize that the road accessing his property has been established as a public road, as according to the respective Utah and federal laws referenced as the basis for his legal claim, such a "right attaches automatically on the basis of activity sufficient to establish a public road," and that "[n]o formal adjudication, deed, application or license is required." *Stichting Mayflower Mountain Fonds v. United Park City Mines Co.*, 2017 UT 42, ¶ 27; *see, also, S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 768 (10th Cir. 2005).

While that is true and would be salient as to a legal claim in relation to quieting title against SLC's interests with respect to the road, it does not erase, for the MSD's purposes, that Mr. Leick's claim is disputed by SLC, and that no entity was shown to have claimed the right-of-way to be a public road as the relevant highway authority.

As such, when a factual matter is disputed in the record, we should not expect any more of a land use authority than what we might expect of a court in considering whether a claimant is entitled to summary judgment in judicial proceedings—that is, the presence of a genuine issue (dispute) of material fact would preclude such a determination in the claimant's favor. *See, e.g., Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9 (summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law).

Here, the record reflects that Mr. Leick provided MSD with many documents and exhibits to support his claim that his property had access by an established public right-of-way, most of them recorded public records, including homestead application and land patents, subsequent deeds, plat maps, cadastral survey maps, aerial photos, recorded mining claims, newspaper clippings, and so on. However, the record also reflects that SLC disputed Mr. Leick's claims, and that no information was produced that any entity had claimed authority over the road as a highway authority, or had been adjudicated by a court.

As a factual matter, the competing allegations of Mr. Leick and SLC resulted in conflicting information in the record as to whether a right of way existed or not. The presence of that genuine dispute of material fact may certainly be taken into account by the MSD in making its determination.

A decision is supported by substantial evidence if there is a quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. *Caster v. West Valley City*, 2001 UT App 212, ¶ 4 (internal quotation marks omitted). In determining whether substantial evidence supports a decision, courts "consider all the evidence in the record, both favorable and contrary, and determine whether a reasonable mind could reach the same conclusion as the [agency]." *M & S Cox Invs., LLC v. Provo City Corp*., 2007 UT App 315, ¶ 36. In conducting a substantial evidence review, a court does not "reweigh the evidence and independently choose

which inferences [it] find[s] to be the most reasonable. Instead, [a court] defer[s] to an administrative agency's findings because when reasonably conflicting views arise, it is the agency's province to draw inferences and resolve these conflicts. *Provo City v. Utah Labor Comm'n*, 2015 UT 32, ¶ 8 (cleaned up).

Here, the MSD reasons that Mr. Leick's claim of a public right-of-way and the evidence he has provided in support of it is countered by:

(1) SLC's dispute that any right-of-way claim exists;
(2) The absence of any information showing a highway authority claiming authority over the road as a public road;
(3) The absence of any court findings of fact, conclusions of law, or order adjudicating the road to be a public road.

The MSD therefore concludes that, in light of the disputed nature of the road's existence, no road has been established for purposes of recognizing a lot of record. While this may not be the *only* conclusion that could have been drawn from the evidence in the record, we nevertheless conclude that a "reasonable mind could reach the same conclusion" as the MSD, and therefore the reasoning provided by the MSD in its response to the advisory opinion request, were it to be provided as a basis for denial of the lot of record determination, if reconsidered, would be supportable under the substantial evidence standard.

IV. MSD Has Discretion Under the Ordinance to Deny the Waiver

One final point to note is that the "lot of record" determination in question is made in the context of granting a waiver to certain slope regulations. The provision for which Mr. Leick sought a "lot of record" determination from the MSD provides as follows:

> Lots of Record—Waivers from Slope Requirements. For properties in the FR zones also located in the foothills and canyons overlay zone (see Chapter 19.72), the planning commission *may* waive grade requirements for streets/roads and slope protection requirements for lots of record and lots and plans of subdivisions that were approved prior to the enactment of Chapter 19.72, provided the conditions and criteria set forth in Section 19.72.060A are satisfied.

ECMTCO §19.12.150 (emphasis added).

The use of the word "may" signals that the planning commission has discretion in approving such waivers, *see, Six Blue Bison LLC v. Alpine City*, 2023 UT App 89, ¶ 18 (the word "may" is discretionary rather than mandatory), and in fact, the Code itself identifies this planning commission function as a "*discretion* to grant waivers or modifications for lots of record from the slope protection standards." *Id.* §19.72.060(D)(4) (emphasis added).

As such, we conclude that whereas the slope waiver does not "enjoy a presumption of regularity with an expectation of approval," *Six Blue Bison*, 2023 UT App 89 at ¶ 18 (internal citation omitted), the MSD would not err in choosing to exercise its discretion to not approve a waiver

where there was some uncertainty about the property's legal access or the proposed development activity would result in conflicts with surrounding properties and uses.

CONCLUSION

The MSD's decision, as issued, was arbitrary and capricious for lacking any reasoned explanation for the basis of its decision to deny the lot of record determination. However, the reasoning provided by the MSD in responding to the request for an advisory opinion satisfies the substantial evidence standard on the merits, in that a reasonable mind could reach the same conclusion that the "right-of-way" required for a lot of record determination has not been factually established where Mr. Leick's alleged public right-of-way access is disputed by a neighboring landowner, has not been shown to have been claimed by any relevant highway authority, nor has it been formally adjudicated by a court. Even assuming the right-of-way in question does in fact exist, Mr. Leick sought the lot-of-record determination for purposes of being granted a waiver to slope regulations, which is a matter of discretion, and the MSD would not err in declining to approve a waiver allowing development activity where the property's access is in dispute.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in Section 13-43-206 of the Utah Code, 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.