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

Re: Okemo Mountain, Inc.
Application #2S0351-10B-EB
(Snowbridge Road - Pedestrian Safety)

MEMORANDUM OF DECISION

This decision pertains to preliminary issues in an appeal of a permit approving a pedestrian safety plan for an access road serving the so-called Snowbridge subdivision next to the ski resort owned .and operated by Okemo Mountain, Inc. (the Applicant) in Ludlow. As is explained below, the Environmental Board concludes that adjoining landowners Michael Fassler and Robert Rossini (the Appellants) have party status, and therefore, the right of appeal, under Criteria 5 (traffic) and 8 (aesthetics), that such status and appeal rights shall be limited to the extent the Appellants can show a direct effect of the pedestrian safety plan on their property interests, and that this matter shall be heard either by a hearing officer or hearing panel, in the discretion of the Acting Chair.

BACKGROUND

On October 23, 1991, the Environmental Board issued Land Use Permit #2S0351-10-EB, authorizing the Applicant to construct improvements to the Snowbridge Road that provides access both to Phase I and Phase II of the Snowbridge subdivision located off West Village Road in Ludlow. Condition #44 of that permit states:

> Prior to occupancy of any of the houses in Phase II, the Permittee shall submit a plan to the District Commission for its review and shall obtain approval of a plan that increases pedestrian safety along the Snowbridge subdivision road.

On February 18, 1992, the Applicant filed an application with the District #2 Commission seeking to fulfill Condition #44. On May 21, the District Commission issued Land Use Permit #2S0351-10B, authorizing the Applicant "to improve the pedestrian safety on Snowbridge Road." This permit approved the plan submitted by the Applicant with conditions.

The District Commission's May 21 decision lists the Appellants as adjoining property owners allowed to participate on Criterion 5 (traffic safety) of 10 V.S.A. § 6086(a). The decision also states that, prior to hearing, all parties had agreed that the application met all Act 250 criteria but Criterion 5.

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On June 22, 1992, pursuant to Board Rule 31(A) the Appellants filed a motion to alter with the District Commission. Among the issues raised in the motion was the compliance of the pedestrian safety plan, as conditioned, with Criterion 8 (aesthetics). On September 4, the District Commission issued a decision on the Appellants' motion, largely denying it.

On October 5, 1992, the Appellants filed a notice of appeal with the Board. On October 16, the Applicant filed a notice of cross-appeal. On October 19, the Applicant filed a motion to dismiss.

On November 16, 1992, Acting Chair Darby Bradley convened a prehearing conference in Ludlow. During the prehearing conference, the Appellants filed a petition for party status with the Acting Chair and handed a copy of the petition to the Applicant.' On November 25, the Acting Chair issued a prehearing conference report. In the report, the Acting Chair made preliminary rulings, pursuant to Board Rule 16(B), concerning the Appellants' party status, the scope of this appeal, and the hearing of this appeal by an officer or panel.

During the first half of December 1992, the parties filed memoranda in response to the prehearing report and to the various filings made by each other. The memoranda included objections by the Appellants and the Applicant to preliminary rulings made by the Acting Chair. The Applicant also identified that the pedestrian safety plan it will put before the Board on appeal will be the plan as permitted and conditioned by the District Commission. The Board deliberated on December 17 in Brandon.

DISCUSSION

A. Party Status

The cross-appeal, the motion to dismiss, and the petition for party status all raise the same question: What shall be the scope of the Appellants' party status and therefore of this appeal? The Appellants seek to expand their party status beyond Criterion 5 to include Criterion 8, and the Applicant seeks to overturn their party status altogether so that the appeal will not go forward.

Interpreting 10 V.S.A. § 6089(a) and Rules 40(A) and (D), we have previously stated that a party may only appeal the criteria on which he or she has party status before the District Commission, except that a party may appeal a criterion on which he or she did not have party status before the District Commission if: (a) the party was denied party status on the criterion and can

persuade us that such status should be granted, or (b) the party can persuade us that party status on the criterion should be granted and that a substantial injustice or inequity will occur if appeal on the criterion is disallowed. Re: Sherman Hollow, Inc., #4C0422-5-EB, Memorandum of Decision at 4 (Feb. 3, 1988); Re: Swain Develonment Corp., #3W0445-2-EB, Memorandum of Decision at 5-7 (July 31, 1989). We have also stated that party status decisions by a district commission may be challenged following the district commission's final decision on an application by appeal or cross-appeal. Re: Finard-Zamias Associates, #1R0661-EB, Memorandum of Decision at 12-13 (March 28, 1990).

The Appellants had party status before the District Commission on Criterion 5. The Applicant has filed a cross-appeal challenging the District Commission's grant of party status on Criterion 5 to the Appellants.

Further, the Appellants requested party status on Criterion 8 before the District Commission through their June 22 motion to alter and were denied such status by the District Commission in its September 4 decision on that motion. The basis for the Appellants' party status request on Criterion 8 was and is an alleged adverse effect of signage requirements imposed by the District Commission in the permit it issued approving the pedestrian safety plan. Based on the filings before us, it appears that the Appellants had no reason to know of these requirements until the District Commission issued its permit. Therefore, they had good cause under Rule 14(B)(2)(c) to request party status on Criterion 8 in their motion to alter. Accordingly, the question of whether the Appellants should have such status is properly before us.

The Appellants assert that they should have party status on Criteria 5 and 8 as adjoining landowners or as permitted parties. The applicable statutory provision is 10 V.S.A. § 6085(c), which provides:

> Parties shall be those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule. ... An adjoining property owner may participate in hearings and present evidence only to the extent the proposed development or subdivision will have a direct effect on his property under section 6086(a)(1) through (a)(10) of this title.

Pursuant to this provision and 10 V.S.A. § 6025(a), we have issued Rule 14(A), which states that adjoining landowners shall have party status to the extent that they can show that a proposed project may have a direct effect under the

criteria on their property interest, and Rule 14(B), which gives us the discretion to grant party status to those who can show that they have an interest which may be affected under the criteria or that they can materially assist us.

The Appellants qualify as adjoining landowners because they each own land adjoining the project tract. Specifically, it appears undisputed that appellant Fassler owns subdivision Lot #38, which adjoins the lot over which the Snowbridge Road runs (#39), and that appellant Rossini owns Lot #41, which adjoins the Applicant's ski slopes that will be used by skiers who will reach the slopes via Snowbridge Road and a nearby trail access between Lots #42 and #43. We believe that the Applicant's ski slopes constitute land involved with Lot #39 under Rule 2(F)(1) because ail of this land appears to be 'one contiguous block owned or controlled by the Applicant and therefore is one tract of land for Act 250 purposes. In re Costello Garage, No. 91-379, slip op. at 2 (Vt., June 26, 1992).

In a memorandum filed with us dated December 4, 1992, the Appellants make a showing that their property interests will be affected by the pedestrian safety plan under Criteria 5 and 8. We conclude that the Appellants are entitled to be heard concerning the alleged effects on their property interests under these criteria. We therefore grant them party status pursuant to 10 V.S.A. § 6085(c) and Rule 14(A)(3) to the extent that their property interests may be affected under Criteria 5 and 8.

However, using our discretion under Rule 14(B), we decline to grant the Appellants party status beyond effects on their property interests as adjoining landowners because we do not believe that the Appellants have raised significant issues beyond those alleged effects.

This ruling is consistent with the preliminary ruling made by the Acting Chair in the prehearing conference report issued on November 25, 1992.

Based on the foregoing, we will issue an order which:

(a) grants the cross-appeal and motion to dismiss to the extent that these filings challenge the Appellants' party status on Criteria 5 and 8 beyond the alleged effects on their property interests;

(b) denies the petition for party status to the extent it seeks status under Rule 14(B) with respect to matters beyond the alleged effects on the Appellants' property interests;

(c) denies the cross-appeal and motion to dismiss to the extent that these filings challenge the Appellants' party status as adjoining landowners;

(d) grants the Appellants' request for party status as adjoining landowners under 10 V.S.A § 6085(c) and Rule 14(A)(3) to the extent that they have alleged direct effects on their property interests in their December 4, 1992 memorandum;

(e) denies the objections filed with respect to the Acting Chair's preliminary ruling concerning party status; and

(f) delineates the scope of this appeal as limited to the effects on the Appellants' property interests alleged by them in their December 4, 1992 memorandum.

B. Use of Hearing Panel or Officer

Under 3 V.S.A. § 811 and Rule 41(A), we may assign the hearing of an appeal to a hearing panel or hearing officer. Under Rule 41(B), if there are objections to the use of a hearing officer or panel, the objections are settled by the full Board.

We conclude that this matter does not need to be heard by the full Board and should be heard by a hearing panel or hearing officer because the issues raised are not complex or highly significant. The Acting Chair may decide whether to hear the matter himself as a hearing officer or to draft other Board members to form a hearing panel.

ORDER

1. The cross-appeal and motion to dismiss are granted to the extent that these filings challenge the Appellants' party status on Criteria 5 and 8 beyond the alleged effects on their property interests.

2. The petition for party status is denied to the extent it seeks status under Rule 14(B) with respect to matters beyond the alleged effects on the Appellants' property interests.

3. The cross-appeal and motion to dismiss are denied to the extent that these filings challenge the Appellants' party status as adjoining landowners.

4. The Appellants' request for party status as adjoining landowners under 10 V.S.A § 6085(c) and Rule 14(A)(3) is granted to the extent of the effects on their property interests alleged in their December 4, 1992 memorandum.

5. The objections filed with respect to the Acting Chair's preliminary ruling concerning party status are denied.

6. The scope of this appeal shall be limited to the effects on the Appellants' property interests alleged by them in their December 4, 1992 memorandum.

7. On or before February 10, 1993, the Applicant shall file prefiled testimony stating the nature and elements of its proposed pedestrian safety plan as approved and conditioned by the District #2 Commission and why this plan will not, with respect to the Appellants' property interests, cause unsafe traffic conditions, unreasonable congestion, or an undue adverse effect on aesthetics. This prefiled testimony shall be accompanied by a final list of witnesses and exhibits associated with the testimony.

8. On or before March 10, 1993, the Appellants shall file prefiled testimony and final lists of witnesses and exhibits with respect to the effects on their property interests of the proposed pedestrian safety plan under Criteria 5 and 8 and whether those effects demonstrate that the proposed plan does not comply with those criteria.

9. On or before March **24, 1993,** the Applicant shall file prefiled testimony, and revised lists of witnesses and exhibits, in rebuttal to the Appellants' prefiled testimony.

10. On March 31, 1993, an administrative hearing panel or officer shall convene a site visit and hearing in Ludlow, the exact time and location to be announced. The Acting Chair shall determine whether the appeal will be a hearing by himself as hearing officer or by a hearing panel.

ENVIRONMENTAL BOARD

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