

**TOWN OF HENNIKER
ZONING BOARD OF ADJUSTMENT**

January 20, 2010
Approved Minutes

Members Present: Doreen Connor, Chairwoman; Bob Stamps; Jeff Connor; Gigi Laberge; Bruce Trivellini, Alternate; Roni Hardy, Alternate

Members Absent: Joan Oliveira, Vice-Chairwoman

Others Present: Tom Hansen; Bill Russell; Jane Russell; Gerald F. Eisen; Shawn Richard; Leon Parker; Peter Flynn, Town Administrator; Mark Fougere, Town Planner; Jennifer Astholz, Recording Secretary

Chairwoman Connor called the meeting to order at 7:06 pm. Chairwoman Connor opened the public hearing and stated that four regular Board members and two alternate members were in attendance. Ms. Connor explained that since alternates rotate turns sitting on the Board, Roni Hardy will be voting in Joan Oliveira's absence.

Public Hearing

Case 2010-01: William Russell, Applicant (William Russell – Russell Forest Management, LLC-owner), pursuant to RSA 674:41 II, is appealing the Board of Selectmen's November 17th, 2009 decision to deny an application for a building permit for Map 1 Lot 741. This property is located off of Bowers Road (Class VI) and accessed via a private easement. The property is Zoned RR (Rural Residential).

William Russell, applicant, was in attendance, and Tim Hansen has been helping him with this application. Mr. Russell stated that he had done some research and asked questions before buying the property where he had planned to build a house on the 100-acre lot. He stated that he put several thousand dollars into the driveway and had house plans drawn up before being denied.

Tim Hansen, former owner of the property who is working with the applicant, stated that RSA 674:41 requires some things since this is a private road. He stated that the exceptions address three items. He read the answers from the written application. Mr. Hansen called the Board's attention to additional documents that were provided. He stated that there is evidence that the Board will allow a subdivision on substandard roads when there is enough acreage (usually 10+ acres). He asked the Board to look at this as a 3,800-foot long driveway.

Mr. Hansen stated that the road was considered to be a Class VI road years ago, and building permits were allowed on Class VI roads at that time. He stated that he understood that an agreement and release document may need to be signed if a home was constructed on a Class VI road. He stated that a driveway permit was granted in 2004.

Mr. Hansen stated that the road had been abandoned by the Town as a Class VI road back in the 1800's. They went to court, and it was determined that it is actually a right-of-way instead of a Class VI road. He then did more research about building on a discontinued road or right-of-way and sold the land to Mr. Russell.

Mr. Russell read the prepared statement for the answer to the second criteria about hardship to a future purchaser. He stated that he did not think this would be a problem. Three agreement and release forms have been done so far; the last one was prepared by the Town Attorney, and the applicant stated that he does not have any problem with that at this time.

Mr. Russell stated that two driveway permits have been issued. A regular public citizen would look at these standards and see that the permits were signed off by the Fire Department, the Police Department and the Code Enforcement Officer and come to the conclusion that everything was in order. The entrance is not on Craney Pond Road but is actually up 100 feet from the house. Also, the driveway permit was approved before any improvements were made, and the second approval was granted in 2008 after only minor improvements were done (such as adding the culvert). The Conservation Commission, Board of Selectmen and Town Clerk signed off on the permit. There was no indication that there would be any problems. The Fire Chief told him that he would need to add a sprinkler system to the prospective house in case they could not get fire trucks through.

Gigi Laberge, Board member, asked if the original plans were to log the property. Mr. Hansen stated that he was logging back in 2004, but the plans always included building a house. He stated that the second permit was for a permanent driveway, not just for logging access.

Bruce Trivellini, Board member, asked for clarification of a point of order. He stated that the ZBA is to determine whether the Board of Selectmen made a correct decision.

Mr. Hansen stated that receiving the permit for the permanent driveway led the applicant down this path. If a maximum driveway length requirement was declared, they would understand a problem. All of the Town employees that reviewed these plans never mentioned a possible problem.

In answer to the third question about causing undue financial hardship to Henniker residents, the applicant read directly from the application stating that it would not.

Mr. Hansen stated that the permit for the culvert was to install a replacement for an old structure. The Conservation Commission, Town Clerk and the State all reviewed it. The applicant stated that everything that was done indicated that their plans would not be a problem. It appeared that granting a building permit would only be a formality. He stated that asking for an agreement and release form to be signed for plans on a Class VI road was not an issue, just another part of the process. Mr. Hansen stated that he has experience with this, so he knew to research more than usual, and there still did not seem to be a problem.

The applicant stated that they believe that the Board of Selectmen's decision is in error because of a letter from the Town Attorney referring to RSA 674:41. It states that they cannot grant the building permit because it is not on a private road; however, it is on the right-of-way of a private road.

Mr. Trivellini stated that the right-of-way is over the other person's property. Mr. Hansen stated that the letter referred to the "private road" issue. The section of the right-of-way is like a private road and acts as a driveway.

Jeff Connor stated that without this private right-of-way, this would be a land-locked piece of property. Mr. Hansen stated that this has always been the only access. The Town had originally showed it as Bowers Road. This is what was discontinued in 1895.

Ms. Laberge wanted to know if they originally only wanted access to log the property. Mr. Hansen stated that they always wanted to build there; and his intention was when he got the first driveway permit in 2004.

Mr. Trivellini asked if there are other houses on what was referred to as Bowers Road. Shawn Richards stated that it was known as the Morse Road extension. When 911 renumbering was done, he was told his house was on Craney Hill Road. From Craney Hill Road south to Morse Road extension at the four-way intersection never existed until the property was purchased in 1999. There is one home access on Craney Hill Road. At that point it is considered a Class VI (not maintained) road.

Leon Parker stated that there is a Superior Court decision about Bower Road. He stated that he is disappointed that the applicant does not have a copy of the letter that was discussed. He stated that, unfortunately, it is the bureaucratic process that led to this point. He stated that the Board of Selectmen is not going to argue with the Superior Court decision. There is no frontage on a Class VI road. He stated that RSA 674:41 cites the zoning regulations as to why the request was denied.

Bob Stamps, Board member, stated that when he reads RSA 674:41, it appears that it could be done if it meets certain criteria, so he understands why this appears to be a circular argument with no clear ending. Chairwoman Connor stated that the access is actually a discontinued road with a right-of-way over it.

Ms. Laberge stated that after studying the Court ruling, she understands that when the Bennett's owned the property, they had access through the Richard's property. Another owner wanted to log the property and also needed access. This became a prescriptive easement, and it is not considered to be any classification of road.

Chairwoman Connor stated that if it were determined to be a private road, they could determine if the Board of Selectmen made a mistake. However, because the Court's findings do not call it a private road, she does not believe that they erred.

Mr. Richards stated that he has presented evidence many times to the Town. He stated that he has detailed records of the vote that created the road and records of when the

Town voted to discontinue it. The Court granted an access easement, not a private road. He also stated that it bothered him that the Fire Chief would have advised the applicant to cut trees along the easement since that is on another person's private property.

Ms. Laberge asked about the kinds of improvement that were made. Mr. Hansen stated that the improvements were more than what would have been necessary for only logging purposes. Mr. Russell stated that he met with the Fire Chief and talked about the plans. The Fire Chief then signed the driveway permit. Ms. Laberge questioned if the easement access extended through Lot 741. Mr. Hansen stated that the rangeway continued through the lot. She showed Mr. Richards a map and asked him to describe it. He also indicated that the rangeway continued through the lot.

Mr. Trivellini stated that section 3 from RSA 674:41(a)(b) talk about Class VI roads. The criteria of Class VI and private roads concern local governing bodies. He can see how the right-of-way could also be attached to this as it also attaches to the local governing body. Right-of-way fulfills the criteria of this section. The document would not speak to easements or right-of-ways if it were to be denied totally. He stated that section 3 refers to #1 which refers to section 3 again, creating the circular argument. He believes the Board of Selectmen had the right to approve or deny the building permit.

Mr. Richards stated that the driveway permit issue is confusing. After review with the Planning Board, he stated that he believes that the Board of Selectmen does not have the authority to grant driveway permits unless authorized by the Planning Board. He also stated that the first permit granted to Mr. Hansen was done on the assumption that it was a Class VI road. A letter was to be sent to him stating that it was null and void as it was based on being a Class VI road, which it is not. He does not believe that the applicant has a valid driveway permit. Mr. Richards posed the question about who would be liable if the culvert fails. He stated that he was surprised to find out that he would be responsible since it is technically on his property, although he did not apply for it and had nothing to do with it. He asked if it is legal for the Town to authorize a driveway to be put over someone else's private property. He stated that road frontage is a requirement, and none exists here. He stated it also bother him that numerous trees have been removed from his property.

Mr. Hansen responded to the classification of the road and referred to the Court's judgment (referred to as Document 12, page 6). The Court acknowledges unwanted traffic; however, there is no other means of access. He quoted the section "petitioner has right of way in the roadway to access the property." The conclusion is that the petitioner may use the roadway owned by Mr. Richards.

Mr. Trivellini stated that the Board must decide whether the Board of Selectmen had the right to deny the building permit. Ms. Laberge stated that it was decided by the Court that if one owns a landlocked piece of land, the person between the land and the road cannot deny access.

Roni Hardy, stated that there is clearly a prescriptive easement here as the area was accessed for more than twenty years without permission. Mr. Richards asked to submit a Court case to the Board about prescriptive easements. The Board accepted this document.

Chairwoman Connor stated that RSA 674:33 (p. 511 of the 2009 Statutes book) calls for the ZBA to determine if an error was made by the Board of Selectmen in denying the building permit. She stated that she does not view this right of access as a private road.

Gigi Laberge **MOVED** that the Zoning Board of Adjustment, in Case #2010-01 regarding the Appeal from an Administrative Decision, uphold the Board of Selectmen's November 17, 2009 decision to deny an application for a building permit for Map 1 Lot 741 because the case does not satisfy the requirements of RSA 674:41, and there is no road frontage for this lot. Roni Hardy **SECONDED** the motion. Mr. Trivellini commented that they should not vote in the negative as it can become confusing. Motion **PASSED, 5-0**, to uphold the decision to deny the building permit.

Ms. Laberge expressed sympathy for both parties in this case.

Mr. Hansen questioned the process, and he stated that he thought they were applying for an exception to RSA 674:41 as described in the letter dated 12/30/09. He stated that the request for exception is based on RSA 674:41(2)(c). He stated that the exception is based on this not being a Class VI road with no frontage. Mr. Fougere, Town Planner, read this section aloud. Chairwoman Connor stated that the Board could only act on the application filed as an Appeal of Administrative Decision.

Mr. Hansen stated that he thought he made it clear that he was applying for a special exception from 674:41(2), so he will continue this process. He asked the Board who he should talk to in order to complete the correct application. Chairwoman Connor stated that the Board cannot give advice but suggested that he seek legal counsel if he is not satisfied with the decision that was reached.

Review Meeting Minutes of 12/16/09

The Board reviewed minutes from the 12/16/09 meeting, and corrections were made. Gigi Laberge **MOVED** to approve the minutes as corrected; Bob Stamps **SECONDED** the motion. Motion **PASSED, 5-0-1**. Ms. Hardy abstained as she did not attend the last meeting.

Mr. Stamps stated that he would like to amend the November 2009 minutes. He stated that he did, in fact, indicate in advance that he would not be attending the November 2009 ZBA meeting and asked that this amendment be recorded this evening.

Bob Stamps and Gigi Laberge stated that they will be out of town and will not be able to attend the February 17, 2010 meeting.

Jeff Connor **MOVED** to adjourn at 8:35 pm; Ms. Laberge **SECONDED**. Motion **PASSED, 5-0**.

Respectfully submitted,

Jennifer Astholz
Recording Secretary