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

Re: *John J. Flynn Estate* Land Use Permit Application
and #4C0790-2-EB
Keystone Development Corp.

Memorandum of Decision

This proceeding involves an appeal to the Vermont Environmental Board (Board) from the issuance of Land Use Permit #4C0790-2 (Permit) by the District 4 Environmental Commission (Commission) to John J. Flynn Estate and Keystone Development Corp. (Keystone) authorizing the construction of a 148 unit multifamily residential condominium project on 40.8 acres in the City of Burlington, Vermont (Project).

I. History

On May 2, 2003, the Commission issued the Permit and accompanying Findings of Fact, Conclusions of Law, and Order (Decision)

On June 2, 2003, Sunset Cliff Homeowner's Association (SCHA) filed an appeal with the Environmental Board (Board) from the Permit and Decision, alleging that the Commission erred in denying SCHA party status under Environmental Board Rules (EBR) 14(A) and (B) and as to its conclusions with respect to 10 V.S.A. §6086(a)(1), (4), (5), (8), (8)(A) and (10). Also on June 2, 2003 the Starr Farm Beach Camp Owners Association (SFBCOA) also appealed the Decision, alleging that the Commission erred in denying SFBCOA party status under EBR 14(A) and (B) and as to its conclusions with respect to 10 V.S.A. §6086(a)(1), (4), (5), (8), and (10).

At the June 30, 2003, Prehearing Conference, the following *Preliminary Issues* were identified:

1. Whether SCHA has party status on Criteria 8 (rare and irreplaceable natural areas), 8(A) (necessary wildlife habitat) and 10 (local plan).

2. Whether SFBCOA has party status on Criterion 8(A) (necessary wildlife habitat and endangered species).

3. Whether exhibits to be introduced through a hostile witness must be prefiled.

On September 2, 2003, SCHA filed a Supplemental Petition for Party Status, seeking EBR 14(A)(5) and (B)(1) and (2) party status on Criterion 1(G) (wetlands).

On September 5, 2003, SCHA filed two motions, one to adjourn the proceedings in light of actions taken by the Water Resources Board concerning the wetland on the site, the second asking that the Board declare Land Use Permit 4C0790-2 null and void.

On September 26, 2003, Keystone filed a request that the first hearing in this matter be held on November 19, 2003.

Keystone and SCHA (now calling itself "Sunset Cliff, Inc.") have filed memoranda on the Preliminary Issues, the two motions, the Supplemental party status request and the November hearing request. There has been no filing by SFBCOA.

The Board held deliberations on the issues before it on September 9, 17 and 24, 2003 and by email on September 29 - 30, 2003.

II. Discussion

A. Party status requirements

1. EBR 14(A)(5)

EBR 14(A)(5) states:

> Any adjoining property owner who requests a hearing, or who requests the right to be heard by entering an appearance on or before the first prehearing conference or, if no prehearing conference is held, the first day of a hearing that has previously been scheduled, to the extent that the adjoining property owner demonstrates that the proposed development or subdivision may have a direct effect on the adjoiner's property under any of the 10 criteria listed at 10 VSA § 6086(a). In making a request for party status, an adjoining property owner shall provide the district commissions or the board with the following:
>
> (a) A description of the location of the adjoining property in relation to the proposed project, including a map, if available;
>
> (b) A description of the potential effect of the proposed project upon the adjoiner's property with respect to each of the criteria or subcriteria under which party status is being requested.

To obtain party status as a 14(A)(5) party, one must show that his property adjoins the project site and that the project may have a "direct effect" on such property under any of the ten Act 250 criteria. *Re: GHL Construction, Inc. and PAK Construction, Inc.*, #2S1124-EB, Declaratory Ruling #396, Findings of Fact, Conclusions of Law, and Order (Dec. 28, 2001); *Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Memorandum of Decision at 1- 2 (May 19, 2000); *McDonald's Corporation*, #1R0477-5-EB, Memorandum of Decision at 10 (May 3, 2000).

"Adjoining property owners" includes people on the opposite side of a state road. *In re Conway*, 152 Vt. 526, 530 (1989).

2. EBR 14(B)(1)

EBR 14(B)(1) states:

> Parties by permission. The board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated:
> (1) That a proposed development or subdivision may affect the petitioner's interest under any of the provisions of § 6086(a)…

To obtain party status as a 14(B)(1) party, the petitioner must demonstrate a connection between project and petitioner's specified interest and that the project may affect such interest; the petition must also articulate how the petitioner's interest differs from that of the general public. *Re: Village of Ludlow*, #2S0839-2-EB, Memorandum of Decision at 3 (May 28, 2003); *Re: Alpine Pipeline Company*, Declaratory Ruling #415, Memorandum of Decision at 4 (Jan. 3, 2003); *Mount Anthony Union High School District #14*, #8B0552-EB(Interlocutory), Memorandum of Decision at 7 (Jan. 31, 2002)

The question of whether a project will have a *direct* impact on a putative party's land arises when a person seeks EBR 14(A)(5) (adjoining property owner) party status; a direct impact is not a requirement for a claim of EBR 14(B)(1) party status. *Catamount Slate, Inc. et al.,* Declaratory Ruling #389, Memorandum of Decision at 12 (Jun. 29, 2001), *appeal docketed*, No. 2002-142. (Vt. Sup. Ct.)

3. EBR 14(B)(2)

EBR 14(B)(2) states:

> Parties by permission. The board or a district commission may allow as parties to a proceeding individuals or groups, including adjoining property owners, not otherwise accorded party status by statute upon petition if it finds that the petitioner has adequately demonstrated: …

> (2) That the petitioner's participation will materially assist the board or commission by providing testimony, cross-examining witnesses, or offering argument or other evidence relevant to the provisions of § 6086(a).

To obtain party status as a 14(B)(2) party, the petitioner must demonstrate that it can materially assist the Commission or the Board in its understanding of the case before it. Mere assertions of an interest do not satisfy Rule 14(B)(2); rather, "party status under EBR 14(B)(2) is sparingly granted, usually to a person with specific expertise who can assist Commission or Board in addressing 'a particularly complex, novel, or unfamiliar project.'" *The Van Sicklen Limited Partnership,* #4C1013R-EB, Memorandum of Decision at 9 (Jun. 8, 2001); *Stonybrook Condominium Owners Association*, *supra,* at 3, *quoting Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 7, (Aug. 14, 1997), *appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. S. Ct. Oct. 30, 1997), *quoting Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995); *and see*, *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal) (Oct. 11, 1996), *aff'd*, *In re Maple Tree Place Associates*, No.96-559 (Vt. S. Ct. Oct. 10, 1997) (Entry Order).

Thus, the Board grants materially assisting party status when issues are complex or novel, and when the petitioner demonstrates expertise to assist Board in understanding issues. *Mt. Mansfield Company, Inc. d/b/a Stowe Mountain Resort*, #5L1125-10B-EB and #5L1125-10A(Revised)-EB, Memorandum of Decision at 2 (Nov. 15, 2001); *The Van Sicklen Limited Partnership, supra,* at 9.

B. Sunset Cliff's party status petitions

Preliminary Issue 1: *Whether SCHA has party status on Criteria 8 (rare and irreplaceable natural areas), 8(A) (necessary wildlife habitat) and 10 (local plan).*

The Commission granted EBR 14(A)(5) party status to Sunset Cliff, as an adjoining property owner in this matter, on Criteria 1 (water pollution), 1(E), 4, 5, 6 and 8 (aesthetics) and EBR 14(B) party status on Criteria 1 (water pollution), 1(B), 1(E), 4, 5 and 8(aesthetics). The grant of party status on these Criteria was not appealed, and, therefore, SCHA is entitled to maintain that status in this appeal. *The Stratton Corporation,* #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Jan. 15, 1998); *Finard-Zamias Associates*, #1R0661-EB, Memorandum of Decision at 12 -13 (Mar. 28, 1990).

The Commission denied Sunset Cliff party status on Criteria 8 (rare and irreplaceable natural areas), 8(A) (necessary wildlife habitat), 9(K), and 10 (local and

regional plans). Sunset Cliff has appealed the denial under Criteria 8, 8(A) and 10 and seeks party status under EBR 14(A)(5), (B)(1) and (B)(2).

In its filings, Sunset Cliff states that it is a corporation which represents the interests of the homeowners in the Sunset Cliff neighborhood. Sunset Cliff lies to the north and west of the Keystone lands. Access to the Project would be over Sunset Cliff Road which presently serves the Sunset Cliff neighborhood.

a. Criterion 8 (rare and irreplaceable natural areas)

Sunset Cliff argues first that it should be entitled to party status on Criteria 8 (rare and irreplaceable natural areas) because it was granted party status on Criterion 8 generally. Citing *Finard-Zamias,* Sunset Cliff notes that people who have been granted party status on a criterion have it on the entire criterion, not just a part. It therefore argues that, absent a cross-appeal of this grant, Sunset Cliff is entitled to maintain general Criterion 8 party status before the Board. *The Stratton Corporation.*

While Sunset Cliff's first point may be supportable as a general proposition, Sunset Cliff's position is contrary to the Commission's Decision, which clearly separates the Commission's grant of Criterion 8 (aesthetics) party status from its denial of Criteria 8 (rare and irreplaceable natural areas) party status. Decision at 3.

Alternatively, Sunset Cliff contends that it intends to present expert testimony that the project will adversely affect a "unique wetlands plant community" on the project site which will be impacted by Keystone's development of the site, which will require a buffer zone and the reconfiguration of the Project.[1]

Keystone replies that Sunset Cliff has only offered an argument that the Project "will have an adverse impact on a unique wetlands community," but it has not established that the wetland adjoins Sunset Cliff's land, that the Project will have a direct effect on its property, EBR 14(A)(5), or that its interests are any different than those of the general public. EBR 14(B)(1). Keystone notes further that Sunset Cliff has only offered to present expert witness testimony.

While there are wetlands on the Project site, Sunset Cliff's petition fails to indicate how such wetlands rise to the level of sites that may be considered to be "rare and irreplaceable natural areas" under existing Board precedent. *See, e.g., Barre Granite Quarries, LLC and William and Margaret Dyott*, #7C1079 (Revised)-EB, Findings of Fact, Conclusions of Law, and Order at 83 (Dec. 8, 2000); *Leo and Theresa Gauthier and Robert Miller*, #4C0842-EB, Findings of Fact, Conclusions of Law, and

[1] Sunset Cliff also makes aesthetic arguments, but these are unnecessary, as Sunset Cliff already has Criterion 8 (aesthetics) party status.

Order at 11 -14 (Jun. 26, 1991); *Finard-Zamias Associates*, #1R0661-EB, Findings of Fact, Conclusions of Law, and Order 18 -19 (Nov. 19, 1990).

The Board denies Sunset Cliff's petition for party status on Criterion 8 (rare and irreplaceable natural areas).

b. Criterion 8(A) (necessary wildlife habitat)

Sunset Cliff's claims as to wildlife habitat relate to its wetlands claims - - that wildlife depends on the wetland.

Keystone's reply notes the elements of the criterion and then asserts that Sunset Cliff has "failed to cite a single species or habitat" as a basis for its claim that the Project will impact such habitat.

Under Act 250, "necessary wildlife habitat" is a "concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a particular species of wildlife at any period in its life including breeding and migratory periods." *In re Southview Associates*, 153 Vt. 171, 174-76 (1989); 10 V.S.A. § 6001(12). Sunset Cliff's petition does not identify any such habitat, nor, on the September 9, 2003 site visit, did Sunset Cliff indicate the existence of such habitat.

The Board denies Sunset Cliff's petition for party status on Criterion 8(A).

c. Criterion 10 (Town Plan)

Sunset Cliff states that it intends to present testimony showing that the Project does not comply with the Burlington City Plan's "requirements that natural areas and neighborhood patterns be protected."

Keystone contends that Sunset Cliff's offer is merely to identify pertinent portions of the Plan, something the Board can do itself.

Party status issues under Criterion 10 are different from those which arise under other criteria. First, the Board need not, and usually does not, hear "evidence" as to what a town Plan "means." 10 V.S.A. §6086(a)(10). Rather, the document – the town plan – speaks for itself; "the town plan *itself is the evidence*, and the Board must make its independent judgment" about whether a project conforms to a plan. *J. Philip Gerbode*, #6F0396R-EB-1, Findings of Fact, Conclusions of Law, and Order at 17 (Jan. 29, 1992) (emphasis added). Thus, the only evidence that is absolutely necessary for a determination under Criterion 10 is evidence as to what the project is and whether there is a town plan that governs the project. As a result, participation by persons who have Criterion 10 party status is usually limited to the presentation of facts regarding the

project as the facts relate to compliance with the plan and legal argument as to whether the project complies with the criterion.

Second, *every* citizen of a town where a project is proposed can claim a direct interest, distinct and different from the public in general, in the efficacy and viability of his or her town plan - - an interest in seeing that such town plan is respected. Thus, every town citizen is a potential EBR 14(B)(1) party. See, *McLean Enterprises Corp.,* #2S1147-1-EB, Memorandum of Decision at 7 (Sept. 19, 2003).

The Board grants Sunset Cliff EBR 14(B)(1) party status on Criterion 10. [2]

C. SFBCOA's party status petition

Preliminary Issue 2: *Whether SFBCOA has party status on Criterion 8(A) (necessary wildlife habitat and endangered species).*

SFBCOA did not file a party status petition as to Criterion 8(A) (necessary wildlife habitat and endangered species) in accordance with §V(3)(a) of the Prehearing Order. Accordingly, the Board denies SFBCOA party status as to Criterion 8(A).

D.. Prefiling exhibits to be used on cross-examination

Preliminary Issue 3: *Whether exhibits to be introduced through a hostile witness must be prefiled.*

The question before the Board is whether a party should be required to prefile exhibits that it intends to use or may use in the examination of a hostile witness. A "hostile witness" is one whose interests are contrary to the party who is conducting the examination. [3] Such witnesses are grouped with adverse parties and witnesses who are identified with adverse parties under Vermont Rule of Evidence (VRE) 611(c), a rule which allows a party to cross-examine such witnesses with leading questions, even if that party has called the witness as his own; ordinarily, one cannot cross-examine or lead one's own witnesses.

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[2] Criterion 10 is before the Board as a result of SFBCOA's appeal.

[3] Interestingly, while courts recognize the existence of "hostile witnesses," there is little case law which defines the term. Rather, descriptions of "hostile witnesses" are indirect. *Cf.* Am Jur. 2d: "The determination whether a witness is hostile is to be made by the trial judge, … based upon such circumstances as the demeanor of the witness, his situation and relationship to and with the parties, his interest in the case and the inducements he may have to withholding the truth."

Under the Prehearing Order, parties are required to prefile all testimony and exhibits that they intend to introduce through their own "friendly" witnesses. At present, parties are not required to prefile testimony or exhibits for those witnesses that they must subpoena. *Brewster River Land Co., LLC.* #5L1348-EB, Memorandum of Decision at 6-7 (Sep. 18, 2000). Certainly, if a party must subpoena someone to appear at a hearing, that witness has already informed the party that he will not appear absent a subpoena, and thus requiring prefiled testimony or exhibits from such a person is akin to requiring the impossible. That witness will not cooperate in such prefilings. But that does not mean that such witness is "hostile;" indeed, the party who has issued the subpoena believes that the witness's testimony will ultimately support such party's position. The witness may simply not wish to participate in the case unless he is required, by a subpoena, to do so.

The question framed in Preliminary Issue 3 focuses – as it was presented in the Prehearing Conference – on whether a party must prefile exhibits that it wants to use when it is examining an adverse party or a witness for such a party. In these instances, the party conducting the examination knows that the witness is never going to cooperate in the filing of prefiled testimony or exhibits.

In this case Preliminary Issue 3 arose within the discussion of Sunset Cliff's intent to call Mr. von Turkovich as its own witness, the question being whether Sunset Cliff should be required to prefile those exhibits that it might intend to introduce through its cross-examination of Mr. von Turkovich. Certainly, Mr. von Turkovich, as he is the person behind Keystone, fits the definition of a witness who is "hostile."

Keystone contends that such exhibits should be prefiled. It advances a series of reasons as to why such prefiling should be required. Keystone's best argument is that "Surprise is not, and should not be, a feature of Board hearings." Prefiling, which supplants a discovery process, is intended to eliminate (or at least reduce) the element of surprise.

Sunset Cliff asserts that such prefiling should not be required because "[t]he very nature of cross-examination of an adverse witness is that it is unpredictable," and it cannot predict what documents (out of the "large wealth of potential exhibits" that exist) may be necessary or relevant in the course of the examination.

The Board believes that the remedy which Keystone suggests is, presently, a solution in search of a problem. The element of surprise has rarely been an issue in past Board hearings, and we believe that requiring a party to prefile documents which may be used on cross-examination causes the Board to venture down the road toward a more formal, court-like process, a journey that the Board, as an quasi-judicial body, hesitates to embark upon.

The Board often addresses issues that arise surrounding the introduction of new evidence which is offered in the course of cross-examination. During hearings the Board routinely rules on the admissibility of exhibits after considering objections and arguments of parties. The process need not be different for the examination of a subpoenaed or "hostile" witness. We will, at this time, therefore not require parties to prefile exhibits that they may use on cross-examination of a hostile witness.[4]

E. Sunset Cliff's Supplemental party status petition

Sunset Cliff seeks EBR 14(A)(5) and (B)(1) and (2) party status on Criterion 1(G) (wetlands).

There are wetlands on the Project site. Whether those wetlands are Class II or Class III wetlands is a matter pending presently before the Water Resources Board.

On August 28, 2003, the Water Resources Board issued a Memorandum of Decision temporarily reclassifying the wetlands in question as Class II. On September 18, 2003, the Water Resources Board dissolved this temporary reclassification. The Water Resources Board will hold a merits hearing on this matter later this year.

Criterion 1(G) protects only Class I and II wetlands under Vermont Wetland Rules. *Barre Granite Quarries, LLC and William and Margaret Dyott*, *supra,* at 72.

Sunset Cliff's petition is therefore premature. When and if the Water Resources Board reclassifies the wetland to a Class I or II wetland, the Board will entertain Sunset Cliff's petition.

F. Sunset Cliff's Motions

There are two motions before the Board, both filed by Sunset Cliff, Inc.

1. The City of Burlington granted Keystone a zoning permit for the Project, but the Environmental Court reversed. The reversal was without prejudice;

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[4] We note, of course, that "What's sauce for the goose is sauce for the gander." *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries, Inc.,* #2W0813-3 (Revised) -EB, Findings of Fact, Conclusions of Law, and Order at 20 (Apr. 19, 2001), quoting *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 134 (2001) (Souter, J., dissenting). Here, while Sunset Cliff need not disclose documents in its possession, Keystone also need not make such disclosures should they decide to subpoena hostile witnesses.

Keystone may reapply, once it has addressed the issues raised in the Environmental Court's decision. Keystone did not appeal the Environmental Court's denial.

Based on the absence of a present zoning permit, Sunset Cliff argues that, because Keystone presently has no zoning permit for the Project, the Board should declare the Permit issued by the Commission to be null and void, and Keystone should, in effect, be sent back to the drawing board.

Case law is clear that "[W]here local regulation is in effect, a person proposing to subdivide or develop might have to gain approval both at the state and local levels ...." *In re Trono Construction Co.*, 146 Vt. 591, 593 (1986), quoting *Committee to Save Bishop's House, Inc. v. MCHV, Inc.*, 137 Vt. 142, 145 (1979). Act 250's purpose is not to supersede local regulation of land development. *In re Kisiel*, 172 Vt. 124, 135 (2000); *Trono, supra,* at 593.

However, the mere fact that an applicant may not have obtained all local permits does not mean that the Act 250 process must be delayed. While most applicants have historically first addressed the local process, nothing prevents an applicant from seeking and obtaining an Act 250 permit before all local permits have been received.[5]

2. Sunset Cliff's second motion asks the Board to adjourn its process because of a ruling by the Water Resources Board on the reclassification of a wetland on the site from a Class III to a Class II wetland.

Should the Water Resources Board reclassify the wetland to a Class II wetland, Keystone may have to obtain a Conditional use Determination (CUD) from the Department of Environmental Conservation for any activities within the wetland or its buffer zone. Reclassification may also have major impacts on the design of the Project, depending on where the Water Resources Board finds the wetland to be. Should the Project be substantially redesigned, and should that redesign create impacts to new parties or to new lands or impacts on Criteria not at issue before the Board, a remand to the Commission would be warranted, and the Board's efforts expended up to that point may well be wasted. *George and Mary Osgood*, #7E0709-3-EB, Dismissal Order at 2 (Nov. 26, 2002); *Ray G. & Lynda J. Colton*, #3W0405-5(Revised)-EB, Memorandum of Decision and Remand Order at 3 (Oct. 2, 2002); *Edward E. Buttolph Revocable Trust*, #5L1339-EB, Chair's Preliminary Ruling at 2 (Jul. 20, 2000).

Sunset Cliff therefore contends that efficiency concerns dictate that the Board should stay its proceedings pending the Water Resources Board's actions. Keystone

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[5] Keystone cites Environmental Board Rule 19(A)(3) in support of its claim that it can seek its Act 250 permit first, but that provision addresses other *state* permits, not local permits.

replies that Sunset Cliff's arguments are speculative and that the Board should not adjourn its process.

Nothing prevents Keystone from presently proceeding within the Act 250 process pending action by the Water Resources Board. We do not know what the Water Resources Board will decide. Should it decide that the wetland should be reclassified, and Keystone must therefore seek a CUD from the Department, then the Board may, at that time, stay its proceedings. But to do so now would, it appears, be premature. Sunset Cliff's concerns are all rather speculative at this time, and the Board declines to adjourn its process based only on such speculation.

G. Request for a hearing on November 19.

Keystone requests that the first hearing in this matter be held on November 19, 2003, with later hearing days set as necessary.

The Board denies this request. The Chair is not available that day, time frames for filing prefiled testimony and exhibits would be unduly restricted, and, in light of the Water Resources Board proceedings, efficiencies dictate that all Criteria at issue in this case be heard on the same day.

III. Order

1. Sunset Cliff's petitions for party status on Criteria 8 (rare and irreplaceable natural areas) and 8(A) (necessary wildlife habitat) are denied.

2. Sunset Cliff is granted EBR 14(B)(1) party status on Criterion 10 (local plan).

3. SFBCOA's petition for party status on Criterion 8(A) (necessary wildlife habitat and endangered species) is denied.

4. Parties need not prefile exhibits that they may use on cross-examination.

5. Sunset Cliff's petition for party status on Criterion 1(G) is premature and is therefore denied without prejudice.

6. Sunset Cliff's motions - (a) to adjourn the proceedings in light of actions taken by the Water Resources Board concerning the wetland on the site, and (b) that the Board declare Land Use Permit 4C0790-2 null and void - are denied.

7. Keystone's request that the first hearing in this matter be held on November 19, 2003 is denied.

8. The Chair shall issue a Scheduling Order in this matter.

Dated at Montpelier, Vermont this 8th day of October 2003.

ENVIRONMENTAL BOARD

*/s/Patricia Moulton Powden*_____
Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
* Donald Marsh
Patricia A. Nowak
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson
Christopher D. Roy

* Board Member Marsh, dissenting:

I must dissent from Part II(D) of this decision.

I believe that the majority decision today, in failing to require a party to disclose those documents in its possession which it may use on cross-examination, unnecessarily allows parties to inject an element of surprise into the hearing process.

If the Board had a discovery process, Keystone, in order to know what (if any) damaging documents were held by Sunset Cliff, could request that Sunset Cliff produce all documents and other evidence that it intends to introduce at the hearing. It could even ask that Sunset Cliff produce all documents and other evidence that it believed to have any relevancy or bearing on the issues before the Board. Thus, through discovery, a party would be able to prepare its witnesses for cross-examination questions that might be asked, and surprise would be eliminated. Without this discovery process, and in the absence of a requirement that a party prefile those exhibits that it might seek to introduce or cross-examine a witness about, surprise can occur.

The Federal Rules of Civil Procedure (FRCP), in an effort to reduce such surprise, provide for pretrial disclosure of certain exhibits:

> [A] party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment … an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

FRCP 26(a)(3)(c).

I believe that, in the absence of a discovery process[6], the Board should follow the lead of the federal rules, and I further see no basis for restricting the reach of this decision to only those witnesses who have been identified as "hostile" [7] or to only exhibits other than those which may be used for impeachment purposes.

Mindful of the burdens that would result were I to require the prefiling of all documents that might be used on cross-examination, I would hold that parties should, similar to what FRCP 26 requires, prefile a list of exhibits which they may use on cross-examination of any witness; such list would include, at a minimum, the name, date and author of the exhibit and a brief description of the exhibit. If requested, parties should be required to provide access to such exhibits for copying by all other parties. I would further require that the list be filed on or before the date that the party in possession of such exhibits is required to file rebuttal testimony and that access be provided no later than two weeks before the hearing day.

Since a party might not choose to use in cross-examination all of the potential exhibits which it possesses, I would not require that ten copies of all such exhibits be prefiled with the Board. However, if a party offers a document for admission into the record, such party should present one copy to the Board at the hearing, so that it may be marked and admitted. Further, soon after the hearing, if requested by the Board, I would require such party to file additional copies of any documents that are admitted into the record.

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[6] By this dissent, I do not wish to imply that the Board should adopt a formal discovery process. The limited disclosure that I would require, however, does not, in my view, take us down a path that we should not travel.

[7] Arguably, parties are already required by the language of the Board's Prehearing Orders, to file such exhibits with their final exhibit lists.