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

Re: Okemo Mountain, Inc.
L.U.P. #2S0351-7A-EB

MEMORANDUM OF DECISION

This decision, **dated** September 6, 1991, pertains to preliminary issues in an appeal by Mount Holly Concerned Citizens on Public Issues (the Appellants) concerning a permit amendment issued for use of the Mid-Mountain Lodge on Okemo Mountain. As is explained below, the Environmental Board grants the Appellants party status on 10 V.S.A. § 6086(a)(5) (Criterion 5 - traffic) and (9)(K) (Criterion **9(K)** - public facilities), and denies their request to stay the permit.

BACKGROUND

On August 2, 1991, ~~the~~ District #2 Environmental Commission **issued** Land Use Permit Amendment #2S0351-7A, authorizing Okemo Mountain, Inc. (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. The project is located in the Town of Ludlow.

The permit amendment includes Conditions 7, 8, and 10, which relate to closure of the Okemo Mountain Road in connection with the permitted project.

In the findings of fact supporting the permit amendment, 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 Road during some of these events. The District Commission also stated that it had previously found the Road to be a public investment in the findings supporting permit #2S0351-7, which was issued on July 1, 1986 and which authorized construction and winter-time use of the Lodge.

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, the Appellants 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 Criteria 5, 9(K), and 10 (conformance with local or regional

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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 22, 1991, the Board issued a memorandum stating that it would consider preliminary issues raised by this appeal in deliberative session and offering an opportunity for written comment. On August 28, the District Commission issued a memorandum of decision denying the **Applicant's** motion for reconsideration. On August 29, the Appellants and the Applicant filed written memoranda regarding preliminary issues with the Board. The Board deliberated on September 4.

DECISION

Two preliminary issues were identified in the Board's August 22 memorandum: whether the appeal is premature and whether the stay request should be granted. In connection with the stay issue, the August 22 memorandum also identified the question of whether a non-party could seek a stay. In their August 29 filing, the Appellants stated that they want the Board to decide their party status appeal prior to the stay request. Further, in its August 29 filing, the Applicant included written argument in opposition to the party status request. Accordingly, the party status issue is ripe for decision.

Prematurity of the Appeal. This issue was raised because the Appellants filed the appeal while a motion for reconsideration was pending before the District Commission. It is now moot because the motion has been decided.

Party Status. The Appellants seek party status under Criteria 5, 9(K), and 10 pursuant to Rule 14(B)(1), which provides in relevant part that the Board may allow individuals or groups as parties to a proceeding if the individual or group has adequately demonstrated:

- (a) That a proposed development or subdivision may affect his interest under any of the provisions of section 6086(a) or
- (b) **That his** participation will materially assist the **board or** commission

The Board has ruled that a person denied party status by a district commission may appeal that denial to the Board, which the Board will review de novo. If party status is granted, the Board will hear an appeal on the relevant criteria. Re: Swain Development Corp., Application #3W0445-2-EB, Memorandum of Decision at 4-7 (July 3, 1989).

The Board concludes that the Appellants should be granted party status under Criteria 5 and 9(K) pursuant to Rule 14(B)(1)(a) because their interests may be affected under those criteria by the closure of the Okemo Mountain Road.

The Road is a public road and Okemo Mountain is within a state forest, and the Road and the forest are therefore protected by Criterion 9(K), which in part seeks to prevent material interference with the public's use and enjoyment of public highways and forests. 10 V.S.A. § 6086(a)(9)(K). The Appellants include members who use the Road as access to Okemo Mountain and closure of the Road would prevent that access.

In addition, Criterion 5 seeks to prevent unsafe conditions and unreasonable congestion. 10 V.S.A. § 6086(a)(5). It is clear that significant use of the Road is contemplated by people who will attend events such as fairs to be sponsored by the Applicant. Thus, closure or non-closure of the Road in connection with such events could lead to traffic safety or congestion effects on people who use the Road, including the Appellants.

The Board denies the request for party status under Criterion 10 because the Appellants have not adequately demonstrated that they may be affected under that criterion or that they could materially assist the Board.

Based on the foregoing, the Board grants party status to the Appellants on Criteria 5 and 9(K) and will hear an appeal with respect to impacts of Road closure under those criteria.

Request for a Stay. The Appellants' stay request is denied. Board Rule 42 states that in deciding whether to grant a stay, the Board will consider the hardship to the parties, the impact (if any) on the values protected by Act 250, and any effect upon public health, safety, and welfare.

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The Appellants are seeking to stay a permit amendment which contains conditions that regulate the closure of the Road. Specifically, Condition 7 requires that the Applicant publish newspaper notice 30 days in advance of closure. Condition 8 also prohibits closure for more than 15 days during non-skiing season, and states that closure may occur on no more than one holiday weekend during that season.

The Board believes that these conditions will be sufficient to soften, during the **pendency** of this appeal, any hardship which the Appellants may experience or any adverse impact under Criteria 5 and **9(K)**. Moreover, the permit amendment authorizes Lodge use from mid-April through October. It is now September, and therefore the permit amendment on its own terms will not be effective for much of the time this appeal is pending.

ORDER

1. The Appellants are granted party status under **Criteria 5** and 9(K) pursuant to Rule 14(B)(1)(a).
2. The Board will hear an appeal relating to the impacts of Okemo Mountain Road closure under **Criteria 5** and **9(K)**.
3. The Appellants' request for a stay is denied.

ENVIRONMENTAL BOARD

Charles F. Storrow (by ADA)

Charles F. Storrow, Acting Chair
Ferdinand Bongartz
Arthur Gibb
Samuel Lloyd
Steve E. Wright

Dissenting:

Lixi Fortna
William Martinez

Members Fortna and Martinez dissent with respect to granting the Appellants party status and hearing an appeal on Criteria 5 and 9 (K). They otherwise concur with the decision.

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