

M A N I T O B A            ) Order No. 130/03  
                                  )  
THE HIGHWAYS PROTECTION ACT    ) August 27, 2003

BEFORE: G. D. Forrest, Chairman  
          M. Girouard, Member

**APPEAL OF MR. LARRY SCHWARTZ, HIGHWAY  
TRAFFIC BOARD PERMIT NO. 068-03 - CHANGE IN  
USE - PROVINCIAL TRUNK HIGHWAY NUMBER 14 IN  
THE RURAL MUNICIPALITY OF RHINELAND**

**APPEARANCES:**

Mr. Peter J. E. Cole, Q.C.	Representing Mr. Larry Schwartz (the Appellant)
Ms. Barbara A. Johnson, Articling Student at Law	
Mr. Larry Schwartz	The Appellant/Permittee
Mr. R. Nichol	Senior Access Management Analyst, Highway Planning and Design, Department of Transportation and Government Services (Highways)

## **Background**

An Application was made to The Highway Traffic Board (the HTB) by Mr. Larry Schwartz for a change in use for property located in the S.E.  $\frac{1}{4}$  of Section 10, Township 3, Range 2 West, in the Rural Municipality of Rhineland and along Provincial Trunk Highway No 14 (PTH #14).

The HTB issued Permit No. 068-03 allowing the change in use from agricultural to residential with conditions. Condition 5 is the source of the appeal and it reads as follows:

"Access to be removed must be completely removed and the ditch area restored to its original condition by Permittee within two (2) months upon issuance of this Permit.

NOTE: Failure of the Permittee to comply with any term or condition of the Permit may result in the Permit being cancelled as provided for under Section 23 of The Highways Protection Act."

By letter dated May 26, 2003 from Mr. Cole to The Public Utilities Board (the Board), Permit No. 068-03 was appealed to the Board.

The evidence in this appeal was taken by the Board at a public hearing held at 11:00 a.m., Thursday, July 10, 2003, in the offices of the Rural Municipality of Rhineland, in the community of Altona, Manitoba.

A summary of the major points raised by the Appellant is as follows:

1. The subject property has been in the family for nearly 50 years and during that time the family has resided on the subject property. The two (2) driveways onto PTH #14 have been in existence for at least that long.
2. The subject property is approximately 2 acres and is surrounded by agricultural land owned by the Appellant.
3. The existing driveways are approximately 43 meters apart and serve an existing farm site including a dwelling and outbuildings. The surrounding farmland is served off a municipal road.
4. The Appellant no longer resides on the subject property which is currently rented to a buyer whose purchase offer has been accepted.
5. There have not been any highway accidents related to the driveways which have allowed for the easy ingress and egress to and from the subject property. The driveway which is the subject of removal is closed in the winter and has not been used on a regular basis recently.
6. The Appellant made application to Community Planning Services of Manitoba Intergovernmental Affairs (the

Department) for subdivision of the land to allow for residential use and in approving same, the Department made the following condition:

"1. Satisfy Council's conditions of approval as set out under the attached Resolution dated September 11, 2002. The condition of Council is as follows:

- a) that the yard site be increased to 264' x 330' (2 acres)
2. Confirmation that the applicant has obtained a change in land and access use permit from the Highway Traffic Board. Highway Traffic Board contact: Iris Murrell (945-0940)."

7. The Appellant advised that Condition #1 has been satisfied and in the process of satisfying Condition #2 Permit No. 068-03 was issued which is the subject of appeal to the Board.

8. Counsel for the Appellant argued that because the existing access pre-dates *The Highways Protection Act* which was passed in 1966, there is some question as to the jurisdiction of the HTB in this matter. Section 7.1 of *The Highways Protection Act* states as follows:

"Where Part I not applicable  
7(1) Subject to subsection (2), this part does not affect any entrance to or exit from a limited access highway that was in existence at the time when the highway became a limited access highway, if the use of the entrance or exit is the same as it was at that time."

Counsel argued there is no substantive change in use proposed at this time. The driveways serve a farm

site that has existed for at least 50 years and will continue to serve the same farm site in the future. Nothing has changed with respect to the use to which the driveway, will be put. The only reason the application for change of use was made was to satisfy the Department's Condition #2.

Counsel advised the Board that this jurisdictional question was not raised at the HTB level. It was not anticipated the change of use application would result in the need to remove a long time existing driveway. When this became known to the Appellant they advised the HTB by telephone but was advised further discussion on the matter was too late.

9. Counsel, noting the objects of *The Highways Protection Act* is to protect "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 highway", stated that there are no safety issues related to the two (2) existing driveways.

A summary of the major points raised by Highways is as follows:

1. PTH #14 in the R. M. of Rhineland was first declared a PTH in 1949 by Order in Council 1603/49 and in 1955 by Order in Council 416/55 the new Right-of-Way limits were incorporated.

2. Highways supported the HTB's decision to limit and rationalize the number of driveways connected to PTH #14 as reflected in Permit No. 068-03 for the following reasons:
  - The high-speed nature and relatively high traffic volumes on PTH 14.
  - The access does not comply with the Department's policy classifying PTH 14 as Primary Arterial and requiring a minimum spacing of 400 metres and preferably 800 metres between agricultural driveway onto these types of highways.
  - The potential impact on motorist safety.
  - The precedent that is established for other land owners on PTH 14.
  - The access is not required or necessary for the residential property being created by the proposed subdivision of Mr. Schwartz's farmsite."
3. Highways noted that the subdivision was creating a small residential property and that a single driveway to PTH #14 should be sufficient for its intended use.
4. As an alternative to eliminating one driveway, Highways suggested relocating one driveway to the proposed property limits of the subject property to jointly serve the adjacent farmland and limit the possibility of additional driveways onto PTH #14.
5. Highways advised that PTH #14 is a 2 lane high-speed rural highway (100 km/h) and carries relatively high traffic volumes of approximately 1800 vehicles per day near the subject property. Approximately 20 - 24% of

the traffic is heavy truck traffic. Summer traffic increases by 6%.

6. The desirable spacing of driveways along highways such as PTH #14 is 800 metres. However, the minimum spacing is 400 metres. The existing 43 metre spacing is unacceptable.
7. While Highways acknowledges the low traffic risk related specifically to these two (2) driveways, driveways generally create a potential safety hazard for users of the highway and users of the property.
8. Highways strongly believes in the rationalization of driveways wherever desirable and whenever possible and is concerned about the perception residents in the area may have about driveway control along PTH #14 if rationalization does not occur at this location.
9. Highways noted that if the cost of removal is an issue, Highways is prepared to conduct the removal on behalf of the Appellant at Highways' cost.
10. In response to the jurisdictional question being raised by the Appellant's Counsel, Highways noted that the proposed change of use from agricultural farm use to residential use required the approval of the planning authority, and that as part of that process, the planning authority required that an application be made to the HTB notwithstanding the history related to

the subject property and the effective date of *The Highways Protection Act*.

#### Board Findings

Having considered the issue of jurisdiction, the Board is satisfied that this matter is properly before the Board. The Board is satisfied that an application was required to be made to the HTB pursuant to the Conditions set by the planning authority, that an application was made and that Permit No. 068-03 resulted from that process. There is no question that up until now the driveways have been grandfathered pursuant to Section 7.1 of *The Highways Protection Act*. However, circumstances have overcome the provision of the grandfathering and that is the change of use.

The Board appreciates that the primary reasons for this matter going to the HTB in the first instance was an application for sub-division and that for all intent and purpose the use to which the property will be put will likely remain unchanged. However, to ignore the fundamental change in land use, for example, a change from agricultural farm use to residential use is a dangerous precedent.

The Application to the HTB created an opportunity to rationalize the number of driveways which, in the Board's opinion is consistent with the objects of *The Highways Protection Act* as set out in Sub-section 2(1) and Sub-section 7(2).



The Board considered the current and future use of the existing driveways and found there is no compelling reason for two (2) driveways at this location. The Board observed that the driveway subject to be removed is not currently being used and further that, the driveway is not used during winter months.

The Board accepts fully the importance of PTH #14 in the area and accordingly, the need to preserve, to the extent possible, highway safety along its entire route including in the area of the subject property. The fact no accident has occurred at the subject property is no guarantee an accident may not occur in the future and does not diminish the risk driveways present generally to highway safety.

Because the driveways have been in existence for many years and because this initiative for rationalization of driveways is Highways and noting that Highways has agreed to pay the cost of removal and restoration of the ditch, the Board will order that this cost be borne by Highways.

Accordingly, the Board will uphold Permit No. 068-03 of the HTB and deny the appeal.

