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

RE: Mount Anthony Union High School District #14
Land Use Permit Application #8B0552-EB(Interlocutory)

## MEMORANDUM OF DECISION

This Memorandum of Decision denies the Conservation Law Foundation (CLF) Environmental Board Rule (EBR) 14(B)(1) party status, grants CLF EBR 14(B)(2) party status, and denies Our Kids Are Important (OKAI) EBR 14(B)(2) party status as further discussed below.

## I. PROCEDURAL SUMMARY

This proceeding concerns interlocutory appeals from Land Use Permit Application #8B0552 (Application) regarding the denial of party status of CLF and OKAI in the District #8 Environmental Commission (Commission) proceedings. The Application is for a 147,500 square foot, 900-student Union Middle School with a parking lot of 218 spaces, playing fields, and town water and sewer, all on a 110 acre parcel off East Street in Bennington, Vermont (Project).

On November 9, 2001, Mount Anthony Union High School District #14 (Applicant) filed the Application for the Project. The Commission held a pre-hearing conference pursuant to EBR 16 on December 12, 2001. During the pre-hearing conference, the Commission heard requests for party status, deliberated on the requests and announced that it would take the requests under advisement. The Commission allowed parties requesting discretionary party status to file additional information subsequent to the pre-hearing conference.

On December 21, 2001, the Commission's Acting Chair issued a Prehearing Conference Report and Order (PHCRO). In the PHCRO, the Commission denied CLF and the Bennington County Conservation District discretionary party status under EBR 14(B)(1) and 14(B)(2). The Commission also denied OKAI party status under EBR 14(B)(2). The PHCRO set hearing dates relative to the Application for January 17 and 24, 2002.

On December 31, 2001, CLF and OKAI filed interlocutory appeals with

the Environmental Board (Board) from the Commission's denial of their respective requests for party status. CLF's interlocutory appeal also requests the Board to stay the Commission's proceedings on the Application pending the Board's resolution of its appeal, alter the Commission's schedule, and order that the commissioners be replaced should CLF be granted party status.

In a January 3, 2002 Chair's Preliminary Ruling, Chair Harding stayed the Commission's proceedings relating to the Application pending the Board's resolution of the interlocutory appeals.

On January 7 and 8, 2002, OKAI filed its Memorandum in Reply to CLF's Motion for Interlocutory Appeal (OKAI's Reply), Applicant filed its Motion to Enlarge Page Limit and its Memorandum in Reply to CLF's Motion for Interlocutory Appeal (Applicant's Reply), and Bennington County Industrial Corp. (BCIC) filed its Memorandum of Law in Opposition to CLF's Motion for Interlocutory Appeal (BCIC's Reply).

On January 23 and 30, 2002, the Board deliberated in this matter. Based upon a thorough review of the record and filings, the Board declared the record complete and adjourned. The matter is now ready for final decision.

## II. DISCUSSION

Pursuant to EBR 43 and the parties' filings in this matter, the Board took up the following issues during its deliberations.

1. Whether to accept and consider the interlocutory appeals.
2. Whether the Board believes that a hearing or oral argument is necessary to decide the appeals.
3. Whether to grant or deny Applicant's Motion to Enlarge Page Limit.
4. Whether the Board's standard of review in an interlocutory appeal is *de novo* or on-the-record.
5. Whether CLF or OKAI are entitled to party status before the Commission.
6. Whether to grant or deny CLF's Motion for New Commission Members.
7. Whether to grant or deny CLF's Request that the Commission Schedule be Altered.

The remainder of this memorandum addresses each of these issues in the order presented.

**1. Whether to accept and consider the interlocutory appeals:**

The Board has discretion to review the interlocutory appeals of the Commission's party status decisions. EBR 43(B). If the Board believes that its consideration of the appeals at this point in the Commission's proceedings "may materially advance the application process," then the Board should take up and consider the appeals. EBR 43(B). *See Re: Maple Tree Place Associates, #4C0775-EB (*Interlocutory Appeal*),* Memorandum of Decision and Order (Oct. 11, 1996)*; see also, H.B. Partners a/k/a Walker II Project*, #8B0500-1-EB *(Interlocutory)* (Mar. 24, 1998). (The Board interprets "application process" to mean the process that has or could occur at the Commission, Board, and Vermont Supreme Court levels.); *see also Town of Albany and Florence Beaudry*, #7R1042-EB *(Interlocutory)* (Mar. 1, 1998).

Fundamental to whether this interlocutory appeal will materially advance an application is the potential for substantial delay in the issuance of a commission final decision. A series of appeals and remands would result in substantial delay. In the matter at hand, the Commission's hearings on the merits of the application have not yet begun. Should the Board not take up the appeals at this juncture, there is a potential for the Commission to proceed and hear the matter and issue a decision. CLF and/or OKAI would then have the right to file an appeal of party status issues. If the Board were to find that CLF or OKAI should have been granted party status, then this matter would be remanded back to the Commission and the Commission would be forced to rehear the matter with new participants. Re-conducting proceedings would clearly be inefficient and result in substantial delay.

Furthermore, by filing interlocutory appeals, CLF and OKAI are seeking immediate relief from the Commission's denials. The Applicant, in its reply memorandum, states that "it agrees that this Board should proceed to resolve the issue of CLF's party status in the pending matter at this time." Applicant's Reply at 27. The Applicant is silent with respect to OKAI's appeal. Under these circumstances, the Board believes that taking up the interlocutory appeals at this juncture of the Commission's proceedings will materially advance the application process.

**2. Whether the Board believes that a hearing or oral argument is necessary to decide the appeals.**

Pursuant to EBR 43(D), any interlocutory appeal shall be determined upon the motion and any response without hearing unless the Board otherwise orders. EBR 43(D). Upon review of the parties' filings, the Board finds that it is unnecessary to hold a hearing or argument to dispose of the appeals.

**3. Whether to grant or deny Applicant's Motion to Enlarge Page Limit.**

Because Applicant's Reply exceeds its 25 page limit, *see* EBR 12(D), Applicant moved for relief from the limit. EBR 12(G) allows the Board to enlarge or extend page limits for reasonable grounds. As the interlocutory appeals raise several sub-issues,[1] the Board grants Applicant's request for leave from the page limitation. The Board believes, however, that the 25 page limit established under EBR 12 is both reasonable and necessary. Accordingly, the Board advises all parties that it will strictly enforce EBR 12 in all future filings, if any.

**4. Whether the Board's standard of review in an interlocutory appeal is *de novo* or on-the-record.**

Applicant's Reply argues that the Board should consider the interlocutory appeals of party status on-the-record. Applicant argues further that past Board decisions have not been consistent and, based on legislative interpretation, on-the-record review is appropriate.

The Board disagrees with the Applicant and hereby clarifies that the Board's standard of review in an interlocutory appeal is *de novo*. EBR 43(D) states, in pertinent part:

> *Any interlocutory appeal shall be determined upon the motion and any response without hearing* unless the board otherwise orders. ... If a motion for interlocutory appeal is granted under section (B) of this rule [party status appeals], the board proceedings shall be confined to the specific grant(s) or denial(s) of party status

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[1] For instance, Applicant seeks clarification of the Board's standard of review in an interlocutory appeal of party status.

> identified in the motion. For any interlocutory appeal, the board may convene such hearings to hear oral argument as it deems necessary to dispose of the appeal. *Such proceedings shall be conducted as provided by these rules for appeals to the board.*

EBR 43(D)(emphasis added).

The last quoted sentence of EBR 43(D) refers to EBR 40(A) Appeals. EBR 40(A) states, in pertinent part:

> Any party aggrieved by an adverse determination by a district commission may appeal to the board and will be given a *de novo* hearing on findings, conclusions and permit conditions issued by the district commission.

EBR 40(A)(emphasis added).

Accordingly, the Board concludes that its standard of review for interlocutory appeals of party status determination is *de novo*.

Rulemaking history of EBR 43 supports this conclusion. The responsive summary for the 1996 rule revisions states, in pertinent part, the following:

> **Comment:** The Board should specify the basis and standards on which it will make a decision in an interlocutory appeal on party status.
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> **Response:** The proposed rule states that the appeal will be reviewed based on the written submissions unless the board orders otherwise. The substantive standard for determining party status are set out in EBR 14 and need not be repeated in EBR 43. In past cases concerning interlocutory appeal on questions of law, the Board has applied its own judgment in a "*de novo* review" and believes that case law will provide adequate guidance as to the standard of review.

Applicant relies in part on *Re: Paul and Dale Percy,* #5L0799-EB, Findings of Fact, Conclusions of Law and Order (Mar. 27, 1985), to advance its theory for on-the-record review. This decision was, however, issued prior to the 1996 rule revisions. To the extent any Board decisions could be interpreted as

precedent for an on-the-record review of interlocutory appeals, such decisions are hereby expressly overturned.

**5. Whether CLF or OKAI are entitled to party status before the Commission.**

Under its *de novo* review, the Board now considers the merits of CLF's and OKAI's interlocutory appeals. CLF seeks EBR 14(B)(1) and 14(B)(2) party status, and OKAI seeks EBR 14(B)(2) status.

The Board considers three elements when determining party status pursuant to EBR 14(B)(1). The petitioner has the burden of establishing a connection between the Project and a specified interest. Second, the petitioner must show that, due to the demonstrated connection, its specified interests may be affected. *Maple Tree Place Associates, #4C0775-EB, Memorandum of Decision and Order at 6 (Oct. 11, 1996)*. Third, the petitioner must articulate how its interests are different from those of the general public. *Springfield Hospital, #2S0776-2-EB, Memorandum of Decision at 5-6 (Aug. 14, 1997), appeal dismissed, In re Springfield Hospital, No. 97-369 (October 30, 1997); see also, Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000).

**A. CLF's Petition**

i. 14(B)(1) Party Status

CLF seeks EBR 14(B)(1) party status under criteria 5 (traffic), 9(A)(growth), 9(B)(agricultural soils), 9(H)(scattered development), 9(K)(public investments) and 10(local and regional plans). CLF states that it has "over 5,000 members, including over 500 members in Vermont, and about 30 members in Bennington County, and over 80% of these members reside in the towns that will be served by the new Middle School. *CLF's memorandum* at 4 and 5. CLF recites its mission statement, describing its work and goals:

> The Conservation Law Foundation works to solve environmental problems that threaten the people, natural resources, and communities of New England. CLF advocates use law, economics, and science to design and implement strategies that conserve natural resources, protect public health, and promote vital communities in our region.

*Id.* at 5. CLF then asserts several of its specific interests potentially affected by the proposed development. These interests include, but are not limited to, the following:

> Promoting development that does not cause sprawl and protects Vermont's valuable natural resources, including farmland, are interests of all of CLF's members that will be protected through this proceeding.
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> ***
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> CLF is working hard to establish a clear public policy agenda to sustain farming in Vermont for years to come.
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> ***
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> Much of CLF's work related to sprawl has focused on the effects of public spending decisions on how and where development occurs.
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> ***
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> CLF and its members have demonstrated a strong interest in protecting viable farmland in Vermont and New England and opposing developments that cause sprawl and have an undue impact on the state's natural resources and land use patterns.

*Id.* at 19 - 21.

The Board is not convinced that CLF's filings sufficiently demonstrate a connection between the Project and a specified CLF interest and that, due to the demonstrated connection, the specified interests may be affected. Even if the Board gave CLF the benefit of doubt and concluded that CLF satisfied the first two elements, the Board concludes that CLF fails to articulate how its interests are different from those of the general public.

The Board concludes that CLF fails to satisfy EBR 14(B)(1) under criteria 5 (traffic), 9(A)(growth), 9(B)(agricultural soils), 9(H)(scattered development), 9(K)(public investments) and 10(local and regional plans). Accordingly, CLF is denied EBR 14(B)(1) party status.

ii. 14(B)(2) Party Status

A determination that a EBR 14(B)(2) party can materially assist the Board requires more than an assertion that the party can cross-examine witnesses and present experts. The Board considers the following elements. First, that they possess particular expertise with respect to the Project; second, that the Project is complex and that the issues presented by the Project are novel and unfamiliar. *Maple Tree Place Associates*, *supra* at 7; see also, *Josiah E. Lupton, Quiet River Campground*, #3W0819 (Revised)-EB, Chair's Preliminary Ruling at 4 (Oct. 3, 2000) and Northeast Cooperatives and L&S Associates, #2W0434-11-EB, Memorandum of Decision at 3 (Jan. 29, 1999). Third, the Board also considers whether another party will provide the assistance which a person who seeks EBR 14(B)(2) status may give. *Stonybrook Condominium Owners Association,* Declaratory Ruling #385, Memorandum of Decision at 3 (May 3, 2000) (citing to *Circumferential Highway, State of Vermont, Agency of Transportation and Circumferential Highway District*, #4C0718-EB, Memorandum of Decision and Dismissal Order at 2 (Sept. 25, 1989)).

CLF demonstrates that it has particular expertise that would assist the Board in the review of this project. CLF satisfies this element, in part, by highlighting its track record in providing useful expertise in past Act 250 proceedings. For instance, CLF provided in-depth expert testimony and legal argument regarding Criterion 9(B) in *Re: Southwestern Vermont Health Care Corporation (SVHC)*, #8B0537-EB (Feb. 22, 2001). And in *Circumferential Highway, State of Vermont, Agency of Transportation*, #4C0718-1 Memorandum of Decision (Sept. 25, 1989), CLF proposed an innovative farmland protection program as a condition of the Act 250 permit to address a highway's secondary growth impacts. CLF's memorandum in support of its appeal also highlights its expertise by summarizing its likely evidence under each of the criteria for which its seeks party status. *See* CLF's memorandum at 8 - 17.[2]

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[2] Qualifying for party status under Criterion 9(K) requires a higher threshold showing than required for party status under Criterion 5. *See Re: The Van Sicklen Limited Partnership*, #4C1013R-EB*,* Memorandum of Decision at 8 (Jun. 8, 2001). As CLF's proposed evidence goes beyond impacts to highways, the Board finds that CLF has preliminarily established materially assisting party status for Criterion 9(K). However, the Commission should re-examine this issue at the completion of its proceedings as further discussed below.

CLF also demonstrates that the Project at issue in the Commission's proceedings is complex. For instance, CLF alleges that the Project will likely have impacts on growth and development in the area similar to other large commercial and infrastructure expansions. *Id.* at 12. CLF also alleges that the location of a school can drive development and diminish a communities' financial and other resources. These Project issues as presented by CLF appear to be complex and novel. *Id.* Furthermore, CLF appears to be the only party opposing the Project, and therefore, no other party is likely to provide the assistance or perspective which CLF may give.

Lastly, CLF provides a description of the evidence or argument that it will present as required by EBR 14(B)(5). *See* CLF's memorandum at 8 – 11. Accordingly, the Board concludes that CLF, at this stage of the proceedings, has made a sufficient showing to support the preliminary grant of party status pursuant to EBR 14(B)(2) under criteria 5 (traffic), 9(A)(growth), 9(B)(agricultural soils), 9(H)(scattered development), 9(K)(public investments) and 10(local and regional plans).

Pursuant to 10 V.S.A. §6085(c)(2) and EBR 14(F) district commissions are to make preliminary determinations of party status at the beginning of its proceedings and then at the conclusion of evidence, cross-examination and argument; prior to the completion of deliberations, the commissions are to re-examine party status.[3] Accordingly, as this decision of the Board determines

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[3] EBR 14(F)(3) states that "...the district commission shall re-examine preliminary party status determinations, unless an interlocutory appeal concerning the determination(s) has been accepted by the board under Rule 43." The Board interprets this rule to forbid a commission from re-examining party status should the Board make a final determination of party status. This could be where the Board denies a party preliminary party status, and therefore, there is nothing to re-examine following the commission's hearings. See *Maple Tree Place Associates*, #4C0775-EB (Interlocutory Appeal), Memorandum of Decision and Order (Oct. 11, 1996). Also, if the Board were to grant statutory party status, i.e. EBR 14(A)(4) status to a state agency, upon an interlocutory appeal, that decision would be final and un-reviewable by a commission. Where the Board orders preliminary EBR 14(B)(2) party status, however, it is appropriate and necessary for the commission to re-examine the party status determination following the commission's hearings to ensure that the party has in fact materially assisted the commission.

that CLF should be granted preliminary EBR 14(B)(2) party status, the Commission is directed to conduct its proceedings and then re-examine party status at the conclusion of proceedings to ensure that CLF continues to qualify for EBR 14(B)(2) party status. *See* 10 V.S.A. §6085(c)(2).

**B. OKAI's Petition**

OKAI seeks EBR 14(B)(2) party status under criteria 5 (traffic), 6 (educational services), 8 (aesthetics), 9(A) (growth), 9(B) (agricultural soils), 9(H) (scattered development), and 9(K)(public investments). OKAI states that the members of its association are parents whose children have attended, are attending or will attend public school in the district relating to the Project and that its members were drawn together by their concern about the present condition of the Middle School and the future of education in the district. *OKAI's memorandum* at 4. OKAI states that is has a unique perspective about how the present Middle School affects children and their community. *Id.* at 5. The Board finds that these allegations go more to establishing a connection between the project and the interests of OKAI pursuant to EBR 14(B)(1) than to showing a particular expertise which OKAI may offer to the Commission.

Furthermore, in OKAI's offer of its testimony and evidence under the criteria for which it seeks party status, OKAI proposes to address impacts from other presently existing developments. For instance, under Criterion 5, OKAI alleges that it will present testimony and evidence regarding the traffic congestion and unsafe conditions that currently exist at the Middle School and how the Project will alleviate congestion and unsafe conditions. *Id.* at 5 - 6. Also, with respect to Criterion 6, OKAI proposes to present evidence on how the location and condition of the present Middle School creates an unreasonable burden on the ability of the community to educate its children and how the Project will alleviate that burden. *Id.* at 6.

In processing an application for a land use permit, district commissions review whether there are impacts caused by the project, not impacts that a project will alleviate elsewhere. For instance, under 10 V.S.A. §6086(a)(5) and (6), a district commission reviews whether a project "[w]ill not cause unreasonable congestions or unsafe conditions with respect to use of the highways..." and "[w]ill not cause an unreasonable burden on the ability of a municipality to provide educational services." Therefore, what OKAI proposes to offer to the commission is not something the Commission can consider in its review of the Project.

Lastly, OKAI supports the project. The Board believes that the Applicant will adequately prepare and present this matter, and therefore finds that OKAI's

participation as a materially assisting party will not be necessary. [4]

Accordingly, the Board concludes that OKAI fails to establish that it is entitled to EBR 14(B)(2) party status under criteria 5 (traffic), 6 (educational services), 8 (aesthetics), 9(A) (growth), 9(B) (agricultural soils), 9(H) (scattered development), and 9(K)(public investments).

**6. Whether to grant or deny CLF's Motion for New Commission Members.**

CLF asks that the Board order that commissioners be replaced as the present members have, as alleged by CLF, demonstrated bias and prejudged CLF's involvement.

The Board finds that this issue is not properly before the Board because pursuant to EBR 43(D): "If a motion for interlocutory appeal is granted under Section (B) of this rule, board proceedings shall be confined to the specific grant(s) or denial(s) of party status identified in the motion." EBR 43(D).

Even if the Board interpreted EBR 43(D) to allow it to consider such an issue, the Board would find that this issue is still not properly before the Board because appeals to the Board are limited to adverse determination by a commission. EBR 40. The Board is without jurisdiction to consider an issue where the issue was not first considered by a coordinator or district commission. *Re: M.B.L. Associates*, #4C0948-1-EB, Findings of Fact, Conclusions of Law, and Order at 2 (May 4, 1998)(citing *In re Taft Corners Associates*, 160 Vt. 583, 591 (1992); *In re Juster Associates*, 136 Vt. 577, 581 (1978)("[i]nitial consideration of a land use proposal is a function assigned by the Legislature to the District Commission')). Based on the parties' filings, the Board finds that CLF has not first presented this issue to the Commission.

Lastly, even if the issue was properly before the Board, the Board notes that a commission's party status determinations do not go to the merits of a proceeding, and therefore, do not necessarily lead to a finding or presumption that commission members are biased or have prejudged the merits of the

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[4] The Board notes that, even though OKAI is without party status, it still may potentially participate in the Commission's proceedings as a witness(es) on behalf of the Applicant as it supports the Project.

application. Inapposite to CLF's argument, the Vermont Supreme Court has held that there is a presumption that government officials will decide a controversy conscientiously and fairly and that the burden of establishing disqualifications rests with the challenging party. *Brody V. Barash*, 155 Vt. 103, 109-110 (1990), *see also In re Judy Ann's Inc.*, 143 Vt. 228, 233 (1983)(the presumption of honesty and integrity which attaches to administrative tribunals is not rebutted by bare allegations of bias).

Accordingly, the Board declines to order the commission members replaced.

**7. Whether to grant or deny CLF's Request that the Commission Schedule be Altered.**

CLF asks that the Commission's schedule provide three weeks for CLF to prepare for hearings should the Board grant CLF party status. In its reply, Applicant states that it has no objection to a reasonable alteration to the Commission's schedule should CLF be granted party status. Applicant's Reply at 37.

The Board believes that a schedule convening Commission hearings no sooner than three weeks from this decision is appropriate and reasonable. However, as discussed above under issue number 6, the Board does not have jurisdiction over issues which are not first presented to a district commission. Based on the parties' filings, the Board finds that CLF has not first presented this issue to the Commission. The Board, therefore, declines to order that the Commission's schedule be altered.

## III. ORDER

1. The Board grants and considers CLF's and OKAI's interlocutory appeals.

2. A hearing or oral argument is unnecessary to decide the appeals.

3. Applicant's Motion to Enlarge Page Limit is GRANTED.

4. The Board's standard of review in an interlocutory appeal is *de novo*.

5. CLF is DENIED EBR 14(B)(1) party status.

6. CLF is GRANTED party status pursuant to EBR 14(B)(2) under criteria 5 (traffic), 9(A)(growth), 9(B)(agricultural soils), 9(H)(scattered development), 9(K)(public investments) and 10(local and regional plans).

7. OKAI is DENIED EBR 14(B)(2) party status.

8. CLF's Motion for New Commission Members is not properly before the Board and is accordingly DENIED.

9. CLF's Request that the Commission Schedule be Altered is not properly before the Board and is accordingly DENIED.

10. Chair Harding's stay of the Commission's proceedings is hereby VACATED and jurisdiction is returned to the District #8 Environmental Commission.

Dated at Montpelier, Vermont this 31st day of January, 2002.

ENVIRONMENTAL BOARD

/s/Marcy Harding
Marcy Harding, Chair
Jack Drake
Samuel Lloyd
William Martinez*
Jean Richardson
Donald Sargent, Alternate Member
A. Gregory Rainville, Alternate Member**

* Member Martinez did not participate in the January 30, 2002 deliberations, however, he has reviewed and concurs with this decision.

** Member Rainville participated in the January 23, 2002 deliberations only. He has not reviewed the written decision but he concurs with the outcome.