

Beware: The Failure To Challenge Government Access Modifications To Your Property Can Destroy Its Utility

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Access to and from the highway is critical for most every business that depends on consumer traffic or deliveries by large truck. Customer convenience begins with easy entry into and exit from a property. Loss of direct highway access, with customers being required to use service roads, access roads or side roads, can negatively impact customers' willingness to visit a business or leave them frustrated when they try. Even small changes in curb cuts can impact on-site vehicle circulation in ways that create inconvenience or confusion for customers or obstacles for large trucks entering and navigating the property.

However, even though a business person may own his or her property, he or she does not control access to it. The government can alter the roadway system that enables customers and vendors to reach the property in ways that can make access circuitous, inconvenient or even difficult. Curb cuts are granted by the State, county or municipality, and, subject to certain limitations, may be taken away, limited or moved.

Business owners are not entitled to the best possible access from a business point of view. The State Highway Code only requires the State to provide "reasonable" access. Counties and municipalities apply the same concept. What constitutes "reasonable" access depends on the use to which a property is put. Even for commercial properties like shopping centers, strip malls, big box stores, automotive dealerships, gas stations and other businesses, direct in-out access to and from the main roadway is not required. A commercial property may be deemed to have "reasonable" access even if it is separated from the main roadway by a service road or loses all direct access and access must be secured, even circuitously, from the local road system, service roads, a side road or other access roads leading to the property. "Reasonable access" may be deemed to exist even if, to gain access, customers and vendors are forced to exit the main roadway and use a service or access road long before the property and the signs for the business on it can be seen. Likewise, curb cuts can be closed, moved or realigned even if on site vehicle circulation is altered.

Once there is a finding that the access provided to a property or the access that remains after a roadway or curb cut is altered is "reasonable", a governmental entity may move forward with its project and the owner is not entitled to any compensation for the negative consequences the project has on his or her business. This is due to the fact that access and changes to access by governmental agencies are deemed to be exercises of the government's police powers, like zoning and land use restrictions, not takings of property as to which the Federal and State constitutions require payment of just compensation. As long as "reasonable" access is provided, the exercise of the police power is deemed valid, and no compensation is required.

At the State level, access changes caused by roadway projects or curb cut changes are handled by the Department of Transportation through formalized proceedings. Prior to any change, the Department gives notice to the affected property owner who has the right to meet with DOT staff to discuss alternatives and to a hearing before the DOT and appeals in Court to challenge whether the DOT proposal affords "reasonable" access to the property.

At the county and municipal levels, the process can be less formalized and less transparent than that with the DOT. A property owner may not be given notice of a proposed access change until late in the agency's development of a project and may not be given much in the way of avenues to rectify problems caused by the change beyond pleading with the municipal or county engineer or the design engineers for the project. Absent

success in such informal discussions with the agency, resort to the courts may be required to challenge the reasonableness of an access change.

Given the potential consequences of an access change, it is advisable for a property owner faced with a proposed change to fully investigate its potential and pursue all available avenues to minimize negative consequences. If pursued, modifications of an agency's plans are possible and unreasonable plans can be defeated. However, too often, property owners pay little heed to the notices from DOT or to whatever notice and information comes to them from county or municipal officials. They either fail to challenge the access proposal at all, fail to present their side through competent, prepared engineers, or fail to pursue all of their hearing and appellate rights. The end result is that the reasonableness of access is approved almost by default, even though modifications or an outright prohibition of the change might have been possible. In fact, there have been recent cases of New Jersey businesses that have been left with properties that were no longer suitable for their business purposes because they did not properly protect their interests.

The conclusion then is: Beware. Notices of access changes must be taken seriously, the consequences of the changes must be carefully assessed and, if they will have any significant adverse impact, the access changes must be challenged at the first opportunity and the challenges must be vigorously pursued. The alternative is a property that may be significantly harmed and a business owner with no ability to redress the harm.

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