

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

Re: Okemo Mountain, Inc.
Application #2S0351-7A-EB

MEMORANDUM OF DECISION

This decision, dated January 9, 1992, pertains to preliminary issues raised by the parties concerning appeals of a permit issued for summer use of the Mid-Mountain Lodge at the Okemo Mountain ski resort in Ludlow. As is explained below, the Environmental Board has made the following decisions:

- (a) The Board has no authority to decide **adjoiner** John Lysobey's claims concerning deprivation of property rights and the Applicant's constitutional claim concerning impairment of a contractual obligation.
- (b) The Board denies the Applicant's appeal of Mr. Lysobey's party status on Criterion 9(K) (public facilities) of 10 V.S.A. § 6086(a).
- (c) The Board declines to reconsider its decision granting party status to Mount Holly Concerned Citizens on Public Issues (MHCCPI).
- (d) The Board denies the requests of Mr. Lysobey and MHCCPI to raise revocation issues in the context of this appeal.
- (e) The Board denies the request of MHCCPI to reopen a 1986 permit issued for winter use of the Lodge, but will evaluate the current application for summer use in light of the Lodge's year-round impacts.
- (f) The Board denies Mr Lysobey's request to invoke **its** subpoena power.

I. BACKGROUND

On July 1, 1986, the District #2 Environmental **Commission** issued Land Use Permit Amendment #2S0351-7 (Amendment-7), authorizing the Applicant "to construct a 350-seat mid-mountain restaurant to be used only during the ski season with access from the ski slopes."

Finding of Fact #5 supporting Amendment-7 states: "The project will not be used except in the winter and access will be from the ski slopes only." Finding of Fact #9K to the amendment states: "The public investment adjacent to this project is the State-owned Okemo Mountain Road."

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The restaurant was constructed and is known as the Mid-Mountain Lodge. The project is part of a ski area located on Okemo Mountain in Ludlow. The ski area adjoins the town boundaries of Mount Holly.

On August 2, 1991, the District Commission issued Land Use Permit Amendment #2S0351-7A (Amendment-7A), authorizing the Applicant to use the Lodge for receptions, banquets, and private and civic functions from mid-April through October of each year, and to create a temporary 74 car parking area.

In the findings of fact supporting Amendment-7A, the District Commission stated that use of the Lodge would occur in connection with events such as a "Game Fair" which the Applicant will sponsor. The Applicant would like to close the Okemo Mountain Road during some of these events. The Applicant leases the Road from the Agency of Natural Resources, Department of Forest, Parks, and Recreation (ANR).

Amendment-7A includes Conditions 6, 7, 8, and 10, which relate to closure of the Road in connection with the permitted project. These conditions include requirements for speed limit signs on the Road, advance newspaper notice of Road closure, limits on the number of holiday weekends and the total number of days the Road can be closed, and a requirement for the Applicant to develop a plan to ensure access to the residence of adjoiner John Lysobey.

On August 12, 1991, the Applicant filed a motion to reconsider with the District Commission concerning Conditions 7, 8, and 10.

On August 20, 1991, MHCCPI filed an appeal and request for stay of the permit with the Board. The appeal seeks to overturn the denial of party status to the Appellants by the District Commission with regard to 10 V.S.A. § 6086(a)(5) (traffic), (9)(K) (impact on public facilities), and (10) (conformance with local or regional plans). The appeal also seeks review of the application's compliance with Criteria 5, 9(K), and 10 with respect to closure of the Road.

On August 28, 1991, the District Commission issued a memorandum of decision denying the Applicant's August 28 reconsideration request.

On September 6, 1991, following submission of legal memoranda by parties, the Board issued a memorandum of decision concerning the MHCCPI appeal and request for a stay. In the decision, the Board denied the request for a stay and for party status and appeal on Criterion 10, granted party status to MHCCPI on Criteria 5 and 9(K), and determined to hear an appeal relating to the impacts of Road closure under Criteria 5 and 9(K).

On September 20, 1991, Mr. Lysobey filed an appeal with the Board. The appeal challenges the District Commission's decision with respect to Criteria 5, 7 (impact on municipal services), and 9(K). The appeal also raises issues regarding revocation of Amendment-7A and constitutional issues regarding deprivation of property rights.

On September 23, 1991, Assistant Executive Officer Aaron Adler convened a prehearing conference in Ludlow. At the conference, preliminary issues for Board decision were identified and a briefing schedule was set. On September 27, the Applicant filed an appeal with regard to Criteria 5 and 9(K) and Conditions 6, 7, 8, and 10 of the permit. On that date, the Applicant also filed a request to reconsider the Board's grant of party status to MHCCPI.

On October 9, 1991, the Board issued a prehearing conference report and order. During October, November, and December, the parties filed memoranda of law. The Board deliberated on December 4.

II. ISSUES

a. Whether the Board can adjudicate constitutional or statutory claims involving deprivations of property rights.

b. Whether the Board can adjudicate the Applicant's constitutional claim that its lease with ANR bars Board review of the impacts of Road closure and issuance of conditions regarding the Applicant's use of the Road.

c. Whether the Board should reverse the grant of party status on Criterion 9(K) made to Mr. Lysobey by the District Commission.

d. Whether the Board should reconsider granting party status to MHCCPI.

e. Whether, in the context of an appeal regarding Amendment-7A, it is appropriate to raise issues concerning revocation of Amendment-7A or Amendment-7.

f. Whether the Board can reopen Amendment-7 in considering Amendment-7A, and if so, whether it should do so.

g. Whether the Board should grant a request by Mr. Lysobey to invoke its subpoena power to obtain documents from the Applicant and ANR.

III. DISCUSSION

A. Deprivation of Property Rights

Mr. Lysobey, an adjoining landowner who was granted party status by the District Commission on Criteria 5, 7, and 9(K), claims that he has a deeded right-of-way (ROW) over the Road to his adjoining property. He also asserts that the Road is a public road. He further argues that Amendment-7A, in allowing closure of the Road, deprives him of use of the ROW and of access to his property. He contends that such deprivation violates the Fifth and Fourteenth Amendments to the U.S. Constitution and the federal Civil Rights Act (42 U.S.C. § 1983). He additionally contends that state agencies cannot extinguish or alter an easement or contractual relationship created by deed.

The Board does not have the authority to decide these issues. Nowhere does Act 250 empower the Board to decide whether a person has a deeded ROW, whether issuance of a permit violates the person's property or contractual right to that ROW, or whether issuance of a permit violates the constitution or the federal Civil Rights Act. Administrative bodies only have such powers as are conferred upon them by the General Assembly. Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 20 (1941).

In determining that the Public Service Board did not have the authority to pass on the constitutionality of its enabling statutes, the Supreme Court stated:

Here, we find no grant of power in the statutory scheme, either expressed or implied, to determine the constitutional validity of statutes ...

[W]e believe that the power to decide constitutional issues is vested in the courts.

Westover v. Village of Barton Electric Dept., 149 Vt. 356, 359 (1988).

The Board believes that the Westover case is dispositive and controlling here. Accordingly, the Board will not review Mr. Lysobey's property rights claim but will proceed with the task assigned to it by the General Assembly: to hear a de novo appeal concerning the compliance of the Mid-Mountain Lodge application with the Act 250 criteria. 10 V.S.A. §§ 6086(a), 6089(a); Re: Okemo Mountain, Inc., #2S0351-12A-EB, Memorandum of Decision at 7 (Sep. 18, 1990).

B. Authority to Review Road Closure

The Applicant argues that it has a lease with the State of Vermont for use of the Road and that land use permit conditions which limit or restrict Road use contravene the Applicant's rights under the lease. The Applicant contends that any restrictions upon its lease rights violate constitutional protection against impairment of contractual obligations.

The Board has stated above that it has no authority to decide constitutional issues. Indeed, the Applicant argued that the Board lacks such authority in response to Mr. Lysobey's request for the Board to determine his property rights claims. If the Board has no authority to decide constitutional issues, then it has no authority to decide the Applicant's constitutional claim.

C. Appeal of Mr. Lysobey's Party Status

The Applicant appeals the District Commission's grant of party status to Mr. Lysobey on Criterion 9(K). The Applicant contends that Mr. Lysobey has not shown that his adjacent property will be affected under this criterion.

The Board believes that Mr. Lysobey should retain his party status. He is an adjoining landowner who must be given party status on Criterion 9(K) if he shows a direct effect upon his property under that criterion. 10 V.S.A. § 6085(c); Board Rule 14(A)(3).

In relevant part, Criterion 9(K) protects the public from projects which will materially interfere with the function, or public use, of public facilities such as the Mountain Road. 10 V.S.A. § 6086(a)(9)(K); Re: Swain Development Corp., #3W0445-2-EB, Findings of Fact, Conclusions of Law and Order at 33-34 (Aug. 10, 1990). The Road provides Mr. Lysobey with access to his adjoining lands. Closure of the Road will impede that access and therefore will interfere with the function of the Road and Mr. Lysobey's use of it. Accordingly, there is a direct effect upon his property.

D. Reconsideration of MHCCPI's Party Status

The Applicant has filed a motion for reconsideration of the Board's September 6 decision to grant MHCCPI party status.

The Board declines to reconsider its decision to grant MHCCPI party status. The issues raised by the Applicant in its motion were fully considered by the Board prior to that decision.

E. Submission of Erroneous Information

Both Mr. Lysobey and MHCCPI contend that the Applicant submitted erroneous information to the District Commission. Specifically, they contend that the Applicant was aware that Mr. Lysobey owned adjoining lands and had an ROW to those lands over the Road. They also contend that ANR erroneously testified to the District Commission that the Applicant, and not Mr. Lysobey, owned the Lysobey lands and ROW. Mr. Lysobey further asserts that the Applicant failed to give the District Commission his name on a list of adjoiners which the Applicant was required to provide with its application pursuant to Board Rule 10(A).

Based on these contentions, Mr. Lysobey and MHCCPI argue that Amendment-7A should be revoked pursuant to Rule 38(A) (2) (a), which concerns revocation for submission of inaccurate information. MHCCPI also argues that Amendment-7 should be revoked because the same erroneous submission of information was made to the District Commission in the application for that amendment.

The Board believes that raising issues regarding revocation of Amendment-7A under Rule 38 is inappropriate and unnecessary in the context of an appeal of Amendment-

7A. The parties will have the opportunity to present accurate information to the Board and the Board may amend the permit or deny the application based upon accurate information. Revocation for misrepresentation to the District Commission will therefore become moot.

The Board also believes that it is not appropriate to seek revocation of the earlier Amendment-7 in the context of an appeal of Amendment-7A. Revocation under Rule 38 is a proceeding which is separate from an appeal. Further, MHCCPI does not have standing under Rule 38 to seek revocation of Amendment-7 because it was not a party to Amendment-7 and it is not an adjoining landowner affected by the alleged violation. See Rule 38(A).

F. Year-round Impacts of the Project

MHCCPI believes that the Board's evaluation of the project's impacts should not be limited to Amendment-7A, which authorizes summertime use of the Lodge. MHCCPI argues that the Board must reopen Amendment-7, which authorizes wintertime use, because otherwise the Board is not looking at the total picture.

The Board declines to reopen Amendment-7. That permit amendment was issued on July 1, 1986, and no appeal of that amendment was filed within the 30 day period required by law. 10 V.S.A. § 6089(a); Allen v. Vermont Employment Security Board, 133 Vt. 166 (1975).

But, while the Board will not reopen Amendment-7, it can and must review the year-round impacts of Lodge use in determining whether to approve the application for Amendment-7A. 10 V.S.A. § 6086(a) requires that the Board find, before issuing a permit, that the development meets the Act 250 criteria. The development here is the Mid-Mountain Lodge and associated land use. See Re: Interstate Uniform Service, Declaratory Ruling #147 at 7-8 (Sep. 26, 1984). By applying for permission to use the Lodge in the summertime, the Applicant is essentially applying to use the Lodge year-round; because it already has permission to use the Lodge during the winter. Thus, in considering whether to authorize the expansion of use, the Board must consider the impacts of summer use not only by themselves but also as they may add to the impacts of winter use. While the Board cannot void the earlier amendment or change it as a result

of such review, the Board may condition or deny the new application on the basis of the cumulative impact which may result from the addition of summer to winter use.

G. Information Requests

Mr. Lysobey asks the Board to invoke its subpoena power to require the Applicant or the Agency of Natural Resources to divulge: (a) a copy of a legislative approval of its lease which the Applicant alleges occurred, (b) the leased area, and (c) the amount of money the State has received thus far in lease payments.

The Board declines to invoke its subpoena power because the subpoena is sought in connection with Mr. Lysobey's request that the Board decide his property rights claims. The Board has earlier stated that it will not decide those claims.

IV. ORDER

1. The Board denies Mr. Lysobey's request that it decide his property rights claims.

2. The Board denies the Applicant's request that it adjudicate the Applicant's constitutional claim of impairment of contractual obligations.

3. Mr. Lysobey retains his party status on Criterion 9(K).

4. The Board declines to reconsider its grant of party status to MHCCPI.

5. The Board declines to consider the revocation issues raised by Mr. Lysobey and MHCCPI.

6. The Board denies MHCCPI's request to reopen Amendment-7.

7. The Board will review the compliance of the application for Amendment-7A with Criteria 5 and 9(K) in light of the impacts of summer use alone and of any cumulative impacts which result from the addition of summer to winter use.

8. On or before March 6, 1992, parties shall file final lists of witnesses and exhibits and prefiled testimony for all witnesses they intend to present.

9. On or before April 2, 1992, parties shall file prefiled rebuttal testimony and revised lists showing rebuttal witnesses and exhibits.

10. On or before April 17, 1992, parties shall file in writing all objections to the prefiled testimony and exhibits previously identified, or such objections shall be deemed waived.

11. On or before April 29, 1992, parties shall file in writing all responses to the prefiled objections.

12. The Board will convene a hearing in this matter on **May 6, 1992**, to be confirmed by subsequent notice with location.

13. No individual may be called as a witness in this matter if he or she has not been identified in a witness list filed in compliance with this order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness will not be permitted to testify. Instructions for filing prefiled testimony are enclosed.

14. The Board may waive the filing requirements upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.

15. Parties shall file an original and ten copies of prefiled testimony, legal memoranda, all exhibits which are 8½ by 11 inches or smaller, and any other documents with the Board, and mail one copy to each of the parties listed on the attached Certificate of Service.

Parties are required to file only lists identifying exhibits which are larger than 8½ by 11 inches that they intend to present, rather than the exhibits themselves. Exhibits must be made available for inspection and copying by any parties prior to the hearing.

16. To save time at the evidentiary hearing, the Board will require that parties label their prefiled testimony and exhibits themselves and submit lists of exhibits which the Board can use to keep track of exhibits during the hearing. With respect to labeling, each person is assigned a letter as follows: "O" for the Applicant, "L" for Mr. Lysobey, "M" for MHCCPI, and "S" for the State of Vermont, Agency of Natural Resources. Prefiled testimony and exhibits shall be **assigned consecutive** numbers: for example, the Applicant will number its exhibits 01, 02, 03, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), letters will be used for each piece, i.e. **O2A, O2B**, etc. The labels on the exhibits must contain the words ENVIRONMENTAL BOARD, #2S0351-7A-EB, the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. Label stickers which can be used by the parties are available from the Board on request; parties must complete the information sought on the stickers prior to the hearing.

Concerning preparation of lists of exhibits, each list must state the full name of the party at the top and the Board's case number. There must be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. The list must include exhibits and prefiled testimony. An example is as follows:

TOWN OF LUDLOW
LIST OF EXHIBITS
RE: OKEMO MOUNTAIN, INC., #2S0351-7A-EB

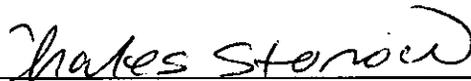
<u>Number</u>	<u>Description</u>	<u>Status</u>
T1	Prefiled testimony of John Smith	
T2A-D	Plan dated, _____ sheets A1 through A4	

The Board will use the status column to mark whether the exhibit has been admitted.

17. The hearings will be recorded electronically by the Board or, upon request, by a stenographic reporter. Any party wishing to have a stenographic reporter present or a transcript of the proceedings must submit a request by January 31, 1992. One copy of any transcript made of proceedings must be filed with the Board at no cost to the Board.

Dated at Montpelier, Vermont this 9th day of January, 1992.

ENVIRONMENTAL BOARD



Charles F. Storrow, Acting Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna*
Arthur Gibb
Samuel Lloyd
William Martinez*
Steve E. Wright

*Members Fortna and Martinez concur in this decision except that they would reconsider MHCCPI's party status.

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