

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. §§ 6001-6092**

RE: Frank Tahmoush and Wendell & Judeen Barwood  
Land Use Permit #3W0815-EB(Revocation)  
Land Use Permit #3W0815-1-EB(Revocation)  
Docket # 789

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

This proceeding concerns a Petition to Revoke Land Use Permit #3W0815 and any amendments thereto.

**I. SUMMARY OF PROCEEDINGS**

On April 19, 1999, the District #3 Environmental Commission ("Commission") issued Land Use Permit #3W0815 ("Permit") and its supporting Findings of Fact, Conclusions of Law, and Order ("Decision"). The Permit authorizes Frank Tahmoush ("Permittee" or "Tahmoush") to construct a driveway and a single family home on 6.7 acres of land. ("Project"). On June 21, 2000, the Commission issued Land Use Permit #3W0815-1 ("Permit Amendment") amending the grade of the Project driveway. The Project is located off of Allen Family Road in the Town of Hartford, Vermont.

On June 4, 2001, Roger H. Goodspeed and JoAnn P. Goodspeed ("the Goodspeeds") and Lee Kennedy, Sr. and Mary E. Kennedy ("the Kennedys") (collectively "Petitioners") filed a Petition to Revoke with the Environmental Board ("Board"), requesting that the Board revoke the Permit and any amendments thereto. The petition is filed pursuant to 10 V.S.A. § 6090(c) and Environmental Board Rule ("EBR") 38(A). The Petitioners contend that Frank Tahmoush misrepresented the facts in his application causing the Commission to issue an inappropriate permit.

On July 9, 2001, Board Chair Marcy Harding convened a prehearing conference and issued a Prehearing Conference Report and Order ("PHCR&O") on July 17, 2001.

On July 26, 2001, Petitioners filed an objection to the PHCR&O.

In an August 2, 2001 Memorandum of Decision, the Board revised the schedule set forth in the PHCR&O by extending the hearing and filing dates to accommodate the parties' counsels' vacation schedules.

Also on August 2, 2001, Permittee filed a Motion to Dismiss and a Motion for Expedited Hearing.

In an August 6, 2001 Memorandum of Decision, the Board established a schedule for filing and oral argument relating to Permittee's Motion to Dismiss. This schedule mirrored the schedule previously set for the Petition to Revoke.

On August 28, 2001, Permittee filed a motion to further extend the deadline for rebuttal testimony and exhibits and the sur-reply to Permittee's Motion to Dismiss.

On September 19, 2001, the Board held an evidentiary hearing on Petitioners' standing to bring the Petition to revoke.<sup>1</sup> The Kennedys did not appear at the evidentiary hearing, and therefore, the Kennedys' prefiled testimony and corresponding evidence was not admitted into the record. Future reference to "Petitioners" is a reference to the Goodspeeds only. Immediately following the hearing the Board deliberated on whether the Petitioners were without standing. The Board then reconvened the hearing and ruled Petitioners were without standing and that oral argument relative to the Motion to Dismiss was unnecessary as the motion was moot.

The Board deliberated again on October 17, 2001. Based upon a thorough review of the record, related argument, and the parties' filings, the board declared the record complete and adjourned. The matter is now ready for final decision.

## **II. ISSUES**

During and subsequent to the first prehearing conference, Chair Harding identified the threshold issue of whether or not Petitioners have standing necessary to bring this petition for revocation. The PHCR&O set out the following preliminary issue to be decided by the Board following an evidentiary hearing:

1. Whether Petitioners have standing to bring a petition for revocation relative to LUPs #3W0815 and #3W0815-1?

Subsequent to the PHCR&O, Permittee filed a Motion to Dismiss the petition based on legal theories of the finality doctrine, equitable estoppel, and

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The parties stipulated to Petitioners' exhibits GK-2, GK-3, GK-4 and GK-5.

laches. Chair Harding set oral argument on this motion to coincide with the evidentiary hearing.

**III. FINDINGS OF FACT**

1. The Kennedys did not appear at the evidentiary hearing, and therefore, the Kennedys' prefiled testimony and corresponding evidence was not admitted into the record.
2. The Project relative to this proceeding is Frank Tahmoush's single family home and associated driveway as permitted under the Permit and Permit Amendment.
3. The Project is located on the southerly side of Hillside Road on Woodstead Lot 3B off of Allen Family Road in the Town of Hartford, Vermont.
4. The Goodspeeds' property is identified as Lot F-29 and is located to the northeast of the Tahmoush property.
5. A greenbelt separates the Project property from the Goodspeeds' property. No portion of the Project property shares a property line with the Goodspeeds' property.
6. The greenbelt is owned in fee by the Quechee Lakes Landowners Association, Inc ("QLLA").
7. Tahmoush filed his land use permit application for the Project on March 18, 1999.
8. The Commission noticed the application to be processed under the Act 250 program's minor application procedures.
9. Roger Goodspeed is listed on the certificate of service for this notice.
10. Tahmoush's permit application was processed as a minor application.
11. The Goodspeeds never requested a hearing with regard to the Permit.

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12. Tahmoush filed a permit amendment application on April 12, 2000, to amend the grade of the Project's driveway.
13. The Permit provided for a driveway having a 10% grade. The actual grade as constructed had a maximum slope of 14.95%
14. The Commission issued the Permit Amendment on June 21, 2000.
15. The Goodspeeds never requested a hearing with regard to the permit amendment process, nor did they raise any other issues.

#### **IV. CONCLUSIONS OF LAW**

##### **A. Jurisdiction and Burden of Proof**

Permit revocation proceedings under Act 250 are governed by 10 V.S.A. § 6090(c) and EBR 38. EBR 38(A) provides, in pertinent part, that a petition for revocation may be made:

by any person who was party to the application, by any adjoining property owner whose interests are directly affected by an alleged violation, by a municipal or regional planning commission, or any municipal or state agency having an interest which is affected by the development or subdivision. ... The Board may also consider permit revocation on its own motion.

Thus, EBR 38(A) states the specific standing requirement which Petitioners must satisfy to invoke the Board's jurisdiction.

For example, in *Re: NJM Realty Limited Partnership, #2W0312-EB (Revocation)*, Memorandum of Decision and Order at 2 (June 29, 1990), the Board dismissed a revocation petition where the petitioner was not a party to the original permit proceeding, was not an adjoining landowner, and did not fit any other category of persons authorized to file petitions for revocation pursuant to EBR 38(A). See also, *Lawrence White, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, #1R0391-6-EB (Revocation) and #1R0391-7-EB (Interlocutory)*, Findings of Fact, Conclusions of Law, and Order at 10-11 (Sept. 17, 1996) and the cases cited therein.

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Petitioners, the persons seeking revocation, have the burden of proof. *Lawrence White*, #1R0391-EB, #1R0391-3-EB, #1R0391-4-EB, #1R0391-5-EB, #1R0391-5A-EB, and #1R0391-6-EB(Revocation)(Sep. 17, 1996); *Putney Paper Co., Inc.* #2W0436-6-EB(Revocation)(Feb. 2, 1995); *Vermont RSA Limited Partnership*, #3W0738-4-EB (Revocation)(Aug. 21, 1998). As the Kennedys did not appear at the evidentiary hearing and their prefiled testimony and corresponding evidence was not admitted into the record, they failed to meet their burden of proof and to the extent the Petition for revocation relates to the Kennedys' interest it is hereby dismissed.

The remainder of this decision focuses on the Goodspeeds' Petition.

**B. STANDING:**

A petitioner must have standing to invoke the Board's jurisdiction to revoke a permit. EBR 38(A) states that a petition for revocation of a permit under 10 V.S.A § 6090(c) may be made to the Board by:

1. Any person who was a party to the application;
2. Any adjoining property owner whose property interests are directly affected by an alleged violation;
3. A municipal or regional planning commission; or
4. Any municipal or state agency having an interest which is affected by the development or subdivision.

Petitioners do not allege that they were parties to the application and there is no evidence that Petitioners were parties to the Permit proceeding. In fact the Permit was issued as a minor. Additionally, there is no evidence that Petitioners establish standing under categories 3 or 4 authorized by EBR 38(A) to file petitions for revocation with respect to LUP #3W0815 or #3W0815-1. Accordingly, only if Petitioners can successfully demonstrate that they are adjoining landowners to the lands associated with the Project, can Petitioners demonstrate standing.

Petitioners expressly allege that "they have standing to bring this petition as they are adjoining landowners whose property interests are directly affected by the violations outlined below." Accordingly, the factors at issue with respect to the Petitioners' standing in this matter are first, whether or not Petitioners are

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“adjoining landowners,” and second, whether or not there are “violations” directly affecting Petitioners’ property interests.

1. Adjoining Landowners:

EBR(2)(R) defines “adjoining property owner” as:

a person who owns land in fee simple, if that land:

1. shares a boundary with a tract of land where a proposed or actual development or subdivision is located; or
2. is adjacent to a tract of land where a proposed or actual development or subdivision is located and the two properties are separated only by a river, stream, or a public highway.

Petitioners provide little evidence on whether or not they are adjoining property owners. In their Memorandum in Support of Petitioners’ Standing Petitioners state: “Petitioners are adjoining landowners to the project site.” *Memorandum in Support of Petitioners’ Standing and in Objection to Permittee’s Motion to Dismiss*, page 3. Nothing more is argued in this pleading. In Roger Goodspeed’s prefiled testimony he testifies that “There is a QLLA greenbelt running between our lots but we are adjoining property owners.” Petitioners do not provide any other evidence, such as property deeds or subdivision plot plans, of their land ownership or its proximity to the Project.

Permittee argues that the lands of Petitioners and the Permittee do not share a boundary but are instead separated by lands owned in fee by a third party, the QLLA. *Permittee’s Reply to Petitioners’ Memorandum in Opposition to Permittee’s Motion to Dismiss (Record #16)*.

Based on the above findings of fact, the Board concludes that Petitioners’ property is separated from the Project by a greenbelt owned by the QLLA, and therefore, Petitioners do not qualify as adjoining landowners.<sup>2</sup>

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One potential argument that the parties do not take up is whether the greenbelt should be treated like a river, stream or public highway under EBR 2(R)(2). Even if a party argued this, the Board would not agree with such an analogy because of the public quality or nature of rivers, streams and public highways which is missing from the privately owned greenbelt.

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**V. MOTION TO DISMISS:**

Because the Board finds that Petitioners are without standing, Permittee's Motion to Dismiss the Petition is now moot. Accordingly, the Board will not address the motion.

**VI. OFFICIAL NOTICE**

In his September 12, 2001 filing, Permittee requested that the Board take official notice of the Commission's file(s) in Land Use Permits #3W0815 and #3W0815-1. During the evidentiary hearing, Petitioners stated that they did not object to this request and the Board took this request under advisement.

The Board has sufficient evidence in the record to render this decision denying Petitioners standing without use of evidence within the Commission's file(s), and accordingly, the Board denies Permittee's request.

**VII. ORDER**

1. Petitioners lack standing to bring the Petition to Revoke.
2. Petitioners' Petition for Revocation of LUP's #3W0815 and #3W0815-1 is **DISMISSED**.
3. Permittee's Motion to Dismiss is moot.
4. Permittee's request that the Board take official notice of the Commission's file(s) in Land Use Permits #3W0815 and #3W0815-1 is **DENIED**.

Dated at Montpelier, Vermont this 18th day of October 2001.

ENVIRONMENTAL BOARD

/s/ Marcy Harding

Marcy Harding, Chair  
John Drake  
George Holland



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Samuel Lloyd  
Rebecca Nawrath  
Alice Olenick  
Jean Richardson  
Nancy Waples  
Donald Sargent

*Concurring Opinion:*

Board members Drake, Lloyd, Olenick, and Waples concur with this decision but would also find that the Petitioner's allegations in essence question the propriety of the Commission's actions in issuing the Permit. Such an allegation would be proper in an appeal from the Commission's decision to the Board, but is not appropriate in a revocation proceeding. A revocation proceeding is for the purpose of enforcement and is not a vehicle for litigating whether a permit should have been issued in the first place. *Putney Paper Co., Inc.*, #2W0346-6-EB(Revocation), Memorandum of Decision at 5 (Mar. 31, 1994).