

STATE OF NEW JERSEY

DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF REVOCATION OF) ORDER
ACCESS BLOCK 139.01, LOT 7,)
CHERRY HILL, CAMDEN COUNTY, NJ,) OAL Dkt. No. TRP-02806-18
ROBERT AND KATHLEEN DENIKEN.)
_____)

This contested case arises from an April 5, 2017 notice from the Department of Transportation ("DOT") to Robert and Kathleen Deniken to revoke non-conforming access points (i.e., driveways) that allow direct access via Route 70 westbound to and from their furniture store called Unique Interiors ("Unique") in the Township of Cherry Hill, Camden County, New Jersey (the "Property"). The proposed revocation of direct access via Route 70 westbound is due to a highway improvement project. The Property has a third driveway to a local roadway, Chambers Avenue, which will not be affected by the proposed revocation.

The notice letter included a copy of the revocation of access plan, which indicated that DOT proposed to close the driveways at issue and to install a new sidewalk and curb on State right of way that would preclude parking in front of the Property. After an informal meeting with DOT at their request, the Denikens appealed the proposed revocation. DOT transferred the matter to the Office of Administrative Law (the "OAL") as a contested case. A plenary hearing was held on February 11 ("1T") and 12 ("2T"), 2020 before the Hon. Jeffrey N. Rabin, A.L.J. (the "ALJ"). Fact

testimony was presented for DOT by Nirav Shah ("Shah"), a principal transportation engineer in DOT's Office of Access Design for five years and the case manager assigned to the Unique and other Route 70 projects. 1T40:21-41:11; 1T42:10-14. Robert Deniken testified as a fact witness and David Shropshire, P.E., testified as an expert witness for Unique.

The record was closed on June 19, 2021. The Initial Decision ("ID") was mailed to the parties on July 30, 2021. Exceptions by DOT, a response by Unique, and a reply by DOT were submitted in August 2021. The time for filing the Final Decision has been extended until October 28, 2021.

The question before me is whether the proposed revocation complies with the alternative access requirements of the State Highway Access Management Act, N.J.S.A. 27:7-89 to -98 (the "Access Act"), and the State Highway Access Management Code, N.J.A.C. 16:47-1.1 to -9.1 (the "Access Code").¹ Specifically, I must decide whether access to the Property via Chambers Avenue alone "is of sufficient design to support commercial traffic to [Unique], and is so situated that motorists will have a convenient, direct, and well-marked means of both reaching [Unique] and returning to the highway." N.J.S.A. 27:7-94(c)(1). "The purpose

¹ The Access Code was first adopted in April 1992 and has been readopted with numerous amendments, most recently in July 2018. This case applies the Access Code in effect at the time of DOT's April 5, 2017 notice letter.

of the [Access Act] . . . is to insure that a property owner is being treated fairly and equitably, and is not being deprived of reasonable use of that property, when the DOT determines to close an existing access point because it does not comply with current requirements." In re Revocation of Access of Block No. 1901, Lot No. 1, Borough of Paramus, Bergen Cnty. Parkway 17 Assocs., 324 N.J. Super. 322, 332 (App. Div. 1999).

The record is incomplete and requires a remand to the OAL for further action under N.J.A.C. 1:1-18.7. First, I reject the ALJ's conclusion that the question "whether the . . . Property was grandfathered . . . is not an issue to be decided in this case." ID at 21. On the contrary, it is critical to determine how the property and driveways at issue were used as of July 1, 1976 (28 years before the Denikens purchased Unique in 2004). See N.J.A.C. 16:47-1.1 (defining "Grandfathered permit" as "the access permit assumed to exist for a lot with access prior to July 1, 1976 when no subsequent or previous permit has been issued for the lot.") (R-9). There should be additional testimony and factfinding on the extent to which (1) the parking spaces in front of the Property encroach on State right of way and (2) backing maneuvers out of those parking spaces encroach on State right of way. Any encroachment would mean that Unique has had the benefit of parking spaces that it should not have had, and losing illegal parking spaces should not factor in analyzing access issues.

Second, there should be additional testimony and factfinding on the purpose and design of the proposed revocation, with expert testimony for DOT. I note that the sole witness to testify for DOT was Shah, who testified as a fact (not expert) witness. ID at 12. No one from McCormick Taylor, DOT's design engineering consulting firm for this project, testified at the hearing.² However, expert testimony in support of the proposed revocation is critical for my assessment of whether DOT's access plan satisfies the Access Act and the Access Code. See, e.g., In re Revocation of Access of Block No. 613, Lots No. 4 & 5, Twp. of Toms River, Ocean Cnty., 224 N.J. 53, 58 (2016) (expert witness for DOT in revocation of access case).

On remand, the DOT's expert should opine on how the proposed revocation will increase safety and traffic movement in the area of the Property. In addition, I am interested in expert estimates of (1) the capacity of the Chambers Avenue driveway and (2) the traffic circulation (and potential conflict) of cars and trucks in the rear of the Property. Cf. Parkway 17 Assocs., 324 N.J. Super. at 337. An access impact assistance study may be necessary. DOT's expert witness should testify in detail on the commercial traffic to the Property.

² It appears that DOT's counsel contemplated testimony from a "second witness," 2T4:6, but I do not know who this was.


Third, there should be additional testimony and factfinding on all improvements to be provided by DOT under the Access Act, such as signage. Shah recognized that the DOT access plan entered into evidence as R-2 does not refer to signage. 1T128:24-129:2. He testified that signage is included in the construction plans and that the access plan will be updated, 1T129:3-13; 1T159:14-18, but "proof of [directional signs] was not submitted [in the OAL]." ID at 6 n.2. Accordingly, there should be testimony on remand on the updated access plan, which also should be entered into evidence, so that the ALJ can more fully consider whether "motorists will have a convenient, direct, and well-marked means of both reaching [Unique] and returning to the highway" under the proposed revocation. N.J.S.A. 27:7-94(c)(1).

In short, a remand to the OAL is necessary because the current record is inadequate for me to decide whether the proposed revocation satisfies the Access Act and the Access Code. On remand, the grandfathering issue should be addressed and DOT should present expert testimony for the updated access plan and have the plan entered into evidence. The ALJ then should make appropriate findings of fact and conclusions of law.

CONCLUSION

For the foregoing reasons, I remand this case to the
OAL.

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION



DIANE GUTIERREZ-SCACCETTI
COMMISSIONER OF TRANSPORTATION

DATED: October 22, 2021