6. *Stonybrook*

In May 2001,the Environmental Board issued a decision in the matter of *Re: Stonybrook Condominium Owners Association,* Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order (May 18, 2001) (*Stonybrook).* In this decision, the Board stated, for the first time, that a project may encompass less than the entirety of the parcel on which it sits.

Stonybrook has been the subject of much discussion over the past five years. The Land Use Panel's September 26, 2006 decision not to move forward with a *Stonybrook* rule *does not change the fact that the decision survives today as Environmental Board precedent*.

What *Stonybrook* applies to: whether a permit amendment is required

The issue in *Stonybrook* was whether a permit amendment was required for the proposed demolition of a farmhouse on a permitted housing development. This involved an analysis of whether the farmhouse was a part of the project that was the subject of the Land Use Permit – the "permitted project," as the term appears in former Environmental Board Rule 34(A). The Board held that the "permitted project" included the entire tract of land on which the housing development was located, and that demolition of the farmhouse therefore required a permit amendment. *Stonybrook* at 20.

The most significant aspect of the decision, however, was the Board's statement that it "would allow a permittee to attempt to limit the boundaries of its 'permitted project'" under certain circumstances. *Stonybrook* at 18.

Currently, a permit amendment is required for any material change to a "permitted development or subdivision." Act 250 Rule 34(A):

> An amendment shall be required for any material change *to a permitted development or subdivision*, or any administrative change in the terms and conditions of a land use permit.

(Emphasis added). A material change is one "which has a significant impact on any finding, conclusion, term or condition of the project's permit and which may result in an impact with respect to any of the criteria" of Act 250. Act 250 Rule 2(C)(6).

If the scope of the permitted project is reduced to an area which is smaller than the tract on which it is located, activities or changes on the tract that are not within the scope of the permitted project will not require a permit amendment, even if they would otherwise have constituted a material change. *See, Re: Alpine Stone Corp.,* #2S1103-EB, Findings of Fact, Conclusions of Law, and Order at 43 (Feb. 4, 2002)(noting that "If the Commission were to limit the scope of the permitted project as Permittees propose, the requirements of EBR 34 would apply only to the 21.6-acre parcel").

Rule 34(A) now refers to a "permitted development or subdivision" instead of a "permitted project." Although the *Stonybrook* case concerned a development and not a

subdivision, the decision seems to indicate that subdivisions would not qualify for "permitted project" reduction. See, *Stonybrook*, Findings of Fact, Conclusions of Law, and Order at 17: "In some instances, such as subdivisions, a 'permitted project' will encompass the entire tract of land on which it sits."

Before *Stonybrook*

Before the *Stonybrook* decision, the "permitted project" was considered - because the question had never been raised - to be the entirety of the tract or tracts on which the project occurred. Thus, the metes and bounds of the project tract (as described in the deed referenced in the permit) defined the "permitted project" for Rule 34(A) purposes. This "bright line" test was easy to apply and to administer. In *Stonybrook,* the Board adopted this bright line test as the default definition or general rule for the scope of the permitted project, but it went on to state that the permitted project could be limited under certain circumstances. *Stonybrook* at 18.

After *Stonybrook*

In *Stonybrook* the Board said that the boundaries of the "permitted project" (now "permitted development or subdivision") could be modified, in limited instances, to be an area smaller than the entire tract. Future construction within that area would be subject to Rule 34(A)'s requirement that an amended permit be obtained for any material change. However, construction *outside of the boundaries* of the "permitted project" would not require a permit amendment.[1] *Stonybrook* at 18. The Board wrote:

> 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.

[1] Of course, if such construction would independently trigger Act 250 jurisdiction because it is itself a "development" or "subdivision," 10 V.S.A. §§6001(3) and (19), a Land Use Permit would be required.

Stonybrook at 17 – 18. The Board's decision, however, made it clear that shrinking the "permitted project" to less than the tract might not be an easy task:

> 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 . . . 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***. . . .[I]n 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 at 18 (emphasis added; footnote omitted). The Board also noted that a request to limit the permitted project would "likely preclude the District Commission from treating the application as a 'minor' application" under Rule 51. *Id.,* n.10.

After *Stonybrook,* the Environmental Board ruled that the District Commission, not the District Coordinator, should rule on applications to reduce the scope of the permitted project. *Re: Alpine Stone Corp.,* #2S1103-EB, Findings of Fact, Conclusions of Law, and Order at 43 (Feb. 4, 2002)(noting that *Stonybrook* requires full evaluation of the nature and extent of the project's impacts, which is the type of review district commissions conduct).

In another subsequent decision, the Board denied a request to eliminate a residential lot from the permitted sawmill and retail building products project on the grounds that lights and sounds from the permitted project went onto and were buffered by the residential property. *Re: Bethel Mills*, #3W0898 (Altered)-EB, Findings of Fact, Conclusions of Law, and Order at 15-16 (Aug. 4, 2005). The Board noted that "[r]eduction 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." *Bethel Mills* at 15. The Board held that the exceptional circumstances did not exist in that case.

There is no Environmental Board decision to serve as an example of how *Stonybrook* relief has been granted. To date, the Environmental Court has not granted a *Stonybrook* request or otherwise issued a ruling based on this concept of reducing the scope of the permitted project.

When a *Stonybrook* motion may be filed

Although the *Stonybrook* decision addressed the issue of "permitted project" reduction within the context of an amended permit application, there is no sound reason to prohibit an applicant for a project from seeking such a reduction within the context of an original application. Allowing an applicant to seek a reduction at the initial stage will, before any construction occurs, inform the applicant as to the scope of the permitted project and will allow neighbors to the project the opportunity to comment on the project's scope. Of course, because it may be difficult or impossible to evaluate the extent of a project's impacts before any construction or activities occur, a Commission may choose to defer ruling on a *Stonybrook* motion until a later time.

Related Legislation and Rules

Legislation

The Vermont legislature has enacted its own "Stonybrook"-type legislation. First, a statutory provision added in 2004 restricts jurisdiction and permit conditions on lands that are being farmed:

> When development is proposed to occur on a parcel or tract of land that is devoted to farming activity as defined in subdivision 6001(22) of this section, only those portions of the parcel or the tract that support the development shall be subject to regulation under this chapter. Permits issued under this chapter shall not impose conditions on other portions of the parcel or tract of land which do not support the development and that restrict or conflict with accepted agricultural practices adopted by the secretary of agriculture, food and markets

10 V.S.A. §6001(E).

A similar provision exists for communications towers:

> In addition to other applicable law, any support structure proposed for construction, which is primarily for communication or broadcast purposes

> and which will extend vertically 20 feet, or more, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes, shall be a development under this chapter, independent of the acreage involved. If jurisdiction is triggered for such a support structure, then jurisdiction will also extend to the construction of improvements ancillary to the support structure, including buildings, broadcast or communication equipment, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure. To the extent that future improvements are not ancillary to the support structure and do not involve an additional support structure, those improvements shall not be considered a development, unless they would be considered a development under this chapter in the absence of this section. The criteria and procedures for obtaining a permit under this section shall be the same as for any other development.

10 V.S.A. §6001c (1997).

Rule

The Land Use Panel considered a draft proposed rule that would codify the *Stonybrook* decision. However, on September 26, 2006, the Panel tabled action on the draft rule after hearing arguments against its adoption from the district coordinators, reserving the right to go forward with the rule at a later date. The Panel's action was not intended to change the existing case law on *Stonybrook.*

The decision and subsequent related decisions remain in place today for appropriate situations, and Commissions may apply this Environmental Board case law as warranted.