

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

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

Declaratory Ruling
Request #398

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This proceeding concerns the Winchester Stables operation (Project). The Project is located in the towns of Newfane and Brookline, Vermont.

I. PROCEDURAL SUMMARY

On July 31, 2001, the District #2 Environmental Commission Coordinator (Coordinator) issued Jurisdictional Opinion #2-146 (JO) in which she determined that all tracts of land upon which construction of improvements has occurred for the commercial purposes encompassed in the Project operations and all tracts of land involved in the operation, such as lands where trails are located, are lands subject to jurisdiction under 10 V.S.A., § 6001 et seq. (Act 250). These lands also include the tracts of land where commercial extraction of earth resources and the construction for the relocation of River Road have occurred.

On August 29, 2001, West River Acres, Inc., Winchester Stables, Inc. and Nicholas J. Mercede (Petitioners) filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JO. The petition for declaratory ruling was filed pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule (EBR) 3. The Petitioners contend that there are no other parcels apart from the 54.2 acre parcel owned by West River Acres, Inc. that are used for the Project.

On October 5, 2001, Board Chair Marcy Harding convened a prehearing conference and on October 9, 2001 she issued a Prehearing Conference Report and Order.

On October 22, 2001, a Panel of the Board (Panel) conducted a site visit.

On December 12, 2001, the Panel convened a hearing in Newfane, Vermont with the following participants:

Petitioners: by Timothy O' Connor, Esq., Nicholas Mercede, Peggy Dils, and Thom Serrani.
Windham Regional Commission (WRC) by James Matteau.

The Panel accepted documentary and oral evidence into the record, and heard opening and closing statements regarding the issues on appeal. After

recessing the hearing, the Panel deliberated on December 12, 2001, January 11, 2002, and February 26, 2002.

Based on a thorough review of the record, related argument, and the Petitioner's proposed findings of fact and conclusions of law, the Panel issued a proposed decision on February 27, 2002 which was sent to the parties. The parties were allowed to file written objections by March 14, 2002 and request oral argument by March 12, 2002.

On March 6, 2002, Petitioners filed a request for oral argument and on March 14, 2002 Petitioners filed written objections to the proposed decision.

On March 11, 2002, WRC filed a letter commenting on the proposed decision.

On March 20, 2002 the Board convened oral argument relative to the appeal with the following individuals and entities participating.

Petitioners by Timothy O' Connor, Esq. and Nicholas Mercede.

The Board deliberated on March 20, 2002. Following a thorough review of the proposed decision and the record, the Board declared the record complete and adjourned. The matter is now ready for a final decision.

II. ISSUE

Whether pursuant to 10 V.S.A. § 6001(3) and EBR 2(F) there are any parcels of involved land that are used directly or indirectly in addition to the 54.2 acre parcel owned by West River Acres, Inc. in the operation of the Project.

III. 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 Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-42 (1997).

1. West River Acres, Inc. is a Vermont corporation formed on November 28, 1994. The directors are Nicholas J. Mercede, Anita Mercede and Frank J. Mercede.

2. West River Acres, Inc. has applied for an Act 250 Permit on a 54.2 acre parcel to reconstruct a demolished barn into an indoor horse arena with view area, tack room, feeding room, bedding bin, office, bathroom and one bedroom apartment.
3. West River Acres, Inc. owns the 54.2 acre parcel which is located on the east side of River Road and is bounded on the north by "Dowley's Beach," on the east by the West River, on the south by land of Frank J. Mercede, Trustee, and on the west by River Road.
4. Winchester Stables, Inc., a Vermont corporation formed on August 12, 1996, operates the Project. The directors are Nicholas J. Mercede and Frank J. Mercede. Since its original acquisition in 1971 by Nicholas Mercede and Anthony Ferro until December 1995, the 54.2 acre parcel has been used by the Mercede family and their friends, guests, and Newfane neighbors and visitors as an agricultural farm, raising pigs and chickens, and by the Mercede family for maintaining their own horses, donkeys, llamas and other livestock. It is a place that the Mercede family regularly visits during the year as a vacation home for recreational and social purposes.
5. Since its inception, the principal activities and events at Winchester Stables are the boarding and training of horses. At the present time, there exists on the 54.2 acre parcel a large barn with stalls for 50 horses, of which 25 are owned by various boarders and 25 are owned by the Mercede family. Attached to the horse barn is the indoor horse arena which replaced a portion of the existing cow barn that was destroyed by a wind burst in 1990. In the horse barn and arena area, there is located a viewing area, tack rooms, feed room, bedding bin, office, bathroom and employee apartment. On the grounds of the 54.2 acre parcel, there are corrals, jumps, open pasture and open space for horseback riding.
6. Carriage tours are held on the 54.2 acre parcel or on River Road and the roads in Brookline. Often, such tours are involved in parades such as the Newfane July 4th Celebration and the Christmas celebration in Newfane for area children.
7. Two or three horse shows are held at the site per year, entirely on the 54.2 acre parcel.

8. Since the original acquisition in 1971, other members and entities of the Mercede family acquired other parcels of real estate in the Town of Newfane, and the dates of acquisition, location and use are as follows.
9. Petitioner stipulated that all the contiguous and non-contiguous parcels listed below are owned by family members listed in 10 V.S.A. 6001(14)(A).
10. The following parcels are contiguous to the 54.2 acre parcel:
 - 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 designated as Maple Row Farm VIII on Exhibits P-22 and P-23.
 - 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. See Dowley VII on Exhibits P-22 and P-23.
 - 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. Both parcels contain old logging roads which, prior to the acquisition by Frank J. Mercede, were used for many years by the general public for snowmobiling, hiking, hunting and

horseback riding. This land is used for both agricultural and forestry purposes. See King VI on Exhibits P-22 and P-23.

- D. On February 28, 1992, Frank J. Mercede, Trustee, the son of Nicholas J. Mercede, purchased three tracts of land in Newfane 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 located on the east side of River Road adjacent to and contiguous with the 54.2 acre parcel. This parcel is used for agricultural purposes. See Peterson III-b on Exhibits P-22 and P-23. The other two parcels are discussed in finding of fact 10 F and 11 B.
 - 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, Trustee, the son of Nicholas J. Mercede, in Newfane 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. See Peterson III-c on Exhibits P-22 and P-23.
11. The following parcels are not contiguous to the 54.2 acre parcel:
- A. On July 3, 1986, NJM Realty Limited Partnership purchased a 23 acre tract of land containing a residential dwelling thereon from Paul C. Setze and Patricia J. Setze by Warranty Deed recorded in Book 58, Page 351 of the Newfane Land Records. This property is residential and is shown as Setze IV on Exhibits P-22 and P-23. The property is north of the 54.2 acre parcel and also has a large hayfield.
 - B. The third parcel purchased on February 28, 1992, Frank J. Mercede, Trustee, the son of Nicholas J. Mercede, in Newfane

from David E. Peterson and Barbara A. Peterson, is 21.6 acres located on the west side of River Road. This land was transferred with State subdivision approval. This is the parcel from which the Town of Newfane condemned the necessary land in order to relocate River Road. See Peterson Land III-a on Exhibits P-22 and P-23.

- C. On August 25, 1993, the son and daughter of Nicholas J. Mercede, Frank J. Mercede and Barbara Pierce, as Co-Trustees, purchased a parcel of land in Newfane from the Vermont Economic Development Authority, located on the west side of the West River and on the east side of River Road by Warranty Deed recorded in Book 73, Page 226 of the Newfane Land Records. This parcel is southerly of and contiguous to the Setze parcel and contains 15 acres used for agricultural purposes. The parcel is northerly of the 54.2 acre parcel and is separated by a parcel known as "Dowley Beach" and a section of River Road close to the west bank of the West River from the 54.2 acre parcel. See FJM and BP V on Exhibits P-22 and P-23.
- D. On July 31, 1996, SB Associates, a limited family partnership, purchased a tract of land in Newfane from Stanley I. Bills and Margaret R. Bills, located on the west side of the West River by Warranty Deed recorded in Book 79, Page 187 of the Newfane Land Records. This is open land without buildings and is used for agricultural purposes, and contains 36.35 acres. This parcel is located approximately one half mile from the West River Acres parcel. See SB Associates I on Exhibits P-22 and P-23.
- E. On December 6, 1996, Townshend Acres, a limited family partnership, purchased tracts of land in Brookline from Susan Smith-Denny, Trustee of the Natalie Clarkson Revocable Intervivos Trust, said parcel containing a total of 199.11 acres, and being located on the east side of the West River by Warranty Deed recorded in Book 22, Page 245 of the Brookline Land Records. This tract of land is open without any buildings, and is used for agricultural and forestry purposes. See Townshend Associates II on Exhibits P-22 and P-23.

12. A land management program has been used which results in all areas of the 54.2 acre parcel being rotated for use, so that the result is that there is no defined trail in any area because the use of the corrals and open areas are rotated. This is done so that the grass cover will not be destroyed and that a particular area will not become dried out. The practice is to avoid erosion, exposure of mineral soils, and the run off of nutrients. This results in healthy turf and no designated riding trail on the site being observable.
13. 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.
14. In general, apart from the 54.2 acre parcel, the land owned by Mercede family is not used in the operation of Winchester Stables, Inc. because of the cost of liability insurance. An exception to this policy is that Mercede family members, guests and friends, with permission, can use the logging roads which are located on the King parcel across and on the east side of the West River for riding purposes. This use is consistent with the use that has been made by the family of this property since it was acquired in 1992. It has never been posted, so that it has been used by the general public for skiing, hiking, hunting, horseback riding and snowmobiling for many years.
15. A boarder of a horse at Winchester Stables, Inc., may ride his or her horse anywhere on the 54.2 acres, with no delineated trails and can use the jumps and corrals.
16. 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 and is open to the general public.
17. No commercial improvements have been constructed on other Mercede family owned parcels which are used in the operation of West River Acres, Inc. and/or Winchester Stables, Inc.
18. Improvements have been made to keep the logging roads on the large parcel on the east side of the West River in Brookline and Newfane open and safe for use in inspecting the area, for

surveillance and for the personal recreation of the Mercede family and friends including horseback riding and picnicking.

19. An obstacle course has been constructed at the south end of the 10.6 acre parcel owned by Frank J. Mercede, Trustee, which is used by Nicholas J. Mercede, Frank J. Mercede and their families and friends.
20. The acquisition of the other parcels by the Mercede family and/or affiliates over a period of years was for the purpose of providing quiet, peace, and enjoyment of the open space by the Mercede family and friends.
21. The non-contiguous parcels are located within a 5 mile radius of the 54.2 acre parcel. No construction of improvements for commercial or industrial purposes that are used as part of the Project has occurred on the non-contiguous parcels. There is no relationship between the non-contiguous parcels owned by the Mercede family and the Project such that there is a demonstrable likelihood that the impact to the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.

IV. CONCLUSIONS OF LAW

The State of Vermont (State) has the burden of proof since it is not the Petitioners but the State, through the JO, which is attempting to change the status quo. Petitioners argue that the Project's involved lands should be limited to the 54.2 acre parcel.

Petitioners' argument is based on the fact that under 10 V.S.A. 6001 (3) and EBR 2(F)(1), the other parcels have no commercial improvements, are not used as part of the operation of the Project, and will not likely be impacted in regards to the values sought to be protected by Act 250.

Pursuant to EBR 2(F)(1), the "involved land" of a project includes:

- (1) The entire tract or tracts of land, within a radius of five miles, upon which the construction of improvements for commercial or industrial purposes will occur; and any other tract, within a radius of five miles, to be used as part of the project or where there is a relationship to the tract or tracts upon which the construction of improvements will occur such that

there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship. In the event that a project is to be completed in stages according to a plan, or is part of a larger undertaking, all land involved in the entire project shall be included for the purpose of determining jurisdiction.

Thus, any parcel that meets the elements of EBR 2(F)(1) is considered involved land of the Project. However, the inquiry does not end with EBR 2(F)(1). Pursuant to EBR 2(U), a “tract of land”¹ is defined as one or more physically contiguous parcels of land owned or controlled by the same person or persons.

Person is defined broadly to include amongst other things an individual’s spouse, parents and children, a corporation, joint venture and individuals affiliated for profit. 10 V.S.A. 6001(14)(A) and (B). Petitioner concedes that all the parcels listed in the Findings of Fact are owned by family members listed in 10 V.S.A. 6001(14)(A). Therefore, for the purposes of this Act 250 proceeding, all the parcels listed are owned by the same person.

The Board has construed a “tract of land” as used in EBR 2(F) for jurisdictional purposes to include all contiguous land in common ownership, regardless of the functional relationship between the tracts and whether the tracts were purchased separately. Even if the land was acquired in separate deeds, contiguous parcels are considered one tract. *New England Land Associates*, Findings of Fact, Conclusions of Law, and Order, Declaratory Ruling #289 (May 26, 1994). Contiguous parcels are considered one tract of land even if the commercial construction has occurred entirely on one parcel because there is no requirement that there be a “functional relationship” between the parcels. *Gerald Costello Garage* Declaratory Ruling #243, Findings of Fact, Conclusions of Law, and Order (July 2, 1991) *aff’d In re Gerald Costello Garage* 158 Vt. 655, 656 (June 26, 1992).

Therefore, since Petitioners concede that all parcels of land owned by family members are owned by the same person for purposes of Act 250, all contiguous parcels owned by a family member are considered part of the entire tract or tracts of land and are involved land of the Project.

As discussed above, any non-contiguous parcel of land could also be

¹ A “tract of land” is the first part of the definition of “involved land” in EBR 2(F)(1). EBR 2(U) postdates some of the cases cited below but is consistent with prior Board precedent.

considered involved land if it meets the definition in EBR 2(F)(1). Petitioners have demonstrated that the non contiguous parcels owned by family members have no commercial improvements, are not used as part of the operation of the Project, and will not likely be impacted in regards to the values sought to be protected by Act 250. Therefore, all non-contiguous parcels listed in the Findings of Fact are not considered involved land.

Although the Board has defined the Project's involved lands more broadly than Petitioners would have liked, under *Stonybrook Condominium Owner's Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order (May 18, 2001) the Petitioners can still move to narrow the land considered part of the permitted project. A petition under *Stonybrook* could result in the Project being limited to the 54.2 acre parcel even if additional parcels were considered involved lands for determining jurisdiction.

In *Stonybrook*, the Board held that the "permitted project" is the tract 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 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.

However, while a permit amendment application under *Stonybrook* may be the only avenue for the Petitioners to obtain the relief they seek, the Board has determined that the Commission is the appropriate forum to hear such a request. Therefore, the Board is without jurisdiction to redefine the scope of the permitted project because this issue has not been initially considered by the Commission. *Alpine Stone Corporation, ADA Chester Corporation, and Ugo Quazzo, #2S1103-EB Findings of Fact, Conclusions of Law, and Order* (February 4, 2002). While the Board does not have jurisdiction to determine whether the Petitioners are entitled to the relief they seek, the Board believes the Petitioners offered substantial evidence which when presented to the Commission, should lead to narrowing the scope of the permitted project.

V. ORDER

1. The involved land consists of the 54.2 acre parcel plus all contiguous parcels listed in Finding of Fact 10.

Dated at Montpelier, Vermont this 21st day of March, 2002.

ENVIRONMENTAL BOARD

_____/s/Marcy Harding_____
Marcy Harding, Chair
Samuel Lloyd
W. William Martinez
Alice Olenick
A. Gregory Rainville
Jean Richardson
Donald Sargent
Rebecca J. Day**

Concurring and Dissenting opinion of Alternate member Rebecca J. Day

Board Rule 2(U) adopted January 18, 2001, requires that all contiguous parcels owned or controlled by a person be counted in determining the amount of land involved for jurisdictional purposes. It is now not possible to limit jurisdiction under the "involved land" analysis. Therefore, the Board has developed the *Stonybrook* analysis to limit the project scope while still taking jurisdiction.

I disagree with the *Stonybrook* decision and the subsequent *Alpine Stone* decision on two points:

First; under the present *Stonybrook* analysis the project size can be limited to a parcel of land that does not necessarily comply with town or state subdivision regulations - no state or local permits are required. I believe this creates yet another land use regime that further and unnecessarily complicates land use law.

Second; the Board is now requiring the District Commissions to determine the scope of the project during their hearing process. I believe the coordinators as the professional staff people are better able to make the necessary investigation and determination for the issuance of the jurisdictional opinion which is then appropriately appealed to the Board. The District Commissioners are volunteer lay

people whose time is limited and better spent analyzing the 10 criteria.

Therefore, first I concur with the Board decision that the non-contiguous parcels are not involved land and not subject to jurisdiction. Second, I concur with the Board decision that the contiguous parcels are owned and controlled by the same person. Third, I dissent from the Board decision referring the matter back to the District Commission. I believe it is the Board's responsibility to narrow the scope of the project, then to return the matter to the District Commission for the analysis under the 10 criteria.