VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Okemo Mountain, Inc., Timothy and Diane Mueller, Vermont Department of Forests, Parks and Recreation, and Green Mountain Railroad

Land Use Permit Applications #2S0351-30-EB (2nd Revision) and #2S0351-31-EB, and #2S0351-25R-EB

MEMORANDUM OF DECISION ON MOTION TO ALTER

Mount Holly Mountain Watch (MHMW) moves to alter the Findings, Conclusions and Order and related permits issued on February 22, 2002. As set forth below, the Board denies this motion.

I. Procedural Summary

This appeal concerns a Master Plan application and related land use permits for the Okemo ski area in Ludlow, Vermont. The Master Plan consists of a base lodge, retail area, hotel, condominiums, train station, parking, water park, tennis center, golf course, ski trails, and ski lifts located on 400 acres of land near Route 103 in Ludlow, Vermont (Master Plan Project). One of the permits authorizes the construction of Phase I of the Jackson Gore development, including a condominium hotel and related parking, water and sewer facilities, fifteen ski trails, three ski lifts, and snowmaking (Jackson Gore Phase I Project), which is a component of the Master Plan, and the other permit authorizes the development of an 11-lot subdivision known as Solitude Village (Solitude Village Project), which is another component of the Master Plan.

On December 29, 2000, the District 2 Environmental Commission (Commission) issued Findings of Fact and Conclusions of Law #2S0351-30 (2nd Revision) and #2S0351-31 regarding the Master Plan Project and the Jackson Gore Phase I Project (Master Plan/Jackson Gore Phase I Project), which was subsequently corrected on January 5, 2001 (Master Plan/Jackson Gore Phase I Decision). The Commission also issued Land Use Permit #2S0351-31 (Jackson Gore Phase I Permit) on December 29, 2000, to Okemo Mountain, Inc.; Vermont Department of Forests, Parks & Recreation and Green Mountain Railroad (collectively, Okemo) for the Jackson Gore Phase I Project. MHMW filed a Motion to Alter on January 10, 2001. The Commission denied the Motion to Alter in a Memorandum of Decision issued on January 12, 2001, and corrected its Memorandum of Decision on January 18, 2001.

On January 24, 2001, the Commission issued Land Use Permit #2S0351-25R ("Solitude Village Permit"), and supporting Findings of Fact, Conclusions of Law, and Order #2S0351-25R ("Solitude Village Decision") to Okemo Mountain, Inc. The Commission heard a portion of the Solitude Village Project proceedings and the Master Plan/Jackson Gore Phase I Project proceedings together.

On February 8, 2001, MHMW filed an appeal from the Jackson Gore Phase I Permit, the Master Plan/Jackson Gore Phase I Decision, the Solitude Village Decision and the Solitude Village Permit with the Vermont Environmental Board (Board), pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rules (EBR) 6 and 40. In its appeal, MHMW alleges that the Commission erred in its conclusions concerning party status and the projects' compliance with 10 V.S.A. § 6086(a)(1), (1)(A), (1)(B), (1)(E), (4), (5), (6), (8), (9)(A), (9)(H), (9)(K), (9)(L), and (10) ("Criteria 1, 1(A), 1(B), 1(E), 4, 5, 6, 8, 9(A), 9(H), 9(K), 9(L), and 10").

On February 21, 2001, Okemo filed two cross-appeals, alleging that the Commission erred in its grant of EBR 14(B) party status to MHMW in the Master Plan/Jackson Gore Phase I Decision, on Criteria 1(A), 1(B), 1(E), 5, 6, 8, 9(A), 9(H), 9(K), 9(L), and 10; and in the Solitude Village Decision, on Criteria 1, 1(B), 1(E), 4, 5, 6, 9(A), 9(H), 9(K), 9(L), and 10.

On March 12, 2001, Board Chair Marcy Harding convened a Prehearing Conference with the following participants: Okemo by Lawrence Slason, Esq., with Tim Mueller, Dave Wilcox, Dan Petraska, and Michael Kraatz; MHMW by Peter Berg; John Lysobey; Vermont Agency of Natural Resources (ANR) by Elizabeth Lord, with Tim Melchert; and Snowtrack Homeowners' Association by Richard Sweetser and Carol Sweetser.

On March 15, 2001, the Chair issued a Prehearing Conference Report and Order, which, among other things, identified and ordered the parties to brief preliminary issues. On March 22, 2001, John Lysobey filed a Motion to Extend Filing Date, Objection to Time Requirements, and Memorandum Regarding the Need for Speed. The Board deliberated on preliminary issues on March 28, 2001 and April 25, 2001.

On May 22, 2001, the Board issued a Memorandum of Decision on preliminary issues, granting MHMW party status on the Master Plan proceeding under Criteria 6, 9(H) and 9(L), and dismissing Criteria 1, 1(A), 1(B), 1(E), 4, 5, 8, 9(A), 9(K), and 10; on the Jackson Gore proceeding under Criteria 1(A), 1(B), 1(E), 5, 6, 8 (aesthetics), 9(A), 9(H), 9(K), 9(L) and 10 (Rutland Regional Plan), and dismissing Criteria 1 and 4; and on the Solitude Village proceeding, under Criteria 1(B), 1(E), 4, 6, 9(H), 9(K) and 9(L), and dismissing Criteria 1, 5, 8, 9(A) and 10. The Chair issued a Scheduling Order on the same day, setting this matter for hearing.

On July 25, 2001, MHMW and John Lysobey filed requests for subpoenas. On August 2, 2001, Chair Harding denied Mr. Lysobey's requests and granted MHMW's subpoena request, subject to the right of any party to file an objection on or before August 8, 2001. On August 8, 2001, Mr. Lysobey asked that the denial

of his subpoena requests be reconsidered by the Chair and the Board. The Board deliberated on this objection on August 15, 2001. On August 21, 2001, the Board issued a Memorandum of Decision denying these requests upon reconsideration.

On August 24, 2001, Chair Harding convened a second prehearing conference, and issued preliminary rulings on evidentiary objections, among other things.

On August 29, 2001, the Board convened a public hearing in this matter, conducted a site visit, admitted exhibits, and heard testimony from MHMW, John Lysobey, and Okemo. The Board also affirmed the Chair's rulings on evidentiary objections. At the hearing, Chair Harding noted that some of the site plans and drawings submitted as evidence bore different revision dates than those listed in certain permits and sewer allocations admitted as Exhibits O23 through O30. Okemo agreed to provide the Board and parties with a copy of the same version of each plan referred to in Exhibits O23 through O30, where a version bearing a different revision date already was in evidence.

On August 31, 2001, the Chair issued a Hearing Recess Order giving Okemo until September 6, 2001 to file the supplemental exhibits, and giving the other parties until September 13, 2001 to file any objection or hearing request regarding the supplemental exhibits.

On September 6, 2001, Okemo filed supplemental exhibits with cover sheets detailing the differences between the original and supplemental exhibits. On September 12, 2001, MHMW filed a letter objecting to, and requesting a hearing on, the supplemental exhibits. MHMW also made other requests in the letter. The Board deliberated on September 19, 2001. On September 21, 2001, Okemo filed a Memorandum in Opposition to MHMW's Request to Reconvene Hearing, and Okemo also requested permission to make unauthorized filings. Also on September 21, 2001, Okemo filed additional supplemental exhibits.

On September 26, 2001, the Board deliberated on MHMW's Request to Reconvene Hearing, and on October 2, 2001 issued an MOD reconvening the hearing. The Board also deliberated on October 17, 2001.

On November 7, 2001, the Board reconvened the hearing, admitted exhibits and took testimony from Okemo's witness, Bruce Boedtker.

On December 5, 2001, MHMW filed a Motion to Strike. Okemo objected to MHMW's motion on December 11, 2001.

On December 11, 2001, John Lysobey filed a document entitled, "Motion to Accept the Following Evidence and Conclusions of Law in the Above Case." Okemo filed its objection to this motion on December 17, 2001.

The Board deliberated on December 19, 2001, January 16, 2002, February 13, 2002, and on February 20, 2002. Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned. The Board issued Findings of Fact, Conclusions of Law, and Order, which concluded that the projects comply with all criteria on appeal, and Land Use Permits #2S0351-31-EB, and #2S0351-25R-EB, for the Jackson Gore Phase I and Solitude Village Projects, respectively.

On March 21, 2002, MHMW filed a Motion to Alter. Okemo filed a reply brief on April 6, 2002. The Board deliberated on April 17, 2002.

II. DISCUSSION

A. Motions to Alter

MHMW has filed a timely motion to alter. Motions to alter are governed by EBR 31(A), which provides in relevant part:

> (A) Motions to alter decisions. . . .
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> A. All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence.
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> B. A motion to alter should number each requested alteration separately. The motion may be accompanied by a supporting memorandum of law which contains numbered sections corresponding to the motion. The supporting memorandum should state why each requested alteration is appropriate and the location in the existing record of the supporting

> evidence. Any reply memorandum of law should also contain numbered sections corresponding to the motion. Additional requirements concerning motions and memoranda are set out in Rule 12 of these rules.

EBR 31(A).

Generally, "[a]ll requested alterations must be based on a proposed reconsideration of the existing record." EBR 31(A); *see also, Re: Van Sicklen Limited Partnership*, #4C1013R-EB, Memorandum of Decision, at 2 (July 26, 2001)(citing *Re: North Country Animal League*, #5L0487-4-EB, Memorandum of Decision at 1 (Apr. 20, 2000)); *see also, Re: Mill Lane Development Corp.*, #2W0942-2-EB, Memorandum of Decision at 8 (Jan. 27, 2000)(citing *Re: Charles and Barbara Bickford*, #5W1186-EB, Memorandum of Decision at 3 (September 12, 1995); *Re: Nehemiah Associates, Inc*., #1R0672-1-EB, Memorandum of Decision at 1 (Oct. 3, 1995); *Re: Swain Development Corp*., #3W0445-2-EB, Memorandum of Decision at 3-4 (Nov. 8, 1990); *Re: Berlin Associates*, # 5W0584-9-EB, Memorandum of Decision at 7 (April 23, 1990)). "This interpretation is based on the need to maintain the integrity of the Board's appeal process by ensuring that arguments and evidence are introduced prior to final decision." *Re: Finard-Zamias Associates*, #1R0661-EB, Memorandum of Decision at 2 (Jan. 16, 1991). This also ensures that motions to alter will not turn Board decisions into "proposed" decisions to which parties have another opportunity to respond. *Charles and Barbara Bickford*, #5W1186-EB, Memorandum of Decision at 3.

These limits on the use of EBR 31(A) encourage parties to present their best case to the Board, which prevents unnecessary delay:

> [P]arties should not be encouraged to use motions to alter to convert Board decisions into "proposed" decisions to which they can later respond. Evidence and argument should be given to the Board before decision so that it is fully informed and can make the best decision, and so that the process is not unnecessarily elongated by motions to alter.

Van Sicklen, Memorandum of Decision at 4 (quoting *Nehemiah*, Memorandum of Decision at 2 (internal quotations omitted)). EBR 31(A) provides in part that "New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence." EBR 31(A). As the Waste Facility Panel stated in *Re: C.V. Landfill, Inc. and John F. Chapple*, #5W1150-WFP (Unlined Landfill Facility), Memorandum of Decision (Feb. 3, 1997):

> Under subsection (1) of EBR 31(A), all requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to the decision. New evidence may not be submitted unless the [Board], acting on a motion to alter, determines that it will accept new evidence.

C.V. Landfill, Inc. and John F. Chapple, Memorandum of Decision. The Board notes that MHMW fails to cite support in the record throughout its Motion to Alter.

B. Requested Relief

1. Procedural Claims

As set forth below, some of MHMW's procedural claims include or involve requested alterations in specific findings or conclusions. Also, some of what MHMW characterizes as requests to alter specific findings or conclusions are, in effect, procedural claims. These are addressed in this section.

Length of Hearing

MHMW argues that it did not get an opportunity to present its case properly, because the appellants were "exhausted and unprepared" for such a lengthy hearing. MHMW also complains that it was not given adequate time to present its case. However, MHMW does not say what it evidence it would have presented if given the time, or if Mr. Berg had not been "exhausted and unprepared" for the 13-hour hearing. (Motion to Alter, at 2-3.)

The Board notes that it intended to complete the hearing in one day and that a second hearing day was only discussed should that not be possible. With the bulk of the evidence being prefiled, it is often possible for parties to prepare and conduct focused cross-examination of witnesses and for the hearing to proceed quickly. This was not the case here, at least with respect to the cross-examination conducted by MHMW and John Lysobey, and this made the hearing longer than necessary. The Board finds no merit in MHMW's argument.

Board Member Participation

MHMW asks for another hearing on the grounds that several Board members missed various parts of the hearing and certain deliberation dates. MHMW estimates that "[a]t least 20% of this appeal was not heard by EB

members either from the two hearings or the deliberations." MHMW also asserts that the hearings "are almost impossible to follow" on tape. The Board is constituted as a nine-person body, with five votes required to make a decision. 10 V.S.A. § 6021(a); *see also*, 10 V.S.A. § 6083a(e)(5); 1 V.S.A. § 172; EBR 18(a). As MHMW concedes, a quorum of the Board was present at all times. In administrative proceedings, the law requires only that a quorum is present throughout and that "members not present when testimony is taken review the testimony before participating in the decision." *Lewandoski v. Vermont State Colleges*, 142 Vt. 446, 452-453 (1983). The members who missed any part of the hearing were given the appropriate audiotapes to listen to. While the Board acknowledges that audiotapes can be difficult to hear, particularly without the right equipment, no member was unable to hear and understand the tapes of the relevant portions of the hearing. This satisfies *Lewandoski.*

As MHMW is well aware, the initial hearing in this case ran much later than anticipated, and not all Board members were able to remain the entire time. As stated above, the lateness of the hearing was largely due to MHMW and Mr. Lysobey's failure to conduct focused, relevant cross-examination. Moreover, apart from the Board Chair who is a full-time Board employee, the Board consists of volunteers -- private citizens who live in various parts of Vermont and who have various professional and family obligations. Occasionally a conflict will arise and a member will be unable to participate in all or part of a hearing. *Lewandoski* recognizes and provides that subsequent review of the testimony is sufficient in administrative proceedings. MHMW's request is denied.

MHMW's Challenge to Denial of Motion to Strike Certain Okemo Exhibits

MHMW asks the Board to reconsider its ruling denying MHMW's Motion to Strike the corrected ANR permits and corresponding revisions to Bruce Boedtker's prefiled testimony, the same issue MHMW had raised in the form of evidentiary objections at the November 7, 2001 hearing. This decision is sound, for the reasons stated in the Board's Findings, Conclusions and Order, and MHMW does not cite anything in the record to indicate otherwise. It is difficult to see how MHMW could have been prejudiced by any lack of preparation because the corrected ANR permits reduced the issues before the Board on the second hearing day and resulted in the use of the original exhibits that MHMW was served with as part of Okemo's prefiled direct case.

"Municipal Presumptions"

MHMW requests another hearing on what it calls "the municipal presumptions the EB has accepted" from the Ludlow Development Review Board (DRB). (Motion to Alter, at 4.) The Board did not make any "municipal

presumptions," although it did find that the DRB decided that the Jackson Gore condominium hotel and retail complex was a Planned Unit Development (PUD) and modified the 35-foot height limit accordingly. The Board concluded independently that the facility was a PUD and that the height limit had been modified. (See Findings, Conclusions and Order, at 92-94.) MHMW points to nothing in the record to indicate that this should be altered.

Also, MHMW's argument relies on evidence outside the record. The Board has discretion to hold a hearing and accept new evidence on a Motion to Alter. EBR 31(A); *C.V. Landfill, Inc. and John F. Chapple*, Memorandum of Decision; *Re: Robert and Barbara Barlow*, #8B0473-EB (Oct. 23, 1992); *Re: Swain Development Corp.*, #3W0445-2-EB (Nov. 8, 1990). The Board notes that the procedural history in this consolidated proceeding is lengthy, with a hearing on August 29, 2001 and another on November 7, 2001. MHMW has provided no justification for why the Board should take the extraordinary step of holding another hearing. Also, the Board will not reopen a hearing to admit evidence which could have been prefiled or submitted during the hearing. At least some of this evidence on the status of the DRB decision was available before the hearing, but MHMW proffered it only on Criterion 10 and it was properly excluded as irrelevant. Had the evidence been proffered on the clear, written community standard issue under Criterion 8, the Board could have admitted the evidence. The Board declines to reopen the hearing.

Likewise, MHMW's requests to change Findings 3(b), 6(a) - (c) and (e)-(k),[1] Findings 217-218, and the findings and conclusions on Criterion 8, insofar as they rely on this argument, are also denied.

Claim of False and Contradictory Information

MHMW claims that Okemo and the Department of Forests, Parks and Recreation (FPR) have presented false and contradictory information on the boundary between Ludlow and Mt. Holly, and that some maps show Bridge #1 in Mt. Holly. (Motion to Alter, at 4.) MHMW contends that, "if it had known this previously, MHMW would have researched how the plan might affect the crossing." Presumably, MHMW means the Rutland Regional Plan and any effects Bridge #1 would have under Criterion 10. MHMW has not provided any reason for the Board to reconsider its conclusions under Criterion 10, and fails to cite support in the record. Instead, MHMW says it is privy to new information which may have

[1] Also, with respect to Finding 6 (a)-(c) and (e)-(k), the Board made findings only as to Okemo's plans, not whether these plans would receive all necessary permits and approvals. There is no need to alter these findings.

some impact on the Board's decision. This is not enough to justify reopening the hearing in this matter.

2. Challenges to Findings of Fact

MHMW requests several other changes in the Board's findings. The Board denies these requests for the reasons stated below:

A. MHMW asks the Board to amend its description of the projects in Finding 1 to "more truthfully [describe] the public the proposed projects would serve," specifically, in terms of Vermont residents and those from out-of-state. (Motion to Alter, at 5.) To the extent that the evidence in the record concerning residency of those who will patronize the proposed projects is relevant to specific criteria on appeal, it is adequately addressed in the decision. The requested change is not warranted.

B. MHMW moves to alter Finding 3(c) about 2 pump stations, and challenges other findings and conclusions related to the sewer allocation, claiming that the sewer allocation is illegal until the Ludlow Wastewater Treatment Facility devises a "fair allotment" plan in accordance with certain Commission orders, one of which MHMW claims was issued in 1992. (Motion to Alter, at 6.) MHMW had ample opportunity to raise this in its prefiled rebuttal and at the hearing. The fact that MHMW didn't learn about it until recently does not mean it could not have reviewed the files in advance of the prefiled deadline and the hearing.

C. MHMW also objects to Findings 7 - 11, regarding Okemo's construction schedule. A finding that an applicant intends to build by certain dates is not the same as granting a permit for such construction. MHMW's observation that Okemo assumes the risk of ultimate permit denial if it commences construction before obtaining a permit is no basis for modifying these findings. These findings are supported by the record.

D. MHMW appears to argue that Findings 26-31, regarding Bridge #1, should be altered because of John Lysobey's boundary dispute with the State and/or questions over the Mt. Holly/Ludlow line. (Motion to Alter, at 9-11.) This argument has been raised and ruled upon repeatedly, prior to and during the hearing. The Board sees no reason to revisit it now. To the extent that this request relies on evidence outside the record, the Board declines to reopen the hearing, as set forth above.

E. MHMW asks the Board to alter its findings on Okemo's Water Quality Monitoring Plan to require Okemo to stop using the crossings in the event

of any degradation in water quality. (Motion to Alter, at 11.) The permit and decision currently require "rapid remediation" of any water quality problem, and this requirement is supported by the record.

F. MHMW asks the Board to alter its findings on snowmaking, to keep water withdrawals from the Black River at their current levels. (Motion to Alter, at 11-12.) In support of its request, MHMW contends that Okemo's figures were erroneous, that the projects will greatly increase effluent from the Ludlow wastewater treatment facility, and that the Black River is already "severely stressed" at its current conservation flow. MHMW fails to cite any support in the record for its request.

G. MHMW moves to alter the findings on ramping to limit the water withdrawal speed to 6,000 gpm until a safe ramping rate is determined by ANR which will not degrade the Black River. (Motion to Alter, at 12.) The ramping procedure the Board included in its findings was proposed by ANR, and the Board found that this ramping procedure does comply with the Vermont Water Quality Standards. Again, MHMW points to nothing in the record which would give the Board reason to alter these findings.

H. MHMW asks the Board to require that Okemo use the Ski Country Traffic Management Plan (Plan). (Motion to Alter, at 14.) However, MHMW's request is without merit since as Okemo correctly points out, MHMW's own witness testified that the Plan was not sufficiently developed for use as a mitigation tool. MHMW did not point to any evidence in the record to support its requested alteration.

I. MHMW challenges findings on Criterion 9(A), on the basis that the cost to the State of "denying John Lysoby [sic] access to his lands with the road system passing through Jackson Gore and Solitude projects will soon be adjudicated for damages by the Vermont Supreme Court," and these damages may "exceed by far" the revenue to state and local governments from the projects. This argument is both speculative in nature relies on evidence outside the record.

J. MHMW moves to alter the decision to require Okemo to make a $550,000 "subsidy" available for affordable housing. MHMW may disagree with the Board's findings, but it does not refer to any evidence in the record to support the numbers in the motion to alter.

K. MHMW moves to alter the decision to find that the projects are scattered development, and that the costs outweigh the revenues. MHMW relies on costs owed by the State as a result of denying Lysobey access to his land.

As discussed before, this argument is based on speculative evidence that is not on the record. This argument is also groundless since Okemo is paying for the vast majority of the infrastructure to support the Project.

L. MHMW argues that Criterion 9(L) is meaningless if headwaters cannot be rural growth areas, but does not ask the Board to alter anything in particular. (Motion to Alter, at 17.)

M. MHMW challenges the part of Finding 312, which states that: "Compliance with the Southern Windsor County Regional Plan is not at issue in this appeal." (Motion to Alter, at 17-18.) Despite its creative argument that Mt. Holly has a right to expect that Ludlow will adhere to its town plan and zoning, MHMW lacks standing to raise issues of the Southern Windsor County Regional Plan, or Ludlow's town plan or zoning, because Mt. Holly is in Rutland County, not Windsor County.

N. MHMW challenges Finding 323, regarding the Okemo Mountain Road, and argues that the State owes John Lysobey damages if he cannot access his land via this road. (Motion to Alter, at 18-19.) MHMW's claim violates EBR 31(A) as it fails to request any alteration, and fails to cite support in the record.

O. MHMW moves to alter, purportedly on Criterion 9(H), and again contends that Okemo admitted that the new project is scattered development. However, the finding referenced by MHMW actually concerns Criterion 10, and is supported by the record.

3. Challenges to Conclusions of Law

A. MHMW asks the Board to deny or delay the permit for Bridge #1, arguing that the boundary is in question, that allowing Bridge #1 would constitute an unlawful taking of Mr. Lysobey's property, and that it would risk damaging the environment. But MHMW's underlying premise, that Okemo had the burden to prove that the state owns this land, is faulty. As stated in prior rulings, the Board does not hear boundary disputes, and Mr. Lysobey is free to bring action in superior court regarding any property boundary dispute. The issues in this proceeding involve compliance with various criteria of Act 250, not property ownership. (Motion to Alter, at 20-21.) In that regard, the Board's decision is supported by the record.

B. MHMW challenges the Board's conclusions under Criterion 9(A). MHMW questions the impacts of the Jackson Gore Phase I Project and suggests it will result in poor Vermonters serving wealthy out of state visitors who live

in multi-million dollar homes. MHMW also raises speculative costs from the Lysobey litigation. MHMW's argument is denied because it relies on evidence outside the record and is not sufficiently specific. (Motion to Alter, at 24-26.)

C. MHMW moves to alter the Board's decision on Criterion 9(H). While MHMW agrees with most of the Board's analysis, it argues that the Board should have considered the Lysobey taking and the cost of unemployment insurance to the State. Both of these arguments rely on evidence not in the record.

D. MHMW moves to alter the Board's conclusion on Criterion 9(K) arguing that it is a small grass roots organization and could not afford an expert witness. MHMW's argument is both without merit and untimely. Parties appealing a criterion undertake the responsibility to present the best case they can before the Board. Insufficient resources are not an excuse for presentation of a weak case without witnesses or evidence, nor justification for considering evidence outside the record. MHMW does not refer to any evidence in the record to support an alteration.

E. MHMW moves to alter the Board's conclusion on Criterion 9(L) and raises general issues concerning the Board's interpretation of Criterion 9(L). In *Stratton* and the instant case, the Board clarified its interpretation of Criterion 9(L). MHMW's suggested interpretation is contrary to the statutory language and would require legislative amendment.

F. MHMW asserts that the Project does not comply with the Rutland Regional Plan, but fails to cite anything in the record to support this assertion. (Motion to Alter, at 19.) The Board's conclusion is supported by the record. MHMW also argues that the Ludlow Town Plan and zoning ordinance should apply because they are connected to the Southern Windsor County Regional Plan. As the Board has stated in a prior ruling, MHMW lacks standing to raise Criterion 10 issues under Ludlow's town plan or zoning ordinance because its members reside in Rutland County.

III. ORDER

1. MHMW's Motion to Alter is DENIED.

2. Jurisdiction is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 29th day of April, 2002.

ENVIRONMENTAL BOARD

__/s/Marcy Harding_____
Marcy Harding, Chair
Jill Broderick
John Drake
George Holland
Rebecca M. Nawrath
Alice Olenick
Donald Sargent