

**STATE OF VERMONT  
ENVIRONMENTAL BOARD**

RE: Guy E. Nido, Inc.  
Declaratory Ruling Request #399  
Docket #DR399

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

This proceeding concerns a Petition for Declaratory Ruling filed by Guy E. Nido, Jr., Janet Nido and Guy E. Nido, Inc. (Petitioners) appealing Jurisdictional Opinion #2-150 (JO) issued on September 27, 2001, and reconsidered on October 18, 2001, asserting Act 250 jurisdiction over the construction of certain improvements to a preexisting automobile service station located on lands owned by Guy E. and Janet Nido, individually, on the north side of Vermont Route 9 in the Town of Wilmington, Vermont.

As explained below, the Vermont Environmental Board (Board) concludes that the Project, as defined below, is not subject to Act 250 jurisdiction.

**I. PROCEDURAL SUMMARY**

On September 27, 2001, the District # 2 Environmental Commission Assistant Coordinator (Assistant Coordinator) issued the JO concluding that the upgrade of gasoline dispensing and vapor capturing equipment, reconfiguration of the station and construction of an island barrier at the Guy Nido, Inc. Service Station (Project) located on the North side of Route 9 in Wilmington, Vermont constitutes the construction of improvements for commercial purposes on more than 1 acre and requires a permit application pursuant to 10 V.S.A. §§ 6001-6092. In an October 18, 2001 letter, the Assistant Coordinator reconsidered his JO and affirmed the conclusions therein.

On October 24, 2001, the Petitioners filed a Petition for Declaratory Ruling with the Environmental Board (Board), appealing the JO. The petition for declaratory ruling is filed pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule (EBR) 3. The Petitioners contend that the Project is on less than one acre and does not require an Act 250 permit.

The Petition was accompanied by a Motion for Expedited Consideration which was granted by the Board.

On November 29, 2001, Board Chair Marcy Harding, acting as Hearing Officer, convened a public hearing in the Town of Wilmington in this matter. The following individuals or entities were granted party status as noted and participated in the

hearing.

Guy E. Nido, Jr. and Janet Nido<sup>1</sup>, EBR 14(A)(2);  
Guy Nido, Inc. by James P. W. Goss, Esq., EBR 14(A)(1);  
The Wilmington Selectboard by Paul Kasanofe, EBR 14(A)(3); and  
The Town of Wilmington by Sonia Alexander and Deborah Anderson,  
EBR 14(A)(3).

Following the conclusion of the hearing, the matter was recessed.

Based upon a thorough review of the record, related argument, and the proposed findings of fact and conclusions of law, the Hearing Officer issued a proposed decision on December 20, 2001 which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before Tuesday, January 8, 2002.

No party filed an objection to the proposed decision nor requested oral argument.

The Board deliberated on January 16, 2002. Based upon a thorough review of the record and filings, including the Petitioners' Proposed Findings of Fact, Conclusions of Law, and Order, the Board declared the record complete and adjourned. The matter is now ready for final decision.

## **II. ISSUE**

Whether the Project constitutes the construction of improvements for commercial purposes on more than 1 acre and requires a permit application pursuant to 10 V.S.A. §§ 6001-6092.

## **III. FINDINGS OF FACT**

To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. *See, Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983).

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Guy E. Nido, Jr. and Janet Nido were represented by James P. W. Goss, Esq.

1. Petitioners, Guy E. Nido, Jr. and Janet Nido, are husband and wife residing in Wilmington, Vermont. They are the sole shareholders of a business known as Guy E. Nido, Inc., which operates two independent businesses in the Town of Wilmington. The first of these businesses is a residential heating oil operation located on Route 100. The second business is a small automobile service station located on lands immediately adjacent to and on the north side of Vermont Route 9 in the western part of town (the Service Station Parcel).
2. This matter pertains exclusively to the Service Station Parcel as there is no significant connection or involvement between the home heating oil business and the Service Station Parcel.
3. The Service Station Parcel is owned by Guy and Janet Nido, individually.
4. The Service Station Parcel is comprised of three contiguous parcels of land as follows: (1) the Garage Parcel, (2) the Bishop House Parcel, and (3) the Triangular Parcel.
5. The Garage Parcel contains a service station which was established and has been operating on the Project site since approximately 1930. The Bishop's House parcel contains a single family residence which is typically leased to a third party. The Triangular Parcel is unimproved land.
6. The Project involves the renovation of the service station in connection with upgrades to the vapor recovery system for the gas pumps.
7. A new vapor recovery system, underground storage tanks, gas pumps and canopy will be constructed on the site.
8. A portion of the existing service station will be demolished and interior renovations will occur within the remainder of the station.
9. A small median strip will also be established in the right-of-way of Vermont Route 9 as required by the Vermont Agency of Transportation.
10. With the exception of the small median island, all construction and operation of the Project is occurring on the Garage Parcel.
11. The proposed improvements are primarily upgrades to existing systems and fixtures at the site to comply with regulatory requirements.

12. Wilmington has permanent zoning but not subdivision bylaws with the result that it is a so-called “one acre town” for purposes of Act 250 jurisdiction. 10 V.S.A. §6001(3).
13. All of the source deeds into Nido indicate that the southerly limit of the Nidos’ property is the northerly line of the Route 9 right-of-way.
14. The Garage Parcel deed states: “Beginning at an iron pin painted yellow marking the common boundary corner of the premises herein conveyed and the lands of Fred Look **located on the northerly side of the highway right of way for Vermont Route #9; thence westerly along the northerly side of the aforesaid Route #9 a distance of 112 feet, more or less,...**”
15. The Bishop House Parcel deed states: “Beginning at an iron stake set in the ground by a maple tree **on the Northerly side of West Main Street**, in the Village of Wilmington; thence Northerly on the lands of said Bishop, this day deeded to the said Grantors, about 100 ft to an iron pipe; thence North-easterly 65 ft to an iron pipe at the North-west corner of the land hereby conveyed; thence Easterly on lands of the Grantors to an iron pipe at the North-west corner of other lands of said Bishop; thence South-westerly long said land about 30 ft to an iron pipe; thence Southerly on said land to the aforesaid Street; thence along said street to the place of beginning;...”
16. No evidence was introduced indicating that the Nidos’ property ownership extends under the Route 9 right-of-way or any further to the south than the northerly line of the Route 9 right-of-way.
17. Merrill Mundell, P.E. researched the Nidos’ deed history and that of adjacent properties. He also reviewed existing older surveys of the Project area. Mr. Mundell further conducted an on-site survey of the property using generally accepted surveying methodology and techniques.
18. As a result of his research and survey, Mr. Mundell produced the Survey introduced as **Exhibit N-8**.
19. All contiguous property owned or controlled by the Nidos at the Project site is 0.901 acres in size and all Project construction, except the small median island, will occur in this area.

20. In connection with the Project, the Vermont Agency of Transportation is requiring that the small median strip be installed by the Nidos within the right-of-way of Vermont Route 9.
21. The Nidos will have to obtain a permit from the Agency of Transportation to conduct work in this area.
22. The total contiguous lands at the Service Station Parcel owned or controlled by Nido, plus the area of the median island, is 0.904 acres in size.
23. The metes and bounds description in the deed for the Garage Parcel excludes any and all portions of the Route 9 right-of-way. Based on the metes and bounds description, the area of the parcel is reasonably estimated to be 14,215.5 square feet.
24. The deed to the Garage Parcel states the following: "The real estate conveyed herein contains by estimation Fourteen Thousand Two Hundred Fifteen and Five-Tenths (14,215.5) square feet, more or less."
25. The Petitioners filed a Certificate of Title produced by the law firm of Reiber, Kenlan, Schwiebert, Hall & Facey, P.C. The Certificate of Title includes an Abstract of the title history of the property back to approximately 1930.
26. The Certificate of Title renders a legal opinion that the southerly line of the Nido property is the northerly line of the Route 9 right-of-way. The opinion further goes on to state that Nido does not own or control any portion of the land located southerly of the northerly limit of the Route 9 right-of-way.
27. The Town of Wilmington does not assess any taxes to Petitioners, or any other party, for the land beneath the Route 9 right-of-way adjacent to the Project parcel.

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

Pursuant to 10 V.S.A. § 6081(a), no person shall commence "development" without obtaining an Act 250 Permit. Under 10 V.S.A. § 6001(3), "development" means the construction of improvements on a tract or tracts of land owned or controlled by a person involving more than one acre of land within a municipality, like Wilmington, which has not adopted both permanent zoning and subdivision bylaws. "Development" also means construction of improvements which would be a substantial change to a

pre-existing development within the meaning of E. Board Rules 2(O) and 2(G).

In this case, while construction of improvements for a commercial purpose is planned by the Petitioners in connection with a pre-existing development, the majority of these improvements are replacing old equipment, upgrading existing equipment to meet current regulations or mere cosmetic changes. For example, a vapor recovery system is to be installed, replacement gas pumps and a canopy are to be constructed, old gas pumps are to be removed and a portion of the existing garage facility is to be demolished and renovated.

The tract of land owned or controlled by the Nidos which is involved in the Project consists of three contiguous parcels of land immediately adjacent to Route 9.

The primary evidence regarding the size of the Service Station Parcel is the Mundell Survey, in combination with the property deeds themselves. Pursuant to the Survey, and the interpretation of the language within the relevant deeds, there appears to be no reasonable doubt regarding the location and configuration of the west, north and east lines of the three parcels. The sole area of possible debate is the location of the southerly line of the Service Station Parcel.

Vermont law holds that where a parcel of land is located adjacent to a public highway, it is presumed, absent contrary evidence, that the abutting owner owns to the centerline of that highway. *See, e. g., Murray v. Webster*, 123 Vt. 194 (1962); *Kennedy v. Robinson*, 104 Vt. 374 (1932); *Marsh v. Burt*, 34 Vt. 289 (1861). This working assumption is used by the Vermont Agency of Transportation in connection with its road improvement projects where title evidence regarding ownership adjacent to public highways is ambiguous.

In this case there is, however, substantial credible evidence rebutting the presumption. First, all sources of title into the Nidos reference the southerly line of the Service Station Parcel as being the “margin” or “limit” of the Route 9 right-of-way. For instance, the Garage Parcel deed states:

Beginning at an iron pin painted yellow marking the common boundary corner of the premises herein conveyed and the lands of Fred Look **located on the northerly side of the highway right of way for Vermont Route #9; thence westerly along the northerly side of the aforesaid Route #9 a distance of 112 feet, more or less, to a point for a corner;...**

[emphasis added].

Additionally, the Bishop House Parcel deed states:

Beginning at an iron stake set in the ground by a maple tree **on the Northerly side of West Main Street**, in the Village of Wilmington;...

[emphasis added].

These express deed descriptions define the southerly line of the Service Station Parcel as the north side of the Route 9 right-of-way. The iron pin and iron stake monuments described in these deeds define the southerly line of the Service Station Parcel as the north side of the Route 9 right-of-way. Furthermore, the area of the Garage Parcel as can be reasonably estimated from the metes and bounds deed description is the same as the estimated area indicated in the deed description itself. Based on this deed evidence, the Nidos do not own anything southerly of the northerly limit of that right-of-way. See, 10 V.S.A. §§301 and 341 indicating that conveyances of land may occur only by a deed executed, witnessed and acknowledged as provided by statute. Ownership of the area under the right-of-way is thus either in a remote predecessor in title to Nido or in the State of Vermont.

Additional evidence supporting the southerly line of the Service Station Parcel as being the north side of the Route 9 right-of-way is the Mundell Survey. The survey was based on a review of the land records, a review of older surveys and an on-site survey using generally accepted surveying methods. This survey clearly shows the Service Station Parcel ending at the north side of the Route 9 right-of-way and includes the iron pin and iron stake discussed above. The survey reveals that the total size of the lands owned or controlled by the Nidos at the Project site is .901 acres.

In this case, the Mundell survey and the relevant deeds confirm that the southerly line of Nido's property is the northerly line fo the Route 9 right-of- way, not the centerline of that right-of-way. Even if one includes the small median island to be installed in connection with the Project, the total tract of land involved with the Project is less than one acre in size.

The Board thus finds that the evidence is clear from the public deed record and from the Nidos' surveying that the southerly line of the Nido property is the northerly line of the Route 9 right-of-way. The Board concludes, therefore, that the tract of land involved in the Project is less than one acre in size. Based on these facts, Act 250 jurisdiction does not attach to the Project.



**V. ORDER**

1. Act 250 jurisdiction does not attach to the Project.
2. The September 27, 2001 JO #2-150, reconsidered on October 18, 2001, is vacated.

Dated at Montpelier, Vermont the 17th day of January 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding  
Marcy Harding, Chair  
John Drake  
W. William Martinez  
Rebecca M. Nawrath  
Alice Olenick  
Jean Richardson  
Nancy Waples  
Donald Sargent, Alternate Member