

637410 ORDER
BOOK 504 PAGE 0772
RECORDED 04/13/2009 AT 08:45 AM
AUDREY KOLTISKA, SHERIDAN COUNTY CLERK

**IN THE MATTER OF THE)
APPLICATION OF ROBERT AND LEONA)
ADSIT, FOR THE ESTABLISHMENT)
OF A PRIVATE ROAD.)**

THIS MATTER came before the Board of County Commissioners of Sheridan County (hereinafter “board”) for public hearing upon the application of Robert and Leona Adsit (hereinafter “applicants”) for the establishment of a private road. The BOCC heard testimony and considered the written submissions, and being otherwise fully advised herein, issues the following findings of fact and conclusions of law. To the extent necessary, any conclusion of law herein is also deemed to be a finding of fact.

1. Applicants filed with the board their Application for Private Road on February 6, 2008. The application met all requirements provided for under W.S. § 24-9-101(a).
2. Pursuant to W.S. 24-9-101(b), applicants sent a copy of the application to Respondent Douglas K. Adsit (hereinafter "Respondent").
3. On March 5, 2008, counsel for Respondent, filed an Entry of Appearance and Response to Application for Private Road.
4. On March 7, 2008, Respondent, through counsel, filed his response to the Application. In paragraph 2 of that pleading Respondent noted that Applicants have enjoyed permissive use of Respondent's property for purpose of ingress and egress. At no time was the board advised that access was being denied or restricted to Applicants.
5. On March 18, 2008, during its regular session, the board acknowledged receipt of the application in proper form. At the March 18, 2008 meeting, the board was advised by the county engineer that it appeared that Franklin M. Schultz (hereinafter "Schultz"), the owner of Lot 1 of the Cohan Subdivision, may be an affected party. The board then directed the county engineer to view the conditions

on the ground and advise the board of any other landowners who may be affected by the application or any alternative route and to report back to the board on April 1, 2008.

6. Subsequently, on March 28, 2008, counsel for Respondent withdrew from representation of the Respondent. Thereafter the Respondent appeared *pro se*.
7. On April 1, 2008, the county engineer reported, in writing, to the board, pursuant to its direction of March 18, 2008. The board then requested that applicants send a copy of the application to Schultz by certified mail, a copy of the return receipt thereafter to be provided to the board.
8. Thereafter, applicants provided a copy of the application to Schultz on April 2, 2008. On April 8, 2008, the board received a copy of the return receipt evidencing receipt of the application by Schultz.
9. On April 15, 2008, at a regular session of the board, a hearing was scheduled to determine whether the applicants have a legally enforceable access from the applicants land to a public road. The contested case hearing on that issue was set to be heard on June 19 and 20, 2008. Notice of the hearing was then given to the parties.
10. On April 25, 2008, the Applicants, Respondent, and Schultz executed a Stipulation Regarding Legally Enforceable Access, wherein the parties agreed that Applicants land was landlocked with no legally enforceable access to a public road. The board accepts that stipulation as true and correct and finds accordingly. It is also noted that on March 7, 2008, Respondent, through counsel, filed with the board a Response to Application for Private Road. In paragraph 3 of that pleading, Respondent acknowledged that he was unaware of any easement of record benefiting Applicants property.
11. On May 16, 2008, the hearing officer submitted to the Applicants, Respondent and Schultz proposed Instructions to the Viewers and Appraisers. The parties were given 10 days within which to make written objections to the same. On or about May 27, 2008, Applicant submitted proposed amendments and objections thereto.
12. On August 5, 2008, during their regularly scheduled meeting, the BOCC appointed as viewers and appraisers, Mike Evans, Jerry Mark and David Withrow. At the same meeting the board caused to be issued an order directing the viewers and appraisers to meet on the proposed road on August 26, 2008 at 9:00 o'clock, a.m., for the purpose of making recommendations to the board of a reasonable and

convenient route for a private road permitting access to the Applicants and thereafter to view and appraise any damages to the burdened property.

13. The viewers and appraisers met at the proposed road on August 26, 2008. At that time the viewers and appraisers subscribed to an oath requiring them to faithfully and impartially perform their duties, conducted an on-site viewing and heard all interested parties that were present. The viewers and appraisers submitted their report on October 7, 2008.
14. On September 2, 2008, at the next regularly scheduled meeting of the board, the board determined that insufficient time had passed from the date of the viewers and appraisers meeting on August 26, 2008 to allow them time to properly complete their report to the board. Thereafter the board determined that the report of the viewers and appraisers would be submitted to the board at its regular meeting scheduled for October 7, 2008.
15. On October 7, 2008, the viewers and appraisers submitted their report and the board ordered the matter set for a contested-case hearing to occur on a date mutually convenient to the parties and an order was subsequently issued setting the matter for December 5, 2008 to begin at 9:00 o'clock, a.m.
16. Present at the hearing, in person or represented by counsel were the Applicants, represented by David C. Smith of the law firm Lonabaugh and Riggs, LLP and the Respondent, representing himself. Also present were viewers and appraisers Jerry Mark and David J. Withrow.
17. The application contains all information required by W.S. § 24-9--101(a) and notice has been provided in accordance with W.S. § 24-9-101(b).
18. At beginning of hearing, the Applicants and Respondent stipulated to the following facts.
 - A. Applicants have no legally enforceable access to their land;
 - B. The route as generally suggested by the viewers and appraisers, but as corrected and amended as shown in Exhibit C, is the most reasonable and convenient route for access to Applicants land for all parties; and
19. Applicants own the land described in the deed attached hereto as Exhibit "A".
20. Respondent owns the land described in the deed attached here to as Exhibit "B".

21. A physical road crosses Respondent's property and has served as the permissive access to the Applicants property since they purchased the property. The permissive use of this access was initiated when the burdened property was owned by Respondent's predecessor in interest, and has continued, unabated, following the transfer of ownership to Respondent to the date of the contested case hearing. The evidence establishes that this is the route proposed by the applicant and is in essentially the same condition as when Applicants purchased their property.
22. The northeast corner of Respondent's property is burdened by an easement in favor of the Sheridan Area Water Supply Joint Powers Board (SAWS). The dimensions of the area encumbered by the SAWS easement are 20' x 25' which serves a waterline and fire hydrant. Approximately 50% of the area burdened by the SAWS easement lies within the Applicants proposed private road.
23. The SAWS Joint Powers Board was not given formal notice of the application for establishment of a private road in this location. Neither did a representative of SAWS make an appearance, though the three commissioners hearing this matter serve on the six person SAWS Joint Powers Board. In light of the findings made herein and the order to be issued, the board finds that failure to provide notice to SAWS is not fatal.
24. The area proposed by the applicant to be the private road comprises 1,067.06 square feet. That route is twenty (20) feet wide and runs on a diagonal across Respondent's property from northwest to southeast. The diagonal, as shown on the Applicant's Exhibit C, bisects Respondent's property leaving a triangular portion of Respondent's property separated from the balance of the property by the proposed road. The dimensions of the triangular portion are 32.80' along the proposed roadway, 20.36' along the northern boundary and 25.72' running from the northeast corner to the point of intersection with the proposed road. The area of this triangular portion of land is 261.83 square feet.
25. In their report, the viewers and appraisers concluded that the proposed route, as shown on Applicant's Exhibit C, is the most reasonable and convenient. That conclusion was based upon the following factors: the existing access (and proposed road) has been in use for that purpose for an extensive period of time; it crosses the northeast corner of Respondent's property in a manner that does the least damage to that property; and the road is already improved.
26. We conclude that the viewers and appraisers assessment is correct. The road as proposed is the most reasonable and convenient. Further, this point was not contested by the parties.

27. In their report, the viewers and appraisers concluded that the value of the land at issue before establishment of the private road was One and 58/100 Dollars (\$1.58) per square foot. David Withrow, one of the viewers and appraisers, and a real estate appraiser by profession, testified at the contested case hearing as to the basis for this opinion. We find their analysis is correct and compelling.
28. The viewers and appraisers further concluded that Respondent will lose the total value of the land over which the private road crosses, or in other words, One Thousand Six Hundred Eighty Five and 95/100 Dollars (\$1,685.95). We believe the viewers and appraisers are correct in their opinion that the loss to Respondent is total. We note that the current access does not provide a use that is shared by Applicants and Respondent. There is no reason to believe it will, as a private road, be otherwise in the future.
29. It was suggested by Applicant that because the permissive access has been in existence for some significant period of time that there is no diminution in the value of Respondent's property if a private road is located there. We believe this to be incorrect. Prior to the establishment of the private road, Respondent is the owner of the land with all the benefits of unfettered ownership. If Respondent wished to allow continued permissive access to Applicants' property he was free to do so. If he wished to remove the access and replace it with a lawn, he was likewise free to do that as well. In short, Respondent was free to make any use of that land which he believed beneficial and which was permitted by law. Upon the creation of the private road that will no longer be the case. Respondent's use of the land will no longer be unfettered. Respondent will be permitted only those uses not inconsistent with Applicant's right to use the road. We believe that this damage and Respondent's right to compensation therefore is recognized in *Mettee v. Kemp*, 236 Kan. 781, 696 P.2d 947, 949 (1985) cited in *Lindt v. Murray*, 895 P.2d 459 (Wyo. 1995) and *R.C.R., Inc. v. Deline*, 70 P.3d 214 (Wyo. 2003).
30. In the same respect, the creation of the private road, as proposed, eliminates any further functional use of the triangular segment of land in the northeast corner. However, we do not find that the loss to Respondent is attributable solely to Applicant. Currently a portion of the land in question, either as part of the private road or the triangular portion remaining is already subject to the easement benefiting SAWS. As such the Respondent does not enjoy all benefits of ownership within that area. Rather Respondent currently enjoys only those benefits not otherwise inconsistent with the easement in favor of SAWS. Therefore, a portion of the damage within that 20' x 25' portion subject to the easement is attributable to SAWS and must be subtracted from the total amount of damages. It is obvious that the Applicants use will be the dominant of the two uses. We apportion that use at 67% within the area of the easement. SAWS, as the

lesser use, will be determined to be 33% of the use. The total area encompassed by the triangular segment and the proposed private road is 1,328.89 square feet. Of that, 500 square feet is already burdened by the pre-existing easement in favor of SAWS. The damage to Respondent for that portion of the property is assessed as follows: 500 square feet x \$1.58/sq.ft. X 67% = \$529.30. The damage to Respondent attributable to the remaining 828.89 square feet is assessed as follows: 828.89 square feet x \$1.58/sq.ft. = \$1,309.65, for a total amount of damages in the amount of One Thousand Eight Hundred Thirty Eight and 95/100 Dollars (\$1,838.95).

31. The fence currently located on Respondent's property is not affected by the establishment of the private road as herein established. Accordingly, Respondent is not entitled to any compensation related thereto.
32. The private road herein established does the least possible damage to the lands through which it is located.
33. A private road, as described on Exhibit "C" attached hereto, is hereby established for the benefit of Applicants' lands contingent upon the payment of damages or costs and the filing of a plat as required in paragraph 35, below.
34. As is apparent, the easement held by SAWS is prior in time, and in that respect, superior to the Applicant's rights with respect to the private road. Therefore, the Applicant's use of the private road is conditioned upon the Applicant, or Applicants' successors in interest, taking no action with respect to the private road that is inconsistent with the rights enjoyed by SAWS.
35. Upon presentation of proof of payment of all costs or damages there shall be caused to be filed with the Sheridan County Clerk a plat of the survey as commissioned by Applicant for the establishment of the private road.
36. That costs are hereby assessed against the applicant in the amount of Five Thousand Nine Hundred Sixty and 48/100 Dollars (\$5,960.48) as itemized in the invoice of costs of December 4, 2008, incorporated herein.
37. All future maintenance costs of the road shall be paid by Applicant or Applicants' successors in interest.

DATED: March 3, 2009.

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**BOARD OF COUNTY COMMISSIONERS
SHERIDAN COUNTY, WYOMING**

Ayes:

Bob Rolston

Bob Rolston

Steve Maier

Steve Maier

Terry Cram

Terry Cram

Nays:

Bob Rolston

Steve Maier

Terry Cram

ATTEST:

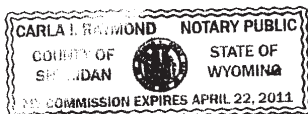
Audrey Koltz

County Clerk

STATE OF WYOMING)
) ss
COUNTY OF SHERIDAN)

The foregoing instrument, identified as the Findings of Fact, Conclusions of Law and Order Establishing Private Road pertaining to the Application of Robert and Leona Adsit, was acknowledged before me by County Commissioners Terry Cram, Steve Maier and Robert L. Rolston on March 3, 2009.

WITNESS my hand and official seal.



Carla I Raymond
Carla I. Raymond
Notary Public

My Commission Expires: April 22, 2011