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

Re: Southwestern Vermont Health Care Corp.
by A. Jay Kenlan, Esq.
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P.O. Box 578
Rutland, VT 05702-0578
and
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Land Use Permit
Application #8B0537-EB

MEMORANDUM OF DECISION

I. Introduction

This proceeding concerns an appeal by Southwestern Vermont Health Care Corporation (formerly H.W. Putnam Memorial Health Care Corporation) ("SVHC") from a decision by the District 8 Environmental Commission ("Commission") in which the Commission denied the SVHC's permit application to construct a retirement facility in Bennington, Vermont.

Pending before the Board are party status petitions filed by Muriel Palmer and the Bennington County Conservation District ("BCCD") and a motion by SVHC to limit BCCD's participation in this matter. For the reasons stated below, the Board denies both petitions and postpones a decision on the motion to a later time.

II. Discussion

A. Muriel Palmer's party status petition

Muriel Palmer lives near the site of the proposed facility. She has been granted Environmental Board Rule ("EBR") 14(B)(2) party status on Criteria 9B and 10 but seeks party status on those same Criteria pursuant to EBR 14(B)(1) as an interested party.

In her petition, Palmer claims that she is entitled to such status under Criterion 9B because her 12-acre property, which is separated by one field from the proposed project, is an open field which is hayed by local farmers about twice a year and she makes these fields available for crop cultivation. She states that the loss of primary agricultural soils less than a mile from her land will make her property less desirable for farmers to lease and will result in a decreased use of her land for farming purposes.

As to Criterion 10, Palmer claims 14(B)(1) status because the Bennington Town Plan states that the site of the proposed project and her land are both within a rural conservation district and the Plan specifically encourages the protection of such lands. Permitting a project to deviate from the Plan's policy of protection, she claims, will jeopardize and directly impact her land.

In determining Palmer's party status, the Commission wrote, in pertinent part:

> The following persons or entities were either admitted as parties or denied party status, as indicated, pursuant to Environmental Board Rule 14(B)(1):
>
> 9. Muriel Palmer, represented by Elizabeth Boepple, admitted as a materially assisting party under Criterion 5-traffic, 9B-ag soils, and 10-town plan. … She owns river bottom land near the Henry Bridge, but has not demonstrated a meaningful nexus between her land and the project tract. Nevertheless, she has materially assisted the Commission under criteria (sic) 9B by cross examination and a thorough legal brief of applicable case law. ….

H.W. Putnam Memorial Health Corp. and Henry Randall, Application #8B0537, Findings of Fact, Conclusions of Law, and Order to Deny Permit at 3 (March 16, 2000).

SVHC concedes that "the Commission's Findings and Conclusions with respect to Muriel Palmer's party status are not particularly well articulated." *SVHC Memorandum* at 2. The Board agrees that, as the heading of the section refers to Rule 14(B)(1) and the Commission's discussion of Palmer's party status makes reference only to "material assistance" (which is an element of EBR 14(B)(2)), there could arguably be ambiguity as to the Commission's decision on her Rule 14(B)(1) party status. [1]

However, while the introductory language concerning Palmer's and the Bennington County Conservation District's party status may have lead to some confusion, the Board finds that it is evident from a reading of the Commission's analysis as to Palmer specifically that the Commission granted Palmer EBR 14(B)(2) status and denied her EBR 14(B)(1) status. The decision states explicitly that Palmer is "admitted as a materially assisting party," and later explains the assistance she has rendered the Commission. The decision further states that Palmer has failed to "demonstrate a meaningful nexus between her land and the project tract," thus finding that Palmer has not shown that she has an interest that will be affected by SVHC's retirement facility.

A party who is denied party status by a Commission for a Criterion or under a particular party status rule may seek review of such denial before the Board by filing a

timely appeal or cross-appeal. *Leonard and Rose Lemieux*, 3R0717-EB, Memorandum of Decision at 2 (Aug. 12, 1993); *Green Peak Estates, Inc.* 8B0314-2-EB, Memorandum of Decision at 2 n. 1 (Sept. 24, 1986) ("It should be noted that if non-appealing parties wish to raise for the Board's review issues which were not the subject of the original appeal, they must file a cross-appeal within 14 days of the Board's mailing of the notice of appeal or risk waiving those issues.") Here, although the Commission had denied Palmer party status under Rule 14(B)(1), and while Palmer's attorney filed a Notice of Appearance on her behalf as "an Interested Party under Environmental Board Rule 14(B)(1) and (2), Palmer did not file a cross-appeal from that denial. She cannot, therefore, seek the Board's review of the Commission's denial.

Even if the Board were to review the question of Palmer's Rule 14(B)(1) party status, the Board would conclude that she has not made a sufficient *prima facie* showing that SVHC's project will affect her interests under Criteria 9(B).

Palmer notes that her property is separated by one field and "less than one mile" from the site of the project. *Palmer Memorandum* at 2. Her property therefore does not fall within the protections afforded to "adjoining lands" under Criterion 9(B)(iv), 10 V.S.A. §6086(a)(9)(B)(iv). *Compare Nile and Julie Duppstadt et al.*, #4C1013 (Corrected)-EB, Memorandum of Decision at 4 (Oct. 30, 1998) (Party status granted to adjoining landowner who demonstrated that project may interfere with and jeopardize continuation of agriculture on adjoining lands).

In an attempt to show a connection between her land and the proposed development, Palmer alleges that, "[a] large decrease in the land available very near Ms. Palmer will make her property far less desirable for a farmer to lease," and that "absent a farmer's willing (sic) to continue to hay the open fields and the potential crop cultivation use of these fields will likely result in a decreased use of her land for farming purposes." *Palmer Memorandum* at 2. The Board finds this contention to be too speculative to support a claim for Rule 14(B)(1) party status, especially given the fact that Palmer's property "consists of approximately 12 acres of land including open fields containing river-bottom soils." *Id.* The Board has previously found property smaller than Palmer's to be of a size that is capable of contributing to an economic farming operation, albeit within the context of an analysis of whether a particular piece of land constitutes "primary agricultural soils" under Criterion 9(B). *Nile and Julie Duppstadt et al.*, #4C1013 (Corrected)-EB, Findings of Fact, Conclusions of Law, and Order at 38 - 39 (Apr. 30, 1999) (parcel of five acres is capable of contributing to an economic farming operation); *Marvin T. Gurman Espley Vermont, Inc.,* #3W0424-EB, Findings of Fact, Conclusions of Law, and Order at 19 (June 10, 1985) (10.3-acre parcel). Therefore, because of the distance between Palmer's land and the SVHC project, the size of her parcel, and the speculative nature of her claims of harm, the Board concludes that SVHC's project will not directly affect Palmer's continued ability to use her land for agricultural purposes and declines to find that she has "demonstrate[d] a

meaningful nexus between the project at issue and an asserted injury to a specific interest." *Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 5 (Aug. 14, 1997), *appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. Supr. Ct. Oct. 30, 1997).

As to Palmer's petition for Rule 14(B)(1) status for Criterion 10, the Board denies such request for the same reasons noted above. Again, while the Board granted Criterion 10 status to an adjoining farmer (Auclair) in the *Duppstadt* case who alleged only "her interest in ensuring conformance with the aspects of the … Town Plan and … Regional Plan that encourage and support the continuation of agriculture and the preservation of open space in the area of the Project and Auclair's farm," the Board was able to conclude that such allegations could be directly related to impacts on Auclair's land. *Duppstadt, supra,* Memorandum of Decision at 5. By contrast, in *Springfield Hospital,* the Board declined to grant Rule 14(B)(1) party status to a petitioner who had "not articulated how his interest [was] distinguishable from those of the general public…." *Springfield Hospital*, *supra,* at 5. Here, Palmer notes that the Bennington Town Plan encourages the protection of agricultural lands within the rural conservation district where both the project and her land are located; she further notes that "[p]ermitting a project to deviate from the Town Plan's policy of protection jeopardizes and directly impacts Ms. Palmer's land." *Palmer Memorandum* at 2. Because the Board has not found such a direct impact or link between Palmer's land and the project tract, the Board is similarly unable to find that Palmer's broad interests in protecting the agricultural soils at the SVHC lands are "distinguishable from those of the general public." Palmer's interests are thus insufficient to support a claim for Criterion 10 party status under Rule 14(B)(1).

Finally, the Board notes that, as a practical matter, denial of EBR 14(B)(1) status to Palmer has little effect. As a Rule 14(B)(2) party, she will be able to participate to the extent that she could have participated had she been granted 14(B)(1) status.

B. Bennington County Conservation District's (BCCD) party status petition

With regard to BCCD's party status petition, BCCD has EBR 14(B)(1) status on Criterion 9B but seeks to participate on that Criterion as an EBR 14(A)(4) (state agency) party by right.

There are no Board decisions which define what constitutes a "state agency" for purposes of Rule 14(A)(4). The only decision which is even remotely related to this question is the case of *White Sands Realty*, 3W0360-EB, Findings of Fact, Conclusions of Law, and Order at 2 (Feb. 25, 1982), in which the Board refused to recognize the Department of Fish and Wildlife as a party distinct from its umbrella agency, the Agency of Environmental Conservation (the predecessor to the Agency of Natural Resources).

BCCD raises a series of arguments as to why it is a state agency for purposes of Rule 14(A)(4); the Board will address each argument, and SVHC's responses, in turn.

1. Whether the Soil Conservation Act (SCA) or BCCD's status as a division of the Natural Resources Conservation Council establishes it as a state agency

a. The Soil Conservation Act

BCCD argues that, under its enabling legislation, the Soil Conservation Act ("SCA"), 10 V.S.A. Ch. 31, it is a "corporate body and governmental subdivision," 10 V.S.A. §702, and a "governmental subdivision of this state and a public body corporate and politic," 10 V.S.A. §715, and therefore an "entity of state government." *BCCD Memorandum* at 2-3. Certainly, BCCD is a creature of state government, created by state statute. However, being an "entity of state government," even one with "broad authority," *id.,* is not necessarily the equivalent of being a "state agency" for purposes of Act 250 party status. And the problem with resting an argument on one's status as a "governmental subdivision" and a "public body corporate and politic" is that towns and cities are similarly such "subdivisions" and "corporate bodies" of the state, *see Richards v. Town of Norwich*, 169 Vt. 44 (1999), created and chartered by the legislature pursuant to its powers under Ch. II, §§6 and 69 of the Vermont Constitution. But this does not mean that towns and cities are "state agencies" for purposes of Rule 14(A)(4).

BCCD then states that it has "broad authority to effect state policy," that it "functions as a state agency," that it has "broad powers to represent and act on behalf of the public." *BCCD Memorandum* at 2-3, *citing* 10 V.S.A. §709 and 723. However, BCCD's "sayin' so, don't [necessarily] make it so." *State v. Brunelle*, 148 Vt. 347, 365 (1987) (Peck, J., dissenting). Significantly, BCCD does not point to any specific provision of §709 or the somewhat lengthy language of §723 to support these claims. At best, BCCD refers to language in §723(3) which grants it the power

> To carry out measures for the prevention and control of soil and stream bank erosion and the protection and conservation of natural resources … on lands owned or controlled by this state or any of its agencies … and on any other lands within the district *upon obtaining the consent of the owner of the lands….*

10 V.S.A. §723(3) (emphasis added). As SVHC points out, however, BCCD does not have the consent of the owner of the lands which are the subject of this appeal. *SVHC Memorandum* at 3. BCCD's "broad powers" may be more limited than it believes.

b. BCCD as a division of the Natural Resources Conservation Council

Along similar lines, BCCD next argues that, as it is a division of the Natural Resources Conservation Council ("Council"), which "is established to serve as an agency of the state," 10 V.S.A. §703, it can, in effect, stand in the Council's shoes and participate as a Rule 14(A)(4) party. *BCCD Memorandum* at 6–7. BCCD notes that the Board routinely allows divisions and departments of state agencies to appear. *Id.* However, even if BCCD is a division of the Council, past practice of the Board has been to allow a particular division or department to appear on behalf of, as the representative of, and under the express authority of its umbrella state agency, only when it is clear that such authority has been given, something which is not apparent here.

SVHC counters that, even if BCCD is a division of the Council, Act No. 210, §86 (1993 Adj. Sess.) transferred the Council "from the agency of natural resources and attached [it] to the Vermont department of agriculture, food and markets for administrative support…." *SVHC Memorandum* at 7. SVHC then argues that the Council's "umbrella agency," the Agricultural Department, has taken a position on Criterion 9(B) (as evidenced by the agricultural lands mitigation agreement) and that the *White Sands* case does not permit the Council (much less BCCD) to participate as a separate party, especially – it may be implied – where BCCD would be taking a position in apparent conflict with the Agricultural Department. *Id.* at 8. While SVHC's argument in this regard is facially attractive, there is a difference between the Council's being a *part* of or a *division* of the Agricultural Department and being "attached" to the Department "for administrative support." The Environmental Board and the Water Resources Board are both "attached" to ANR for administrative support, 3 V.S.A. §2878, and neither Board is a division of ANR.

SVHC makes a better argument when it notes that the SCA specifically states that it is the Council upon which has been conferred "state agency" status, §703, and that the SCA does not similarly confer such status on the Soil Conservation Districts, such as BCCD. *SVHC Memorandum* at 7 and 10. Indeed, as noted above, BCCD is a "corporate body and governmental subdivision," 10 V.S.A. §702, and a "governmental subdivision of this state and a public body corporate and politic…." 10 V.S.A. §715. This difference in language is significant, and the presumption is that language in a statute is inserted for a purpose. *Slocum et al. v. Department of Social Welfare*, 154 Vt. 474, 481 (1990), *citing State v. Racine*, 133 Vt. 111, 114 (1974). Thus, if the Council is defined by the SCA as a "state agency," but BCCD is only defined as a "governmental subdivision," then it may be assumed that the Legislature's use of different terms has some significance.

The Board concludes that neither the language of the SCA nor BCCD's status as a division of the Council supports BCCD's claim that it as a "state agency" sufficient to

confer upon it party status under EBR 14(A)(4).

2. Policy and intent of Act 250

BCCD next argues that the policies of Act 250 "provides for broad participation of state agencies, neighbors, organizations and other parties with interests in the proceeding." *BCCD Memorandum* at 3. This is no doubt a true statement, but it does not answer the question presented here. Parties who are admitted to participate before the Board and Commissions do have privileges of broad participation, and may so appear as Rule 14(B)(1) or 14(B)(2) parties; but this does not mean that they are necessarily entitled to all of the rights of Rule 14(A) parties.

There can also be no argument to BCCD's claim that state agencies should and need to participate in Act 250 matters which affect their interests and that such participation by state agencies serve the process and the public. *Id*. at 3. But this begs the question of whether BCCD *is* a state agency.

Nor can one contest BCCD's claims that it has an expertise on soil and natural resource issues within Bennington County which can aid the Board in making "more informed decisions." *Id.* at 4. But, again, such expertise does not, by itself, confer upon BCCD the Rule 14(A) status which it seeks. Further, nothing prevents BCCD from providing its expertise to the Board as a 14(B)(1) party.

The Board concludes that Act 250's policy and intent do not support BCCD's claim for EBR 14(A) party status.

3. The Vermont Administrative Procedures Act (APA)

Perhaps BCCD's best argument is that the Vermont Administrative Procedures Act ("APA") supports its claim that it is a state agency.

The APA definition of "agency" means "a state board, commission, department, agency *or other entity of state government* … authorized by law to make rules or to determine contested cases." 3 V.S.A. §801(b)(1) (emphasis added). BCCD does not claim that it determines contested cases, but it does claim that it has rulemaking authority, and 10 V.S.A. §724 does authorize BCCD to "formulate regulations … governing the use of lands within the district in the interest of conserving soil, controlling soil and stream bank erosion and promoting conservation of natural resources and drainage." As such, BCCD thus would appear to fit the definition of an "agency" under the APA. [2]

However, one must read the APA definition of "agency" within the context of the entire statute, with particular reference to the "rules" which are mentioned within the definition. Not every rule or regulation made by a governmental entity is an APA "rule."

The APA establishes a very formal process which APA "agencies" must follow when adopting "rules". *See* 3 V.S.A. §§817 – 848. BCCD does not follow this process; rather the SCA sets out a radically different procedure which BCCD must follow when promulgating its regulations. *See* 10 V.S.A. §§724 – 728. Because the SCA and APA rule adoption processes are so dissimilar, this must mean that the regulations adopted by BCCD under the SCA are not the "rules" contemplated by the APA in its definition of "agency." Because they are not, BCCD is not an APA "agency." [3]

Further, even if BCCD could be considered a "state agency" for APA purposes, it does not automatically follow that BCCD would be a "state agency" for purposes of determining EBR 14(A)(4) status. The Board is empowered to interpret its own statute, and the Supreme Court "gives deference to the Environmental Board's interpretation of Act 250, to its own rules, and to Board's specialized knowledge in the environmental field." *OMYA, Inc., et al. v. Town of Middlebury, et al.* No 99-282 (July 25, 2000). slip op. at 2, *citing In Re Wal*Mart Stores, Inc.,* 167 Vt. 75, 79 (1997); *and see In re Commercial Airfield*, No. 99-079 (Vt. Supr. Ct. Jan. 27, 2000) slip op. at 1. *Accord, In re Rusin*, 162 Vt. 185, 188 (1994), *citing In re Killington, Ltd*., 159 Vt. 206, 210 (1992): "Absent compelling indication of error, the Board's interpretation of Act 250 and its own duly promulgated rules must control." While the APA may therefore provide some guidance to the Board in this interpretation, it is not controlling.

The Board concludes that BCCD is not a "state agency" for purposes of EBR 14(A)(4). BCCD's petition for Rule 14(A) party status is therefore denied. [4]

C. SVHC's motion to limit BCCD's participation in this case

BCCD argues that it is directly affected by SVHC's proposed project. *BCCD Memorandum* at 7-8. By not cross-appealing the Commission's grant of Rule 14(B)(1) party status to BCCD, SVHC has already conceded that BCCD has an "interest" in this appeal. SVHC argues, however, that BCCD's participation in this matter is constrained by the SCA -- in particular, the restrictions placed on BCCD when addressing soil conservation on land owned by private persons who have not given their consent. 10 V.S.A. § 723(3). *SVHC Memorandum* at 1-5.

To the extent that SVHC thus asserts that BCCD's interest is limited, which consequently limits the evidence or argument which BCCD can present, this claim is not ripe. At the time that BCCD submits such evidence or argument, SVHC may contest the admission of such evidence; until that time, without knowing the specifics of BCCD's proffered submittals and the concomitant basis for SVHC's claim that such submittals should not be admitted into the record, it is neither necessary nor appropriate for the Board to consider SVHC's arguments. *See Town of Stowe*, Application #100035-9-EB, Findings of Fact, Conclusions of Law, and Order at 40 (May 22, 1998) (Board should not rule as a matter of law regarding the relevancy of evidence under a criterion prior to

receipt of the evidence); *Circumferential Highway, Vermont Agency of Transportation and Chittenden County Circumferential Highway District*, #4C0718-1-EB, Dismissal Order at 4-5 (April 26, 1990) (Board will not consider questions that are not ripe).

III. Order

1. Muriel Palmer's petition for EBR 14(B)(1) party status is denied.

2. BCCD's petition for EBR 14(A)(4) party status is denied.

3. SVHC's motion to limit BCCD's participation in this case will be considered if and when SVHC files evidentiary objections to BCCD's prefiled evidence and exhibits.

Dated at Montpelier, Vermont this 10th day of August 2000.

ENVIRONMENTAL BOARD

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Marcy Harding, Chair
John Drake
George Holland
Samuel Lloyd
W. William Martinez
*Rebecca M. Nawrath
*Alice Olenick
*Robert H. Opel

* Board Members Nawrath, Olenick and Opel did not participate in the final deliberations in this matter but concur with the decision.

ENDNOTES

[1] On the other hand, the apparent ambiguity in the Commission's decision may not be all that real. The Commission's decision reads "The following persons or entities were either *admitted as parties or denied party status, as indicated*, pursuant to Environmental Board Rule 14(B)(1)." (Emphasis added) It is entirely reasonable to read the Commission's decision under such a heading as explaining why Palmer's

request for 14(B)(1) status was denied.

If there were such ambiguity, however, it was incumbent on Palmer to either seek clarification of the Commission's determination through a request for reconsideration pursuant to EBR 31 or to appeal the Commission's decision to the Board pursuant to EBR 40. She did neither.

[2] SVHC's argues (*Memorandum* at 8) that it is the *Council* that is the "state agency" for APA purposes, because it is the *Council* that is defined as an "agency of the state," and the *Council* has no rule-making authority. But this misses the fact that the APA places "other entit[ies] of state government" within the ambit of 3 V.S.A. §801(b)(1), and BCCD is such an "other entity."

[3] Likewise, the process whereby municipalities adopt bylaws differs substantially from the APA model. *See* 24 V.S.A. §4404. Since municipalities are "entities of state government" which are "authorized by law to make rules" (ordinances), one might well likewise argue that such municipalities are "state agencies" under a broad reading of the APA. But such an argument would suffer the same fate as the one presented here.

[4] Because the Board concludes that BCCD is not a "state agency," it does not address SVHC's procedural argument that BCCD did not seek Rule 14(A) party status before the Commission. The Board does note, however, that while the first evidence in the record before the Commission as to BCCD's party status request appears in Exhibit 48, wherein BCCD "requests party status under Environmental Board Rules, Article II, rule 10, 14(b)...," proposed findings from the BCCD later argue that BCCD is a "political subdivision" entitled to party status as of right. Thus, were the Board to reach this question, the Board would likely conclude that there is sufficient support in the record to indicate that BCCD did seek EBR 14(A) status before the Commission.