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ITD
LEGAL SECTION

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

BRANDON M. ROBERTS,)
)
 Applicant,) PERMIT APPLICATION NO. 05-13-24
vs.)
)
IDAHO DEPARTMENT OF) **FINDINGS OF FACT,**
TRANSPORTATION (“ITD”),) **CONCLUSIONS OF LAW**
) **AND RECOMMENDED ORDER**
)
 Respondent.)
_____)

INTRODUCTION

This is a contested case proceeding before the Director of the Idaho State Transportation Department (“ITD”). Applicant, Brandon M. Roberts, owns property along State Highway 91 (“SH91”), south of 4th Street East in the City of Preston. Roberts applied for an encroachment permit, requesting an access to his property from SH91. ITD staff denied the Application and Roberts timely appealed to the Director, pursuant to ITD’s review process (IDAPA 39.03.42.200.09 and .13). The undersigned Hearing Officer was appointed to conduct a hearing on the appeal and to enter proposed findings of fact, conclusions of law and recommended order.

This appeal came on for hearing at the ITD offices in Pocatello, Idaho, on February 7, 2013. Roberts represented himself and ITD was represented by Deputy Attorney General Chris Kronberg. Testimony from witnesses was taken and a record was made thereof. References to

the hearing transcript will be “Tr. p. ___” and the hearing exhibits as “Exh. ___”. Subsequently, the parties submitted written closing arguments. The appeal has been fully submitted.

FINDINGS OF FACT

1. This appeal involves Roberts’ Right-of-Way Encroachment Application and Permit Approaches and Other Encroachments (“Application”) with supporting documentation, submitted on October 26, 2012, for a new access to his property (“subject property”) located between 4th Street East and 6th Street South along the west side of SH91 in the City of Preston (ITD Exhs. 13BR-33BR)¹.

2. Access control to the subject property was deeded to the State of Idaho in February of 2004, by Marion N. Adamson, trustee of the trust, which at that time owned the subject property (ITD Exh. 1BR, 2BR).

3. The State’s purpose in acquiring said access rights to the subject property and other properties along SH91 was to protect highway operations and safety for fifty (50) years (Tr. p. 45).

4. In March of 2008, Roberts purchased the subject property “subject to all easements, rights of way, covenants, restrictions, reservations, applicable building and zoning ordinances and use regulations and restrictions of record” (ITD Exhs. 1BR, 2BR).

5. The Application herein was denied on November 5, 2012, by District Five Engineer, Ed Bala, P.E., because the State was deeded access control as described above:

Your request for a new driveway is in an area of deeded access control, and as such conflicts with the purchased access standards for the route.

(ITD Exh. 38BR)

¹ Roberts previously submitted an Application for an access to the subject property in October of 2007, which was denied for reasons consistent with the denial of the Application herein (Roberts Exh. B).

6. Roberts applied for an access to the subject property for the purpose of accommodating new retail/office development, which is restricted under the current roadway design, that is, potential customers must access the subject property from the newly constructed 6th Street South, which connects to 4th Street East, running to the west or back of the subject property (ITD Exhs. 13BR, 17BR, 22 BR)².

7. Granting the Application in this case would require ITD to except the subject property from the design access spacing standards (IDAPA 39.03.42.400.02.c) because the subject property does not meet the 660 feet spacing requirements under these standards (Tr. pp. 81-83; ITD Exh. 22BR).

8. Economic necessity is one of several criteria under the current rule whereby ITD has the discretionary power to except an access application from design access spacing standards (IDAPA 39.03.42.400.02.e).

9. Roberts presented significant evidence that there is a need for ITD to grant an exception to the access spacing requirements for the subject property. Sandra Hubbard, Preston City Council Member, and Joel Wilson, Superintendent of Schools, presented credible testimony as to the economic growth limitations and traffic congestion issues in close proximity to the subject property (Tr., pp. 92-119; Roberts Exh. D; ITD Exh. 9BR, 10BR).

10. Roberts contends that highway safety would not be compromised if his Application were granted due to the low volume of traffic and speed limits applicable (Tr. pp. 9-16); however, ITD did not conduct any meaningful factual analysis of the Application for the reason

² At the time of the hearing, ITD and the City of Preston were in the process of negotiating the reconnection of 4th Street East to SH91 north of the subject property, which would provide an alternative access to the west side of the subject property (Tr. pp. 70-72).

that it did not deem the subject property as qualifying for access as a matter of law (Tr. pp. 46, 83).

CONCLUSIONS OF LAW

1. The evidence presented in this case indicates that ITD staff did not undertake a substantive review of Roberts' Application for the reason that Roberts, as the owner of the subject property, did not qualify as an applicant as a matter of law.

2. ITD determined that Roberts did not qualify as an applicant because access control to the subject property had been deeded to ITD before Roberts became the owner (ITD Exhs. 1BR, 4BR).

3. ITD distinguishes between deeded access control property and purchased access control property for purposes of processing the type of Application in issue. (Tr. pp. 46, 66; ITD Exh. 38BR). Because the subject property was a deeded access control property (meaning access control had been deeded to ITD), Roberts was not a qualified applicant (IDAPA 39.03.42.300.03).

4. The Hearing Officer concludes that property owners who retain access control to a property when purchased are qualified applicants for purposes of applying for an access encroachment permit under the "Rules Governing Highway Right-Of-Way Encroachments on State Rights-Of-Way" (IDAPA 39.03.42, *et seq.*); these applicants are entitled to a meaningful review process (IDAPA 39.03.42.200.09) and ITD has the authority to consider economic growth issues as factors in excepting a property from the spacing and other access standards (IDAPA 39.03.42.400.03.e).

5. But for the fact that ITD was deeded the access rights to the subject property, this Hearing Officer, without making any determination as to the merit of Roberts' Application,

would recommend that the Application be remanded to the District Office for a review, as required under the rules cited above.

6. Nevertheless, ITD's position on the legal issue of whether Roberts qualifies to initiate the review process has merit. Access to private property, as well as the qualification to request a new access approach and encroachment permit, is a property right. Access to a public way is one of the incidents of ownership of land bounding thereon (*Johnson v. Boise City*, 87 Idaho 44, 51, 320 P.2d 291, 51 (1964), citing *Farris v. City of Twin Falls*, 81 Idaho 583, 342 P.2d 996 (1959)). Therefore, because ITD was deeded all access rights to the subject property, including any subsequent qualification to request new approaches and encroachment permits, Roberts does not qualify as an applicant for purposes of this Application.

7. ITD does have the discretion to dispose of its real property interests if they are "no longer needed for state highway purposes" and declare these rights surplus (Idaho Code §40-311(4))³. However, this discretionary power does not alter ITD's property rights with respect to access control or an applicant's qualifications to request an access encroachment permit as discussed above.

8. Furthermore, this Hearing Officer finds that ITD's interpretation that Roberts does not qualify to request an access encroachment permit to be well within its power to reasonably interpret administrative rules under the rule of deference (*Duncan v. State Board of Accountancy*, 149 Idaho 1, 232 P.2d 322 (2010)). The test to determine the appropriate level of deference is four-pronged:

- (1) The agency is responsible for the administration of the rule;
- (2) The agency's construction of the rule is reasonable;
- (3) the language of the rule does not expressly treat the matter at issue;

³ The Federal Highway Administration has joint authority with ITD over the disposal of such rights (Tran. pp. 84, 85, ITD Exh. 33BR).

(4) any of the rationales underlying the rule of agency deference are present.

(Id. at p. 3)

The Hearing Officer finds that ITD's rule interpretation here meets all four tests. Clearly, ITD meets the first three, that is, it is responsible for the administration of the pertinent rules involved, the rules do not expressly address the issue and its interpretation is reasonable as ITD intended to restrict access encroachment permit applications like Roberts' by acquiring deeded access control. With respect to the rationales underlying the rule of agency deference (*Id.* at p. 3), ITD satisfies at least two of those rationales. ITD's interpretation is practical and ITD's expertise in highway operations and safety justifies reliance on its interpretation.

RECOMMENDED ORDER

Upon the foregoing FINDINGS OF FACT and CONCLUSION OF LAW, the Hearing Officer respectfully recommends to the Director that Applicant's appeal of the denial of the permit application herein should be denied.

SCHEDULE FOR REVIEW

1. This is a recommended order of the Hearing Officer. It will not become final without action of the Director of the Idaho Transportation Department. Any party may file a petition for reconsideration of this Recommended Order with the Hearing Officer issuing the Recommended Order within fourteen (14) days of the service date of this Order. The Hearing Officer issuing this Recommended Order will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Idaho Code §67-5243(3).

2. Within twenty-one (21) days after (a) the service date of this Recommended Order, (b) the service date of a denial of a petition for reconsideration from this Recommended Order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this Recommended Order, any party may, in writing, support or take exceptions to any part of this Recommended Order and file briefs in support of the party's position on any issue in the proceeding.

3. Written briefs in support of or taking exceptions to the Recommended Order shall be filed with the Director of the Idaho Transportation Department. Opposing parties shall have twenty-one (21) days to respond. The Director 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 for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. See Idaho Code §67-5244.

DATED This 21 day of March, 2013



JOHN C. LYNN
Hearing Officer

CERTIFICATE OF SERVICE

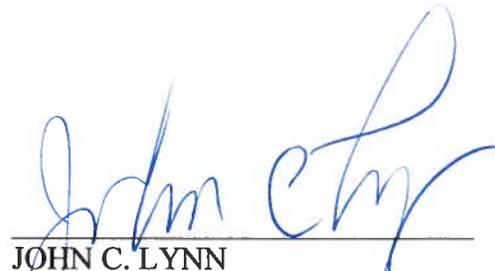
I HEREBY CERTIFY that on this 21 day of March, 2013, I served a true and correct copy of the foregoing document by depositing the same in the U.S. Mail, postage prepaid, to the following:

Brandon M. Roberts
1415 W. Highway 36
Preston, ID 83263

Chris Kronberg
Deputy Attorney General
Idaho Transportation Dept.
P. O. Box 7129
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Brian W. Ness, Director
IDAHO TRANSPORTATION DEPT.
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Boise, ID 83707-1129

DATED This 21 day of March, 2013.



JOHN C. LYNN
Hearing Officer