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**Sent:** Tuesday, January 28, 2020 11:32 AM  
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**Subject:** [External] Act 250 Evidentiary Standards

[External]

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During the Committee's afternoon session on January 24th, questions arose as to the meanings of the three evidentiary standards used in Act 250 cases: the burdens of production, proof and persuasion.

Below is an excerpt from an Environmental Board decision ( Foster 5R0891-8B-EB) from 1997 explaining the three burdens . For ease of reading I have stripped out references to caselaw in the excerpt . There are many other Act 250 cases -including decisions of the Environmental Court - which restate the same basic explanation. The original case on the topic was Pratt's Propane 3R0486-EB (1987) . I have bolded a few sections of the excerpt in an effort to assist in reading through the decision.

Please provide this email to the members of the Committee and add to the Committee's record.

Thank you.

Ed

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From pages 10-12 in Foster :

Pursuant to 10 V.S.A. 6086(a), the Board is required to make positive findings with respect to the ten Act 250 criteria, irrespective of the placement of the burden of proof. The applicant has the burden of producing sufficient evidence in order to enable the Board to making affirmative findings under all ten criteria. A party with the burden of producing evidence can lose if sufficient evidence is not provided. However, if an applicant puts forward sufficient evidence to permit the trier of fact to find in the applicant's favor, then the question remains which party -- the applicant or the person opposing a project -has the burden of persuasion.

Pursuant to 10 V.S.A. 6088, the **burdens of production and persuasion** are both squarely on the applicant under criteria 1 through 4, 9 and 10. However, pursuant to 10 V.S.A. 6088(b), **the burden of persuasion** with respect to criteria 5 through 8 is on the party opposing the application. However, **the burden of production always falls on the applicant.**

**Using the example of review of a project's impact on historic sites, the Board has previously construed the allocation of burdens of production and persuasion as follows:**

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 [or the Board] 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.

The Board has previously concluded that an applicant must provide sufficient evidence for the Board to make a positive finding even if the burden of proof on a criterion rests with the opponent. Moreover, the Board has determined that the necessary corollary of this rule is that should the evidence presented suggest a negative finding to the Board, it must make such a finding. **The Vermont Supreme Court has summarized the allocation of burdens under 10 V.S.A. 6088(b), with specific reference to project review under criterion 8, as follows:**

The allocation of the burden of proof to opponents merely relieves the applicant of the "risk of non-persuasion," and means that in the absence of evidence on the issue, or where the evidence is indecisive, the issue must be decided in the applicant's favor. The burden of proof allocations of Act 250 impose "no limits, direct or indirect, on the evidence the Board is allowed to consider in deciding whether a particular issue has been proved." While the applicant never bears the risk of non-persuasion of the Board as to the aesthetics criterion, the burden of proof is properly satisfied by the actual proof of adverse aesthetic effect regardless of which party introduces the evidence."

Additionally, the Court has held that the Board's rules contemplate circumstances in which no party appears in opposition to a permit issuance or no opponent presents evidence on the issues for which opponents bear the burden of proof. EBR 20, in particular, permits the Board "to make reasonable inquiry as it finds necessary to making findings and conclusions as required." Therefore, even when there is no opposing party or evidence in opposition with respect to criterion 8, this does not mean that the applicant will automatically prevail on the aesthetics issue. Indeed, as long as it does not constitute the exclusive basis for the Board's decision, evidence gathered by the Board during a site visit may satisfy the burden of proof on factors to be considered in granting a Land Use Permit.