

**Wal-Mart Real Estate Business Trust v. Town of Conway
Docket Nos.: 20892-04PT; 21665-05PT; 22694-06PT**

**Wal-Mart Real Estate Business Trust v. Town of Plymouth
Docket No.: 21720-05PT**

**Wal-Mart/Trustee, Glass, David v. Town of Amherst
Docket Nos.: 21157-04PT; 22685-06PT**

**Wal-Mart Real Estate Business Trust v. Town of Epping
Docket Nos.: 21161-04PT; 21669-05PT; 22697-06PT**

**Wal-Mart Stores, Inc. v. City of Lebanon
Docket Nos.: 21162-04PT; 21677-05PT, 22703-06PT**

**Wal-Mart Real Estate Business Trust v. City of Lebanon
Docket No.: 22704-06PT**

**Wal-Mart/Trustee, Glass, David v. City of Concord
Docket No.: 22691-06PT**

**Wal-Mart Stores, Inc. v. City of Concord
Docket No.: 22693-06PT**

**Wal-Mart Real Estate Business Trust v. Town of Rindge
Docket No.: 22873-06PT**

ORDER ON PENDING MOTIONS AND SCHEDULING ORDER

The board has received a number of motions (listed in the Addendum) pertaining to the October 9, 2008 Order (the "Order") issued following the hearings held on August 21 - 22, 2008 and September 16, 2008, respectively, for the Wal-Mart store located in the Town of Conway

(“Conway”) and the “super” Wal-Mart store located in the Town of Plymouth (“Plymouth”).

The Order noted the schedule of upcoming hearings for other Wal-Marts in the Towns of Amherst, Epping and Rindge and the Cities of Lebanon and Concord and the existence of a number of facts and issues that appear to be common to all of these appeals.

To avoid any potential misunderstanding, the board clarifies it will limit its focus to the evidence presented and the review appraiser’s report filed in each appeal. The board has no intention to look at ‘all’ of the evidence presented in all of the appeals in a consolidated fashion, especially in light of the concerns expressed in several of the motions. The parties are no doubt aware of the other pending appeals, and may attend the hearings if they desire to, but each appeal will be considered and decided separately. Fully cognizant of the “due process and fundamental fairness” considerations mentioned in these motions, the board will take whatever steps are reasonable and prudent to insure no “prejudice” to any party occurs by following the procedural steps described below.

In light of these and other concerns expressed in the various motions (summarized in the Addendum) and to bring about the orderly and timely disposition of the Wal-Mart appeals, the Order is modified as follows:

1. the board will not hold hearings in the remaining Wal-Mart appeals (see Clerk’s November 12, 2008 letter to the parties) until after it issues its decisions in the Conway and Plymouth cases;
2. the board’s review appraiser is directed to complete and submit individual reports for the Wal-Mart stores in Conway and Plymouth;
3. the parties to the Conway and Plymouth appeals will then have a reasonable period of time (20 days) to file any written comments to each report;

4. the board will then issue its decisions in the Conway and Plymouth appeals (without reopening the evidentiary record unless a party makes or renews a timely motion with a showing of good cause); and
5. the board will then reschedule for hearing any Wal-Mart appeals that are still pending and will decide those appeals in due course.

The board believes the procedure outlined above adequately addresses and rules on the substance of the pending motions, based upon its statutory authority and the relevant case law. See RSA 71-B:5, I; RSA 71-B:7; RSA 71-B:14; RSA 541-A:31, VI (h); Appeal of Sokolow, 137 N.H. 642, 643-44 (1993); and Appeal of Land Acquisition, 145 N.H. 492, 494 (2000). RSA 71-B:5, I authorizes the board to “institute its own investigation, or hold hearings, or take such other action as it shall deem necessary”; RSA 71-B:7 authorizes the board to take into consideration any information obtained through its own investigation and any “information obtained by persons employed under RSA 71-B:14”; and the latter statute provides for the employment of two staff review appraisers “who shall be competent to review the value of property for tax and eminent domain purposes.” For its part, RSA 541-A:31, VI(h), contained in the Administrative Procedure Act, defines the record in a contested case to include, not only the “[e]vidence received or considered,” but also “[s]taff memoranda or data submitted to the presiding officer.” In Sokolow, the supreme court cited the board’s statutory authority in tax abatement appeals “after inquiry and investigation . . . [to] make such orders thereon as justice requires” (see RSA 76:16-a and RSA 71-B:5, I) and, by implication, encouraged the board to utilize its staff review appraisers in an efficient and effective manner. In Land Acquisition, the supreme court further recognized the inherent authority of the board to manage and control its docket. With this brief overview, the board will make additional rulings based on the motions presented.

First, the board does not agree that any party should be allowed, as a matter of course, to undertake any additional “discovery” (such as a deposition) after receipt of the review appraiser’s report. The board will consider all the evidence presented by the parties and intends to give the review appraiser’s report in each appeal only the weight it deserves. In doing so, the board is following established practice. See, e.g., Rymes v. Town of Deering, BTLA Docket No. 21084-04PT (October 5, 2007).

It is, of course, the market value of each Wal-Mart (adjusted by the level of assessment in the municipality) that is the overriding issue in each appeal, see RSA 75:1, not the so-called “credibility” of the independent review appraiser submitting her report; in other words, the report will speak for itself and should not subject the staff review appraiser preparing it to deposition or other discovery.¹ Therefore, absent a showing of good cause (based on a renewed or further motion after the issuance of the report), the board will not allow any additional discovery or ‘reopen the evidentiary record’ for the purpose of allowing any party to question the review appraiser. This approach will apply to each of the appeals, including those already heard by the board, namely Conway and Plymouth. (See also Addendum, #s 11 and 12.)

Second, as to the issue of prehearing statements, the board notes they have already been filed by the parties to the Amherst and Epping appeals, making the Wal-Mart motions to extend the dates for submission of those statements (see Addendum, #s 9 and 10) moot. The board grants Wal-Mart’s requests in the Amherst and Epping appeals to use the additional comparables contained in the filed prehearing statements. (See Addendum, #s 7 and 8).

¹ In this regard, the board has considered Wal-Mart’s citation of a Public Utilities Commission (“PUC”) case, Public Service Company of New Hampshire Petitions for Valuation of Certain Hydro-Electric Facilities: Order Addressing Threshold Issues, 2001 N.H. PUC LEXIS 7 (N.H. PUC 2001), and finds it to be distinguishable and not controlling in any respect.

Since the hearing dates for the appeals noted above are to be rescheduled, the parties, in accordance with the board's rules and standard procedures, shall file their prehearing statements at least fourteen (14) days prior to each rescheduled hearing date. The motions in the Amherst, Epping, Lebanon and Concord appeals to have the review appraiser submit her report in advance of each hearing are therefore denied, making the further requests to "supplement" prehearing statements moot. In other words, the board envisions proceeding with these hearings and directing its review appraiser to submit a separate report after each hearing is held. (See Addendum, #s 1 through 6).

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order has this date been mailed, postage prepaid, to each of the parties in the Conway and Plymouth appeals, as follows: Margaret H. Nelson, Esq., Sulloway & Hollis, P.L.L.C., PO Box 1256, Concord, NH 03302, counsel for the Taxpayer; Chairman, Office of the Selectmen, Town of Conway, 1634 East Main Street, Center Conway, NH 03813; Peter J. Malia, Jr., Esq., Hastings Law Office PA, PO Box 290, Fryeburg, ME 04037, counsel for the Town of Conway; David C. Wiley, Cross Country Appraisal Group, LLC, 210 North State Street, Concord, NH 03301, Contracted Assessing Firm; and Chairman, Board of Selectmen, Town of Plymouth, 6 Post Office Square, Plymouth, NH 03264. In addition, a copy of the foregoing Order has been mailed, postage prepaid, to each of the parties in the other Wal-Mart appeals shown on the attached service list.

Dated: November 24, 2008

Anne M. Stelmach, Clerk

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SERVICE LIST FOR OTHER WAL-MART APPEALS

Wal-Mart/Trustee, Glass, David v. Town of Amherst

Docket Nos.: 21157-04PT; 22685-06PT

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Wal-Mart Real Estate Business Trust v. Town of Epping

Docket Nos.: 21161-04PT; 21669-05PT; 22697-06PT

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Wal-Mart Real Estate Business Trust v. Town of Conway, et al.

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Wal-Mart Stores, Inc. v. City of Lebanon

Docket Nos.: 21162-04PT; 21677-05PT; 22703-06PT

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Wal-Mart Real Estate Business Trust v. City of Lebanon

Docket No.: 22704-06PT

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Wal-Mart/Trustee, Glass, David v. City of Concord

Docket No.: 22691-06PT

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Wal-Mart Stores, Inc. v. City of Concord
Docket No.: 22693-06PT

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Wal-Mart Real Estate Business Trust v. Town of Rindge
Docket No.: 22873-06PT

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ADDENDUM

| <u>Location</u> | <u>Party/Docket #s</u> | <u>Pleading/Date Filed</u> | <u>Summary</u> |
|------------------------|--|--|---|
| 1 Amherst | Town of Amherst/ 21157-04; 21648-05; and 22685-06 | Town's "Motion Regarding Sequence of Events"/ October 31, 2008 | Modify Order to: require review appraiser to file report after prehearing statements are submitted but before hearing on the merits; (2) allow parties to supplement prehearing statements before hearing and examine review appraiser at hearing |
| 2 Amherst | Wal-Mart Real Estate Business Trust/ 21157-04; 21648-05; and 22685-06 | Taxpayer's Assented to Motion Regarding Sequence of Events/ November 4, 2008 | Agree with #1 and further proposing parties should have opportunity to conduct "appropriate discovery" after receipt of review appraiser's report |
| 3 Epping | Town of Epping/ 21161-04; 21669-05; and 22697-06 | Town's "Motion Regarding Sequence of Events"/ November 3, 2008 | (Same as #1) |
| 4 Epping | Wal-Mart Real Estate Business Trust/ 21161-04; 21669-05; and 22697-06 | Taxpayer's Assent to Municipaliy's Motion Regarding Sequence of Events/ November 4, 2008 | Agree with #3 and further proposing parties should have opportunity to conduct "appropriate discovery" after receipt of review appraiser's report |
| 5 Lebanon & Concord | Cities of Lebanon & Concord/21162-04; 21677-05; 22703-06; 22704-06; 22691-06; and 22693-06 | Cities' "Motion for Revised Review Appraiser Procedure"/ October 31, 2008 | Modify Order as follows: (1) establish new date for submission of prehearing statements by all parties; (2) require review appraisers to file report; (3) allow parties 14 days for parties to review report and (a) communicate regarding settlement; (b) either agree to allow report to "come into evidence at the hearing on the merits" or to request a "pre-hearing in which they can question the staff" |

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| 6 | Lebanon & Concord | Wal-Mart Stores & Wal-Mart Real Estate Business Trust/ 21162-04; 21677-05; 22703-06; 22704-06; 22691-06; and 22693-06 | Taxpayer's Assent to Municipalities' Motion for Revised Review Appraiser Procedure/November 10, 2008 | Modify procedural schedule and subject review appraiser to "discovery" before testimony at hearing |
| 7 | Amherst | Wal-Mart Real Estate Business Trust/ 21157-04; 21648-05; and 22685-06 | Taxpayer's Motion For Leave to Use More Than Twenty Comparables / November 5, 2008 | Permit use of 21 comparables contained in Taxpayer's appraisal -- assented to by Town (Granted in accompanying order) |
| 8 | Epping | Wal-Mart Real Estate Business Trust/ 21161-04; 21660-05; and 22697-06 | Taxpayer's Motion For Leave to Use More Than Twenty Comparables / November 5, 2008 | Permit use of 22 comparables contained in Taxpayer's appraisal – assented to by Town (Granted in accompanying order) |
| 9 | Amherst | Wal-Mart Real Estate Business Trust/ 21157-04; 21648-05; and 22685-06 | Taxpayer's Assented to Motion to Extend Date for Submission of Prehearing Statements to November 12, 2008/ November 4, 2008 | [Moot: prehearing statements have since been submitted] |
| 10 | Epping | Wal-Mart Real Estate Business Trust/ 21161-04; 21660-05; and 22697-06 | Taxpayer's Assented to Motion to Extend Date for Submission of Prehearing Statements to November 12, 2008/ November 4, 2008 | [Moot: prehearing statements have since been submitted] |

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| 11 | Conway | Wal-Mart Real Estate Business Trust/ 20892-04; 21655-05; and 22694-06 | Taxpayer's Motion to Reopen Evidentiary Hearing for the Limited Purpose OF Addressing the Issues Raised by the BTLA Order of October 9, 2008/ November 10, 2008 | Request to reopen record after review appraiser files her report [No assent indicated from Town] |
| 12 | Plymouth | Wal-Mart Real Estate Business Trust/ 21720-05 | Taxpayer's Motion to Reopen Evidentiary Hearing for the Limited Purpose OF Addressing the Issues Raised by the BTLA Order of October 9, 2008/ November 10, 2008 | Request to reopen record after review appraiser files her report [Assented to by Town of Plymouth] |