

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

RE: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Department of Forests, Parks and Recreation, and Green Mountain Railroad	Land Use Permit Applications #2S0351-30-EB (2 <sup>nd</sup> Revision) and #2S0351-31-EB, and #2S0351-25R-EB
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**MEMORANDUM OF DECISION**

This decision addresses a request filed by Mount Holly Mountain Watch to reconvene the hearing on this matter, and related issues. The hearing will be reconvened, as set forth below, for a limited time and purpose.

**I. Procedural Summary**

Mount Holly Mountain Watch ("MHMW") filed this appeal concerning a Master Plan application and related land use permits for the Okemo ski area in Ludlow, Vermont. The Master Plan includes a base lodge, retail area, hotel, condominiums, train station, parking, water park, tennis center, golf course, ski trails, and ski lifts located on 400 acres of land near Route 103 in Ludlow, Vermont ("Master Plan Project"). One of the permits authorizes the construction of Phase I of the Jackson Gore development, including a condominium hotel and related parking, water and sewer facilities, fifteen ski trails, three ski lifts, and snowmaking ("Jackson Gore Phase I Project"), which is a component of the Master Plan, and the other permit authorizes the development of an 11-lot subdivision known as Solitude Village ("Solitude Village Project"), which is another component of the Master Plan.

On December 29, 2000, the District 2 Environmental Commission ("Commission") issued Findings of Fact and Conclusions of Law #2S0351-30 (2<sup>nd</sup> Revision) and #2S0351-31 regarding the Master Plan Project and the Jackson Gore Phase I Project ("Master Plan/Jackson Gore Phase I Project"), which was subsequently corrected on January 5, 2001 ("Master Plan/Jackson Gore Phase I Decision"). The Commission also issued Land Use Permit #2S0351-31 ("Jackson Gore Phase I Permit") on December 29, 2000, to Okemo Mountain, Inc.; Vermont Department of Forests, Parks & Recreation and Green Mountain Railroad (collectively "Okemo") for the Jackson Gore Phase I Project. MHMW filed a Motion to Alter on January 10, 2001. The Commission denied the Motion to Alter in a Memorandum of Decision issued on January 12, 2001, and corrected its Memorandum of Decision on January 18, 2001.

On January 24, 2001, the Commission issued Land Use Permit #2S0351-25R ("Solitude Village Permit"), and supporting Findings of Fact, Conclusions of Law, and Order #2S0351-25R ("Solitude Village Decision") to Okemo Mountain, Inc. The Commission heard a portion of the Solitude Village Project proceedings and the Master Plan/Jackson Gore Phase I Project proceedings together.

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On February 8, 2001, MHMW filed an appeal from the Jackson Gore Phase I Permit, the Master Plan/Jackson Gore Phase I Decision, the Solitude Village Decision and the Solitude Village Permit with the Vermont Environmental Board ("Board"), pursuant to 10 V.S.A. 6089(a) and Environmental Board Rules ("EBR") 6 and 40. In its appeal, MHMW alleges that the Commission erred in its conclusions concerning party status and the projects' compliance with 10 V.S.A. 6086(a)(1), (1)(A), (1)(B), (1)(E), (4), (5), (6), (8), (9)(A), (9)(H), (9)(K), (9)(L), and (10) ("Criteria 1, 1(A), 1(B), 1(E), 4, 5, 6, 8, 9(A), 9(H), 9(K), 9(L), and 10").

On February 21, 2001, Okemo filed two cross-appeals, alleging that the Commission erred in its grant of EBR 14(B) party status to MHMW in the Master Plan/Jackson Gore Phase I Decision, on Criteria 1(A), 1(B), 1(E), 5, 6, 8, 9(A), 9(H), 9(K), 9(L), and 10; and in the Solitude Village Decision, on Criteria 1, 1(B), 1(E), 4, 5, 6, 9(A), 9(H), 9(K), 9(L), and 10.

On March 12, 2001, Board Chair Marcy Harding convened a Prehearing Conference.

On March 15, 2001, Chair Harding issued a Prehearing Conference Report and Order ("PHCRO"), which identified and ordered the parties to brief preliminary issues of party status and ripeness.

On March 16, 2001, Okemo filed a brief on the ripeness of the Master Plan appeal. MHMW did not file a reply brief.

On March 19, 2001, MHMW filed its Petition for Party Status. Okemo filed a brief in opposition to MHMW's Petition for Party Status on March 22, 2001.

On March 22, 2001, John Lysobey filed a Motion to Extend Filing Date, Objection to Time Requirements, and Memorandum Regarding the Need for Speed.

The Board deliberated on preliminary issues on March 28, 2001 and April 25, 2001.

On May 22, 2001, the Board issued a Memorandum of Decision on preliminary issues, granting MHMW party status on the Master Plan proceeding under Criteria 6, 9(H) and 9(L); on the Jackson Gore proceeding under Criteria 1(A), 1(B), 1(E), 5, 6, 8 (aesthetics), 9(A), 9(H), 9(K), 9(L) and 10 (Rutland Regional Plan); and on the Solitude

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Village proceeding, under Criteria 1(B), 1(E), 4, 6, 9(H), 9(K) and 9(L). The Chair issued a Scheduling Order on the same day, setting this matter for hearing and setting prehearing filing deadlines, among other things.

On July 25, 2001, MHMW and John Lysobey filed requests for subpoenas.

On August 2, 2001, Chair Harding denied Mr. Lysobey's requests and granted MHMW's subpoena request, subject to the right of any party to file an objection on or before August 8, 2001.

On August 8, 2001, Mr. Lysobey asked that the denial of his subpoena requests be reconsidered by the Chair and the Board.

The Board deliberated on this objection on August 15, 2001. On August 21, 2001, the Board issued a Memorandum of Decision denying these requests upon reconsideration.

On August 29, 2001, the Board convened a public hearing in this matter, conducted a site visit, heard testimony and admitted exhibits. At the hearing, Chair Harding noted that some of the site plans and drawings submitted as evidence bore different revision dates than those listed in certain permits and sewer allocations admitted as Exhibits O23 through O30. Okemo agreed to provide the Board and parties with a copy of the same version of each plan referred to in Exhibits O23-O30, where a version bearing a different revision date is already in evidence.

On August 31, 2001, the Chair issued a Hearing Recess Order giving Okemo until September 6, 2001 to file the supplemental exhibits, and giving the other parties until September 13, 2001 to file any objection or hearing request regarding the supplemental exhibits.

On September 6, 2001, Okemo filed supplemental exhibits with cover sheets detailing the differences between the original and supplemental exhibits.

On September 12, 2001, MHMW filed a letter objecting to, and requesting a hearing on, the supplemental exhibits. MHMW also made other requests in the letter.

On September 21, 2001, Okemo filed a Memorandum in Opposition to MHMW's Request to Reconvene Hearing, and Okemo also requested permission to make

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unauthorized filings. Also on September 21, 2001, Okemo filed additional supplemental exhibits.

On September 26, 2001, the Board deliberated on MHMW's Request to Reconvene Hearing.

## **II. DISCUSSION**

In its request letter, MHMW raises several issues. Okemo objects to some of these requests, including the request to reconvene the hearing. Okemo's request that the Board accept its "Memorandum in Opposition to MHMW Request to Reconvene Hearing" is granted.

### **A. Request to Reconvene Hearing**

MHMW requests additional hearing time to cross-examine Okemo's experts on the new exhibits. Okemo objects to MHMW's request, claiming that there are no significant differences between the original and new exhibits, and that MHMW failed to demonstrate why additional hearing time is necessary as required by the Recess Order.

Act 250 requires that parties have an opportunity to be heard on the evidence. Since MHMW has filed a request to cross-examine Okemo's witnesses on the new exhibits, MHMW is entitled to do so. See, 10 V.S.A. § 6085(f)(providing, in relevant part, that "A hearing shall not be closed until a commission or the board provides an opportunity to all parties to respond to the last permit or evidence submitted."); 3 V.S.A. § 809(c)("Opportunity shall be given all parties to respond and present evidence and argument on all issues involved."); *Re: Town of Stowe*, #100035-9-EB, Findings, Conclusions and Order at 26 (May 22, 1998)(granting a motion to supplement would require reopening the hearing to allow parties an opportunity to be heard on new evidence); *see also Re: Okemo Mountain, Inc.*, # 2S0351-10-EB, Memorandum of Decision at 2 (Oct. 31, 1990)(requirements of applicable law, including the Administrative Procedures Act and Vermont Rules of Evidence, satisfied where ample opportunity existed for the appellants to file objections to the information submitted by the Permittees and to request a hearing). However, this opportunity is a fairly narrow one.

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MHMW also seeks to cross-examine Okemo's expert witnesses on the sewer allocation referenced in O27 and related exhibits. Specifically, MHMW "wishes to cross examine Okemo's expert witnesses on where the allocation is going since MHMW believes the Ludlow Sewage Treatment Facility (which is in the process of being permitted) cannot accept further allocations until certain requirements are met." MHMW then references an attached letter dated September 10, 2001 from Peter Berg to the Department of Environmental Conservation regarding a "Draft Discharge Permit No. 3-1207." The Board declines to speculate on whether and how this sewer allocation issue relates to the issues raised by the supplemental exhibits, and notes that neither the letter nor the draft discharge permit is in evidence. MHMW will have an opportunity to raise this issue at the reconvened hearing only insofar as MHMW could not have addressed this issue on the first hearing day, and only insofar as it is relevant to the issue presented at the reconvened hearing, described below.

The Board grants MHMW's request to reconvene the hearing, but only for a limited purpose. **Cross-examination and any rebuttal evidence shall be limited to issues raised by differences between the new drawings and drawings already in evidence, and issues raised by Okemo's additional supplemental exhibits and supplemental prefiled testimony. To be clear, the reconvened hearing is not an opportunity for the parties to raise issues or arguments that could have been raised at the original hearing.**

To streamline the reconvened hearing, the Board asks that Okemo prefile testimony of the witness or witnesses who can sponsor each of the new exhibits and be available for cross-examination on them. Given the limited nature of the reconvened hearing, this prefiled testimony need not be extensive or formal. It may be as simple as a statement authenticating each exhibit sponsored and describing the changes between versions of drawings. Where appropriate, the sponsoring witness could briefly adopt the description of changes between versions Okemo already has submitted. MHMW will be given an opportunity to prefile any rebuttal testimony and evidence.

#### **B. Request to Call David Deen as a Witness**

MHMW wishes to call David Deen as a witness on "water issues." Mr. Deen was listed as a witness by MHMW but his prefiled testimony was not admitted because he did not appear at the August 29, 2001 hearing. Now that Okemo has submitted new exhibits at the Board's request, providing an opportunity to reopen the hearing:

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MHMW requests that at the next hearing Mr. Dean be permitted to appear and enter his testimony as well as act as an advisor and consultant on "water issues." Mr. Dean was not aware at the time he submitted his prefiled testimony that the permits did not have proper documentation and he also was not aware of the two corrections, which Okemo submitted during the hearing, which he could not review.

Okemo objects to this request on the grounds that MHMW had the chance to have Mr. Deen's testimony admitted on August 29, 2001.

Okemo also argues that Mr. Deen's proposed testimony concerned only the impacts on the Coleman Brook, not Criterion 1(B). The Board notes that the evidence obtained at the reconvened hearing may be relevant to more than Criterion 1(B). It is not clear from MHMW's request whether MHMW seeks admission of the testimony it previously prefiled for Mr. Deen, or whether it seeks to elicit new testimony from this witness. To the extent that MHMW seeks admission of the proposed Exhibit M-46, this request is denied. The reason MHMW failed to have this witness present at the first day of hearing -- "communication problems," is not related to the Board's request that Okemo submit new evidence. MHMW missed its opportunity to get this testimony into evidence, and the reconvened hearing is no reason to give it MHMW another chance.

To the extent that MHMW may wish to elicit new testimony from Mr. Deen, it must be in rebuttal to the new exhibits and evidence filed by Okemo, and limited to issues that could not have been addressed on the previous hearing day. MHMW's request raises only issues that could have been explored prior to the first hearing. While the Board did not request the supplemental exhibits until that time, nothing barred MHMW from comparing the revision dates on the permits and sewer allocations

to those on the prefiled exhibits before or during the hearing. Any corrections or issues raised at the hearing could have been addressed by MHMW at that time. Still, MHMW did not file any evidentiary objection or rebuttal evidence on this point, and did not explore it at the hearing.

MHMW's request to allow Mr. Deen to testify is denied insofar as the request concerns Mr. Deen's prefiled testimony or any testimony on issues that could have been raised on the previous hearing day had Mr. Deen been present. MHMW's request is granted only insofar as Mr. Deen has rebuttal testimony to offer concerning the differences between the new drawings and drawings already in evidence or issues raised by Okemo's additional supplemental exhibits and supplemental prefiled testimony.

### **C. Evidentiary Objections**

MHMW objects to admission of all the new Okemo exhibits, and to the new Okemo exhibit list, "for the reasons stated" in its request letter. While "major deficiencies" in the exhibits are claimed throughout MHMW's letter, the only deficiency MHMW specifies is the absence of ANR's "approved" stamp on several drawings. Okemo has since submitted several exhibits with the ANR "approved" stamp. If the second set of supplemental exhibits does not address MHMW's concerns in this regard, MHMW may explore the issue on cross-examination and the Board will give the evidence the weight to which it is entitled. MHMW's evidentiary objections, therefore, are overruled. MHMW's objections to the final list of Okemo exhibits are not considered because the exhibit list is not evidence.

### **D. Supplemental Proposed Findings and Conclusions**

MHMW seeks an opportunity to file supplemental proposed findings of fact and conclusions of law. This is a reasonable request in light of the new evidence and the reconvening of the hearing in this matter. This opportunity will be given to all parties. The Chair will announce a filing deadline at the reconvened hearing or shortly afterward.

### **E. Other Requests and Issues**

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MHMW also requests an opportunity to examine certain plans that have not been submitted by Okemo. According to MHMW, these plans are listed in exhibits that are in the evidentiary record in this case. This request is denied. In Board proceedings generally, parties are not empowered to compel each other to produce documents for discovery or evidentiary purposes. In this case, the documents listing the various "additional plans" MHMW seeks to examine were available to MHMW before the August 29, 2001 hearing. Insofar as this has any bearing on the merits of this case, MHMW had the opportunity to raise these issues at that time, in cross-examination.

MHMW requests permission to retain counsel to assist at the reconvened hearing. MHMW is well within its rights to retain counsel at any time, and need not request the Board's permission to do so. The Board notes, however, that a decision to retain a lawyer would not furnish grounds for delay at this late stage in the proceeding. MHMW has had ample opportunity to retain counsel.

MHMW also contends that Okemo has proceeded with construction without proper documentation. This is not relevant to any issue currently before the Board, and has no bearing on this appeal. Therefore, the Board will not consider this claim.

### III. ORDER

1. The hearing in this matter shall be reconvened for one hour on **Wednesday, November 7, 2001, at 10:00 a.m.**, for the limited purpose set forth above. The specific location of this hearing shall be announced later.
  - a. On or before **Tuesday, October 23, 2001**, Okemo shall submit prefiled testimony in accordance with this Order, a final list of witnesses, and a final list of exhibits indicating which prefiled testimony and other exhibits are proposed for admission at the reconvened hearing.
  - b. On or before **Tuesday, October 30, 2001**, each party shall file any rebuttal exhibits, prefiled rebuttal testimony, and a final list of witnesses, and a final list of exhibits indicating which prefiled testimony and other exhibits are proposed for admission at the reconvened hearing.

- c. On or before **Monday, November 5, 2001**, the parties shall file any evidentiary objections to the evidence filed or such objections shall be deemed waived. The Chair will not issue a preliminary ruling on these objections before the hearing.
  - d. Testimony and exhibits shall be marked, filed and served in accordance with the Scheduling Order issued on May 22, 2001 and applicable Board rules.
  - e. No individual may be called by a party as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this Order and if prefiled testimony for such witness has not been filed in compliance with this Order. EBR 17(E). Prefiled testimony and exhibits shall not be required of witnesses who must be subpoenaed to attend and present evidence, but such witnesses must be identified as such in the witness list. No exhibit may be offered as evidence to the Board if it has not been identified in an exhibit list filed in compliance with this Order.
2. MHMW's evidentiary objections are **OVERRULED**.
  3. MHMW's request to allow David Deen to testify at the reconvened hearing is **DENIED** in part and **GRANTED** in part.
  4. MHMW's request for an opportunity to submit supplemental proposed findings of fact and conclusions of law is **GRANTED**. A filing deadline shall be announced at the reconvened hearing or shortly thereafter.
  5. MHMW's requests to examine additional documents not in evidence are **DENIED**.

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Dated at Montpelier, Vermont this 2nd day of October, 2001.

ENVIRONMENTAL BOARD

\_\_\_/s/Marcy Harding\_\_\_\_\_

Marcy Harding, Chair

John Drake

George Holland

Alice Olenick

Don Sargent