

State Of Wisconsin DIVISION OF HEARINGS AND APPEALS

In the Matter of the Driveway Removal Appeal,
Southeast Region, STH 59, Village of Waukesha,
Waukesha County Section 01-6N-19E,
Family Revocable Trust and
Petitioners

Case No. DOT-24-0036

FINAL DECISION

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

Family Revocable Trust and and and Petitioners, by Attorneys Mackenzie Terry and Todd Terry Terry & Nudo, LLC 600 52nd Street, Suite 320 Kenosha, WI 53140

Wisconsin Department of Transportation, by Attorney Jenine Graves P.O. Box 7910 Madison, WI 53707-7910

PRELIMINARY RECITALS

By letter dated August 26, 2024, received by the Division of Hearings and Appeals (DHA) on August 29, 2024, the Petitioners, the Family Revocable Trust and appealed the decision of the Department of Transportation (Department) to remove their driveway connection from State Highway 59, Waukesha County, and requested a hearing. Administrative Law Judge Angela Chaput Foy was assigned to preside over the matter. A telephone prehearing conference was held on September 20, 2024, at which time the issue for hearing was confirmed and the hearing was scheduled. A status telephone conference was held on January 8, 2025 to confirm the location of the hearing after the parties disclosed witnesses.

Pursuant to due notice, ALJ Chaput Foy conducted the hearing at the Lee Sherman Dreyfus State Office Building in Waukesha, Wisconsin on February 25, 2025. Testimony was heard from and and The hearing was digitally recorded, and the record contains the hearing recordings; exhibits 1-19, 21-22, 100-103, 105-109, 111-112, 114, and 118-122; and written closing arguments filed by each party on March 14, 2025.

Pursuant to Wis. Stat. § 227.46(2m), on April 25, 2025, ALJ Angela Chaput Foy issued a Proposed Decision in a form that may be adopted by the Division Administrator. The Proposed Decision found in favor of the Petitioners, which would rescind the Department's July 8, 2024 order to remove the STH 59 driveway. The parties were given the opportunity to file objections to the Proposed Decision within 15 days. The Department timely filed objections, and the Petitioners timely filed a letter in support of the Proposed Decision.

The undersigned Division Administrator may adopt the Proposed Decision as the Final Decision of this division. To the extent the Final Decision varies in any respect from the Proposed Decision, it must provide an explanation of the basis for each variance.

OBJECTIONS

The Department objects on grounds that the Proposed Decision: (1) misinterpreted Wis. Admin. Code § Trans 231.03(2); (2) used an incorrect legal standard to determine what constitutes reasonable access; and (3) failed to address safety standards and principles.

This matter is governed by Wis. Admin. Code § Trans 213.03(2), which states:

"The number of driveways permitted serving a single property frontage along a state trunk highway shall be the minimum deemed necessary by the department for reasonable service to the property without undue impairment of safety, convenience, and utility of the highway."

The Department emphasizes the latter part of this provision to the exclusion of the middle. It asserts that the Proposed Decision applied the "safety" and "convenience" factors to the property owner rather than the highway, which was error. On the contrary, the Proposed Decision acknowledged that the Department deemed removal of the property owner's driveway necessary to prevent impairment of safety, convenience, and utility of the highway. However, the Proposed Decision also recognized the provision's requirement that the owner maintain a driveway that provides reasonable service to the property, and that is the crux of this case. Reasonable service to the property must be balanced with considerations of safety, convenience, and utility of the highway.

Thus, § Trans 213.03(2) sets forth a balancing test, not a free pass to remove any driveway that may impair the safety, convenience, and utility of the highway. Even if a driveway would impair the safety, convenience, and utility of the highway, the Department obviously cannot remove it if it is the only one. Nor may the Department remove a driveway if it is the only one that gives the property owner reasonable access to their property. That is why the Proposed Decision focused on whether the subject driveway is necessary to maintain reasonable service to the property.

The Proposed Decision effectively conceded that the subject driveway necessarily has some negative impact on the safety, convenience, and utility of the highway. But again, that is not the end of the inquiry, as the property owner is authorized under the law to have the minimum number of driveways for reasonable service to the property so long as it does not unduly impair the highway's safety, convenience, and utility.

The cases cited by the Department are not analogous to the case at hand. They involve matters in which property owners sought a driveway permit from the Department, and the Department's denials were upheld at hearing. That is quite different from the instant case, in which the property owner already had a single permitted driveway with highway access, which the Department initiated the process of removing. When an agency has issued an order and the order's recipient requests a hearing, as was the case here, the agency bears the burden of proof by a preponderance of the evidence. Wis. Admin. Code §§ HA 1.12(3)(a), 1.17(2).

As noted in the Proposed Decision, the burden was not met because removing the subject driveway would not allow the property owner reasonable service to the property under the facts that existed at the time of the Department's order. Nor did the Department show that keeping the subject driveway would unduly impair the highway's safety, convenience, and utility. Rather, the impairment is ordinary – the Department simply wants less access points to the highway for general, acknowledged safety and convenience of its users. The subject driveway does not present any extraordinary safety or convenience concerns different from its neighbors.

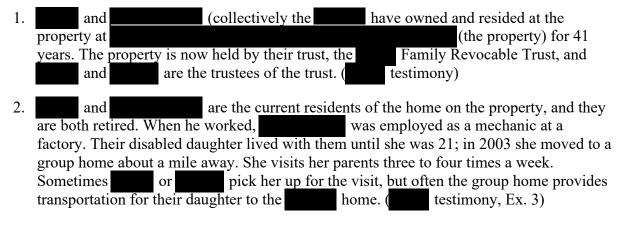
As a final matter, reasonable service to the property based on an alternative driveway conditioned on the Petitioners being made to take burdensome legal steps for the <u>possibility</u> of rendering the alternative driveway reasonable is untenable. The alternative driveway is currently not reasonable; the subject driveway is.

Accordingly, the Administrator hereby adopts the Proposed Decision as DHA's Final Decision. The only variance is to some language and citations in the conclusions of law to make clear that the Final Decision is grounded on reasonable access, not safety or convenience of the highway.

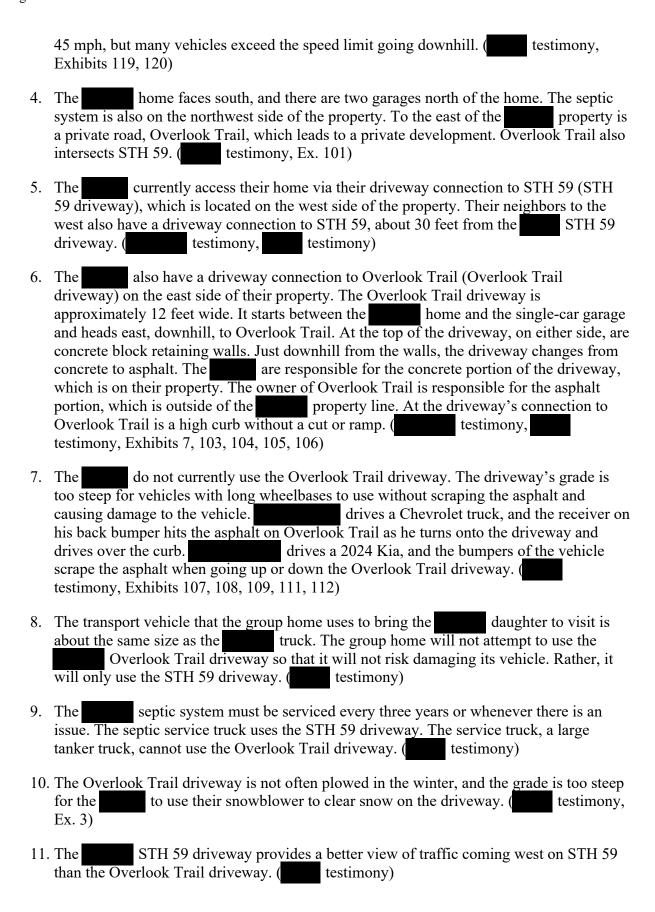
ISSUE

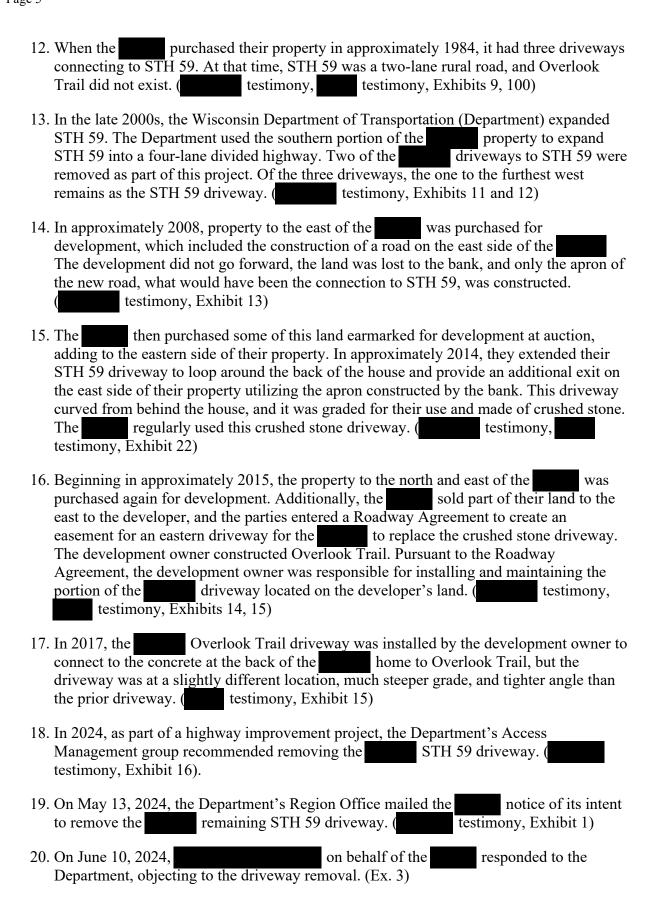
The issue is whether the Department is properly removing the Petitioners' driveway connection to Wisconsin State Highway 59 as part of a highway improvement project in compliance with Wis. Admin. Code § Trans 231.03(2).

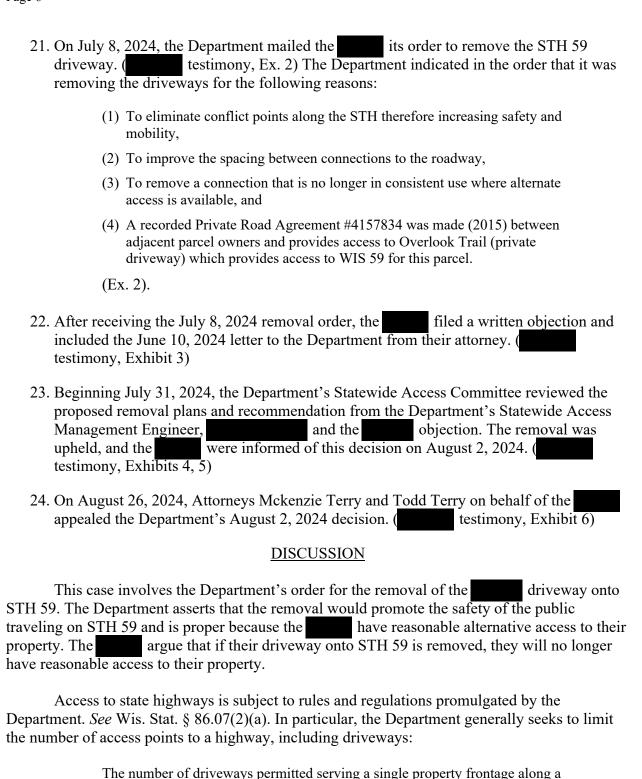
FINDINGS OF FACT



3. Arcadian Avenue is also known as Wisconsin State Highway 59 (STH 59). STH 59 is a four-lane divided highway that runs in an east-west direction. The property is on the north side of STH 59, at the bottom of a hill. The speed limit in this area of STH 59 is







The issue of whether removing the STH 59 driveway would be safer for the public traveling on the highway is largely undisputed. The Department seeks to reduce the

convenience, and utility of the highway.

Wis. Admin. Code § Trans 231.03(2).

state trunk highway shall be the minimum deemed necessary by the department for reasonable service to the property without undue impairment of safety,

number of driveways accessing the highway because that reduces conflict points, which is where a vehicle enters or exits a highway, and fewer conflict points reduces the overall number of accidents on the highway. The offered evidence that no accidents have occurred because of the STH 59 driveway, and also asserted that the STH 59 driveway may be safer for the to use than the Overlook Trail driveway because a driver exiting the property would have a better view of oncoming traffic and more time to react to drivers making a U-turn from the turn lane west of their property from the STH 59 driveway than from the Overlook Trail driveway. However, they did not contest that reducing conflict points is generally safer for traffic on the highway. The crux of the dispute between the parties is whether the alternative access to their property if the STH 59 driveway is removed. See J & E Investments, LLC v. Div. of Hearings & Appeals, 2013 WI App 90, 349 Wis. 2. 497, 835 N.W.2d 271. "[W]hether there is reasonable access depends on the specific facts in a case." Nat'l Auto Truckstops, Inc. v. State Dep't of Tras., 2003 WI 95, ¶ 20, 263 Wis. 2d 649, 665 N.W.2d 198. The Department asserts that the have reasonable alternative access to their property via the Overlook Trail driveway. It argues that "the right of access merely involves only the right to enter and leave the property without being forced to trespass across the land of another." (Department Br. at 6, citing Surety Sav. & Loan Ass'n v. Dep't of Trans., 54 Wis. 2d 438, 444 (1972)). The alternate access does not need to be equivalent to the access removed, and it may still be reasonable even if the property owner is required to use an easement. (See id. at 7.) dispute that the Overlook Trail driveway is reasonable access. Because of the grade cannot use it without damaging their vehicles. Their daughter would of the drive way, the not be able to visit them because the transport vehicle that she uses cannot use that driveway. Snow and ice removal from the driveway is dangerous, and often not even attempted by the development owner. Emergency vehicles, including firetrucks and ambulances, would not be able to use this driveway because of their long wheelbases. The truck that services their septic system cannot use this driveway. The parties also dispute how the easement for the Overlook Trail driveway applies to this matter. The Department argues that a relevant consideration is whether the property owner has control over implementing access. It cites to *In the Matter of the Request for* Access Modification by Mark Ertman, a case in which the ALJ found that moving an existing driveway or granting an easement would allow for reasonable alternative access, and these options were within the control of the property owner. Applying this reasoning to this case, the Department asserts that the Roadway Agreement governs the Overlook Trail driveway, and if enforced, could correct any issues with the grade of the driveway. Therefore, correcting any disagree with the Department's problems remains within the control. The contention. They emphasize that Overlook Trail is a private road and that they have no control over the grade, width, upkeep, plowing or overall conditions of the Overlook Trail driveway. The would have to expend significant funds both to initiate a legal battle to attempt to enforce their rights and in construction fees to change the grade, angle, fill, and placement of the driveway.

A property on a state trunk highway, such as the may only have the minimum number of driveways accessing that highway necessary for reasonable service to the property without undue impairment of safety, convenience, and utility of the highway. Wis. Admin. Code

CONCLUSIONS OF LAW

- 1. The Department bears the burden of proving by a preponderance of the evidence that the Petitioners' driveway is properly subject to removal. Wis. Admin. Code §§ HA 1.12(3)(a), 1.17(2).
- 2. The Overlook Trail driveway does not constitute reasonable service to their property, and the STH 59 driveway does not unduly impair the safety, convenience, or utility of the highway.
- 3. Accordingly, the Department has not met its burden of showing that the STH 59 driveway is properly subject to removal under Wis. Admin. Code § Trans 231.03(2).
- 4. The Division of Hearings and Appeals has authority to issue this Final Decision pursuant to Wis. Stat. §§ 227.43(1)(bg) and 227.46(2m).

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Department's July 8, 2024, order to remove the STH 59 driveway is RESCINDED.

Appeal rights follow.

Dated at Madison, Wisconsin on June 4, 2025.

STATE OF WISCONSIN DIVISION OF HEARINGS AND APPEALS 4822 Madison Yards Way, 5th Floor North Madison, Wisconsin 53705 Telephone: (608) 266-7709

FAX: (608) 264-9885

By:_			
	Brian Hayes		
	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 ensure 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 served and 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 4822 Madison Yards Way, 5th Floor Madison, Wisconsin 53705

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.