

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Okemo Mountain, Inc. Land Use Permit Application
n/k/a Okemo Limited Liability Co. Amendment #2S0351-25U-EB
and Timothy & Diane Mueller
and Daniel & Debora Petraska

MEMORANDUM OF DECISION

This proceeding concerns a proposal to develop the remaining 22 lots of Solitude Village as single-family residences (Project). The Project is located on 160 acres off Okemo Ridge Road in the Town of Ludlow, Vermont.

I. PROCEDURAL SUMMARY

On August 19, 2002, Okemo Mountain, Inc. n/k/a Okemo Limited Liability Company and Timothy & Diane Mueller and Daniel & Debora Petraska (Permittees) filed Land Use Permit Application #2S0351-25U with the District #2 Environmental Commission (Commission) seeking authorization for the Project.

On October 9, 2002, the Commission issued Land Use Permit Amendment #2S0351-25U (Permit) and a Memorandum of Decision (Decision) denying Mount Holly Mountain Watch's (MHMW) request for a hearing and party status.

On October 31, 2002, MHMW filed an appeal with the Environmental Board (Board) from the Decision alleging that the Commission erred by denying MHMW party status and a hearing concerning 10 V.S.A. § 6086(a)1(B) and 9(K) (Criteria 1(B) and 9(K)).

On December 5, 2002, the Chair convened a prehearing conference and on December 10, 2002, the Chair issued a Prehearing Conference Report and Order (PCRO).

On December 16, 2002, MHMW requested oral argument on the issues set forth in the PCRO.

On January 6, 2003, the Chair issued a Chair's Preliminary Ruling denying MHMW's request for oral argument.

On January 15, 2003, the Board deliberated.

II. Discussion

During the prehearing conference, the parties agreed to the following 4 issues as set forth in the PCRO.

1. Whether MHMW is barred from raising substantive issues on Criterion 1(B).
2. If the answer to issue #1 is in the negative, whether pursuant to EBR 51(D), there are substantive issues on Criterion 1(B) that require a hearing.
3. Whether pursuant to Environmental Board Rule (EBR) 51(D), there are substantive issues on Criterion 9(K) that require a hearing.
4. If issue #2 or 3 is decided in the affirmative, whether MHMW is entitled to party status under EBR 14 on Criteria 1(B) and 9(K).

Although MHMW requested oral argument on the issues, no party had a substantive objection to the framing of the issues. Therefore, although MHMW's memorandum touched upon additional issues, the Board will limit this Memorandum of Decision to the 4 issues in the PCRO.

1. Whether MHMW is barred from raising substantive issues on Criterion 1(B).

Permittees argue that MHMW is barred from raising substantive issues on Criterion 1(B) because it did not request party status on that Criterion before the Commission. MHMW requested EBR 14(B)(1) and (2) party status before the Commission on Criteria 1 (air pollution), 9(H), and 9(K). The Commission's Decision denied MHMW's party status request in its entirety. MHMW's appeal requests EBR 14(B)(1) and (2) party status on Criterion 1(B) and 9(K).

Thus, MHMW never requested party status before the Commission on Criterion 1(B). An appellant who did not request party status before the district commission, and seeks party status for the first time before the Board, bears a heavy burden.

To appeal a criterion to the Board, an . . . EBR 14(B) party must obtain party status on that criterion before the district commission, or have been denied party status on that criterion by the district commission, appealed to the Board, and then been granted party status on that criterion by the Board. . . . It is possible for a petitioner to overcome this impediment if he can persuade the

Board that party status on the criterion should be granted and that a substantial injustice or inequity will occur if the appeal on the criterion is disallowed.

Re: Old Vermonter Wood Products and Richard Atwood, #5W1305-EB, Memorandum of Decision at 2 (Feb. 3, 1999) (citing Re: Okemo Mountain, Inc., #2S0351-10B-EB, Memorandum of Decision at 3 (Jan. 15, 1993) and Re: Gary Savoie, supra, at 6-7.)

The “substantial injustice or inequity” standard from EBR 40(E) applies because a request for initial party status effectively seeks to expand the scope of the appeal. MHMW has not demonstrated to the Board that a substantial injustice or inequity would occur if its appeal on Criterion 1(B) was disallowed. MHMW claims that one of its member’s water supply will decline if the Project is allowed. That claim would be relevant to a request for a hearing on Criterion 3 (water supply) but has no bearing on Criterion 1(B). MHMW did not appeal Criterion 3. Regardless, the Board does not find that MHMW’s claim rises to the level of substantial injustice or inequity.

In addition, there is a second and equally compelling reason that bars MHMW from raising substantive issues on Criterion 1(B). The Board does not have jurisdiction to decide issues regarding Criteria that were not raised before the Commission and ruled upon by it. *In re MBL Associates, #4C0948-1-EB Memorandum of Decision (May 4, 1998).*

Under EBR 51(B), the Commission issued a notice of its intent to issue a permit without convening a hearing, unless a request for a hearing is received by a certain date. Pursuant to EBR 51(B)(3)(d), any request for a hearing from a potential party “shall state the criteria or subcriteria at issue, why a hearing is required and what evidence will be presented at the hearing.” On September 16, 2002, MHMW requested a hearing on Criteria 1 (air pollution), 9(H), and 9(K).

MHMW can only request the Board to determine if there are substantive issues, on a specific Criterion, that merit a hearing if it first requested the Commission to hold a hearing on that Criterion. *Re: Haystack Highlands, LLC. #700002-10D-EB Memorandum of Decision at 8 (Dec. 20, 2002).* MHMW did not raise substantive issues or request a hearing before the Commission on Criterion 1(B) and therefore, cannot attempt to raise substantive issues before the Board on that Criterion now.

Therefore, for the above reasons, MHMW is barred from raising substantive issues on Criterion 1(B).

2. If the answer to issue #1 is in the negative, whether pursuant to EBR 51(D), there are substantive issues on Criterion 1(B) that require a hearing.

Since the answer to issue #1 was in the positive, the Board will proceed to issue #3.

3. Whether pursuant to EBR 51(D), there are substantive issues on Criterion 9(K) that require a hearing.

Under EBR 51(D), upon receipt of a request for a hearing, the Commission shall convene a hearing if it determines that substantive issues have been raised. As discussed before, MHMW requested a hearing on Criteria 1 (air pollution), 9(H), and 9(K).

The Commission denied MHMW's request for a hearing because it determined that MHMW did not raise any substantive issues on Criteria 1 (air pollution), 9(H), and 9(K). As a result, the Commission issued its decision without holding a hearing. Since MHMW requested a hearing on Criterion 9(K) before the Commission, it can appeal the Commission's denial of its request to the Board.

Pursuant to 10 V.S.A. § 6089(a)(3), the Board holds a *de novo* hearing on all of the Commission's findings and conclusions that are raised in an appeal. Therefore, the Board will review whether MHMW has raised substantive issues on Criterion 9(K) that require a hearing. *Re: Haystack Highlands, LLC.* at 8.

Under 10 V.S.A. § 6086(a)(9)(K):

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or

enjoyment of or access to the facility, service, or lands.

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities. First, the Board examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities, or (b) the public's use or enjoyment of or access to such facilities. *Swain Development Corp.*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990).

MHMW argues that the Project will affect the Okemo State Forest and Okemo Mountain Road. Specifically, MHMW questions whether the Project will result in limited access to the Okemo State Forest.

The Board notes that it previously considered the impacts of the development of other residential lots in the Solitude Subdivision on the Okemo State Forest and the Okemo Mountain Road. Re: *Okemo Mountain, Inc.*, #2S0351-30-EB, #2S0351-31-EB, and #2S0351-25R-EB, Findings of Facts, Conclusions of Law, and Order (Feb. 22, 2002). In that decision the Board recognized that state forests are managed for multiple uses.

Pursuant to 10 V.S.A. 2601(a):

It is the policy of the state to encourage economic management of its forests and woodlands , to maintain, conserve and improve its soil resources and to control forest pests to the end that forest benefits including maple sugar production, are preserved for its people, floods and soil erosion are alleviated, hazards of forest fires are lessened, its natural beauty is preserved, its wildlife is protected, the development of its recreational interests is encouraged, the fertility and productivity of its soils are maintained, the impairment of its dams and reservoirs is prevented, its tax base is protected, and the health, safety, and general welfare of its people are sustained and promoted.

Pursuant to 10 V.S.A. 2603(b), the Commissioner of the Department of Forests, Parks, and Recreation shall "... promote and protect the natural , productive,

and recreational values of such lands, and provide for multiple uses of the lands in the public interest.”

More specifically, the Board takes official notice of the Department of Forests, Parks, and Recreation Stewardship Plan for Okemo State Forest (1990) which states that “Okemo State Forest was originally acquired to provide broad based recreational opportunities to the general public.” *Id* at 25. Thus, Okemo State Forest is an important public investment for its substantial recreational potential as well as for its natural beauty. Okemo has demonstrated that the Jackson Gore Phase I Project will not endanger the public’s use and enjoyment of Okemo State Forest and Okemo Mountain Road. In fact, Okemo also demonstrated that the Jackson Gore Phase I Project will increase the public’s use and enjoyment through enhanced recreational opportunities. Therefore, Okemo has met its burden and the Jackson Gore Phase I Project complies with Criterion 9(K).

Id at 101-102.

The Board does not believe that the development of the remaining 22 lots at Solitude Village will have any different impacts than the lots already approved. In addition, the Board notes that finding of fact #305 ensures that the “ public has access to the portions of the Jackson Gore Phase I Project located on the Okemo State Forest year round with the exception of a few weeks each fall for maintenance.” *Id* at 69.

MHMW has not raised any substantive issues concerning how the Project will unnecessarily or unreasonably endanger the public investment in the Okemo State Forest or the Okemo Mountain Road. Nor has MHMW raised any substantive issues how the Project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities, or (b) the public’s use or enjoyment of or access to such facilities. Therefore, the Board holds that MHMW has not raised any substantive issues that require a hearing under Criterion 9(K).

4. If issue #2 or 3 is decided in the affirmative, whether MHMW is entitled to party status under EBR 14 on Criteria 1(B) and 9(K).

Since issues #2 and 3 were decided in the negative, the Board does not need to reach issue #4.

III. ORDER

1. MHMW is barred from raising substantive issues under Criterion 1(B). Thus, the Board does not need to determine whether there are substantive issues that require a hearing on Criterion 1(B) or whether MHMW qualifies for party status on Criterion 1(B).
2. There are no substantive issues that require a hearing on Criterion 9(K). Thus, the Board does not need to decide whether MHMW qualifies for party status on Criterion 9(K).
3. The matter is dismissed. Jurisdiction is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont, this 16th day of January, 2003.

ENVIRONMENTAL BOARD

 /s/Marcy Harding
Marcy Harding, Chair
Rebecca Day
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A. Gregory Rainville
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