Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Request for Access

Modification by Mark Ertman — Case No. 97-H-1057

FINAL DECISION

Mark Ertman applied for a driveway access point on State Trunk Highway 310 in Manitowoc County. By letter dated September 15, 1997, the Wisconsin Department of Transportation denied the application. By letter dated September 24, 1997, Attorney Raymond R Greig, on behalf of Mark Ertman, requested a hearing to review the denial.

Pursuant to due notice a hearing was held on November 10, 1997, in Manitowoc, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last submittal was received on January 15, 1998.

In accordance with secs. 227 47 and 227 53((1)(c), Stats , the PARTIES to this proceeding are certified as follows:

Mark Ertman, Petitioner, by

Raymond R. Greig, Attorney
980 Maritime Drive – Suite C
Manitowoc, WI 54220-2961

Wisconsin Department of Transportation, Respondent, by

Allyn Lepeska, Attorney
Office of General Counsel
P. O. Box 7910
Madison, WI 53707-7910

The Administrative Law Judge issued a proposed decision in this matter on February 16, 1998. The Department of Transportation filed comments in support of the proposed decision on March 3, 1998. No other comments on the proposed decision were received. The proposed decision is adopted as the final decision in this matter.

FINDINGS OF FACT

The Administrator finds:

1. Mark Ertman along with his sisters, Sherry and Jill Ertman, owns an 8.40 acre parcel along the north side of State Trunk Highway 310 (STH 310) in the Town of Two Rivers, Manitowoc County. The legal description of the parcel is the SW ¼ of the SE ¼, section 34, Township 20 North, Range 24 East, Town of Two Rivers, Manitowoc County. This parcel was part of The Ertmans' grandparents' farm. Mark Ertman along with his sisters acquired this property as part of the settlement of their grandparents' estate.

2. Mark Ertman and his wife, Christine Ertman, also own a one acre parcel in the southwest corner of the 8.40 acre parcel described in paragraph one. The one acre parcel includes the original farmhouse of Mr. Ertman's grandparents and has driveway access to STH 310. This parcel was subdivided from the rest of the farm and is currently used as rental property.

3. In 1981, the Wisconsin Department of Transportation (the Department) declared STH 310 a controlled access highway.

4. In 1985, Narcy Ertman, Mark Ertman's grandmother, applied for and was granted driveway access to STH 310. This is the driveway access located on the one acre parcel.

5. The 8 40 acre parcel presently contains no buildings The Ertmans plan to divide it into three large residential lots. The proposed driveway would serve all three lots.

6. No ingress and egress presently exists for the 8.40 acre parcel; however, alternatives to granting the proposed driveway access exists. The alternatives include three suggested in the September 15, 1997, denial letter. The alternatives suggested are:

A. The original Narcy Ertman driveway could be moved to the property line between the one acre and the 8.40 acre parcels, or an easement could be granted to allow the 8.40 acre parcel to access this driveway at its current location.

B. The driveway could be relinquished for an authorization for a public street.

C. An easement could be sought from the property adjacent to the west to allow access to that driveway.

Mr. Ertman does not consider any of these alternatives viable. His primary concern is that the cost of obtaining access by any of these alternatives would exceed the value of the property. However, the fact remains that alternatives for access to the property exist and because one of the alternatives, Alternative A, involves property owned by Mark Ertman, the implementation of the alternative is within his control.

7. Based upon the existence of reasonable alternatives, the denial of the application for driveway access to STH 310 is reasonable.

DISCUSSION

At the outset of the hearing, the Department of Transportation moved for dismissal of petitioner's request for a hearing. The Department argued that the Division of Hearings and Appeals does not have jurisdiction in this matter. The Department cited the opinion in Narloch v. Department of Transportation, 115 Wis. 2d 419, 34 N.W.2d 542 (1983), and sec. 84.25(6), Stats., as support for its motion.

Section 84.25(6), Stats., provides:

> After the designation of a controlled access highway, the owners or occupants of abutting lands shall have no right or easement of access, by reason of the fact that their property abuts on the controlled-access highway or for other reason, except only the controlled right of access and of light, air or view.

Narloch holds that "existing right of access" in sec. 32.09(6)(b), Stats., includes the right of an abutting property owner to ingress and egress, and the right to be judged on the criteria for granting permits for access points under sec. 86.07(2) and Wis. Adm. Code Ch. Hy. 31. The opinion in Narloch involved three cases in which property owners were seeking compensation for loss of access rights. None of the three properties abutted highways which had been declared controlled access highways pursuant to sec. 84.25, Stats. The court held that because the highways had not been declared controlled access highways pursuant to sec. 84.25, Stats., the abutting property owners still had an existing right of access and this right of access included the right to apply for driveway access.

The Department argues that it can summarily deny an application for driveway access by a property owner whose property abuts a controlled access highway. Although the court in Narloch acknowledged that the Department may summarily deny a application for driveway access to a controlled access highway without considering the criteria set forth at sec. 86.07(2), Stats., or ch. Hy 31, Wis. Adm. Code, these property owners do have a right to apply for driveway access.

In the instant case, the Department accepted an application for a driveway access permit. On its face, the application states that it is an application pursuant to sec. 86.07(2), Stats., and ch. Hy 31, Wis. Adm. Code. The Department subsequently evaluated the application and ultimately denied it. In its denial letter, the Department advised the petitioner that he had a right to petition for review by the Division of Hearings and Appeals.

Throughout the process, the Department treated this application as one filed under sec. 86.07(2), Stats. If the application is permissible under this section, the Division of Hearings and Appeals has jurisdiction, pursuant to sec. 86.07(3), Stats., to review the denial of the application. In Stefan Auto Body v. State Highway Commission, 21 Wis.2d 363, 124 N.W.2d 319, (1963), the Wisconsin Supreme Court recognized that a person who owns property abutting a public

street has a right of access, or right, subject to reasonable regulation, of ingress and egress to and from the public street.

Stefan involved a property owner whose property abutted a highway which became a controlled access highway and was seeking compensation for the loss of direct access to the highway. The court found that the plaintiff in Stefan had access to the controlled access highway by means of a frontage road and held that since the plaintiff had reasonable access, albeit more circuitous access then he had previously, he was not entitled to compensation. The issue in the instant case is whether Mark Ertman has reasonable ingress and egress from the property. As found in the findings of fact above, the Ertmans have reasonable alternatives for ingress and egress from the property and another driveway access is not necessary.

CONCLUSIONS OF LAW

The Administrator concludes:

1. Mark Ertman has reasonable alternatives for ingress and egress from the property described in the findings of fact. Additional driveway access from State Trunk Highway 310 is unnecessary.

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 Department of Transportation denial of Mark Ertman's application for driveway access to State Trunk Highway 310 in Manitowoc County is reasonable and is affirmed.

Dated at Madison, Wisconsin on March 18, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By _____
DAVID H. SCHWARZ
ADMINISTRATOR

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