

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

RE: West River Acres, Inc. /
Winchester Stables, Inc. /
Nicholas Mercede

Land Use Permit
#2W1053-EB

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an appeal of the District #2 Environmental Commission's (Commission) grant of Land Use Permit # 2W1053 (Permit) to West River Acres, Inc., Winchester Stables, Inc. Nicholas Mercede, NJM Realty Ltd. Partnership and Frank J. Mercede (Permittees). The Permit authorizes the alteration of a cattle barn into 50 horse stalls, reconstruction of demolished barn into a 100-foot by 175 foot indoor riding arena, related facilities and office located off River Road in the Towns of Newfane and Brookline, Vermont (Project).

I. Procedural History

On June 4, 2003, the Commission issued the Permit and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) to the Permittees.¹

On July 2, 2003, Permittees filed an appeal with the Environmental Board (Board) from the Permit and Decision, alleging error with respect to 10 V.S.A. §6086(a) Criteria 1(F) Shorelines, 8(A), 9(K) and 10 and in failing to limit the scope of the permitted project.

On July 28, 2003, the Chair held a prehearing conference and on July 30, 2003, she issued a Prehearing Conference Report and Order.

On Wednesday, October 8, 2003, the Board conducted a site visit.

On March 3, 2004, the Board convened a hearing and on March 17, 2004, the Board deliberated.

On March 26, 2004, the Board issued a Memorandum of Decision requesting a planting plan for the vegetated buffer.

On April 20, 2004, the Permittee submitted information concerning a tree survey and plans to undertake additional planting.

On April 21, 2004, the Board deliberated.

¹ The Permittees agreed to file for an Act 250 Permit in an Assurance of Discontinuance approved by the Environmental Court on June 18, 1999.

On April 27, 2004, the Board issued a Memorandum of Decision requesting a revised planting plan to clarify certain ambiguities contained in Permittees' planting plan.

On May 12, 2004, Permittees submitted a revised planting plan.

On May 24, 2004, ANR submitted a response to Permittees' revised planting plan.

On June 23, 2004, the Board deliberated.

II. Issues

1. Whether, and to what extent the Project complies with Criterion 1(F).
2. Whether, and to what extent the Project complies with Criterion 8(A).
3. Whether, and to what extent the Project complies with Criterion 9(K).
4. Whether, and to what extent the Project complies with Criterion 10.
5. If the Board grants a permit, pursuant to *Stonybrook Condominium Owner's Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order (May 18, 2001), should the Board limit the area of the permitted project.

II. Findings of Fact

To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied. See, *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation*, 167 Vt. 228, 241-42 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

General Findings

1. West River Acres, Inc. is a Vermont corporation formed on November 28, 1994. Its directors are Nicholas J. Mercede, Anita Mercede, and Frank J. Mercede. West River Acres, Inc. owns the 54.2 acre parcel of land on the east side of River Road in the Town of Newfane, Vermont. The 54.2 acre parcel is bounded on the south and east by the West River.

2. Winchester Stables, Inc. is a Vermont corporation formed on August 12, 1996. Its directors are Nicholas J. Mercede and Frank J. Mercede. Winchester Stables, Inc. operates the Project on the 54.2 acre tract.

3. The Permittees seek a permit authorizing the construction of an already constructed cattle barn with 50 horse stalls, a 100-foot by 175 foot indoor riding arena, related facilities and office located off River Road in the Towns of Newfane and Brookline, Vermont.

4. From the Mercede family's original acquisition in 1971 until 1995, the 54.2 acre parcel was used by the Mercede family for agricultural purposes, such as raising and maintaining pigs, chickens, horses, donkeys, llamas, and other livestock. The family regularly visits the land during the year for recreational and social purposes. A wind storm in 1990 knocked down many trees along the vegetated buffer by the West River. Since then the Permittees have planted many replacement trees.

5. Since 1996, Winchester Stables, Inc. has engaged principally in the boarding and training of horses on the 54.2 acre parcel. A large barn on the site houses 50 horses. Twenty-five of these horses are owned by the Mercede family. The indoor horse arena replaced a portion of the cow barn that was destroyed by a wind storm in 1990.

6. In addition to the horse barn and arena, the site now includes a viewing area, tack rooms, feed room, bedding bin, parking lot, office, bathroom, and employee apartment. The rest of the site consists of corrals, jumps, and open pasture. Additionally, there are two points of access to the West River on the shoreline of the parcel, one used for swimming and the other for canoes and other water craft.

7. The Permittees host two or three horse shows per year on the 54.2 acre parcel. The Permittees also offer carriage tours on the 54.2 acre parcel or on River and Brookline roads.

8. The Mercede family acquired other parcels over a period of years for the purpose of providing quiet, peace, and enjoyment of the open space by the Mercede family and friends.

9. However, since the parcels are contiguous to the 54.2 acre parcel and owned by members of the family, the Board previously found that they are part of the Project tract of land. *West River Acres, Inc, et. al.* Declaratory Ruling #398, Findings of Fact, Conclusions of Law, and Order (Mar. 21, 2002). These

parcels include:

- A. On July 3, 1986, NJM Realty Limited Partnership, of which Nicholas Mercede is a partner, purchased a tract of land containing 122 acres, commonly known as Maple Row Farm located on both sides of the River Road in Newfane, from the Lawrence family by Warranty Deed recorded in Book 58, Page 354 of the Newfane Land Records. This property consists of a dwelling, which is rented, barns and agricultural land, which is used for producing hay. The tract also includes a gravel pit on the west and northwest side of River Road. This parcel is referred to as Maple Row Farm.
- B. On November 25, 1987, NJM Realty Limited Partnership purchased a parcel of land containing 10 acres, more or less, from Richard B. Dowley and Sandra Dowley by Warranty Deed recorded in Book 62, Page 122 of the Newfane Land Records. This parcel is on the west side of River Road and is used for agricultural purposes.
- C. On January 15, 1992, Frank J. Mercede, Trustee, the son of Nicholas J. Mercede, purchased a large tract of land on the east side of the West River from John H. King and Robert A. King by Warranty Deed recorded in Book 19, Page 378 of the Brookline Land Records, and in Book 69, Pages 326 of the Newfane Land Records. The parcel in Brookline contains 290.65 acres, and the parcel in Newfane contains 240.7 acres. This land is used for both agricultural and forestry purposes. The King parcel contains old logging roads which have been used by the general public for snowmobiling, hiking, hunting, and horseback riding.
- D. On February 28, 1992, Frank J. Mercede, Trustee, the son of Nicholas J. Mercede, purchased two tracts of land contiguous to the 54.2 acre parcel from David E. Peterson and Barbara A. Peterson, located on the west side of the West River by Warranty Deed

recorded in Book 69, Page 358 of the Newfane Land Records. One parcel is 10.6 acres and is located on the east side of River Road. This parcel is used for agricultural purposes.

- E. Family members also own an approximately 2 acre parcel immediately north of the above 10.6 acre parcel. This parcel is contiguous to both the above parcel and the 54.2 acre parcel. Peggy Dills, the stable manager resides on a house located on the two acre parcel. The Warranty Deed for this parcel is located in Book 77, Page 94 of the Newfane Land Records.
- F. The second parcel of land purchased on February 28, 1992, by Frank J. Mercede from David E. Peterson and Barbara A. Peterson is 4.8 acres and is located between River Road and the West River. The parcel contains a residential dwelling.

10. With one exception discussed in finding of fact 14, Winchester Stables, Inc. does not utilize the contiguous land owned by family members in its operations. There are no agreements between West River Acres, Inc., Winchester Stables, Inc. and any Mercede family members for use of any real estate other than the 54.2 acre parcel by Winchester Stables, Inc. in its operation of the boarding stable and horse arena.

11. There have not been any commercial improvements made to contiguous property owned by the Mercede family for use in the operation of West River Acres, Inc. and/or Winchester Stables, Inc. However, the logging roads have been maintained on the King parcel on the east side of the West River in Brookline and Newfane for use in inspecting the area, for surveillance and for the personal recreation of the Mercede family and friends including horseback riding and picnicking.

12. Mercede family members, guests and friends use the logging roads on the King parcel for riding purposes. The family has been using this property since it was acquired in 1992.

13. A boarder of a horse at Winchester Stables, Inc., may ride his or her horse anywhere on the 54.2 acres and can use the jumps and corrals. A land management program has been used which results in all areas of the 54.2 acre

parcel being rotated so there are no defined trails in any area. This is done so that the grass cover will not be destroyed and that a particular area will not become dried out. The practice avoids erosion, exposure of mineral soils, and the run off of nutrients. This results in healthy turf and no observable or designated riding trails.

14. However, a boarder of a horse at Winchester Stables, Inc., may also ride on any of the unposted land on the Mercede family properties if he or she first signs a waiver of liability. Boarders may also use the town roads in the Newfane and Brookline area and any access off those roads and any other agricultural open space that is not posted.

15. Permittees prior brochure advertised “over 1,000 acres with miles of glorious trails.” Permittees current brochure advertises “miles of picturesque trails through fields, forests, and mountains...”

16. A horse-jumping obstacle course has been constructed at the south end of a 10.6 acre parcel owned by Frank J. Mercede which is used by the Mercede family and friends. No boarders may use this obstacle course.

17. Occasional equine use of unposted Mercede family land by boarders and the general public causes minimal impact. While it is not known exactly how many members of the general public ride horses on unposted Mercede family land, a significant number has historically used the lands over the years. The 25 boarders from the Project represent a tiny fraction of that use.

Criterion 1(F)

18. The shoreline of the project includes a vegetated buffer area along the entire shoreline, with the exception of the two river access areas. According to the Permittees’ revised planting plan the buffer width ranges from approximately 20’ on the eastern shoreline to 46’ on the southern shoreline. The buffer contains several different species of trees, including maple, sycamore, spruce, and pine. Some of these have been planted and others are native to the area and have been established for many years. The planted sugar maples, ranging from about 10’ to 20’ tall, have been evenly dispersed about 50’ apart.

19. There are two river access points along the shoreline of the tract, one for canoeing and one for swimming access. These areas are cleared of trees and most other vegetation. The Permittees have historically allowed the general public to access the West River if they requested permission.

20. There are no obvious signs of significant erosion along any part of the shoreline. However, the soil is exposed in the carriage training area.

21. The swimming access area is located approximately 2000' east of the western property line, where the West River turns from a north-south flow to an east-west flow. The area cleared of vegetation to provide access is about 50' wide. This area is mowed down to the shoreline. The landscape here gently slopes to the river bank. There is a picnic area and a dry hydrant used for emergency purposes located in the access area. The vegetated buffer is approximately 30' wide on either side of the mowed area.

22. The canoe launch site is located about 1000' east of the western property line. The gap in the dense vegetated buffer is a couple of hundred feet wide. There is sparse vegetation in this area consisting of grasses and underbrush, but no trees.

23. A carriage training area is located adjacent to the riverbank near the canoe launch site. This area contains no defined trails, but some cones and large rocks which serve as an obstacle course. There are no plantings here, and sandy soil is exposed due to high use.

24. Japanese Knotweed is an invasive plant species that grows in the vegetated buffer. It often out competes native species and reduces the diversity of the vegetation. It is a hardy plant that is difficult to eradicate.

Criterion 8(A)

25. A fresh water mussel species listed on the state "threatened species" list, the brook floater (*Alasmidonta varicosa*), has been identified immediately upstream and downstream of the project site on the West River. This is the only known population of this species found in the State of Vermont.

26. The West River at the Project site provides critical wildlife habitat for many fish species, including smallmouth bass, rock bass, white suckers, tessellated darters, and several species of minnows. There is also Atlantic salmon habitat and spawning ground on or near the 54.2 acre parcel.

27. There was no persuasive evidence that the Project has any significant impact on any species in the West River.

Criterion 10

28. The Newfane Town Plan contains the following relevant provisions:

1. Maintenance of Newfane's surface waters and shorelands in their natural state is necessary. ...
3. New Development within or adjacent to shoreland areas shall be designed to result in stable river and stream banks and cause minimal disturbance to the riparian environment.
4. Development activity shall not result in increased rates of stormwater runoff to Newfane's surface waters nor cause surface waters to become silted, contaminated or otherwise degraded.

29. The Windham Regional Plan contains the following relevant provisions:

1. Maintain undisturbed buffers of vegetation along watercourses, lakes, ponds, wetlands and vernal pools in order to protect shorelines, provide shading to prevent undue increase in stream temperatures, minimize the effects of erosion, sedimentation, and other sources of pollution, and maintain scenic, recreational, and habitat values.
2. Maintain or enhance existing chemical, physical, and biological quality of the Region's surface waters.

III. Conclusions of Law

Scope of the Project

In *West River Acres Inc. et. al.*, Declaratory Ruling #398 Findings of Fact, Conclusions of Law, and Order (Mar 21, 2002), the Board held that the involved land for this Project included the 54.2 acre parcel and all the contiguous tracts owned by family members listed in Finding of Fact 9. As part of their appeal, the Permittees petitioned the Board to narrow the scope of permitted project pursuant to *Stonybrook Condominium Owner's Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order (May 18, 2001).

In *Stonybrook*, the Board held that the "permitted project" is the entire tract or tracts of land governed by the land use permit, on which the construction

occurs, except in those instances in which the permittee establishes that only a smaller portion of its tract has a nexus to, or is actually impacted or affected by, such construction. *Id* at 17.

In *Stonybrook*, the Board stated:

In most cases, such as subdivisions, a "permitted project" will encompass the entire tract of land on which it sits. However, the Board is cognizant that a definition of "permitted project" that does not allow for flexibility in appropriate situations is neither wise nor fair. Were a small project on a large tract to require, without exception, that the entire tract be included within the definition of "permitted project," inequitable or absurd results could follow. For example, were a farmer to allow the installation of a telecommunications antenna on one of his silos, should this mean that his entire farm must be considered to be the "permitted project"? Clearly, under this scenario, were the permittee able to establish that its construction has no, or only limited, impacts beyond those caused by the actual construction itself, the definition of "permitted project" should be tempered by reason and reality.

Thus, while the Board adopts the "bright line" definition of "permitted project" as stated in §IV(B)(3) above as the default definition or the general rule, the Board will also allow a permittee to attempt to limit the boundaries of its "permitted project" in the manner described in §IV(B)(2), above. The Board recognizes that delineating such boundaries will require a careful evaluation by the Coordinator for the District Commission of the natural resources on the project tract and of the actual impacts or effects created by the project on those resources. It may also require the permittee to present to the Coordinator a survey and other evidence which accurately establish the extent of such impacts or effects. For all the reasons stated in the Blodgett case, it is apparent that in many instances it will be neither an easy nor inexpensive task to define a project's nexus areas, and the Board can foresee that a permittee's attempt to limit the area of its "permitted project" may be subject to challenge by others and form the basis for appeals to the Board which might not otherwise be taken. Nonetheless, should a permittee choose to follow this route, recognizing that it must bear the burden of proving the extent of its project and its impacts, the Board concludes that there may be instances in which restricting the scope of the "permitted project" to something less than the entire tract will result in a fair and reasonable approach to this issue.

Id. at 17-18.

The Board first notes that there has been no development relating to the Project on the contiguous parcels. However, simply because a contiguous parcel has no development relating to the Project, does not mean that the Project has no nexus to the parcel or is not impacted by the Project.

Thus, the Board must determine whether any of the other contiguous parcels are impacted or affected by the Project. The Permittees contend that the Project is limited to the 54.2 acre parcel because boarders primarily ride their horses on the 54.2 acre parcel, on town roads, and any unposted open land. The Permittees also stated that the horse shows only take place on the 54.2 acre parcel. However, the Permittees acknowledge that boarders can ride on the King parcel if they sign a waiver of liability. The Board also notes that even though the references in the prior brochure that advertised “over 1,000 acres with miles of glorious trails” has been replaced, the current brochure still advertises “miles of picturesque trails through fields, forests, and mountains...”

However, notwithstanding the question of the accuracy of Permittees’ brochure, the Board concludes that the occasional use of the contiguous parcels by boarders or members of the general public has virtually no environmental impact under the Act 250 Criteria. The Permittees own 25 of the 50 horses boarded at the Project. Whatever impacts the boarders’ 25 horses cause is not only minimal, it is minuscule compared to the greater but still insignificant impact of the general public which the Permittees passively allow to ride on the parcels by not posting their land. Thus, the Board concludes that in light of the minuscule to insignificant environmental impacts, the size of the “permitted Project” must be limited to the 54.2 acre tract.

Criterion 1(F)

Before granting a permit for a Project located on a shoreline, the Board must find that:

the development or subdivision of shorelines must of necessity be located on a shoreline in order to fulfill the purpose of the . . . [Project], and the . . . [Project] will, insofar as possible and reasonable in light of its purpose:

- (i) retain the shoreline and the waters in their natural condition,
- (ii) allow continued access to the waters and the recreational opportunities provided by the waters,

(iii) retain or provide vegetation which will screen the development or subdivision from the waters, and

(iv) stabilize the bank from erosion, as necessary, with vegetation cover.

10 V.S.A. § 6086(a)(1)(F).

Development on the Shoreline

The first inquiry is whether the development is on the shoreline. Act 250 defines "shoreline" as: "'Shoreline' means the land adjacent to the waters of lakes, ponds, reservoirs and rivers. Shorelines shall include the land between the mean high water mark and the mean low water mark of such surface waters." 10 V.S.A. § 6001(17).

The Board has held that shorelines are not limited to the area located between the mean high water mark and the mean low water mark, but rather, may include lands adjacent to and a considerable distance from the water body itself. *Josiah E. Lupton, Quiet River Campground, #3W0819 (Revised)-EB*, Findings of Fact, Conclusions of Law, and Order at 15 (May 18, 2001). The Board has not established specific horizontal limits which define a shoreline, especially when considering river shorelines. "The word 'adjacent' is a relative term that must be considered in the scale of a project." *Re: L & S Associates, #2W0434-8-EB*, Findings of Fact, Conclusions of Law, and Order at 37 (June 2, 1993). Thus, there is no bright-line rule regarding where a shoreline begins and ends. Rather, the Board determines whether a project is located on a shoreline by considering the facts on a case-by-case basis.

In prior cases, whether or not all or part of a project was on a shoreline was not at issue. *Bernard and Suzanne Carrier, #7R0639-EB*, Findings of Fact, Conclusions of Law, and Order (Oct 5, 1990); *Woodford Packers, Inc., d/b/a WPI, #8B0542-EB* Findings of Fact, Conclusions of Law, and Order at 13 (Oct 5, 2001). These cases did not address the fact that some components of a project may be on the shoreline while other components may be far removed and not impact the shoreline or river at all.

The Project tract is 54.2 acres and only a fraction of that is on the shoreline. The purpose of Criterion 1(F) to protect shorelines is not served by imposing restrictions on portions of a project tract that are not adjacent to the

river.² Therefore, the Board will only apply the Criterion 1(F) test to those components of a Project that it determines are on the shoreline.

In this case, the Board finds that given the moderately sloping meadow towards the top of the river bank, the shoreline extends beyond the high water mark and includes the land immediately adjacent to the top of the river bank. Therefore, the Board concludes that the swimming access area, the canoe access area, and the carriage-driving training area are within the shoreline for purposes of Criterion 1(F). As a result, the Board will apply the Criterion 1(F) analysis only to those areas.

Of Necessity Test

Historically, the “of necessity” element was easily established by mere statements that it was desirable for the project to be located on a shoreline. For example, in *Bernard and Suzanne Carrier*, the Board concluded that the purpose of building a subdivision in its specific location was “clearly for the landowners to enjoy the pleasures of living on a shoreline.” This alone led the Board to conclude that the project must be located on the shoreline to fulfill its purpose. *Bernard and Suzanne Carrier* at 11.

However, in *Josiah E. Lupton, Quiet River Campground* the Board applied the “of necessity” test more strictly.

In analyzing the “of necessity” requirement of Criterion 1(F), the Board now concludes that its earlier decisions may have not given the “of necessity” requirement of Criterion 1(F) the weight it deserves and that the legislature’s inclusion of the “of necessity” language evinces a clear mandate that the project must serve a water-related purpose. The phrase “of necessity” is not a soft requirement lending to compromise, but rather, the plain meaning of these words requires a finding beyond the fact that the project’s purpose in locating on the shore is simply desirable. In the future, the Board will consider whether the project’s location on the shoreline serves as an integral part of the developmental scheme.

² The Board notes that element iii of Criterion 1(F) requires permittees to use vegetation to screen the development or subdivision from the water. It makes little sense under Criterion 1(F) to require anything more than adequate screening for projects or portions of projects that are not on the shoreline. In the instant case, the Permittees’ vegetated buffer will provide adequate screening.

Id. At 16.

The Board considered whether there were water-dependent elements associated with the project such as docks, boardwalks or swimming platforms that necessitated the project to be located on the shoreline; whether the development would be incomplete without the shoreline; and whether the purpose of the Project can be satisfied by a similar project located in other non-shoreline locations.

Likewise, in *Woodford Packers* the Board held that a housing development project did not comply with Criterion 1(F) because it was not water related.

To give proper significance to Criterion 1(F) and its "of necessity" provision, the Board must look first to the functional purpose of a project to determine whether the project's purpose is water-related. The Project in question is an affordable housing development for retired persons, with a walking path and other facilities to meet the residents' physical and social needs. Nothing about this purpose is so water-related as to require that the Project to be located on the shoreline of a river. WPI's desire to provide residents with river views is not a water-related purpose sufficient to meet the "of necessity" requirement of Criterion 1(F).

Woodford Packers at 24.

In the instant case, the Board finds that the swimming and canoeing access areas are "of necessity" located on a shoreline because they are water-dependent activities. However, the carriage training area is not water-dependent and does not require proximity to the shoreline or river. The Board concludes that the carriage training area fails the "of necessity" test. Therefore, the Permittees are required to relocate the carriage training area at least 100' from the top of the river bank (as delineated on Exhibit Map S-2). The vegetated buffer in this area must also be restored to a width, density, diversity, and height comparable with the other portions of the vegetated buffer. No other construction of structures, training, or activities which disturb the soil will be permitted within 100' of the top of the river bank. This area which currently has exposed soils should be seeded with grass and mulched. The Permittees may only mow outside the boundaries of the vegetated buffer as depicted in the Permittees' revised planting plan dated May 11, 2004.

Elements of Criterion 1(F)

First, the Board notes that it must consider the elements of Criterion 1(F) in light of what is “possible and reasonable” given the purpose of the Project. This requires the Board to balance the Project’s effect on the resource (the West River) against the Permittees’ need to affect the resource to accomplish its ends. *Okemo Mountain, Inc., # 2S0351-12A-EB*, Findings of Fact, Conclusions of Law and Order at 17 (Mar. 22, 1992).

(i) retain the shoreline and the waters in their natural condition

The Board finds that in order to appropriately retain the shoreline and waters of the West River in their natural condition, the vegetated buffer must be enhanced. Vegetated buffers are of significant value to river ecosystems, serving to filter stormwater, shade the river, provide habitat and food, along with many other critical functions.

However, given the nature of the Project which has limited impacts on the West River, the Board concludes that the width of the existing vegetated buffer provides reasonable benefits to the West River and does not inhibit the Project’s operations. Therefore, the width of the vegetated buffer as depicted in the Permittees’ revised planting plan should be maintained. There shall be no encroachment on the vegetated buffer except for the voluntary manual removal of fallen and dead trees and for the control of Japanese Knotweed.

In order to promote the species diversity and stability of the vegetated buffer, the Permittees shall control the Japanese Knotweed by manual and selective cutting 2 to 3 times a year. The Permittees are not required to attempt to eradicate the Japanese Knotweed because eradication could require the use of harmful machinery and/or chemicals which could result in bare patches and erosion.

In addition, while the break in the vegetated buffer for the swimming area may remain, the break in the dense multi-layered vegetated buffer for the canoe access area is a couple hundred feet. It is both possible and reasonable for this area to be substantially narrower yet still provide adequate canoe access. Therefore, the break in the vegetated buffer for the canoe access area must be reduced to the size depicted in the Permittees’ revised planting plan. The enhanced vegetated buffer for the canoe access area shall consist of native vegetation randomly spaced or clumped to create a diverse, multi-layered community of plant species, consistent with the Permittee’s approved plan. The width of the new vegetated buffer at the canoe access area shall be at least the width of the adjoining vegetated buffer.

Furthermore, the existing vegetated buffer near the canoe access area must have at least the same density and diversity of vegetation as the area to be planted pursuant to the Permittees' revised planting plan. Thus, if the existing vegetated buffer near the canoe access area has less diversity or density of vegetation, the Permittees shall plant additional vegetation to make up for any deficiency in the existing buffer.

(ii) allow continued access to the waters and the recreational opportunities provided by the waters

The Permittees have historically allowed members of the general public to access the West River with permission. The Project will not change the current access or recreational opportunities provided by the West River. Therefore, this element of Criterion 1(F) is met.

(iii) retain or provide vegetation which will screen the development or subdivision from the waters

With the exception of the breaks in the vegetated buffer for the swimming area and canoe access area, the vegetated buffer effectively screens most of the development from the water. The Board also notes that to the extent one can see the Project from the water, it is a visually pleasing view of a horse farm. Therefore, the Permittees have satisfied this element of Criterion 1(F).

(iv) stabilize the bank from erosion, as necessary, with vegetation cover

The bank of the West River is relatively stable along the Permittee's 1800' shoreline, and there is no evidence of significant erosion problems. There are some areas where the soil is exposed, but these areas are few and far between compared to the vegetated buffer and the vast horse pasture.

Criterion 8 (A)

The Board will not grant a permit if it is demonstrated by any party opposing the applicant that the development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

(i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or

(ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or

(iii) a reasonable acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

10 V.S.A. § 6086(a)(8)(A)(i)-(iii). The burden of proof is on the opponents under Criterion 8(A). *Id.* § 6088(b).

"'Necessary wildlife habitat' means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life including breeding and migratory periods." 10 V.S.A. § 6001(12). *See Re: Bernard and Suzanne Carrier, #7R0639-EB, Findings of Fact, Conclusions of Law and Order at 18 (Oct. 5, 1990); Re: Southview Associates, #2W0634-EB, Findings of Fact and Conclusions of Law at 7-9 (June 30, 1987) aff'd In re Southview Associates, 153 Vt.171 (1989); Re: Nile and Julie Dupstadt & John and Deborah Alden, #4C1013-EB, Findings of Fact, Conclusions of Law, and Order (Corrected) at (Apr. 30, 1999).*

Criterion 8(A) involves a three stage inquiry: (a) whether the alleged habitat constitutes "necessary wildlife habitat;" (b) if so, whether the project will destroy or significantly imperil such habitat; and (c) if so, whether one or more of subcriteria (i) through (iii) is satisfied. *Re: Mark and Pauline Kiesel, #5W1270-EB, Findings of Fact, Conclusions of Law, & Order (Altered) at 37 (Aug. 7, 1998).*

ANR argued that a population of a state threatened species of fresh water mussels was observed within 1,000 feet of the Project site. ANR also asserted that the West River at the Project site provides critical fish habitat for a number of fish species including smallmouth bass, rock bass, white suckers, tessellated darters, and minnows.

The Permittees assert that there is no necessary wildlife habitat in the West River. However, the Permittees did not produce an aquatic zoologist or other qualified expert and conducted no sampling or studies. Therefore, Permittee's assertion is not persuasive and the Board concludes that the West River at the Project site contains "necessary wildlife habitat."

The next inquiry is whether the Project will destroy or significantly imperil such habitat. Although ANR demonstrated the importance of the habitat, it did not demonstrate how the Project will destroy or significantly imperil the habitat. The

Project is already constructed and ANR was unable to point out any significant impacts of the Project. As a result, the Board concludes that ANR did not meet its burden of proof and the Project complies with Criterion 8(A).

Criterion 9(K)

Criterion 9(K) 10 V.S.A. § 6086(a)(9)(K) provides that:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The burden of proof to show that the proposed development will satisfy Criterion 9(K) is on the Permittee. 10 V.S.A. § 6088(a). The public land or facility at issue here is the West River. The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. *Swain Development Corp.*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

While no party produced any evidence or testimony specific to Criterion 9(K), the evidence under Criteria 1(F) and 8(A) concerning the Project's impacts to the West River are relevant under Criterion 9(F). Under those Criteria the Board already concluded that the Project did not cause any significant impacts to the West River. In light of that conclusion, the Board finds that the Project complies with Criterion 9(K).

Criterion 10

Before granting a permit, the Board must find that the project “is in conformance with any duly adopted local or regional plan or capital program of Title 24.” 10 V.S.A. §6086(a)(10). The burden of proof is on the Permittees. 10 V.S.A. §6088(a).

If the town plan or regional plan provisions are specific, they are applied to the proposed project without any reference to the zoning regulations. A provision of a town plan evinces a specific policy if the provision: (a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within the area or district in which the project is located; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding. *The Van Sicklen Limited Partnership*, #4C1013R-EB, Findings of Facts, Conclusions of Law, and Order at 52 (Mar. 8, 2002).

If the provisions are ambiguous, however, the Board examines the relevant zoning regulations for provisions which resolve the ambiguity. *Molgano* at 29-31. This does not mean that the Board conducts a general review of a project for its compliance with the zoning regulations, but rather it sees if there are provisions in the zoning regulations that address the same subject matter that is at issue under the town plan. *Re: Fair Haven Housing Limited Partnership and McDonald's Corporation*, #1R0639-2-EB, Findings of Fact, Conclusions of Law, and Order at 19 (Apr. 16, 1996), *aff'd*, *In re Fair Haven Housing Limited Partnership and McDonald's Corporation*, Docket No. 96-228 (Vt. Apr. 23, 1997) (unpublished).

The Board has held that when town and regional plans do not conflict, a project will be reviewed for its conformance with both plans. *Green Peak Estates*, #8B0314-2-EB, Findings of Fact, Conclusions of Law, and Order (Jul. 22, 1986), *aff'd*, *In re Green Peak Estates*, 154 Vt. 363 (1990); *Heritage Group, Inc.*, #4C0730-EB, Findings of Fact, Conclusions of Law, and Order (Mar. 27, 1989); *George & Barbara Musbek*, #2W0600-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 13, 1986). If there is a conflict between the town and regional plan, the regional plan applies if the project has substantial regional impacts; if the project does not have substantial regional impacts, then the town plan, not regional plan, applies. *Richard Provencher*, #8B0389-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 19, 1988).

Most town plans and regional plans are aspirational in nature and do not contain words such as "prohibited" or phrases such as "shall not be allowed. See *John A. Russell Corporation and Crushed Rock, Inc.*, Land Use Permit Application #1R0489-6, Findings of Fact, Conclusions of Law, and Order (Aug. 19, 1999), *citing*, *Kalakowski v. John A. Russell Corp.*, 137 Vt. 219, 225 (1979);

Casella Waste Management Inc., #8B0301-7-WFP, Findings of Fact, Conclusions of Law, and Order at 41 (May 18, 2000).

Even though town and regional plans are "abstract and advisory," *id.*, Act 250 requires that projects comply with a "local or regional plan," if one exists. 10 V.S.A. §6086(a)(10). The Board therefore reviews the town and regional plans for language that is appropriate to be given regulatory effect.

For example, where a plan uses ineffectual language, the Board will not read that language to prohibit a project. See, *Re: The Van Sicklen Limited Partnership*, #4C1013R-EB, Findings of Fact, Conclusions of Law, and Order at 55 (Mar. 8, 2002) (phrases such as "strongly encourages" and "should focus its efforts to encourage" indicate nonmandatory elements of a town plan); *Re: Green Meadows Center, LLC, The Community Alliance and Southeastern Vermont Community Action*, #2W0694-1-EB, Findings of Fact, Conclusions of Law, and Order at 42 (Dec. 21, 2000) (while words such as "direct," "encourage", "promote," and "review" in town or regional plans may provide guidance in the interpretation of such plans and may be used to bolster more specific policies in such plans, they do not, by themselves, constitute a mandate). *And see, The Mirkwood Group and Barry Randall, supra*, at 29; *Ronald Carpenter*, #8B0124-6-EB, Findings of Fact, Conclusions of Law, and Order at 16 (Oct. 17, 1995); *Horizon Development Corp.*, #4C0841-EB, Findings of Fact, Conclusions of Law, and Order at 28 (Aug. 21, 1992). *Compare, Re: Southwestern Vermont Health Care Corp.*, #8B0537-EB, Findings of Fact, Conclusions of Law, and Order at 54 (Feb. 22, 2001) (use of the phrase "shall be protected" in town plan is mandatory).

But on the other hand where the language of a town or regional plan is sufficiently clear in its intent not to allow a project, the Board must give effect to the language of §6086(a)(10), even if the town or regional plan is not written in prohibitory terms similar to those found in zoning regulations. To do otherwise would be comparable to ignoring Criterion 10's requirement that a project conform with town and regional plans, something which the Board cannot do. *State v. Stevens*, 137 Vt. 473, 481 (1979) (in construing a statute, every part of the statute must be considered, and every word, clause, and sentence given effect if possible); *State v. Racine*, 133 Vt. 111, 114 (1974) (presumption that all language is inserted in a statute advisedly).

Although most of the provisions of the town and regional plans are drafted using non-mandatory language, the Board concludes that the following provisions are sufficiently clear, mandatory, and applicable to the Project. As a result, the Board finds that the Project must comply with the following provisions of the

Newfane Town and the Windham Regional Plan.

The Newfane Town Plan Surface Water Policy states:

1. Maintenance of Newfane's surface waters and shorelands in their natural state is necessary. ...
3. New Development within or adjacent to shoreland areas shall be designed to result in stable river and stream banks and cause minimal disturbance to the riparian environment.
4. Development activity shall not result in increased rates of stormwater runoff to Newfane's surface waters nor cause surface waters to become silted, contaminated or otherwise degraded.

The Board notes that these provisions essentially mirror the requirements of Criterion 1(F) and do not add additional or stricter protections. Therefore, the Project complies with the Newfane Town Plan.

The Windham Regional Plan "Natural Resources Policies" states:

1. Maintain undisturbed buffers of vegetation along watercourses, lakes, ponds, wetlands and vernal pools in order to protect shorelines, provide shading to prevent undue increase in stream temperatures, minimize the effects of erosion, sedimentation, and other sources of pollution, and maintain scenic, recreational, and habitat values.
2. Maintain or enhance existing chemical, physical, and biological quality of the Region's surface waters.

Windham Regional Plan at 103.

The above provisions are mandatory and require buffers along watercourses to protect the shoreline and waters of the West River. The Windham Regional Plan does not conflict with the Newfane Town Plan and is thus applicable to the Project. However, like the provisions of the Newfane Town Plan, the Windham Regional Plan imposes no additional protections beyond those found in Criterion 1(F). Therefore, the Board concludes that the Project complies with Criterion 10.

V. Order

1. The Project complies with 10 V.S.A. §§6086(a)(1)(F), (8)(A), (9)(K) and (10).
2. Land Use Permit #2W1053-EB is issued.
3. Jurisdiction is returned to the District 2 Environmental Commission.

Dated at Montpelier, Vermont this 16th day of July, 2004.

ENVIRONMENTAL BOARD

/s/Patricia Moulton Powden
Patricia Moulton Powden, Chair
George Holland*
Sam Lloyd
W. William Martinez
Patricia A. Nowak
A. Gregory Rainville
Jean Richardson
Christopher D. Roy

* Board Member Holland dissents from the opinion. I dissent from this decision because I believe this horse farm to be a farming activity exempt from Act 250 jurisdiction. I applaud the increased shoreline protection of the West River afforded by this decision, however, it should never have been required at the Mercede family's expense in time, cost, and frustration.

I further question as to why this farm should not now be excluded from any further Act 250 actions and/or jurisdiction, including all permits and decisions to date, since the law has been modified effective July 1, 2004, to specifically exclude equine farms of this type from Act 250 review. I continue to maintain my argument that the law always did exclude this and other similar farms from such review.