

MANITOBA ) Order No. 78/03  
 )  
THE HIGHWAYS PROTECTION ACT ) May 8, 2003

**BEFORE:** G.D. Forrest, Chairman  
S. Proven, Member

**APPLICATION BY  
MR. ERNIE PAMMER AND MR. GERALD MASSEY  
TO REVIEW AND VARY THE PUBLIC UTILITIES BOARD ORDER 3/03**

## ***Background***

Ernie and Lee Pammer, as registered owners of a parcel of land in the community of Clandeboye, Manitoba, made an application to The Highway Traffic Board (“HTB”) for approval to build a structure within the central limits of Provincial Trunk Highway No. 9 (“PTH #9”), and for access onto PTH #9 from their property.

The HTB published public notices and invited interested parties to attend a public hearing in respect of the Pammers’ application.

On June 25, 2002, the HTB issued Permit No. 103-02 conditionally approving the building of the structure and construction of access to PTH #9.

On the same date, June 25, 2002, Mr. Paul Murphy on behalf of the Clandeboye/Petersfield Concerned Citizens, Clandeboye Amalgamated United Church and the William S. Patterson Parent Council, filed an appeal with The Public Utilities Board (the “Board”) in respect of the issuance of the HTB permit.

The Board notified all parties involved in the HTB hearing that an appeal hearing would take place on November 14, 2002 in the Community Centre in the community of Clandeboye, Manitoba. The public hearing was conducted as a “hearing de novo” where all parties were given an opportunity to present their positions with

respect to the Pammers' application to the HTB. No parties were represented by counsel. All parties focused on the merits of the application that was made to the HTB.

After considering all submissions, the Board issued its Order 3/03 on January 8, 2003 which quashed HTB Permit No. 103-02.

***Review and Vary Board Order 3/03***

On January 30, 2003 legal counsel for Ernie Pammer and Gerald Massey initiated a process to have the Board's Order 3/03 reviewed and varied by the Board and/or appealed to the Manitoba Court of Appeal.

Legal counsel for Messrs. Pammer and Massey advanced legal arguments that had not previously been raised at the Board's appeal hearing into the HTB's decision to grant a permit to Mr. Pammer.

The Board established a procedure which permitted all parties involved in the process leading to Order 3/03 to provide their submissions in respect of Mr. Pammer's and Mr. Massey's Application to Review and Vary Order 3/03. Counsel for Messrs. Pammer and Massey was also provided with an opportunity to respond to the submissions of the other parties.

### ***Summary of Positions of the Parties***

1. Position of Mr. Pammer and Mr. Massey

Mr. Pammer and Mr. Massey, through their counsel, contend that the Board did not have jurisdiction to hear the appeal application in respect of the permit awarded by the HTB.

Messrs. Pammer and Massey contend the parties appealing the HTB decision to this Board had no standing under *The Highway Protection Act* (the "Act"), because they were not a person "... having an interest in the land in respect of which the permit is issued."

Messrs. Pammer and Massey submit that "(t)he only legal and logical interpretation is that the right of appeal (to The Public Utilities Board) be limited to persons having a proprietary interest in the land ...".

Because the Clandeboye/Petersfield Concerned Citizens, Clandeboye Amalgamated United Church and the William S. Patterson Parents Council are all public interest groups, with no proprietary interest in the land subject to the permit, Messrs. Pammer and Massey contend this Board has no jurisdiction to entertain the appeal by these public interest groups.

2. Position of Clandeboye/Petersfield Concerned Citizens (the “Concerned Citizens”)

Mr. Paul Murphy, on behalf of the Clandeboye/Petersfield Concerned Citizens opposes the Application to Review and Vary Order 3/03.

The Concerned Citizens contend that the process initiated by the HTB was a public process, as required by legislation, and therefore their participation is permitted throughout.

Further, the Concerned Citizens contend the legislation permits this Board to hear from interested persons such as the Concerned Citizens when prescribing the notice and process for the appeal hearing.

The Concerned Citizens conclude it would be unlikely for the owner of land to appeal a HTB decision when a permit is issued, therefore the legislation must include other interested parties such as the Concerned Citizens.

The Concerned Citizens also submit that because there is a procedure for the council of a municipality to appeal a HTB decision, it is reasonable that other members of the general public would also be given the ability to appeal the HTB decision to this Board.

While the Concerned Citizens also take issue with other points raised by Messrs. Pammer and Massey in their court documents, the overall conclusion is that the Concerned Citizens want this Board to deny the Application to Review and Vary Order 3/03, and not adopt a narrow interpretation of which parties have an interest in the land in respect of which the HTB issues a permit.

3. Position of Manitoba Department of Transportation and Government Services (“Transportation and Government Services”)

Transportation and Government Services also disagrees with the interpretation Messrs. Pammer and Massey suggest be given to the words “... other persons having an interest in land in respect of which the permit is issued.”

To restrict the interpretation to persons having a proprietary right in the land is too narrow according to Transportation and Government Services, which urges a broader interpretation be adopted.

This party contends that when the Act is considered as a whole, including its purpose and objects, the appeal provisions should encompass persons having a legal interest in the land which is broader than a proprietary interest.

4. Position of William S. Patterson Parent Council (“Parent Council”)

The Parent Council contends it has the right as well as the responsibility to voice concerns when issues threaten the safety of school children. Because the proposed structure will increase traffic and congestion inside a school zone, the Parent Council submits that it should be permitted to be heard at the appeal hearing.

5. Position of the Rural Municipality of St. Andrews (“R.M.”)

The R.M. takes no position in respect of the Application to Review and Vary Order 3/03.

6. Position of Lord Selkirk School Division (“School Division”)

The School Division submits that whether or not it has a financial interest in the subject land, it does have an interest in the land use – which in this case is as a proposed restaurant, bar and motel unit.

The School Division’s interest in the land use is that it raises potential safety hazards, including increased highway traffic and possible overflow parking on school division property due to inadequate parking on the subject property.

The School Division considers the risks unacceptable and urges the Board to uphold its Order 3/03.

7. Position of Clandeboye Amalgamated United Church (“United Church”)

The United Church concurs with the positions advanced on behalf of the Concerned Citizens

***Board Findings***

The Board is prepared to consider Messrs. Pammer’s and Massey’s Application to Vary Order 3/03 because their Application is based on submissions that were not advanced at the public hearing leading to Order 3/03. The prior public hearing before this Board was focused on the merits of Mr. Pammer’s application for a HTB permit and not on the jurisdictional arguments that counsel for Messrs. Pammer and Massey made in this Review and Vary Application.

In brief summary, pursuant to the Act, Mr. Pammer initially sought HTB approval to build a structure within a “controlled area” and also to construct exits/entrances to a “limited access highway”.

The HTB was required to advertise, in a newspaper of general circulation in the Clandeboye area, its hearing plans to consider the Pammers’ requests.

Various parties attended the HTB hearing. The HTB granted a permit to Mr. Pammer. Various parties appealed the HTB decision to this Board.



The main issue raised in this Application to Review and Vary Order 3/03 is whether this Board ought to have entertained the appeal requested by the Concerned Citizens, United Church and Parent Council.

The applicable legislation from the Act includes:

**21(2)** Where the traffic board has issued a permit to construct an entrance to, or exit from, a limited access highway, or to erect, construct, reconstruct, or to make additions to, a structure situated on land within a controlled area, or to change the use of the land or the use to which a structure in a controlled area is put, the traffic authority for the highway or the municipality within which the highway or controlled area is situated, or the owner or lessee or other person having an interest in the land in respect of which the permit is issued, may, within thirty days of the date upon which the permit is issued, appeal the issue of the permit to The Public Utilities Board, and shall give such notice of the appeal to such persons, and in such manner, as The Public Utilities Board may direct.

**21(4)** An appeal to The Public Utilities Board under this section shall be a hearing de novo.

**21(5)** Subject to section 58 of The Public Utilities Board Act, the decision of The Public Utilities Board in an appeal under this section is final and binding upon all persons; and where, on an appeal taken against the regulation or the issuance of a permit, The Public Utilities Board quashes the regulation or the permit, the traffic board shall not, for a period of one year from the date on which the appeal is determined, make a regulation or issue a permit that is the same, or to a like effect as the regulation or permit that was quashed unless the traffic board is satisfied that the circumstances existing at the time the regulation or permit was quashed have changed materially.

Messrs. Pammer and Massey submit, through their counsel, that the right of appeal from a decision of the HTB is restricted to “the traffic authority, municipality or

the owner or lessee or other person having an interest in the land in respect of which the permit is issued, "... where the other persons having an interest in the land is confined to persons having a proprietary interest in the land."

After careful consideration, the Board respectfully disagrees with the narrow interpretation of "other persons having an interest in the land in respect of which the permit is issued", being put forth on behalf of Messrs. Pammer and Massey. To accept their narrow interpretation of who can appeal the issuance of a HTB permit would, in the Board's view be contrary to the purpose and objects of the Act as found in sub-section 2(1) as follows:

**2(1)** The purposes of this Act are

- (a) to control the location, construction and use of entrances to and exits from certain highways;
- (b) to control the use made of land that is contiguous or adjacent to, or that lies near certain highways; and
- (c) control the erection of structures along certain highways; with the objects of protecting the interests of the public in the highways, promoting the safety of persons using the highways and generally furthering the amenities of travel on the highways.

The Board finds that a broader interpretation of "persons having an interest in the subject land", so as to include the Concerned Citizens, United Church and Parent Council, is consistent with

- the HTB initially having to give notice to persons or parties who do not have a proprietary interest in the land;
- the HTB initially giving public notice of its hearings by way of a newspaper of general circulation in the area of Clandeboye, Manitoba;
- the HTB initially publishing notice of its hearing in The Manitoba Gazette;
- this Board being authorized to determine which persons, and in what manner, notice of an appeal from a HTB decision is to be given;
- this Board being permitted to establish its rules of practice related to its procedures;
- an appeal from the HTB being a hearing de novo by this Board.

In Order 3/03 the Board's findings focused on issues of public safety as the proposed project by Mr. Pammer would compound existing highway risks and introduce other risks that were found to be unacceptable.

The Board is unconvinced by the submissions on behalf of Messrs. Pammer and Massey, that the public safety issues should not be the subject of an appeal, by parties that do not have a proprietary interest in the subject land, where the HTB grants a permit, in first instance. This is particularly the case where the project being proposed changes or is subject to change as it is taken through the various

approval steps. As noted in Order 3/03 the initial project by Messrs. Pammer and Massey appeared to have changed from what was originally before the Rural Municipality and the HTB. The Board's decision in Order 3/03 was based on the current information it received through its appeal hearing process.

If there has been a material change in circumstances for the project, the legislation affords Mr. Pammer and Mr. Massey the opportunity to go back before the HTB.

The other Board decisions in Order 3/03 which aggrieved Messrs. Pammer and Massey were based on the Board's consideration of the evidence at the appeal hearing. Nothing in the Application to Review and Vary Order 3/03 has convinced the Board to alter its decisions in Order 3/03.

The Board finds that the Concerned Citizens, United Church and Parent Council, as well as others, have sufficient interest in the land in respect of which the HTB permit was issued, so as to entitle them to appeal the HTB decision to this Board. The application by Messrs. Pammer and Massey to Review and Vary Order 3/03 will be denied.

The Board thanks all parties for the submissions made in respect of this matter.

**IT IS THEREFORE ORDERED THAT:**

1. The Application by Messrs. Pammer and Massey to Review and Vary Order 3/03 BE AND IS HEREBY DENIED.

THE PUBLIC UTILITIES BOARD

"G.D. FORREST"  
Chairman

"H. M. SINGH"  
Acting Secretary

Certified a true copy of Order No. 78/03 issued  
by The Public Utilities Board

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Acting Secretary