

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE APPEAL OF) Permit Application No. 1-13-088
THE DENIAL OF APPLICATION FOR)
ENCROACHMENT PERMIT AND) **FINAL ORDER**
DENIAL OF VARIANCE BY:)
)
CHRIS-SARAH ONE LLC,)
APPLICANT.)
_____)

This matter involves an application requesting permits for two commercial approaches to SH 41 in Kootenai County. The Applicant, Steven J. Davis, Owner of Chris-Sarah One L.L.C., requested one permit for a new right-in/right-out approach and a second permit for a new right-in/right-out/left-in approach.

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.)

The Idaho Transportation Department's District One Office denied the application on July 10, 2013. The District One Office denied the permit based upon: (1) the failure to meet the 500-foot distance spacing requirements for approaches; (2) access already was available on Early Dawn/Ketchikan Ct.; (3) access also was available on Poleline; and (4) the District did not want to add a non-conforming access to SH 41 which could affect highway safety.

Mr. Davis appealed the denial of his application in a letter dated July 29, 2013 to District One Engineer, Damon Allen and Management Assistant, Heidi Lewis, in the Legal Section. Mr.

Davis also submitted a request for variance within the same letter of his appeal dated July 29, 2013.

The Idaho Transportation Department (ITD) appointed Stephen A. Bywater to act as an independent hearing officer in this matter and to hold a contested case hearing pursuant to the Idaho Administrative Procedures Act. On September 12, 2013, Mr. Bywater conducted a Prehearing Telephone Conference with the parties. He issued a Notice of Hearing on September 24, 2013 setting the matter for hearing. Mr. Bywater then issued a Prehearing Order on November 12, 2013, outlining the administrative procedures for the hearing.

The Hearing Officer conducted the hearing on November 22, 2013 in Coeur d'Alene, Idaho. Mr. Davis and Department employees testified at the hearing. On January 6, 2014, the Hearing Officer issued Proposed Findings of Fact, Conclusions of Law and Preliminary Order. Based on the record before him, the Hearing Officer upheld the action of District 1 and the decision of the District Engineer to deny the permit application.

On January 16, 2014, the Department received a letter from Mr. Davis. Mr. Davis filed exceptions to the Hearing Officer's Findings, Conclusions, and Preliminary Order and petitioned the Director for review.

The letter was forwarded to me and on January 27, 2014, I sent out a briefing schedule. On February 3, 2014, Mr. Davis filed his Brief in support of his exceptions to the Hearing Officer's Order. In his brief, Mr. Davis stated that the primary issue prompting his application for an access permit is to preserve development opportunities for both the private-sector and the public-sector.

Mr. Davis stated that such development opportunity would only be increased by having access from State Highway 41 and from local roads such as Poleline Avenue. He stated that this

type of dual-access does not guarantee a favorable outcome; however, single-access permanently forecloses the near-term possibilities to bring major first-class development to this site. In addition, Mr. Davis stated that Developers rely upon frontage pads for project profits and frontage pads need good access. Mr. Davis predicts that the presence of a major retailer would prompt a competitive surge of smaller retailers vying to occupy the frontage pads along Hwy 41 and along Poleline Avenue, ultimately enhancing and preserving the competitiveness of the property's location.

On February 14, 2014, the ITD Staff filed a Response Brief. Staff stated that because the requested approaches were in violation of the administrative rule IDAPA 30.03.42 that mandates access spacing to 500 feet apart, the District appropriately denied the permit. Staff went on to say that the southern approach requested by Mr. Davis would only be 280 feet north of Poleline Avenue and the northern approach would only be 320 feet north of that, leaving four approaches along the highway within a distance of less than 1000 feet, thereby compromising the safety of the general traveling public along SH 41.

Staff also addressed the variance request Mr. Davis submitted, asking ITD to make an exception and waive the signal and spacing requirements of the administrative rule. During the hearing, Staff testified that variances or exceptions are for situations where relief needs to be provided for a landowner in an extreme situation, or in a situation where the lack of compliance with the rules is so close that granting a variance would not deteriorate safety or mobility. Staff indicated that the spacing of the approaches involved here were not close to the spacing requirements of the rule and that Mr. Davis failed to establish an exception that would be in the best interest of the public.

Staff noted that Mr. Davis failed to provide any new documentation or explanation that would justify an exception to the access requirements. Mr. Davis did not file a reply brief.

In my review of the hearing record and the briefs submitted to me, I find substantial evidence exists to support the findings of fact made by the Hearing Officer in the Preliminary Order. I do not find the findings of fact to be clearly erroneous or unsupported by the record in any respect. Accordingly, I adopt the findings of fact of the Hearing Officer contained in the Preliminary Order as my own and incorporate said findings of fact by reference into this Final Order.

After a review of the documents and the relevant law, I also agree with the Conclusions of Law set forth in the Preliminary Order. As set forth above, the purpose of the access rules is to protect the public and ensure its safety. I share the Staff's concern that vehicles merging from adjoining commercial properties into faster moving highway traffic would put the travelling public (in terms of pedestrians, merging vehicles and vehicles travelling on the highway) at risk. Therefore, I adopt and incorporate herein the conclusions of law contained in the Preliminary Order.

NOW THEREFORE, IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Preliminary Order dated January 6, 2014 is ADOPTED as the FINAL ORDER of the Idaho Transportation Department.

IT IS FURTHER ORDERED that the encroachment application, the request for variance, and the appeal filed by Mr. Davis is hereby DENIED.

This Order is a Final Order and is the final administrative action of the Idaho Transportation Department pursuant to Idaho Code § 67-5246. The parties' right to file an appeal and seek the judicial review of this order is set forth in title 67, chapter 52, Idaho Code.

See Explanation of Appeal Rights attached.

DATED this 3rd day of April, 2014.


BRIAN W. NESS
Director

CERTIFICATE OF SERVICE

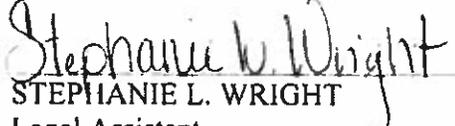
I hereby certify that on this 3rd day of April, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Stephen J. Davis
Chris-Sarah One, LLC
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STEPHANIE L. WRIGHT
Legal Assistant

EXPLANATION OF APPEAL RIGHTS

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency 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* I.C. § 67-5246(4).

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this 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 hearing was held; the final agency action was taken; the party seeking review of the order resides, or operates its principal place of business in Idaho; or the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of (a) the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* I.C. § 67-5273. The filing of an appeal to District Court does not itself stay the effectiveness or enforcement of the order under appeal.