

M A N I T O B A) Order No. 85/09
)
THE HIGHWAYS PROTECTION ACT) May 21, 2009

BEFORE: Graham Lane, CA, Chairman
 Susan Proven, P.H.Ec., Member

APPEAL OF HIGHWAY TRAFFIC BOARD DECISION
RURAL MUNICIPALITY OF ST. ANDREWS/WEST ST. PAUL

INTRODUCTION AND EXECUTIVE SUMMARY:

By this Order, and on the grounds that the Board lacks jurisdiction, the Public Utilities Board (Board or PUB) denies an application by Mr. and Mrs. Lang (Lang) to set aside a Highway Traffic Board (HTB) decision concerning access to Provincial Highway #9 (PTH 9).

The Board accepts the position of Manitoba Infrastructure and Transportation (MIT) that HTB was correct when that board denied Lang's application to change the status of an access to PTH 9, also on the basis that it did not have jurisdiction to overturn a government decision to construct a service road to connect property owned by Lang to Parks Creek Road, which intersects with PTH 9.

MIT also concluded that PUB similarly lacks jurisdiction to reject a government decision to construct a service road to access a provincial highway, to also involve closing an existing direct access.

That said, PUB will describe what its decision would have been if it believed it had jurisdiction to overturn a government decision to construct a service road, and concurrently close an existing direct highway access.

Finally, the Board will also provide recommendations and commentary, for the consideration of MIT.

If the Board had found it had the necessary jurisdiction to grant Lang's application, it would have directed HTB to

provide Lang with a temporary permit for limited commercial and residential access to Lang's property directly from PTH 9, conditional on the basis that the permit would remain in effect only until such time as a service road was constructed. And, notwithstanding PUB's decision that it lacks jurisdiction, the Board recommends that MIT reconsider its decision to proceed with the construction of a service road (and the concurrent realignment of gas and telephone service) at this time. The Board's recommendation is based on the following:

- i) Presently there are only two accesses to PTH 9 from the three properties the service road is intended to serve;
- ii) The likely cost of constructing the planned service road including the present value of the future cost of maintaining it (and the ditches to adjoin the service road) likely represent costs in excess of the benefits gained by constructing the service road.

The likely cost of constructing the service road should also include the cost of upgrading a portion of the municipal road from PTH 9 to its intersection with the planned service road, to allow the municipal road to accommodate heavy trucks, so as to allow Mr. and Mrs. Lang to continue with their business from their present location.

Accordingly, if, regardless of PUB's recommendation that it reconsider its decision, MIT proceeds with the planned

service road, the Board recommends that both the service road and the municipal road to link PTH 9 with Lang's property, be constructed and/or strengthened so as to allow Lang to continue truck access from PTH 9 to their property and business.

To proceed with the service road, without assuring that the service road and the municipal road can accommodate commercial vehicles and trucks would not represent fair and reasonable treatment of Lang.

That said, the Board accepts that MIT's objective, reducing access to provincial highways by closing existing accesses and constructing service roads, is reasonable and intended to improve road safety.

However, the Board understands that MIT's general goal has been subverted on a regular basis due to cost limitations imposed by the department's budget, by the presence of houses with existing direct PTH access that are built too close to the highway to allow for a service road, and by other provincial and/or municipal business development objectives.

While highway safety is of paramount importance, the closing of two direct accesses and constructing a service road at considerable overall cost neither seems cost effective nor logical when there are other opportunities to expend those funds for other projects that would likely provide a better balance between cost and benefit.

That said, the Board believes that periodic case-by-case deviations from MIT's rational goal to reduce access to major provincial highways does not negate the validity of the general objective of improving highway safety, the achievement of which is a matter of long-term planning, government budget considerations and a reflection of governmental changing priorities.

BACKGROUND:

On August 29, 2008, Mr. Robert Lang applied to the HTB on behalf of his wife, Mrs. Georgette Lang for a permit for a change in use of Mrs. Lang's access to PTH 9 from temporary to permanent, noting that "we would like our long time access to PTH 9 to remain in place".

In its decision, HTB advised "it was determined that as a result of the proposed service road construction, direct access to the subject property from PTH 9, Lot 1, Plan 23079, R.L. 1, Parish of St. Andrews, RM of St. Andrews and R.L. 59, Parish of St. Paul in the RM of West St. Paul was considered by the Board on the above noted date and denied".

On December 24, 2008, PUB received a letter from Lang appealing the decision of the HTB dated December 1, 2008.

The Board established a timetable for the orderly exchange of submissions and information, and a hearing was held on Tuesday, April 28, 2009 in the Hearing Room of the Board. Graham Lane, CA, Chairman of the Board heard the appeal on a "hear and report" basis.

MANITOBA INFRASTRUCTURE AND TRANSPORTATION (MIT):

MIT was represented at the Board's Hearing by:

- a) Ms. Marjorie Webb, Crown Counsel Civil Legal Services
Manitoba Department of Justice; and
- b) Mr. Eric Christiansen, Director of Highway Planning
and Design, Highways Planning and Design (Winnipeg).

On the matter of jurisdiction, MIT submitted that neither the Highway Traffic Board nor the Public Utilities Board has jurisdiction to determine whether or not a service road may be constructed. Furthermore, MIT submitted that neither HTB nor the Board has jurisdiction to provide for "permanent" access to a provincial highway.

MIT submitted that Lang's application, in essence, asks the Board to override section 7 of Manitoba Regulation 42/89R of *The Highway Protection Act*, R.S.M. 1987, c. H. 50, which reads as follows:

Conditions re limited access highway
7 A permit issued for an entrance to or an exit from a limited access highway is subject to the condition that, if a service road, having access to the limited access highway and to which the owner or occupier of the land to which the permit refers has access, is later constructed, the entrance to or exit from the limited access highway may be removed by the traffic authority of the highway.

MIT further submitted that neither HTB nor the Board has jurisdiction to issue a permit inconsistent with

Regulations. MIT pointed to Section 20(1) of *The Highway Protection Act*, R.S.M. 1987, c. H. 50., which reads as follows:

Conditions of permits

20(1) In issuing a permit under Part I or III, the traffic board may make the permit subject to such terms and conditions not inconsistent with this Part or the regulations as it may prescribe.

MIT noted that:

- a) MIT, for the Minister, is the traffic authority on PTH 9, and all permits granting direct access to the highway are temporary;
- b) Information from the applicant indicated that commercial activity was carried on at the site;
- c) The current permit allowing direct access to the PTH was granted to the previous owner; and
- d) That permit was neither reassigned to Mrs. Lang (the new owner) nor amended to allow for commercial use.

MIT indicated that it would not oppose the issuance of a permit to Lang, but that such a permit, given the information provided by Lang, would best be designated commercial, and that in order to designate the access as commercial, additional information would be required.

MIT also noted that service roads are recommended for provincial trunk highways, for the objectives of achieving accident reduction and mitigating noise and environmental concerns.

MIT advised that land adjacent to highways is generally reserved for future highway use, and this was done in this case. MIT advised that it supports the continuing consolidation and removal of driveways as a means to improve highway safety.

MIT observed that HTB decides to add or delete accesses (in cases where service roads are not involved) and there are instances where MIT opposes the decisions of HTB and have appealed those HTB decisions to the Board.

In this particular case, MIT reported that land was set aside for a service road when the property was subdivided, and prior to the Winnipeg-Selkirk Corridor Study (WSCS).

MIT noted that the construction of service roads is and has been delayed in some areas, and it has constructed medians rather than service roads in some other places. MIT advised that where sufficient land was available, service roads were developed.

MIT submitted that service roads are the best solution for highway safety, and that the WSCS Report supports this contention.

MIT submitted that the recommendations of the WSCS formed the basis of highway and service road activity on PTH 9. MIT noted that some new housing developments were utilizing internal roadway systems, obviating the need for service roads in those developments.

In addition, MIT noted that the relocation of utilities was a necessary part of advance work to be undertaken in preparation for the reconstruction of the Parks Creek Drain (which is underway), and that the construction of the service road could begin in one to two years.

MIT also noted that the Parks Creek Road would have been built to Municipal standards and that the service road will be built for the approved land use of the residents. MIT submitted that the cost of the service road was not a matter for the Board but for the government. MIT indicated that the RM would be fully consulted on the matter of maintenance of the service road.

MR. AND MRS. LANG:

On the matter of the jurisdiction of the Board, Lang indicated that they would leave the issue of jurisdiction to PUB, indicating their agreement that competency to consider such matters resided with PUB.

Lang indicated they had been trying to resolve the issue of the need for the service road for some time, and that making an application for a change in use permit was the only route by which they could get "anyone to the table" to discuss the matter.

Lang submitted that the stakes and the relocation of the utilities service was an attempt by MIT to reinforce the fact of the ownership of the land and to intimidate the applicants.

Lang opined there is no justification for the construction of a service road to service only three properties. Lang indicated that their business did not generate much commercial traffic, though, occasionally, a five-ton truck required access. Lang asserted that semi-trailer trucks enter their property as Mr. Lang picks up the materials required for the business and "personally" delivers almost all products.

Lang indicated they want direct access to the highway and the lack of access would negatively affect their livelihood.

Lang submitted that only two driveway accesses to PTH 9 would be eliminated by way of a service road, as the two other nearby landowners currently share a driveway. Lang also submitted that any road accidents that occur in the area occur on the highway, and that the highway accesses have not been a cause of past accidents.

Lang further submitted that the construction of the service road could not be justified on the basis of highway safety, and that there were not enough other valid reasons for the service road construction costs to be incurred.

Lang further submitted that MIT was misinterpreting the WSCS report, as it recommended that service roads be dropped from the plans for the highway, and suggested that further improvements would bring only limited benefits. Lang suggested that with highway medians and turning points in place (as recommended by WSCS), safety risks at the subject point would no longer be an issue.

Lang further submitted that there were a number of areas in the vicinity that had been developed without service roads. Because of this, Lang submitted they had been unfairly "singled out".

Lang proposed that either the status quo be allowed to stand "forever", or that discussions on the need for a service road be reopened, and that all three of the to-be-affected landowners be allowed to work out a solution with MIT.

OTHERS IN ATTENDANCE:

One neighbour of Lang (a landowner who indicated he would not be negatively affected by the service road) noted his concern as to likely expenditure required for the service road, just to replace two direct-access driveways.

Responsibility for the proper maintenance of the road was also noted as an issue of concern for this party. He suggested that, over time, "little or no money" has been invested in service roads in general, diminishing MIT's argument that safety was the abiding motivation.

Another neighbour of Lang, noted that he shared a driveway with the other neighbour and that he had expected the direct access to PTH 9 remain in place, given he had previously been required to redesign his house to accommodate a shared driveway.

He also submitted that a service road would mean a lower standard of maintenance than at present, and that a service road will risk increased crime.

BOARD FINDINGS:

The Board carefully reviewed the evidence and considered the positions of the parties present at the hearing.

As well, Graham Lane (Chairman) visited the site in advance of the hearing and observed both the presence and absence of service roads and direct accesses to PTH 9 in the area.

On the matter of jurisdiction, the Board accepts MIT's argument with respect to jurisdiction and agrees the Board lacks the statutory jurisdiction to overturn a government decision to construct a service road. PUB also concurs with HTB's decision, noting that HTB also lacks jurisdiction.

The Board notes that Manitoba Regulation 42/89 s. 7 allows for the removal of an access where a service road is constructed. The Board further notes that Section 20(1) of *The Highway Protection Act* requires all permits for access be consistent with the regulations.

The Board finds no basis for meeting Lang's request to declare the access permanent, to prohibit the construction of the service road, or to impose a requirement on MIT to meet with the landowners and amicably resolve the matter.

If, however, the Board had jurisdiction, it would have directed HTB to issue Lang a temporary permit for limited-time commercial and residential access to the property from PTH 9. The permit would specify the condition that the access would be temporary, until a service road is constructed.

In any case, the Board recommends that MIT reconsider the construction of a service road and the realignment of gas and telephone service, based on the following:

- a) presently there are only two accesses from the three properties that the service road is intended to serve;
- b) the present value cost of the service road, taking into account future maintenance of the road and its ditches (including snow clearing and hauling, and grass cutting), and the cost of the relocation of the gas and telephone lines, likely exceeds \$100,000;
- c) the likely present value cost of a probable necessary upgrade of a portion of the municipal road to allow it to handle heavy trucks. This upgrade would allow the applicant to continue with their commercial business from the site; and
- d) that the highway (when upgraded) in this vicinity would likely include wide medians and

openings for turning points, accommodating right turns only when entering the PTH from private driveways, as per the WSCS.

If MIT proceeds with the service road, the Board strongly recommends that the municipal road connecting the service road to the PTH be strengthened, as may be required, to allow Lang to continue to receive truck service to their property.

Regardless of the jurisdictional issue, the Board notes that it appears that while MIT's objective is to reduce access to highways (and to construct service roads for that reason), this goal of limited access has evidently been subverted on a regular basis due to matters such as limitations imposed by the department's budget (where land acquisition and construction is involved), the presence of houses with access that are too close to the highway to allow for a service road, and business development objectives. Indeed, the Board notes the recent upgrading to the intersection of PTH 9 and PTH 27, and the fact that service roads were not included in that upgrade.

As a result, the full extent to which the government's various objectives are being achieved, and whether or not there is consistency in decision-making on the matter of granting access to highways, is not transparent.

PUB is not aware of all the accesses being granted or denied (and the accompanying rationale); PUB is only aware in the case a HTB decision is appealed. If this was a

matter within its jurisdiction, the Board would have enquired into the number of new accesses to all PTHs over the last few years, the number of new accesses on PTH 9, the number of accesses closed in recent years, and the number of permits issued by the HTB allowing accesses that were not opposed by MIT.

The Board is aware that MIT does have spacing requirements for driveways accessing PTHs, and that MIT does apply those standards as it deems required. The Board also recognizes that this aspect of highway planning is influenced by the presence of existing access to the highway, and by the progress of adjoining land development.

The Board (in a previous order) noted the risks that lie with dead-end service and municipal roads where, in the event of accidents or emergencies, vehicles such as fire trucks or ambulances cannot readily gain access to properties.

The Board also notes the possibility that there may be a risk of increased crime with the development of service roads (as raised by a presenter) and it finds some merit with that concern.

In the event that MIT proceeds with construction of the service road, then it is the Board's recommendation that the municipal road be upgraded as may be necessary to ensure Lang's business can receive trucks throughout the year.

APPEARANCES:

Ms. Marjorie Webb	Crown Counsel, Civil Legal Services SOA, Manitoba Department of Justice
Mr. Eric Christiansen	Director of Highway Planning and Design, Highways Planning and Design (Winnipeg)
Mr. and Ms. Robert Lang	The Applicant
Neighbour of Lang	Interested Party
Neighbour of Lang	Interested Party