

VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Lawrence E. Thomas by Findings of Fact, Conclusions of
Raymond P. Perra, Esq. Law and Order
Weber, Perra & Wilson Land Use Permit Application
P.O. Box 558 #2W0644-EB
Brattleboro, VT 05301

This decision pertains to an appeal filed with the Environmental Board ("the Board") on July 17, 1985 (as supplemented on July 24, 1985), by Lawrence E. Thomas from the June 20, 1985 decision of the District #2 Environmental Commission ("the Commission") denying Land Use Permit Application #2W0644-EB ("the Application"). The Application sought approval for the installation and operation of a 125' tall radio communications tower, and related improvements, in the Town of Dover, Vermont.

On August 2, 1985, the Board notified the parties of its intention to appoint an administrative hearing officer to conduct a hearing in this case pursuant to 3 V.S.A. § 811 and Board Rule (EBR) 41. No party having expressed any objection to this procedure, Board Member Ferdinand Bongartz, serving as hearing officer, convened a hearing in this appeal on August 19, 1985. The following participated in the hearing:

Applicant/Appellant Lawrence E. Thomas by Raymond Perra,
Esq.;
The Town of Dover and Dover Planning Commission by Donald
Albano;
The Agency of Environmental Conservation by Gordon Gebauer.

The hearing was recessed on August 19, pending the conduct of a site visit, the submission of proposed findings by the parties, the preparation of a proposed decision, and a review of the record and deliberation by the full Board. A site visit was taken immediately following the hearing./1/ Proposed findings were submitted by the Applicant on August 30, 1985. A Proposed Decision was issued on September 18, and forwarded to all parties of record on that date. On February 10, 1986, the Board heard oral argument with respect to the proposed decision. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing. To the extent that the Board agreed with and found necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby denied.

/1/ The weather on August 19, was very poor: rain and low-lying clouds prevented any visual appraisal of the site from surrounding areas, despite the Applicant's efforts at floating balloons to exemplify the tower.

I. ISSUES IN THE APPEAL

In denying the application, the Commission concluded that the tower would constitute a commercial use prohibited by the Dover Town Plan within the "Agricultural-Residential" district where the project site lies. Because the regional plan incorporates the local plan by reference, the Commission also concluded that the project failed to comply with the Windham Regional Plan.

The Commission further concluded that the Applicant presented insufficient evidence for it to make a judgment with regard to Criterion 8, aesthetics and scenic and natural beauty. Finally, the Commission lacked sufficient evidence to evaluate the project's access road with respect to erosion under Criterion 4.

The Applicant argues that, while the Rural Residential-Agricultural Residential district boundary divides the tower site, he will locate the tower within the Rural Residential zone. The latter zone, the Applicant argues, permits uses such as the proposed radio tower. With regard to aesthetics, the Applicant argues that the tower will be visible from few "public viewing spots" and, therefore, will not have an undue adverse effect on the scenic beauty of the area. Finally, the Applicant asserts that he used accepted erosion control techniques in the construction of the access drive, preventing any erosion problems at the site.

The Town and Planning Commission argue that the project fails to conform with the Town Plan and will have an undue adverse impact on the scenic beauty of the area. AEC believes that the tower would "detract from the natural and aesthetic resources of the town" and recommends that the Board consider the availability of alternate sites and consider reducing the tower's height.

II. FINDINGS OF FACT

1. Applicant proposes to construct a 120' high communications tower^{2/} on an approximately 70 acre tract in Dover, Vermont. The tower is designed for use in radio communications associated with the Applicant's gravel hauling and excavation business. The Applicant uses dump trucks, pick-up trucks and loaders in his business and has a total of 21 vehicles which are radio controlled. Approximately 60% of Applicant's business is in Vermont with the remainder being in New Hampshire.

^{2/} Testimony established the tower's height to be 120'. The Applicant's April 30, 1985 land use permit application described the tower's height as 125'.

2. Mr. Thomas' business office is located in West Chesterfield, New Hampshire. He currently uses short-wave radio communications but the existing system is inadequate because of limited communication distances and because there is no direct communications between vehicles in the field; all communication must go through an employee in the West Chesterfield office.
3. The proposed communications tower would permit the Applicant a broader communication range and would allow, through a "repeater system" direct communication between vehicles in the field. The 120' height proposed in the application is what Mr. Thomas believes to be the minimum height to achieve effective communication, eliminating most "shadow" areas. The tower will allow effective communication within a 40 mile radius.
4. The Applicant was invited to place an antennae on an existing tower on Mt. Snow. However, the Applicant believes this 60' tower to be inadequate because the hill on which he plans to build impedes communications between the Mt. Snow tower and the Brattleboro area.
5. Mr. Thomas has installed a several hundred foot long access roadway to the tower site. The road was established as an access to a homesite where Mr. Thomas intends to erect a personal residence. After selecting the Dover site for his residence and constructing the driveway, Mr. Thomas determined that the property would also be suitable for a communications tower.
6. The site visit revealed that, upon completion of the road construction, the area had been properly stabilized against erosion. Roadside drainage ditches have been installed, the drive has been crowned to improve drainage, the ditches have been lined with stone, and culverts have been installed. The entire area had been seeded incrementally and grass had taken in most areas. Mulch was not necessary because of stable soils at the site. Based upon the implementation of these protective measures, we find that the project will not cause unreasonable soil erosion and will not reduce the capacity of the land to hold water.
7. The tower itself will be constructed of galvanized steel in a lattice-type design. It will be four-sided measuring 10.5' on each side at the base, tapering to 12" each side at a height of 100'. Attached to the top of the tower will be a 25' long, three-quarter inch diameter pipe antennae with a white plastic cover. Trees at the project site range in height between 40' and 50'.
8. The Applicant plans to install a red light on the top of the tower which will be visible from a distance of approximately four miles at night. The light will be installed as

a navigational aid for local pilots, including Mr. Thomas. The light is not required by the Federal Aviation Administration./3/

9. In a section entitled "Guidelines for Development," the January, 1985 Dover Town Plan divides the Town into several distinct areas and, with respect to each, identifies land use purposes, land use recommendations, and recommended uses. These guidelines are supplemented by an "Official Map" depicting graphically the location of land use areas. The land use area boundaries shown on the map are further described in written form in appendices to the Plan.
10. The boundary line dividing the Agricultural-Residential district (D-2, the East Dover Area) from the Rural Residential II district (F-4, the Dover Manor - Sugar House - Heritage Rural Residential Area) apparently crosses the southeast corner of the Applicant's 70 acre tract. Appendices D and F indicate that the dividing line between these two districts is co-extensive with the "Fire District #1 sewer district" easterly boundary line. The parties stipulated that the Fire District's easterly line runs along the top of a ridge which runs roughly parallel to Applicant's westerly property line.
11. No direct evidence concerning the precise locale of the Fire District boundary was presented at the hearing, nor was the Applicant able to definitively state within which district the tower would lie. Because Mr. Thomas has selected the height of land for the location of the tower, it appears that the structure will be located either on the D-2 - F-4 dividing line or within the F-4 District. The Applicant's site plan confirms this finding. See Exhibit #5./4/

/3/ FAA requires lights for all towers exceeding 200' in height. Mr. Thomas has applied to FAA for a permit for the tower so that it will be depicted on FAA navigational maps.

/4/ The Applicant's testimony on this issue was equivocal at best. The burden of proof under Criterion 10 being on the Applicant (10 V.S.A. § 6088), it was incumbent upon Thomas to clearly establish the location of the tower vis-a-vis the Town Plan's district boundaries. The Fire District billing (Exhibit #9) may establish that some portion of the Thomas property lies in the F-4 District but it does not establish that the proposed tower site is in that District.

12. Regardless of where the tower is depicted on the site plan, Mr. Thomas intends to erect the tower at a location within the F-4 District. This would require moving the location in a westerly direction. However, Mr. Thomas intends to maintain a 150' buffer between the tower and his property lines. Therefore, the site can be moved only approximately 75' in a westerly direction. Because the Applicant has not definitively established the location of the D-2 - F-4 boundary, we cannot find that moving the tower base 75' would place the project in the F-4 District. Further, whether or not the tower itself is located in the F-4 District, the access roadway to the site, and the extension of that roadway to the tower base, will be located within the D-2 District.

13. In respect to the D-2 District, the Plan states as follows:

Description. These areas, with some exceptions, are sparsely settled and include working farms and open fields maintained for agriculture and animal husbandry The area includes extensive forest land and undisturbed wildlife habitat that serves as animal refuge areas from more populous portions of the Town.

Land Use Purpose: These areas recognize that there are still areas in Dover in which agricultural as well as residential use is appropriate and should be the primary use of the land. While most residences will be working farms, some non-farming residential use is present and will probably increase. In order to preserve the rural character of these areas, such residential use should be restricted to low density development.

Land Use Recommendations: Farms with barns and other accessory structures associated with agriculture, animal husbandry or other occupations incidental to home industry. Where new buildings are planned that are not to be used for agriculture they should be built on land not suitable for agriculture. Single family dwellings should be limited to a maximum of one building with accessory structures per two or more acres, with the encouragement of cluster development.

Recommended Uses: Forest Management, Outdoor Recreation, Low Density Residential (1 unit per 2 acres), Agriculture.

14. The Plan includes the following provisions with regard to the F-4 District:

Description: Lands for the most part below 2,200 feet MSL. These areas have ready accessibility to Town and State roads with secondary development roads in some areas.

Land Use Purpose: These areas vary from 2,200 to 1,800 feet MSL and consist of variably steep hillsides and upland valleys within which residential housing and housing developments exist or could be developed. They are readily accessible to Town roads and are within Fire District #1, although only partially served by the district sewer at present.

Land Use Recommendations: Recognizing the constraints noted in this plan, these areas are suitable for residential buildings at average densities of not more than two units per acre, utilizing cluster development. Some commercial structures directly associated with residential and recreational facilities are also appropriate.

Recommended Land Uses: Residential Use, Outdoor Recreation, Forest Management.

15. The project does not conform with the purposes, recommendations or recommended uses for the D-2 District. The project is not consistent with the district's purposes of preserving the area's rural character, with farming and low density residential development the predominant features. The project is neither agriculturally related nor is it associated with residential development. Finally, the project is not consistent with the recommended uses listed in the Plan for the D-2 area.
16. The project also does not conform with the purposes, recommendations or recommended uses listed for the F-4 District. The tower is not related to residential activities, the only use identified in the description of district purposes. Neither is the project a "commercial structure directly associated with residential and recreational facilities"; the tower is directly associated with a purely commercial activity: the operation of Mr. Thomas's excavation and hauling business. The tower is not consistent with any of the recommended land uses listed for the F-4 District.
17. The tower would be located on the crest of a prominent ridge which divides East from West Dover. The ridgeline, which runs in a north-south direction, extends from the Town of Marlboro on the south, through Dover and into Wardsboro on the North. The tower would lie at a base elevation of 2250'. Almost the entire ridgeline lies above 2200' in elevation, with some portions (Rice Hill, Cooper Hill) lying above 2500'.
18. The Village of Dover lies less than a mile northeast of the tower site and the Villages of East Dover and Goose City lie approximately two miles away. Ridgelines tend to be

prominent and sensitive natural landscape features. The ridgeline at issue in this case is especially sensitive because of its proximity to three Village areas, the fact that it is situated in an area which has not been subjected to substantial residential or commercial development, and because the ridgeline is currently unbroken, not having been disrupted by man-made structures.

19. The Applicant estimates that the tower will be readily visible from a distance of at least one mile during the day and may well be visible from two or more miles. Exhibit 2. The red light will be visible from a distance of four miles at night. It is a policy of the Town to maintain "an attractive rural environment" and to protect the Town's appearance "through careful siting of all development." Exhibit #6, page 12. These goals have been addressed in the Town Plan through the guidelines for the D-2 District which are intended to preserve the East Dover area in its existing rural, agricultural state. With the exception of a day care center, a village store and a lodge, there are no commercial activities in the East Dover area.
20. The tower will be visible at various points along Route 100 and the Dover Road, both southwest and northeast of the site. Visibility will increase during winter months when vegetation provides less of a visual buffer. The tower may also be visible from some vantage points in Wilmington and Marlboro. In addition to views from roadways, the tower will be visible from several private residences, especially those northeast of the site.
21. We find that the tower could have an undue adverse impact on the aesthetics and scenic and natural beauty of the area. The tower will constitute the first man-made break in an otherwise undisturbed ridgeline. The interruption will be substantial: the tower itself will extend 50' above the treeline and the antennae tip will extend 75' above the treeline. This disturbance could be undue when evaluated in the context of the tower's surroundings: there are few commercial enterprises in East Dover and the area is predominantly pastoral in character with a scattering of residences. The installation of such an obtrusive structure on a sensitive site within an undisturbed, natural pastoral setting could have an undue adverse impact on the scenic beauty of the area.
22. While the Applicant is not responsible for the poor weather conditions encountered during the site visit, the Applicant made no effort to provide visual evidence through alternative media. No photographs of the area were presented and no model of the project was prepared depicting the tower within its surrounding context. The

only evidence in the record upon which we could base findings with regard to aesthetic impacts is the hearing officer's unproductive site visit and directly conflicting testimony offered by the Applicant's consultant, on the one hand, and a long-time Dover resident and member of the Board of Selectmen on the other.

23. The Windham Regional Land Use and Housing Plan (Regional Plan) provides, in part:

"Where duly adopted municipal plans provide more restrictive land use policies, guidelines, or criteria with reference to the development project or public investment involved, such plans shall supersede the Regional Map (i.e. the Regional Settlement Pattern Map) for the purpose of review and commentary."

The Dover Town Plan is more restrictive than the Regional Plan because the Town Plan identifies policies with respect to uses which are recommended for designated districts within the Town. Exhibit #7. Therefore, the Town Plan supersedes the provisions of the Regional Map. Because we have found that the project does not conform with the Town Plan, we also find that the project does not conform with the Regional Plan.

III. CONCLUSIONS OF LAW

We have found that the Applicant has used effective measures to control soil erosion subsequent to the construction of the access road. Installation of stone-lined ditches, culverts, crowning of the road, and seeding disturbed areas have resulted in proper stabilization of the area. We therefore conclude that installation of the road will not cause unreasonable soil erosion nor would erosion occur if the Applicant employed the same practices during the installation of the radio tower.

The tower is intended for use in association with a commercial enterprise, Mr. Thomas' excavation and hauling business. Its purpose is to improve communications between construction vehicles. The tower is, therefore, a commercial structure.

The Applicant failed to establish with precision where the tower would be located in relation to the F-4 - D-2 District boundary. The burden with regard to 10 V.S.A. § 6086(a)(10), conformance with the Town Plan, lies with the Applicant, so it was incumbent upon the Applicant to provide the Board with all information necessary to determine Town Plan conformance. However, we conclude that the tower as depicted on the site plan lies within the D-2 District and, while maintaining a 150'

set-back from his property line, Mr. Thomas will not be able to move the tower site a sufficient distance to remove the project from the D-2 District. Furthermore, the access road which has been installed and the drive to be constructed for access to the tower itself will also lie within the D-2 District.

The project does not conform with the Town Plan's guidelines for the D-2 District: it is not a project consistent with the district's purpose of preserving the area's low-density residential and farming character, the project has no association with agricultural or residential pursuits, and the project is not consistent with any of the uses recommended for the D-2 District. The project also does not conform with the F-4 District guidelines: the tower is not a residential structure, nor is it a commercial structure directly associated with recreational or residential facilities. The tower's function as an ancillary component of a commercial excavation business is not consistent with the uses recommended for the district. Finally, the project does not conform with the Town Plan's goal of preserving an attractive rural environment and preserving the Town's appearance through the careful siting of new structures.

In support of his argument for Town Plan conformance, the Applicant argues that the tower would be compatible with District F-4 goals if it was directly associated with a residence (i.e. for use by a ham radio buff at his own home). No direct testimony of this proposition was offered by the Applicant nor, apparently, has the Planning Commission as a body addressed this possibility. We conclude that a 120' high communications tower is not a structure which a reasonable person would consider or expect to be "directly associated with residential facilities"; such a tower is not among the structures that we would find consistent with the normal development of a residential project in the same manner that barns, garages, pools, storage buildings and other structures would be consistent.

We further conclude that the Windham Regional Plan in essence incorporates by reference the provisions of a duly adopted local plan in those circumstances where the local plan provisions are more restrictive. In submitting Exhibit #7, the Applicant presumably concurs with the conclusion set forth in that exhibit that the Town Plan does contain more restrictive provisions with regard to this project. Therefore, because we have concluded that the project does not conform with the Town Plan, we also conclude that it does not conform with the regional plan.

We also conclude that the Applicant has failed to meet his burden of proof with regard to Criterion 8 - aesthetics and scenic and natural beauty. We discussed at length in Re: Imported Cars of Rutland, Inc., Application #1R0156-2-EB issued October 12, 1982, the concept of "burden of proof" as

distinguished from "burden of going forward." We concluded in that case, as we conclude here, that, irrespective of which party has been allocated the burden of proof by 10 V.S.A. § 6088, the Applicant has the burden of going forward with respect to each of the ten criteria. The latter burden was characterized in our previous decision as the obligation to "present sufficient evidence to permit a trier of fact to find in that party's favor. [Citation omitted.] 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."

Based upon the Applicant's own testimony we have found that ridgelines are, by their very nature, sensitive landscape features. We also found that the ridgeline upon which the tower would be erected is especially sensitive because it has not previously been subjected to visual degradation from development activities and it is close to three rural village areas. The Applicant has estimated that the tower would be visible from at least one mile away during daylight hours (and may be visible from two or more miles), and from a distance of at least four miles at night. This evidence is more than sufficient to raise a substantial issue with regard to the project's impact on the aesthetics and scenic and natural beauty of the area. Yet the Applicant has presented little evidence which would assist the Board in evaluating the nature and extent of the tower's visual impact: no graphic materials were presented in a case which turns on an assessment of visual impacts.^{/5/} We, therefore, conclude that the Applicant failed to meet his burden of proof.

We also note other deficiencies in the Applicant's Criterion 8 case. First, we do not agree that Criterion 8 can only recognize a project's impact on "public viewing areas." In a case such as this where the project may well be visible from the private property of many individuals, the Applicant must produce evidence with respect to impacts on public viewing areas as well as the collective impact on area residents. Nothing in the express language of Criterion 8 restricts our evaluation to impacts on publicly-owned areas. Nor does the language of 10 V.S.A. § 6087 support the Applicant's position.^{/6/} The term "general welfare" encompasses such things as a project's

^{/5/} The testimony of Mr. Jewell and Mr. Brown on which the Applicant relies was in the nature of lay opinion. While they were qualified as experts concerning local and regional planning, they were not qualified as having any particular expertise with respect to aesthetics.

^{/6/} § 6087(a) provides: "No application shall be denied by the board . . . unless it finds the proposed . . . development detrimental to the public health, safety or general welfare."

impairment of scenic vistas enjoyed by residents of Dover. We do not apply Criterion 8 in contemplation of protecting private property; rather, Criterion 8 serves as a mechanism for protecting members of the public from exposure to aesthetic degradation. This objective is consistent with generally accepted police power goals. See DeWitt v. Brattleboro Zoning Board of Adjustment, 128 Vt. 313 (1970) and Galanes v. Town of Brattleboro, 136 Vt. 235 (1978) (preservation of neighborhood continuity); see also, Williams, American Land Planning Law, 1974, §§ 7.01 et seq. (Regulation Under the Police Power).

Second, we do not believe that the Applicant has adequately considered alternative proposals. Little evidence was offered with regard to the feasibility of a shorter tower which would not extend substantially above the treeline at the site. While the Applicant also broached the subject of a potential alternative site on Mt. Snow, little evidence concerning the suitability of that alternative was offered. The Applicant did not provide sufficient technical information concerning his performance requirements to permit the Board to evaluate whether or not feasible on- or off-site alternatives exist.

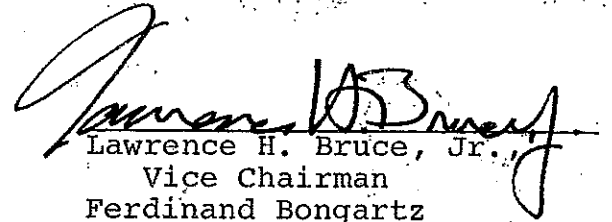
Based upon the above findings of fact and conclusions of law, we conclude that the proposed communications tower described in Land Use Permit Application #2W0644-EB will be detrimental to the public health, safety and welfare with respect to Criteria 8 and 10 of 10 V.S.A. § 6086(a). We therefore deny the Application under the authority of 10 V.S.A. § 6086.

IV. ORDER

Land Use Permit Application #2W0644-EB is hereby denied.

Dated at Sheldon, Vermont this 18th day of February, 1986.

VERMONT ENVIRONMENTAL BOARD



Lawrence H. Bruce, Jr.

Vice Chairman

Ferdinand Bongartz

Jan S. Eastman

Elizabeth Courtney

Samuel Lloyd III

Donald B. Sargent