

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

*Re: Bethel Mills, Inc.*

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

**MEMORANDUM OF DECISION**

Bethel Mills challenges a condition requiring a screening hedgerow pursuant to Criterion 8(aesthetics), and seeks to reduce the scope of the permitted project. This decision addresses a preliminary issue, the scope of the appeal concerning Criterion 8(aesthetics). As set forth below, the Board concludes that all of Criterion 8(aesthetics) is on appeal.

**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. (Permittee). The Permit authorizes the previous removal of a sawmill and the construction of a storage building, 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, Permittee 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. Permittee also challenges Condition 10 of the Permit, which requires that the Permittee 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 the Permittee, 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.

**II. ISSUE**

The preliminary issue before the Board is:

Whether the scope of the issue on appeal with respect to Criterion 8 (aesthetics) should be limited to Condition 10 or any other requirement of a screening hedgerow?

### III. DISCUSSION

The Permittee challenges Condition 10 of the Permit, which requires, pursuant to Criterion 8(aesthetics) that the Permittee plant a dense, evergreen hedgerow. The merits issue in this case is whether the Project complies with Criterion 8(aesthetics) without Condition 10 or any other screening requirement. It is undisputed that Condition 10 was imposed to alleviate adverse affects under Criterion 8 (aesthetics). Adjoining property owner Mary Pavone argues that Permittee's appeal put all of Criterion 8(aesthetics) before the Board. Permittee argues that the issue is limited to consideration of the screening requirement imposed under Condition 10.

Vermont Supreme Court and Board precedent are clear that once an issue under a particular criterion is on appeal, the "whole criterion" is on appeal. *In re Taft Corners Associates, Inc.*, 160 Vt. 583 (1993); *In re: Green Peak Estates*, 154 Vt. 363 (1990); *Re: City of Montpelier, #5WO840-6*, Memorandum of Decision (September 9, 1999).

In *Green Peak Estates*, the Court ruled that:

Where an appeal of a ruling by the Commission is taken to the Board, the Board must "hold a *de novo* hearing on all findings requested by any party." In a *de novo* hearing, the tribunal hears the matter as if no prior proceedings had taken place. Because all of the evidence must be heard anew, . . . it follows that each of the original parties has the right to be heard. Although Board Rule 40(d) provides that "[i]f timely notice of appeal is filed by a party, any other party entitled to take an appeal . . . may file a notice of appeal," this rule is permissive, at least where the other party does not wish to address criteria other than those already noticed.

*In re Green Peak Estates*, 154 Vt. at 372-373 (citation omitted).

It is worth noting that this approach differs markedly from that in civil practice, in which an intervening party would need to file its own cross, counter or responsive pleading to ensure that certain issues are before the court. See *generally* V.R.C.P. 8; V.R.A.P 3. However, where Board practice is concerned, the Vermont Supreme Court has endorsed the "whole criterion

rule,” to avoid encouraging the filing of “duplicitous” appeals. *In re Green Peak Estates*, 154 Vt. 363, 372, 373 (1990). Whether this approach or the standard civil approach is the better one, the case law is clear that the whole criterion rule applies in Board appeals.

The Permittee acknowledges this well-established precedent, but argues that this case should have a different result because the Notice of Appeal raised only the screening issue under Criterion 8(aesthetics). In support of this argument, Permittee cites *Re: University of Vermont and State Agricultural College et al.*, #4C0895-EB, Findings of Fact, Conclusions of Law, and Order (August 28, 1992). In the *UVM* case, the Board declined to conduct “an overall evaluation of aesthetics” because a memorandum of the issues on appeal raised only certain specific issues (the aesthetics impacts of (1) noise generation, (2) student council, (3) lack of occupancy controls, (4) lack of open space, and (5) loss of a view corridor to the Green Mountains).

However, the *UVM* case did not involve another party who relied on the original notice of appeal. To the contrary, *UVM* illustrates a corollary to the whole criterion rule: if a narrow issue has been appealed and no party seeks a broader review, the Board hears only the narrow issue raised in the notice of appeal. See also *Re: Realty Resources Chartered and Bradford Housing Associates*, #3R0678-EB, Memorandum of Decision at 5 (Feb. 17, 1994)(citing *In re Killington Ltd.*, 159 Vt. 206, 214 (1992); *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)).

The *UVM* case does not apply here because Ms. Pavone has requested a broader review under Criterion 8(aesthetics) than that urged by the Permittee. The whole criterion rule applies. Nothing in applicable case law or Rule 40 indicates otherwise.

The Permittee argues that it should not be put to the task of retaining expert testimony with regard to issues which it contends were not seriously challenged in the District Commission hearings and which have not been identified by an adverse party in a cross-appeal to the Board. First, Act 250 appeals are heard *de novo*, and it is irrelevant whether a party raised a particular issue before the Commission. Second, the evidence in this case will be prefiled, so each party will have an opportunity to review and respond to the other party’s evidence before the hearing. This practice has long served the important function of providing parties with notice and a meaningful opportunity to respond to opposing parties’ cases, without resort to civil discovery.

The whole criterion rule endorsed by the Vermont Supreme Court remains undisturbed. Parties have been relying on this rule for at least a

decade. To change it now would put intervenors like Ms. Pavone at an unfair disadvantage.

Although the Notice of Appeal clearly challenges Condition 10 and any other screening requirement, all of Criterion 8(aesthetics) is at issue. To be clear, it is only the portion of Criterion 8 related to aesthetics that is raised by the intervenor. Other issues under Criterion 8, such as historic sites, remain beyond the scope of this appeal.

#### **IV. ORDER**

For the foregoing reasons, the Board answers the preliminary issue in the negative. The Permittee's request to limit the scope of this appeal to the screening requirement and planting of a hedgerow in Condition 10 or otherwise is DENIED.

DATED at Montpelier, Vermont this 4<sup>th</sup> day of November, 2004.

ENVIRONMENTAL BOARD

/s/ Patricia Moulton Powden  
Patricia Moulton Powden, Chair  
George Holland\*  
Samuel Lloyd  
Patricia Nowak  
Alice Olenick  
Karen Paul  
Richard C. Pembroke, Sr.\*  
Jean Richardson

\* Board members George Holland and Richard C. Pembroke, Sr., dissent.