BEFORE THE

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

In the Matter of the Denial of a
Driveway Permit to Omen Swensen
at USH 141 and STH 29, Palo
Estates Subdivision, Town of Bellevue,
Brown County.

Case No. 96-H-987

FINAL DECISION

Omen Swensen filed an application for a permit for driveway access pursuant to sec. 86.07(2), Stats. The application was denied by the Department of Transportation. Mr. Swensen requested a hearing to review the denial. Pursuant to due notice, a hearing was held in Manitowoc, Wisconsin on October 10, 1996, before Mark J. Kaiser, Administrative Law Judge.

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

Omen Swensen
2206 Michigan Avenue
Manitowoc, WI 54220

Wisconsin Department of Transportation, by
Attorney Allyn J. Lepeska
Office of General Counsel
PO Box 7910
Madison, WI 53707-7910

The Administrative Law Judge issued a proposed decision on November 6, 1996. On November 12, 1996, Mr. Swensen filed an affidavit from Steven E. Zeitler and on November 14, 1996, Mr. Swensen filed a letter requesting a rehearing. Since the request for rehearing was filed prior to the final decision in this matter being issued, it is assumed that Mr. Swensen meant to file objections to the proposed decision and his letter will be treated as such. Instructions for filing a petition for rehearing have been included with this decision.

In his letter, Mr. Swensen raises two issues. One issue is that the residents of Palo Estates subdivision are in favor of driveway access unto State Trunk Highway 29 and United States Highway 141 for lot 19 of the subdivision. The other issue is that he was coerced into conveying the access restriction for lot 19 at the time the subdivision was platted. Both of these issues were raised at the hearing and were adequately addressed in the proposed decision. For

the reasons set forth in the proposed decision, Mr. Swenson's arguments are not persuasive and the proposed decision is adopted as the final decision in this matter.

Finding of Fact

The Administrator finds:

1. Omen Swensen owned land along the south side of State Trunk Highway 29 and United States Highway 141 (STH 29-USH 141) in the Town of Bellevue, Brown County, Wisconsin. In 1986, a residential subdivision was platted which included Mr. Swensen's land. The subdivision is known as Palo Estates.

2. Mr. Swensen was the owner of lots 18, 19, 20, 21, 22, 23, 24, and 27 in Palo Estates. Mr. Swensen is still the owner of lot 19. Lot 19 abuts STH 29-USH 141. At the time Palo Estates was platted, Mr. Swensen restricted lot 19 "in that no owner, possessor, user, nor licensee, nor any other person shall have any right of direct vehicular ingress or egress with STH '29'-USH '141'" (owner's certificate on Palo Estates plat survey, exhibit 2). The owner's certificate further states that the restriction is for "the benefit of the public according to Section 236.293, Wisconsin Statutes, and shall be enforceable by the Department of Transportation."

3. As Palo Estates was platted, lot 19 has access to Woodland Hills Court, an internal subdivision street. Lot 19 is 1.98 acres in size. Mr. Swensen wishes to divide lot 19 into five lots. Two of the lots will have access to Woodland Hills Court. Mr. Swensen proposes a shared driveway access to STH 29-USH 141 for the other three lots. By letter and application dated March 3, 1995, Mr. Swensen applied to the Department of Transportation (Department) for a driveway access permit to STH 29-USH 141 pursuant to sec. 86.07(2), Stats.

4. By letter dated June 15, 1995, the Department denied the application. By letter dated June 27, 1996, the Department reaffirmed the denial and advised Mr. Swensen of his right to a hearing before the Division of Hearings and Appeals to review the denial. By letters dated July 5, 1996, and July 20, 1996, Mr. Swensen requested a hearing to review the denial.

5. Lot 19 as platted has access to Woodland Hills Court; however, Mr. Swensen testified that a lot this large in Palo Estates is unsalable as a residential lot. A certified survey map has been prepared subdividing lot 19 into five residential lots served by a cul-de-sac connecting to Woodland Hills Court (exhibit 9). This alternative is undesirable to Mr. Swensen because of the cost of constructing the street and the amount of land which

would be consumed by the street serving the five lots. The residents of the subdivision also prefer driveway access for the three lots abutting STH 29-USH 141 because this alternative would generate less traffic on the internal streets of the subdivision.

6. The certified survey plat for Palo Estates complies with the basic principles of sec. HY 33.02, Wis. Adm. Code. It is in the public interest to minimize the number of vehicular accesses to state trunk highways. Although granting a driveway access for lot 19 would benefit Omen Swensen and the residents of the subdivision, it is in the public interest to deny the application. No valid reasons exist to deviate from the basic principles set forth at sec. HY 33.02, Wis. Adm. Code.

7. Omen Swensen expressly conveyed the access restriction for lot 19 as part of the certified survey map. Mr. Swensen testified at the hearing that he did not know the access restriction had been conveyed, however, he did admit that he signed the owner's certificate conveying the access restriction on the certified survey map.

   Mr. Swensen also testified that he was assured driveway access would be granted for lot 19 and that he signed the owner certificate under a false impression. Mr. Swensen's claim of misrepresentation is uncontroverted; however, it is unlikely the certified survey map would have been approved without the access restriction. Therefore, even if a misrepresentation occurred, Mr. Swensen was not harmed.

Discussion

After the hearing, the Department filed a letter contending that the Division of Hearings and Appeals does not have jurisdiction to hear this matter. This letter will be treated as a motion to dismiss for lack of jurisdiction. The Department contends that when Mr. Swensen conveyed the access restriction he waived his right to appeal any denial of his application for a driveway permit.

The Department advised Mr. Swensen to apply for a driveway access permit and after the application was denied informed him that the denial was appealable to the Division of Hearings and Appeals. The Department argued in its letter that Mr. Swensen gave up his right to apply for a driveway access permit. However, there is no evidence in the record that Mr. Swensen received any consideration for the conveyance of the access restriction. Nor is there anything in sec. 236.29, Stats., indicating that the conveyance of access restriction is irrevocable. Absent clear legal authority that Mr. Swensen waived his right to challenge the Department's denial of his application for a driveway access permit, it is disingenuous on the part of the Department to move for dismissal for lack of jurisdiction after informing Mr. Swensen of his right to appeal. The Department's motion to dismiss is denied.

Nevertheless, Mr. Swensen did convey access restriction to the Department in the owner's certificate on the certified survey map. As mentioned in the Findings of Fact, it is unlikely that the certified survey map would have been approved without the conveyance of this access restriction. It is inconsistent on Mr. Swensen's part to grant the conveyance in order to have the certified survey map approved and then a seek driveway access when it would be financially beneficial to him.

Mr. Swensen claims that he was told that he would be able to get access for lot 19 in the future even though he conveyed the access restriction. There is no indication in the record as to how much experience Mr. Swensen has as a subdivision developer; therefore, it is impossible to determine whether, assuming the misrepresentation did occur, it was reasonable for Mr. Swensen to rely on the misrepresentation. It is more likely that, if anything, Mr. Swensen was a victim of a misunderstanding. Again, even if it was a misunderstanding, it was necessary for Mr. Swensen to convey the access restrictions in order to have the certified survey map approved. It was necessary for him to convey the access restriction whether he understood the effect of such conveyance or not. It is not unfair to Mr. Swensen to now deny the application for a driveway access permit.

In summary, lot 19 can be subdivided without access to STH 29-USH 141. This can be done by construction of an internal subdivision road connected to Woodland Hills Court. This will be more costly for Mr. Swensen and obviously will reduce the profit he realizes by subdividing lot 19; however, since it is possible to provide access to these lots without granting driveway access directly to STH 29-USH 141 the public interest, as defined in the basic principles set forth at sec. HY 33.02, Wis. Adm. Code, requires denial of the application for driveway access.

Conclusions of Law

The Administrator concludes:

1. Omen Swensen conveyed vehicular access restriction to STH 29-USH 141 for lot 19 of Palo Estates subdivision in the Town of Bellevue, Brown County as part of the owner's certificate of the certified survey map for the subdivision.

2. Pursuant to secs. 86.07(3) and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

The denial by the Department of Transportation of the application of Omen Swensen for a driveway access permit is affirmed.

Dated at Madison, Wisconsin on November 25, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By _____
David H. Schwarz
Administrator

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