

VERMONT ENVIRONMENTAL BOARD
10 V.S.A §6001 et seq.

Re: The Mirkwood Group
Land Use Application #1R0780-EB

CHAIR'S RULING ON PRELIMINARY ISSUES

This ruling pertains to a motion to dismiss and several petitions for party status.

I. BACKGROUND

On September 1, 1995, the Mirkwood Group ("**Appellant**") filed an appeal with the Board from the District #1 Environmental Commission's August 3, 1995 denial of Land Use Permit Application #1R0780 ("**Decision**"). The Appellant sought permission to construct a 180 foot tall FM radio tower and a 600 square foot equipment building on the summit of Cox Mountain at an elevation of approximately 1,412 feet ("**Project**"). The proposed project site is immediately north of Pittsford, Vermont and east of U.S. Route 7. Access to the Project is via a right-of-way which weaves its way for approximately 4,100 feet up the side of Cox Mountain. The Appellant believes that the District #1 Environmental Commission ("**District Commission**") erred with respect to the following criteria of 10 V.S.A. § 6086(a): 1 (air-pollution), 1(G) (wetlands), 4 (soil erosion and runoff), 7 (municipal services), 8 (scenic beauty, historic sites and natural areas), 9(G) (private utilities) and 10 (local and regional plans).

11. MOTION

On October 3, 1995, Henry M. Paynter ("**Paynter**") filed a Motion to Dismiss and Memorandum in Opposition to Request for Hearing on Appeal ("**Motion**"). The Motion is based upon two grounds. First, Paynter contends that the Appellant does not have a zoning variance authorizing construction of the Project on the project site. Second, Paynter contends that the Appellant has not yet complied with certain District Commission orders for the supplying of factual information.

In accordance with the Board's November 3, 1995 Prehearing Conference Report and Order, the Appellant responded to the Motion on October 31, 1995. On November 14, 1995, Paynter filed a memorandum in support of the Motion. On November 15, 1995, David R. Swift ("**Swift**") filed a memorandum in support of the Motion.

Upon consideration of the Motion and related pleadings, the Motion is denied. The variance will be considered to the extent necessary and appropriate under Criterion 10

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(local and regional plans). Further, if the Board requires certain factual information to evaluate the Project, the Board will compel the relevant parties to supply it in a timely manner. Like the District Commission, the Board will not render a decision on the merits of this matter until it has sufficient information to do so.

III. PARTY STATUS

Three longstanding Board principles control the petitions for party status at issue. First, parties in district commission proceedings are automatically parties on appeal with respect to the same criteria concerning which the district commission granted them party status. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 12 (March 28, 1990). Second, district commission grants or denials of party status may be challenged by the filing of a valid appeal or cross-appeal by an aggrieved party pursuant to Environmental Board Rule ("EBR") 40. Id. citing Re: Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision at 12-13 (December 22, 1988) and Re: Swain Development Corporation, #3W0445-2-EB, Memorandum of Decision at 4-7 (July 31, 1989). Third, a party before the Board may seek to expand its party status to include criteria on appeal even though it did not have party status under such criteria before the district commission. Charles and Barbara Bickford, #5W1186-EB, Memorandum of Decision at 4 (May 31, 1994) citing Re: Derby Plaza Associates Limited Partnership, #7R0886-EB, Memorandum of Decision at 5 (February 25, 1994) and Re: L & S Associates, #2W0434-8-EB, Memorandum of Decision at 2 (November 24, 1992).

A. Emerson L. Frost

The District Commission granted Emerson L. Frost ("**Frost**") party status under Criteria 5 (traffic safety) and 8 (aesthetics) pursuant to EBR 14(B)(1)(a) and under Criteria 1 (air pollution) and 8 (aesthetics) pursuant to **EBR 14(B)(1)(b)**. The Appellant did not appeal this District Commission party status determination. Consequently, Frost

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shall have party status before the Board under Criteria 1 and 8.¹

B. David R. Swift

The District Commission granted Swift party status under Criteria 8 (aesthetics) and 10 (town plan) pursuant to EBR 14(B)(1)(a). The Appellant did not appeal this District Commission party status determination. Consequently, Swift **shall** have party status before the Board under Criteria 8 and 10.

Swift seeks party status in this matter for the first time under Criteria 4 (soil erosion and runoff), 5 (transportation), 7 (municipal services) and 9(G) (private utilities).² He may do so under Criteria 4, 7 and 9(G) because the Appellant has appealed these Criteria.

Swift can materially assist the Board under Criteria 4, 7 and 9(G). He has germane professional and personal experience. He is a life long resident of the Town of Pittsford. He owns property which enjoys a direct **line-of-sight** relationship to Cox Mountain. He has used Cox Mountain for recreational purposes for at least 30 years. For the past 17 years he has worked as an environmental engineer engaged in site evaluation, plan review and **permitting**. He is generally familiar with soil mechanics, **soil** analysis, storm water systems, erosion control, **construction** techniques and civil and sanitary engineering

¹ The District Commission found that the Project was **"deficient** with respect to conformance with Criteria 5 [(Transportation). ...]" Decision at 18. The Appellant did **not** appeal the Decision under Criterion 5. Consequently, Criterion 5 is not at issue before the Board and neither Frost nor any other party can have party status before the Board under it.

² In his October 1, 1995 letter to George E. H. Gay, Board General Counsel, Swift "requests the opportunity to speak to the issues that pertain to [Criteria 4, 5, 7 and 9(G)]". In light of Swift's Supplemental Petition for Party Status, this **pro se** request is appropriately construed as a petition for party status pursuant to EBR 14(B)(1)(a) and/or (b).

principals. Thus, Swift shall also have party status before the Board under Criteria 4, 7 and 9(G) pursuant to EBR 14(B) (I) (b) .

C. Robert J. Williams

The District Commission granted Robert J. Williams ("Williams") party status under Criteria 1(G) (Wetlands), 8 (aesthetics) and 8(A) (wildlife and endangered species) pursuant to EBR 14(A)(3). The Appellant did not appeal this District Commission party status determination. Consequently, Williams shall have party status before the Board under Criteria 1(G) and 8.³

D. Allen M. Hitchcock

The District Commission granted Allen M. Hitchcock ("Hitchcock") party status under Criteria 8 (aesthetics) and 10 (local and regional plans) pursuant to EBR 14(B)(1) (a). The Appellant did not appeal this District Commission party status determination. Consequently, Hitchcock shall have party status before the Board under Criteria 8 and 10.

E. Henry M. Paynter

The District Commission granted Paynter party status under Criteria 5 (traffic), 8 (aesthetics) and 10 (local and regional plans) pursuant to EBR 14(B)(1) (a) and (b). The Appellant did not appeal this District Commission party status determination. Consequently, Paynter shall have party status before the Board under Criteria 8 and 10.

Paynter seeks party status in this matter for the first time under Criteria 4 (soil erosion and runoff). He may do so because the Appellant has appealed this Criterion.

Paynter can materially assist the Board under Criterion 4. He has practiced as a civil engineer for more than 50 years. He was a professor of hydraulic engineering at M.I.T. for approximately eight years. He has taught undergraduate and graduate level courses in hydrology and water power. Hydrology is a complex science. Thus, Paynter

³ Criterion 8(A) is not on appeal before the Board. Consequently, neither Williams nor any other party can have party status before the Board under it.

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shall also have party status before the Board under Criteria 4 pursuant to EBR 14(B)(1)(b).

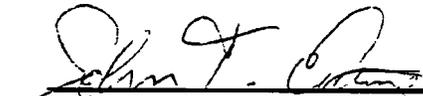
IV. ORDER

1. The Motion is denied.
2. Frost is granted party status under Criterion 8 (aesthetics) pursuant to EBR 14(B)(1)(a) and Criteria 1 (air pollution) and 8 (aesthetics) pursuant to EBR 14(B) (1) (b).
3. Swift is granted party status under Criteria 8 (aesthetics) and 10 (town plan) pursuant to EBR 14(B)(1)(a) and Criteria 4 (soil erosion and runoff), 7 (municipal services) and 9(G) (private utilities) under EBR 14(B)(1)(b).
4. Williams is granted party status under Criteria 1(G) (wetlands) and 8 (aesthetics) pursuant to EBR 14(A) (3) .
5. Hitchcock is granted party status under Criteria 8 (aesthetics) and 10 (local and regional plans) pursuant to EBR 14(B)(1)(a).
6. Paynter is granted party status under Criteria 8 (aesthetics) and 10 (local and regional plans) pursuant to EBR 14(B)(1)(a) and (b) and Criterion 4 (soil erosion and runoff) pursuant to EBR 14 (B) (I) (b) .
7. Pursuant to EBR 16, this ruling shall become final unless a written objection to it, in whole or in part specifically setting forth the grounds for objection, is filed with the Board on or before Thursday, December 28, 1995, in which case the matters objected to will be decided by the full Board. The filing deadlines set forth in Section V of the Board's November 3, 1995 Prehearing Conference Report and Order shall not be automatically stayed or otherwise altered by the filing of an objection in accordance with this paragraph.

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Dated at Montpelier, Vermont, this 13th day of
December, 1995.

ENVIRONMENTAL BOARD


John T. Ewing, Chair

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