COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1628 **Cir. Ct. No. 2014CV203**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CHARLES SLATER AND SHARON SLATER,

PETITIONERS-RESPONDENTS,

V.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION AND STATE OF WISCONSIN DIVISION OF HEARINGS AND APPEALS,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. The State of Wisconsin Department of Transportation (DOT) and the State of Wisconsin Division of Hearings and

Appeals (DHA) appeal from a circuit court order reversing DHA's decision to revoke the driveway permit for commercial property owned by Charles and Sharon Slater. We conclude that DHA's decision was correct, and the circuit court erred in reversing it. Accordingly, we reverse the circuit court and remand with directions to reinstate DHA's decision.

¶2 The Slaters own commercial property in the City of Waukesha. The property contains a parking lot and a building housing their architectural office. The property's driveway gives direct access to U.S. Highway 18. USH 18 is scheduled for reconstruction starting in 2017. To facilitate the forthcoming reconstruction, the DOT notified the Slaters in 2012 that their driveway was slated for removal, and the driveway permit was being revoked pursuant to WIS. STAT. § 86.073(1) (2013-14).[1] The driveway permit revocation notice stated that the existing driveway, "located within right turn lane of the Springdale Road intersection … can potentially increase the risk of crashes at the intersection. It is for these reasons that the [DOT] has determined that your driveway be removed." The DOT stated that the Slaters "had reasonable alternative access to Springdale Road" via an easement over the property to the west that provides driveway access to Springdale Road, approximately two hundred feet north of USH 18.

¶3 The Slaters sought review of DOT's permit revocation decision. DOT affirmed the decision as did DHA after a three-day contested case hearing. On judicial review, the circuit court remanded to the administrative law judge for

[1] DOT has statutory authority to revoke a driveway permit. ***J&E Invs. LLC v. Division of Hearings & Appeals***, 2013 WI App 90, ¶21, 349 Wis. 2d 497, 835 N.W.2d 271.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

additional evidence. After a September 18, 2014 hearing on remand, the administrative law judge made additional findings, and the case returned to the circuit court. The circuit court reversed DHA on the following grounds: DOT failed to establish that revocation of the Slaters' driveway permit was "required to satisfy safety considerations, and that revocation of the driveway access permit would leave the Slater property with reasonable alternative access to a public right-of-way." DOT and DHA appeal.

¶4 We review the decision of the agency, not the decision of the circuit court. ***Milwaukee Cty. v. LIRC***, 2014 WI App 55, ¶13, 354 Wis. 2d 162, 847 N.W.2d 874. The agency's findings of fact will be upheld if they are supported by "substantial evidence in the record." WIS. STAT. § 227.57(6). "Substantial evidence" is relevant evidence that would allow reasonable minds to arrive at the same conclusion as the agency. ***Gilbert v. Medical Examining Bd.***, 119 Wis. 2d 168, 195, 349 N.W.2d 68 (1984); ***Kitten v. DWD***, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649. The agency determines the weight of the evidence. Sec. 227.57(6).

¶5 On appeal, the Slaters argue that the evidence before the agency did not support DOT's finding of documented safety concerns and reasonable alternative access. We agree with DHA and DOT that the issues for determination by the agency were: whether safety concerns required revoking the Slaters' driveway permit and whether the Slaters' property would have reasonable alternative access to USH 18 without its driveway.

¶6 Applying the substantial evidence test, we conclude that the decision to revoke the Slaters' driveway permit was based upon documented safety concerns and evidence that the Slaters would have reasonable alternative access to

USH 18 without their driveway.[2] DOT and DHA relied upon the evidence presented by traffic engineer Patrick Hawley, whose credibility was for the agency to determine.

¶7 The record contains substantial evidence about the safety issues associated with the Springdale Road-USH 18 intersection near where the Slaters' driveway is located. DOT found that removing several driveways, including the Slaters' driveway, which is located within the right turn lane, was warranted by a 2008 Access Management Plan for the Springdale Road intersection project and a 2008 Safety Assessment. The 2008 Access Management Plan recommended eliminating numerous driveways along USH 18 because they directly conflict with well-established engineering and DOT guidelines and policies and create an unacceptable risk of unsafe conditions. Hawley's 2008 Safety Assessment found that USH 18 had a high crash rate attributable to the number of access points, high travel speeds, and the number of lanes. A 2009 Traffic Study found that the Slaters' driveway is located 200 feet from the intersection, which is within the intersection's functional area. The Slaters' driveway presented additional conflict points for crashes to occur and impede traffic. Removing the driveway would serve the access plan's principles,[3] including limiting direct access to USH 18, preserving the functional area of the intersection, limiting the number of conflict points, separating conflict points to create a safer intersection, and removing turning vehicles from through lanes. DOT determined that USH 18 would be a

[2] Because our analysis of the evidence disposes of this appeal, we do not reach whether it was error for the circuit court to remand to the agency for further proceedings. ***Hussey v. Outagamie Cty.***, 201 Wis. 2d 14, 17 n.3, 548 N.W.2d 848 (Ct. App. 1996).

[3] Patrick Hawley testified that the Access Management Plan principles are well-recognized in the field of traffic engineering.

safer roadway if the Slaters did not have direct access to USH 18 via a driveway and gained access to USH 18 through a side road.

¶8 DHA determined that there was ample evidence to support DOT's decision to revoke the Slaters' driveway permit. We agree that DHA's decision was supported by substantial evidence as discussed above.

¶9 We turn to whether DHA erred when it determined that the Slaters' property has reasonable alternative access to USH 18. The Slaters' property, which contains one office building and a parking lot, is a "destination" location rather than a "drive by" retail-type location, and its access needs can be understood in that context. In addition to the property's current direct access to USH 18 via its own driveway, the property can be reached through the parking lots of the drive-through restaurant via Heritage Lane and AT&T via Springdale Road. The Slaters' property benefits from an easement over the AT&T property for ingress and egress. Because the Slaters' property benefits from an easement, losing the driveway does not require the Slaters to trespass over other property to reach their property. ***Surety Sav. & Loan Ass'n v. DOT***, 54 Wis. 2d 438, 444, 195 N.W.2d 464 (1972) (property access rights involve "the right to enter and leave the property without being forced to trespass across the land of another"). That the Slaters and their visitors would have to travel an extra 200 feet to turn onto a side road to reach the property does not mean that the property lacks reasonable alternative access. The record contains substantial evidence that the Slaters have reasonable alternative access to their property from the west (via Springdale Road using the AT&T easement) and from the east (via Heritage Lane using the drive-through restaurant parking lot). ***J&E Invs. LLC v. Division of Hearings & Appeals***, 2013 WI App 90, ¶22, 349 Wis. 2d 497, 835 N.W.2d 271.

¶10 We conclude that DOT's decision to revoke the Slaters' driveway permit was based upon substantial evidence.[4] DHA did not err in affirming DOT's decision.

¶11 The Slaters argue that while DOT found they would have access to USH 18 over the drive-through restaurant property, they do not have an easement over that property. It is undisputed that the Slaters have an easement across the AT&T property which provides them with USH 18 access via Springdale Road. The Slaters posit that reasonable alternative access necessarily requires direct access, not the non-exclusive access provided by the AT&T easement. The Slaters cite no authority for this proposition. Therefore, we do not consider it further. ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990).

¶12 The Slaters next argue that DOT did not give notice of the permit revocation to all adjoining property owners who have a right to use their driveway. DHA determined that this issue was waived because the Slaters did not raise it until their post-hearing brief.

¶13 If the issue were not waived, we would reject the Slaters' contention that the owners of the AT&T and drive-through restaurant parcels met the statutory criteria for receiving the permit revocation notice under WIS. STAT.

[4] The Slaters complain about a March 15, 2013 letter to them from Norman Pawelczyk, Bureau of Technical Services, Division of Transportation Systems development. The letter described "existing cross access with the property to the east [the drive through property]." The Slaters do not have an easement across this property. As we have stated, we review DHA's decision, and DHA's decision was supported by substantial evidence. While the Slaters argue on appeal that other evidence supports a different decision, we need only determine whether the record contains substantial evidence to support DHA's decision, and we do not discuss every piece of evidence to which the Slaters refer that might support a contrary decision.

§ 86.073(3). When DOT "confirms or modifies" a permit revocation decision made by a district office, DOT shall notify the "applicant" of the decision. WIS. STAT. § 86.073(3). Here, the Slaters, the holders of the driveway permit being revoked, were the only parties entitled to notice. *See* ***J&E Invs. LLC***, 349 Wis. 2d 497, ¶¶4, 18. The Slaters have not established that any other entity was entitled to notice.

¶14 Finally, the Slaters contend that DOT erred when it abandoned an eminent domain proceeding it commenced to terminate their driveway permit. We conclude that any issue relating to the eminent domain proceeding is outside the scope of this appeal in which we review DHA's driveway permit revocation decision.[5]

¶15 The circuit court erred when it reversed DHA. We reverse the circuit court and remand with directions to reinstate DHA's decision.[6]

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

[6] We grant the motion to correct the Slaters' respondents' brief.