STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., CHAPTER 151

RE: Imported Cars of Rutland, Inc.
North Clarendon, Vermont

Findings of Fact and
Conclusions of Law
Land Use Permit
Amendment #1R0156-2-EB

Imported Cars of Rutland, Inc. ("Imported Cars" or "Permittee") filed an appeal and a Motion for Order for Issuance of a Land Use Permit pursuant to 10 V.S.A., Chapter 151 with the Environmental Board (the "Board") on August 4, 1982. Imported Cars appeals from District #1 Environmental Commission's Findings of Fact and Conclusions of Law dated July 20, 1982, denying Land Use Permit Amendment Application #1R0156-2 for the installation of three advertising signs at the previously permitted auto dealership. The dealership is located at the intersection of Vermont Route 103 and U.S. Route 7 in the Town of North Clarendon, Vermont.

The Chairman of the Board held a pre-hearing conference on August 26, 1982 at City Hall, Rutland, Vermont. The Board convened a public hearing on September 8, 1982 at City Hall, Rutland, Vermont, Chairman Leonard U. Wilson presiding. Parties present at the hearing were:

Appellant/Permittee, Imported Cars of Rutland, Inc. by
A. Jay Kenlan, Esq.; and
State of Vermont, Agency of Environmental Conservation by
Dana Cole-Levesque, Esq.

At the request of and with the agreement of the parties, the Board conducted a site visit.

I. PROCEDURAL ISSUES IN THE APPEAL

Along with its notice of appeal, Imported Cars filed a Motion for Order of Issuance of Permit. The Board heard oral argument on the motion, took it under advisement and then heard the substantive issues raised by the appeal. Based upon the pleadings, oral argument and a memorandum of law submitted by the Agency of Environmental Conservation (the "AEC"), the Board denies the motion made by Imported Cars.

Imported Cars bases its motion upon the following argument:

10 V.S.A. §6088(b) provides that the burden of proof with respect to Criteria 5 through 8 of 10 V.S.A. §6086(a) is on any party opposing the project. Because no "opposing party" appeared at the District Commission hearing on Criterion 8 (the only criterion before the District Commission), the District Commission exceeded its statutory authority in denying the amendment request; therefore, the Board must order the District Commission to enter findings and a decision in favor of the amendment request.

The Board denies the motion because under 10 V.S.A. §6089(a), its statutory authority is limited to de novo review of district commission decisions. Furthermore, 10 V.S.A. §6086 requires that evidence sufficient for making affirmative findings on each criteria be available to the district commission or Board. This burden of providing sufficient evidence on all relevant criteria is always on the applicant.

A. DE NOVO REVIEW

10 V.S.A. §6089(a) requires that the Board hold a de novo hearing on appeals from decisions made by a district commission. "A de novo proceeding at an appellate level commonly designates 'a hearing as though no action whatever had been instituted in the District Environmental Commission below." In re Preseault 130 Vt. 343, 348 (1982). See In re Poole, 136 Vt. 242 (1978); Bookstaver v. Town of Westminster, 131 Vt. 133 (1973); and In re Automobile Insurance Rates, 128 Vt. 73 (1969). A trial de novo is regarded as an original proceeding, and it is immaterial what errors or irregularities took place in the initial proceeding. 2 Am. Jur.2d Administrative Law §698.

In 10 V.S.A. §6089(a) the legislature has specified that an appeal before the Board or Superior Court is to be a de novo review of district commission decisions. Under the de novo mandate, a court, or in this case the Board, has the duty to enforce, and the power to condition or waive the statute or regulations in question in the same manner as the initial reviewing body. It cannot, however, merely make an order affirming or revising the decision of the reviewing body below. In re Poole, supra. Thus, the Board in this case cannot order the District Commission to issue a permit but can only hear the case as though the District Commission had never taken any action.

B. BURDEN OF PROOF

Because the Board is limited to de novo review of district commission decisions, it is unnecessary for the Board to reach the burden of proof issue raised by Imported Cars. However, since this issue frequently confronts district commissions, the Board will discuss the question briefly.

Pursuant to 10 V.S.A. §6086(a), the Board or district commission is required to make positive findings with respect to the so-called ten criteria. 10 V.S.A. §6086(a)(8) ("Criterion 8"), requires a finding that the proposal "will not have an undue adverse effect on the scenic or natural beauty of the

area, aesthetics, historic sites or rare and irreplaceable areas." In order to carry out their responsibilities, under 10 V.S.A. §6027(a) the Board and district commissions have the power to compel the attendance of witnesses and to require the production of evidence. Board Rule 20 outlines this statutory responsibility of the Board and district commission to make reasonable inquiry upon which to base a decision.

Pursuant to 10 V.S.A. §6088(b), the "burden" is on the "opposing party" with respect to Criteria 5 through 8 of §6086(a). The "applicant" has the burden on the remaining criteria (10 V.S.A. §6088(a)). The requirement under §6088(b) that the opposing party carry the burden on specified criteria is unusual. Generally, the burden of proof rests with the party who must establish his case. Typically, the burden remains with the "plaintiff" throughout the proceedings. See Town of Manchester v. Town of Townshend, 110 Vt. 136 (193'8).

There is a second burden that shifts between the parties called the burden of evidence or the burden of going forward and producing evidence. See Larmay v. VanEtten, 129 Vt. 368 (1971). The "burden of going forward" or of producing evidence requires that a party present sufficient evidence to permit a trier of fact to find in that party's favor. Northwestern Mutual Life Ins. Co. v. Linard, 359 F. Supp. 1012, 1021 (D.C.N.Y.)( ). The party having the burden of producing evidence on an issue can lose if, as a matter of law, sufficient evidence to make out a case is not produced. The burden of proof or persuasion, however, refers to the risk borne by a party when the evidence is equal. State v. Robinson, 351 N.E.2d 88 (1976).

Thus, in the Act 250 process the applicant has the burden of producing evidence on all ten criteria. It is the applicant who must produce evidence to support the application and thus provide the district commission or Board with sufficient evidence to make affirmative findings as required by 10 V.S.A. 56086(a). As the court explained in State v. Robinson, a party with the burden of producing evidence can lose if sufficient evidence is not provided. For example, under Criterion 8 an applicant must provide a district commission or the Board with information regarding any historic sites in the project area. If there are historic sites involved, then the applicant would have to provide evidence as to the effect of the project on the historic site. Without such information, a district commission could not make a finding on Criterion 8, and thus the project would have to be denied. However, once such information is provided, any party opposing the project would have to show an undue adverse effect. If the evidence provided by the applicant and "any party opposing" were equal, the district commission or Board would have to find in favor of the applicant.

In the case at hand, the Board must make a de novo review of the criterion at issue; and therefore, it cannot review the District Commission record to determine whether the Applicant satisfied its burden of producing evidence, or whether any opposing party satisfied its burden of proof or persuasion.

II. SUBSTANTIVE ISSUES IN THE APPEAL

The substantive issue raised in this appeal is whether the signs proposed by Imported Cars meet the requirements of Criterion 8 under 10 V.S.A. §6086(a). The Board notes that in previous decisions it has also reviewed such sign proposals under Criterion 5 (unsafe highway conditions) and Criterion 9(K) (impact on public investments). -See Ammex Warehouse Company, Inc., Appeal #6F0248-EB, August 3, 1981. However, in this case thereview is limited to Criterion 8 as it relates to aesthetics and the scenic or natural beauty of the area, since this was the only issue before the district commission, and/or raised on appeal.

The Board's Findings of Fact and Conclusions of Law are based upon the record developed at the hearing as well as a site visit made on the hearing date at the request of the parties. To the extent that the Board has not adopted or incorporated any requests for findings or conclusions by the parties in this decision, the Board has determined said requests are either unnecessary or irrelevant to its decision and said requests are denied. The Board completed its deliberation and adjourned the hearing on October 12, 1982.

III. FINDINGS OF FACT

1. Imported Cars proposes to erect three signs on its property located near the intersection of U.S. Route 7 and Vermont Route 103 in the Town of North Clarendon, Vermont. Two of these signs (Saab and Volvo) will be combined on one support pole. The remaining sign will advertise "Dodge."

2. There is an existing free-standing sign consisting of a number of wooden plaques identifying the various franchises. This sign sets well back from U.S. Route 7 within the paved area of the dealership and is lighted by a spotlight. The sign would be removed subsequent to the installation of the proposed signs.

3. The proposed signs will be located approximately ten (10) feet from the westerly edge of the U.S. Route 7 right-of-way. The combined Saab/Volvo sign will be

located between the existing free-standing sign on the site and U.S. Route 7. The Dodge sign will be located north of the Saab/Volvo sign in the northeast corner of the paved parking area. Exhibit #1.

4. The signs will be standard polycarbonate automotive dealership signs, lighted internally by non-moving, non-flashing lights. Exhibit #4. The illumination of the signs will be operated by a light sensitive timer.

5. The Dodge sign is rectangular and divided into three panels with the Chrysler Corporation corporate symbol, the Penta Star, on top. The top and bottom panels are red with white lettering and the center panel, white with red lettering. The top of the Dodge sign will stand 26 feet off the ground, and with the Penta Star,. approximately 30 feet high. Exhibits #3 and #4.

6. The Dodge sign is approximately 8 feet, 1 7/8 inches wide by 9 feet, 9 3/16 inches high and may be double-faced. The support pole is dark colored and anchored in a concrete base. Each face of the Dodge sign is approximately 80 square feet not including the Penta Star'. Exhibit #4.

7. The Volvo and Saab signs are doublefaced, blue and white in color. The Volvo sign is flag-shaped, approximately 25 feet high and 12 feet wide overall. The flag area is approximately 12 feet long by 5 feet 6 inches wide. Each face of the flag area is approximately 66 square feet. Each face of the Saab sign is about 12 feet long by 3 feet wide for an overall area of 36 square feet. This sign will hang below the flag-shaped area Volvo sign. Exhibit #2.

8. U.S. Route 7 in this area of the Permittee's dealership is a "Limited Access Facility" as defined by 19 V.S.A. §1862. Access to the Permittee's dealership is off a town road that extends from Vermont Route 103.

9. Joseph Drugan purchased Imported Cars of Rutland, Inc. on November 15, 1979. At that time the franchises at this location included Fiat, Renault, Volvo, and Saab. In March of 1982 Mr. Drugan obtained the Dodge car and truck franchise. The display of a Dodge sign is a franchise condition.

10. Signs similar to those proposed can be seen at other automotive dealerships located in Rutland Town just north of the town line, which line is approximately 2.2 miles north of this site. Exhibit #4 and site visit.

11. There are few visual distractions in the vicinity of the Permittee's dealership. The area south of the Rutland Town/North Clarendon line becomes increasingly rural with fewer artificial visual distractions as one drives south on U.S. Route 7. At the Permittee's location the general character of the area is rural.

12. Although the Board readily acknowledges that any business needs to be adequately identified, the Board cannot find that the sign package currently proposed "will not have an undue adverse effect on the scenic or natural beauty of the area" under 10 V.S.A. §6086(a)(8).

IV. CONCLUSIONS OF LAW

The Board concludes that the proposed sign package, if completed as proposed by the Land Use Permit Amendment Application, will cause or result in a detriment to the public health, safety or general welfare under 10 V.S.A. §6086(a), and that pursuant to 10 V.S.A. §6087, the permit amendment application is denied. We base this conclusion on our Findings illustrating the size, the construction material, the colors of the signs, and their nonconformity with the rural character of the area. By this conclusion, the Board does not suggest that other sign proposals would fail to meet the requirements of Criterion 8 under 10 V.S.A. §6086(a).

Jurisdiction over this permit shall be returned to the District #1 Environmental Commission.

Dated at Winooski, Vermont, this 12th day of October, 1982.

Board members participating
in this decision:
Leonard U. Wilson
Lawrence H. Bruce, Jr.
Warren M. Cone
Dwight E. Burnham, Sr.
Ferdinand Bongartz