

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

*Re: Bethel Mills, Inc.*

Land Use Permit  
#3W0898(Altered)-EB  
[DOCKET #851]

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

Bethel Mills challenges a permit condition requiring a screening hedgerow pursuant to Criterion 8(aesthetics), and seeks to reduce the scope of the permitted project. As set forth below, the Board concludes that the Project complies with Criterion 8(aesthetics) with certain conditions. The Board also denies Bethel Mills' request to reduce the scope of the permitted project.

**I. PROCEDURAL SUMMARY**

On March 3, 2004, the District 3 Environmental Commission (Commission) issued Land Use Permit #3W0898 and accompanying Findings of Fact, Conclusions of Law, and Order to Bethel Mills, Inc. (Bethel Mills). The Permit authorizes the previous removal of a sawmill and the construction of a 19,000-square-foot warehouse, wood storage racks and sheds, site paving, and related infrastructure, located on a 4.04-acre tract on North Main Street in Bethel, Vermont (Project).

On May 21, 2004, the Commission issued a Memorandum of Decision on a Motion to Alter and Land Use Permit #3W0898(Altered) and accompanying Findings of Fact and Conclusions of Law and Order (Amended Decision).

On June 21, 2004, Bethel Mills filed an appeal with the Vermont Environmental Board (Board) from the Altered Permit and Amended Decision, alleging that the Commission erred by declining to exclude a .61-acre residential lot from the permitted project. Bethel Mills also challenges Condition 10 of the Permit, which requires it to plant a dense, evergreen hedgerow between the Project and the Pavone property, and related findings and conclusions, and alleges that the Project will comply with 10 V.S.A. § 6086(a)(8) (Criterion 8(aesthetics)) without Condition 10 or other screening requirement.

On July 27, 2004, Board Chair Patricia Moulton Powden convened a Prehearing Conference by telephone with Bethel Mills, represented by Dan Hershenson, Esq. with Lang Durfee, and Mary Pavone, represented by Susan M. Ceglowski, Esq. On July 29, 2004, the Chair issued a Prehearing Conference Report and Order (PCRO) which, among other things, identified issues and set the matter for hearing.

The Board deliberated on the preliminary issue, the scope of the appeal, on October 27, 2004. On November 4, 2004, the Board issued a Memorandum of Decision holding that all of Criterion 8(aesthetics) is on appeal.

On February 16, 2005, the Board convened a public hearing, Chair Moulton Powden presiding. At the hearing, the Board admitted exhibits, took testimony, and conducted site visits. The parties were given until March 16, 2005, to submit supplemental proposed findings and any written closing argument.

The Board deliberated on April 13, 2005, June 22, 2005 and July 20, 2005. Based on the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

## **II. ISSUE**

There are two issues on appeal:

1. Whether the Project complies with Criterion 8(aesthetics).
2. Whether the scope of the permitted project should be reduced to exclude the 0.61-acre residential parcel.

## **III. FINDINGS OF FACT**

To the extent that any proposed findings of fact are included in this decision, 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). Facts stated and terms defined in the procedural summary are incorporated herein. Topic headings are used only for organizational purposes and do not limit the applicability of any particular finding.

### ***Project Tract***

1. Bethel Mills operated a sawmill from approximately 1781 until the 1970s, when it converted the business to retail sales of lumber and building materials. The sawmill was relocated from another site in Bethel to the current Project site after the flood of 1927.
2. The Project tract was originally 2.93 acres in size.
3. At some point, Bethel Mills purchased a half-acre of land from an adjacent residential property owner, Richard Mills, to resolve a boundary line issue.

4. In December 1988, Bethel Mills purchased the remaining 0.61-acre residential property from Richard Mills (Mills Parcel) adjacent to the original 2.93-acre tract.
5. The Project tract is now 4.04 acres in size.

***Project and Context***

6. There are three enclosed buildings and five storage racks on the Project site.
7. The first enclosed building is a two-story retail sales building, approximately 130 feet long by 100 feet wide at its widest point and 60 feet at the narrowest, with space for offices, retail sales and storage; and a 19,000-square foot warehouse. Siding of the retail/office building varies from red to blue-green to brown. There is open storage on the North Main Street side of this building.
8. The second enclosed building is a warehouse, built in 1986, within 15 feet of the Mills Parcel. The warehouse is approximately 130 feet by 130 feet in size with light tan-colored corrugated metal siding and a flat roof. The roof of the warehouse is light in color, as are most roofs within the Project's complex of buildings and storage racks. The light color of the warehouse and its roof increase its visibility. The warehouse is considerably higher in elevation than the retail/office building.
9. The third building is a barn sitting at the front of the lot directly on North Main Street. It has wooden siding.
10. There are five storage racks. Two storage racks on the North Main Street side of the lot are approximately 175 feet long by 25 feet wide and 75 feet long by 25 feet wide, respectively. The smaller of the two storage racks is enclosed on the North Main Street side. A steep, grassy bank extends from North Main Street to the backs of the two storage buildings.
11. Three storage racks sit near the back of the lot. The first one is approximately 175 feet long by 60 feet wide. Behind it is another storage rack, located alongside the railroad tracks, that is approximately 250 feet long by 25 feet wide. The newest storage rack, constructed in 2001, is approximately 126 feet long by 5 feet wide and is located behind the warehouse. This structure consists of a white metal wall along the railroad track side, approximately 15 feet high with open storage facing the warehouse.
12. The two storage racks closest to the railroad tracks are located on property leased to Bethel Mills by the Central Vermont Railroad (CVRR). The

- northwest end of these storage racks is used to store blue pipes and other materials.
13. With the exception of electrical lines running to a single building, Bethel Mills has buried all of its electrical lines on its site.
  14. North Main Street runs along the northeast of the Project tract. Railroad tracks are on southwestern side, and Marsh Meadow Road and the Third Branch of the White River are to the south. Between the river and the railroad tracks is a row of large pine trees. The Project is adjacent to residential properties to the north, and there are residential properties across North Main Street from the Project.
  15. On a gross area basis, the Bethel Mills sawmill and retail lumber yard has been the predominant business development in this part of Bethel since the 1920s.
  16. Similar industrial and commercial uses, such as G.W. Plastics, Valley Motors, and the Grain Mill, are located within three-quarters of a mile of the Project tract, but are not visible from the Project.
  17. The old sawmill operation involved several saws, blowers and a planer, as well as storage of logs and other materials out in the open.
  18. Before construction of the warehouse, sawmill-related structures and piles of materials were situated in that northwestern corner of the Project site.
  19. The conversion of the Bethel Mills property from an operating sawmill to a retail lumber yard in the 1960s and 1970s, and the related construction of improvements, decreased site clutter by bringing materials under cover. Bethel Mills also blacktopped most of the Project site, which decreased mud and dust.
  20. The Project site is significantly lower than the adjacent roadway and the residential properties to the north. This helps minimize the visual impact of the buildings. The warehouse building is built into the side of a slope, with the shortest, above-ground side of the building facing north.
  21. It would be very difficult to put in trees or other landscaping along the Project tract frontage on North Main Street, due to the extremely steep bank, and proximity to the road.
  22. There is no screening between the Project and the residential properties to the north.
  23. Trees cannot be planted between the north side of the warehouse and the Mills Parcel because the 15' strip of land is needed for a fire lane.

24. In December of 2000, Bethel Mills applied for a zoning permit to build the 5' x 126' foot storage rack. The permit was issued with the following notes or conditions: "Since Bethel Mills presently owns the former "Mills" property which is adjacent to and northerly of the Village Industrial District the northerly boundary of the "Mills" property shall be the boundary applicable for satisfaction of the required 25 foot setback; however, any conveyance of title for division of the "Mills" property may necessitate [sic] application for a variance if the division line were to be less than 25 feet removed from the (indecipherable) proposed development."
25. The Zoning Permit was issued on December 21, 2000, and Bethel Mills built the 5' x 126' foot storage rack in 2001.
26. The 5' x 126' foot storage rack was actually built on land leased from CVRR, and it is not clear that the Mills Parcel would be needed to satisfy the 25' setback requirement.
27. Land uses nearest the Project site are primarily residential, with two churches located across the street. Further southeast on North Main Street near the intersection with Route 12 are the Bethel post office and the old Town Hall. An active railroad track runs along the west side of the Project site.
28. The Church Street Bridge runs east/west across the White River at a higher elevation than the Bethel Mills Project site, and to the south of the post office.
29. The original Church Street Bridge is closed for renovation, and there is a temporary bridge in use to the south of the original bridge. The original Church Street Bridge is closer to the Project site and effectively blocks the view of the Project from the temporary bridge currently in use.
30. Commercial development in the village of Bethel is focused east and southeast of the Church Street Bridge.
31. The Project is visible from North Main Street and, to a lesser degree from the original Church Street Bridge. The original Church Street Bridge offers views down over the village and White River, both southeast and northwest, including the Project site.

### ***Lighting***

32. The Project has more lighting than the former sawmill.

33. There are nine lights around the Project.
34. Light #1 is a pole fixture of unknown wattage located next to the river.
35. Lights #2, 3, 4 (with a combined wattage of 1800) are mounted on a single high pole alongside the river and used to illuminate the truck loading area in the lower yard during the early morning hours and in the late evening when there is insufficient daylight. This set of lights casts the light straight out over a broad area. These lights are turned off at night.
36. Light #5 is no longer in use. It was a 150-watt, high-pressure sodium light, on a pole at the back end of the sales building and near North Main Street.
37. Light #6 is a 150-watt, high-pressure sodium light mounted on a storage rack near the back of the site.
38. Lights #7 and 8 are 400-watt halide lights, mounted on the front and south sides of the warehouse, respectively. These lights stay on all night. Light #7 can be seen from North Main Street. Light #8 is primarily visible from Church Street and cannot be seen from North Main Street.
39. Light #9 is a 400-watt metal halide light mounted on the south back end of the warehouse. Light #9 remains on all night. It is primarily visible from Church Street and cannot be seen from North Main Street.
40. Light #10 is positioned high above the entrance to the sales building. Its wattage and type are unknown.
41. None of the lights on the Project site is shielded.
42. According to *The Outdoor Lighting Manual for Vermont Municipalities*, average security lighting standards are 0.5 foot candles in high density residential areas, and no more than 1.5 foot candles in industrial commercial districts. For actively used entryways, lighting levels can increase to an average of 5 foot candles.
43. There are several streetlights along North Main Street.

### **Noise**

44. The background sounds in the area include normal yard maintenance activities, people walking and talking, cars, trucks, the passing of 4-6 trains per day, and occasional air traffic. These sounds occur during daylight hours beginning at approximately 7:00 a.m. By evening, the area generally is quiet.

45. Large trucks enter and leave the site all day beginning early in the morning, with materials arriving onsite as early as 5:30 a.m. These trucks frequently leave their engines running, particularly in the winter when they have to wait in the early morning for employees to arrive.
46. The Project generates noise from back-up alarms on trucks and forklifts. These alarms emit high-pitched, intermittent noises.
47. Sounds generated by the sawmill that was on the Project tract before Bethel Mills converted to a retail lumberyard were likely louder than those generated by the current Project, but were also of a different character.
48. Suppliers' deliveries are unloaded from large delivery trucks. Bethel Mills has its own fleet of delivery vehicles. These are used on a daily basis. All vehicles larger than pickup trucks are also equipped with back-up alarms.
49. Loading of delivery trucks occurs from early morning business hours until late in the day.
50. Also, materials are reorganized and moved in the storage racks around the site from time to time. The Project produces a mixture of non-residential noises all day long related to these activities.
51. There are seven forklifts working the site, one of which is dedicated to use inside the warehouse. The forklifts are used to move materials to and from the storage areas and onto waiting trucks, particularly when the delivery trucks are being loaded. The forklifts and trucks are equipped with backup alarms for safety reasons.
52. Bethel Mills has installed smart alarms on the six forklifts at the site. These types of back-up alarms are self-adjusting as the ambient noise changes.
53. There is a corridor between the storage racks behind the warehouse that Bethel Mills uses routinely for access to the building materials stored on the racks. This corridor extends onto the CVRRR-owned land behind the Mills Parcel, and is located about 100 feet from Ms. Pavone's property line.
54. During the site visit, two different forklifts were driven in reverse in the corridor between the storage racks behind the warehouse, with back-up alarms sounding. One forklift was noticeably louder than the other forklift.
55. Ms. Pavone testified that the loudest and most bothersome source of noise for her is the forklifts that work in the corridor behind the warehouse.
56. Trucks are also brought into the corridor for loading or unloading, but this occurs less frequently than the use of forklifts in the corridor.

57. The noise from the Project can occur in the early morning hours, when the rest of the neighborhood is relatively quiet.
58. Operating hours for the Project are from 6:00 a.m. to 5:00 p.m., Monday through Friday and 6:00 a.m.-12:00 p.m. on Saturday throughout half the year. Winter hours begin at 7:00 a.m.
59. Noise from the Project does not exceed 55 dB(A) Lmax at the Pavone property line.

***Mills Parcel***

60. Bethel Mills purchased the Mills Parcel with the original intent to expand the Bethel Mills business.
61. The Mills Parcel contains a two-and-a-half story home and outbuildings.
62. Bethel Mills filled in the swimming pool on the Mills Parcel and applied for a zoning variance to use the Mills Parcel for storage and for a 5' x 60' open shed. In 2000, the Town of Bethel Development Review Board denied the variance request for expansion of its industrial use onto the Mills Parcel because the Mills Parcel is zoned Village Residential, stating that "the use of the land for commercial reasons would alter the essential character of the neighborhood by bringing more truck traffic, etc. into a residential area."
63. The home on the Mills Parcel has been used as reduced-rate rental housing for Bethel Mills employees, and neither the home nor any of the outbuildings has been used for storage or sales of lumber or other building materials.
64. The house and attached barn on the Mills Parcel provide some mitigation of the Project's noise impacts.
65. Light from the Project does illuminate part of the Mills Parcel, and structures on the Mills Parcel partially block this light from view from some vantage points.
66. The home and attached barn on the Mills Parcel screen or partially screen the Project from at least three and possibly as many as five neighbors, including Ms. Pavone.
67. A row of deciduous and some evergreen trees and shrubs extends across a portion of the rear Mills Parcel boundary, and partially screens the large storage rack nearest the railroad tracks from view from Ms. Pavone's property.



#### IV. CONCLUSIONS OF LAW

The Board must decide whether the Project complies with Criterion 8(aesthetics), with or without mitigating conditions, and whether the 0.61-acre residential lot should be excluded from the permitted project. Each issue is discussed below.

##### A. Criterion 8(aesthetics)

The question under Criterion 8(aesthetics) is whether the Project has or will have “an undue adverse effect on the scenic or natural beauty of the area [or] aesthetics,” with or without a screening row of trees or other mitigating conditions. 10 V.S.A. § 6086(a)(8)(aesthetics). As the opponent, Ms. Pavone bears the burden of proving noncompliance with Criterion 8, *id.* § 6088(b), but Bethel Mills must produce enough evidence for the Board to make affirmative findings. *Re: The Home Depot U.S.A., Inc., Ann Juster and Homer and Ruth Sweet, #1R0048-12-EB*, Findings of Fact, Conclusions of Law, and Order at 31 (Aug. 20, 2001) (citing *Re: Black River Valley Rod & Gun Club, Inc., #2S1019-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 19 (Jun. 12, 1997)).

To determine whether a project complies with Criterion 8 (aesthetics), the Board applies a two-part test, known as the *Quechee* test. The first question is whether the project fits its context. *Re: Barre Granite Quarries, LLC, #7C1079* (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 78 (Dec. 8, 2000) (citing *Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB* (Revised), Findings of Fact, Conclusions of Law, and Order at 24-25 (Aug. 19, 1996); *Re: Quechee Lakes Corp., #3W0411-EB* and *#3W0439-EB*, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1985)). If a project “fits” its context, it will not have an adverse effect, and the inquiry ends. *Re: John J. Flynn Estate and Keystone Development Corp., #4C0790-EB*, Findings of Fact Conclusions of Law, and Order (May 4, 2004).

If a project does not fit its context, this is considered an adverse aesthetic impact, and the Board must determine whether that adverse effect is undue. *Barre Granite*, Findings, Conclusions and Order at 79 (citing *Hand*, Findings, Conclusions and Order at 24; *Quechee Lakes*, Findings, Conclusions and Order, at 17-20).

The Vermont Supreme Court has held that it is the Board, not the average person in the community, who must determine whether a project has an undue impact on the aesthetics of an area. *In re Robert B. and Deborah J. McShinsky*, 153 Vt. 586, 592-93 (1990). “In making such a decision, the Board does not need to poll

the populace or require vociferous local opposition in order to conclude that an average person would consider the project to be offensive.” *Id.* at 592.

### **1. Adverse Impact: Does the Project Fit its Surroundings?**

To determine whether a development fits in with its context, or whether it has an adverse aesthetic impact, the Board considers a variety of factors, including:

1. What is the nature of the project's surroundings? Is the project to be located in an urban, suburban, village, rural or recreational resort area? What land uses presently exist? What is the topography like? What structures exist in the area? What vegetation is prevalent? Does the area have particular scenic values?
2. Is the project's design compatible with its surroundings? Is the architectural style of the buildings compatible with other buildings in the area? Is the scale of the project appropriate to its surroundings? Is the mass of structures proposed for the site consistent with land use and density patterns in the vicinity?
3. Are the colors and materials selected for the project suitable for the context within which the project will be located?
4. Where can the project be seen from? Will the project be in the viewer's foreground, middleground or background? Is the viewer likely to be stationary so that the view is of long duration, or will the viewer be moving quickly by the site so that the length of view is short?
5. What is the project's impact on open space in the area? Will it maintain existing open areas, or will it contribute to a loss of open space?

*Re: J. Philip Gerbode, #6F0396R-EB, Findings of fact, Conclusions of Law, and Order at 11 (Mar. 25, 1991); see also, Re: James E. Hand and John R. Hand, d/b/a Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 25 (Aug. 19, 1996) (factors to be considered include: a. the nature of the project's surroundings; b. the compatibility of the project's design with those surroundings; c. the suitability for the project's context of the colors and materials selected for the project; d. the locations from which the project can be viewed; and e. the potential impact of the project on open space).*

The aesthetic issues in this case can be divided into three categories: general visual aesthetics, lighting and noise.

### ***General Visual Aesthetics***

In this case, the Project's surroundings are primarily residential, with two churches, railroad tracks with a bridge, the Church Street bridge, and one bank in the vicinity. The boundary between the original Project tract and the Mills Parcel is also the boundary between the village industrial zoning district and the residential zoning district. There are other large commercial or industrial uses within a three-quarter-mile radius that are not visible from the Project site. These include the G.W. Plastics facility and a car dealership. Consequently, the Project is a large commercial project that directly abuts a residential part of Bethel.

At 19,000 square feet, the warehouse is much larger than other buildings in the area, and its materials and colors differ from most of those of the other buildings in the area. These factors would tend to weigh against Bethel Mills in the first part of the *Quechee* aesthetics analysis. However, the Project is at a lower elevation than the surrounding residences and North Main Street, which reduces the aesthetic impact of the structures, particularly the large warehouse. The Project is also a vast improvement over prior aesthetic conditions on the Project site.

There is no question that Bethel Mills has improved the general aesthetics of the Project site in the past 30 or 40 years. By all accounts, the old sawmill was much more aesthetically adverse than the current retail operation, with large quantities of materials out in the mud and dust. Bethel Mills deserves credit for improving this industrial site over the past several decades. This is relevant under Criterion 8 insofar as the development's "impact on open space" is a legitimate consideration, *Gerbode*, Findings, Conclusions, and Order at 11, and the Board gives great weight to this factor in this case. Given this vast improvement over prior conditions, it is hard to see how the Project could have an adverse aesthetic impact.

Based on these unusual facts and circumstances, the Board concludes that the general visual aspects of the Project fit the visual context of their surroundings and cause no adverse aesthetic impact.

Because there is no adverse impact from the Project's general appearance, the screening condition can be deleted from the permit, and there is no need to consider the second part of the *Quechee* analysis.

### ***Lighting***

There are several lights on the Bethel Mills site. The context in terms of the lit environment at night includes regular residential lighting, which is low in comparison

to the lights on the Project site, and street lights along North Main Street.

The street lights, though bright, are consistent with the primarily residential nature of the surrounding area. The lights on the Project site, by contrast, are not. These lights are not shielded and can be seen from North Main Street and the surrounding area. As set forth below, this is something that can be addressed through minimal mitigation. The Board concludes that the lights have some adverse aesthetic impact.

### **Noise**

The Project generates noise from back-up beepers on trucks and forklifts, from truck engines, and from a ventilation fan. The back-up alarms are equipped with technology that varies their volume with the ambient noise. The noise in the area varies by time of day, but includes passing trains from time to time, normal residential traffic, and normal levels of residential noise that drop during the night and into the early morning.

In the *Hannaford* case, the Board held that noise from backup beepers, a PA system, and the bangs from loading and unloading at a Lowe's home improvement store next to a residential neighborhood, would have an adverse aesthetic impact. *Re: Hannaford Brothers Co. and Southland Enterprises, Inc., #4C0238-5-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) at 18 (Nov. 27, 2002). The Board concluded that "it is the sudden, sharp, piercing, disruptive and instantaneous noises - such as those which will be created by the backup beepers on trucks and forklifts, the PA system, and the bangs from loading or unloading of products - that cause the Project to not fit within its surrounding context." *Id.* at 13. Although there is no PA system at issue here, there are backup alarms and noises from unloading materials that are sudden, sharp and disruptive, particularly in the early morning hours when the neighborhood is relatively quiet.

Bethel Mills represents that noise from the Project will not exceed 55 dBA Lmax at the property line between Ms. Pavone's property and the Mills Parcel. The standard applied in past cases is slightly different: 55 dBA Lmax at neighboring homes during the daytime, and 45 dBA Lmax at neighboring homes between the hours of 7:00 p.m. and 7:00 a.m. *Hannaford*, Findings, Conclusions and Order (Altered), at 25. Noise from the Project does not currently meet this standard, and noise in the early morning hours is of special concern.

Accordingly, the Board concludes that noise from the Project is out of context with its surroundings and that reasonable mitigation is appropriate, as discussed below.

## 2. Is the Impact Unduly Adverse?

Because there are aesthetic aspects of the Project that are out of context with the surrounding area (i.e., light and noise), the Board must determine whether those impacts are unduly adverse. *Barre Granite*, Findings, Conclusions and Order at 79 (citing *Hand*, Findings, Conclusions and Order at 24; *Quechee Lakes*, Findings, Conclusions and Order, at 17-20). An aesthetic impact is unduly adverse if any of the following is true:

1. The project violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area;
2. The project offends the sensibilities of the average person because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area; or
3. The applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings.

See *Black River* at 19-20; *Hand* at 25-29; *Quechee Lakes* at 19-20.

In this case, Ms. Pavone concedes that there is no clear, written community standard intended to protect the aesthetics of the area. Therefore, only the second and third questions apply. Because mitigation or the lack thereof can affect the “shocking and offensive” analysis, the third question is addressed first.

### a. Reasonable Mitigation

In this part of the *Quechee* test, the Board looks to the steps that the applicant has taken or may take to reduce the aesthetic impacts of a project on the character of the area where it is proposed; the Board asks whether there are generally available mitigating steps that have or should be taken to improve the harmony of the project with its surroundings. See *Re: Thomas W. Bryant and John P. Skinner*, Findings, Conclusions and Order at 22 (height and exterior color restrictions on homes, plantings to screen the development, covenants to govern future activities on the site and retained open space all comprised generally available mitigating steps to alleviate adverse effects of subdivision on the surrounding area). This element of the *Quechee* test goes hand-in-hand with the Board’s authority to impose reasonable permit conditions to bring a project into compliance with any criterion. 10 V.S.A. § 6086(c).

### ***Lighting***

As noted above, the glare from the unshielded lights can be mitigated easily, by shielding them and focusing them downward. These are “generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings.” *Quechee*, Findings, Conclusions and Order at 19-20. Cut-off fixtures, and lowering the height of the light sources, can help reduce glare. However, the best approach is to provide Bethel Mills with flexibility to decide how best to meet this permit requirement.

### ***Noise***

Bethel Mills represents that noise from the Project will not exceed 55 dB(A) Lmax at Ms. Pavone’s property line. However, the standard the Board applied in the *Hannaford* case for noise from a commercial development near a residential neighborhood, requires that noise limits be gauged at the nearest residences, not the property line. *Hannaford*, Findings, Conclusions and Order (Altered) at 25. This precedent also supports a higher noise limit during daytime hours than during the night (7:00 p.m. – 7:00 a.m.). *Id.* Although part of what Bethel Mills has offered as mitigation in this case – a limit at the property line – may be more stringent than the Board’s standard, part of it is less so (the nighttime standard). The *Hannaford* standard will provide more protection from noise when the neighborhood is generally quiet, yet it will allow Bethel Mills considerable flexibility to decide how to keep noise within these limits. Accordingly, the Board will apply the *Hannaford* noise standard as reasonable mitigation.

The other issue of concern to the Board is the noise from trucks idling on the Project tract in early morning hours. Even with the *Hannaford* standard, the Board concludes that it is reasonable to require that Bethel Mills limit this idling to the part of the Project site that is on the other side of the retail/office building from Ms. Pavone’s home. Limiting trucks to the paved area to the south of the retail/office building, and no closer to North Main Street than that building, will further mitigate any noise from these trucks before 7:00 a.m.

### ***Shocking and Offensive***

Next, the Board must determine whether Project is so out of character with its surroundings, or so significantly diminishes the scenic qualities of the area, that it is offensive or shocking to the average person. *Re: Pike Industries, Inc.*, #1R0807-EB, Findings of Fact, Conclusions of Law, and Order at 18-19 (Jun. 25, 1998); *Re: OMYA, Inc. and Foster Brothers Farm, Inc.*, #9A0107-2-EB, Findings of Fact,

Conclusions of Law, and Order at 37 (May 25, 1999), *aff'd*, *OMYA, Inc. v. Town of Middlebury*, No. 99-282 (Jul. 26, 2000). This is an objective test. *In re McShinsky*, 153 Vt. 586, 592 (1990).

With the reasonable mitigating conditions set forth above, the Project is not shocking and offensive. The Board concludes that this Project complies with Criterion 8.

## **B. Scope of the Permitted Project**

Bethel Mills asks the Board to exclude the .61-acre Mills Parcel from the "permitted project" pursuant to *Re: Stonybrook Condominium Owners' Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 17 (May 18, 2001). Generally, the permitted project includes the entire tract or tracts of involved land. *Stonybrook*, Findings, Conclusions and Order at 17 and at 20 n.13. In *Stonybrook* and subsequent cases, the Board has carved out an exception to that rule for "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," the construction of improvements. *Id.* at 17.

Although the Board did not actually limit the scope of the permitted project in *Stonybrook*, it noted that to do so would require careful evaluation of the actual impacts or effects of the project on values protected by Act 250. *Stonybrook*, Findings, Conclusions and Order at 17-18. Specifically, the Board stated that:

delineating such boundaries will require a careful evaluation . . . 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 . . . 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.

*Stonybrook*, Findings, Conclusions and Order at 19 (footnote omitted). Reduction of the scope of permitted projects is only appropriate in exceptional circumstances, where a requesting party is able to prove that the extent of the project's impacts is limited.

There is ample evidence that Bethel Mills' business plans for the Mills Parcel were short lived. Regardless of the fact that the business connection between the parcels has been virtually severed, the Act 250 nexus is more difficult to cut. Noise and light from the Project do affect that residential land, and the house, outbuildings and vegetation on the Mills Parcel provide some screening – both visual and aural – of the Project. Accordingly, the Board cannot grant Bethel Mills' request to reduce the scope of the permitted project under *Stonybrook*.

Although it is beyond the scope of this permit appeal, the Board notes that the question of whether the Mills Parcel is involved land has not been addressed in any jurisdictional opinion. Involved land is defined in EBR 2(F) to include:

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 commercial or industrial 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.

EBR 2(F)(1)(defining "involved land").

The Mills Parcel was acquired after the warehouse was built, for the purpose of expansion of the retail lumberyard and building materials business. It would appear that the land has not been used for that purpose. Whether the Mills Parcel constitutes involved land under EBR 2(F), or whether it formerly did but no longer does, could be addressed by the appropriate district environmental coordinator upon request by Bethel Mills.

Given the scope of this appeal, however, the Board lacks authority to determine whether such after-acquired property would become involved land under the facts of this case.



**V. ORDER**

1. The Project, with the conditions discussed herein, complies with Criterion 8(aesthetics). Land Use Permit #3W0898(Altered)-EB is issued herewith.
2. Bethel Mills's request to exclude the Mills Parcel from the permitted project is DENIED.

DATED at Montpelier, Vermont this 4<sup>th</sup> day of August, 2005.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*\_\_\_\_\_  
Patricia Moulton Powden, Chair\*  
George Holland\*\*  
W. William Martinez  
Patricia Nowak  
Alice Olenick\*  
Karen Paul\*  
Richard C. Pembroke, Sr.  
A. Gregory Rainville  
Christopher D. Roy

\* Chair Moulton Powden and Members Alice Olenick and Karen Paul DISSENT in part as follows:

We dissent from the majority's conclusion that the Project has no adverse visual impact. We all agree that the appearance of Bethel Mills has improved since it was used as a sawmill, and there is no doubt the Project is less aesthetically adverse than before. However, that sawmill was never subject to Act 250 and we are required to apply the law as it exists today. Under Criterion 8, a project has an adverse aesthetic effect if it is out of context with its surroundings. In this case, the scale of the new warehouse, as well as its style, colors, and building materials, are substantially different from the other buildings in the area, many of which are private homes. Had this Project received Act 250 review prior to construction, screening would likely have been required between the warehouse and the neighboring residences. This sort of reasonable aesthetic mitigation has been standard operating procedure in Act 250 for years. We see no reason to stray from these requirements today.

Conducting Act 250 review after a project is already built is always a challenge because we, as humans, want to be "fair" to all concerned. Conditions imposed on a project after it has been built may seem unfair and unnecessary. However, the more fair approach is to apply Act 250 evenhandedly, without regard to whether the project was built when the application was filed.

Otherwise, we join in the Board's decision.

\*\* Board Member George Holland DISSENTS in part, as follows:

I join in the Board's decision except that I would apply the more restrictive noise standard from 7 p.m. through 6 a.m. rather than through 7 a.m.