

**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**

ORDER ON JOINT MOTION FOR CLARIFICATION

On November 24, 2008, the board issued its Order on Pending Motions and Scheduling Order (hereinafter, the “Order on Pending Motions”), addressing certain concerns expressed by the parties in a number of previously filed motions (described in the Addendum thereto) and making certain necessary rulings. For the most part, the parties have not objected or sought modification or reconsideration of these rulings.

On December 18, 2008, however, the municipalities and the “Taxpayer” (a Wal-Mart entity) in most, but not all,¹ of these appeals filed the instant “Joint Motion for Clarification of Board’s Order of November 24, 2008” (the “Joint Motion”). As stated in the Joint Motion (see p. 2), “[t]he movants seek clarification of the precise role of the review appraiser” in these appeals. This Order addresses the question presented in the Joint Motion: namely, “whether the review appraiser will be limited solely to the evidence submitted by the parties at each hearing to develop a staff report, or whether the [b]oard intends for the review appraiser to conduct her own investigation and obtain information after the hearing but prior to formulating the staff report.” (Id.) While the phrasing of this question expresses a legitimate concern, the board finds no “prejudice” need result and no “due process” rights will be violated if the review appraiser, using her independent judgment and preparing her report after the hearing, determines there is additional relevant, reliable and verifiable information concerning the valuation issue that the parties, in their respective appraisals, either omitted or failed to give adequate emphasis.

The review appraiser, as a matter of course in preparing a self-contained appraisal, will clearly identify any such information, including its source(s), and may choose to append it to her report, as she has consistently done in other work undertaken for the board. To restrict the review appraiser only to what evidence may be presented at the hearing in each appeal would unduly tie her hands and might prevent her from fulfilling her responsibilities under “USPAP” (the Uniform Standards of Professional Appraisal Practice, published by the Appraisal Standards Board of The Appraisal Foundation), which would be clear and obvious disadvantages.

¹ Not included in the Joint Motion are the parties to the Conway, Plymouth and Rindge appeals (identified in the caption to the Order on Pending Motions). Courtesy copies of the instant Order are being sent to the parties in those appeals (as addressed in the Certification set forth below).

A very important safeguard to the “prejudice” and “due process” concerns mentioned in the Joint Motion is that each party will receive a copy of the review appraiser’s report and will have a reasonable period of time (20 days) to file any written comments with the board.

(Cf. Order on Pending Motions, p. 2, subparagraph 3.) Such comments could pertain to the assumptions and conclusions stated in the report or the information utilized in supporting them.

To the extent any party believes written comments are insufficient at that point, such party can make a timely motion to reopen the record and that motion will be granted upon a showing of good cause. (Id., p. 3, subparagraph 4, and p. 4.)

The board’s rulings in prior appeals provide clear precedent and illustrate well how this process can work; these prior rulings also demonstrate the board’s willingness to grant such a motion if good cause exists. In Rockywood-Deephaven Camps v. Town of Holderness, BTLA Docket Nos. 20317-03PT, 21102-04PT and 22042-05PT (November 6, 2008 Order), for example, the board granted the taxpayer’s request to reopen the record to permit questions of the review appraiser’s work (where she prepared and submitted her report after the hearing was held) and to present rebuttal evidence to the report.

Clearly, each party (and in particular, the taxpayer having the burden of proof) has the primary and fundamental responsibility of presenting evidence to enable the board to rule on whether the assessment is disproportional and whether the remedy of abatement is warranted under RSA 76:16-a. It is the board’s understanding that each party is already prepared to present either its own appraisal or other market evidence on this central and overriding issue.

Participation of the review appraiser in the manner envisioned by the board is not intended to supplant or change this responsibility at all. Her independent work and report, when directed by

the board, should not therefore be the focus of the hearing (as it might well be if the report were to be prepared and issued in advance of the hearing).

It is also quite possible, of course, the board may find, upon consideration of the evidence submitted at the hearing of each appeal, that preparation of an independent review appraiser's report is not necessary for that appeal, either because the parties have resolved some or all of their differences and disputes or the board is otherwise able to issue a decision based on the then existing record. Requiring the review appraiser to submit her report in advance of each hearing might therefore be wasteful of limited resources.

As stated in the prior order (the Order on Pending Motions at p. 4):

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.

The board will deliberate independently on the evidence presented and, as the fact finder, will reach its own value conclusions that may or may not be in agreement with those of the review appraiser or any other expert, for that matter. The board's record in following this procedure and making its own independent findings is well documented and established. See, e.g., Rymes v. Town of Deering, cited above (where the board considered the taxpayer's appraisal and disagreed with several of the review appraiser's specific conclusions regarding elements of value); and Vaillancourt v. Town of Greenville, BTLA Docket No. 21118-04PT (June 7, 2007) (where the board disagreed with the value conclusion contained in the review appraiser's report and found, "[o]n balance" and considered in light of the "entire evidence" presented, the report

“underestimates the Property’s overall value”); cf. Mostafa H. El-Sherif Rev. Trust v. City of Laconia, BTLA Docket No. 20357-03PT (March 3, 2006) (review appraiser’s estimate of value within \$2,000 of the value estimated by the taxpayer’s own appraiser -- \$325,000 versus \$323,000).

The board is unpersuaded by the limited legal reasoning presented in the Joint Motion. In particular, nothing in RSA 71-B:7 precludes the board, either expressly or by implication, from following this envisioned procedure, which is also consistent with RSA 541-A:31, VI (h)² and the board’s broad investigative authority under RSA 71-B:5 (quoted on page 3 of the Order on Pending Motions). See also RSA 76:16-a, III, which specifically provides that “[a]ny investigative report filed by the staff of the board . . . shall be made a part of [the] record,” but does not require such report to be filed either before or at the hearing.

In addition, the board does not agree with the Joint Motion’s attempt (at p. 3) to minimize the applicability of the Appeal of Sokolow decision, 137 N.H. 642 (1993), to the procedural issue at hand. Sokolow recognizes there may be instances, such as the present appeals, where the board can and should involve its review appraisers, provided in RSA 71-B:14, after a hearing has been held in order to undertake “its own investigation” (citing RSA 71-B:5, I) and arrive at a ruling regarding whether an assessment is disproportional. Id. at 643. Sokolow is settled law, has guided the board in many appeals over the past 15 years, and is not “questionable” as precedent simply because it has not been subsequently cited (in any manner) by the supreme court.

² Incorrectly referenced in the Joint Motion at page 3, paragraph 5, as paragraph “V.” This statute, part of the Administrative Procedures Act, provides that the record in a contested case includes (along with the pleadings, any prehearing order, the “[e]vidence received or considered” (presumably at the hearing) and a “statement of matters officially noticed”) any “[s]taff memoranda or data submitted to the presiding officer . . .” See subparagraph VI (h) of this statute. The sequence of items constituting the “official record” listed in this statute suggests that staff memoranda need not be submitted either before or during the course of the hearing, but can be submitted afterwards. The Joint Motion presents no case or other authority to support a contrary conclusion.

In Vaillancourt, cited above, the board reviewed the applicable statutes and case law before reaching the following conclusions:

The board finds the use of its review appraiser to perform a summary appraisal report is well within the board's authority to make "its own investigation" and/or to "take such other action as it shall deem necessary" in order to reach a proper decision. Such steps are not precluded simply because a hearing has been held. In fact, in Appeal of Sokolow, 137 N.H. 642, 644 (1993), the supreme court noted the existence of these statutes and indicated the board had an obligation to utilize the expertise of its review appraisers when the "'lack of information' on valuation precluded their ability to grant the taxpayers' requested abatements." In Sokolow, as in this case, any appraiser's report then becomes evidence and part of the record. Cf. RSA 71-B:7 and RSA 76:16-a, III.

When read in concert, these statutes and case law negate the conclusion the record must be limited solely to evidence presented by the parties at the hearing. If the board determines it is warranted, it can undertake its own investigation, take a view of the property and/or, under RSA 71-B:14, utilize a review appraiser to inspect and value the property for tax purposes. The board also has the option, and at times has done so, of involving its review appraiser before the close of the hearing. However, this practice does not foreclose it from involving the review appraiser after a hearing providing the parties are apprised of the process and given an opportunity to respond to the review appraiser's report. Sokolow at 643.

In summary, this Order has clarified the procedure the board intends to follow and the "role" it envisions for the review appraiser's report, if one proves to be necessary and is prepared and submitted following the hearing of each appeal. The board is mindful of, and has weighed, the competing concerns and has, in its judgment, already established adequate and sufficient safeguards to address and resolve those concerns. Consequently, the board disagrees with the premise of the Joint Motion that an alternative procedure is warranted, especially in light of the totality of facts and circumstances and the board's authority to decide these appeals.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Michele E. LeBrun, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order on Joint Motion for Clarification has this date been mailed, postage prepaid, to each of the parties in the respective "Wal-Mart" appeals shown on the attached service list, who are all listed parties to the Joint Motion. In addition, a courtesy copy has been sent on this date in the same manner to the parties in the Conway, Plymouth and Rindge Wal-Mart appeals (identified in the Order on Pending Motions), addressed as follows: 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; Chairman, Board of Selectmen, Town of Plymouth, 6 Post Office Square, Plymouth, NH 03264; and Chairman, Board of Selectmen, Town of Rindge, PO Box 163, Rindge, NH 03461.

Dated: January 13, 2009

Anne M. Stelmach, Clerk

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SERVICE LIST FOR WAL-MART APPEALS THAT ARE PARTIES TO THE JOINT MOTION:

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

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

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Docket No.: 22691-06PT

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