

**Re: The Estate of John A. Swington
c/o Donna Swington**

**Land Use Permit Amendment
#9A0192-4-EB**

CHAIR'S PRELIMINARY RULING

On January 26, 1998, Marcy Harding, the Chair of the Environmental Board ("Board") convened a prehearing conference in Montpelier with respect to the above-captioned matter. At that time, the Chair raised the issue whether Appellant Talon Hill Gun Club, Inc. has standing to bring this appeal. For the reasons stated below, the Chair rules that the Appellant lacks standing and therefore its appeal should be dismissed for lack of jurisdiction. This preliminary ruling is subject to objection and review by the full Board pursuant to Environmental Board Rule ("EBR") 16(B).

I. BACKGROUND

On November 19, 1997, the District #9 Environmental Commission ("Commission") issued Land Use Permit Amendment #9A0 192-4 ("Permit"). The Permit was issued pursuant to EBR 5 1 to The Estate of John A. Swington ("Permittee"). It specifically extends the construction completion date in Condition #2 of Land Use Permit Amendment #9A0 192-3 from November 1, 1997, to November 1, 1999, for construction of an access road on property owned by the Permittee and located off of Arnold District Road in Leicester, Vermont.

On December 19, 1997, Talon Hill Gun Club, Inc., ("Appellant") filed a Notice of Appeal with the Commission through its attorney, John R. Barrera, Esq., pursuant to 10 V.S.A. § 6086(a). The appeal was subsequently transferred to the Board on December 30, 1998.

The Appellant contends that the Commission erred in issuing the permit because the Commission failed to take into consideration substantive issues raised by the Appellant and to hold a hearing as requested. Therefore, the issue on appeal is whether an extension in the construction completion deadline set forth in Land Use Permit Amendment #9A0 192-3 should be granted, and if so, what should be the new deadline. See Prehearing Conference Report and Order at 6, Item 4 (Jan. 29, 1998).

A prehearing conference with respect to this matter was convened by the Chair on January 26, 1998. Those entering timely appearances and participating in the prehearing conference were: the Appellant represented by John R. Barrera, Esq., and the Permittee, represented by Donna Swington, ~~pA B~~ Prehearing Conference Report and Order, memorializing the participants' discussion and the Chair's rulings, was issued on January 29, 1998.

At the prehearing conference, the Chair informed the participants that, based on her reading of the pleadings to date, there was a preliminary issue which would need to be decided

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before this matter could proceed to a hearing on the merits. She framed the issue as follows: Whether the Appellant has standing to bring this appeal. See Prehearing Conference Report and Order at 3 and 6, Item 3.

She asked the Appellant whether it had a position with respect to this issue. The Appellant reiterated the arguments made in its Notice of Appeal and comments attached thereto: namely, that it is the principal co-permittee for the skeet and trap facility authorized in Land Use Permit #9A0192 and all succeeding amendments, and therefore it possesses "all rights" under those permits, even though it no longer holds a lease in the Permittee's real property and even though the permits are not transferrable to another tract of land. Accordingly, the Appellant argued that it, and no one else, is entitled to operate a skeet and trap facility on the Permittee's property. See Prehearing Conference Report and Order at 3.

The Permittee argued that the Appellant has no "party status" to bring this appeal, because the Permit at issue runs with the land and because the Appellant's leasehold interest in the Permittee's land was terminated with the issuance of a recent order by the U.S. Bankruptcy Court. In support of its argument, the Permittee presented the Chair with copies of two documents from the U.S. Bankruptcy Court, which were shown to counsel for the Appellant. See Prehearing Conference Report and Order at 3.

The Chair asked the Appellant whether it objected to the Board taking official notice of the two court documents and Land Use Permit #9A0192 and all subsequent amendments. Attorney Barrera indicated that the Appellant had no objection to the noticing of these documents. Additionally, the Permittee did not object to the noticing of the prior permit decisions. See Prehearing Conference Report and Order at 3-4. Therefore, pursuant to 3 V.S.A. § 810(4), the Chair ruled that the Board would take official notice of the following land use permits, amendments, and supporting decisions:

1. In re: Talon Hill Gun Club, Inc., Debtor, Case No. 97-10567 (U.S. Bankruptcy Court, VT Dist.), Memorandum of Decision (Sept. 12, 1997); and
2. In re: Talon Hill Gun Club, Inc., Case No. 97-10567 FGC (U.S. Bankruptcy Court, VT Dist.), Order Terminating Lease and Granting Immediate Surrender of Non-Residential Real Property (Sept. 12, 1997).
3. Land Use Permit #9A0192 (Sept. 13, 1990) and Supporting Findings of Fact and Conclusions of Law (Sept 13, 1990).
4. Land Use Permit Amendment #9A0192-2 (Revised) (June 21, 1994) and Supporting

Findings of Fact and Conclusions of Law (Revised) (June 21, 1994). (This amendment supersedes Application #9A0192-1.)

5. Land Use Permit Amendment #9A0192-2-EB (June 7, 1995) and Supporting Findings of Fact, Conclusions of Law and Order (June 7, 1995).¹
6. Land Use Permit Amendment #9A0192-3 (Jan. 18, 1996).
7. Land Use Permit Amendment #9A0192-4 (Nov. 19, 1997).

See Prehearing Conference Report and Order at 3-4 and 5-6, Item 2.

The Chair indicated that she would decide the preliminary issue of the Appellant's standing based on the noticed documents, plus the Appellant's pleadings filed to date. She indicated that her ruling would be issued within two weeks of the prehearing conference and that the parties would have an opportunity to file written objections, supported by legal memoranda, and request oral argument before the full Board. See EBR 16(B). She noted that if such oral argument is requested, that it would likely be held at the Board's meeting on the fourth Wednesday in March. See Prehearing Conference Report and Order at 4.

Counsel for the Appellant requested an opportunity to have the standing issue heard by the full Board in conjunction with a hearing on the merits, so that the matter could be decided based upon a full evidentiary record. Representatives for the Permittee objected to this approach, arguing that the preliminary matter should be decided expeditiously by the Chair so that they would not have to incur the cost of hiring an attorney to represent them unless the appeal is heard on the merits. See Prehearing Conference Report and Order at 4.

The Chair denied the Appellant's request to convene a hearing combining the standing issue and consideration of the merits. See Prehearing Conference Report and Order at 4 and 6, Item 3.

¹ Due to a typographical error, Land Use Permit Amendment #9A0192-2-EB (June 7, 1995) was incorrectly identified in the Prehearing Conference Report and Order as "Land Use Permit Amendment #9A0192-EB (June 7, 1995)."

II. ISSUE

Whether the Appellant, Talon Hill Gun Club, Inc., has standing to bring this appeal under EBR 14(A)(1) or (2).²

III. FINDINGS

Based on the documents officially noticed and the Appellant's pleadings, I make the following findings:

1. On September 13, 1990, the Commission issued Land Use Permit #9A0192 and supporting Findings of Fact and Conclusions of Law ("Permit") to the Talon Hill Gun Club, Inc., and John Swinington, as Co-Permittees. The Permit applied to land owned in fee simple by John Swinington in the Town of Leicester, Vermont, subject to a lease to Talon Hill Gun Club, Inc.
2. No distinction is made within the body of the Permit between the rights and obligations of one Permittee and the rights and obligations of the other.
3. The Permit authorizes the Permittees to construct, operate, and maintain a skeet and trap and sporting clays shooting facility, including a 40-foot by 80-foot club house and associated parking, and 3,600-foot access road to the Arnold District Road in Leicester ("Project"), in accordance with the conditions of the Permit. The Permit specifically provides:

The Permittees and their assigns and successors in interest are obligated by this permit to complete, operate and maintain the project as approved by the District Commission in accordance with the following conditions: . . .

² In its Notice of Appeal, the Appellant did not identify under what provision of EBR 14(A) or 14(B) it sought party status in this proceeding. Indeed, it made no reference to the Board's party status rules at all. However, given the content of its arguments, the Chair assumes that the most applicable provisions of the Board's rules are EBR 14(A)(1) (applicant/ permittee) or 14(B)(2) (landowner/lessee, if the applicant is not the landowner).

4. Condition #4 of the Permit states:

By acceptance of the conditions of this permit without appeal, the Permittees confirm and agree for themselves and all assigns and successors in interest that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the Permittees and all assigns and successors in interest.

5. No appeal was taken from the Permit, so the Permit became final. Condition #4 has never been removed or modified by subsequent permit amendment. It was, however, reincorporated as Condition #5 in Land Use Permit #9A0 192-2 (Revised).

6. Condition # 22 of the Permit stated:

All construction on this project must be completed by October 15, 1992.

7. On September 17, 1992, Talon Hill Gun Club, Inc., filed a request to extend the construction completion date of the Project from October 15, 1992, until October 15, 1994. (Application #9A0 192-1.)

8. On October 15, 1992, a petition to revoke the Permit was filed with the Board. On October 29, 1992, the District Coordinator issued a memorandum stating that the Commission would not consider the request to extend the construction completion date until such time as the Board issued a decision on the permit revocation petition.

9. On October 8, 1993, the Board issued Findings of Fact, Conclusions of Law and Order relative to the revocation petition. The Board concluded that the terms and conditions of Land Use Permit #9A0192 had been violated but that the violations did not represent a clear threat of irreparable harm to public health, safety, general welfare, or to the environment. The Board provided Talon Hill Gun Club, Inc., a reasonable opportunity to correct the violations prior to any order of revocation becoming final. Corrective measures included the filing of a permit amendment application with the Commission.

10. On June 21, 1994, the Commission issued Land Use Permit #9A0192-2 (Revised) and supporting Findings of Fact and Conclusions of Law ("Permit Amendment Two (Revised)"). Permit Amendment Two (Revised) authorized the Permittees to relocate certain porting clay shooting stations, to use, on a temporary basis, of an access road off the Leicester-Whiting Road, and to install and operate an archery facility. Permit Amendment Two (Revised) was issued to Talon Hill Gun Club, Inc., and John Swinington, as Co-Permittees.

11. Condition #16 of Permit Amendment Two (Revised) stated:

All construction on the skeet and trap facility and the access road from Arnold District Road shall be completed by November 1, 1995.
12. On July 21, 1994, several persons residing near the Project appealed Permit Amendment Two (Revised) to the Board.
13. On June 7, 1995, the Board issued Land Use Permit #9A0192-2-EB, which specifically authorized the Permittees to relocate and/or reorient several sporting clays shooting stations to allow for shooting in a direction not greater than 45 degrees to the south of magnetic west and not greater than 45 degrees to the east of magnetic north; to use, on a temporary basis, an access road off the Leicester-Whiting Road; and to install and operate an archery facility ("Board Permit Amendment Two"). Board Permit Amendment Two incorporated by reference the conditions of Permit Amendment Two (Revised), except as specifically amended. Condition #16 of Permit Amendment Two (Revised), which provided for a November 1, 1995, construction completion deadline for the Project, was incorporated in Board Permit Amendment Two.
14. On October 20, 1995, John A. Swington asked the Commission to grant a two-year extension for the construction completion deadline to allow completion of the access road. On October 24, 1995, he filed a supplemental request to extend the construction completion deadline to include the trap and skeet range, the larger shooting facility, and any other aspect of the Project that had not been completed as of the date of the request.
15. On January 18, 1996, the Commission issued Land Use Permit Amendment #9A0192-3 ("Permit Amendment Three"). Permit Amendment Three was issued to Talon Hill Gun Club, Inc., and John Swington, as Co-Permittees. Condition #2 of Permit Amendment Three stated:

This permit specifically extends the construction completion date to November 1, 1997.
16. John A. Swington died in February 1997.
17. On September 12, 1997, the U.S. Bankruptcy Court, District of Vermont, terminated the lease between the Estate of Swington and Talon Hill Gun Club, Inc., granting immediate possession of the property subject to the lease to the Estate of Swington.

18. On October 6, 1997, the Estate of John A. Swington asked the Commission to grant a two-year extension to the construction completion deadline to allow completion of the Project. In its correspondence to the Commission, the Estate of John A. Swington informed the Commission of the court order terminating the lease between itself and Talon Hill Gun Club, Inc.
19. On October 9, 1997, the Commission provided notice of the minor amendment to persons required to receive notice pursuant to EBR 5 1.
20. On October 28, 1997, Talon Hill Gun Club, Inc., filed written comments with the Commission objecting to the proposed extension and requesting a hearing.
21. On November 12, 1997, the District Coordinator informed Talon Hill Gun Club, Inc., that its written comments had been reviewed by the Commission, but that the Commission declined to conduct a hearing with respect to the extension request on the basis that substantive issues had not been raised.
22. On November 19, 1997, the Commission issued Land Use Permit Amendment #9A0192-4 ("Permit Amendment Four"). Permit Amendment Four was issued to the Estate of John Swington. It specifically authorized the extension of the construction completion date of the access road off the Arnold District Road to November 1, 1999.
23. Condition # 1 of Permit Amendment Four stated:

All conditions of Land Use Permit #9A0 192 and amendments are in full force and effect except as amended herein.
24. Condition #2 of Permit Amendment Four stated:

This permit specifically extends the construction completion date to November 1, 1999.

III. CONCLUSIONS OF LAW

The Board may adjudicate only those matters that are properly within its jurisdiction to decide. If a person lacks standing (party status) to bring an appeal or there is no controversy in fact, the Board lacks jurisdiction to consider the merits of that appeal and the appeal must be dismissed. See In re Warnlanes, Inc., Dean Martin, and Vermont Agency of Transportation,

Land Use Permit #9A0136-1-EB, Findings of Fact, Conclusions of Law and Order (May 1, 1989); see also Re Grievance of Boocock, 150 Vt. 422 (1988).

The question of whether a person has standing to bring an appeal is answered by examining whether that person has a sufficient "stake" in an otherwise justiciable controversy to obtain resolution of that controversy. Unlike other elements of justiciability, standing focuses on the person seeking to get its complaint before the adjudicating body, not on the merits of the appeal. In the context of Act 250 appeals, standing is evaluated in the context of whether a person qualifies for party status under EBR 14.

In this proceeding, the Appellant concedes that it no longer has a leasehold interest in the real property subject to Act 250 jurisdiction. Nevertheless, the Appellant argues that its stake in the controversy is its personal and continuing property interest in the Permit which it argues survives even though the lease agreement has been terminated and it proposes to move its operations to another site. The Appellant asserts that the Permit and subsequent amendments gave it exclusive rights to own and operate a gun club at the Swinington property, and that the Estate of Swinington cannot now construct the access road under the "umbrella of the Permit."³ See Notice of Appeal at 2-5 (Dec. 30, 1997). The question then is whether, once having received a land use permit, the Appellant continues to have the requisite property interest to bring an appeal to the Board under EBR 14(A)(1) or (2), even though its leasehold interest in the subject land has been terminated.

The Board has previously dealt with this question in the matter, In re Warnlanes, Inc., Dean Martin, and Vermont Agency of Transportation, Land Use Permit #9A0136-1-EB, Findings of Fact, Conclusions of Law and Order (May 1, 1989). In Warnlanes, the appellant owned an airplane hangar at which it operated a business to repair, restore, and sell surplus military aircraft. The real property and its commercial use were subject to Act 250 jurisdiction.

³ The Appellant also argues that it has a property interest in "the name and concept" of Talon Hill Gun Club, Inc., "and that property interest [was] violated when the Estate of Swinington, without consultation or permission, [sought] to implement and use the rights granted to Talon Hill Gun Club, Inc.," presumably under the Permit. Notice of Appeal at 3. I decline to respond to this argument, as the Board's jurisdiction is limited to construction and application of Act 250 and the EBRs. Adjudication of property rights arising from contract or secured by trademark or corporate law are not within the purview of the Board to decide. See In re: Okemo Mountain, Inc., Application #2S0351-7A-EB, Memorandum of Decision at 4 (Jan. 9, 1992), citing Trybulski v. Bellows Falls Hydroelectric Corp., 112 Vt. 1, 20 (1941).

The appellant asked the Board to review a permit condition imposed by the Commission prohibiting the repair, maintenance, and sale of jet aircraft as part of its business operations. During the pendency of the appeal, the appellant sold his real property to a person who proposed to refurbish and maintain his own aircraft at the hangar, and possibly buy, repair and fix-up other aircraft. The Board concluded that the former owner "no longer ha[d] a legal interest in the permit" under appeal and therefore "no longer ha[d] any standing to pursue that appeal." In re Warplanes, Inc., at 3 (May 1, 1989).

The Board dismissed the appeal in Warplanes on the ground of mootness. Id. 3-4. It did not dismiss the appeal for lack of standing, because there was a cross-appellant, the municipality in which the subject property was located, that had the requisite standing to support Board jurisdiction over the matter. Id. at 1; see EBR 14(A)(3). As a consequence, the Board determined that because the appellant had ceased its operations and the activities that were proposed by its successor in interest might be different than those permitted, the appeal of the permit condition was rendered moot. Id. 3-4. Had the former property owner been the sole appellant, the Board could have promptly disposed of the appeal solely based on lack of standing.

The Warplanes decision is instructive because the Board determined that the "legal interest in the permit," or stake in the outcome of the proceeding, was the interest that the appellant had in the real property that was the subject of the permit. As soon as that interest was terminated, the appellant lost standing to bring his appeal. This is consistent with the statutory scheme and rules governing Act 250, which provide that land use permits "run with the land" rather than exist as licenses personal to the licensees. 10 V.S.A. § 6090 and EBR 32 (B) and 33; In re David Enman (St. George Property), Declaratory Ruling #326, Findings of Fact, Conclusions of Law, and Order at 19-20. Accordingly, a permittee or co-permittee's interest in a land use permit is divested at the time it voluntarily or involuntarily transfers its interest in the real property that is the subject of the permit. It no longer has the requisite interest to support either applicancy or co-applicancy, pursuant to EBR 14(A)(1), or participation as a matter of right by virtue of ownership or other significant interest in the subject real property, pursuant to EBR 14(A)(2).

While ownership in fee simple of the land that is subject to Act 250 jurisdiction is the most common property interest supporting standing under EBR 14(A)(1) or (2), a person may have other substantial interests in the subject real property giving him or her a stake in the outcome of the proceeding. Such interests are described in EBR 10(A). That rule enables the Commission or Board to require the co-applicancy of a person whose property interest in the subject property is "of such significance" that the permit application cannot be accepted or reviewed without that person's participation. In addition to "title" in the subject land, EBR

1 O(A) identifies "lease, purchase or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control." Additionally, with respect to certain operations such as earth extraction, the Board has recognized a "verbal license" to extract gravel, sand and fill as constituting a sufficient interest in the subject property to require, "by express condition," that operators as well as the land owner be named co-permittees. In re: George and Marjorie Drown, Land Use Permit #7C0950-EB, Findings of Fact, Conclusions of Law, and Order (June 19, 1995).

In the present appeal, the Appellant and John Swington were Co-Permittees. A close reading of the Permit reveals that it authorized both Permittees not only to construct, but to operate and maintain the shooting facility, including the access road from Arnold District Road. Under the terms of the Permit, the Co-Permittees each took all rights and obligations under the Permit. No permit condition specifically identifies the Appellant as the sole operator of the shooting facility. Indeed, Condition #4 of the Permit expressly states that the "Permittees" (plural), by acceptance of the conditions of the Permit without appeal, confirmed and agreed for themselves and all assigns and successors in interest that the conditions of the Permit would run with the land and the land uses therein permitted, and would be binding upon and enforceable against themselves and all assigns and successors in interest.

Neither Permittee appealed the Permit, and the Permit, including Condition #4, became final. In subsequent amendments, the Permittees were granted the same rights and subjected to the same obligations. This is evident from Permit Amendment Two (Revised) and Board Permit Amendment Two, which both authorize "the Permittees" (plural) to relocate and/or reorient several sporting clays shooting stations; to use, on a temporary basis, an access road off the Leicester-Whiting Road, and to install and operate an archery facility.

As the record reveals, the property interest that gave rise to the Appellant's interest in the Permit and subsequent amendments was its leasehold interest in the property owned in fee simple by John Swington. However, any personal rights or obligations contained in the lease agreement were not incorporated into the Permit. Indeed, the Permit itself does not distinguish between the rights and obligations of Mr. Swington and those accruing to Talon Hill Gun Club, Inc. Therefore, when the U.S. Bankruptcy Court terminated the lease agreement between the Appellant and the Estate of John A. Swington, Mr. Swington's successor in interest, and then granted immediate possession of the property to the Estate, the property interest supporting Appellant's interest in the Permit was terminated.

Accordingly, the Commission, having considered the Appellant's property interest arguments and having concluded that they lacked merit, had the authority to issue Permit Amendment Four in the name of the Estate of John A. Swington, Permittee, without the necessity of instituting a separate proceeding to effectuate a "transfer" of rights and obligations

from one Co-Permittee to the other. See EBR 33(C)(1) and 5 1. For similar reasons, I conclude that the termination of the lease agreement divested the Appellant of the requisite interest to support standing under either 14(A)(1) or (2). As a consequence, this appeal should be dismissed for lack of jurisdiction.

In reaching this conclusion, I offer the following observation. In Warnlanes, the Board was cognizant that a change in owner/operator might well result in a change in project operations. Indeed, the facts in Warplanes suggested that while the successor in interest would engage in the repair and sale of aircraft, he did not intend to conduct the type of engine tests that gave rise to the imposition of the condition that was at issue in the appeal. In re: Warnlanes, Inc., at 3. Therefore, although the Board dismissed the appeal, it included in its order a requirement that the new owner/operator contact the District Coordinator within 30 days to obtain a determination whether a permit or permit amendment would be required for the activities to be conducted at the subject property. Id. at 4.

I conclude that such a requirement is not necessary in this instance. While the Permit as amended authorizes the construction, operation and maintenance of a skeet and trap and sporting clays shooting facility, the Estate of John A. Swington requested Permit Amendment Four for the limited purpose of extending the construction completion deadline for construction of the access the road. I'd advise the Permittee, should it decide to operate the shooting facility or make other use of its property, to ask the District Coordinator to issue a Project Review Sheet determining whether a material or substantial change in the Project has occurred or will occur and whether certain permits or approvals incorporated into the Permit must be amended, renewed, or reissued. Such a determination will provide the Estate of John A. Swington, as Permittee, with guidance on how to conform with applicable state environmental law and avoid Permit violations giving rise to enforcement under 10 V.S.A. ch. 201.

IV. ORDER

Pursuant to EBR 16(B), I hereby rule:

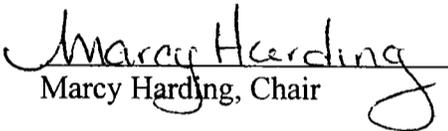
1. Appellant Talon Hill Gun Club, Inc., lacks standing to appeal under EBR 14(A)(1) or (2).
2. This appeal is hereby dismissed.
3. Jurisdiction is returned to the District #9 Environmental Commission.

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4. This order shall become final and binding, unless a written objection to the above rulings, supported by legal memorandum and any request for oral argument, is filed with the Board on or before **4:30 p.m., Tuesday, February 23, 1998**, and timely served on all persons required to receive notice. Any responsive memoranda shall be filed on or before **4:30 p.m., Thursday, March 5, 1998**, and timely served on all persons required to receive notice. If oral argument is requested, it shall be held on **Wednesday, March 25, 1998**, in the Environmental Board Conference Room (R2B), National Life Record Center Building, Montpelier, Vermont, at a time to be announced by subsequent notice.

Dated at Montpelier, Vermont, this 9th day of February, 1998.

VERMONT ENVIRONMENTAL BOARD


Marcy Harding, Chair