

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE APPEAL)
OF THE DENIAL OF APPLICATION FOR)
ENCROACHMENT PERMIT 1-13-088)
AND DENIAL OF VARIANCE BY:)
CHRIS-SARAH ONE LLC. et al.)
APPLICANT.)

**PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
PRELIMINARY ORDER**

THIS MATTER came on for hearing on November 22, 2013. It involves the consolidated appeals of the denial of an application for access permits and the denial a request for variance. Witnesses for each of the parties testified and Applicant's Exhibits 1-35 were offered and admitted into evidence as were Department Exhibits A through S.

The hearing officer, was appointed by the Director of the Department of Transportation to preside at this matter, conduct a hearing, take evidence, and submit proposed findings of fact, conclusions of law, and a preliminary order to the Director. The hearing officer having now reviewed the documentary exhibits admitted, heard the testimony presented in person and reviewed the transcripts of the same, and having considered the matter herein, being fully advised in the premises and the law, makes the following proposed:

FINDINGS OF FACT

I.

Chris-Sarah One, L.L.C., Wayne A. and Pamela J. Humphrey, and Bradley J. and Nicola J. Rowe (herein, the Applicant) own property consisting of approximately thirteen (13) acres located in the city of Post Falls, Kootenai County, Idaho. (Subject Property). The Subject Property is situated in the northeast quadrant of the intersection of public roads State Highway

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41 and Poleline Ave. It is adjacent on the east to segment 001630 of State Highway 41(SH 41), which is under the jurisdiction of the Idaho Transportation Department (the Department). SH 41 at that location is a statewide route located in an urban area and the posted speed limit on the section of SH 41 abutting the Subject Property is forty-five (45) miles per hour. (Tr. Page 204, Lines 12-21). Poleline Ave., a road under the jurisdiction of a local highway agency, borders the Subject Property to the south.

II.

On June 2, 2008 Chris-Sarah Two L.L.C., a sister corporation of Chris-Sarah One, L.L.C. filed an application with the Department (Exhibit 6 – herein the 2008 Application) for approach permits for the Subject Property asking for two commercial access points to SH 41 with the intent of creating a commercial development consisting of a 134,000 square-foot retail/general merchandiser store with three pads totaling 19,700 square-feet on the Subject Property (Exhibit 8, Page 2). This application was assigned number 1-08-096 by the Department. (Exhibit 17).

III.

The 2008 Application was supported by a June 2008 Traffic Impact Analysis prepared by Kittelson and Associates, Inc. regarding the proposed approaches. (Exhibit 8 - herein the Kittelson Report). The conclusions and recommendations reached by the Kittelson Report are summarized in Exhibit 9 and, in general, state that “the proposed ... development by the Applicant can be constructed while maintaining acceptable levels of service and safety on the surrounding transportation system, so long as the appropriate mitigations are in place.”

IV.

Inexplicably, the Department did not make a decision on the 2008 Application until May of 2009. (Exhibit 17). By the time a decision was finally made and mailed, Mr. Davis, a principal in

the Chris-Sarah corporations and their representative at the hearing, had left Idaho due to personal financial problems created by the nationwide economic recession and did not receive the Department's denial of the 2008 Application. (Tr. Page 34, Line 19 through Page 36, Line 13). Accordingly the denial of the 2008 Application was not appealed.

V.

On June 17, 2013 the Applicant filed an application with the Department for two commercial approaches from the Subject Property to SH 41. (Exhibit 19 - herein the 2013 Application). This application was assigned the number 1-13-088 by the Department and is the subject of this appeal. The Department acknowledged receipt of the application and requested any additional information from the Applicant on June 25, 2013. (Exhibit K). Applicant responded with additional information on June 25, and 26, 2013. (Exhibit 26).

VI.

The 2013 Application requested permits for two commercial approaches to SH 41. One was for a permit for a new right-in/right-out approach to be located at Milepost 1.498 on Segment 001630 of SH 41. The distance between the location of this requested approach and the signalized public road intersection of SH 41 and Poleline Ave. is approximately two hundred eighty (280) feet. (Exhibit 19). The second access permit request was for a new right-in/right-out/left-in (with future widening of SH 41) approach to be located at Milepost 1.559 on Segment 001630 of SH 41, which is approximately the northern boundary of the Subject Property. The distance between the location of this second requested approach and the first requested approach is approximately three hundred twenty (320) feet. (Exhibit 19). At the hearing Mr. Davis on behalf of the Applicant testified that the Applicant is seeking only right-in/right-out access at Milepost 1.559.

VII.

In support of the 2013 Application the Applicant provided the Department with site plans, maps of the existing and proposed access configurations on the Subject Property, a copy of the June 2008 Kittleson Report and all other exhibits that had been included with the 2008 Application. (Exhibit 26).

VIII.

At the time of the 2013 Application existing access points to the Subject Property consisted of: (1) a single family residential approach from SH 41 on the west; (2) access from Early Dawn/Ketchikan Ct. streets to the north; and (3) access from Poleline Road to the South. (Exhibit 27).

IX.

Mr. Davis testified on behalf of the Applicant that without two access points off of SH 41 the Subject Property is "under-equipped" to qualify as a major retail site for a general merchandiser and would be bypassed by general merchandisers as they seek sites to build large retail developments. He testified further that the lack of two approaches off of SH 41 would impair the competitive the value of the property and deprive the public of the attendant tax revenue from a potential thirty to forty million-dollar development on the site. (Tr. Page 39, Line 10 through Page 41, Line 2). No other evidence was presented regarding the relative values of the Subject Property with one approach to SH 41 versus two approaches or as to the specific financial consequences or economic opportunities (public or private, positive or negative) of the one versus two approach scenarios.

X.

The Department staff reviewed the 2013 Application on July 3, 2013, unanimously

recommending denial of the application (Exhibit H).

XI.

On July 9, 2013, by prior arrangement with the Applicant, the District One Engineer, Mr. Allen, (herein the District Engineer) reviewed the 2013 Application, supporting documents, and the staff recommendation. This review was conducted pursuant to IDAPA 39.03.42.003. The Applicant did not provide the District Engineer any additional or supplemental information prior to this review. Following his review the District Engineer agreed with the recommendations and reasoning of the staff in denying the application. (Exhibit H). This decision was communicated to the Applicant on July 10, 2013 via certified mail. (Exhibit 27).

XII.

In the July 10, 2013 letter (Exhibit 27) the Department stated its reasons for denying the application as follows: "1. The Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way IDAPA 39.03.42 requires a separation distance of 500-Ft. The requested additional approach location does not meet ITD separation policy. 2. Access is available on Early Dawn/Ketchikan Ct. which is pointed out by Kittelson as a potential remediation for the degraded service at the intersection of SH-41 and Poleline. 3. Access is available on Poleline. 4. The preferred solution would be to improve the intersection of SH-41 and Poleline rather than add a non-conforming access to SH-41."

XIII.

The District Engineer testified that in his review of the staff decision to deny the 2013 Application he looked at the big picture, i.e. was the proper process followed and was it fair, was there anything else that should be considered that might be outside the staff's purview. He stated that he found no flaws in the process followed by the staff and he agreed with the staff decision

to deny the permits. He found the failure to meet the 500-foot distance spacing requirement for approaches to the Subject Property to be the most compelling factor in support of the denial. (Tr. Page 243, Line 17 through Page 245, Line 25.)

XIV.

On July 29, 2013 the Applicant filed an appeal of the decision to deny the 2013 Application to the Idaho Transportation Board. (Exhibit 29).

XV.

At the hearing Mr. Roletto an expert witness for the Applicant testified that the Department acting through its District One Staff acted appropriately under the existing rules in denying the 2013 Application. (Tr. Page 161, Lines 19-23). Mr. Roletto also agreed that the District One Engineer acted appropriately in sustaining the denial of the permit on review. (Tr. Page 161, Line 24-25 through Page 162, Line 13).

XVI.

On July 29, 2013 the Applicant pursuant to IDAPA 39.03.42.400.03.e filed a Request for Variance with the District Engineer requesting an exception to the minimum signal and approach spacing distance requirements for an access onto a state highway as established by the Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way found at IDAPA 39.03.42.400.03.c. (Exhibit 30).

XVII.

In support of the Request for Variance the Applicant submitted: A copy of the conclusions and recommendations of the Kittelson report (Exhibit 9); A copy of a memorandum dated November 14, 2008 from Kittelson staff to Mr. Davis (Exhibit 14); and, A copy of a memorandum dated December 15, 2008 from Kittelson staff to the Department and the City of Post Falls (Exhibit

15). Applicant also incorporated by reference the exhibits submitted in support of the 2013 Application and the 2008 Application (Exhibit 30 p. 2).

XVIII.

Applicant based its Request for Variance primarily upon three rationales: (1) The minimum signal and approach spacing requirements for access points onto a state highway established by the Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way found at IDAPA 39.03.42.400.03.c had changed in the interim between the filings of the 2008 Application and the 2013 Application. The requested access points complied with the spacing distance requirements that were in effect in 2008 and an exception to the new distance requirements should be granted now as a matter of equity; (2) The Department's inexcusably slow handling of the 2008 Application, intentional or not, contributed to a situation where the Applicant did not receive notice of the denial of the 2008 Application and was thus unable to pursue the stronger position under the more favorable spacing distance rule on appeal. Therefore the Department should grant an exception to the requirements of the current rule; and (3) The Kittelson Report analyzed the specific situation that the two requested approaches would create on the Subject Property and found that the requested access would have no significant negative impacts on traffic flow or safety on SH 41, therefore an exception to the general spacing distance requirements should be granted in light of the site specific engineering analysis.

XIX.

With regard to the third rationale the Applicant maintains that the Kittleson Report was a credible study made by competent engineers and though prepared in 2008, was still applicable to the 2013 Application. (Tr. Page 121, Line 8 through Page 122, Line 10). Further, since the Kittelson report fully evaluated the operational and safety impacts of the requested access points

under the specific site conditions at the Subject Property, in the Applicant's view it is a better indicator of the appropriate signal and access spacing distance requirements at the site than are the general rules. Applicant maintains that the information in the Kittleson report justified the grant of a variance/exception from the spacing distance requirements of the rules. (Tr. Page 126, Line 11-22).

XX.

The Department views the Kittleson Report as being extensive and credible as far as it goes, but found that its conclusions were not determinative and did not justify an exception because: (1) It limited the analysis to three options, all of which involved two access points onto SH 41, which conformed to the Applicant's plan for the Subject property, but did not include all available options (including a "one approach" option) from the Department's point of view; (2) The report focused almost exclusively on operational and traffic flow impacts from the proposed approaches and lacked a full analysis of safety impacts which the Department deems essential. (Tr. Page 206, Line 22 through Page 209, Line 9 and Tr. Page 265, Line 14 through page 266, Line 16).

XXI.

The Applicant's Request for Variance was denied by the District Engineer on August 7, 2013. (Exhibit 31).

XXII.

The District Engineer, in deciding whether to exercise his discretion to grant an exception to the signal and access distance requirements established by the IDAPA Rules reviewed the information the Applicant provided in support of his Request for Variance and found it to be primarily a review of the frustrations, delays and problems Applicant encountered in the 2008 Application process as well as a review of the findings of the Kittleson Report. The District

Engineer in his review did not find factual information that warranted a variance. (Tr. Page 247, Line 20 through Page 248, Line 4).

XXIII.

The District Engineer testified that variances or exceptions are for situations where relief needs to be provided for landowner in an extreme situation, or in situation where the lack of compliance with the rules is so close that granting a variance would not deteriorate safety or mobility. He stated that variances/exceptions are usually used in extreme situations. He found that the decision on this Application for a variance/exception was “cut and dry” because of the distances involved and the availability of reasonable alternative access for the Subject Property. In this situation the District Engineer found no overriding justification to grant a variance, which would then become difficult to apply along the entire corridor. (Tr. Page 252, Line 6 through Page 253 Line 6). The District Engineer did not consider the rule change between the 2008 Application and the 2013 Application as a justification for the grant of a variance/exception. (Tr. Page 253, Line 7 through Page 254 Line 1).

XXIV.

The District Engineer stated that overriding economic opportunity considerations arise only when an applicant would be unfairly burdened or deprived of a reasonable level of economic opportunity for their parcel. (Tr. Page 262, Line 16 through Page 263 Line 4). He found that the Applicant had not presented evidence that justified and documented that such was the case here. (Tr. Page 258, Lines 9-22).

CONCLUSIONS OF LAW

I.

Idaho Code Section 40-312 gives the Idaho Transportation Board the authority to prescribe rules

and regulations affecting state highways and enforce compliance with those rules and regulations.

II.

The Idaho Transportation Board adopted rules under the authority of Idaho Code Section 40-312 designated as IDAPA 39.03.42, "Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way," IDAPA 39, Title 03, Chapter 42. The purpose of these rules is to establish standards and guidelines for encroachments on state highway rights-of-way. (IDAPA 39.03.42.001.02.)

III.

An encroachment is any authorized or unauthorized use of highway right-of-way. An approach is an encroachment consisting of a connection between the outside edge of the shoulder or curb line and the abutting property at the highway right-of-way line, intended to provide access to and from said highway and the abutting property. An approach may include a driveway, alley, street, road or highway. (IDAPA 39.03.42 010.06, .29, and .30.)

IV.

The Department has retained the authority to issue all encroachment permits on the State Highway System. (IDAPA 39.03.42.100.01.a.)

V.

All new or additional approaches require an approved State highway right-of-way use permit and shall meet all access control requirements that correspond to the state highway being affected. Requests for approaches shall be reviewed and considered for approval based on the needs of the total development, regardless of the number of individual parcels it contains. The location, design, and construction of all approaches shall comply with PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER-10

Department standards. (IDAPA 39.03.42.300.01, .02, and .04.)

VI.

Approaches are to be located where the highway alignment and profile meet approved geometric standards, where they do not create undue interference with or hazard to the free movement of normal highway or pedestrian traffic, and where they do not restrict or interfere with the placement or proper function of traffic control signs, signals, lighting or other devices. Failure to comply with the Department requirements for approaches may be sufficient cause for the Department to deny an approach application. (IDAPA 39.03.42.300.05 and .06.)

VII.

The location of all approaches shall comply with current Department geometric standards and design principles. Approaches should be designed for current and future property access requirements; and to reduce conflicts associated with access points through the application of channelization, auxiliary lanes, joint-use approaches, frontage and other local roads, restricted on-street parking and off-street traffic circulation. (IDAPA 39.03.42.400.01 and .02.)

VIII.

In order to maintain system capacity, safety and efficiency, maximize signal progression and minimize delays to the traveling public, all approaches and signals shall be spaced in accordance with the Department standards established by rule. The minimum recommended distance between a right-in/right-out approach and a signalized public road intersection on a statewide route, in an urban area, where the speed limit is in excess of 35 miles per hour is 500 feet. The minimum recommended distance between unsignalized approaches on a statewide route, in an urban area, where the speed limit is in excess of 35 miles per hour is 500 feet. (IDAPA

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39.03.42.400.03.c.)

IX.

All applications for encroachment permits are reviewed and evaluated for current access control requirements, deed restrictions, safety and capacity requirements, design and location standards, or an approved variance of these standards, environmental impacts, location conflicts, long-range planning goals, and the need for an appraisal. Applications for encroachments not allowed shall be verbally denied. If the applicant insists on proceeding with the application, the non-refundable fee shall be accepted and a permit denial issued by certified letter. Upon receipt of the denial letter, the applicant can appeal the Department's action. (IDAPA 39.03.42.200.09 and .13.)

X.

Applicants may appeal denied permits, in writing to the Department's District Engineer. Notice of the decision of the District engineer is issued by certified mail within seven (7) days of the ruling. (IDAPA 39.03.42.003.01)

XI.

Pursuant to IDAPA 39.03.42.003.01 the District Engineer reviewed the 2013 Application, supporting documents, and the staff recommendation. The District Engineer agreed with the staff recommendation and decision finding the failure to meet the 500-foot distance spacing requirement for approaches to the Subject Property to be the most compelling factor in support of the denial. In so finding, the District Engineer acted within the bounds of his discretion and his decision to uphold the decision of the Department staff in denying the application was based upon substantial, competent and sufficient evidence. This decision was communicated to the Applicant on July 10, 2013 via certified mail in compliance with the rule.

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XII.

If the District Engineer upholds the original denial the applicant may initiate an appeal to the Idaho Transportation Board. (IDAPA 39.03.42.003.03)

XIII.

Based upon statutes and rules applicable to regulation of access to public highways under the jurisdiction of the Department as well as the totality of the evidence adduced at the hearing of this matter on appeal, the Board finds and concludes that the Department's reasons for denying the application as stated in the July 10, 2013 denial letter to the Applicant (Exhibit 27) constitute a valid, substantial and sufficient basis for the denial of the Applicant's 2013 Application.

XIV.

The District Engineer has the authority to exercise discretion to approve a decrease in the minimum access spacing distances set forth in IDAPA 39.03.42.400.03.c provided that the basis for any exception is justified and documented by the party requesting the variance/exception. The basis for the exception may include overriding economic opportunity considerations. (IDAPA 39.03.42.400.03.e.)

XV.

The District Engineer, in deciding whether to exercise his discretion to grant an exception to the signal and access distance requirements established by the IDAPA Rules, reviewed the information the Applicant provided in support of his Request for Variance. In this review the District Engineer did not find any additional information that provided justification to warrant a variance. He found that the distances between the approaches the Applicant was requesting were significantly less than permitted by rule and that the Subject Property had reasonable alternative access available without the requested non-compliant approaches. The District Engineer found

no justification to grant a variance. The District Engineer found that the Applicant had not presented evidence that justified and documented any overriding economic opportunity considerations supporting the discretionary grant of an exception to the access and signal distance requirement established by rule. In so finding, the District Engineer did not act arbitrarily or capriciously, but acted within the bounds of his discretion and his decision to deny the Applicant's Request for Variance was based upon substantial, competent and sufficient evidence.

XVI.

If a District Engineer denies a request for an exception on an encroachment permit application and the denial is appealed to the Idaho Transportation Board, the Board or its delegate has the authority to approve exceptions to the access and signal spacing distances if, in the judgment of the Board, overriding economic considerations cause the exceptions to be in the best interests of the public. (IDAPA 39.03.42.400.03.h.)

XVII.

Based upon statutes and rules applicable to regulation of access to public highways under the jurisdiction of the Department as well as the totality of the evidence adduced at the hearing of this matter on appeal, the Board finds and concludes that the Applicant has not established that overriding economic considerations cause the exceptions requested in its Request for Variance to be in the best interests of the public.

PRELIMINARY ORDER

Based upon the proposed Findings of Fact and Conclusions of Law set forth above the hearing officer enters the following preliminary order subject to the terms and conditions set forth in Appendix A, which is attached and made a part of this preliminary decision:

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(1) The decision of the District Engineer entered on July 10, 2013 sustaining the Department's denial of Application 1-13-088 is UPHELD.


IT IS ORDERED that Application for Highway Right-of-Way Encroachment Permit Number 1-13-088 is DENIED.

(2) The decision of the District Engineer entered on August 7, 2013 to deny the Applicant's Request for Variance is UPHELD.

Further, the Board declines to grant Applicant an exception under the authority of IDAPA 39.03.42.400.03.h to the signal and access distance requirements established by IDAPA 39.03.42.400.03.c.

IT IS ORDERED that Applicant's Request for Variance is DENIED.

DATED this 6th day of January, 2014.


STEPHEN A. BYWATER
Hearing Officer

CERTIFICATE OF SERVICE BY MAIL

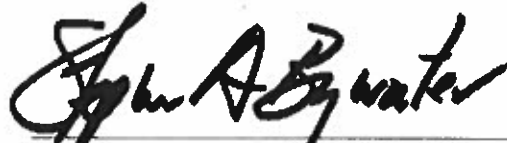
I HEREBY CERTIFY that I have this 6th day of January, 2014, served a true and accurate copy of the foregoing **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER** by depositing the same in the United States mail, postage prepaid, addressed to the following persons:

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APPENDIX A

THIS IS A PRELIMINARY ORDER OF THE HEARING OFFICER. It can and will become final without further action of the Hearing Officer unless any party petitions for reconsideration to the Hearing Officer issuing this Preliminary Order or petitions for review to the Director.

Any party may file a petition for the Hearing Officer's reconsideration of this Preliminary Order within fourteen (14) days of the service date of this Order. The Hearing Officer issuing this Preliminary Order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3), Idaho Code. (Parties should not combine a petition for reconsideration to the Hearing Officer with a petition for review to the Director. If a party wishes to petition the Director after receiving a ruling from the Hearing Officer on a petition for reconsideration, the petition to the Director should be filed according to the following provisions.)

Within fourteen (14) days after:

- (a) The service date of this Preliminary Order,
- (b) The service date of the Hearing Officer's denial of a petition for reconsideration from this Preliminary Order, or
- (c) The failure within twenty-one (21) days of the Hearing Officer to grant or deny a petition for reconsideration from this Preliminary Order, any party may in writing petition for review or take exceptions to any part of this Preliminary Order and file briefs in support of the party's position on any issue in this proceeding to the Director. Otherwise, this Preliminary Order will become a Final Order of the Department.

If any party petitions for review before or takes exceptions to this Preliminary Order to the Director, opposing parties shall have twenty-one (21) days to respond before the Director to the petition for review or exceptions. Written briefs in support of or taking exceptions to this Preliminary Order shall be filed with the Director. The Director may review this Preliminary Order on its own motion.

If the Director reviews this Preliminary Order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to this Preliminary Order and may schedule oral argument in the matter before issuing a Final Order. The Director will issue a Final Order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter to the Hearing Officer for further evidentiary hearings if further factual development of the record is necessary before issuing a Final Order.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this Preliminary Order becomes final, any party aggrieved by the Final Order or Orders previously issued in this case may appeal the Final Order and all previously issued Orders in this case to district court by filing a petition in the district court of the county in which:

- (a) A hearing was held,
- (b) The final agency action was taken,
- (c) The party seeking review of the Order resides, or
- (d) The real property of personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the Order under appeal.