

M A N I T O B A) Order No. 176/03
)
THE HIGHWAYS PROTECTION ACT) December 3, 2003

BEFORE: G. D. Forrest, Chairman
 S. Proven, Member

**APPEAL OF MR. HAROLD AND KENDALL ELLINGSON
CONCERNING AN APPLICATION FOR AN ACCESS DRIVEWAY
ONTO PROVINCIAL TRUNK HIGHWAY NUMBER 83A**

APPEARANCES :

Harold Ellingson Kendall Ellingson	The Appellants
Richard Nichol	Senior Access Management Analyst, Highway Planning and Design, Department of Transportation and Government Services (Highways)
Chuck Lund, P.Eng.	Technical Services, Engineer, Dauphin
Mark Allard, P.Eng.	Regional Construction Engineer, Dauphin
Curtis Yaschyshyn, P.Eng.	Senior Project Engineer, Swan River
Kim Buchanan	Project Supervisor, Manitoba Transportation, Swan River
Ed Froese	Property Appraisal and Acquisition Officer, Land Management, Dauphin
R. Rick Reich	Reeve, Rural Municipality of Swan River

Background

An Application was made to The Highway Traffic Board (the HTB) by Harold and Kendal Ellingson (the Appellants) for the location of an access onto Provincial Trunk Highway No. 83A, Lot 1, Plan 2607 N.W. ¼ Section 9, Township 36, Range 27 West in the Rural Municipality of Swan River.

By way of letter dated September 10, 2003, the HTB denied the application.

By way of letter dated October 2, 2003, Mr. Harold and Kendall Ellingson appealed the decision to The Public Utilities Board (the Board).

The evidence in this appeal was taken by the Board at a public hearing held at 7:00 p.m., Thursday, November 20, 2003, in the Council Chambers of the Rural Municipality of Swan River (RM), Manitoba.

Highways recently constructed PTH 83A as a by-pass directing through traffic around the Town of Swan River. Right-of-way property for the construction was acquired from the appellant's property. The right-of-way cut the appellant's property into two parts and that part south of PTH 83A became "land locked" (no access to the PTH) and accordingly, Highways provided for access onto the by-pass consistent with their policy.

The northerly portion of the Appellant's property is not "land locked", as the owner has access to the highway via a government road allowance. Highways built a temporary access onto the highway from the northerly property for use during the construction of the highway only. To date, this access has not been removed.

The Appellant

On behalf of the Appellant, Mr. H. Ellingson indicated to the Board that an application was made to The Highway Traffic Board for a permit to convert the temporary construction access into a permanent access but was denied. Accordingly, he appealed to The Public Utilities Board.

Mr. Ellingson advised that he approached a local representative for Highways regarding the conversion and was advised that the proposal was acceptable. He later learned that this information was incorrect.

Mr. Ellingson indicated that access to PTH 83A was critical as the alternative route along the government road allowance was less desirable and in fact, increased the risk to the motoring public. Mr. Ellingson submitted that if access is not granted directly onto the by-pass, significant inconvenience would result.

The alternate route from his homestead begins on a portion of PR 212 which by the Rural Municipality's own admission will now render a part of PR 212 a residential road.

Mr. Ellingson is concerned that the current state of this road is deplorable and even impossible to travel at times due to flooding conditions which can last as long as a week. While the Appellants noted that the road is repairable, to date no efforts have been made.

Mr. Ellingson indicated that the alternate route intersects with existing PTH No. 83 north of the entrance to the by-pass and that due to obstructions on adjacent property at the intersection, the sight lines for diverting highway traffic are not good. He further noted that he would be required to travel across the north bound lane of traffic, travelling at high speeds, in close proximity to the by-pass intersection. He believed this was detrimental to highway safety at this location.

With respect to convenience, Mr. Ellingson indicated that prior to the construction of the by-pass, he was able to travel to town and gain highway access on 2 km of PR roads in a very direct route. With the construction of the by-pass and the closure of part of PR 12 and if his application is not approved, Mr. Ellingson advised he now has to travel about 4 km to reach the same point on the highway.

Mr. Ellingson observed that there are numerous accesses onto PTH 10 in his area and that he should be given equal treatment.

He also noted that the access already exists and has been constructed to highway standards and that its removal would cause unnecessary costs which would be incurred by Highways.

Highways

Highways noted that during the construction of PTH 83A, a temporary construction access onto PTH 83A was built to access land on the north side of PTH 83A that was being used with permission of the Appellants, the owners, as a staging and equipment storage area during the highway construction. The driveway was to have been removed when construction was completed. Upon completion of the highway the Appellants, requested the construction driveway be left in place for their personal use.

Since the access was not included in the Department's approved plans for the highway, Mr. Ellingson applied to the Highway Traffic Board to retain the access and was subsequently denied by the Highway Traffic Board.

Highways concurs with the Traffic Board's decision to deny the permit for the following reasons:

- The requested driveway is not required or necessary since access exists to this property from the municipal road bounding the north limit of this property.
- A direct access to this property conflicts with Departmental practice of limiting access to high speed provincial highways

where alternate access is available from a lesser highway or the municipal road system.

- PTH 83A has been constructed as a safer high-speed truck bypass route around the Town of Swan River.
- The precedent that is established for other landowners located adjacent to and desiring access onto PTH 83A.
- The inconsistency that is created by accommodating residential and development of more intensive land uses after expending approximately \$2 million to construct a safer, high speed truck route around Swan River.

Highways noted that this project involved the construction of approximately 3.7 km of new highway from PTH 83 on the south side of Swan River to the PTH 10/10A intersection on the east side of Swan River, at an estimated cost of \$2.1 million. The highway was constructed to provide an alternate high-speed route for heavy truck traffic that was previously required to travel through downtown Swan River between PTH 10 and PTH 83. The grading of the rural portion of this project was completed in July 2003 as a gravel roadway and opened to traffic in August 2003.

The parcel of land owned by the Ellingsons' was severed by the right of way required for the highway.

The department provided an access to the southern part of the Ellingson's property that was severed by the highway since it was land locked without access.

Access was not provided to the northerly property since the landowner was not interested in access onto PTH 83A when land was being acquired and existing access was available from the municipal road on the north side of the Ellingson's property. When Mr. Ellingson Sr. inquired about retaining the construction access he was mistakenly informed by local Departmental staff that the driveway could remain.

Highways submitted that in order to maintain the primary function and safety of this section of roadway it is imperative that access to this highway be restricted and strictly controlled. This is in recognition that each access onto a high speed/major highway creates a potential safety hazard for the users of the highway, as well as the adjacent property owner utilizing the access. Highways further submitted that this is particularly important considering the nature of the traffic (heavy truck traffic), the speeds and volumes of traffic expected to use this highway.

Highways submitted that the Highway Traffic Board was correct in denying permission for this access to remain at its current location.

Highways, noting the recent investment in the highway, submitted that the function of the highway should be protected from a new precedent that would be set by approving the application.

Highways submitted that The Public Utilities Board should deny Mr. Ellingson's appeal and uphold the Highway Traffic Board's decision in this instance.

Rural Municipality

The Reeve noted the RM Road 212 is a municipal road and was used extensively in the spring by fertilizer trucks. The Reeve noted that with the closing of a portion of the road the remaining section would essentially become a private driveway. The Reeve indicated that it would be kept to the standard for residential roads and he anticipated that it would be in better condition in the future given the absence of the trucks. The Reeve also indicated that water flow conditions should be improved with the drainage offered by the new by-pass. The Reeve noted that the community has waited for some time for a by-pass which now must be protected.

Board Findings

The Board wishes to thank all parties for their presentations. The Board notes the positions of both parties on the issue of this access at the time negotiations were underway to acquire land for the by-pass route.

The Board notes that the plans for the by-pass did not include access to the subject property. The Board also notes Highway's admission that the Appellants were mistakenly advised that they could keep the access after the construction period had concluded. The Board however notes this by-pass recently

constructed, and not yet paved, was built at a considerable expense, to deal with heavy traffic previously having to utilize Highway 83 through the Town of Swan River.

The Board notes the Appellant's concerns about RM Road 212 and the Reeve's indication as to the change in utilization of the roadway and the intent of the Rural Municipality to maintain it to residential standards. The Board understands the safety concerns raised by the appellant when exiting from or entering Highway 83 from RM Road 212 but is of the opinion that those risks will diminish when signage is in place on the new highway in the spring of 2004. The Board believes direct access from the Appellants' property as proposed to Highway 83A would pose a greater risk.

For all of the above reasons and in consideration of the matter of precedent and the safety of the motoring public the Board will deny the Applicant's request for an access to PTH 83A.

In doing so the Board recognizes that the access has already been constructed and is currently in use. The Board will require Highways to remove the said access at its earliest convenience but not later than June 1, 2004 and provide the Appellant with at least 2 weeks notice of the removal.

