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

RE: "The Switchyard"
c/o Myron Hunt
Statler Building -
Suite 1306
Buffalo, New York 14202

Land Use Permit #6F0192-3-EB
Findings of Fact, Conclusions
of Law and Order

On July 25, 1983 The Switchyard ("the Applicant") filed an appeal with the Environmental Board (the "Board") from the July 12, 1983 decision of District #6 Environmental Commission (the "Commission") denying approval of a final landscaping plan for the Switchyard Shopping Center located in the City of St. Albans, Vermont.

Board Chairman Leonard U. Wilson held a pre-hearing conference on August 5, 1983, in Essex Junction, Vermont. A public hearing was convened on August 23, 1983, in St. Albans, Vermont. The Applicant, represented by Joseph Cahill, Esq., was the only party present at the hearing. The hearing was recessed on August 23, pending the conduct of a site visit and a review of the record. The site visit took place on August 23. On September 1, the Board received Applicant's Request for Findings of Fact--and Conclusions of Law and Memorandum of Law. On September 7, 1983 the Board determined the record complete and adjourned the hearing.

This matter is now ready for decision. The Board bases its Findings of Fact and Conclusions of Law on the record developed at the hearings. To the extent that the Board agreed with and found necessary any requests for findings or conclusions by the Applicant, they have been incorporated herein; otherwise, such requests are denied.

A. ISSUES

The Applicant appeals the Commission's disapproval of its final landscaping plan under 10 V.S.A. §6086(a) (8) and requests the Board to approve that plan under Condition No. 2 of permit #6F0192-2-EB issued by the Board October 12, 1982 ("Condition #2"). Preliminarily, the Applicant argues that, because the "burden of proof' on Criterion 8 resides with "any party opposing the applicant" (see 10 V.S.A. $6088(b)) and because there is no party in opposition to the Applicant before the Board, the Applicant need only discharge its burden of going forward under Criterion 8. Once having done so, the Applicant argues, the Board has no discretion to exercise its independent judgment under that criterion and must approve the landscaping plan.

B. SCOPE OF REVIEW

In Imported Cars of Rutland, Inc., #1R0156-2-EB issued October 12, 1982, the Board reviewed District Commission responsibilities in those cases where no opposing party participates. We concluded that, independent of the "burden of proof," the Applicant has an obligation under each criterion to enter sufficient evidence on the record to enable the Commission or Board to make the affirmative findings required by 10 V.S.A. §6086(a). We noted that a party with this "burden of going forward" risks permit denial should he not provide sufficient evidence under any criterion.

The Applicant does not dispute this analysis but, instead, takes the issue one step further: assuming sufficient credible evidence to support affirmative findings under Criterion 8 is entered on the record, does the Board or Commission nonetheless have the discretion to conclude that the project will have an undue adverse effect on aesthetics or historic sites?

The answer to this question lies in the responsibilities conferred on Commission and Board members as quasi-judicial officers. Act 250 expressed the Legislature's intent to vest the Board and the Commissions with the authority to regulate land use in conformance with statutory guidelines. The regulatory mechanism selected by the Legislature was the quasi-judicial "contested case" procedure described in 3 V.S.A., Chapter 25, the Vermont Administrative Procedure Act (APA), as modified by Chapter 151 of Title 10. See 10 V.S.A. §6086(a).

Through the contested case procedure, the Board and Commissioners are directed:

1) To make affirmative findings on each of the ten criteria before issuing a permit. 10 V.S.A. §6086(a).

2) Not to deny a permit unless a project is determined to be detrimental to the public health, safety or general welfare and unless the denial is accompanied by a statement of specific reasons for the denial. 10 V.S.A. §6087.

31 To impose such conditions in issuing a permit as deemed appropriate. 10 V.S.A. §§6086(c) and 6087(b).

To enable the Board and Commissions to discharge these obligations, the Board's Rules:

1) Authorize the Board and Commissions to "... make reasonable inquiry as they find necessary to make affirmative findings as required" when no opposing party participates (Board Rule 20(C)) and issue subpoenas in-conducting that inquiry, if necessary (Board Rule 4).

2) Require that permit decisions be reduced to written findings of fact and conclusions of law. Board Rule 30.

3) Reiterate the authority to impose reasonable conditions. Board Rules 20(B), 30(C), and 32(A).

These provisions must be considered in recognition of general principles of contested case review. The Board and Commissions are empowered to judge the credibility of evidence:

> "The trier of fact has the right to believe all of the testimony of any witness, or to believe it in part and disbelieve it in part, or to reject it altogether."

In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975). In performing this function, the experience, technical competence, and specialized knowledge of Board and Commission members may be applied and the entire case record should be considered. 3 V.S.A. §810(4); Vt. Elec. Power Co., Inc. v. Bandel, 135 Vt. 141, 147 (1977). Finally, in preparing findings of fact, Board and Commission members cannot simply restate evidence in the record; rather, findings must articulate the adjudicators' decision-making analysis and must show the credence placed on the evidence of record, including the extent to which various evidenciary materials influenced the decision. Louis Anthony Corp. v. Dept. of Liquor Control, 139 Vt. 570, 573 (1981).

It follows inevitably from this contested case framework that the Board would be shirking its statutory obligations were it to accept the position advanced by the Applicant. The Board must of necessity conduct such reasonable inquiry of the Applicant as is necessary to understand the evidence, weigh its credibility and prepare adequate findings and appropriate conditions. It is

inherent in this process that the Board exercise independent judgment; the existence or non-existence of a party in opposition to the Applicant has no bearing on this function. The Board is required by 8 V.S.A. §812 to "... sift the evidence with patience and reflection and then to exercise its independent judgment.' Louis Anthony Corp. v. Dept. of Liquor Control, supra, 139 Vt. at 573.

C. FINDINGS OF FACT

1. On October 12, 1982 the Board issued Land Use Permit Amendment #6F0192-2-EB to the Applicant approving the demolition of a two-story tower and installation of a sign at the "Switchyard" Shopping Center in St. Albans, Vermont.

2. Condition #2 of that permit reads:

"The permittee and all assigns and successors in interest shall maintain continuously the landscaping substantially as approved in Exhibits #13 and #14 by replacing any dead or diseased plantings as soon as seasonably possible. The permittee shall submit to the District Commission a revised final landscaping plan that incorporates the previously approved locomotive or caboose display by April 1, 1983. All plantings and landscaping requirements must be completed by June 30, 1983."

3. The April 1, 1983 deadline was extended 60 days by order of the Commission and final landscaping plans were submitted on June 2, 1983, by the Applicant for review by the Commission pursuant to Conditon #2. By Order dated July 12, 1983, the Commission denied approval of the plans as an inadequate substitute for the approved locomotive or caboose display and as failing to satisfy 10 V.S.A. §6086(a)(8) (Criterion 8).

4. The substitute proposed by the Applicant contemplates a courtyard westerly of the brick "machine shop" building, including:

   a. a handcar encircled by a walkway at the courtyard's northerly-end;

   b. a "photo kiosk" adjacent to a "crow's foot walkway" providing pedestrian access to the courtyard from Lake Street to the south of the project;

c. a north-south connecting walkway, including a central circular walk, with lights and benches specially cast for the project;

d. several varieties of trees, shrubs, and flowers; and

e. a "40 & 8" Railroad Car display across an access drive, westerly of the courtyard.

See Exhibit 1.

5. The Applicant's plan incorporates a variety of amenities (including plantings, lights, benches, brickwork design, and general layout) which are compatible with architectural tastes prevailing in St, Albans during the latter part of the 19th century. The plan is also compatible with the proposed use of the machine shop building for office space.

6. The 40 & 8 car was a gift to the State of Vermont from France at the close of World War II. The Car is owned by the Vermont Historical Society and will be leased to a "40 & 8 Club" composed of American Legion members. The lease will have renewable five-year terms with a maximum duration of 99 years. The club will be responsible for maintenance of the car while it is on the Switchyard site.

7. The St. Albans City Planning Commission has reviewed and approved the plans submitted to the Board. Exhibit 8. The State Agency of Environmental Conservation expressed no objections to the alternate plan. Exhibit 9.

8. There has been substantial involvement by the St. Albans community, especially members of the 40 & 8 Club, in the proposed display of the 40 & 8 car at the Switchyard site.

9. Efforts by the Applicant to locate a caboose or locomotive pursuant to Condition #2 were meager:

a. 'there is only minimal evidence that the Applicant ever contemplated or searched for a locomotive for the site;

b. the Applicant wrote one letter of inquiry to "Steamtown USA" but no evidence of any follow-up was presented (Exhibit 4);

c. the Applicant was successful in having the General Manager of Central Vermont Railway, Inc. discuss the availability of a caboose with members of the Vermont State Railroad Association (Exhibit 5);

efforts by the Applicant itself to comply with #2 which are of record consist solely of the correspondence admitted as Exhibits 3,4, and 6.

D. CONCLUSIONS OF LAW

Preliminary Discussion

Applicant argues that proceedings before the Board are in the nature of an Amendment to Land Use Permit #6F0192 and, therefore, the only issue for the Board is whether the proposed landscaping will have an "undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." 10 V.S.A. §6086(a) (8).

We disagree. While the requirements of Criterion 8 were the basis for the Board's imposition of Condition #2 and are central to our appraisal of the revised landscaping plan, we here consider whether that plan is a substantially equivalent substitute for the locomotive or caboose display required by Condition #2. Therefore, this proceeding is a review for compliance with Condition #2, not a return to the merits of Criterion 8; Applicant has not chosen to contest the substance of our October 12, 1982 decision either by appeal, motion pursuant to Board Rule 30(E) or reconsideration pursuant to 10 V.S.A. §6087.

1. We cannot conclude that Applicant has diligently searched for a locomotive or caboose as required by Condition #2. Applicant's efforts were hardly a comprehensive attempt to comply with our directive. The Board is disappointed that the Applicant has not seriously sought to keep its previous commitments forged in the context of a request to destroy a building of historic interest. The availability of the 40 & 8 car appears to have resulted more from the concerted efforts of the 40 & 8 Club than from any substantial efforts by the Applicant.

2. However, the Board is reluctant, in view of the community support marshalled in support of the 40 & 8 car, to deny its approval of the final landscaping plan. We conclude that the plan is aesthetically and historically consistent with the surrounding area. We

further conclude that the plan is a substantially equivalent substitute for the display required by Condition #2.

E.. ORDER

Condition #2 of Land Use Permit Amendment #6F0192-2-EB dated October 12, 1982, is revised to read as follows:

"The permittee shall complete final landscaping for the project as depicted on plans prepared by Trudell Consulting Engineers, Inc., submitted to the Board on August 23, 1983, as Exhibit #1 (five sheets). Any significant deviation from those plans shall be approved in advance by the Commission. Landscaping shall be completed as depicted on or before July 1, 1984. The permittee and all assigns and successors in interest shall maintain said landscaping as approved by replacing any dead or diseased plantings as soon as seasonably possible.

Should, for'any reason, the 40 & 8 car be removed from the site (except temporarily for ordinary maintenance or repair purposes) the permittee shall immediately notify the Commission in writing and within 30 days file alternative plans for approval by the Commission in conformance with the Board's decisions on October 12, 1982 and September , 1983."

Jurisdiction over this permit is returned to the District #6 Commission.

Dated at Montpelier, Vermont, this 17th day of October, 1983,

ENVIRONMENTAL BOARD

Melvin H. Carter

Ferdinand Bongartz

Leonard U. Wilson

Dissenting:

Warren M. Cone

Roger N. Miller

Board members participating
in this decision:
Melvin H. Carter
Ferdinand Bongartz
Warren M. Cone
Roger N. Miller
Leonard U. Wilson