**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 29, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1096** **Cir. Ct. No. 2004CV2845**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**LMMIA, LLC,**

**PETITIONER-APPELLANT,**

**V.**

**STATE OF WISCONSIN, DIVISION OF HEARINGS AND APPEALS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 LUNDSTEN, J. This case concerns the Department of Transportation's (DOT) denial of LMMIA's permit application for driveway access onto a state highway. LMMIA appeals an order of the circuit court affirming a decision of the Division of Hearings and Appeals. The Division's

decision affirmed DOT's denial of LMMIA's permit application, concluding the denial was reasonable. On appeal, LMMIA challenges the Division's decision, arguing that DOT was required to grant LMMIA's application because DOT was bound by a previously issued driveway permit at the same location and because DOT's denial was arbitrary, unreasonable, and an abuse of discretion. We conclude that the circuit court correctly rejected both arguments, and affirm.

## *Background*

¶2 LMMIA owns two adjacent parcels of land that, together, abut State Highway 110 to the east, and US Highway 10 (USH 10) to the south, in the town of Fremont. When LMMIA purchased these parcels, one carried with it an access permit issued by DOT. This permit was the product of negotiations between DOT and the former owners of the two parcels, Marilynn Taylor and Big Beaver Ranch, Inc. We will refer to the permit at issue in this case as the "Taylor permit" because it provides access from the Taylor parcel to Highway 110.

¶3 The Taylor permit provides driveway access to Highway 110 at a point 704 feet north of the USH 10 access ramps. The permit contains check boxes for estimated daily traffic use. It has a box checked indicating estimated usage of the access road of between "0-100" vehicles per day. The check box is on the permit application and the application, when granted, became the main permit document.

¶4 The Taylor permit also states: "Additional permit provisions are listed below (to be added by WisDOT): See attached." The attachment is a document titled "Additional Clauses for Application/Permit to Construct Driveway to State Trunk Highway." One of the "additional clauses" states that

DOT will provide a median crossover with turning lanes at 704 feet north of the USH 10 access ramps.

¶5 The Taylors planned on constructing and operating a cheese factory on the land. After the Taylor permit was granted, and after the median crossover was constructed, LMMIA bought the Taylor parcel, along with the adjacent Big Beaver Ranch parcel. LMMIA's planned development of the land included a gas station and a hotel. In some manner, DOT communicated that, in light of changed circumstances, it planned to move the median crossover further away from USH 10 to a point 1080 feet north of that highway.

¶6 LMMIA filed a new permit application. LMMIA's application, consistent with the Taylor permit, sought an access driveway 704 feet north of USH 10 and a median crossover with turning lanes. Unlike the Taylor permit, the LMMIA application indicated its estimated daily traffic would be over 500 vehicles.

¶7 DOT's district office denied LMMIA's application, and LMMIA appealed to the acting director of the Bureau of Highway Development within DOT, who affirmed the denial. LMMIA then appealed to the Division of Hearings and Appeals pursuant to WIS. STAT. § 86.073 (2003-04).[1] The Division upheld DOT's denial of the permit, concluding that the denial was "reasonable."

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The Division rejected LMMIA's argument that DOT was required to grant LMMIA's application because the Taylor permit had already been granted.[2]

¶8 LMMIA appealed the Division's decision to the circuit court under WIS. STAT. § 227.53. The circuit court affirmed the Division's decision. LMMIA appeals.

## *Discussion*

¶9 WISCONSIN STAT. § 86.07(2) requires that a property owner obtain a "permit to put in a driveway for access from private property abutting [a] highway." ***Bear v. Kenosha County***, 22 Wis. 2d 92, 96, 125 N.W.2d 375 (1963). WISCONSIN STAT. § 86.073 provides for review of a DOT denial of an application for such a permit or the revocation of a granted permit. Specifically, § 86.073 states that, where DOT's district office denies a permit application or revokes an issued permit, a permit applicant or holder may request that DOT, and subsequently the Division, review that denial or revocation.[3] LMMIA appeals the denial of its permit application.

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[2] LMMIA, in fact, filed two new permit applications and both were denied. The other application was for driveway access with a median crossover at 525 feet north of the USH 10 access ramps. On appeal to the Division, LMMIA did not address the denial of this other application, and the Division concluded that LMMIA had abandoned that application. LMMIA does not address the denial of that application here, nor does it address the Division's conclusion that LMMIA abandoned the application. We also conclude, therefore, that LMMIA has abandoned any challenge to the denial of the other application.

[3] WISCONSIN STAT. § 86.073 provides:

> **Review of denial of permit. (1)** If a district office of the department denies a request for a permit under s. 86.07(2) to construct an entrance to a state trunk highway from abutting premises or revokes a permit issued under s. 86.07(2), the department shall, upon written request by the applicant within 30 days after the denial, review the decision of the district office.

(continued)

¶10 This action was commenced in the circuit court as a statutory review of an agency decision under WIS. STAT. § 227.53. Our standard of review is contained in ***Schwartz v. DOR***, 2002 WI App 255, 258 Wis. 2d 112, 653 N.W.2d 150:

> On appeal, we review the decision of the agency … not that of the circuit court. Nonetheless, we value the circuit court's decision on the matter. As to the standard of review, the [Division]'s findings of fact are governed by WIS. STAT. § 227.57(6): "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." However, we will set aside the agency's action if we find that it depends on any finding of fact that is not supported by substantial evidence in the record. Substantial evidence is that degree of evidence which would allow a reasonable mind to reach the same conclusion as the agency.

***Id.***, ¶14 (citations omitted).

¶11 Before addressing LMMIA's challenge to DOT's denial of its application, we briefly address LMMIA's assertion that the Division erred when it concluded that it could not enforce the conditions of the Taylor permit. The Taylor permit, as we have explained, is the permit LMMIA acquired when it purchased the Taylor parcel. LMMIA makes several arguments that seem geared

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> **(2)** After review, the department may reverse, confirm or modify the decision of the district office.
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> **(3)** If the department confirms or modifies the decision of the district office, the department shall notify the applicant of the action and the grounds for the action and shall also notify the applicant of a right to a hearing before the division of hearings and appeals. Upon written request by the applicant within 30 days after the notice is mailed to the applicant, the division of hearings and appeals shall schedule a hearing to be held within 60 days after receipt of the request.

to buttress this general assertion. The flaw in its argument is that LMMIA did not appeal from a refusal by DOT to comply with the Taylor permit. Similarly, LMMIA has not argued that the removal of the median crossover contemplated by the Taylor permit constituted a revocation of that permit. What LMMIA did do was appeal from DOT's denial of LMMIA's application. LMMIA fails to explain how its appeal from the denial of its application confers on the Division, the circuit court, or this court the authority to address DOT's alleged failure to comply with the Taylor permit.[4]

¶12 We turn our attention to DOT's denial of LMMIA's application. LMMIA first argues that DOT was *required* to grant LMMIA's application because DOT had previously granted the Taylor permit.[5] To the extent LMMIA is

[4] We observe that LMMIA successfully argued to the Division that the check boxes on the front of the permit application indicating estimated daily traffic were not "conditions on the permit." So far as we can tell, the higher estimated daily traffic number was the only significant difference between the Taylor permit and the permit sought by LMMIA with its new application. Why LMMIA did not, by some means, seek enforcement of the Taylor permit is not apparent from the record. To the extent LMMIA complains in its appellate briefing that DOT prompted LMMIA to file a new application, that does not explain why LMMIA did not concurrently seek enforcement of the Taylor permit. It appears from the totality of LMMIA's arguments that LMMIA believes the Taylor permit grants LMMIA all that it desires. Regardless, the germane point here is that the only DOT action properly before this court is its decision to deny LMMIA's application.

[5] LMMIA's actual argument is that the Division has the authority to require DOT to comply with the "legal agreement" between DOT and the Taylors. By "legal agreement," LMMIA means, presumably, the extra conditions—such as the median crossover—that were attached to the Taylor permit. But LMMIA never makes a developed argument that the conditions attached to the Taylor permit are anything other than conditions of a permit. LMMIA, rather, seems to assume that this document should be treated as something akin to a contract, but LMMIA never answers the questions that such an assumption entails, i.e.: Is it a contract? Is it binding on both parties? Does it run with the land? Does traditional contract law apply? Does DOT retain the power to alter or revoke permits pursuant to WIS. ADMIN. CODE § TRANS 231.02(4) if such a "legal agreement" were part of the permit? Thus, because LMMIA fails to demonstrate that the Taylor permit, and its conditions, should be treated as anything other than a granted permit, LMMIA's argument then becomes that DOT should have granted LMMIA's application because it had previously granted the Taylor permit.

arguing that DOT is bound by the conditions of the Taylor permit, the argument fails for the reasons above. To the extent LMMIA argues that it is irrational for DOT to deny a permit that is the equivalent of a permit it has already granted, we agree with the Division that circumstances may change and that DOT is entitled to consider the new application in light of the circumstances at the time of the new application. Further, the Division argues that DOT has the power to revoke or change a permit or conditions thereof, pursuant to WIS. ADMIN. CODE § TRANS 231.02(4), and therefore would never be required to grant a new permit based on an existing permit. LMMIA never squarely addresses this argument in the context of whether DOT is *bound by* prior permits. We conclude, therefore, that LMMIA's argument that DOT is required to grant LMMIA's permit application because DOT is bound by the Taylor permit fails.[6]

¶13 LMMIA more broadly argues that DOT's denial of its application was "arbitrary, unreasonable and an abuse of discretion."[7]

¶14 The Division concluded that its review of DOT's denial of LMMIA's permit application under WIS. STAT. § 86.073 was limited to "whether [DOT]'s denial [was] reasonable." LMMIA disputes this standard of review. LMMIA argues that DOT was required to satisfy WIS. ADMIN. CODE § TRANS 231.02(4). Thus, LMMIA asserts, DOT must establish that, under § TRANS

[6] Our conclusions that enforcement of the Taylor permit is not before us, and that its existence does not compel the granting of a subsequent similar application, make it unnecessary to address the details of LMMIA's argument that DOT is bound by the Taylor permit. We note only that we are mindful of these arguments.

[7] LMMIA argues for the first time in its reply brief that DOT did not have the authority to require LMMIA to "apply for a new permit." It is well established that we are not obligated to consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

231.02(4), "the *relocation* of the access and median crossover by DOT was necessary to provide proper protection to life and property" (emphasis added). Section TRANS 231.02(4), however, plainly addresses DOT's authority to change, add to, repair, and relocate driveways and their appurtenances. Thus, this code section might be relevant if the question here was whether DOT improperly failed to comply with the *Taylor permit*. Those questions, however, were not before DOT or the Division. Our review concerns the denial of *LMMIA's application*.[8] LMMIA has not made the connection between this denial and § TRANS 231.02(4). Thus, LMMIA provides no viable argument why the Division should not have reviewed DOT's denial under the reasonableness standard.

¶15 LMMIA argues that the Division erred in finding DOT's denial reasonable because the median crossover requested in LMMIA's application "and its relative location to the entrance ramp was well within DOT safety guidelines."[9] LMMIA points to DOT's Facilities Development Manual, which states that, in

[8] LMMIA characterizes the Division's decision as relying on WIS. ADMIN. CODE § TRANS 231.02(4) to find DOT's denial reasonable. LMMIA misreads the Division's decision. The Division did cite the condition of the Taylor permit that includes the language set out in § TRANS 231.02(4), but the Division did not apply that language to its decision. After citing that condition of the Taylor permit, the Division went on to state: "LMMIA's development plans clearly constitute a substantial change in the prospective nature and use of the proposed driveway and justify [DOT]'s reconsideration of the location of the driveway access point for the LMMIA property. *However, [DOT] did not seek to revoke the permit* …." (Emphasis added.) Thus, the Division clearly assumes that this provision would be relevant had DOT *revoked* the Taylor permit.

[9] We note that the Division, DOT, and LMMIA all assume that a median crossover can be part of a permit application and permit under WIS. STAT. § 86.07(2). Thus, the parties address the reasonableness of DOT's denial of LMMIA's application and discuss whether a median crossover would be safer at 704 feet or at 1080 feet. Because the parties do not address the issue of whether a permit application may specifically request median openings, we do not address it, but merely assume, for purposes of this discussion, that an application may contain such.

urban areas, both the minimum and desirable spacing between a crossroad and an expressway access ramp are 500 feet. For rural areas, the minimum spacing is 500 feet, and the desirable spacing is 1000 feet. The parties have not pointed out whether the area at issue here is classified as urban, suburban, or rural.[10] LMMIA argues that, regardless whether it is urban, suburban, or rural, a crossover at 704 feet from the USH 10 access ramps far exceeds DOT's own spacing requirements. LMMIA also argues that, because more development is planned for this stretch of Highway 110, that indicates urbanization and, according to DOT's standards, urbanization requires *less* spacing between crossovers.

¶16 The Division fielded the same arguments at its hearing. It concluded:

> Regardless of whether this area should be classified as urban, suburban, or rural, what needs to be kept in mind is that the standards cited by LMMIA are minimum spacing requirements. [DOT] properly exercised its discretion in this case in requiring that a driveway access with a median opening should be located at a point 1080 feet north of the USH 10 ramp ….

The Division based that conclusion, in part, on the following finding:

> [DOT] anticipates that the intersection of the proposed driveway and STH 110 will eventually be signalized. A traffic signal at this intersection [704 feet

[10] LMMIA asserts that DOT has characterized this area as "suburban," and draws our attention to one of its exhibits from the division hearing. The language that we find pertinent in that exhibit comes from an e-mail between DOT employees: "This is not an urban situation. Currently and into the near future, it is a 'rural setting.' When it more completely develops, it is really a 'suburban setting.'" For obvious reasons, the Division did not rely on this language in order to determine how this area was characterized. Additionally, Bruce Fredrickson, a manager of systems planning and operations for DOT, testified that the stretch of Highway 110 at issue here qualifies as "rural" highway based on the fact that it is a "roadway without curb and gutter." As is clear from its decision, however, the Division did not determine the classification of this area. We therefore find it unnecessary to do so.

> from the USH 10 access ramps] will not meet the spacing standards desired by [DOT] for the anticipated traffic volumes at this location. The spacing standards are designed to promote the flow of traffic. The placement of traffic signals at closer intervals impairs the flow of traffic resulting in diminished traffic safety.

¶17 The Division's findings and conclusions are supported by substantial evidence in the record. Bruce Fredrickson, a manager of systems planning and operations for DOT, testified that DOT anticipated installing signals at the crossover at 1080 feet north of the USH 10 ramps. He further testified that this spacing is "imperative" to insure proper timing between signals at USH 10, south of the crossover, and USH 96, north of the crossover. Frederickson also testified that DOT was operating under the proposition that 1000 feet was the desired spacing between access ramps and full crossovers.

¶18 DOT manager Frederickson also explained the significance of the spacing standards:

> The spacing standards allow us to maintain a highway with safe flow over time. What typically would happen, if we do not have the spacing standards, is traffic flowing off the interchange ramp, to make a left turn into the LMMIA development needs to cross over two northbound lanes. And what you need is sufficient space to weave and make those changes. And when you don't have sufficient space, and as traffic grows and grows, you end up having capacity and congestion problems. You end up having traffic safety problems.

Thus, we conclude that the Division's conclusion regarding the spacing between the crossover and access ramps is supported by substantial evidence in the record.

¶19 Finally, LMMIA argues that the Division should have considered the Taylor permit in deciding whether to grant or deny LMMIA's application. We agree with LMMIA that the Division may "consider" any information it finds

relevant to its determination whether DOT reasonably denied LMMIA's permit application. The problem with LMMIA's argument is that the Division did consider the Taylor permit.

¶20 The Division's decision states that "after Marilynn Taylor sold the property to LMMIA, the proposed use and daily traffic level changed substantially, thus the agreement entered into by [DOT] and Marilynn Taylor is no longer applicable." Thus, it is clear that the Division considered the Taylor permit, but determined that circumstances had changed. We agree, and likewise conclude that it was reasonable to deny LMMIA's application.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.