



State of New Jersey

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July 19, 2022

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Email and Regular Mail

Re: Route 18 E. Brunswick Drainage and Pavement Rehabilitation, Modification of Driveways, Block 27, Lot 2.02, East Brunswick Township, Middlesex County (RP Family Capital, LLC)

Dear Mr. Lavender:

This is the final agency decision for an appeal of a determination of the Office of Access Design ("OAD") of the New Jersey Department of Transportation ("NJDOT"), modifying access between State Highway Route 18 ("Route 18") and a property owned by RP Family Capital, LLC ("Owner") located at 252 Route 18 in East Brunswick Township, Middlesex County, New Jersey ("Property"). The Property is identified as Block 27, Lot 2.02 in the local tax map.

On August 27, 2020, the OAD informed the previous owner of the Property (which was trying to sell the Property) of an adjustment of driveways plan that would affect the Property. On September 12, 2020, the previous owner and its counsel attended an informal meeting with the OAD to discuss the previous owner's objections to the proposed plan. Following the meeting, the OAD sent a letter dated November 23, 2020, with a modification of driveways plan, to which the previous owner still objected. The OAD and the previous owner had a second informal meeting on January 12, 2021. Following this meeting, the OAD sent a letter dated April 15, 2021, advising of its determination to modify the driveways as proposed. The previous owner requested this appeal on May 3, 2021. On July 1, 2021, the previous owner sold the Property to the Owner, which submitted its own appeal of the proposed plan on February 17, 2022.¹ A formal hearing was held on May 12, 2022, pursuant to N.J.A.C. 16:47-11.3(f).

¹ Regarding the Owner's complaint that it was not afforded the opportunity to meet with the OAD, the NJDOT's regulations contemplate the sale of a lot or site after the then-owner receives

I presided over the formal hearing and considered the pre-hearing submissions, testimony, documents presented, and arguments proffered by the parties, which were both represented by counsel. At the conclusion of the hearing, I announced that I would hold the record open pending the receipt of the transcript and written closing arguments. The administrative record was closed on June 20, 2022, rendering this decision timely pursuant to N.J.A.C. 16:47-11.3(g). My findings on the basis of the record are as follows.

The modification of driveways at issue is being undertaken in conjunction with an NJDOT project to reconstruct four miles of Route 18 within East Brunswick. The NJDOT will improve drainage and resurface Route 18; it also will upgrade traffic signals and add sidewalks to comply with the Americans with Disabilities Act of 1990 ("ADA"). T15:4-21; T17:25-18:20.² The new sidewalk by the Property will include a bus stop. T18:9-20. The posted speed limit for Route 18 by the Property is 45 miles per hour. T23:14-15.

The Property is triangle-shaped and oriented roughly north-south, with Route 18 northbound directly to the west and Old Bridge Turnpike southbound ("Route 527"), a county highway not subject to the NJDOT's jurisdiction, directly to the east. DOT-20. There is no shoulder along Route 18 by the Property. T23:17-22. Route 18 and Route 527 intersect at the northern point of the Property. DOT-20.

The southern half of the Property is improved with a three-store rectangular building that has customer entrances on both the Route 18 and Route 527 sides. T22:8-9; T81:14-82:3. Since November 2021, the Owner has operated a liquor store in the southernmost store, with six angled parking spaces on the Route 18 side ("Angled Spaces") and additional parking spaces on the Route 527 side. T100:6-12. The Owner leases the northernmost store (with parking spaces to the north) to a tile store. T99:15-100:5. The middle store, with five parallel parking spaces on the Route 18 side ("Parallel Spaces") and additional parking spaces on the Route 527 side, is currently unoccupied. T82:13-17. Handicap parking spaces are located to the north of the tile store and on the Route 527 side. T152:5-7; T155:1-156:8.

The Property has three driveways on Route 18: the northernmost one ("Driveway 1"), which leads to parking in the northern half of the Property, is 30.3' wide, the middle one ("Driveway 2"), which enters the Property at the northern end of the Parallel Spaces, is 30.4' wide, and the southernmost one ("Driveway 3"), which enters the Property at the southern beginning of the Angled Spaces, is 43.1' wide. DOT-20; T19:3-22.³ All three driveways are used for ingress and egress. T19:10-22; T131:1-17.

Motorists entering the Property from Driveway 1 can park in the parking spaces north of the tile store. Motorists entering the Property from Driveway 2 can travel north and park in the same manner. Motorists entering the Property from Driveway 3 can park in the Angled Spaces or the

² "T" refers to the transcript of the May 12, 2022 hearing.

³ While Driveway 3 is marked as 43.1' on the OAD's proposed plan, a photograph of the Property shows that Driveway 3 is wider and extends the length of the Angled Spaces. DOT-20; P-11.

Parallel Spaces. Those parking in the Angled Spaces can exit the Property by backing out and then exiting through Driveway 3 or traveling north along the Parallel Spaces and exiting through Driveway 2 or Driveway 1. T131:1-17; T159:1-24; P-11. Those parking in the Parallel Spaces can exit the Property by traveling north and exiting through Driveway 2 or Driveway 1. These parking/exiting maneuvers could conflict with motorists entering the Property from Route 18. T30:16-31:5; T41:16-42:10.

Motorists entering the Property from any of the three driveways along Route 18 can travel around the building to reach the Route 527 side. On that side, the Property features a 26.3'-wide northern driveway and a 157.7'-wide southern driveway, where trucks enter the Property. DOT-20. These driveways are both ingress and egress. T20:13-20.

The Property is a nonconforming/commercial lot that should have one two-way driveway on Route 18 under the State Highway Access Management Code, N.J.A.C. 16:47-1.1 to -14.1 ("Code"). DOT-20; T24:17-24; N.J.A.C. 16:47 App. D (D-1(b)(1)). The Property, which has three driveways, therefore has more than the allowable number of driveways on Route 18. In addition, Driveway 2 does not comply with the Code because the northernmost Parallel Spaces require backing maneuvers within State right-of-way and exiting motorists could cause restriction, queuing, or hesitation on Route 18. DOT-20; T65:18-66:7; N.J.A.C. 16:47 App. E (E-2.1(a) & (b)). Driveway 3 has the same issues as Driveway 2. See DOT-20; T160:17-161:1. In addition, Driveway 3 does not comply with the Code because it (1) is more than 30' wide and has a curbline opening of more than 34', (2) is less than 24' from the nearest driveway, and (3) has less than 12' edge clearance from the southern boundary of the Property. See DOT-20; N.J.A.C. 16:47 App. E Table E-1.

Under the OAD's proposed plan, Driveway 2 and Driveway 3 would be closed, the Angled Spaces and the Parallel Spaces would be removed, and Driveway 1 would be widened to 50.1' to allow simultaneous ingress and egress by an SU-30 size box truck and a passenger vehicle, which cannot happen today. T31:20-32:11; T33:11-34:5; DOT-16. Truck deliveries would continue to be made to the Route 527 side. T126:13-23; T127:12-19. The removal of the Angled Spaces and the Parallel Spaces would increase highway safety by eliminating backing maneuvers that encroach in State right-of-way and queuing and hesitation. T27:22-28:3. A sidewalk and a bus stop would be added along Route 18. T18:9-20. The OAD's proposed plan is fully compliant with the Code. T34:16-20; T53:9-14.

"Modification of driveway" as defined at N.J.A.C. 16:47-2.1 covers NJDOT-approved "changes to driveways in conjunction with the implementation of a State highway improvement advanced by the [NJDOT] . . . which changes the number of driveways [or] the width of the curbline opening of a driveway by more than five feet." N.J.A.C. 16:47-11.3(g) provides that review of a modification decision is to be heard on the basis of criteria set forth in the State Highway Access Management Act, N.J.S.A. 27:7-89 to -98, the Code, and the evidence presented at the hearing.

The issue before me is whether the OAD's proposed plan would provide "reasonable access to the general system of streets and highways in the State," N.J.S.A. 27:7-90(e), and "allow continuation of the existing use on the lot or site," N.J.A.C. 16:47-11.1(a). "The access rights of an owner of property abutting a State highway must be held subordinate to the public's right and interest in a

safe and efficient highway.” N.J.S.A. 27:7-90(g). The NJDOT’s ultimate aim is to “select[] the plan that will best achieve the overarching goal of providing reasonable access to the State’s system of highways rather than maximizing the business interests of a particular property owner.” In re Revocation of Access of Block No. 613, Lots No. 4 & 5, Twp. of Toms River, Ocean Cty. (Arielle Realty, LLC), 224 N.J. 53, 56 (2016) (“Arielle Realty”).

Access to the Property under the OAD’s proposed plan is reasonable because motorists may enter the Property through Driveway 1 and either park in the northern spaces or circle around the building and park on the Route 527 side, after which they may enter the middle or the southernmost store through the customer entrances on the Route 527 side. Motorists also may enter the Property through the driveways on Route 527 (which will not be affected by the DOT’s improvements and will remain as they are) and park on the Route 527 side. The OAD’s proposed plan furthers highway safety and efficiency by eliminating the hazards and conflict points resulting from motorists entering and exiting the Property through Driveway 2 and Driveway 3.

The facts of this case are similar to those in Arielle Realty, where the NJDOT’s proposal to revoke (not modify)⁴ access from State Highway Route 66 (“Route 66”) would eliminate parking spaces located in State right-of-way in the front of a commercial property. 224 N.J. at 57. Motorists exiting these spaces had to back into Route 66, which the Supreme Court noted “creates safety problems and also impedes the free flow of traffic.” Ibid.; id. at 68. The Supreme Court recognized that the loss of these spaces would “burden[] the property” but motorists still had “direct access [through a longer route] to the remaining parking spaces on the property.” Id. at 68. Likewise, motorists have direct access to the remaining parking spaces on the Property through Driveway 1 and the driveways on Route 527. The circuitry of travel is not a factor against the OAD’s proposed plan. See ibid. (route to property under DOT plan “may be longer but it provides direct access to the remaining parking spaces on the property”; “the DOT plan fully satisfies the statutory and regulatory requirements for access to the State’s system of highways”).

The Owner does not contest the underlying facts, including the multiple ways Driveway 2 and Driveway 3 do not comply with the Code. Instead, it focuses on how closure of the two driveways and removal of the Angled Spaces and Parallel Spaces will impact the liquor store. The Owner’s primary argument against the OAD’s proposed plan is that it “presents a classic case of inverse condemnation because it destroys a substantial value to the Property” by (1) “requir[ing] trucks making delivery to the liquor store to park more than 200 feet” away and (2) “requiring customers to walk more than 200 feet to and from the liquor store.” This argument is incorrect as a matter of law and fact.

As a threshold matter, the fact that the Property was sold to the Owner after the OAD proposed to modify the Property’s driveways on Route 18 is significant because the Code requires any modification of driveway to “allow continuation of the existing use on the lot or site.” N.J.A.C. 16:47-11.1(a). No liquor store existed on the Property until November 2021, more than a year after the OAD informed the previous owner of the Property of the Route 18 project. The Owner was fully aware of the OAD’s proposed plan when it purchased the Property in July 2021.

⁴ Revocation involves the removal of all driveways on a State highway; modification leaves at least one driveway on a State highway. N.J.A.C. 16:47-11.1(b)(2) & (3).

T142:16-143:6; T145:3-10. Accordingly, there is no issue of prejudice to the Owner and no need for me to consider concerns specific to a liquor store.

Regarding the law, “modification . . . of an access point, so long as free and reasonable access remains, does not constitute a taking.” State ex rel. Comm’r of Transp. v. Marlton Plaza Assocs., L.P., 426 N.J. Super. 337, 355 (App. Div. 2012); see also id. at 356 (“Although changes in access may result in an owner suffering some diminution of property value, regulation under the police power secures an average reciprocity of advantage to everyone concerned.”) (quotation omitted). I have discussed above the reasonableness of access under the OAD’s proposed plan for general commercial use of the Property. Accordingly, there is no issue of inverse condemnation here.

Regarding the facts, the Owner’s claim of “a catastrophic effect on the business [of the liquor store] which would necessarily result in the failure of the business” is speculative and unsupported by expert evidence. In claiming that trucks and customers will be “required” to park more than 200 feet away (i.e., north of the tile store), the Owner ignores the parking spaces on the Route 527 side of the Property. There is nothing in the record to indicate that trucks making deliveries to the liquor store will stop parking on the Route 527 side, where they make deliveries today, and start parking in the northern spaces. There is also nothing in the record to indicate that customers will refuse to park on the Route 527 side and to enter a store on that side; indeed, a handicap parking space is on that side.⁵ The Owner acknowledged that maintaining parking spaces on the Route 18 side is to maximize its business interests. T151:6-7 (“It’s a convenience element that’s lost when you’re not near the door [on the Route 18 side].”). However, that is not a relevant factor for me.

The Owner faults the OAD for “fail[ing] to consider alternate designs,” but did not present an engineering plan for any alternate design or testimony from an expert in support of an alternate design. The only expert who testified was Steve Alpert, P.E., for the OAD. See T13:13-16 (no objection by Owner). Because the Owner has no expert, I do not have two designs by engineers to compare against each other. I only have the OAD’s proposed plan to consider. The Owner proposes that Driveway 3 remain open (for ingress only) to allow motorists to travel one-way along the Route 18 side of the building and exit through Driveway 1, “which would permit parallel parking for the businesses at the south end of the Property.” This proposal, which is not supported by expert evidence, does not address the many ways that Driveway 3 does not comply with the Code or the one two-way driveway limit for the Property. Moreover, the Owner has made no showing that an alternate design would be fully compliant with the Code, like the OAD’s proposed plan. Nor has the Owner requested a waiver under N.J.A.C. 16:47-9.9. T95:12-24.

The Owner’s claim that the NJDOT’s “motivation for its design is to create a public sidewalk on the extraordinarily busy Rt. 18” ignores numerous components of the Route 18 project (including drainage and pavement improvements and upgraded traffic signals). As for its claim that the NJDOT has not shown how the sidewalk “would be used by the public,” I note the ADA’s sidewalk requirements and the bus stop featured in the OAD’s proposed plan. DOT-20.

⁵ The Owner testified that “the consumer prefers the immediate entry, purchase, and exit [on the Route 18 side]. They do not want to drive around to the other side.” T107:10-12. Customer preference (as stated by the Owner) does not equal customer refusal. I consider the Owner’s testimony to be speculative and note that no customer testified.

Finally, the Owner's suggestion that the NJDOT should consider "how other access points along Rt. 18 were being resolved" is not helpful. Highway access management under the Code is highly fact-specific and each lot or site on a State highway must be evaluated on its own merits. See In re Revocation of Access of Block No. 1901, Lot No. 1, Borough of Paramus, Bergen County Parkway 17 Assocs., 324 N.J. Super. 322, 341 (App. Div. 1999) (access decision "must be judged on its own merits and its validity determined by the plan or the action itself").

For these reasons, I find that the OAD's proposed plan meets the requirements of the Code. I therefore adopt the proposed plan.

This is the final agency decision rendered on behalf of the NJDOT, which may be appealed, if desired, to the Appellate Division of the Superior Court of New Jersey.

Should you have any questions, please feel free to contact my office at (609) 963-1180.

Sincerely,



Victor Akpu
Director
Division of Right of Way and Access Management

cc: David Kahler, Deputy Attorney General
Paul Ignarri, Supervising Engineer