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

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

Memorandum of Decision

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

I. History

On September 22, 2004, the Commission issued Land Use Permit #2S0351-34 (Permit) and accompanying Findings of Fact, Conclusions of Law, and Order (Decision) to Okemo Limited Liability Company (Okemo) 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 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).

The Board issued a Memorandum of Decision on January 7, 2004, granting MHMW's petition for party status under Environmental Board Rule (EBR) 14(A)(6) as to 10 V.S.A. §§6086(a)(1)(B), (1)(E), (5) and (6), denying the petition 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), and, because the Commission had never held hearings in this application with MHMW participating, remanding jurisdiction to the Commission.

On January 21, 2005, MHMW and Okemo both filed timely motions to alter the Board's decision.

The Board deliberated on February 23, 2005.

II. Discussion

A. MHMW's motion to alter: whether MHMW should have party status as to Criterion 1

MHMW's motion to alter asks the Board to grant MHMW party status as to Criterion 1 (water pollution). MHMW contends that, as the Board granted it party status as to Criteria 1(B) and 1(E), and both of those criteria address a project's impacts on waters, it follows that MHMW should have Criterion 1 party status.

The Board denied MHMW party status as to Criterion 1 because:

> MHMW's petition does not indicate how MHMW's interests under [the] criteria will be *directly* affected by the Project at issue here, as EBR 14(A)(6) requires. Nor, … does MHMW's petition establish that its interests under [Criterion 1] … 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.

MHMW's motion to alter does not specifically address these shortcomings as to Criterion 1. The implication of MHMW's motion, however, is that, as it did meet the requirements for party status as to Criteria 1(B) and 1(E), success on those requirements can be implied for Criterion 1.

Okemo opposes MHMW's motion. See *Okemo's Memorandum in Opposition* (Jan. 26. 2005). Okemo notes cases in which the Board granted Criterion 1(B) party status but not Criterion 1 party status; see *Re: Peter S. Tsimortos,* #2W1127-EB, Findings of Fact, Conclusions of Law, and Order (Apr, 13, 2004); *Re: Pittsford Enterprises, LLP, and Joan Kelley,* #1R0877-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 31, 2002). However, neither *Tsimortos* nor *Pittsford Enterprises* presented the question presented here.

Okemo further contends that MHMW's claims under Criterion 1 are subsumed into its claims under Criterion 1(B), but not vice versa. Okemo also notes that MHMW's Criterion 1concerns regarding the Ludlow waste treatment facility, waste disposal and stormwater runoff can be fully addressed within the context of Criterion 1(B).

The Board declines to alter its earlier decision. A motion to alter must do more than raise implications; it should indicate where a party believes the Board has erred in its understanding or the arguments presented earlier.

On a motion to alter, new arguments are not acceptable, with exception of argument about matters parties could not reasonably have known about before. *Re:*

Catamount Slate, Inc. et al., Declaratory Ruling #389, Memorandum of Decision at 6 (Jul. 27, 2001), *rev'd on other grounds, In re Catamount Slate, Inc.,* 2004 VT 14 (V.S.Ct.2/13/04); *Re: The Van Sicklen Limited Partnership,* #4C1013R-EB, Memorandum of Decision at 4 (Jul 26, 20/01).

B. Okemo's motion to alter

Okemo's motion to alter asks the Board (a) to deny MHMW party status as to Criterion 6, and (b) to retain jurisdiction over Criteria (1)(B), (1)(E) and (5) and not to remand the matter to the Commission.

1. whether MHMW should have party status as to Criterion 6

The Board's Memorandum of Decision held, "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." *Id* at 6.

Okemo contends at pages 12 -13 of its memorandum, that the focus of any consideration of Criterion 6 is limited to burdens, primarily the capacity of the area school systems to accommodate the additional students resulting from a project's construction, that are not associated with traffic concerns.

The inquiry under Criterion 6 focuses on the reasonableness of the burdens imposed on the local government. *In re St. Albans Group and Wal*Mart Stores, Inc.,* 167 Vt. 75, 83 (1997). These burdens have been framed mostly in terms of the *protection of government finances* from burdens imposed by new development. *Re: St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB (Altered), Findings of Fact, Conclusions of Law, and Order 50 -51 (Jun. 27, 1995), *aff'd*, *In re St. Albans Group and Wal*Mart Stores, Inc.*, *supra.*

Okemo advances this view and contends that the burdens under Criterion 6 have been focused on new school construction or increased property taxes that may result from additional students, and not on the traffic that additional students may create. While this may be where the case law has also focused, there is nothing in the criterion itself that so limits its scope.

Further, while MHMW's petition for party status did focus much of its argument on the traffic that the Project might bring to the area, it also spoke, if obliquely, in terms of other burdens on the government in terms of general educational services:

> 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. … 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.

The Board declines to amend its decision granting party status to MHMW on Criterion 6.

2. whether the Board should retain jurisdiction or remand this matter to the Commission

The Board's January 7 Memorandum of Decision remands this matter to the Commission for a hearing on criteria (1)(B), (1)(E), (5) and (6). Although unstated, the remand was ordered because the Commission had never ruled on the merits of the application after a hearing in which MHMW appeared.[1]

Okemo urges the Board to reverse its decision to remand the case and instead hold a de novo hearing on criteria (1)(B), (1)(E), (5) and (6). Okemo cites case law supporting its request and raises a policy argument: that its Project should not have to incur the substantial delay involved with a second Commission hearing simply because MHMW chose to wait to appeal the denial of party status until the Commission had concluded its hearings and issued a decision.

This is a case of first impression before the Board; the Board has never specifically addressed the question of whether a reversal of a Commission's denial of party status should result in a remand to the Commission or should remain at the Board for a hearing on the merits. Those cases which have been remanded to a Commission have involved instances in which remand to the Commission was required because, by the time the case is presented to the Board on appeal, the *project* has changed sufficiently so that it had impacts on persons or lands that were different from those which the Commission had considered, *see, e.g., In re Taft Corners Assocs.,* 160 Vt. 583 (1993); *Re: Marvin T. Gurman,* #3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 5 (Jun. 10, 1985), citing, *In re Application of Juster Assocs.,* 136 Vt. 577 (1978), *Re: Ray G. & Lynda J. Colton,* 3W0405-5(Revised)-EB, Memorandum of Decision and Remand Order (Oct. 2, 2002), or instances in which the Commission's failure to afford proper notice to impacted

[1] The question of whether this case should be remanded or should remain with the Board was not raised by either party or the Board until the Board issued its January 7, 2005 decision. Okemo has thus not had the opportunity, before today, to argue against a remand, and the prohibitions against raising new arguments on reconsideration, *Catamount Slate, supra; Van Sicklen, supra,* are therefore not applicable.

parties required a remand. *See, e.g., In re Conway*, 152 Vt. 525 (1989); *Re: Winooski Housing Authority and Harry Goetz,* #4C0857-EB, Memorandum of Decision and Proposed Remand Order at 6 - 7 (Apr. 30, 1991).

This case is different. The Project has not changed in the course of this appeal, and MHMW had notice of the hearings before the Commission. In addition, even though it had an opportunity to seek interlocutory review of the Commission's March 4, 2004 denial of its party status petition, MHMW elected not to do so. Instead, MHMW simply did not participate in the Commission's March 4 and April 13, 2004 hearings, nor did it file written memoranda with Commission. Rather, MHMW waited until the Commission issued the permit to Okemo on September 22, 2004 and then filed its appeal, limited to the party status question, to the Board on October 18, 2004.

Although, as noted, there is no Board case law exactly on point, there is some support in decisions issued by the Board for Okemo's position.

Two cases support Okemo's assertion that the Board should not remand this matter to the Commission. *Re: Village of Ludlow,* #2S0839-2-EB, Memorandum of Decision (May 28, 2003), and *Re: Conservation Designs, Inc., and Ritchie Crockett Lawton,* #5W1418-EB, Memorandum of Decision (Jun. 3, 2004), both involved instances in which project opponents who had been denied party status on criteria by the Commission appealed this denial to the Board. While neither case directly addressed the question of remand, the Board, following a grant of party status on certain criteria, heard the merits of the appeal on those criteria and did not remand the matter to the Commission.

In at least one decision, the Board addressed, in dicta, the question raised in this matter. In *Re: Maple Tree Place Assoc.,* #4C0775-EB(Interlocutory Appeal), Memorandum of Decision at 13 (Dec. 22, 1988), the Board wrote:

> The Board interprets Rule 40 in conjunction with these prior decisions as allowing persons denied party status by a district commission the right to appeal that denial to the Board following the district commission's final decision approving or denying the application in question. This right applies whether the person was denied on all criteria for which the person requested party status or was granted status on some criteria but denied status on others. *The Board further interprets Rule 40 to allow the Board, if it finds that a person denied party status by a district commission on a particular criterion should in fact be granted such status, to consider directly the person's testimony and evidence regarding the criterion at issue, without remanding the matter to the district commission.*

(Emphasis added).

In addition, other Board decisions, while not controlling, indicate the Board's concern with avoiding undue delay. For example, in *Re: River Station Properties III, LLC.,* #5W1436-EB (Interlocutory Appeal), Memorandum of Decision at 1 - 2 (Sept. 17, 2004) and *Re: Mt. Anthony Union High School District #14,* #8B0552-EB (Interlocutory Appeal), Memorandum of Decision at 3 (Jan. 31, 2002) the Board noted the difficulty that a refusal to accept an interlocutory appeal might cause an applicant.

Board member Richardson in her dissent makes a series of arguments to which we believe responses are necessary. The dissent cites *Re: Winooski Housing Authority,* #4C0857-EB, Memorandum of Decision and Proposed Remand Order (Apr. 30, 1991), to support her assertion that a remand to the Commission is in order. *Winooski Housing Authority,* however, involved failure of notice; here, MHMW had notice and made (as the dissent terms it) a "strategic decision" to remain silent before the Commission.

The dissent would require Okemo to seek interlocutory review of a party status decision in its favor in order to avoid the substantial delay resulting from a remand after the Commission has conducted all its hearings and issued a decision. We are not aware of other instances in which a person is required to appeal a victory. *See, In re M.C. and C.C*, 156 Vt. 642, 643 (1991) (mem.).

The dissent argues that a remand is "required," citing *In re Taft Corners Associates, Inc.*,160 Vt. 583, 591 (1993); *In re Vermont Gas Systems*, 150 Vt. 34, 40 (1988); *In re Juster Assocs*., 136 Vt. 577, 581 (1978); and *Re: JCR Realty, Inc*., Declaratory Ruling #426, Memorandum of Decision at 6 (May 7, 2004). While those cases stand for the proposition that the Board cannot hear an appeal on an application which the Commission did not review, in this case the Commission did review Okemo's application. Granted, the Commission did so without MHMW's participation, but that was the result of MHMW's decision not to avail itself of its appeal rights. Having made that choice, it cannot now complain that it cannot present its case to the Commission.

The dissent contends that the Board is citing *Ludlow* and *Conservation Designs* decisions as "precedent" when in fact the cases are "silent on the question presented in this matter." We acknowledge that these cases are not directly on point, but they are not "silent" on the issue at hand; in both cases the Board declined to remand and, accordingly, the Commission's review of the application did not include participation by the appellant. We note that the dissent cites no cases exactly on point in support of her position either. Again, this is a case of first impression.

Lastly, while Okemo might not have "allowed any interlocutory appeal by MHMW to proceed unopposed," this is irrelevant to the matter at hand. Whatever Okemo's position might have been within the context of an interlocutory appeal, the Board would have decided the party status question.

The delays that will result should this matter be remanded to the Commission for a hearing are unwarranted under the circumstances and can be avoided by the Board considering MHMW's claims as to Criteria (1)(B), (1)(E), (5) and (6) in a *de novo* hearing.

There is no prejudice to MHMW by this decision. MHMW is entitled to a hearing on its claims, and it will receive a hearing.

IV. Order

1. MHMW's motion to alter the January 7, 2005 Memorandum of Decision in this matter and grant MHMW party status as to 10 V.S.A. §§6086(a)(6) is denied.

2. Okemo's motion to alter the January 7, 2005 Memorandum of Decision and deny MHMW party status as to 10 V.S.A. §§6086(a)(6) is denied.

3. Okemo's motion to alter the January 7, 2005 Memorandum of Decision and retain jurisdiction over the merits of this matter as to 10 V.S.A. §§6086(a)(1)(B), (1)(E), (5) and (6) is granted.

4. This matter shall be set for a Prehearing Conference.

Dated at Montpelier, Vermont this 21st day of March 2005.

ENVIRONMENTAL BOARD

*/s/Jean Richardson*____
* Jean Richardson, Acting Chair [2]
Jill Broderick [3]
George Holland
** W. William Martinez
Alice Olenick
Richard C. Pembroke, Sr.
A. Gregory Rainville

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[2] Board Member Richardson was not present for the February 23 deliberations, but she has read and concurs with this decision, except as stated in her dissent.

[3] Board Member Broderick was not present for the February 23 deliberations, but she has read and concurs with this decision.

* Board Member Richardson, dissenting in part:

For a number of reasons, I dissent from the portion of this decision that does not remand this matter to the Commission for a hearing on the merits with MHMW's participation.

First, In *Re: Winooski Housing Authority,* #4C0857-EB, Memorandum of Decision and Proposed Remand Order (Apr. 30, 1991), the Board held that, where the failure of notice deprived a party of the ability to participate in hearings, the opportunity to be heard, to present evidence, and to cross-examine witnesses, "remand to the District Commission appears required." *Id.* at 6. This decision was based on the Board's understanding that "Act 250 is structured so that matters will be first heard by district commissions and appeals are brought to the Environmental Board." *Id.* at 7, citing *In re Juster Assocs.,* 136 Vt. 577 (1978).

The Board's holding in *Re: Winooski Housing Authority* follows from the Board's jurisdiction as an appellate body. There is much precedent to the effect that the Board has no jurisdiction to decide issues regarding criteria that were not before the Commission and not ruled upon by it. *In re Taft Corners Associates, Inc*.,160 Vt. 583, 591 (1993); *In re Vermont Gas Systems,* 150 Vt. 34, 40 (1988); *In re Juster Assoc. supra,* 136 Vt. at 581 (because initial consideration of a land use proposal is a function assigned by the Legislature to Commission; the Board lacked authority to entertain the application not heard by Commission); *Re: JCR Realty, Inc.,* Declaratory Ruling #426, Memorandum of Decision at 6 (May 7, 2004).

While it is true that the Commission ruled on the criteria in issuing the Permit, it never did so in a case in which MHMW had the opportunity to appear as a party. A case within that context, therefore, was never ruled upon by the Commission, and, under these circumstances, a remand is not only proper, but required.

Second, I cannot find the Board's decisions in either *Re: Village of Ludlow,* #2S0839-2-EB, Memorandum of Decision (May 28, 2003), or *Re: Conservation Designs, Inc., and Ritchie Crockett Lawton,* #5W1418-EB, Memorandum of Decision (Jun. 3, 2004), support the Board's decision today. In *Conservation Designs,* certain appellants sought party status on a series of criteria for the *first time* before the Board; they had not, for various reasons, sought – and had been denied - party status before the Commission. Upon granting party status on those criteria, the Board proceeded to the merits.

The instant case presents a different scenario. Here, MHMW sought and was denied party status at the Commission level. Where a person has unsuccessfully sought party status before the Commission, if such status is later granted by the Board, it is incumbent upon the Board to remand the matter to the Commission.

Otherwise, the Commission will never have the opportunity to hear the merits of a case with the contributions of a party who was not permitted to participate.

I would further note that in neither *Village of Ludlow* nor *Conservation Designs* did the Board directly address the question raised today -- whether a remand is appropriate. I do not believe that the Board should cite as precedent cases that are silent on the question presented in this matter.

Lastly, I do not give much weight to Okemo's claim that MHMW *could* have filed an interlocutory appeal from the Commission's preliminary denial of party status but did not do so. Had Okemo itself wished to have the question of MHMW's party status resolved before the Commission took evidence, it could have sought review before the Board of the Commission's denial pursuant to EBR 43(B). Applicants make strategic decisions to oppose or remain silent on party status petitions; Okemo cannot now argue that MHMW should lose the opportunity to present its case to the Commission because it did not seek interlocutory review, when Okemo itself could have sought such review.

Further, we have no evidence before us to indicate that Okemo would have allowed any interlocutory appeal by MHMW to proceed unopposed. *See, e.g.*, *Re: Town of Albany and Florence Beaudry*, #7R1042-EB (Interlocutory), Memorandum of Decision at 2 (Mar. 19, 1998). Thus, Okemo cannot rely on MHMW's failure to seek interlocutory review of the Commission's decision as a basis to argue in against a remand here.

I am authorized to state that Board Member Olenick joins in this dissent.

** Board Member Martinez, dissenting in part : For the reasons stated in my dissent in *Re: Okemo Limited Liability Company, et al.,* #2S0351-34-EB, Memorandum of Decision at 6 (Jan. 7, 2005), I continue to dissent from the grant of party status to MHMW on Criterion 6.