

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

Re: Okemo Limited Liability Company, et al. Land Use Permit #2S0351-34 -EB
Docket #859

Memorandum of Decision

This proceeding involves an appeal from a decision by the District 2 Environmental Commission (Commission) denying party status to Mt. Holly Mountain Watch (MHMW) as to several criteria listed in 10 V.S.A. §6086(a).

I. History

On September 22, 2004, the District #2 Environmental Commission (Commission) issued Land Use Permit #2S0351-34 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) to Okemo Limited Liability Company for a project generally described as the construction of three residential buildings with 104 units with underground parking; a 20,000 square foot conference center and a 17,000 square foot recreation/health club facility; an 800 foot beginner ski trail with snowmaking; relocation of the currently permitted quad chair lift; relocation of a currently permitted parking lot; an increase in total parking to 988 spaces; expansion of utilities including waterlines, sewer lines and pump station storage capacity, powerlines and stormwater drainage pipes (Project). The Project is located off Okemo Ridge Road in Ludlow, Vermont.

On October 13, 2004, MHMW filed an appeal with the Environmental Board (Board), alleging that the Commission erred in denying MHMW party status with respect to 10 V.S.A. §§6086(a)(1), (1)(A), (1)(B), (1)(E), (2), (3), (5), (6), (7), (8)(natural areas), (8)(A), (9)(A), (9)(F), (9)(K), and (10)(Town and Regional Plans).

Following a November 23, 2004 Prehearing Conference with MHMW by Peter Berg and Okemo by Lawrence G. Slason, Esq. participating, Acting Board Chair Jean Richardson issued a Prehearing Conference Report and Order.

Okemo filed a memorandum in response to MHMW's petition on December 7, 2004, and the Board deliberated on December 15, 2004 and January 5, 2005.

II. Issue

The issue in this matter is:

Is MHMW entitled to EBR 14 party status under any or all of the following statutory sections: 10 V.S.A. §§6086(a)(1), (1)(A), (1)(B), (1)(E), (2), (3), (5), (6), (7), (8)(natural areas) (8)(A), (9)(A), (9)(F), (9)(K), and (10)(Town and Regional Plans)?

III. Discussion

A. Review on the filings

The parties have submitted this matter to the Board on filings only; no evidentiary hearing has been held. Under these circumstances, the Board accepts allegations in a party status petition as true, unless the person opposing such petition seeks a hearing to contest their veracity.¹ *Re: Hale Mountain Fish and Game Club, Inc.*, Declaratory Ruling #435, Memorandum of Decision at 3 (Sep. 24, 2004); *Re: Okemo Limited Liability Company, et al.*, #2S0351-24B-EB, Memorandum of Decision at 2 (May 10, 2004) [EB #843], citing *Re: Bradford B. Moore*, #5L1423-EB, Memorandum of Decision at 2 (Apr. 27, 2004) and *Re: McLean Enterprise Corporation*, #2S1147-1-EB, Memorandum of Decision at 6 (Sep. 19, 2003) [EB #829]; and see *Re: River Station Properties III, LLC* #5W1436-EB (Interlocutory), Memorandum of Decision at 2 (Oct. 14, 2004) (where Board has no contrary evidence, it assumes party status petition to be true).

B. MHMW

MHMW's petition describes its membership as:

MHMW is an organization made up of about 30 Mount Holly residents who own property in the town, pay taxes and vote there, and many of their children and grandchildren who attend Mount Holly schools or the Black River High School or junior high school in the Town of Ludlow. MHMW also has several honorary members who either reside in the town of Ludlow or are members of the Vermont House of Representatives, such as David Deen, who assisted MHMW on several Act 250 matters. In addition to school attendance by family members, members regularly shop at Ludlow stores, use Ludlow based professional services and attend meetings of associations and clubs based in Ludlow. MHMW members have many friends in the town of Ludlow with whom they interact socially. MHMW members use the state facilities on the state lands on Okemo Mountain.

¹ Holding evidentiary hearing on party status petitions would enable the Board to make more precise rulings, but the delay such a hearing causes sometimes generally outweighs its benefit. However, an applicant – in this matter Okemo - aware of the potential for delay, may choose to contest a factual issue in a party status petition beyond submitting opposing memoranda, by requesting an evidentiary hearing before the Board makes its final determination. *Re: McLean Enterprises Corporation* #2S1147-1-EB Memorandum of Decision at 6 (Sep. 19, 2003).

MHMW Petition at 5.

C. *Analysis*

1. *The applicable party status rule*

EBR 14(A)(6), as adopted on January 12, 2004, states:

Party status. In proceedings before the board and district commissions, the following persons shall be entitled to party status:

(6) Any person who demonstrates an interest under any of the criteria listed at 10 V.S.A. Section 6086(a) which may be directly affected by the outcome of the proceeding.

2. *The criteria at issue*

a. *Criterion 1(A)*

MHMW did not seek party status before the Commission on Criterion 1(A). Under these circumstances, its petition is subject to higher scrutiny. As the Board wrote in *Re: Okemo Mountain, Inc.*, #2S0351-30-EB (2nd Revision), and #2S0351-31-EB, and #2S0351-25R-EB, Memorandum of Decision at 10 (May 22, 2001):

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’s petition does not state grounds sufficient to meet the “substantial injustice or inequity” standard. The Board therefore denies MHMW’s petition as to Criterion 1(A).

- b. *Criteria (1), (2), (3), (6), (7), (8)(natural areas) (8)(A), (9)(A), (9)(F), (9)(K), and (10)(Town and Regional Plans)*

As to Criteria (1), (2), (3), (7), (8)(natural areas) (8)(A), (9)(A), (9)(F), (9)(K), and (10)(Town and Regional Plans), MHMW’s petition does not indicate how MHMW’s interests under these criteria will be *directly* affected by the Project at issue here, as EBR 14(A)(6) requires. Nor, as to some of these criteria, does MHMW’s petition establish that its interests under those criteria are, in any respect, different from those which any member of the general public might assert, also a requirement for party status under EBR 14(A)(6) as it has been interpreted. See, *Re: Okemo Limited Liability Company, supra*, at 7.²

- c. *Criteria (1)(B), (1)(E) and (5)*

- i. *Criteria (1)(B) and (1)(E)*

MHMW’s petition alleges:

The additional conventioners, spouses, and their children in the base area of the resort for extended, unknown periods of time will also impact Criteria 1(B) Waste disposal and 1(E) Streams, since the effluents are treated by the Ludlow Waste Management Treatment Facility which treats the Ludlow effluent before it reaches a known and designated local swimming area which ... is used by residents of Mount Holly and the petitioners.

MHMW Petition at 3. Similar allegations of MHMW’s direct use of a water resource directly affected by a project have been found sufficient to establish its party status under Act 250 water-related criteria. See, *Re: Village of Ludlow, #2S0839-2-EB*,

² This requirement also existed under former EBR 14(B)(1), see, *Re: Village of Ludlow, #2S0839-2-EB*, Memorandum of Decision at 3 (May 28, 2003); *Re: Alpine Pipeline Company*, Declaratory Ruling #415, Memorandum of Decision at 4 (Jan. 3, 2003); *Re: Mount Anthony Union High School District #14, #8B0552-EB*(Interlocutory), Memorandum of Decision at 7 (Jan. 31, 2002).

Memorandum of Decision at 4 – 5 (May 28, 2003). The Board grants MHMW EBR 14(A)(6) party status as to Criteria (1)(B) and (1)(E).

ii. Criterion 5

The Board has recently written:

The question of party status under 10 V.S.A. §§6086(a)(5) does not necessarily turn solely on where the petitioner resides relative to a proposed project. Rather, the relevant inquiry is whether the petitioner uses the roads that may be impacted by a project on a regular basis. See *Re: Okemo Mountain, Inc., #2S0351-30-EB (2nd Revision), #2S0351-31-EB, and #2S0351-25R-EB, Memorandum of Decision at 11 (May 22, 2001)*. A project may cause a hazardous condition or congestion at a point some distance from the actual project site or the petitioner's home; conversely, a person may live immediately adjacent to a proposed project but never drive the roads that the project will use. Therefore, the location of a petitioner's residence is only one factor that may be relevant to a consideration of party status under Criterion 5, to the extent that it demonstrates that the petitioner's use of the roads may be impacted on a regular basis and that the petitioner may thus experience impacts that differ from those experienced by the public in general.

Re: Pike Industries, Inc. and Inez M. Lemieux, #5R1415-EB, Memorandum of Decision at 2 (Nov. 19, 2004).

MHMW's petition, which discusses in some detail the particular use by its members of the Ludlow area roads, meets the requirements of EBR 14(A)(6) as to Criterion 5.

iii. Criterion 6

Specifically as to 10 V.S.A. §6086(a)(6), MHMW's petition states:

The Applicant must also meet Criteria (sic) 6 of Act 250, that is to show that the development will not cause an unreasonable burden on the ability of a municipality to provide educational services. The petitioners, Mount Holly residents and their children attend the junior high school and the Black River High School in Ludlow. They reach school in Ludlow and go home through the means of buses. Both the Black River High School and the junior high school have their access on Main Street in Ludlow. The intersections through which school buses must travel in Ludlow are greatly impacted by Okemo traffic. The amount of time already spent on the buses does not take into account the growth already permitted. However (sic) the convention center, its 500 conventioners and family (sic), plus

their cars has (sic) not been presented by the Applicant who has not explained this impact of the development on educational services. ...

MHMW Petition at 4.

While MHMW's petition appears to be focused mostly on the impacts of traffic on educational services, it meets the requirements of EBR 14(A)(6) as to Criterion 6.

IV. Order

1. MHMW's petition for party status is granted under EBR 14(A)(6) as to 10 V.S.A. §§6086(a)(1)(B), (1)(E), (5) and (6).

2. MHMW's petition for party status is denied as to 10 V.S.A. §§6086(a)(1), (1)(A), (2), (3), (7), (8)(natural areas) (8)(A), (9)(A), (9)(F), (9)(K), and (10)(Town and Regional Plans).

3. Jurisdiction is remanded to the District 2 Environmental Commission.

Dated at Montpelier, Vermont this 7th day of January 2005

ENVIRONMENTAL BOARD

/s/Jean Richardson
Jean Richardson, Acting Chair
Jill Broderick
George Holland
* W. William Martinez
Karen Paul
Alice Olenick
Richard C. Pembroke, Sr.
A. Gregory Rainville

* Board Member Martinez, dissenting: While I agree with the majority's conclusions as to granting MHMW party status under 10 V.S.A. §§6086(a)(1)(B), (1)(E), (5), I dissent as to §6086(a)(6). MHMW's petition on Criterion 6 is related more to traffic concerns than issues involving educational services, and I would therefore deny MHMW party status under that criterion.