

M A N I T O B A) Order No. 17/05
)
THE HIGHWAYS PROTECTION ACT) February 2, 2005

BEFORE: Graham F. J. Lane, C.A., Chairman
S. Proven, P.H.Ec., Member

APPEAL OF WEST HAWK UNITED CHURCH CONCERNING
HIGHWAY TRAFFIC BOARD PERMIT NO. 046-04:
APPLICATION FOR AN ACCESS DRIVEWAY
(RESIDENTIAL) ONTO PROVINCIAL TRUNK HIGHWAY
NUMBER 44, S.E. ¼ SECTION 16, TOWNSHIP 9,
RANGE 17 EAST IN THE LA VERENDRYE ELECTORAL
DIVISION BY ASTORIA INVESTMENTS CORP.

ABSTRACT:

The Public Utilities Board (the "Board") heard an appeal by the West Hawk United Church (the "Church") of a Highway Traffic Board ("HTB") decision. The decision allowed Astoria Investments Corp. ("Astoria") access to Provincial Trunk Highway 44 ("PTH 44") from land located adjacent to the highway and to the Church's property.

The HTB decision granted access to Astoria and removed the Church's existing access. HTB found that the Church's access, which has been in place and use for approximately forty years, was invalid, in that the Church had misinterpreted the direction originally provided to it with respect to the placement of the access.

HTB's decision directed the relocation of the Church's access to a shared access with Astoria to be located on the common property line of Astoria and the Church and adjacent to PTH 44. The Church appealed the HTB's decision.

Following a public hearing, and subsequent to consultations carried out by Highways at the Board's request and reported to the Board, by this Order the Board over-turns the decision of the HTB, denies Astoria access to PTH 44 and confirms the Church's access.

BACKGROUND:

Astoria applied to the HTB for access to PTH 44 from S.E. ¼ 16-9-17E in the La Verendrye Electoral Division. The HTB permit granted allowed for access to PTH 44 with a concurrent requirement that the Church's existing access to its property be relocated to the Church's east property line for joint use with Astoria, the existing driveway to the Church was to be removed.

Evidence was presented to the Board at a public hearing held at 1:00 p.m., Monday, September 20, 2004, in the Meeting Room of the Whiteshell Fire Department, Highway 44 in the Town of West Hawk Lake Manitoba. Immediately prior to the hearing, Mr. Lane, Chairman of the Board, viewed the properties involved, highway and existing accesses, and other roads related to the appeal.

The public hearing was then conducted on a hear and report basis; accordingly, the Chairman reported and obtained the concurrence of Board Member Susan Proven for this Order.

HIGHWAYS:

Highways indicated that it had opposed Astoria's application to the HTB, which sought an additional access to PTH 44. Highways advised the proposed access, as approved by HTB, was approximately 105 metres S.E. of an existing access used by the West Hawk United Church, and within 200 metres of another driveway to the west of the Church. Highways noted that it supports HTB's objective, that being to rationalize (restrict) access onto PTH 44.

Highways opposed the creation of an additional access onto PTH 44 to service the property of Astoria for six reasons, those were reported to be:

1. PTH 44 is classified and functions as a Secondary Arterial, and such highways are considered too busy to safely allow an unlimited number of accesses;
2. Astoria's property is separated from the right of way of PTH 44 by approximately 50 feet of Public Work, which is under the jurisdiction of the Department. As a result, the property of Astoria Investments Corp. does not physically abut PTH 44. Therefore, Highways was of the view that Astoria lacked legal standing under *The Highways Protection Act* to apply for direct access onto PTH 44 without the permission of Manitoba Transportation.
3. The Department was concerned with Astoria's proposal to Parks Branch, as it involved the creation of two commercial lots adjacent to the Public Works, and fifty to sixty residential cottage lots. Highways indicated that, despite the HTB ruling, it remained concerned with the proposed intensification of use and access to PTH 44.

3. Motorist and traffic safety would be compromised with an additional access road;
5. The availability of alternate access for Astoria from Crescent Beach Road to the north;
6. The potential availability to Astoria of existing access now utilized by the Parks Branch and/or the Church;
7. The Department expressed concern with respect to the potential precedent that would be established (i.e. the granting of additional access to a highway in apparent contradiction to the Department's policy statements).

Highways reported that PTH 44 is a Secondary Arterial Highway, and that the primary function of these types of Provincial Highways is to move traffic with optimum mobility, maximum safety and minimal interruption. Highways advised that the provision of access to an adjacent property is a secondary consideration to the Department, a lesser objective for such roads within the Primary Arterial Classification.

Highways further noted that Departmental Guidelines (Classification Study/Transportation Manual) recommend a minimum spacing of 300 metres, and a desirable spacing of 600 metres between farm/agricultural driveways for highways designated Primary Arterial. This policy was for the purpose of protecting the primary functioning of highways, such as PTH 44, and to minimize potential interference from land and development projects adjacent to the highway system.

Highways submitted that PTH 44 functions as the primary connection to the eastern portions of Whiteshell Provincial Park and PTH 1. Highways noted that PTH 44 carries a moderately high volume of traffic; the 2002 Average Annual Daily Count ("AADT") is in the +1000 AADT range. And, Highways reported that approximately 6% of the traffic on PTH 44 was truck traffic. Seasonally adjusted traffic counts (summer) on this portion of PTH 44 were reported to indicate a traffic increase of 45% during peak summer periods. Highways opined that traffic activity can be extreme in the vicinity of the Park Gate, where cottagers and trailers enter the park.

Highways suggested that the consequence of allowing additional adjacent development to the highway would be to increase the safety hazard and travel delay for motorists, and would likely accelerate the need for future costly highway improvements. Highways further noted that each new access onto a high speed/major highway creates a potential safety hazard, and is, thus, problematic.

Highways provided its perspective to be that:

1. A driveway is an obstruction in the Right of Way and increases the risk associated with vehicles leaving the highway and striking the crossing; and
2. Each additional driveway creates a potential safety hazard by creating an intersection where turning movements on and off the highway increase the accident potential of the highway.

Highways noted its understanding that approximately 35% of all collisions on the rural portion of the provincial highway system occur at intersections and access points.

Highways submitted that the further proliferation of access along PTH 44 would create an undesirable precedent, and would likely result in increased demand for similar concessions with respect to access.

Highways affirmed its opposition to the creation of any additional access onto PTH 44, but indicated a willingness to support the consolidation of access demand with an existing access. Highways provided its opinion that Astoria's requirement for an additional access onto PTH 44 could have been avoided at the subdivision stage, by:

1. Orienting the development of Astoria's property northerly, with west access onto Crescent Beach Road; or
2. Providing joint access for the Church and the Applicant at the boundary; or
3. Developing a service road for the Parks Branch, the Church and the Applicant.

In conclusion, at the public hearing Highways recommended that the Board dismiss the appeal by the Church, and uphold HTB's decision which was to deny an additional access onto PTH 44 and require the relocation of the Church's existing access.

Prior to concluding the hearing, the Board requested Mr. Richard Nichol, Highway's Senior Access Management Analyst, to explore with the Parks Branch the possibility of obtaining access to Astoria's property by means of the current access of the Parks Branch.

Highways, by way of a letter to the Board dated January 13, 2005 reported on its discussions with the Parks Branch. To its report, Highways attached a letter from Mr. Gordon Jones, Director, Parks and Natural Areas Branch ("the Branch"). The attachment outlined the position of the Branch on the matter.

The Branch submitted that alternative access proposals for Astoria were unnecessary. The Branch noted that the property, which was privately-owned by Tamarak Resort and Spa Inc., is located within the Whiteshell Provincial Park and subject to The Provincial Park Act. The Branch noted that Astoria was approved for "construction of a residential structure on Lot 32", and that "as part of that development Mr. Jurcevic applied for and received permission for an access driveway from West Hawk Boulevard onto his private land holding".

The Branch also noted that Manitoba Regulation 141/96 provides in part that "no person shall construct erect or move more than one vacation home onto a lot on private land in a provincial park". The Branch concluded that as Astoria "has not received any additional approvals respecting any further developments at this time, Manitoba Conservation does not believe there exists a need to have any additional points of access to this lot."

Highways advised that a permitted access to West Hawk Boulevard has been constructed entirely on private land not encroaching on park land. Highways submitted that "in view of the change in circumstances since the hearing of this appeal in September 2003, the change being that Astoria Investments now has legal and physical access from their property to West Hawk Boulevard, Manitoba Transportation concurs with Manitoba Conservation's assessment that additional access is not required to PTH 44 to service this property."

Highways further submitted that "... in view of the preceding, Manitoba Transportation contends that the material facts which formed the basis for issuing of Highway Traffic Board Permit No. 046-04 in May 2004 have changed significantly in the intervening period and the appeal of West Hawk United Church should be granted and the Highway Traffic Board's permit quashed."

Copies of Highways' report together with the letter from Mr. Gordon Jones of the Parks and Natural Areas Branch were forwarded to all parties for their comments by January 30, 2005.

THE WEST HAWK UNITED CHURCH:

At the public hearing, several members of the Church spoke on its behalf. Mr. Harbottle noted several issues of concern to the community, reporting that safety was a concern in light of the heavy traffic during the summer. Mr. Harbottle noted that the booth regulating entry and exit to the park was located in close vicinity to the Church entrance, and that the stretch of the roadway is often heavy with traffic as vehicles stop at the booth.

Mr. Harbottle submitted that by moving the entrance to the Church (the current entrance is directly in front of the Church), confusion will arise as drivers slow to turn as they bypass the Church and or search for the entrance to the Church.

Mr. Harbottle also reported that the Church was also used by a number of different religious and community groups on different days of the week, and therefore the entranceway was heavily used. Church members also noted that the relocation of the driveway would impose costs on the community, and that parking would become a problem.

Members of the Church further submitted that the cost of snow removal to the access road would be an additional burden, one beyond the capacity of the Church to bear.

Church members present opined that a lack of control arises in joint access situations, and suggested that the matter was even more complicated than would normally be the case as Astoria's property was listed for sale.

The Church asked that the HTB decision be overturned and that its current access remain in place. The Church did not object to Astoria obtaining a separate entrance further down the Highway, or by means of access from West Hawk Blvd.

Subsequently, the Church responded to the report from Highways, this by way of letter dated January 25, 2005, and indicated its concurrence with the revised recommendations of Highways.

ASTORIA (MR. JURCEVIC):

Mr. Jurcevic spoke on behalf of Astoria. He noted that Astoria's application to the HTB was for a single separate access to his property from PTH 44, and not for joint access. Mr. Jurcevic submitted that the approval that was granted was based on his meeting with the HTB, and the HTB arriving at the best possible decision in the circumstances. Mr. Jurcevic submitted that access from West Hawk Boulevard was not feasible.

Mr. Jurcevic advised he had no issue with the Church, and that it was the HTB which raised the issue of the legality of the Church's present access. He noted that the matter of further development was a non-issue, as he was simply seeking access to the property.

Mr. Jurcevic submitted that from a safety perspective access to his property would pose no greater danger than that of access to other sites. Mr. Jurcevic submitted that as a taxpayer the government had a duty to provide him with access to his property. Mr. Jurcevic further noted that there was a public access further down PTH 44, and inquired as to whether he could use it (this last matter was outside the scope of the hearing, and is not commented upon further).

By way of letter dated January 14, 2005 delivered by hand to the Board's offices on January 28, 2005, Mr. Jurcevic provided his comments to the Board on the report submitted by Highways. Mr. Jurcevic indicated he had been assured by Highways that all parties would meet in the New Year, and that Highways did not follow proper instructions from the Board and, therefore, had acted in a prejudicial manner towards Astoria. Mr. Jurcevic also indicated that Highways was aware that the subject property had an access permit from West Hawk Blvd., but had never addressed the issue.

Mr. Jurcevic noted that the only change in circumstances was that he broke the rock ridge in order to move the heavy equipment up the hill. Mr. Jurcevic further noted "that the ridge is impossible to travel up and down with vehicles more than three tons" because of the slope of the incline. Mr. Jurcevic also noted the safety issues arising out of a break failure exiting the site and access by the Whiteshell Fire Department.

Mr. Jurcevic also noted his conversations with Mr. Colpitts with regards to arriving at a "gentleman's agreement between all parties" as well as the movement of heavy equipment on West Hawk Lake Blvd. Mr. Jurcevic submitted that in addition to the single cabin allowed by the Parks Branch he is allowed to have guest cabins, storage shed or garage.

He further noted that the access permit to PTH 44 was required "for heavy equipment specifically where shed equipment will be constructed at a future date either temporary or permanent". Mr. Jurcevic confirmed his position that he had no issue with sharing a joint access, and assured the Board that the access would not be used for any development until it is requested.

Mr. Jurcevic also submitted that as many as sixty cars are parked on the road shoulder at the Church in the summer, and he indicated that he was willing to construct a parking lot for the Church at no cost to the Church. Mr. Jurcevic noted that he had approval to cross the Public Works Land, giving him direct access to PTH 44, and asked that access be granted to PTH 44 as well.

BOARD FINDINGS:

The Board wishes to thank all parties for their advice on the matter. The Board notes the frank and friendly manner of all those participating and attending the public hearing. It also notes that both Astoria and the Church indicated no desire to upset the plans of the other.

The Board is sensitive to the needs of landowners for access to our highways. The Board is also sensitive to the policies and guidelines applied by Manitoba Transportation for the protection of highways and the promotion of safety.

The Board reminds all parties that the Board proceeds by way of a "hearing de novo" on appeals of HTB decisions. The Board has heard directly from the various parties, and is not bound, in whole or in part, by the decision or the record of the HTB.

With regards to Mr. Jurcevic's written submission received on January 28, 2005, the Board notes that Highways was asked to explore the possibilities for alternative access to the property with the Parks Branch. The Board did not specify the process to be used by Highways, nor the timeframe for a report. The Board specifically did not specify a process, this in order to allow Highways every opportunity to put forward its best efforts. In addition the Board did not specify a timeframe, as it is of the opinion that in the circumstances all parties were being saved harmless while Highways examined the options.

All parties were given an opportunity to comment on the report of Highways, this by invitation from the Board. The Board is satisfied that all parties have been given a fair and reasonable opportunity to make their views known to the Board.

The Board notes that Mr. Jurcevic has not disputed the fact that as part of the development, he applied for and received permission to construct an access driveway from West Hawk Blvd. onto his private landholding.

In this matter the Board notes the position of the Parks and Natural Areas Branch that Astoria was granted access to the property from West Hawk Boulevard. The Board also notes the understanding of the Parks Branch that the access road has been constructed to the property. The Board takes particular note of Highway's submission that the material facts which formed the basis for the issuing of HTB Permit No. 046-04 have changed significantly.

The Board therefore finds that Astoria's access to PTH 44 is not necessary in the circumstances, and will quash (overturn) HTB Permit No. 046-04.

Concurrently, the Board finds that the Church is entitled to the further enjoyment of its current access, and that any misinterpretation of direction with respect to the location of the Church's access of forty years ago has been offset by forty years of use without contest.

APPEARANCES :

Ms. Eva Ziemanski & members of West Hawk United Church The Appellant (the Church)

Mr. Mike Jurcevic Astoria Investments Corp. -
(Astoria)

Mr. Richard Nichol Senior Access Management Analyst,
Highway Planning and Design,
Department of Transportation and
Government Services (Highways)