

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

RE: Washington Electric
Cooperative, Inc. by
Peter G. Anderson, Esq.
Diamond & Associates, P.C.
P.O. Drawer D
Montpelier, VT 05602

Findings of Fact,
Conclusions of Law
and Order
Land Use Permit
#5W1036-EB

This decision pertains to an appeal of a permit that authorized the installation of a 7.2 KV aerial electric distribution utility line along Town Highway #1 in the Town of Washington, Vermont. As is explained below, the Environmental Board has found that the Applicant has failed to **sustain** its burden of proof with respect to 10 V.S.A. § 6086(a)(9)(B) through (L) and (10), and accordingly the application is denied and the permit is void.

I. SUMMARY OF PROCEEDINGS

On June 14, 1989, the District #5 Commission issued Land Use Permit #5W1036, which authorized the construction of a 7.2 KV aerial electric distribution utility line along Town Highway #1 in the Town of Washington. On July 12, Jonathan Abts filed an appeal of this permit with the Environmental Board regarding all ten criteria of 10 V.S.A. § 6086(a). That proceeding resulted in a remand to the District Commission by memorandum of decision dated August 29. The District Commission issued a corrected decision on September 11. Jonathan Abts filed an appeal in the above matter on October 6, again challenging the District Commission's findings on all ten criteria. After briefing by parties, on December 12, the Board issued a memorandum of decision limiting the scope of the appeal to review of the application with respect to 10 V.S.A. § 6086(a)(7) through (10) (Criteria 7 through 10).

An administrative hearing panel convened a hearing on January 31, 1990, with the following parties participating:

The Applicant by Peter G. Anderson, Esq.
Central Valley Regional Planning Commission by
Joe Bongiovanni
Town of Washington Planning Commission by George Plumb
Jonathan Abts

After taking a 'site visit and testimony, the panel recessed the hearing. The hearing was reconvened on March 15, with the same parties participating. After taking testimony, the panel recessed the hearing pending filing of proposed findings of fact and conclusions of law, review of the

455.

Findings of Fact, Conclusions of Law and Order

Washington Electric Cooperative, Inc.

Land Use Permit #5W1036-EB

Page 2

record, deliberation, and preparation of a proposed decision. On April 10, the Applicant and Mr. Abts filed proposed findings and conclusions.

A proposed decision was sent to the parties on September 19, 1990, and parties were given an opportunity to file written comments and to request oral argument before the full Board. On September 27, 1990, the Applicant requested oral argument. On October 31, Jonathan Abts filed a memorandum. The Board convened a public hearing in Berlin on November 7. The Board deliberated on November 29 in Norwich. This matter is now ready for decision. To the extent requests for findings and conclusions are included below, such requests are granted; otherwise, they are denied.

II. ISSUE

The issue before the Board is whether the proposed project complies with the following criteria of 10 V.S.A. § 6086(a): 7 (local governmental services), 8 (aesthetics, scenic beauty, natural areas), 9(A) (impact of growth), 9(B) (primary agricultural soils), 9(C) (forest and secondary agricultural soils), 9(D) (protection of earth resources), 9(E) (extraction of earth resources), 9(F) (energy conservation), 9(G) (private utility services), 9(H) (costs of scattered development), 9(J) (public utility services), 9(K) (impact on public facilities), 9(L) (rural growth areas) and 10 (conformance with local and regional plans).

III. FINDINGS OF FACT

1. This application results from a request to the Applicant from Eugene Galfetti of the Town of Washington for electric service to two residences which he owns in that town along Town Highway #1.
2. The proposed project consists of a 7.2 KV aerial electric distribution utility line. The line will carry more power than Mr. Galfetti will need. The Applicant currently owns an electric line which ends east of the Galfetti residences at the border of the Towns of Washington and Corinth. The Applicant proposes to extend that power line from the town line west along Town Highway #1 to the Galfetti residences. The length of the new power line will be approximately 10,750 feet.

3. The proposed power line will be constructed entirely within right-of-way easements which run along Town Highway #1. The width of the rights-of-way varies but does not exceed 25 feet.
4. Topography in the general area of the proposed project consists of mildly to steeply sloping hills and mountains. The road along which the line will run goes over flat to mildly sloping terrain. The dominant land use is forest interspersed with rural residential development and some agricultural land.
5. The area of the proposed project is largely undeveloped. Town Highway #1, an unpaved country road, is one of the few evidences of human construction in the area. In the area of the proposed project, it runs through the middle of a large tract of land which includes the Washington State Forest, the Washington Wildlife Management Area, Duplissey Swamp and Duplissey Hill. Wetlands exist on either side of Town Highway #1 in this area. No wetlands will be filled as part of the proposed project.
6. Construction of the proposed project will begin with the clearing of the right-of-way to allow construction. Single wood poles will be set up within the right-of-way and the line will be strung along these poles. All poles and utilities will be installed from the surface of Town Highway #1. At no time will the Applicant travel off the road with machinery in order to perform construction activities.
7. The power line itself will not require any services from the Town. Fire, police, and emergency services could be affected if the power line's existence were to encourage growth in the area.
 - a. The power line will cost approximately \$50,000 to \$60,000 to construct, and this cost will be borne by Mr. Galfetti.
9. Pole structures typically will be shorter in height than the trees in the existing forest, allowing the forest to provide a backdrop for the poles. The power line will be a covered conductor called "tree wire" which will blend with the surrounding forest. Use of this conductor will mean that the Applicant will clear a smaller portion of the right-of-way than it would have to with a different kind of wire. This will reduce the amount of trees and other vegetation which is removed along the right-of-way. Small shrubs and

bushes will be allowed to grow up under the power line. Right-of-way clearing and maintenance will be done in accordance with a "Vegetative Management Plan" submitted as part of the application (Exhibit 12). The Applicant has located the power line close to Town Highway #1 in order to reduce the necessary amount of vegetation to be cleared.

10. The proposed power line will cross a stream at two locations. Poles have been placed away from these locations to prevent disturbance of the stream or stream banks.
11. The following types of wildlife have been observed in the general area of the proposed project: black bear, deer, moose, woodcock, and wild grouse. The only species which will be directly affected by the proposed project will be black bear, which use areas both north and south of Town Highway #1 on a seasonal basis. A bear habitat located approximately five to ten miles north of the Galfetti residences is known as a "bear production habitat" because it supports relatively high densities of cub-producing females. The impact on bears from the proposed project will only be during construction, during which bears will be discouraged from crossing the highway.
12. In 1980, the population of the Town of Washington was approximately 700. The current population is approximately 900 to 1000. The Town does not have a capital improvement program.
13. The proposed project itself will not immediately increase the Town's population. If the proposed project were to encourage persons to move to the area of Town Highway #1, the project might result in such a population increase.
14. The Town of Washington is located east of the City of Barre, which is a growing development center and which has in recent years contributed toward growth in the areas east of the City.
15. The construction and land use associated with the proposed project will not reduce the potential of the soils on which the project is located from agricultural or forestry use. No topsoil will be removed from the site.
16. The land on which the proposed project will be constructed contains no earth resources, and no

extraction of such resources is planned as part of the proposed project.

17. No private utility services will be used by the proposed project.
18. The proposed project is not physically contiguous to an existing settlement. The project will serve the two existing Galfetti residences. The Applicant has received a request from David Barre, who lives east of Mr. Galfetti between the Galfetti residences and the border of Washington and Corinth, to connect to the proposed power line.
19. The proposed project itself will not immediately result in costs with respect to public utilities and services. Public utility and **service** costs could result if the proposed project encourages growth.
20. The only public utility service affected by the proposed project is the Applicant. The Applicant has the capacity to provide the requested power.
21. Public investments in the area of the proposed project include Town Highway #1 and the Washington State Forest. The proposed project itself will not immediately affect these investments.
22. The application for the proposed project was filed April 10, 1989.
23. The Town of Washington did not have a plan in effect in April 1989. A plan was proposed in March 1989 and enacted in June 1989.
24. The Central Vermont Regional Planning Commission adopted a revision of its plan in May 1985. A further revision to this plan was enacted on June 13, 1989.
25. The Town Plan and the 1985 and 1989 Regional Plans all contain strong statements that commercial activity and growth should be concentrated in **existing** settlement areas in part to maintain the rural character of the area. The 1985 Regional Plan at page 30 states:

It is the goal of this Plan to insure that the existing settlements remain as community centers. New, major development and growth outside of the existing settlements is to be discouraged until such time as the public facilities, services and structures in the

existing settlements are used to their
fullest capacity. ...

The rural character of Central Vermont is considered an important regional resource, as are the villages, downtowns, and neighborhoods throughout the Region. Development occurring in a scattered pattern outside of the limits of public services already in place could have a serious negative influence on both the Region's character and its existing settlements. While it is important that growth be promoted in a positive economic context, such growth should not occur at the expense of the Region's existing settlements.

IV. CONCLUSIONS OF LAW

The burden of proof is on the Applicant in this proceeding except with respect to Criteria 7, 8, S(A), and 9(A), concerning which the burden is on those parties **opposing** the application. To V.S.A. §§ 6086(a)(9)(A), 6087.

The burden of proof refers primarily to the risk of non-persuasion. The Supreme Court has stated:

The fact that a party has the burden of proof does not mean that he must necessarily shoulder it alone; it simply means that he, and not the other party, bears the risk of non-persuasion.

In re Quechee Lakes Corporation, No. 87-108, slip op. at 10 (July 13, 1990). Thus, in judging whether a party has met its burden of proof, the primary issue is not whether that party has offered evidence, but whether that party has persuaded the Board.

A related issue involves the burden of coming forward with evidence. For all the Act 250 criteria, this burden is on the applicant. The Board has stated:

Regardless of who bears the burden of persuasion in a given case, the usual rule of law is that the plaintiff, the proponent of a rule or order, or an applicant for a permit always bears the burden of producing evidence. ... Therefore, even without further analysis, at the very least it is

clear that the applicant for an Act 250 permit, when proceeding before either a District Commission or the Board, has the burden of providing sufficient evidence upon which the Commission or the Board can make a positive finding. If the applicant does not do so, a Commission or the Board can deny the permit under Criteria 1-4 and 8-10. . . .

To better understand this issue, it is helpful to examine the difference between the role of a judicial factfinder and that of an agency acting in a quasi-judicial capacity. The Commissions and the Board are charged by statute with the affirmative obligation of making positive findings under each of the ten criteria of 10 V.S.A. § 6086(a). That section requires that before granting a permit, the Board or Commission shall find that the subdivision or development will not cause an undue adverse impact on the environment. . . . Regardless of who bears the burden of producing evidence or of persuasion, the Board or Commissions must be able to make positive findings on all the criteria.

Re: Pratt's Propane, Application #3R0486-EB, Findings of Fact, Conclusions of Law and Order at 4-5 (Jan. 27, 1987).

Turning to the case at hand, the main issue has been the potential growth impacts of the proposed project. The opponents contend that installation of an infrastructure item such as a power line in a primarily forest and rural environment will generate growth which will have significant adverse impacts under all the criteria at issue.¹ The Applicant contends that this power line will not necessarily result in growth, and that in any case, the Board does not have the authority to look beyond what it terms the "direct" impacts of the power line. The Applicant contends that the effects of growth caused by the power line are "indirect" and speculative.

¹The opponents also contend that the Board must apply Board Rule A-4, regarding installation of distribution lines, to this project. The Board declines to reach this issue because it is denying the application on other grounds.

Findings of Fact, Conclusions of Law and Order

Washington Electric Cooperative, Inc.

Land Use Permit #5W1036-EB

Page 8

The Board believes that it has the authority to review the growth impacts of the proposed project. Criterion 9(A) specifically authorizes the Board to do so with regard to ability of the town and region to accommodate growth. Further, Act 250 was enacted to protect and conserve the lands, environment, and welfare of Vermont. 1969 Vt. Laws No. 250, § 1 (Adj. Sess.). To this end, the Board reviews projects to determine whether they meet the environmental, social, and fiscal criteria set forth at 10 V.S.A. § 6086(a).

None of the Act 250 criteria except Criterion 9(H) makes a distinction between direct and indirect effects. Moreover, the indirect effects of a development may be considered under Criterion 9(H), wherein the Board is supposed to evaluate the costs of scattered development. Under 9(H), which is on appeal, the Board must decide whether the "additional costs of public services and facilities caused directly or indirectly" by a proposed development that is not physically contiguous to an existing settlement outweigh the tax revenues and other benefits arising from the development. Obviously the legislature, by using the phrase "caused . . . indirectly" in 9(H), is directing the Board to look beyond the immediate impacts of a project.

The cases cited by the Applicant in asserting that the Board lacks authority to review potential growth impacts do not support its argument. For example, the case of In re Agency of Administration, 141 Vt. 68 (1982), involves the issue of at what point during the development process an Act 250 permit is required. The Vermont Supreme Court ruled in that case that no permit is required until an applicant has a concrete plan and is ready to commence construction. Id. at 81. The Court concluded that the State of Vermont Agency of Administration did not have a concrete plan and that certain actions which it was taking on its land did not constitute construction of improvements. Id. at 92, 93. In this case, the Applicant has a concrete plan and is ready to construct a power line. There is no question that a land use permit is required prior to construction of the line.

The issue, therefore, is not whether the Board may review the impacts of the proposed power line but rather what is the reasonable scope of information required to make positive findings. In this case, the Board is dealing with a basic infrastructure item. The provision of electric power is essential to most development activities and especially residential development. It is reasonable to expect the parties to this proceeding to have addressed

the question of whether this power line will cause further development along its length and the potential environmental and fiscal consequences of further development. Otherwise, the Board's review would be rendered largely meaningless. In a narrowly focused review, the power line would be more likely to receive a permit because the actual construction of the line may have relatively small immediate impacts. The consequence of such a permit could, however, be the deterioration of a scenic area with valuable wildlife habitat and the unreasonable escalation of the cost of municipal services. These types of impacts go to the very heart of the concerns Act 250 is designed to address.

There is little evidence in this case to support any party's assertions that the power line ~~will or~~ will not cause growth. No evidence and analysis have been offered by either side concerning power lines placed in similar areas and the growth consequences thereof. Further, little evidence has been offered of the potential of the area to accommodate growth. Simply asserting that the ~~area~~ around the project is near the growing City of Barre is not enough; nor is it sufficient to merely counter that assertion by saying that the project will not encourage growth. What the Board needs, in addition to an analysis of power lines built in similar locations, is an assessment of those factors present in the area which may promote or discourage growth such as resources in the area, soil characteristics, topographic limitations, and access to employment. No such information has been offered by any party.

The Board does not believe that ascertaining the extent of growth impacts would be unduly speculative. Such information has previously been placed before the Board. See, e.g., Re: Department of State Buildinas, #2S0609-EB, Findings of Fact, Conclusions of Law and Order at 3-5 (June 3, 1985). Obviously there may be variables and unforeseen factors which will prevent an absolute conclusion as to the potential for development as a result of the proposed power line. However, since the standard of proof in Act 250 proceedings is a preponderance of the evidence, the conclusion need only be more likely than not rather than absolute. See In re Muzzy, 141 Vt. 463, 472-73 (1982). Thus, it would not be necessary to engage in an expensive information-gathering process in an attempt to make conclusive forecasts. Rather, basic information about the rate and pattern of growth in the local and regional areas could be provided. General information about the suitability for development of the land along the route of the power line would not be difficult to ascertain. There

Findings of Fact, Conclusions of Law and Order
Washington Electric Cooperative, Inc.
Land Use Permit #5W1036-EB
Page 10

might be in existence studies of the effect, if any, of new power lines on rates of development. Finally, because new power lines and power line extensions have been built in Vermont on an ongoing basis, it should not be too difficult to provide information on what effect, if any, they have had on growth.

The potential impacts of growth caused by the power line relate to all of the criteria at issue here, except Criterion 8(A). On that criterion, the Board finds positively for the Applicant because the opposing parties have not persuaded the Board that there is necessary wildlife habitat as defined at 10 V.S.A. § 6001(12). However, the Board cannot find positively on the other criteria at issue. For example, the Board cannot properly assess the potential impacts in the areas of impact of growth, local governmental services, or aesthetics, without more information on power line-engendered growth. The Applicant bears the burden of providing enough information for the Board to make positive findings on these criteria.

Similarly, without information on growth caused by the power line, the Board cannot assess the potential impacts of the power line on the costs of scattered development, public investments, and the settlement **pattern** directives contained in the applicable regional and town plans.² With regard to this last set of issues, the burdens of production and persuasion are on the Applicant.

The Board has concluded that the Applicant has not met its burden of production on Criteria 7, 8, and 9(A), and its burdens of production and persuasion on Criteria 9(B) through (L) and 10. Accordingly, the application is denied.

2With respect to the town and regional plans, an issue has arisen over whether the current town and regional plans, both adopted in June 1989, may be applied to the project, the application for which was filed in April 1989. The alternative is to apply the 1985 regional plan; there was no town plan in existence in April 1989. However, the Board declines to rule on this issue because of the similarity of the directives in all the potentially applicable plans concerning concentration of settlement in existing centers.

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V. ORDER

1. The Applicant has failed to sustain its burden of proof with respect to Criteria 9(B) through (L) and 10.
2. The Applicant has failed to sustain its burden of production with respect to Criteria 7, 8, and 9(A).
3. The opponents have failed to sustain their burden of proof with respect to Criterion 8(A).
4. Application #5W1036 is denied.
5. Land Use Permits #5W1036 and #5W1036 (Corrected) are void.

Dated at Montpelier, Vermont this 19th day of December, 1990.

ENVIRONMENTAL BOARD

Charles Storrow
Charles F. Storrow
Ferdinand Bongartz
Elizabeth Courtney
Rebecca Day
Steve E. Wright

Members Dissenting:
Stephen Reynes, Chairman
Arthur Gibb
Samuel Lloyd
W. Philip Wagner

A dissenting opinion will be issued separately in the near future.