

10/31/90

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

RE: **Okemo** Mountain, Inc. by  
Thomas Salmon, Esq.  
P.O. Box 535  
Bellows Falls, VT 05101

Memorandum of Decision  
Land Use Permit  
**#2S0351-10-EB**

This decision pertains to a Motion to Strike, Motion to Vacate, and Motion for Other Appropriate Relief filed with the Environmental Board by Robert Rossini and Michael Fassler (the Appellants) on July 26, 1990. On August 3, Okemo Mountain, Inc. (the Permittee) filed a Motion to Dismiss and Responsive Memorandum. The Board deliberated on September 5, 1990.

Background

This matter began as an appeal filed on September 2, 1988 by the Appellants from the Land Use Permit and decision of the District #2 Environmental Commission approving the **Permittee's** proposal to create an eight-lot subdivision and 800 **feet** of road in the Town of Ludlow. On November 16, 1988, a hearing was convened by an administrative hearing panel of the Board. After receiving the proposed decision, the Permittee filed a motion to reopen the hearing to allow the Permittee to present additional evidence in connection with sight distances at the intersection of West Village Road and the subdivision access road. The Board agreed to reopen the hearing, and on September 13, 1989, the panel reconvened. A proposed decision was again sent to the parties on January 3, 1990 and oral argument was held on January 17. Following oral argument, the Permittee filed a post-argument memorandum, the Appellants filed an objection and motion to strike the Permittee's memorandum, and the Permittee **filed** a response to the Appellants. On April 5, the Permittee filed affidavits describing proposed and existing changes to the project since the hearings, and on May 22 the Permittee submitted photographs showing the installation of two 15 m.p.h. signs and two curve warning signs that were installed on the West Village Road.

On July 11, 1990, the Board issued its decision. In that decision, the Board stated that, having received no objections to the affidavits or the photographs, it would accept them **into** the record. Based upon **these** documents the Board found that sight distances at the intersection in question were adequate.

Issues

The Appellants object to the Board's consideration of these documents in **reaching** its decision. They claim that the Administrative Procedure Act (**APA**) requires that all

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parties be given an opportunity for hearing and to respond and present evidence and argument on all issues and that findings of fact must be based exclusively on the evidence and matters officially noticed. The Appellants also claim that the Board is required to follow the Vermont Rules of Evidence which require that a party may conduct **cross-examination** and may object to evidentiary offers. Finally, the Appellants contend that the letters that **Okemo's** counsel sent to the Board's Executive Officer constitute ex parte contacts that violate section 813 of the **APA**.

#### Decision

The Board denies the Appellants' Motion to Strike, Motion to Vacate and Motion for Other Appropriate Relief dated July 26, 1990, for the following reasons:

The Board believes that the requirements of the **APA** and the Rules of Evidence that notice and opportunity for hearing, cross-examination, and objection be provided to all parties were fully satisfied. The Permittee submitted affidavits and photographs for the Board's consideration on April 5 and May 22, 1990, respectively, and the Board issued its decision on July 11, 1990. The Appellants were sent copies of all documents. More than three months elapsed between the submission of the affidavits and issuance of the decision, and seven weeks elapsed between the submission of the photographs and issuance of the decision. Ample opportunity existed for the Appellants to file objections to the information submitted by the Permittees or to ask for a hearing to cross-examine and object to the evidence.

It is also clear that no ex parte communications took place. An ex parte communication is an undisclosed communication between a finder of fact and a party. The Permittee forwarded copies to all parties of all documents submitted to the Board. Since all of the **Permittee's** communications to the Board were disclosed to the Appellants and all other parties, they were not ex parte communications.

The Board failed in its decision dated July 11, 1990 to address the Appellants' Objection to and Motion to Strike Applicant's "Post-Argument Memorandum" filed on January 26, 1990. In that motion, the Appellants argued that the post-argument memorandum filed by the Permittee following the January 17 oral argument contained evidence in the **guise** of argument which should not be considered by the Board. The Board agrees with the Appellants that the Permittee's post-argument memorandum inappropriately contained new

evidence. The Board did not consider or rely on any new facts contained in that memorandum and grants the Appellants' Motion to Strike dated January 26, 1990 with regard to the new facts in the memorandum.

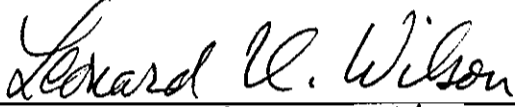
Order

1. The Appellants' Motion to Strike Applicant's "Post-Argument Memorandum" dated January 26, 1990 is hereby granted with regard to the new facts therein.

2. The Appellants' Motion to Strike, Motion to Vacate and Motion for Other Appropriate Relief dated July 26, 1990 is hereby denied.

Dated at Montpelier, Vermont this 31st day of October, 1990.

ENVIRONMENTAL BOARD

  
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A:OKEMO (S5)