ENVIRONMENTAL COURT TO TOWN: SELECTBOARD ISSUES CURB CUT PERMITS

The Environmental Court has issued a ruling on applications for curb cuts/highway access, a rather unusual subject for a court cases. *In Re O'Rear et al.,* Env. Ct. No. 2-1-00Vtec (Apr. 24, 2001).

Black Rock Coal, Inc. applied for a conditional use permit to re-open a quarry in the Town of Calais. The permit was issued by the Town's Zoning Board of Appeals (ZBA) and appealed to the Environmental Court on the grounds that the access permit granted by the Town and incorporated into the conditional use permit was invalid. There were other issues raised in the appeal, but they are not relevant for our discussion.

Black Rock originally proposed a highway access via a new curb cut on the Guerette property. The Calais town clerk issued the access permit. The Court ruled that this was not a valid permit because the permit must be issued by the selectboard under 19 V.S.A. § 1111 and the Calais Zoning Ordinance. Re-application was made and the selectboard denied the permit.

The applicants then submitted an application for an alternative curb cut via an existing driveway on the Simmons property. Appellants challenged the concept of alternative proposals, but the Court held that alternative proposal could be filed. Appellants also argued that, although the ZBA had considered the Guerette access, it had never seen the application for the Simmons access when considering the conditional use permit application. The Court agreed that the ZBA must consider the proposed access because one of the factors that must be considered for conditional use is "traffic on roads and highways in the vicinity." 24 V.S.A. § 4407 (2)(C)

Next, the question of whether an access permit was even required was raised. Black Rock argued that no permit was needed for use of an existing driveway and, even if it were required, 19 V.S.A. § 1111 (b) is triggered only if the work will affect the grade of the existing highway or divert the flow of water into the right-of-way.

Here the Court said the purpose of the statute is to regulate the use of the highway right-of-way through a permitting process. Factors to be considered include development, construction, and resurfacing of any driveway **or** change in grade **or** diversion of water. Since either of the proposed driveways will require widening with added materials, the criteria for "development or construction" will be met. Therefore, the Court said, an access permit was required.

This is an interesting case because, although it is a lower court case and not binding law, it highlights the topic of access and curb cuts on town highways. First, the **legislative body, not** the town clerk, **shall** issue the permit. It cannot merely delegate the task to the town clerk as a rubber stamp job. Second, there must be some criteria for issuing the permit. The statute specifically says that safety, service to the public and protection of the infrastructure must be considered. It also says that a condition of the permit is to comply with "all local ordinances and regulations." That gives implied authority for the selectboard to adopt an access policy or ordinance regulating highway access. Such a policy or ordinance must set clear criteria for denying or issuing the permit, or it will probably be held invalid and unenforceable by a court.

The Vermont Local Roads Program's excellent booklet, *Developing a Highway*

Access Policy, contains guidelines and a model ordinance. Every town should have one! To get a copy, call the Program at 800/462-6555.

VLCT News, May 2001