

On March 9, 2001, Board Chair Marcy Harding convened a Prehearing Conference with Petitioner Ralph Winchester participating *pro se*.

On March 14, 2001, Chair Harding issued a Prehearing Conference Report and Order.

On July 11, 2001, a Panel of the Board convened a hearing in Vernon, Vermont, where it took testimony from Petitioner. The Panel then conducted a site visit to the Guilford Cabins property and the North Star property in Guilford, Vermont, and took additional testimony from Petitioner. Participants included the Petitioner; Frederick Humphrey, Chair of the Guilford Selectboard, John Kristensen, member of the Guilford Selectboard; John Bennett, Windham Regional Commission, and Frank and Jeanie McPhearson, interested observers. At the start of the hearing, representatives of the Guilford Selectboard and Windham Regional Commission requested that their status as parties be reflected in this matter. At the conclusion of the hearing, the Panel recessed the hearing and deliberated.

The Panel deliberated again on October 31, 2001.

Based upon a thorough review of the record and related argument, the Panel issued a proposed decision on November 1, 2001. The parties were given an opportunity to review the proposed decision and to file written objections and request oral argument before the Board on or before November 16, 2001.

On November 19, 2001, Petitioner filed a request for oral argument and moved that the Board accept his request out of time. The Chair granted Petitioner's request to extend the November 16, 2001 filing deadline, in a Chair's Preliminary Ruling issued on November 26, 2001.

On December 19, 2001, the Board heard oral argument and testimony from Petitioner. The Board also heard comments from a new lessee of the North Star property.

After adjourning oral argument, the Board deliberated. Based on a thorough review of the record, related argument, and the Panel's proposed decision, the Board declared the record complete and adjourned. The matter is now ready for final decision.

II. ISSUE

Whether the Guilford Cabins property is "involved land" with respect to the North Star salvage yard, the subject of Land Use Permit Application #2W1058, such that a Land Use Permit is required pursuant to 10 V.S.A. § 6081, EBR 10, and EBR 2(F)(defining "involved land").

III. OFFICIAL NOTICE

During the hearing Chair Harding proposed that the Board take official notice of the Findings of Fact and Conclusions of Law and Order issued by the District #3 Environmental Commission (Commission) on February 20, 2001, in *Re: Ralph G. Winchester d/b/a R.G. Winchester Auto, #2W1058* (Decision), for the limited purpose of the background information the Decision provides regarding the North

Star property and the fact that there is Act 250 jurisdiction over the North Star property. These facts are not in dispute and no party objected to the Board's taking official notice of this document. Accordingly, the Board takes official notice of the Decision for the limited purpose stated herein.

Under 3 V.S.A. § 810(4), notice may be taken of judicially cognizable facts in contested cases. A declaratory ruling is a contested case under the Administrative Procedures Act. 3 V.S.A. § 801(b)(2); see also, 10 V.S.A. § 6007(c). Pursuant to the Vermont Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); see also, 3 V.S.A. § 810(1)(rules of evidence apply in contested cases); *In re Handy*, 144 Vt. 610, 612 (1984). Official notice may be taken whether requested or not and may be done at any stage of the proceeding. 3 V.S.A. § 810(4); V.R.E. 201(c) and (f).

IV. FINDINGS OF FACT

1. In 1982, the Petitioner purchased the Guilford Cabins property on Route 5 in the Town of Guilford, Vermont. At the time of purchase, the tract was approximately 5 acres in size. Since then, Petitioner has purchased an adjacent parcel, approximately 1.5 acres in size. Currently the Guilford Cabins property is approximately 6.5 acres in size.
2. When Petitioner purchased the Guilford Cabins property it consisted of nine cabins, a main house, and a restaurant. There were no junk cars or salvage materials on the Guilford Cabins property when it was purchased.
3. At some point after Petitioner purchased the Guilford Cabins property, he began using it to store and sell salvage materials such as junk vehicles and vehicle parts.
4. Petitioner concedes that he actively sold salvage parts from the Guilford Cabins property for three to four years, through 1988.

5. Petitioner also has acquired additional salvage inventory, much of which remains on the Guilford Cabins site and is owned by the Petitioner.
6. In recent years, Petitioner has allowed tenants to give him junk cars by leaving them on the Guilford Cabins site. In addition, old vehicles have been abandoned by others on the Guilford Cabins property as recently as last year. Now junk vehicles are abandoned only on the North Star property.
7. Currently, the restaurant and main house on the Guilford Cabins property are uninhabited and are being used for storage of salvage materials.
8. Petitioner currently rents five of the nine cabins on the Guilford Cabins property for residential purposes. In addition, one travel trailer on the site appeared to be lived in at the time of the site visit.
9. There is a coach (large bus) on the Guilford Cabins property, which Petitioner has sold to another person. The buyer is making repairs to the coach while it is on the Guilford Cabins property with the intention of driving it off the site once it is in running condition.
10. Some of the salvage inventory remaining on the Guilford Cabins property is difficult to get to because the land has grown in and, in some cases, larger pieces are blocked by trees that have grown since the pieces were moved to the site. Much of this salvage inventory is obsolete junk.
11. Petitioner has removed at least 2,000 tires from the Guilford Cabins property. Large quantities of tires remain on the property, and many are stacked in the forested area just beyond the cabins.
12. The land surrounding the Guilford Cabins property is wooded and undeveloped.
13. Large quantities of salvage inventory and junk are visible on the Guilford Cabins property. Some of the inventory and junk is obscured from view of the Route 5 by the row of cabins, but some can be seen from the road. Large quantities of salvage parts, vehicles, and junk are clearly visible to the residents of the homes on the Guilford Cabins site.
14. Items observed on the Guilford Cabins property at the time of the Panel's site visit include:
 - a very old tow truck or wrecker;
 - an old trailer truck and car carrier which has a large quantity of scrap metal stored on it;

a trailer from a tractor trailer which is full of old tires;
a 1940 Oldsmobile; an old Lincoln;
a newer truck; approximately 14 cars that may be in running condition;
numerous junk cars and trucks;
a pile of I-beams; a number of wagon wheels;
two coils of plastic pipe;
a large dumpster;
several 55-gallon drums;
parts of old motorcycles;
at least three uninhabited mobile homes;
old travel trailers and a pop-up camper;
a flatbed trailer with a satellite dish on it;
a coach in apparent disrepair;
a junk bus with trees growing through it such that the trees would have to be cut to move the bus;
five old school buses and approximately three other old buses;
a shed area in which substantial amounts of metal piping, exhaust systems and car parts are stored;
a large underground storage tank on the ground;
at least five large piles of tires, one of which is used as walls around a storage area for a boat and one is used as walls around a pen for geese;
remains of three golf carts, a go-cart and a snowmobile;
a bucket loader;
and miscellaneous scrap metal, appliances, car parts, and tires.

15. In 1985 or 1986, the Petitioner purchased the North Star property, a tract of land approximately 11.5 acres in size on Route 5 in the Town of Guilford, Vermont. The North Star property is approximately three miles from the Guilford Cabins property.
16. Sometime after 1986, the Petitioner began to operate a salvage yard from the North Star property and he continues to operate this salvage yard presently.
17. At the North Star property, Petitioner sells salvage vehicle parts, and recycled vehicle and household metal. A portable crusher comes to the North Star property to crush salvage materials approximately twice a year. Limited automotive services are provided at a garage on the North Star property. Petitioner also sells used cars from the North Star property.
18. A Project Review Sheet dated September 2, 1997, establishes that Act 250 jurisdiction attaches to the North Star property because the project involves the construction of improvements for a commercial purpose on more than

one acre in a town that does not have permanent subdivision regulations, and thus constitutes "development" pursuant to EBR 2(A)(2), and because it is a substantial change to a pre-existing development, and thereby constitutes "development" pursuant to 10 V.S.A. § 6001(3) and EBR 2(G) and 2(O). Petitioner did not appeal this jurisdictional determination and does not dispute that Act 250 jurisdiction exists over the North Star parcel.

19. In its Decision issued February 20, 2001 in *Re: Ralph G. Winchester d/b/a R.G. Winchester Auto, #2W1058*, the Commission denied Petitioner's application for a Land Use Permit for the North Star project, holding that the project did not comply with 10 V.S.A. § 6086(a)(8)(aesthetics and scenic beauty)(Criterion 8"), 10 V.S.A. § 6086(a)(9)(K)(public investments and facilities), and 10 V.S.A. § 6086(a)(10)(conformance with regional plan).
20. After the primary location for Petitioner's salvage activities shifted from the Guilford Cabins property to the North Star property, in or after 1988, Petitioner moved only some salvage inventory from the Guilford Cabins site to the North Star property. Petitioner did not move more of the materials to the North Star property in the past because he was not forced to, and because he was busy and the materials were not in his way personally.
21. Petitioner continued to accept and sell vehicles and salvage materials from the Guilford Cabins property after the focus for his salvage activities shifted to the North Star property.
22. Petitioner continues to make efforts to remove remaining salvage inventory and junk from the property to the North Star site for recycling or sale. Petitioner has employed his son in the past but now generally works alone. Also, the equipment Petitioner uses to move the salvage materials has malfunctioned recently and Petitioner has been unable to use it.
23. Petitioner now wants to take the salvage materials from the Guilford Cabins property and move them to the North Star junkyard where they can be recycled or sold. But if it is determined that there is Act 250 jurisdiction over the Guilford Cabins property, Petitioner intends to try to get a junkyard license to expand the use of the Guilford Cabins property as a junkyard.
24. The Town of Guilford does not have zoning and subdivision regulations.

V. CONCLUSIONS OF LAW

A. Scope of Review

A petition for declaratory ruling is conducted *de novo* to determine the applicability of any statutory provision or of any rule or order of the Board. 10 V.S.A. §6007(c) and EBR 3(D). Although the petition may come to the Board as an appeal of a jurisdictional opinion, the issue in a declaratory ruling proceeding is not whether a jurisdictional opinion, or any part thereof, is correct. Thus, facts stated or conclusions drawn in the jurisdictional opinion are not considered by the Board. Provided a petition is timely filed, the only issue is the applicability of any statutory provision or of any rule or order of the Board over the project described in the jurisdictional opinion.

B. Discussion

There is no dispute that the North Star parcel is subject to Act 250 jurisdiction. However, Act 250 jurisdiction extends to all "involved land" with a particular project,¹ so the question is whether the Guilford Cabins property is "involved land" with respect to the North Star salvage yard. Because this is a *de novo* proceeding, the Board must evaluate the facts as they exist when the proceedings are convened. *Re: Chester and Donna Brileya, #1R0580-EB, Findings, Conclusions and Order at 5 (May 1, 1986)*(making new determination of "involved land" based on new facts in existence at the time of the appeal proceedings).

This proceeding commenced when the Petition was filed with the Board on December 19, 2000. At that time "involved land" was defined to include:

- (1) The entire tract or tracts of land upon which the construction of improvement for commercial or industrial purposes occurs; and
- (2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which is incident to the use of the project; and
- (3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, 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.

EBR 2(F)(prior version). This prior version of EBR 2(F) was also in effect on November 28, 2000, when the JO was issued.

¹

See 10 V.S.A. § 6081(a)(Act 250 permit required for "development"); 10 V.S.A. § 6001(3)(defining "development" to include involved land).

Effective January 18, 2001, EBR 2(F) was amended to define "involved land" to mean, in relevant part:

- (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. . . .

Under this current definition of "involved land," the Board must determine if the Guilford Cabins property is to be used as part of the North Star project, or if it bears a relationship to the North Star property 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." This is a more narrow definition of "involved land" than the prior definition, because it leaves out the former "incident to the use" test. To the extent that the Petitioner may benefit from the amended rule, the Board may apply it without disturbing Petitioner's vested rights.

The Board does not reach the question of whether Petitioner has any right to avail himself of the more narrow definition of "involved land," because, as set forth below, the Guilford Cabins property is involved land with the North Star project under either definition.

There is no question that the Guilford Cabins property is within a five-mile radius of the North Star property, and that Petitioner owns both properties. Likewise, Petitioner concedes that he actively operated the Guilford Cabins property as a salvage yard beginning in 1985 for three or four years. During that period, the Petitioner purchased the North Star property and began operating a salvage yard on it. At some point, Petitioner shifted most of the active salvage business to the North Star junkyard, where he also conducted some automotive repairs and services, and used car sales. Petitioner moved some portion of the Guilford Cabins inventory to the North Star property, but continued to accept and sell salvage materials at the Guilford Cabins site, for instance, his recent sale of the inoperative coach and accepting inoperative vehicles from tenants.

Petitioner argues that the Guilford Cabins property is not "involved land" because it is not an "active" junkyard. Petitioner is correct that his salvage operations at the Guilford Cabins site are less significant than those conducted on the North Star site, and less significant as those conducted on the Guilford Cabins site in years past. Nevertheless, Petitioner continues to conduct salvage operations on the Guilford Cabins property. Moreover, Petitioner uses the Guilford

Cabins property to store salvage materials for his salvage business. Some of these materials, such as the coach, are being sold directly from the Guilford Cabins site. Others, Petitioner has been moving to the North Star site for recycling or sale. Petitioner intends to continue moving salvage materials to North Star for recycling or sale unless Act 250 jurisdiction extends to the Guilford Cabins property. Petitioner's plan, should the Board rule that the Guilford Cabins property is involved land, is to apply for a permit to operate the Guilford Cabins property as a junkyard. In either event, the properties and uses for Petitioner's salvage business are intertwined.

The Board concludes that the Petitioner's business, a salvage operation, is a single business that has been operated from at least two sites. Materials stored on the Guilford Cabins property and on the North Star property are all inventory for the same salvage business. Therefore, the Board concludes that use of the Guilford Cabins property is "incident to the use"² of the North Star property and salvage yard operation, and that the Guilford Cabins site has, and will be, used as part of the North Star project.³

The remaining issue is whether the Guilford Cabins site bears a relationship to the North Star property 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."⁴ It is clear that two properties that are part of the same salvage operation bear a relationship to each other. As set forth below, the Board concludes that this relationship is demonstrably likely to have a substantial effect on aesthetics and scenic beauty under Criterion 8.

The Board has found that the salvage materials on the Guilford Cabins property are partially visible from Route 5 and are readily visible from the residential homes on the property. The presence of such large quantities of junk has the potential to create an adverse aesthetic impact as it does not fit with its

²

This is in accordance with the definition of "involved land" in the former EBR 2(F)(2), which was in effect at the time this Petition was filed.

³

This is in accordance with the first type of "involved land" listed in the current EBR 2(F)(1)(defining "involved land" to include land "to be used as part of the project").

⁴

This is the second type of "involved land" listed in the current EBR 2(F)(2)(defining "involved land" to include land with a relationship to a project tract "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."

surroundings and is unsightly. By storing large quantities of unsightly junk on the Guilford Cabins residential property, at a minimum, the aesthetic values sought to be protected by Act 250 pursuant to 10 V.S.A. § 6086(a)(8) are likely to be affected in a substantial manner by the relationship to the Petitioner's North Star property. Thus, the Guilford Cabins property constitutes "involved land" under the more narrow definition in the 2001 version of EBR 2(F)(1).

C. Conclusion

The Board concludes that the Guilford Cabins property is involved land with regard to the North Star project, because it is incident to the use of the North Star project, has been and will be used as part of the North Star project, and bears a relationship to the North Star project such that "there is a demonstrable likelihood" that the impact on the aesthetic and scenic values sought to be protected by Criterion 8 of Act 250 "will be substantially affected by reason of that relationship." EBR 2(F). Therefore, Act 250 jurisdiction attaches to the Guilford Cabins property as involved land with Petitioner's North Star project.

VI. ORDER

1. The Board takes official notice of the District #3 Environmental Commission's Findings of Fact and Conclusions of Law and Order in *Re: Ralph G. Winchester d/b/a R.G. Winchester Auto, #2W1058*, issued on February 20, 2001 for the limited purposes stated herein.
2. The Guilford Cabins property is subject to Act 250 jurisdiction and requires a Land Use Permit.

Dated at Montpelier, Vermont this 19th day of December, 2001.

ENVIRONMENTAL BOARD PANEL

/s/Marcy Harding _____
Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
Alice Olenick
A. Gregory Rainville
Jean Richardson
Nancy Waples