

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

Mount Holly Mountain Watch (MHMW) objects to the Scheduling Order issued by the Chair on April 15, 2005, and asks for an extension of time in which to take an appeal from the Environmental Board's March 21, 2005 Memorandum of Decision. As set forth below, the Board denies MHMW's objection and request for an extension.

I. Procedural 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 (Okemo) authorizing 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 a permitted quad chair lift; relocation of a permitted parking lot; an increase in total parking to 988 spaces; and 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).

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 remanding jurisdiction to the Commission.

On January 21, 2005, MHMW and Okemo each filed timely motions to alter the Board's decision. The Board deliberated on February 23, 2005. On March 21, 2005, the Board issued a Memorandum of Decision granting Okemo's Motion to Alter, requiring that the case be set for another prehearing conference at the Board and not be remanded to the Commission, and denying MHMW's Motion to Alter.

A second prehearing conference was held on April 14, 2005, Acting Chair A. Gregory Rainville presiding and participating by telephone. Okemo was present, represented by Lawrence Slason, Esq., with David M. Wilcox. Peter Berg participated

by telephone on behalf of MHMW. The prehearing conference was held to set this matter for hearing.

On April 15, 2005, the Chair issued a Scheduling Order setting deadlines for prefilng evidence, and scheduling a hearing and a third prehearing conference.

On April 21, 2005, MHMW filed a letter objecting to the Scheduling Order and requesting documents from the Commission file.

On April 25, 2005, MHMW filed a letter requesting an extension of time in which to take an appeal to the Vermont Supreme Court, presumably, an interlocutory appeal from the Board's March 21, 2005 Memorandum of Decision.

The Board deliberated by telephone on April 27, 2005.

II. DISCUSSION

MHMW has filed two letters with the Board: one appears to object to the Scheduling Order and request documents from the Commission file; the other requests an extension of the deadline for filing a notice of interlocutory appeal to the Vermont Supreme Court. Each is discussed in turn.

A. Document Request and Objections to Scheduling Order

MHMW argues that it "cannot conduct a proper appeal" without having received the documents served on parties to the Commission hearing. On this basis, MHMW objects to prefilng deadlines that "do not give MHMW sufficient time to respond to the actual documentation of the case." MHMW does not specify which deadlines these might be, but does indicate that it can prefile its direct case by June 1, 2005, provided it receives the documents from the Commission file "shortly."

The Board hears permit appeals *de novo*, as if there had been no prior hearing before the Commission. 10 V.S.A. § 6089(a); *In re Killington, Ltd.* 159 Vt. 206, 214 (1992)(citing *In re Green Peak Estates*, 154 Vt. 363, 372 (1990)). This means that the documents in the Commission file are not part of the evidentiary record in this appeal unless they are prefiled by a party or unless the Board takes official notice of them. It appears that MHMW will receive a copy of every exhibit prefiled in this case, with the possible exception of oversized exhibits, which ordinarily do not have to be served upon the parties. The Board will require that the parties serve a copy of oversized exhibits on each other. The copy may be reduced in size as long as it is legible. In addition, ten legible copies shall be prefiled with the original.

The documents served on parties to the Commission proceeding have been available to MHMW all along. They are in the Commission file, which was at the Commission's office in Springfield until shortly after this appeal was taken, at which

time it was sent to the Board's offices in Montpelier. MHMW can arrange to review the file and make photocopies from the file for the standard fees, by contacting the Board's offices in Montpelier. Even if the Commission file were a part of the evidentiary record in this appeal, MHMW has access to all the documents submitted to the Commission. There has been no prejudice to MHMW in this regard.

In short, MHMW has failed to state good cause to continue the prefiling or hearing deadlines in the Chair's Scheduling Order.

Under the Scheduling Order, Okemo was to prefile its direct case on or before April 27, 2005, and MHMW was to prefile its direct case on or before May 13, 2005. Because the Board has not had an opportunity to deliberate prior to April 27, 2005, these deadlines are being extended by five days each. Okemo shall have until May 2 to prefile its direct case, and MHMW shall have until May 18, 2005 to prefile its direct case. All other deadlines and provisions in the Scheduling Order shall remain in effect.

B. Request to Extend Appeal Period

In its second letter, MHMW requests "an extension of the time period required to make an appeal to the Vermont Supreme Court on the subject permit." Presumably, MHMW refers to the appeal period from the Board's most recent order, the Memorandum of Decision issued on March 21, 2005.

The Vermont Rules of Appellate Procedure allow the Board to extend the period for filing appeals to the Vermont Supreme Court by up to 30 days, or 10 days after the motion to extend is granted. VRAP 4; see *also* VRAP 13 (VRAP applicable in administrative appeals). In relevant part, Rule 4 provides that:

[the Board] may extend the time for filing the notice of appeal by any party (1) for good cause, with or without motion or notice, if request therefore is made before the expiration of the period originally prescribed by this subdivision; (2) for excusable neglect, upon motion and notice, if request therefore is made within 30 days after the expiration of the period originally prescribed by this subdivision.

VRAP 4. The request under consideration here was filed after the appeal period expired, so the question is whether MHMW has made a sufficient claim of excusable neglect.

The Vermont Supreme Court has held that the excusable neglect standard in Rule 4 "is a strict one," and that "the more commonly occurring situations -- such as an internal office mistake -- do not constitute excusable neglect." *Bergeron v. Boyle*, 176 Vt. 78, 88 (2003)(citing *In re Town of Killington*, 2003 VT 87, ¶ 17, 176 Vt. 60 (although the standard for excusable neglect has become more elastic, its application

"must remain strict lest there be a de facto enlargement of the appeal-filing time to sixty days.")).

The Court in the *Killington* case stated that:

federal courts have taken an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is "excusable." *United States v. Hooper*, 43 F.3d 26, 28-29 (2d Cir.1994) (per curiam) (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of the rules); see also *Gibbons v. United States*, 317 F.3d 852, 855 (8th Cir.2003) (affirming denial of extension where solo practitioner failed to timely file because of vacation followed by temporary illness); *Graphic Communications*, 270 F.3d at 8 (affirming denial of *69 extension because late filing was result of ignorance of the law and "inattention to detail"); *Canfield*, 127 F.3d at 250 (affirming denial of extension when attorney's late filing was a result of his personal involvement in other business); *Jin v. Metropolitan Life Ins. Co.*, 2003 WL 21436211 (S.D.N.Y. June 20, 2003) (denying extension because neglect occasioned by changes in attorney's office personnel and location was not "excusable").

Killington, 2003 VT 87, ¶ 17, 176 Vt. 60. Thus, the Vermont Supreme Court has determined that it is appropriate to take a hard line in making excusable neglect determinations, where the neglect is not beyond the control of the party or its attorney.

MHMW fails to cite any reason for having missed the appeal deadline. As set forth above, Rule 4 authorizes the Board to extend the appeal deadline only in cases in which the deadline was missed for reasons beyond the control of the party or its attorney. There is no indication in MHMW's motion that this is the case. With no basis for finding excusable neglect, the Board cannot extend the deadline, and MHMW's request for an extension under Rule 4 must be denied.

III. ORDER

1. MHMW's Objection to the Chair's Scheduling Order is DENIED. Okemo shall prefile its direct case on or before **May 2, 2005**. MHMW shall prefile its direct case on or before **May 18, 2005**.
2. A legible copy of each oversized exhibit prefiled by any party shall be served on all parties in accordance with this order, and ten legible copies shall be filed with the Board, in addition to the original.

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3. Other provisions of the Scheduling Order, and other prior orders, shall remain in force.
4. MHMW's Request to Extend the Appeal Period is DENIED.

DATED at Montpelier, Vermont this 27th day of April, 2005.

ENVIRONMENTAL BOARD

 /s/A. Gregory Rainville

A. Gregory Rainville, Acting Chair

George Holland

W. William Martinez

Patricia Nowak

Alice Olenick

Richard C. Pembroke, Sr.