



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Denial of a Driveway Appeal
from Commonweal Development Corporation by
the Department of Transportation

Case No.: TR-09-0062

FINAL DECISION

By letter dated September 14, 2009, Commonweal Development Corporation by its attorney, Joseph R. Mirr, requested a hearing pursuant to Wis. Stat. § 86.073(3) to review the Department of Transportation's decision to revoke a permit for a driveway access to STH 16, City of La Crosse, La Crosse County Section 10-16-07W. Pursuant to due notice, the Division of Hearings and Appeals held a hearing on February 11, 2010, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The last submission was received on March 4, 2010.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Commonweal Development Corporation, by

Attorney Joseph R. Mirr
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Department of Transportation, by

Attorney Frederick G. Wisner
Department of Transportation
Office of General Counsel
P. O. Box 7910
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The Administrative Law Judge issued a Proposed Decision on April 14, 2010. On April 27, 2010, the Department filed a letter in support of the Proposed Decision and a document identifying some typographical errors in the Proposed Decision. No other

comments on the Proposed Decision were received. Other than correcting the typographical errors, the Proposed Decision is adopted as the final decision in this matter.

Issues for hearing

The issues for hearing are whether the reasons for the revocation of the subject driveway access permit are true and, if found to be true, whether they constitute a reasonable basis for the revocation of the permit.

Findings of Fact

The Administrator finds:

1. The Richard H. Pfister Revocable Trust of 1992 (Trust) is the owner a parcel of land, consisting of approximately 1.525 acres in the City of La Crosse, La Crosse County (Trust property). The Trust property is zoned for commercial uses and has frontage on both State Trunk Highway 16 (STH 16) on the south side of the property and County Trunk Highway "PH" (CTH "PH") on the north and east side of the property. (CTH "PH" curves to the south and intersects STH 16 at the south east corner of the Trust property.) The Trust property is now managed by Commonweal Development Corporation (CDC or the petitioner).

2. The first documented commercial use of what is now the Trust property was for a business known as the Fireside Restaurant. The Department of Transportation (Department) issued a driveway access permit (permit no. 32-8-81) to the owners of the Fireside Restaurant authorizing the construction of two driveway accesses to STH 16 from the property (exh. 7). The driveways were to be located .03 and .07 miles southwest of the intersection with CTH "PH."

3. At some point the Fireside Restaurant closed. Beginning in 1993, the property was used for a Barnes and Noble bookstore with a café. Also in 1993, CDC executed an access covenant with the Department (exh. 8). In the access covenant, CDC agreed to limit the access to the Trust property from STH 16 to one driveway located 275 feet southwest of the intersection with CTH "PH." The Barnes and Noble bookstore relocated in 2007. The building is now vacant and the property is currently unused.

4. The stretch of STH 16 that passes the Trust property is a four lane divided highway, with two lanes carrying traffic in each direction. STH 16 is classified as a Tier 2A highway under the State Access Management Plan. A Tier 2A highway is the second highest classification that the Department assigns to highways. Generally, the Department seeks to limit access to Tier 2A highways to public roads and interchanges. The Department also attempts to limit private accesses on Tier 2A highways to low volume residential and agricultural driveways (testimony of David Nielsen). The traffic count for the stretch of USH 16 that passes the Trust property was 9,600 average daily traffic (ADT) in 1981, the year the driveway accesses for the Fireside Resturant were

permitted, and had increased to 23,000 ADT in 2009 (testimony of Oestreich, exh. 12). The speed limit for the stretch of STH 16 that passes the Trust property is 45 mph.

5. On July 23, 2009, CDC entered into a lease with Walgreen Company (Walgreens) to construct and lease a retail pharmacy on the Trust property (exh. 23). The proposed Walgreens building will be 14,280 square feet in size and include a drive-thru pharmacy. The Trust property currently has one driveway access from CTH "PH" and the existing driveway access from STH 16. Because STH 16 is a divided highway, the driveway access from STH 16 for the Trust property is limited to a right-in/right-out driveway.

6. The site plan for the Walgreens store envisions a second driveway access for the property from CTH "PH." A letter dated January 12, 2010, indicates that the City of Onalaska, which controls CTH "PH," will permit the second driveway access from CTH "PH" (exh. 3). As of the date of the hearing, the City of La Crosse had not approved the site plan for the proposed Walgreens pharmacy.

7. In June of 2007, Stuart Schaefer, a principal of CDC, contacted the Department regarding obtaining a permit for a second driveway access from STH 16 for the Trust property.

8. A corridor study of STH 16 was conducted in 2001/2002. The recommendations of the study included that private access points on the stretch of STH 16 that passes the Trust property be removed and relocated to local roads (exh. 19, page 86).

9. By letter dated April 21, 2008, the Department's Southwest Region office informed CDC that it was revoking driveway access permit no. 32-8-81 (exh. 6). On May 12, 2008, CDC appealed this decision to the Department's central office. By letter dated November 14, 2008, the Department's central office affirmed the regional office's decision. This letter was apparently never received by CDC and, after an inquiry from Mr. Schaefer, was reissued on August 26, 2009 (exh. 11).

10. The stated reasons for the Department's decision to revoke driveway access permit no. 32-8-81, as set forth in the August 26, 2008 letter, are:

- a) The driveway is located within the functional area of the intersections of STH 16 & CTH PH and STH 16 & Theatre Road, which is in direct conflict with WisDOT Maintenance Manual Policy 91.10 – Item 6. Driveways within the functional area of an intersection are prone to accidents and inefficiency due to the additional confusion created when a driver must simultaneously monitor numerous access points.
- b) A corridor study concerning STH 16 was completed in 2001/2002. This study analyzed present and future mobility and

access issues, and included solutions to those issues. This study was done in conjunction with the Cities of La Crosse and Onalaska, and involved public participation. This corridor study recommended that private access points on this section of STH 16 should be removed and relocated to side roads.

- c) This property already has reasonable access to CTH PH. If additional access to CTH PH is needed, this will be consistent with other businesses in the area having multiple access points to CTH PH.

11. The “functional area of an intersection” is defined as “the area where motorists have to make numerous decisions regarding exiting, merging, weaving, turning, stopping, accelerating, *etc.*” (exh. 10). The subject driveway is located 275 feet “downstream” from the intersection with CTH “PH” and 550 “upstream” from the intersection with Theater Road. The functional area of the intersection “downstream” from CTH “PH” is 360 feet and “upstream” from Theater Road is 550 feet (testimony of David Nielsen). The subject driveway is located in the functional area of both intersections.

12. In response to an inquiry from the Department after CDC requested the second driveway access from STH 16 for the Trust property, Mr. Schaefer estimated that the proposed Walgreens would generate between 400 and 500 customer trips per day. Mr. Schaefer further estimated that most of those customers would access the Trust property from the CTH “PH” (exh.9). Mr. Schaefer subsequently indicated that by “most” he meant that between 75 and 80% of Walgreens’ customers would use the CTH “PH” driveway.¹

13. Since the existing driveway access is a right in/right out driveway by virtue of the fact that this stretch of STH 16 has a median, use of the driveway would necessarily be limited to motorists approaching the Trust property from the northeast and to customers exiting the property and heading southwest on STH 16. Prospective southwest bound Walgreens’ customers could reach the business either by turning right at the intersection of STH 16 and CTH “PH” or, if they missed that turn, by turning right at Theater Road, after passing the Trust property, and doubling back on CTH “PH.” Neither of these alternatives would require a significant amount of unnecessary travel or time.

14. Although the route for customers approaching the Trust property from the northeast does not involve a significant deviation in terms of either distance or time, Mr. Schaefer testified that the concern is Walgreens will lose the business of impulse

¹ Wayne Higgins, the petitioner’s expert, questioned this estimate of the number of customer trips. Mr. Higgins testified that according to an Institute of Traffic Engineer’s trip generation manual the daily number of weekday trips will be around 150. Both Mr. Schaefer’s and Mr. Higgins’ testimony is hearsay; however, Mr. Schaefer’s estimate purportedly came from Walgreens and is based on Walgreens’ familiarity with its pharmacies. Mr. Higgins’ estimate is based on a generic pharmacy with drive-thru capability. Of the two estimates, Mr. Schaefer’s is probably more reliable.

customers approaching the property from the northeast to stores such as Target or Wal-Mart which sell many of the same items as Walgreens and also have stores in the vicinity. The petitioners did not present any studies showing what percentage of Walgreens customers are impulse shoppers and how many of those customers are likely to shop at a big box store, such as Wal-Mart or Target, as opposed to Walgreens because of the lack of a driveway access from STH 16.

15. Each private access adds additional conflict points to a highway. A “conflict point” is a point where the paths of two vehicles cross and is a potential crash site (testimony of Dale Oestreich). In general, the Department attempts to minimize the number of conflict points on a highway.

16. The petitioner presented the testimony of Wayne Higgins, a civil engineer specializing in traffic safety. Mr. Higgins admitted that the existing driveway was unsafe as the access is currently constructed and made recommendations for modifying the access to improve safety.

Discussion

The issues for hearing are whether the grounds cited by the Department for revocation of the driveway access permit are true, and if so, whether they constitute a reasonable basis for the revocation of the permit. The Department’s first two grounds for revocation, that the driveway is located within the functional area of an intersection and that the corridor study recommended the elimination of private accesses on this stretch of STH 16, are undisputed. The third basis the Department cited for revocation of the permit, that the petitioner has reasonable, alternative access, is partially disputed. The Trust property has alternative access to its property from CTH “PH.” However, the petitioner disputes whether the CTH “PH” driveway constitutes reasonable access.

For the two grounds that are undisputed, the question that needs to be decided is whether these grounds constitute a reasonable basis for the revocation. The Department relies on engineering guidelines and a corridor study to support its conclusion that the existing driveway access adversely impacts traffic safety along the stretch of STH 16 where the driveway is located. Specifically, the Department has shown that the driveway is located within the functional area of two intersections. The engineering guidelines used by the Department strongly discourage allowing driveways to exist within the functional area of a highway. Additionally, a recent corridor study of STH 16 recommended relocating private accesses from STH 16 to local roads whenever possible to improve traffic safety.

These are merely guidelines and recommendations and do not require that the driveway access be eliminated. An owner of property that abuts a public roadway has a right of ingress and egress from the public roadway. If the Trust property had no other frontage, it would have a right of access from STH 16 and then the issue would become how to construct the access to maximize traffic safety. However, the Trust property does

have access from CTH "PH." The issue, therefore, is whether the CTH "PH" access constitutes reasonable, alternative access to the existing access from STH 16.

Reasonable, alternative access does not mean equivalent access. The petitioner concedes that the majority of the customers who will shop at the proposed Walgreens will use the access from CTH "PH" because they will be approaching the store from the southwest. It is also clear that the additional time and distance to travel to the CTH "PH" access is not significant. The only concern raised by the petitioner on behalf of Walgreens is that the store will lose business from impulse shoppers approaching the property from the northeast. Mr. Schaefer's testimony on this issue is hearsay. There is no reason to doubt that Walgreens has expressed such a concern to him; however, the Department is unable to cross-examine Mr. Schaefer regarding the basis for this concern and to determine whether the concern is legitimate.

Mr. Schaefer's real concern is not that Walgreens will lose some impulse shoppers, but that Walgreen will not lease the Trust property without a driveway access from STH 16. Although this contention may ultimately be true, at this point that concern is still speculative. Walgreens does have the right to terminate the lease if the access to the property from STH 16 is eliminated. However, the Department showed two examples of other Walgreens that were located on property with frontage on state highways, but whose only access was from local roads (see exhs. 30 and 31). Additionally, even if Mr. Schaefer's concern is legitimate, it is not a sufficient basis to overcome the adverse impacts on traffic safety of allowing a driveway access to exist in the functional area of an intersection.

Alternatively, the petitioner argues that equity requires that the Department's revocation order be reversed. The basis of this argument is that nearly sixteen months passed between the petitioner's appeal of the regional office's decision and the petitioner's receipt of the central office's affirmation of the regional office's decision. The petitioner contends that during this time he assumed that the dispute had been resolved and had acted accordingly. Assuming, *ab arguendo*, that the petitioner's assumption was reasonable; this does not constitute a basis for reversing the Department's revocation order. First of all, as an administrative agency, the Division of Hearings and Appeals does not have equitable powers. Secondly, such reliance does not justify the allowance of a threat to traffic safety. If the petitioner was harmed by the alleged delay on the part of the Department, his remedy is to file a claim for damages, not impose a hazard on the public.

In summary, the revocation of the permit and removal of the driveway accesses from USH 16 to the Trust property will increase highway safety along the stretch of STH 16 that passes the Trust property. The petitioner has reasonable alternative access to the property via an existing permitted driveway access from CTH "PH" and possibly a second driveway from CTH "PH." Each driveway adds additional conflict points along a highway. The reduction of the number of conflict points improves the safety of a highway. The Department has authority to promote highway safety by regulating the number and design of driveways providing access to abutting properties from state

highways. This authority must be balanced with the abutting property owner's right of ingress and egress. The petitioner has reasonable, alternative access to the Trust property from CTH "PH."

The Department has not shown that the subject driveway has been a factor in a disproportionate number of traffic accidents on STH 16 in the vicinity of the subject driveway. However, it has established that the location, design, and mere existence of the subject driveway access are contrary to engineering guidelines and Department policy and on that basis adversely impacts traffic safety. Additionally, the driveway access is unnecessary because the trust property has reasonable, alternative access from CTH "PH." For these reasons the Department's revocation of driveway access permit no. 32-8-81 is supported by the evidence in the record and should be affirmed.

Conclusions of Law

The Administrator concludes:

1. The petitioner has reasonable, alternative access to its property from CTH "PH." The existing driveway access from STH 16 is unnecessary and reduces traffic safety on STH 16. The Department of Transportation's decision to revoke driveway access permit no. 32-8-81 is reasonable and consistent with the standards of Wis. Stat. § 86.07
2. Pursuant to Wis. Stat. §§ 86.07(3) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The Department of Transportation's decision to revoke driveway access permit no. 32-8-81 is hereby AFFIRMED.

Dated at Madison, Wisconsin on May 11, 2010.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.