

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

RE: Okemo Mountain, Inc.
Vermont Department of Forests, Parks, and Recreation
Master Plan Application #2S0351-30-EB

MEMORANDUM OF DECISION

This proceeding concerns a master plan application for 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 on Route 103 in the Town of Ludlow, Vermont ("Project").

I. PROCEDURAL HISTORY

On February 23, 1998, Okemo Mountain, Inc., and Co-Applicant Vermont Department of Forests, Parks and Recreation ("Applicants") filed Land Use Permit Application #2S0351-30 with the District # 2 Environmental Commission ("Commission") seeking partial review of the criteria for a master plan for ski resort improvements.

On October 15, 1999 the Commission issued Partial Findings of Fact, Conclusions of Law, and Order ("Decision").

On November 11, 1999, Okemo Mountain, Inc. ("Okemo") filed a Motion for Reconsideration. Okemo supplemented this filing on December 7, 1999.

On March 9, 2000, the Commission issued a Memorandum of Decision on Okemo's Motion to Alter and accompanying Revised Master Plan Findings of Fact, Conclusions of Law, and Order ("Revised Decision").

On March 30, 2000, Mt. Holly Mountain Watch ("Appellant") filed an appeal with the Environmental Board ("Board") from the Revised Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086 (a) 1, 1(A), 1(B), 1(E), 1(F), 1(G), 5, 6, 8, 8(A), 9(A), 9(H), 9(K), 9(L), 10, and in denying the Appellant party status on Criteria 1, 1(A), 1(B), 1(E), 1(F), 1(G), 8, 8(A), 9(H), and 9(L). The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rule ("EBR") 6 and 40.

On April 13, 2000, Okemo filed a cross appeal challenging the party status of Appellant on Criteria 5, 6, 9(A), 9(K), and 10.

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On May 5, 2000, Board Chair Marcy Harding convened a prehearing conference, and on May 11, 2000, she issued a Prehearing Conference Report and Order ("PCRO") which limited the party status issues to those discussed below. The PCRO requested that the parties submit written memoranda on two preliminary issues. In addition, on May 22, 2000, Appellant requested a continuance and on June 6, 2000, Okemo requested that the case be remanded.

On June 21, 2000, the Board deliberated on the preliminary issues below.

II. PRELIMINARY ISSUES

The Chair and the parties have identified the following preliminary issues:

1. Party Status
 - A. Whether Appellant should have party status on Criteria 1 (A), 6, 9(H), and 9(L).
 - B. Whether John Lysobey should have party status on Criterion 1(A).
2. If the Board grants Appellant party status on any Criteria, whether the Board should grant Okemo's request for a remand.
3. Whether the District Commission's Revised Decision contained a finding of fact sufficient to support a conclusion of law on Criterion 1 (A).
4. Whether the Board should grant Appellant's request for a continuance.

III. DISCUSSION

1. Party Status

To establish party status under EBR 14(B)(l), a party must demonstrate that the project may have a direct affect on his property or interests with regard to the criterion. For example, the Board has required that a party allege a direct affect from the project, such as being able to see a proposed radio tower Vermont Electric Power Corporation #7C0565-EB Findings of Fact, Conclusions

of Law, and Order (Dec. 13, 1984) or a proposed intersection. Springfield Hospital #2S0776-2-EB Memorandum of Decision (Aug. 14, 1997). However, the Board has also granted party status to organizations interested in preserving public land, such as the Green Mountain Club, Vermont Department of Forests, Parks, and Recreation #1R0488-EB Findings of Fact, Conclusions of Law, and Order (Jan. 11, 1984) or a neighborhood organization, Okemo Mountain Inc. #2S0351-16-EB Memorandum of Decision (March 1, 1993).

-To establish party status pursuant to EBR 14(B)(2) as a party who can materially assist the Board, the Board requires more than an assertion that such person can cross-examine witnesses and present experts. The Board also considers whether that person possesses particular expertise with respect to a proposed project, the complexity of the project, whether the issues involved are novel and unfamiliar or the subject of sufficient public notice and awareness, and whether the Board has experience with the issues involved. Sprina Brook Farm Foundation, Inc., #2S0985-EB, Chair's Ruling on Preliminary Issues (June 2, 1995). An individual may be denied party status under EBR 14(B)(2) when he cannot demonstrate that he is a person with specific expertise who could assist the Board, and the issues presented by the project are not particularly complex, novel or unfamiliar. Old Vermonter Wood Products and Richard Atwood, #5W1305-EB, Memorandum of Decision (Feb. 3, 1999).

a. Appellant's party status request on Criteria I(A), 6, 9(H), and 9(L)¹.

Appellant has requested party status for Criteria I(A), 6, 9(H), and 9(L) pursuant to EBR 14(B)(1) and 14(B)(2). Appellant is a citizens group from Mt. Holly founded in 1997 to protect the natural environment where its members live, work, and recreate. At inception, the organization had twenty-eight members. The Town of Mt. Holly abuts the Town of Ludlow where the Project is located.

1) Criterion 1 (A)²

¹Appellant's appeal requested party status on Criterion I(G) but Appellant subsequently withdrew the request.

²Should the Board determine that Criterion I(A) is not an appealable issue, the party status requests for both Appellant and John Lysobey for Criterion 1 (A) would become moot.

Appellant states that the headwaters to Coleman Brook are in the Town of Mt. Holly and that its members use the headwaters area for hiking, snowshoeing, and hunting and want to preserve it from irreparable harm. Appellant states further that Coleman Brook and its tributaries would be harmed by the construction of bridge #1, the abutments, excessive trail clearing, and contamination from snowmelting. Appellant has demonstrated a sufficient interest to qualify for party status for Criterion I(A) pursuant to EBR 14(B)(I).

2) Criterion 6

In support of its request for party status on Criterion 6, Appellant states that the Town of Mt. Holly shares Black River High School with the Town of Ludlow. Appellant asserts that the Project would increase the number of students attending the high school and require an increase in taxes to accommodate more students. Appellant has demonstrated a sufficient interest and qualifies for party status for Criterion 6 pursuant to EBR 14(B)(I).

3) Criterion 9(H)

Appellant argues that the Project would result in scattered development which would lead towards additional costs for public services and facilities. For example, Appellant asserts that the Project would require additional capacity for both the high school and the sewage treatment facility.

Okemo opposes Appellant's party status based on the fact that all the public services and facilities are located in and paid for by the Town of Ludlow. However, since the Town of Mt. Holly shares the high school with the Town of Ludlow, the Town of Mt. Holly's taxes could also be directly affected by the need to fund capital investments such as a school bus to service new neighborhoods created by the Project. Therefore, Appellant has demonstrated a sufficient interest and qualifies for party status for Criterion 9(H) under EBR 14(B)(I).

4) Criterion 9(L)

Appellant argues that the Project is partially in a rural growth area located on the border of the Town of Mt. Holly. Appellant acknowledges that the Okemo State Forest parcel is not a rural growth area because it contains protected resources which predominate the land. However, Appellant argues that Okemo's Ranta parcel is a rural growth area because only a small portion of the area contains the protected resources. Appellant asserts that the Project does not

call for reasonable population densities, rates of growth, and does not economize on the costs of roads and land usage. Appellant claims the Project would damage the educational system, the natural, social and economic environment, and result in a significant tax burden. Appellant has sufficient interests concerning Criterion 9(L) that qualify for party status under EBR 14(B)(1).

As a result of the Board's decision granting Appellant party status pursuant to EBR 14(B)(1) on the above Criteria, the Board does not need to reach the question of whether Appellant qualifies for party status pursuant to EBR 14(B)(2).

2. **Okemo's Alternative Request for a Remand³**

Okemo has requested that the case be remanded if the Board determines that the Appellant has party status under any Criterion and therefore, the appeal should be heard. Okemo's request is based on the fact that the Commission currently is reviewing Okemo's application for construction of Phase I of its Jackson Gore project, a component of the master plan permit.

This case presents an unusual scenario not anticipated by the master plan permit process. Typically, a master plan permit application is submitted, hearings are held, and any appeal is resolved before an applicant wants to begin construction. However, in this instance, Okemo wants to begin construction on Phase I even though the master plan permit appeal has yet to be resolved.

Okemo argues that, in light of the purpose of master permits, which is to provide greater efficiency in the environmental review process and avoid unnecessary and unreasonable costs and delays, the applicant should have the right to defer a master plan appeal until the Commission has rendered a final decision on the application for a construction phase.

However, the master plan permit process is also intended to provide review of cumulative impacts from multi-phased development projects. Rockwell Park Associates #5W0772-5-EB Findings of Fact, Conclusions of Law, and

³Since the Board has granted Appellant party status, the Board will next address Okemo's request for a remand since granting that request would result in the other issues becoming moot.

Order (August 9, 1993). Allowing review of individual construction projects in a piecemeal fashion could circumvent that purpose and result in redundant hearings contrary to the principles of judicial economy.

Therefore, though the Board is remanding the case, the Board strongly urges the Commission to consolidate the master plan permit application with the Phase I construction application. Consolidation of the two cases will allow the construction permit to be issued as soon as the issues on that phase of construction are resolved, yet still consider cumulative impacts and result in judicial economy. For the above reasons, the Board grants Okemo's request for a remand.

3. Other Preliminary Issues

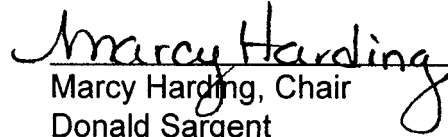
As a result of the Board's decision to remand the appeal, John Lysobey's request for party status for Criterion 1 (A), Appellant's request for a continuance, and the issue of whether the Commission's Revised Decision contained a finding of fact sufficient to support a conclusion of law on Criterion I(A) are all moot.

IV. ORDER

1. Pursuant to EBR 14(B)(I), Appellant is granted party status on Criteria I(A), 6, 9(H), and 9(K).
2. Okemo's motion for a remand is granted.
3. John Lysobey's request for party status on Criterion I(A) is moot.
4. Appellant's request for a continuance is moot.
5. The issue whether Criterion I(A) should be considered as part of this appeal is moot.
6. Jurisdiction is remanded to the District #2 Commission.

Dated at Montpelier, Vermont this 30th day of June, 2000.

ENVIRONMENTAL BOARD



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