

**ZONING BOARD OF ADJUSTMENT  
MINUTES OF MEETING  
JULY 31, 2003**

**MEMBERS PRESENT:** Dean Trefethen, William Colbath, David Ruoff, Tom Dolbec

**MEMBERS ABSENT:** Richard Callaghan, Art Corte, Frank Landford

**STAFF PRESENT:** Thomas Clark, Building Official; Christopher Parker, City Planner  
and Jacqueline Freeman, Recording Secretary

Chairman Trefethen brought the meeting to order at 7:06 PM. He explained that there were four members present that would be voting. He added that when they have less than five members present, they offer the option to the applicant to either proceed with the four members or wait until there are five members. Chairman Trefethen read the following case:

- 1: Z03-17 Eric Sweetser, 2 Wallingford St., requests an Appeal from an Administrative Decision regarding the issuance of a building permit to the property owner of a lot on Paul St., a/k/a Assessor's Map 22, Lot 33, zoned R-12, for the construction of a single family dwelling.**

Atty. Nancy Quinlan, 89 Knox Marsh Road, represented Eric Sweetser. She stated that on June 16, 2003, a building permit was issued to Kevin McEneaney to allow the construction of a single-family residence on Lot #33, Map 22 located on Paul Street. The applicant describes access to the lot as going through a private drive. Atty. Quinlan said that this lot didn't have any frontage on any City street. She added that the lot was landlocked and could only be reached by a paper street which is located between lot 22 - 12, owned by Gina Knox and 22-14, which is owned by her client, Eric Sweetser. She stated that the building permit should not have been issued and they are asking the ZBA to overturn the decision of the Building Inspector. She said that RSA 674:41 sets forth the street frontage requirements for the issuance of a building permit and lot 22-33 does not meet the requirements of the statute. She said that in reading the ZBA Handbook it appears that the role of the ZBA in an Appeal of an Administrative Decision is to apply the strict letter of the law. She stated that in order to do that the Board has to find that the building permit was issued inappropriately and it should have been denied. She said that looking at RSA 674:41 it stated that the Administrative Officer does not have the authority to waive frontage provisions of the statute. She read 674:41 II and explained that the Administrative Officer doesn't have the authority to waive the provisions of the statute but it is up to the applicant of the building permit to seek relief in front of this Board, not for an abutter to seek relief. She said that the third problem that her client has with this is that the building permit describes the access to this lot as a private drive. She submitted a picture of the lot to the Board members. She said that there is no private drive and said that the private drive is currently the subject of a petition to Quiet Title which is presently before the Strafford County Superior Court. The name of that case is Wayne and Patricia Taylor et al Doris Desmond et al docket #01E0081. She said that

Mr. Sweetser is one of the plaintiffs in that case and the issue is the ownership of the so-called paper street. The street was created in 1929, on a map for a subdivision long before zoning and was never built on. She added if a paper street is not built on after a number of years, the ownership reverts back to the owners of either side of the proposed street and this is the subject of the action in Superior Court. Blacks Law Dictionary defines a quiet title action as removing a cloud from title by a proper court action. A proceeding to establish the plaintiffs title to land by bringing into court an adverse claimant and there compelling him to establish his claim or be forever after stopped from asserting it. The City of Dover is one of the respondents in that matter and at this time, the City has expended at least \$25,000 of the taxpayer's money in this matter. Atty. Quinlan stated that their final argument is that it is premature for the building permit to be granted and they believe that they should wait until the outcome of that case because it may make this issue moot. She said they are requesting that the decision of the Building Inspector be overturned that the building permit be denied pending the outcome the Superior Court case.

David Ruoff asked Atty Quinlan if she has sought any relief from the Superior Court with respect to this building permit.

Atty. Quinlan stated that she had not. Her understanding is that the proper procedure is once the building permit has been granted that the next step would be to ask the ZBA to hear this as an Appeal of an Administrative Decision. She said that after this is heard the next step would be an appeal to the Superior Court.

Dean Trefethen asked if they are lots of record, how would someone use them if they don't have access.

Atty. Quinlan stated that her understanding is that they are lots of record but the issue of the paper street is the matter that is before the Superior Court and has been going on for two years.

Dean Trefethen stated that Atty. Quinlan cited the State law that supposedly reverts the ownership of the right-of-way to the adjacent landowners but to him the term reverts means goes back to the original owners.

Atty. Quinlan stated that there are a number of cases indicating that it is whoever files the petition to Quiet Title and in this case it is Mr. Sweetser and Mrs. Knox. She said that it is their rights that are being decided.

Dean Trefethen said that until the court rules, the City owns that land and not Mr. Sweetser.

Atty. Quinlan said that who owns that land is the issue and that is what the Superior Court must decide. She said that Mr. Sweetser and the other landowners are saying that they have a right to this because sufficient time has passed and road was not built, therefore, they have the right to this now.

Dean Trefethen said that until someone says otherwise, the City owns that land.

Atty. Quinlan said that the City never owned the land. This was a plan developed in 1929 by Mr. Grimes and none of the back lots were ever developed. If the lots were never developed the paper street then goes to the owners on either side.

Tom Clark stated that it is being decided at the Superior Court level and at this point, he felt that it was not relevant.

Dean Trefethen said that if the Building Permit is granted, Mr. McEneaney is well aware of the situation and would build at his own great risk and would probably be well advised to wait until this outcome is finalized.

Bill Colbath asked how many lots in the back are individually owned and how many of them are a parcel.

Atty. Quinlan said that her understanding is that several of the landowners of Wallingford Street own the next lot and the next lot back, so they own a strip. Some of them are individually owned and she is not sure which one they are.

Bill Colbath asked if it has been determined how many lots are land-locked.

Chris Parker explained that they are all individual lots with separate deeds and it is conceivable that Eric Sweetser can sell the back lot.

David Ruoff stated that he thinks that their concerns is precedence setting and asked how the paper street was being taxed. He asked if any of the deeds for the back lots have been amended to unify the lots. He said that he is just trying to figure out what the status of that back strip was and if that was the subject to the petition of quiet title.

Atty. Quinlan stated that she is not representing Mr. Sweetser in the petition of Quiet Title but their position is that the street was never built on and ownership of the land has reverted to the landowners on either side as of 1954. She said if you look at the statute and the definition of what frontage on a street consists of, then this is not a street and that would be the reason for denying the building permit.

Dean Trefethen said that there is precedence that has allowed the same thing elsewhere in the City, this is not unique situation.

Atty. Quinlan stated that she feels that the Board's job is to apply the letter of the law and not to look for exceptions. She said that if the applicant for the Building Permit believes that he's been denied the application, then it is his job to come in and ask for relief.

Bill Colbath made the motion to accept the case.  
David Ruoff seconded.

## VOTE U/A

Tom Clark stated that the ownership of the street is irrelevant because he believes that whoever wins the Quiet Title, this property owner is still going to have the right of access over it. Whether it is by a private drive or by a driveway constructed under the provisions of Chapter 92, he is going to get access to that lot over this right of way. He said that even though the cases are related, he didn't think that the ownership at this point in time for the purposes of this Board to make a decision, is relevant. Tom said with an appeal of this type, the Board has to act as if they were the Administrative Official that made the decision. He added that the information that he has presented follows that thought process both written and verbal as to why the decision was made to approve the building permit and issue it to the property owner. He said that the first thing that he did was to look into the Zoning Ordinance Chapter 170:14, which defines a nonconforming lot. It doesn't say anything about frontage or right-of-way, only that the lot size be a minimum of 5,000 square feet and a minimum width of 50 feet and has to be a legal lot of record at the time of passage of the ordinance. This particular parcel met all three tests. He said that he read 674:41 and disagrees with Atty. Quinlan, because 674:41 (b)1 reads "if this lot corresponds in its location and lines with a street shown on the official map" and to him it's clear according to his attachment B, which is from the City's Geographic Information System. He said that Mr. Parker has official tax maps dating back to 1960, which show a similar configuration and he has his own official zoning map which shows a similar configuration. There is no question that this particular lot corresponds with the lines on the official map. He said that it may not be a street but it certainly has lines on an official map. He said that 674:41 III which does talk about frontage and it says that for the purpose of paragraph one, the street giving access to the lot means a street or way abutting a lot and upon which the lot has frontage, it does not include the street from which the sole access to the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in sub paragraph 1a, b or c. He said that it refers back to 1 b., which says a street shown on the Official Map. Tom said that there wasn't any question in his mind that it complies with 674:41 as a buildable lot.

Tom Clark stated that they have issued permits in the past for similar circumstances and the question of frontage never came up. He said the attachment to Atty. Battles, which is labeled Attachment C, where he listed other examples that have occurred in Dover. One of which is 10 Sunhawk Lane, along with a memo from Atty. Wyskiel, describing it as a easement by necessity even though the lot did not have frontage on a public right-of-way. He said a concurring opinion from Scott Woodman, who was City Attorney at the time, said that that lot on Sunhawk was considered a buildable lot. He said that in May of 2002, the property on Dover Point Road, owned by Jeffrey Loundres, was appealed by an abutter after he had written a letter saying that it was a buildable lot. The appeal was filed in District Court and was denied. Tom said that the frontage was not an issue and came to this Board under different circumstances. The issue of frontage was not brought up because it was recognized as a legal lot of record according to our regulations and of State law. The decision was upheld and it was appealed to Superior Court and prior to depositions, the applicant withdrew so it was never heard at that level. Attachment D, is a copy of the letter that Atty. Battles wrote to the City Manager regarding this Paul St.

issue. Tom added that Atty. Battles was present in the position of City Attorney since he has been representing the City in this Case and Atty. Wattendorf couldn't be present. He said that during this paper street case both sides, including the applicants, agreed that the building permit for this parcel should be issued. He said they were now waiting for a court transcript for confirmation. He said that based on these facts, he respectfully requested that the appeal be denied.

Bill Colbath asked if any of the cases cited relate to a right-of-way being granted.

Tom Clark stated that all of them do. He said that the Londres case was only an easement over the abutting parcel.

Bill Colbath said that the argument was whether or not the right-of-way was legal.

Tom Clark stated that the Sunhawk Lane case was an old State right-of-way for maintenance access to the turnpike but a lot was created on it prior to the adoption of the subdivision regulations and was a legal lot of record. The other two were both on Dover Point Rd. with similar circumstances. A recent case was Center Drive, which is a private road, but the lot was a lot of record. He said that since then he has issued a permit to an individual on Iona Avenue, which was a discontinued street that shows on the map but physically is not there. He said that it is a legal lot of record and the owner has a right of access to it.

Discussion ensued with regard to the tax map and to the deeds and when the tax maps were first digitized.

Atty. Robert Battles stated that he was acting as City Attorney in the absence of George Wattendorf. He said that he was with the firm of Donahue, Tucker & Ciandella, 104 Congress Street, Portsmouth. He stated that there is no need to litigate the Paul Street case because it is a very narrow issue. He said that Mr. McEneaney applied for a building permit under the section of Ordinance 170:14 and the Building Inspector issued it the same as he has done throughout his tenure in office and has given him a list in a letter of all the examples of the instances where he issued permits with lots of record under 170:14. In some of those instances there are deeds that reference an easement and in some of them they are easements from necessity because there is no other way for the landowner to access that lot. Under existing case law *Duchesnaye vs. Silver*, 118 NH page 728, one proposition that is fully upheld by the court in that case was the instance where a deed references a plan of record and the plan that they are referencing is the 1929 plan that was recorded at the original subdivision. The lot numbers are different on that plan than they are on the tax map. The tax map references City numbers, and the other references just plan numbers. In any instance, the lots that were on the back side of that street are on areas of streets that were depicted on the original 1929 plan and are depicted in all of the recorded Official Maps of the City. He said that Mr. McEneaney was not a party to that action, so no matter what happens to that case, Mr. McEneaney's rights of access will not be implicated. He said that as the attorney for the City, the City's expert witness, Atty. Schulte and Atty. Karen Forbes, who represented the plaintiffs in that case

and their expert, Jack McGee, all agreed and testified with the court, that regardless of what decision the court makes as to the ownership of those streets, Mr. McEneaney's rights will not be affected. It's in the transcript and he is making a representation tonight that that is an accurate representation of what was said.

Atty. Battles said that what this Board has to make a decision on tonight is the basis of whether or not the Administrative Official of this City properly applied the ordinances under 170:14 in making this decision. He said that he rendered an opinion which became somewhat controversial, but the point was to suggest to the Building Inspector that the consistency of his actions was extremely important for the perspective of the City. A case that applies to Administrative Loss is WinCash Corp. vs. Town of Merrimack, it's a 1991 case and there is a string of other cases that are consistent with that opinion. It states that where the Administrative Official of a City has enforced an ordinance in a consistent manner whether or not that is consistent with the writing itself, that the City or Town is administratively stopped from denying it and the only way that it can be changed is for the legislative body of the City or Town to make a change to the ordinance. He said that that hasn't happened in that case so Mr. Clark's decision in this is consistent with 170.14. As far as the implications of RSA 674:41, it is true that there are extreme limitations as to Building Permits being issued under that statute, but there are methods for the Building Inspector to issue them in situations where 674:41 I, b.1. "a street that is shown on the official map." He said that they believe that the GIS series of maps all the way back into the '60's, which show consistently these lots with access across these roads or streets are official maps of the City and under that basis, Mr. Clark made his decision. He said 674:41 allows for relief and allows this Board to grant relief and under the administrative powers of this Board, in reviewing an Administrative Decision of an agent of this City, the Board has the authority to vary in some degree within limitations. Atty. Battles quoted RSA 674:33 Power of the Zoning Board of Adjustment, I a. and b.

Atty. Battles stated if this is overturned, from the City's perspective, the City granted the Building Permit because they believed under 170:14 and under the succession of instances where the Building Official has been consistent in granting those permits, that it was the right thing to do. He said that there was an issue as to what would happen if Mr. McEneaney couldn't get access to that lot because the City had denied him his right of access. He said that although there is some very limited case law that has allowed for a takings not to be affected by 674:41, it specifically provided under Sanderson vs. Town of Candia, an instance where the person that purchased the land purchase it without having any right to access and knew it at the time that they purchased it. If you look at Mr. McEneaney's deed that is dated May 8, 2000, it specifically references the 1929 plan that shows the streets. The deed addresses and references rights of access. Mr. McEneaney bought the lots with the understanding that he had access, before this case with Paul Street, so there was no dispute at that point, at least officially, that there was or wasn't access and including rights of access across the streets. Atty. Battles added that in order to be a taking, the Court would have to find that there was arbitrary or unreasonable restriction that substantially deprived the owner of any economic use of his property. If you can't get to the land, you don't have any economic use of the property. His job is to

advise Tom Clark as to whether or not his actions are going to expose this City to any kind of litigation or damage claims and it's his opinion that to deny this would have, and that is why he suggested that this appeal should be denied. Atty. Battles explained that even though there is a right of access in the deed, or if the roads are referenced in the deed and the Superior Court comes down and say that the road belongs to "these folks," it doesn't matter, Mr. McEneaney has an easement by necessity. He read from the Law of Easements and Licenses that states that a private easement may be implied from reference to a plat even if the streets delineated on the plat were never dedicated and the plat was never recorded. He said that in this case, the plan is recorded and the deed does reference access so he has more than enough right to access.

Chairman Trefethen opened the public hearing.

Atty. Barrington, 98 High Street, Somersworth, represented Mr. McEneaney and stated that the picture is that there is a difference between public rights and private rights. When you have a street and a dedication, then the rights of the public have rights. There is no question in the Superior Court action, or the NH Law, that Mr. McEneaney and his brothers and sisters who inherited this property from their father, who bought this property in good faith for real cash 59 years ago, has a private right of access. The case in the Superior Court is whether the City of Dover, as owning land in the back has rights, not because they are on this plan or whether the City of Dover and the Superior Court representing all of the people of Dover, have the right to go back and forth. That's why Mr. McEneaney and his brothers and sister's claims are totally separate and distinct from that action even though that happened at the same time. This isn't a case which is going to open up a can of worms because the lots are owned to the back except for the two ends where the McEneaneys' have owned Tax Map 39 on one end and Tax Map 33 and 34 at the other end. He said that he is not opening up 50 or 60 lots of an unproved subdivision, but he is talking about a single person and a single family trying to build a house after paying taxes on this for 59 years.

Atty. Barrington he read his submittal entitled **Request for Findings of Fact and Law by the Applicant** and went over each question one by one as follows:

1. He said that the Building Permit has been issued and if you agree check Granted.
2. He said this isn't a developer coming into town; this is an old Dover resident trying to get a return on their investment. That usually is granted.
3. This can be granted.
4. He said that is the same point that was made with the definition of a non-conforming lot that doesn't require a public right-of-way, just a right-of-way.
5. There are many lots that are even smaller and this lot has 8,000 sq. ft. and 111 feet of frontage.
6. The lot was created in 1929.
7. Under Duchesnaye, a private individual owning a lot and acting in good faith has a right-of-way over any streets which are laid out regardless of whether built or accepted.

8. Indicates that it is not trying to figure out whether it is a dedicated or accepted street because the issue is a private right-of-way.
9. The litigation is a separate issue - that should be granted.
10. It is not the responsibility of the City. He said making this a driveway, prevented the City of Dover in having to maintain this field. It is solely Mr. McEneaney's responsibility, economically and liability wise to build the access and to keep it up.
11. He said that public harm would be caused if this lot was four miles from a developed road and someone could have a heart attack and an ambulance could never get there. He said that in this case, it is reasonable to factor in that this lot is grandfathered and gets a permit.
12. The question of RSA 674:41 2. The Statute says "if it comes to you as it is now, properly noticed as an Appeal of an Administrative Decision, then ZBA, this is what you can do:
  - a. You can consider that a reasonable exception may be made for issuance of a permit which will not cause hardship to future owners or undue hardship to the City of Dover. The applicant is going to maintain the driveway.
  - b. The driveway is no longer than many driveways in Dover and is reasonably close for fire protection. The driveway is going to be built under the eye of the City Engineer. It will be wide enough, flat enough and safe enough so that emergency personnel can get in.

Atty. Barrington said that they will sign a waiver of liability form, which he has attached and has made it part of the hearing and will be recorded it at the Registry of Deeds so nobody from now until the end of time can say that they are surprised that this driveway is not a City street. He added that he has been doing Real Estate Law for 20 years and is City Attorney for the City of Somersworth.

Kevin McEneaney, 8 Gold Post Road, provided a deed that was signed August 1<sup>st</sup>, 1944 and stated that it was a deed from Edward Riley to his parents. He said that they have owned that property since 1959. He said that he also owns individually, a lot next door which he purchased in 2001. The building permit is for the lot in question which was purchased by his parents in 1944. Kevin said that Lot 33 and lot 39, are owned by himself, his three brothers and one sister. Lot 34 is owned by him individually. This particular deed in 1944 has two parcels listed on it because there were two tracts purchased at the same time. The first tract was a multi-family unit that sits on the corner of Paul St. and Henry Law Ave. and the second parcel is the tract that is being discussed this evening. It was not uncommon in those times, for people to receive a back lot as many of the abutters have done. This subdivision was made to house the workers of the Pacific Mills. The mill managers lived in single family houses, the next level of workers lived in multi-family houses. The application has been properly administered. He said that Tom Clark has asked for multiple amounts of information that he has provided to the point of providing stamped, engineered, certified plans. This has been gone over with a fine tooth comb. The reasonable question to ask the applicant is does he think that there is no access to that lot that he can walk out there on that paper street and that a driveway or a garden can't be put out there. Kevin McEneaney said that he thinks that he can and he thinks that the Building Permit should be issued. If it is at his peril to put in the

driveway prior to Superior Court, then he will take responsibility for that but he feels very comfortable that the Superior Court is not going to deny his rights for access. Mr. McEneaney said that the judge specifically asked in the case what would happen to the rest of the back lot owners - what are their rights. Every one of the experts and the attorneys involved, all said that the rights for those people to access those lots would not be affected by the outcome of this case.

Kathi Derby, 141 Henry Law Avenue, stated that she is in opposition of this and can not imagine how the utilities could be brought out there. She wasn't agreeing or disagreeing whether Mr. McEneaney could pass over that area if it's a right-of-way but she questioned how a road could be built that would be wide enough for emergency vehicles and utilities and which would have to come in from the street side. There are also families that have lived there for years and many of them purchased those houses with the understanding that nothing was going to be done or developed. She could not see why they couldn't wait for the decision. She stated that this one permit would not make so much money for Mr. McEneaney that it couldn't wait. She asked that the people of Paul St. be given a little piece of mind by waiting for the decision. She said that it's time for the City of Dover to help the people who live in Dover.

Atty. Jim Schulte, 2 Towle Avenue, stated that he is not representing any of the people present and is coming before the Board because he attended the trial in the Paul St. case that Mr. Sweetser identifies as the paper street case. He was a witness on behalf of the City and at four instances during that trial the issue of Mr. McEneaney's rights as a property owner and his rights to have access to his property were addressed specifically by the judge in that case. The first instance occurred during the testimony of Atty. John McGee, who was the expert for Mr. Sweetser and the other people who had filed the Quiet Title action against the City. During the course of examination of Mr. McGee, questions were asked for him by both Atty. Forbes, who represented the plaintiffs in that case and by Atty. Battles, who represented the City. He said that as to Mr. McEneaney's rights and the other owners along the very back tier of lots, which abuts land that the City now owns, Mr. McGee testified that the issue before the court was ownership of the streets. It was not asked to decide and could not decide rights of access for Mr. McEneaney, because he was not a party to that litigation. The Paul St. plaintiffs had not seen fit to include him in that litigation so that judgment could not affect his rights. The Court specifically asked Mr. McGee whether or not, regardless of what his decision was, if he agreed that the City owned the street which the City was contending, or that the abutters owned the street which they were contending or that the abutters own the street which they were contending and would that affect Mr. McEneaney's right of access. Atty. Schulte said that Atty. McGee for the plaintiffs, testified that it would have no affect on Mr. McEneaney's rights because his lot is shown on the plan. He referenced the Duschenaye Case which was the principal case relied upon by the plaintiffs in their Quiet Title action. Under that case one of the two holdings in that case, there are two, the first is that in most instances the abutters own to the center line of the street. The second holding in that case was that any lot owner in the subdivision, who is shown as abutting one of the streets in the subdivision, has the rights to develop the streets end to end for public access or private access to his lot. It's an easement; not of necessity but it is an

implied easement by virtue of the fact the lot and the street both being shown on the plan and then being referred to in the deed. The second time that this question came up was when Mr. McEneaney was being examined, and Atty. Forbes brought out the fact that he had applied for a building permit. Atty. Schulte stated that again the question was raised and the judge asked if, regardless of what he decides on who owns the street, if that would have any impact on the rights of Mr. McEneaney to get access to his lots and again the answer from both sides from Atty. Battles and from the plaintiff, through Atty. Forbes, was that it would have no impact on Mr. McEneaney's rights of access. Atty. Schulte had been approved for a Building Permit at the time of the trial; he just hadn't picked up the permit yet. He said that by definition if you have a right-of-way, you don't own the land because if you own the land it gets merged and you don't need a right-of-way, therefore, whenever you have a right-of-way it is over someone else's land. It could be over the City's land or over the plaintiff's land but he would have a right-of-way. Atty. Schulte said that at the end of the trial the judge said that he wanted to make this very clear, whatever he decides on who owns the street, does this have any affect upon Mr. McEneaney's rights of access to his property or any of the other lot owners' access or rights to his property and his right to get a building permit. Mr. Battles said no it has no impact and the plaintiffs' lawyer said no. He said that they acknowledged in open court, in direct response to a question from the bench, that Mr. Mc Eneaney had that right in their opinion and had the right to get out to his property.

Atty. Schulte said that Atty. Quinlan is in a significant disadvantage in coming before the Board tonight because she wasn't at the trial and it appears that Mr. Sweetser did not bother to inform her as to what his other attorney told the judge was the fact of this case. He said that he has reviewed all the chains of title for all of the lots in the Paul Street subdivision. All of the lots in that subdivision that you see on the 1929 plan have been conveyed by description, which says that they abut the streets in that plan. That's true of the streets that show on Pain St. (now Henry Law Ave.) the ones that abut Wallingford and Paul St. on the side and the ones that are behind the second and third tier and the back tier. For example, he gave a description for lot 38, identified at being owned by the Taylors. He said that they bought that lot as a separate lot, from the Ayer Family, who had owned it for 50 years, and it is described as lot 38 on a plan of Wallingford Heights, drawn by Wheeler and bounded on the north by land of Pacific Mills and on the east by lot 37, on the south by a proposed street and on the west by lot 39. Said lot shall be used by resident purposes only and should never be used for business but a garage can be placed to accommodate your private car. Every other deed that was given has a similar description. A number of the back lots along that fourth tier of lots have been sold separately. Lot 38, from Ayer to Taylor, lot 37 sold by Cooper to the Howards and lot 34 was sold by the Lavoies to McEneaney. Atty. Schulte said that the utilities will go within the street as it was shown on the plan, as all the other utilities have been constructed. The right-of-way is 40 feet wide, and however the driveway is going to be within that and the paved or used portion is narrower than the extent of the right-of-way itself. Mr. McEneaney has the right, as has every other lot owner of the 41 lots in that subdivision has, the right to use those streets to the full width as shown on that plan.

Wayne Taylor, 10 Wallingford St., stated that he is one of the litigants. He said that their case was being prepared in 1999 and their first attorney was Peter Laughton and he rendered the first decision for them that they own that street. They found out in December of 1999, that he had to drop out of their case and they had to get another attorney. Mr. McEneaney was always welcomed to meet with them and join their case. They hired a third attorney to represent anybody else in the City that had any case against them or have any discrepancies with them. He said that Mr. McEneaney never came forward and he had several reasons to come out and meet with them. He said he guessed that he didn't need to because he has the City fighting his battles for him. He said that this case has been going on for a long time and he hopes that Mr. McEneaney waits for the Court to make a decision.

Atty. Quinlan stated that if Atty. Battles is suggesting that Mr. McEneaney's access is through a private road, she would say that RSA 674:41 section I d. has to apply and that says that a building permit can only be issued on a private road provided that, (1) The local governing body after review and comment by the Planning Board has voted to authorize the issuance of building permits for the erection of buildings on said private road or portion thereof; and (2) The municipality neither assumes responsibility for maintenance of said private roads nor liability for any damages resulting from the use thereof; and (3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds for the lot for which the building permit is sought. She said that she feels that Atty. Barrington is trying to suggest that in these findings of fact that you could agree that Mr. McEneaney can do this now. Using the law, it appears that those things would have to be in place, along with the approval that this be a private road by the City Council and none of those things have happened.

Atty. Barrington, said that it is an either or situation. Either you go to the governing council under c. and that is for a Class IV highway. Class IV Highway is like a woods road that has always been a road that goes for miles and miles and is dirt. That doesn't apply. The definition of a non-conforming lot is that if it's contiguous to another under common ownership, they are merged. It is only if you are stranded that you can use what he is using today. All the other folks own all their lots in a row under the same ownership right up to a City street, so they can't come back and say that these are non-conforming lots. So you are not opening this up to a whole bunch of extra lots because it is only Mr. McEneaney who is stranded.

Kevin McEneaney stated that he takes a high offence to Mr. Taylor's comments and is deeply offended by that. He said that for Mr. Taylor to imply that the City is paying his legal fees is absurd. The reason the City has expended legal fees is because the people behind him have filed the action in Superior Court and he is not a party to that. Mr. Taylor has incorrectly informed the Board that they invited him to be a party of that action and that is all that he will say to that. In the deed that he has submitted there are restriction that limits that lot to residential purposes and to garages to accommodate vehicles. He asked if that was listed in there, how they would expect people to get the vehicles to that lot. He said that he would also like to make the point that Mr. Schulte

made and that is since he is not a party to the case in Superior Court, and since the judge has not been asked specifically to rule on his access issues, he may not render an opinion to that. The stake in Superior Court is who owns the right-of-way. If he doesn't rule on that, that means that this decision goes months and probably years down the road and that is the tactic that that is being used tonight. This issue doesn't have anything to do with the Paul Street case, it has to do with a Building Permit and he knows that the Board members are focused enough to decide on that.

Patty Frew Warner, 6 Paul Street, she said that some of the recollections she has heard here tonight would be qualified as hearsay. She wanted to caution the Board on that. She said that without a copy of all the testimony, it is easy to say everybody agreed that Kevin had rights to an easement. She's not saying whether or not he does, that is what has to be determined. The other thing that she thought was important for the Board to know is that during that litigation, Mr. McEneaney testified for the City and to make the playing field even, it's fair for you to know both sides.

David Ruoff asked her what the recollection of the hearsay was.

Patty Warner stated that both of the attorneys said that everybody agreed that Kevin had access and that no matter what happened with this case, he would not lose any rights. She said that that was not what was being discussed and, when Atty. Karen Forbes was asked that question, her recollection of her response was that she really didn't know the answer to that because it wasn't something that had been discussed. She said that they were there on the discussion of the paper street; nobody was planning anything against Kevin or saying that down the road, if he does anything we were going to go get him. When the judge asked that question, both attorneys were standing there and Karen was honest and said that was not something that she had discussed with the litigants. She said that Atty. Forbes did not misrepresent them; she was paid to represent them in the decision of the paper street, not to criticize Kevin or to make decisions about his property.

Kevin McEneaney said that he was subpoenaed by the plaintiffs' attorney to give a deposition and he was under threat of subpoena by the City to appear. He said that he was going to appear whether he did voluntarily or not. The only thing that he passed up was the \$16.00 fee.

The public hearing was closed.

Dean Trefethen said that he understands the sentiment of asking to wait until the decision is made, unfortunately, that wasn't what they were asked to do tonight. He said that the Board was asked to make a decision on whether the Building Permit should have been issued or not.

Bill Colbath said that there is a quite a difference between the plot plan that was given to the Board and the tax map,

Attorney Battles explained that at the time that the 1929 plan was recorded, the alleyway was reserved out by the owner of the subdivision. It was later deeded back to the abutters by a successor to the original developer. He said the 1929 plan shows an alleyway that the tax maps will not because those portions of the alleyway that abutted those individual lots, were deeded by Mr. Riley who is the successor and also the person who deeded the lot to Mr. McEneaneys. This subdivision was laid out in 1929 and recorded at that time but lots were sold by a succession of people over a period of years.

Bill Colbath said that radically different numbers of lots and locations of lots, in his mind still need to be clarified.

Chris Parker said that he thinks that Atty. Battles is saying that the alley was conveyed and the lots were combined. He pointed to the lots and showed how they mirror the lots on the other map.

Atty. Battles said that the 1929 plan is offered as the plan of record that the deeds reference, which has to be the case in order for Implied Easement to occur. The Tax/GIS Map is offered for the purposes for which the Building Inspector granted the Building Permit under RSA 674:41, which is that there be an official map of the City for him to reference in order to grant it. The maps are offered for different purposes so neither are misrepresenting the situation, they are just representing different aspects of it.

Chris Parker said that the oldest map that he could find was 1949 and that was the same configuration of lots as the 1960 map that he brought tonight.

Tom Dolbec asked if Mr. Taylor owned 22-18 and 22-38 and what access did they have to that piece of property. He said that he is relaying information to access and rights through Paul Street as an easement to get to that piece of property which is separate and is not in line with their property.

Tom Clark said that he may have the same prescribed easement access along that small alley behind 22-17 and behind all of the lots.

Tom Dolbeck asked if the lots would all have access from Paul Street if they were sold separately. If 22-38 was sold to some other individual, that person would have access and that would be their right to go across 22-14, 15, 17 and 18. He just wanted to make sure that that would be their right.

Dean Trefethen stated that if Mr. McEneaney has the right to go over that right of way, so would anyone else.

David Ruoff said that his issue was the access issue and he was just waiting to hear what everyone had to say on the issue. He said that he doesn't think that waiting for the Superior Court is going to affect this because, legally, McEneaney wasn't a party to the litigation. He said that the statute says access, not frontage on the roadway. He said that it is clear that the Building Permit should be issued.

Bill Colbath made the motion to uphold the Administrative Decision.  
David Ruoff seconded.  
**VOTE U/A**

Dean Trefethen stated that the request to overturn the Administrative Decision has been denied.

Bill Colbath made the motion to adjourn.  
David Ruoff seconded.  
**VOTE U/A**