

**TOWN OF HENNIKER**  
**Zoning Board of Adjustment**  
*Draft Minutes*  
**November 19, 2008**

**Members Present:** Joan Oliveira, Vice-Chairwoman; Jeff Connor; Bob Stamps; Gigi Laberge, Alternate; Doreen Connor, Chairwoman; Rick Patenaude, Alternate; Kris Blomback

**Member Appointed by Board of Selectmen for tonight's hearing:** John Partridge

**Others Present:** Laura Scott, Planning Consultant; Gregory Michael, Esq.; Wayne Patenaude; Jennifer McCourt; Scott Osgood; Luke Webster; John Kjellman; Jennifer Astholz

Joan Oliveira, Vice-Chairwoman, called the meeting to order at 7:00 pm.

**Public Hearings**

**Case 2008-108.** A request has been made for an Appeal of Administrative Decision. The applicant, Wayne Patenaude, is appealing a decision made by the Planning Consultant, Laura Scott, in her interpretation of the Zoning Ordinance as it pertains to a proposed excavation operation. The property is located off NH 114 (Map 1 Lots 44 & 99) in the Medium Commercial (CM) & Rural Residential (RR) Zoning Districts.

The panel of Board members hearing this case consists of Joan Oliveira, Jeff Connor, Bob Stamps, Gigi Laberge and John Partridge. Doreen Connor, Rick Patenaude and Kris Blomback have recused themselves from this case.

Attorney Gregory Michael, representing applicant Wayne Patenaude, described the two parcels of property relative to this application. Lot 99 is in the Medium Commercial (CM) zoning district where excavation is an allowed use. He described an old roadway on adjoining Lot 44 in the Rural Residential (RR) zone where excavation is not allowed. He stated that an issue was raised since the roadway on Lot 44 must be used to gain access to Lot 99. Atty. Michael stated that he disagrees with, but respects, the opinion of Laura Scott, Town Planning Consultant, as it pertains to the proposed excavation operation.

Atty. Michael stated that the area of Lot 99 will support the proposed commercial activity. Since no actual activity is being proposed to occur on Lot 44, they are of the opinion that a special exception is not needed. He stated that it is no different than cars and trucks traveling through other areas of town to reach their place of operation. Atty. Michael stated that there is nothing in the Town ordinance to restrict the proposed activity. He cautioned the Board members about the law of unintended consequences which could wreak havoc on other activities in Town. Atty. Michael asked to hypothetically consider how this case would be interpreted if the access road

were a Town road that crossed Lot 44 to Lot 99. He warned that this case potentially opens up more significant issues than just the immediate concerns of Mr. Patenaude's property.

Atty. Michael read aloud comments made by Roland Soucy, Town Code Enforcement Officer/Building Inspector in his letter dated September 30, 2008. Atty. Michael commended Mr. Soucy's comments, reiterating that Lot 44 is only involved as an access way to Lot 99. He stated that the letter supports some of the same concerns that they are bringing to the Board's attention.

Atty. Michael stated that Town Counsel's reference to Section 133-5(C) of the ordinance has no bearing on this case as the zoning line does not pass through this lot. He stated that this provision is designed to help when the zoning line passes through a property. The issue being raised has to do with providing access to the landlocked Lot 99. He also commented on the reference made by Town Counsel to Section 133-39(F); Mr. Michael stated that this section relates to subdivided lots and has no application to this case. Atty. Michael also stated that RSA 674:41-43 relates to the erection of buildings on parcels and access to lots for that purpose, which is not being proposed here.

Atty. Michael stated that Lot 99 is a grandfathered lot that has suitable access for the proposed operation. He stated that the applicant is not bothering anyone as Mr. Patenaude also owns Lot 44. The access road goes out to a main artery, and the old roadway is being used for a proper, allowed use in the CM zone. Atty. Michael requested that the ZBA grant the administrative appeal so that the applicant may go forward with the Planning Board process.

In order to more fully show the problems that can arise from requiring a special exception for access to Lot 99, Jennifer McCourt, engineer for the applicant, showed potential impact to zoning districts throughout Town if the administrative decision stands. Ms. McCourt showed a map outlining several zoning districts. She stated that one enters the Town of Henniker in the Rural Residential zone. One has to cross the Rural Residential zone on Rte. 202 to get to Rte. 114 where there is Rural Neighborhood, Commercial Recreational, Medium Commercial and Heavy Commercial zoning districts. She showed on the map where the center of town that is crossed with heavy traffic is in the Residential Village zone. She stated that the Board would be opening Pandora's Box if this ruling stands as it would then apply to so many other lots in the Town of Henniker. To get from one zone to another, you might have to cross through other zones. Ms. McCourt expressed her agreement with Atty. Michael's opinion that there is no statement in the ordinance about using access routes which pass through other zones.

Vice-Chairwoman Oliveira asked if the Board members had any questions of the applicant.

Gigi Laberge asked if there are any instances where one goes through one lot to gain commercial access to another lot. Ms. McCourt stated that she thought Michie Corp. owns a pit off of Flanders road which is accessed through an easement. Ms. Laberge asked if the road off of

Rte. 114 to Henniker Crushed Stone is a private road. Others stated that it is, in fact, a private road. Ms. Laberge asked the applicant if he had expected to be able to access Lot 99 from the access road on Lot 44 at the time that he bought the properties. Mr. Patenaude stated that was always his intent and understanding.

Ms. McCourt stated that the access to Lot 99 has been in place since the 1800's. She stated that there was an easement created in the 1800's for that purpose. Mr. Wayne Patenaude stated that the access road was historically used for commercial purposes. Ms. Laberge asked if they knew how Lot 99 became landlocked with no other access. Ms. McCourt stated that it had been used for logging purposes, and it was just the way that properties were broken up back then. She stated that it was commonplace in those days for landowners to share access ways.

Jeff Connor stated that he would like to make sure that the applicant is allowed to upgrade the access road to a useable standard. Ms. Oliveira stated that they are only deciding the matter of the administrative appeal this evening, but his concern is duly noted.

Atty. Michael stated that they still have to go through the Planning Board process for all other pertinent matters.

Laura Scott, Planning Consultant, asked to speak to her decision. She stated that it was a difficult decision to make. She understands that excavation is only proposed on Lot 99, but she is not going to call the access way a "road" as it does not meet any of the Town standards. She explained that if the Planning Board was only looking at an application for excavation on Lot 99, they may not have the opportunity of looking at DOT matters, alteration of terrain issues, wetlands impacts, traffic concerns, safety concerns, etc. If the application was only for Lot 99, she asked how the Planning Board, members of the public or other Town departmental agencies could ask questions about what was going to happen to the access way on Lot 44. She stated that she agreed with Atty. Michael about how many things in Town Counsel's letter did not apply to this case, but her decision was made on the basis that it was an unclear zoning issue that should be decided by the Zoning Board. Ms. Scott stated that the applicant has to make applications to the State about some of the issues concerning Lot 44. DOT must approve the driveway permit for Lot 44. She stated that this seemed to be the clearest way for the Planning Board and members of the public to see the entire excavation operation. She stated that she also respects the applicant's opinion in this matter but disagrees with it.

Ms. Laberge asked Ms. Scott about the Planning Board's ability to review the entire operation if it were only noticed as excavation occurring on Lot 99. Ms. Scott stated that the public hearing notice would only include Lot 99. Ms. Scott stated that she was concerned that the Planning Board may not be able to include conditions on a lot not listed on the application. She stated that this is different than off-site improvements made on a Town road as it would be considered a driveway.

Bob Stamps asked what specifically would happen if the decision is overturned. Ms. Scott stated that the Planning Board is now aware of the situation and the involvement in Lot 44 in the overall excavation project; however, upgrades can be made to driveways without going to the Planning Board. Therefore, if the application were only for Lot 99, the Town Engineer would not review plans for drainage, and the Police, Fire and Highway departments would not review the plans for any other concerns such as traffic, safety, etc. Ms. Scott stated that if both of these lots were in the same zoning district, there would probably not have been a problem; however, she wanted to preserve the Planning Board's ability to look at the entire project.

John Partridge asked if any State authorities would be reviewing upgrades made to Lot 44. Ms. Scott stated that the State has some degree of oversight (i.e. Alteration of Terrain permit), but the Planning Board would not be part of the process, and the public hearing process would not include Lot 44.

Ms. Oliveira asked if the access is considered a driveway or a right-of-way. Atty. Michael stated that a right-of-way easement is written in the deeds. Mr. Michael also stated that it is the duty of the Planning Board to review the entire operation, even though the actual excavation would occur on Lot 99. He stated that the Planning Board is required to include conditions for the health, safety and prosperity of the residents. He stated that the Board is required to review the off-site improvements of the operation to ensure the safe operation of this facility. The access road would have to be included in the review of the entire operation, and he disagreed with the statement that the Planning Board could only focus on Lot 99 if the public hearing notices did not specifically list Lot 44. He stated that they fully expect the Planning Board to follow their mandates, and he assured the Board that they have made no attempt to remove that responsibility from the Planning Board. Atty. Michael stated that he feels very comfortable that the Planning Board will look at the entire access piece of the operation.

Scott Osgood stated that the Planning Board is charged with enforcing Section 155-E (Excavations) which covers much of the concerns presented.

Ms. McCourt stated that there is an easement for the access which makes it an integral part of the lot, and they fully expect the Planning Board to review the plans.

Jeff Connor stated that the access road had been used for logging; as it is now proposed to be an access for dump trucks he questioned whether there is really any difference.

Ms. Oliveira opened the public hearing and asked for any comments from the public. Hearing none, the public hearing was closed at 7:40 pm, and Board deliberations began.

Mr. Stamps stated that it is important that proper oversight be given to improvements made on the access easement.

Ms. Laberge stated that she is disappointed that the matter was taken to Legal Counsel before the Board got to review the case on its own merits.

Mr. Partridge stated that he appreciated the opinions made by Legal Counsel. He stated that most boards have the best interests of the municipality in mind but don't usually have the legal expertise to decide these matters. He commended Ms. Scott for noticing the unusual circumstances in this particular case and thought she acted appropriately.

Gigi Laberge **MOVED** that the ZBA overturn the administrative decision made by Ms. Scott because the Board does not feel that a special exception is needed for Lot 44. Jeff Connor **SECONDED** the motion. Motion **PASSED, 5-0.** (Mr. Connor, Mr. Partridge, Ms. Laberge, Mr. Stamps and Ms. Oliveira voted IN FAVOR of the motion. No one voted against.)

**Case 2008-109:** A request has been made for a Special Exception under §133-26(A). The applicant, Wayne Patenaude, is proposing to excavate Lot 99, with the commercial excavation operation access through Lot 44. Lot 44 is located off NH 114 in the Rural Residential (RR) Zoning District and a Special Exception is required for excavation operations in the RR District.

Bob Stamps **MOVED TO TABLE** Case 2008-109 to the January 21, 2009 meeting. Jeff Connor **SECONDED** the motion. Motion **PASSED UNANIMOUSLY.**

Atty. Michael stated that upon conclusion of the 30-day appeal period, they will submit a formal letter to withdraw their request for the special exception.

### **Review and Approve 10/15/08 Meeting Minutes**

Bob Stamps **MOVED** to approve the minutes of the October 15, 2008 meeting. Doreen Connor **SECONDED** the motion. Motion **PASSED, 5-0.** (Doreen Connor, Joan Oliveira, Bob Stamps, Kris Blomback and Jeff Connor voted.)

### **Member Binder Update**

- ❖ Revised Use Variance, Area Variance, and Special Exception Applications (Tab #5)
- ❖ 2009 Meeting Schedule (Tab #2)

### **Miscellaneous**

The ZBA will hold their next meeting on December 10, 2008 at 6:00 pm, followed by a joint meeting with the Planning Board at 7:00.

### **Adjourn**

Jeff Connor **MOVED** to adjourn at 7:55 pm. Bob Stamps **SECONDED**, and the motion **PASSED UNANIMOUSLY.**

Respectfully submitted,  
Jennifer Astholz