



**Before The
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,

Case No. DOT-24-0036

██████████ Family Revocable Trust and ██████████ and
██████████ Petitioners

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 ██████████ 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 ██████████ 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 ██████████. 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 [REDACTED] 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 possibility 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

1. [REDACTED] and [REDACTED] (collectively the [REDACTED] have owned and resided at the property at [REDACTED] (the property) for 41 years. The property is now held by their trust, the [REDACTED] Family Revocable Trust, and [REDACTED] and [REDACTED] are the trustees of the trust. ([REDACTED] testimony)
2. [REDACTED] and [REDACTED] are the current residents of the home on the property, and they are both retired. When he worked, [REDACTED] was employed as a mechanic at a factory. Their disabled daughter lived with them until she was 21; in 2003 she moved to a group home about a mile away. She visits her parents three to four times a week. Sometimes [REDACTED] or [REDACTED] pick her up for the visit, but often the group home provides transportation for their daughter to the [REDACTED] home. ([REDACTED] testimony, Ex. 3)
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 [REDACTED] 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

45 mph, but many vehicles exceed the speed limit going downhill. (█████ testimony, Exhibits 119, 120)

4. The █████ home faces south, and there are two garages north of the home. The septic system is also on the northwest side of the property. To the east of the █████ property is a private road, Overlook Trail, which leads to a private development. Overlook Trail also intersects STH 59. (█████ testimony, Ex. 101)
5. The █████ currently access their home via their driveway connection to STH 59 (STH 59 driveway), which is located on the west side of the property. Their neighbors to the west also have a driveway connection to STH 59, about 30 feet from the █████ STH 59 driveway. (█████ testimony, █████ testimony)
6. The █████ also have a driveway connection to Overlook Trail (Overlook Trail driveway) on the east side of their property. The Overlook Trail driveway is approximately 12 feet wide. It starts between the █████ home and the single-car garage and heads east, downhill, to Overlook Trail. At the top of the driveway, on either side, are concrete block retaining walls. Just downhill from the walls, the driveway changes from concrete to asphalt. The █████ are responsible for the concrete portion of the driveway, which is on their property. The owner of Overlook Trail is responsible for the asphalt portion, which is outside of the █████ property line. At the driveway's connection to Overlook Trail is a high curb without a cut or ramp. (█████ testimony, █████ testimony, Exhibits 7, 103, 104, 105, 106)
7. The █████ do not currently use the Overlook Trail driveway. The driveway's grade is too steep for vehicles with long wheelbases to use without scraping the asphalt and causing damage to the vehicle. █████ drives a Chevrolet truck, and the receiver on his back bumper hits the asphalt on Overlook Trail as he turns onto the driveway and drives over the curb. █████ drives a 2024 Kia, and the bumpers of the vehicle scrape the asphalt when going up or down the Overlook Trail driveway. (█████ testimony, Exhibits 107, 108, 109, 111, 112)
8. The transport vehicle that the group home uses to bring the █████ daughter to visit is about the same size as the █████ truck. The group home will not attempt to use the █████ Overlook Trail driveway so that it will not risk damaging its vehicle. Rather, it will only use the STH 59 driveway. (█████ testimony)
9. The █████ septic system must be serviced every three years or whenever there is an issue. The septic service truck uses the STH 59 driveway. The service truck, a large tanker truck, cannot use the Overlook Trail driveway. (█████ testimony)
10. The Overlook Trail driveway is not often plowed in the winter, and the grade is too steep for the █████ to use their snowblower to clear snow on the driveway. (█████ testimony, Ex. 3)
11. The █████ STH 59 driveway provides a better view of traffic coming west on STH 59 than the Overlook Trail driveway. (█████ testimony)

12. When the [REDACTED] purchased their property in approximately 1984, it had three driveways connecting to STH 59. At that time, STH 59 was a two-lane rural road, and Overlook Trail did not exist. ([REDACTED] testimony, [REDACTED] testimony, Exhibits 9, 100)
13. In the late 2000s, the Wisconsin Department of Transportation (Department) expanded STH 59. The Department used the southern portion of the [REDACTED] property to expand STH 59 into a four-lane divided highway. Two of the [REDACTED] driveways to STH 59 were removed as part of this project. Of the three driveways, the one to the furthest west remains as the STH 59 driveway. ([REDACTED] testimony, Exhibits 11 and 12)
14. In approximately 2008, property to the east of the [REDACTED] was purchased for development, which included the construction of a road on the east side of the [REDACTED]. The development did not go forward, the land was lost to the bank, and only the apron of the new road, what would have been the connection to STH 59, was constructed. ([REDACTED] testimony, Exhibit 13)
15. The [REDACTED] then purchased some of this land earmarked for development at auction, adding to the eastern side of their property. In approximately 2014, they extended their STH 59 driveway to loop around the back of the house and provide an additional exit on the east side of their property utilizing the apron constructed by the bank. This driveway curved from behind the house, and it was graded for their use and made of crushed stone. The [REDACTED] regularly used this crushed stone driveway. ([REDACTED] testimony, [REDACTED] testimony, Exhibit 22)
16. Beginning in approximately 2015, the property to the north and east of the [REDACTED] was purchased again for development. Additionally, the [REDACTED] sold part of their land to the east to the developer, and the parties entered a Roadway Agreement to create an easement for an eastern driveway for the [REDACTED] to replace the crushed stone driveway. The development owner constructed Overlook Trail. Pursuant to the Roadway Agreement, the development owner was responsible for installing and maintaining the portion of the [REDACTED] driveway located on the developer's land. ([REDACTED] testimony, [REDACTED] testimony, Exhibits 14, 15)
17. In 2017, the [REDACTED] Overlook Trail driveway was installed by the development owner to connect to the concrete at the back of the [REDACTED] home to Overlook Trail, but the driveway was at a slightly different location, much steeper grade, and tighter angle than the prior driveway. ([REDACTED] testimony, Exhibit 15)
18. In 2024, as part of a highway improvement project, the Department's Access Management group recommended removing the [REDACTED] STH 59 driveway. ([REDACTED] testimony, Exhibit 16).
19. On May 13, 2024, the Department's Region Office mailed the [REDACTED] notice of its intent to remove the [REDACTED] remaining STH 59 driveway. ([REDACTED] testimony, Exhibit 1)
20. On June 10, 2024, [REDACTED] on behalf of the [REDACTED] responded to the Department, objecting to the driveway removal. (Ex. 3)

21. On July 8, 2024, the Department mailed the [REDACTED] its order to remove the STH 59 driveway. ([REDACTED] testimony, Ex. 2) The Department indicated in the order that it was removing the driveways for the following reasons:
- (1) To eliminate conflict points along the STH therefore increasing safety and mobility,
 - (2) To improve the spacing between connections to the roadway,
 - (3) To remove a connection that is no longer in consistent use where alternate access is available, and
 - (4) A recorded Private Road Agreement #4157834 was made (2015) between adjacent parcel owners and provides access to Overlook Trail (private driveway) which provides access to WIS 59 for this parcel.
- (Ex. 2).
22. After receiving the July 8, 2024 removal order, the [REDACTED] filed a written objection and included the June 10, 2024 letter to the Department from their attorney. ([REDACTED] testimony, Exhibit 3)
23. Beginning July 31, 2024, the Department's Statewide Access Committee reviewed the proposed removal plans and recommendation from the Department's Statewide Access Management Engineer, [REDACTED] and the [REDACTED] objection. The removal was upheld, and the [REDACTED] were informed of this decision on August 2, 2024. ([REDACTED] testimony, Exhibits 4, 5)
24. On August 26, 2024, Attorneys McKenzie Terry and Todd Terry on behalf of the [REDACTED] appealed the Department's August 2, 2024 decision. ([REDACTED] testimony, Exhibit 6)

DISCUSSION

This case involves the Department's order for the removal of the [REDACTED] driveway onto STH 59. The Department asserts that the removal would promote the safety of the public traveling on STH 59 and is proper because the [REDACTED] have reasonable alternative access to their property. The [REDACTED] argue that if their driveway onto STH 59 is removed, they will no longer have reasonable access to their property.

Access to state highways is subject to rules and regulations promulgated by the Department. *See* Wis. Stat. § 86.07(2)(a). In particular, the Department generally seeks to limit the number of access points to a highway, including driveways:

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.

Wis. Admin. Code § Trans 231.03(2).

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

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 [REDACTED] 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 [REDACTED] to use than the Overlook Trail driveway because a driver exiting the [REDACTED] 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 [REDACTED] have reasonable 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. 2d 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 [REDACTED] 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.) The [REDACTED] dispute that the Overlook Trail driveway is reasonable access. Because of the grade of the driveway, the [REDACTED] cannot use it without damaging their vehicles. Their daughter would 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 [REDACTED] 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 problems remains within the [REDACTED] control. The [REDACTED] disagree with the Department’s 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 [REDACTED] 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 [REDACTED] 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

§ Trans 231.03(2). As it stands today, the Overlook Trail driveway does not provide the [REDACTED] with reasonable alternative access to their property. If the STH 59 driveway is removed, the [REDACTED] would only be able to access their property in specific cars that they do not currently own and in specific weather. Their daughter would not be able to visit them, and emergency vehicles would not be able to access them at their property. This does not constitute reasonable access to their property. It would constitute undue impairment of the [REDACTED] safety and convenience. Additionally, requiring the [REDACTED] to spend significant funds initiating a legal case to try to enforce easement rights and reconstruct their Overlook Trail driveway would also constitute an undue impairment to their convenience. Consequently, it would not be proper to remove the [REDACTED] STH 59 driveway at this time.

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 [REDACTED] Overlook Trail driveway does not constitute reasonable service to their property, and the [REDACTED] 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 [REDACTED] 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.