

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

Re: The Home Depot USA, Inc.,  
Ann Juster and  
Homer and Ruth Sweet

Land Use Permit  
#1R0048-12-EB

**MEMORANDUM OF DECISION**

This proceeding concerns an application to demolish 182,812 square feet of existing retail space, to construct a 133,298 square foot Home Depot retail store and garden center to replace the old Montgomery Wards and Ames stores, and future construction of two additional retail buildings - a 13,120 square foot building attached to the old **Osc**o Drug and a **35,500** square foot stand-alone building, along with associated parking, lighting, landscaping, a storm water discharge system and related improvements at the previously permitted and constructed Juster Mall. The development **also** involves renovation of the remaining Juster Mall building facade as depicted on the elevations ("Project"). The Project is located on Woodstock Avenue/US Route 4 in the Town of Rutland, Vermont.

This Memorandum of Decision concerns party status and other preliminary issues.

**I. PROCEDURAL SUMMARY**

On June 21, 2000, the District #1 Environmental Commission ("District Commission") issued Land Use Permit #1R0048-12 ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to The Home Depot USA, Inc., Ann Juster, and Homer and Ruth Sweet ("Permittees") for the Project.

On July 28, 2000, the Commission issued a Memorandum of Decision on Motions to Alter ("**MODMTA**") filed by **Rutland** Region First, Inc. ("**RRFI**") and Friends of Vermont's Way of Life, Inc. ("**Friends**").

On August 25, 2000, RRFI, filed an appeal with the Vermont Environmental Board ("Board") from the **Permit**, Decision, and MODMTA alleging that the Commission erred in its **conclusions** concerning 10 V.S.A. § 6086(a) (1)(G), (5), (6), (7), (8), (8)(A), (9)(A), (9)(K) ("**Criteria 1(G), 5, 6, 7, 8, 8(A), 9(A), and 9(K)**") and denial of party **status** under Environmental Board Rule ("**EBR**") 14(B)(1) for the above Criteria.

11/30/2000

Docket #766M1

On August 28, 2000, Friends filed an appeal from the Permit, Decision, and MODMTA alleging that the Commission erred in its conclusions concerning Criteria t(B), l(E), l(G), 4, 5, 7, 8, 8(A), 9(A), and 9(H) and denial of party status under EBR 14(B)(l) for the above Criteria.

On September 7, 2000, the Permittees filed a cross-appeal with respect to granting of party status to RRFI, Ann Vargas, Lynne Anderson, Friends, Vermont Natural Resources Council, Inc., and Heritage Hill Condominium Association. Permittees also appealed certain permit conditions imposed by the Commission pursuant to 10 V.S.A. § 6089(a) (5), (8), and (9)(K).

On September 8, 2000, M.T. Associates, Midway Oil Corporation, T.M. Services, and Donuts of Rutland, Inc. ("M.T. et al.") filed an appeal with the Board contending that the District Commission erred by denying M.T. et al. party status and finding that the Project complies with Criteria 5 and 8.

On October 2000, Board Chair Marcy Harding convened a prehearing conference and on October 6, 2000 she issued a Prehearing Conference Report and Order.

On November 15, 2000, the Board deliberated on the party status and other preliminary issues raised during the Prehearing Conference and briefed by the parties.

## II. PRELIMINARY MATTERS

### A. Party Status

Act 250 confers party status to participate in an appeal upon adjoining property owners, as a matter of right, *provided that* the adjoiner demonstrates that the proposed project "may have a direct effect on the adjoiner's property" under one or more of the ten criteria set forth at 10 V.S.A. § 6086(a). 10 V.S.A. § 6085(c); EBR 14(A). See also *Re: Gary Savoie d/b/a/ WLPL and Eleanor Bemis, #2W0991-EB*, Findings of Fact, Conclusions of Law, and Order at 6 (Oct. 11, 1995). In addition, the District Commissions and Board have the discretion to grant party status to any individual or entity that demonstrates that its interests may be affected by a project under one or more of the ten Act 250 criteria or that it can materially assist the Commission or Board as to any of those criteria. EBR 14(B)(1) and 14(B)(2), respectively. *Gary Savoie, supra* at 6-7.

- 1) Friends:

Friends requests party status on Criteria 1 (B), 1 (E), 1 (G), 4, 5, 7, 8, **8(A)**, 9(A), 9(H), and 9(K). Friends argues that the District Commission erred in denying it party status pursuant to EBR 14(B)(I) as to Criteria I(B), I(E), I(G), 4, 5, 7, 8, 8(A), 9(A), and 9(H). The District Commission granted Friends **party** status on the above Criteria pursuant to EBR 14 (B) (2).

Permittees object to Friends' request for party status as to these Criteria pursuant to EBR 14(B)(I) and cross-appeal the District Commission's decision granting them party status pursuant to EBR 14(B)(2) for Criteria 1 (B), 1 (E), 1 (G), 4, 5, 7, 8, 8(A), 9(A), 9(H), and 9(K). Friends makes a related argument that will be addressed later in this section that since the District Commission did not make a final party status determination on Criterion 9(K), the case must be remanded back to the District Commission.

Friends is a non-profit public benefit corporation comprised of approximately 35 individuals and businesses including Vermont Natural Resource Council ("VNRC"). Its members are based near Rutland and some, who own property in close proximity to the Project, claim they can see the Project from their property, or adjoin the wetlands impacted by the Project. Some of **VNRC's** members live in **Rutland**. Friends was organized to support sustainable growth which does not threaten the environment.

Permittees point out that Friends' corporation was formed solely to oppose the Project. Permittees also argue that Friends should not be granted party status pursuant to EBR 14(B)(I) on any Criteria because its interests are not different than those of the general public. According to Permittees, the few members whose identities Friends disclosed, live between 1/2 mile to 1 1/2 miles away from the Project, which Permittees argue is too far away for these members to have a particular interest distinguishable from the general public. The Town of **Rutland**, which is a statutory party, concurs with Permittees' arguments against granting Friends party status and adds that Friends provided insufficient detail in its petition concerning the effect on Friends' interest.

Permittees and the Town of **Rutland** also argue that Friends made an insufficient demonstration how it would materially assist the Board, and therefore, should not qualify for EBR 14 (B)(2) party status. Relying on Rule 26 (b)(4) of the Vermont Rules of Civil Procedure for support, the **Town of Rutland argues that those seeking EBR 14 (B)(2)** party status need to provide the substance of their proposed testimony and the conclusions. However, that Rule applies to discovery regarding expert witnesses in civil litigation. Since all **testimony including expert testimony is pre-filed before the Board conducts a hearing**, that Rule is inapplicable in this matter.

The Town of **Rutland** also questions why should an EBR 14 (B)(2) party which was “admitted solely to assist the District Commission on Criteria which were before the District Commission be allowed to appeal to the Environmental Board.” The EBRs do not distinguish appellate rights between EBR 14(B)(1) and (2) parties, thus the Town of Rutland’s argument is without merit. In addition, as long as Friends requested party status before the District Commission on EBR 14(B)(1), Friends could appeal the denial of party status and the Criteria in question to the Board.

Criteria 1(B), 1(E), 7(G), 4, 8(A)

In support of its petition for party status, Friends states that some of its members’ properties adjoin the impacted wetland along Tenney Brook and/or Dunklee Pond. Friends adds that other members use those areas for recreational purposes.

Friends asserts that the portion of the 155 acre wetlands complex near the Project is seriously degraded. It claims that discharges from the Project could adversely affect its members’ properties, that the Permittees’ **failure** to account for peak discharges could result in flooding, that snow melt could go directly into the storm water pond, and that the contaminants in snow could interfere with the operation of the storm water detention basins. As a result, Friends asserts that the stream and wetlands would be further degraded and the stream bed would become filled with sediment which will impact insect and marine **life**.

Criterion 1 (B) concerns a wide range of wastes that could affect water quality from sewage to storm water run-off. Friends has demonstrated that its interest concerning storm water run-off may be affected and as a result the Board grants Friends EBR 14(B)(1) party status under Criterion **1(B)**.

Friends also plans to call an expert witness to testify on storm water run-off issues. The Town of **Rutland** argues that Friends has merely provided extensive allegations of counsel and has not demonstrated how **it** would materially assist the Board. Since this Criterion requires technical information concerning storm water run-off and other water quality issues, the Board determines that Friends’ expert may materially assist the Board. Accordingly, the Board grants Friends EBR 14(B)(2) party status under Criterion 1(B).

A similar analysis applies to Criterion 1(E) which concerns streams. Friends’ members live near Tenney Brook and its members use it for recreation. Friends also plans to call an expert witness on the Project’s impacts on streams. Friends has demonstrated that the Project may impact its interest under this

Criterion and that it may also materially assist the Board. Therefore, the Board grants Friends both EBR 14(B)(1) and (2) party status under Criterion 1 (E).

Friends also has an interest concerning Criterion I(G) because the Project calls for filling in .38 acres of wetland. The Project could impact nearby members of Friends whose properties adjoin the wetland. Friends also plans to call an expert witness on wetlands. As a result, the Board grants Friends both EBR 14(B)(1) and (2) party status under Criterion I(G).

Criterion 4 addresses whether the Project would cause unreasonable soil erosion or reduce the capacity of the land to hold water. Friends argues that the Project will cause soil erosion, and it plans on presenting an expert witness on soil erosion. For reasons similar to those discussed in connection with the above Criteria, the Board grants Friends EBR 14 (B)(1) and 14 (B)(2) party status under Criterion 4.

Under Criterion 8(A), Friends asserts that the Project will imperil necessary wildlife habitat for otter, brook trout, minnows, mayfly, and caddis fly Jarvae. Since Friends' members use and enjoy the resources where the habitat is located, Friends argues that it qualifies for EBR 14(B)(1) party status. Under Criterion 8(A) a project need only imperil a particular population of the species, not the entire species. In Re *Southview Associates* 153 Vt. 171, 176 (1989). Friends would present an expert witness who would testify on technical issues concerning impacts to habitats. The Town of Rutland argues that Friends provided allegations of counsel and did not demonstrate how it would materially assist the Board. The Board determines that an interest of Friends may be affected and that it may materially assist the Board. Therefore, the Board grants Friends EBR 14 (B)(1) and 14(B)(2) party status under Criterion 8(A).

#### Criteria 7, 9(A), and 9(H)

For the fiscal criteria, 7, 9(A), and 9(H), Friends argues that the Permittees underestimated the impact the Project will have on the Rutland region and that the proposed mitigation payments to the local governments are insufficient to compensate for the detrimental impacts. Friends argues that the Project will decrease the tax revenue because the value of commercial buildings will decline. Friends claims that its members have an interest in preserving the tax revenue and the current level of city services. It alleges that the city is already at its fiscal limits and must either cut back services or raise taxes.

Friends' members are similarly situated to the opponents in the *St. Albans Wal-Mart* case who opposed a project on fiscal grounds and were

granted party status on those Criteria because of the development's potential impacts on the local tax base. *St. Albans Group and Wal\*Mart Stores, Inc. #6F0471-EB*, Findings of Fact, Conclusions of Law, and Order (Altered) (June 27, 1995) affirmed *In re Wal\*Mart Stores, Inc.* 167 Vt. 75 (1977).

In *Brewster River Land Co. LLC., #5L1348-EB*, Memorandum of Decision (September 18, 2000), the Board denied party status on the fiscal Criteria to a group of neighbors opposing a development because the opponents only argued that the development would allegedly increase the need for municipal services and ultimately their taxes. The Board held that the fiscal Criteria protect the municipality's ability to provide services, not the taxpayer. In the instant case, Friends requests party status based on the alleged decrease to the tax base and the financial burden the Project would impose on the municipality's ability to provide the same level of services. Thus, Friends is not seeking party status as a group of taxpayers concerned about increases as in *Brewster River*, but as a local organization of members of the community concerned about the municipality's ability to provide services, as in *St. Albans Wal\*Mart*.

#### *Criterion 7*

Under Criterion 7, Friends argues that the Project will place an unreasonable burden on the ability of the local government to provide governmental services. Friends argues that the mitigation payments will not compensate for the decrease in the tax base. Permittees argue that Friends' interest is similar to that of the general public. Friends is similarly situated to the opponents in *St Albans Wal\*Mart* and has an interest that is affected under this Criterion. Therefore, the Board grants Friends EBR 14(B)(1) party status.

Friends would also present an expert witness on the fiscal Criteria. Permittees and the Town of **Rutland** argue that Friends did not provide sufficient detail on the expert's testimony or qualifications. Permittees add that the Board has gained sufficient experience on the fiscal Criteria and that Friends' testimony would not materially assist the Board. Given the highly contentious and complicated nature of this **issue, notwithstanding Permittees' confidence in the Board's experience**, Friends' expert's testimony could materially assist the Board. Therefore, the Board grants Friends EBR 14(B)(2) party status.

#### *Criterion 9(A)*

Under Criterion 9(A), the issue is whether the Project would result in growth that would place demands on the region greater than it could absorb. Once again, Friends argues that the Project will have a negative impact on the

existing businesses in town which will have a negative impact on the tax base. Friends focuses on the fact that the Project will result in increased costs for governmental services rather than the rate of growth the Project will bring. Permittees and the Town of Rutland repeat their arguments from Criterion 7 against granting party status. Friends has an interest under this Criterion that may be affected and its expert could materially assist the Board. Therefore, the Board grants Friends party status under both EBR 14 (B)(I) and (2) for Criterion 9(A).

*Criterion 9(H)*

Under Criterion 9(H), projects that do not border existing settlements must demonstrate that the additional costs of public services for the project do not outweigh the public benefits. Friends asserts that the Project should be treated as a new application pursuant to EBR 34 and that it does not border an existing settlement. **Permittees'** reply brief concedes that the Project should be treated as a new application.

Friends has an interest concerning the public costs and benefits that will result from the Project. In addition, it would present expert testimony from a fiscal expert. Permittees and the Town of Rutland repeat their arguments against granting Friends party status on the fiscal Criteria. The Board determines that Friends has a sufficient interest and may materially assist the Board. Therefore, the Board grants Friends both EBR 14 (B)(I) and (2) party status under Criterion 9(H)\*

Criterion 8

Under Criterion 8, Friends requests party status based on the claim that the Project would result in increased emissions and noise from car and truck traffic, street sweepers and snow removers which would adversely affect the members who live nearby. Friends also claims the lights from the Project would damage the aesthetics of the area. Friends' members would present testimony on these assertions.

Permittees assert that Friends' members do not live in the immediate vicinity of the Project. The Board concludes, however, Friends' members live in the general area of the Project and may be affected by some of its impacts such as light and noise. Therefore, the Board grants Friends EBR 14(B)(I) party status under Criterion 8.

Friends only offered its members' testimony for EBR 14 (B)(2) party

status. Permittees and the Town of **Rutland** questioned how the members of Friends could materially assist the Board. The Board agrees and concludes that Friends would not materially assist the Board and therefore denies EBR 14 (B)(2) party status under Criterion 8.

Criterion 5 and 9(K)

Under Criteria 5 and 9(K), Friends asserts that its members will be affected by the traffic generated from the Project. Friends also argues that the Permittees did not consider traffic from the extensive proposed market area when they evaluated traffic. During the Prehearing Conference, Friends stated that it intended to call a traffic expert as a witness, although its party status petition did not state that Friends intended to call an expert witness. Permittees and the Town of **Rutland** argue that Friends has not made a case for EBR 14 (B)(2) party status for Criteria 5 and 9(K) because Friends did not identify the witness. Friends' party status petition pointed out alleged errors in Permittees' traffic study and recounted its cross-examination of Permittees' expert before the District Commission. Friends' members live close enough to the Project to be affected by the traffic. Therefore, the Board grants Friends EBR 14 (B)(I) party status for Criteria 5 and 9(K). Friends' expert witness and cross-examination could materially assist the Board and therefore, the Board grants Friends EBR 14 (B)(2) party status for Criteria 5 and 9(K).

2) RRFI

RRFI requests party status for Criteria I(G), 5, 6, 7, 8, 8(A), 9(A), and 9(K) pursuant to EBR 14 (B)(I) and 14(B)(2). RRFI argues that the District Commission erred in denying them party status pursuant to EBR 14(B)(I) as to Criteria I(G), 5, 6, 7, 8, 8(A), 9(A) and 9(K). Permittees object to RRFI's request for Party Status as to these Criteria pursuant to EBR 14(B)(I) and cross-appeal the District Commission's decision granting it party status pursuant to EBR 14(B)(2) for Criteria I(G), 5, 8, 8(A), 9(A), and 9(K).

RRFI is a non-profit organization organized to support economic development and growth that is sustainable without threatening the viability of local businesses.

Permittees and Town of **Rutland** argue that RRFI did not reveal its membership. Permittees state that based on information gathered from the Secretary of State's office, RRFI is comprised of local business competitors of Home Depot. Permittees continue that RRFI is seeking to protect purely economic interests which are not cognizable under Act 250. Permittees and

Town of Rutland also argue that whatever interests RRFI has are not distinguishable from those of the general public.

Pursuant to EBR 14(B)(3)(b), a petition for party status “must, in the case of a petition by an organization, describe the organization, its membership and its purposes.” While RRFI described the purpose of its organization, it did not provide any information on its membership. The Board does not require disclosure of the names of members of an organization petitioning for party status but it does require a description of the organization’s membership, as stated in the rule. The Board denies RRFI party status because its petition was deficient.

3) M.T. et. al.

M.T. et al. requested party status on Criteria 5, 8, and 9(K). M.T. et al. own property adjacent to the storm water detention pond which is part of the Project. M.T. et al. oppose the proposed vegetative wall which they claim is largely perpendicular to Route 4 and obscures their view of Route 4. They also claim that the vegetative wall may raise safety issues for traffic entering or exiting their property.

Permittees point out that M.T. et al. requested party status on the 4th day of hearings before the District Commission and their request was denied as untimely. Permittees argue as a result that the Board should deny their party status request. However, while M.T. et. al. could not independently appeal a Criterion to the Board if they did not make a timely party status request to the District Commission, M.T. et. al. can request party status on any Criterion properly before the Board pursuant to another party’s appeal. Friends has appealed and been granted party status on the Criterion that M.T. et. al. is seeking party status on. M.T. et. al.’s petition for party status demonstrated that the Project may have a direct effect on their property by raising important safety issues for traffic entering or exiting their property. Accordingly, the Board will grant them party status for Criteria 5, 8, and 9(K) pursuant to EBR 14 (A)(5).

**C. Other Preliminary Issues’**

Friends has raised the following preliminary issues. Friends argues that the first three issues require the Board to remand the case back to the District Commission.

1. *Whether, pursuant to 10 V.S.A. §6085(c)(2) and EBR 14 (F)(3), the District Commission failed to make a final ruling under Friends’ party status under*

*Criterion 9(K) such that this appeal must be remanded back to the District Commission.*

Friends was initially granted party status on Criterion 9(K) pursuant to EBR 14 (B)(l) and (2) and participated before the District Commission on that Criterion. In its decision, the District Commission issued a final ruling on party status for every other Criterion at issue for Friends but left out Criterion 9(K). Friends argues that once a party is granted preliminary party status, pursuant to 10 V.S.A. 6085(c)(2) and EBR 14 (F)(3), the District Commission is obligated to re-examine party status issues and state its determinations in the final decision.

Permittees point out that since they cross-appealed the District Commission's decision granting party status to Friends on Criterion 9(K), Friends must re-prove its party status on Criterion 9(K) regardless of the District Commission's decision. Thus, Permittees and the Town of Rutland argue that it is a harmless error and that remanding the case would be a futile waste of time. The Board agrees with Permittees and the Town of Rutland; the District Commission's omission in the final decision will be cured by the Board's *de novo* review and determination.

2. *Whether, pursuant to the Board's Stowe Club Highlands test, this appeal must be remanded because the District Commission never required Permittees to state, for the record, which permit conditions from the prior #1R0048 Land Use Permits they seek to void.*

Friends argues that enumerating which permit conditions an applicant seeks to modify is fundamental to the Stowe *Club Highlands* analysis. Friends requests that the Board rule that the Stowe *Club Highlands* analysis applies, require the Permittees to identify the permit conditions they seek to void, and remand the case. ANR concurs with Friends concerning the need for *Stowe Club Highlands* analysis.

Permittees argue that there are no permit conditions from the prior 11 **permits that they seek to modify** or void. Permittees claim to be **renovating** an existing impervious area. Permittees state that they have already stipulated to permit conditions that are more restrictive than those currently in force.

In *In re Stowe Club Highlands*, 166 Vt. 33 (1996), the Supreme Court affirmed the Board's denial of a permit amendment **application** for a project to develop a lot previously set aside as undeveloped land by permit conditions under Criteria 8 and 9(B). The Court stated:

The Board framed its discussion as weighing the competing values of flexibility and finality in the permitting process. If existing permit conditions are no longer the most useful or cost-effective way to lessen the impact of development, the permitting process should be flexible enough to respond to the changed conditions. The Board recognized three kinds of changes that would justify altering a permit condition:

(a) changes in factual or regulatory circumstances beyond the control of a permittee; (b) changes in the construction or operation of the permittee's project, not reasonably foreseeable at the time the permit was issued; or (c) changes in technology.

*Id.* at 38.

Therefore, under *Stowe Club Highlands*, before the Board can amend a permit, it must first make the threshold determination based on the facts of the case that the competing value of flexibility outweighs finality. Friends and ANR argue that in order to perform that analysis, Permittees must state for the record which permit conditions they are seeking to void. Friends and ANR's request is reasonable when *Stowe Club Highlands* is applicable. However, the Board has determined that the *Stowe Club Highlands* analysis does not apply because the Permittees are not seeking to void any permit condition.

In *Bull's Eye Sporting Center and David and Nancy Brooks and Wendell and Janice Brooks #5W0743-2-EB* (Revocation) Findings of Fact, Conclusions of Law, and Order (June 23, 2000), the Board recently clarified under what circumstances the *Stowe Club Highlands* analysis is applicable and stated that:

the basic tenet of the *Stowe Club Highlands* doctrine is that a permittee should not obtain a permit based on one set of representations and restrictions, and then later, except under limited circumstances, seek an amendment which relieves it of those restrictions and therefore grants it greater benefits or advantages than those initially obtained. E.g. *Stowe Club Highlands* (amendment not allowed where, to obtain permit, permittee agreed to condition requiring an open lot and later sought amendment in order to develop that lot); citing Re: *Nehemiah Associates, Inc.*, #1R0672-1-EB, Findings of Fact, Conclusions of Law, and Order (April 11, 1997), *aff'd* 168 Vt. 288 (1998); Re: *Bernard and Suzanne Carrier*, Land Use Permit Application #7R0639-1-EB, Findings of Fact, Conclusions of Law and Order (Aug. 19, 1999) (same); Re:

Donald and Diane Weston, #4C0635-4-EB, Findings of Fact, Conclusions of Law, and Order (March 2, 2000) (same);

. . .The instant case, however, does not involve an instance where a permittee, having obtained a permit with conditions based on one set of representations, now seeks to amend its permit to relieve it of previously imposed obligations or restrictions, and thereby realize a gain at the expense of the reliance by the Board, the Commission, or its neighbors.

Id. at 20-22.

The teachings of *Bull's Eye* are relevant here because the Permittees are not seeking to amend the permit to relieve them of any permit conditions in order to realize a gain. Here, the Permittees have represented that there are no permit conditions that they are seeking to modify and they claim to have stipulated to more restrictive permit conditions. While the Board suspects that Permittees may be overlooking the fact that Findings of Fact and representations made in Permit Applications and Exhibits generally become permit conditions, the Board will accept Permittees' representations and hold Permittees to their word. Since all prior permit conditions will be in effect and perhaps supplanted by more restrictive conditions, the rationale behind the *Stowe Club Highlands* analysis is inapplicable and there is no reason to apply the test. Since the District Commission heard this matter as a new application, there is no need to remand the case back to the District Commission.

3. *Whether, pursuant to EBR 34(B), the District Commission applied an erroneous standard with respect to its findings of fact and conclusions of law under 10 V. S. A. §6086(a) (9) (H) such that a remand of this appeal is required.*

Friends argues that the District Commission was in error when it held that the Project meets Criterion 9(H) because the "scattered development horse left the barn" in the 1970's when the mall was first approved. Friends proceeds to argue that the application must be treated as a new application and that the existing strip development does not meet the existing settlement test of Criterion 9(H). Friends requests that the Board remand the case back to the District Commission because the District Commission applied an erroneous legal standard.

**ANR** agrees with Friends' analysis but states that since the Board will hear the case *de novo*, there is no need to remand the case. Permittees respond that the application of a wrong legal standard is grounds for appeal not remand. Permittees add that the Board has not remanded cases due to mere legal error.

ANR and Permittees are correct that the Board's *de novo* proceeding will cure Friends' concerns about alleged legal errors by the District Commission. At the Board's *de novo* hearing Friends will have an opportunity to present testimony on whether the Project is physically contiguous to an existing settlement and argument on what the correct legal standard should be.

4. *Whether, pursuant to 10 V.S.A. §6086(a)(1)(B) and (G), and Re: Unifirst Corporation and Williamstown School District, #5R0072-2-EB, Findings of Fact, Conclusions of Law, and Order (June 7, 2000), the Board should defer deciding this appeal until there is a final ruling in the matter In Re: Appeal of Home Depot, WQ-00-06 (June 15, 2000), and In Re: Appeal of Home Depot, Inc., CUD-07 (June 15, 2000).*

Friends argues that consistent with *Unifirst*, the hearing should be continued until there is a binding and final resolution of Permittees' conditional use determination for wetlands and the discharge permit for storm water. Both of these approvals are currently on appeal before the Water Resources Board. These approvals could create presumptions with regard to Criteria 1 (B) and (G).

ANR argues that the Board's hearing should not take place until after the Water Resources Board has made its determinations on the appeals. However, ANR suggests that the Board not wait until all appeals are exhausted up to the Vermont Supreme Court since that would cause unnecessary delay and not further the goals of deference to the Water Resources Board's expertise and avoidance of inconsistent decisions between the boards. ANR suggests that should Permittees choose to go forward with construction if the Board issues a Land Use Permit Amendment, it would be at their own risk if the ANR approvals are overturned in a subsequent appeal. ANR also suggests that a condition for any Land Use Permit Amendment issued should require the Permittees to return to the District Commission in the event that a court invalidates an ANR approval.

Permittees attempt to distinguish *Unifirst* which involved a groundwater collection and filtration system because the ANR pen-nits in *Unifirst* pertained directly to the issues before the two boards. Permittees argue that the conditional use determination for wetlands and the stormwater discharge permit are for a minor aspect of the Project. Permittees also point out that the Water Resources Board has scheduled a hearing for November 21, 2000, so the issues will likely be resolved before the Board's hearing.

The Board will proceed with the scheduled hearing but will await the decision of the Water Resources Board before issuing a decision.

5. *Whether, pursuant to EBR 34(B), the Board's scope of review of the Project is limited to the difference in impacts between that which has been authorized in the prior #1 R0048 land use permits versus the Project or, rather, the Project's full and total impacts.*

Friends argues that the Board must review the full and total impacts of the Project, not the difference between the Project and what was previously authorized by prior permits. Friends claims that the Permittees argued before the District Commission that the scope of review over the Project should take the prior permits into consideration.

In *Town of Stowe, #1000035-9-EB*, Findings of Fact, Conclusions of Law, and Order (May 22, 1998), the Board refused to make a substantive ruling on the scope of relevant evidence prior to the convening of an evidentiary hearing. Likewise, the Board declines to rule on the scope of the evidence at this point. Moreover, this preliminary issue is not ripe, since the Board will hold a *de novo* hearing, and no parties have yet to offer any evidence or arguments.

6. *Whether the Permittees may withhold from the other parties information relied upon by their fiscal impact expert under the claim that it constitutes a trade secret.*

**Friends argues that** the Permittees' expert utilized confidential information before the District Commission concerning 17 small market Home Depot stores in its fiscal impact statement, which was disclosed to ANR but not to the opponents to the Project. The confidential information concerned the population density of the area, the size of the stores, distance to major arteries, median household income, rate of growth, and number of households in **the area**. **Friends cites** *Sherman Hollow, Inc. #4C0422-5R-1-EB*, Findings of Fact, Conclusions of Law, and Order (November 19, 1991), *affirmed*, 160 Vt. 627 (1993), where the Board denied a permit based on the applicant's refusal to reveal confidential information concerning ingredients of a fertilizer. In *Sherman Hollow*, the Board held that environmental review cannot be dispensed with in **order to protect the need** for confidentiality. *Id.*

ANR concurs with Friends and adds that disclosure of the information is also required by principles of fairness, due process, and good government. ANR also points out that the legislature has provided an opportunity to raise confidentiality claims in other situations such as air permits but chose not to in Act 250 permit applications.

Permittees respond that their expert performed a comprehensive analysis of the Project's impacts to the tax base in the region by reviewing information on Home Depot stores throughout New England. Permittees claim that all information relied upon by their expert was disclosed as part of this report. Permittees add that their expert performed a statistical check examining 17 other Home Depot markets throughout the country that are similar to the Rutland Market. Permittees claim that the information on the 17 other stores is confidential but that it was only used to confirm the conclusions that were reached based on examining the non-confidential information.

Permittees claim that disclosure of the confidential information could hurt their business interests, especially since they claim that one of the opponent's experts has performed work for a competitor.

Permittees argue that pursuant to Rules 703 and 705 of the Vermont Rules of Evidence, expert witnesses can rely on facts not admissible as evidence so long as they are of a type reasonably relied upon by experts in the field. However, according to Rule 705, the court can require disclosure and the expert can be required to reveal the underlying facts or data on cross-examination.

Permittees also suggest that this issue is not ripe since they have not determined whether they will utilize this information before the Board in any capacity. Permittees' suggestion is consistent with the Board's approach in similar situations where the Board has generally declined to rule on evidentiary issues prematurely. (See Town of *Stowe, supra*).

Permittees are correct that this issue will not be ripe until they attempt to utilize the confidential information. Should Permittees attempt to utilize the confidential information without providing the information to all parties, Friends will have an opportunity to raise its concerns and the Board will rule on the issue at that time.

### **III. ORDER**

1. Friends, RRFI, and M.T. et. al.'s requests for party status are granted or denied as set forth in Section II Preliminary Matters.
2. Friends' request that the Board remand the matter back to the District Commission is denied.
3. The Board will proceed with the scheduled hearing but will await

the decisions of the Water Resources Board before issuing its own decision.

Dated at Montpelier, Vermont this 30th day of November, 2000.

ENVIRONMENTAL BOARD

  
\_\_\_\_\_  
Marcy Harding, Chair

Jill Broderick

John Drake

George Holland

Rebecca M. Nawrath

Alice Olenick

Donald Sargent\*

Nancy Waples

\*Donald Sargent dissents from the Board's decision to grant party status to Friends pursuant to EBR 14 (B)(I) for Criterion 8.

1. Since RRFI was denied party status on all Criteria it appealed, the Board does not consider any preliminary issues it raised.