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

RE: Brewster River Land Co., LLC.
Land Use Permit Application #5L1348-EB

MEMORANDUM OF DECISION

This proceeding concerns an application for a permit for the construction and operation of 32 residential housing units to be configured in three buildings on a 5.4 acre tract of land ("Project"). The Project is located off Church Street in the Village of Jeffersonville within the Town of Cambridge, Vermont.

This memo concerns objections to the Prehearing Conference Report and Order ("PCRO") made by William and Jan Sander, Constance Edwards, Tony Kryzak, Judy Stout, Thomas A. Latshaw, Jr., and Peggy List (collectively, the "Neighbors").

I. PROCEDURAL SUMMARY

On September 14, 1999, Brewster River Land Co., LLC ("Permittee") filed a land use permit application for the Project with the District #5 Environmental Commission ("District Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On April 7, 2000, the District Commission issued Land Use Permit #5L1348 ("Permit") and supporting Findings of Fact and Conclusions of Law and Order ("Decision") to Permittee for the Project.

On May 5, 2000, a motion to alter was filed by the Neighbors. Permittee filed a memorandum in opposition to the motion on May 16, 2000. The District Commission denied the Neighbors' motion to alter on May 24, 2000.

On June 16, 2000, the Neighbors filed an appeal with the Environmental Board ("Board") from the Permit and Decision contending that the District Commission erred by finding that the Project complies with 10 V.S.A. § 6086(a)(1)(B), (1)(D), (1)(G), (4), (5), (6), (7), (8), (9)(A), and (10) ("Criteria 1(B), 1(D), 1(G), 4, 5, 6, 7, 8, 9(A), and 10"). The Neighbors also appeal the denial of party status to: William and Jan Sander on Criteria 1(G), 5, 6, and 7; Constance Edwards on Criteria 1(G), 5, 6, 7, and 9(A); Tony Kryzak on Criteria 1(D) and 6; Judy Stout on Criteria 1(B), 1(D), and 10; Thomas A. Latshaw, Jr. on Criterion 4;

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Peggy and Paul List on Criteria 1(D), 4, and 5. The appeal was filed pursuant to 10 V.S.A. § 6089(a) and Environmental Board Rule ("EBR") 6 and 40.

On July 18, 2000, Board Chair Marcy Harding convened a prehearing conference and on July 21, 2000, she issued a PCRO.

On July 28, 2000, the Neighbors filed an objection to the PCRO concerning the following issues.

On August 14, 2000, the Neighbors filed a petition for party status for the Criteria discussed below.

On September 6, 2000 and on September 13, 2000, the Board deliberated.

II. DISCUSSION

1. Whether, if the District Commission applied an erroneous standard in determining party status, the Board must remand the case back to the District Commission.

The Neighbors object to the Chair's ruling in the PCRO that any alleged errors concerning party status by the District Commission can be cured by a de novo hearing. The Neighbors argue that de novo review cannot make up for the District Commission's failure to apply the correct legal standard. The Permittee counters that the Board will reach its own legal conclusions through its de novo review and that there is no substantive benefit to remanding the case.

Under *de novo* review, the Board "must take entirely new evidence and base its decision upon the record developed solely in the proceedings before the Board". *Re: Sherman Hollow, Inc. et al., #4C0422-5-EB*, Findings of Fact and Conclusions of Law and Order (Revised) (Feb. 17, 1989) at 6. A *de novo* proceeding is an original proceeding and it is irrelevant what errors or irregularities took place below. *See Re: Imported Cars of Rutland, #1R0156-2-EB*, Findings of Fact, Conclusions of Law and Order (Oct. 12, 1982).

The Neighbors cite *In re: Juster Associates* 136 Vt. 577, 581, (1978) for the notion that consideration of all issues must first be done at the district commission. However, in *Juster* remand was appropriate because the Board was considering a changed project on a different tract of land that would potentially affect different people than those who participated in front of the

district commission. Thus, *Juster* only stands for the proposition that the district commission should consider an issue before the Board considers it upon appeal.

In the instant case, the District Commission rulings on party status did not alter the project, the land involved, the people affected by the project or any other issues that could require remand that the Court in *Juster* addressed.

Likewise, the Neighbors' reliance on *John A. Russell Corporation* #1R0849-EB, Memorandum of Decision at 5 (April 13, 2000) is misplaced. In *Russell*, the Board stated that "initial consideration of all issues, including party status, must first be done by the Commission prior to an appeal to the Board."

In *Russell*, some parties applied for party status before the Board on Criteria they had not requested party status on before the district commission. The Board held that the district commission must make initial considerations on all issues, including party status. The Board denied the party status request on those Criteria and did not remand the matter back to the district commission.

In the instant case, the District Commission has ruled on party status issues and the Neighbors appealed that ruling to the Board.The Board's de novo review cures any irregularities below concerning party status issues and is consistent with *Juster* and *Russell* since the District Commission already considered and ruled upon party status issues. Therefore, the Neighbors request for a remand based on the District Commission's final party status determinations is denied.

2. Whether, if the District Commission's Permit contains a condition subsequent, the Board must remand the case back to the District Commission.

The Neighbors contend that the District Commission's Permit condition #10 is a condition subsequent and that the Board must remand the case back to the District Commission. The Neighbors object to the ruling in the PCRO that regardless whether Permit condition #10 is a condition subsequent, the Board's de novo review will cure any irregularities.

Permit condition #10 requires the Permittee to submit a proposed retention basin maintenance program within 30 days of the issuance of the Permit to the District Commission for approval. The Neighbors argue that because the maintenance program was filed after the Permit was issued, they were denied their rights under the Administrative Procedure Act to respond to the

subsequent filing through cross-examination or rebuttal. The Neighbors request that the matter be remanded to the District Commission and the hearing re-opened in order to present evidence regarding the maintenance program.

Regardless whether the Neighbors' assertion that Permit condition #10 is invalid because it is a condition subsequent is true, the Board will hear the case de novo. Accordingly, the Board will hear new evidence and make a fresh decision solely on the record in front of it. Therefore, the Board's de novo hearing cures any alleged improper permit conditions such as a condition subsequent imposed by the District Commission.

3. Whether the Applicant's failure to serve the maintenance plan on all parties violated EBR 12(J) and requires the Board to remand the case to the District Commission.

The Neighbors also object to the ruling in the PCRO that failure to serve the maintenance plan on all the parties to the proceeding does not violate EBR 12(J). Under EBR 12(J), "[e]very document filed by any party subsequent to the initial document filed *in a case* shall be served upon the attorneys or other representatives of record for all other parties and upon all parties who have appeared for themselves."

In *Re: Barre Granite Quarries, LLC*. the Board confined the definition of a "case" to the following:

> [W]hen a party applies for a permit or when an appeal is filed concerning a decision on a permit application, a "case" begins. At that point, service of all filings on all parties is required. Once an application is approved and a permit issues or the appeal is decided, the "case" is complete and no additional filings are necessary.
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> *Id.*

Relying on *Barre Granite Quarries, LLC*, the Chair held in the PCRO that EBR 12(J) does not apply to subsequent filings submitted after the permit is issued. The Neighbors argue that a case is not over until after the expiration of the 30 day period to file a motion to alter or appeal. The Neighbors rely on *In re Taft Corners Assocs.*, 160 Vt. 583, 593 (1993) where the Board held that a permit decision becomes final after 30 days if not appealed. The Neighbors point out that EBR 31(A)(4) allows the Board or district commission to alter a decision within 30 days as support for the notion that the case is not over until 30 days

has passed from permit issuance. The Neighbors also point out that a motion to alter would not have to be filed with the other parties if a case ends with permit issuance.

The Neighbors' argument is compelling and is also consistent with other Board cases besides *Barre Granite*. *See Roger V. and Beverly Potwin, #3W0587-1-EB (Revocation)*, Findings of Fact, Conclusions of Law and Order at 12 (Jul. 15, 1997). In *Potwin,* the Board stated that "[o]nce a permit is issued and the applicable appeal period has expired, the findings, conclusions, and permit are final and are not subject to attack in a subsequent application proceeding, whether or not they were properly granted in the first instance." supra *at 12.*

However, notwithstanding the Neighbors' compelling argument concerning EBR 12(J), the Board's de novo review cures any service irregularities just like it cures the alleged irregularities concerning party status and a condition subsequent. Therefore, despite the fact that the document at issue should have been served on all parties, there is no need to remand the case since the Board will decide the case based on the record created in front of it.

4. Whether Jefferson Community Housing Limited Partnership ("JCHLP") needs to be a co-applicant under EBR 10(A).

The Neighbors object to the ruling in the PCRO that JCHLP is not required to be a co-applicant under EBR 10(A). The Neighbors assert that the Permittee will only be the owner until the Project is constructed at which point it will transfer ownership interest to JCHLP. The Permittee responded that requiring JCHLP's participation is up to the Board's discretion and that since the Permit runs with the land, JCHLP would be equally bound by the permit regardless to what extent it participates in the hearing. Permittee is correct that there is nothing in EBR 10(A) that requires JCHLP to be a co-applicant and that it is up to the Board's discretion. Since JCHLP would be bound by any permit, there is no reason to require its participation.

5. Whether alternate Board members Broderick and Day should be ruled out from hearing this case.

The Neighbors object to alternate Board members Broderick and Day hearing the case because of ties to the law firm that represents Permittee. The PCRO stated that they would only be asked to sit on the case if necessary to have a sufficient number of members hear the case and that they would have

the opportunity to recuse themselves if they felt that they could not be impartial or if their participation would create the appearance of impropriety. Since there are sufficient Board members available to hear this matter, the Neighbor's objection is moot.

6. Whether a second hearing day should be scheduled at this time.

The Neighbors object to the Chair's ruling in the PCRO that a second hearing day will only be scheduled if additional grants of party status result in a substantial increase in the number of witnesses. The Neighbors also object to the Chair's failure to allocate three hours for the presentation of their direct case because of the possible need for live testimony for witnesses testifying pursuant to a subpoena.

The PCRO reserved a second day for a hearing if necessary. Once the parties file their pre-filed testimony, the Chair will determine if a second hearing day is necessary. If the Neighbors determine that they will need additional time for witnesses testifying pursuant to a subpoena, they can request more time at a later date.

7. Whether the Neighbors have sufficient time to prepare their pre-filed direct testimony.

The Neighbors object to the deadline for pre-filed direct testimony in the absence of confirmation by the Board that the Memorandum of Decision will be issued in time for the Neighbors to have thirty days to prepare pre-filed direct testimony on any additional criteria that they are seeking party status on. This is an unusual objection that completely lacks any support. Parties cannot dictate deadlines to the Board. The Neighbors could have begun preparation for any or all Criteria in their appeal at any time. Nevertheless, the objection is moot based on the date this Memorandum of Decision is issued.

8. Whether the Neighbors Must Submit Pre-filed Testimony for all Witnesses.

The Neighbors have objected to the requirement in the PCRO to submit pre-filed testimony for all witnesses. Since the Neighbors may need to subpoena hostile or unwilling witnesses, they argue that they will be unable to submit pre-filed testimony for those witnesses. In *Lawrence White* #1 R0391-EB et seq. (Revocation) Memorandum of Decision on Motions for Rehearing and to Alter (July 24, 1998), the Board held that requiring subpoenaed witnesses to prefile

testimony would be inappropriate and inconsistent with EBR 4 which provides for parties to compel by subpoena, the attendance of witnesses to testify and produce records and books. Therefore, pre-filed testimony shall not be required for witnesses appearing pursuant to a subpoena.

9. Party Status Issues

The Neighbors have appealed the District Commission's denial of party status for the following Criteria:

Judy Stout EBR 14(A)(5) Criteria 1(B), 1(D), and 10;
Tony Kryzak EBR 14(A)(5) Criteria 1(D) and 6;
Thomas Latshaw EBR 14(A)(5) Criterion 4;
Constance Edwards EBR 14(A)(5) Criteria 1(G), 5, 6, 7, and 9(A);
William and Jan Sander EBR 14(A)(5) Criteria 1(G), 5, 6, and 7;
Peggy List EBR 14(B)(1) Criteria 1(D), 4, and 5.

Under EBR 14(A)(5), adjoining property owners are entitled to party status if they demonstrate that the proposed development may have a direct affect on their property. *Spring Brook Farm Foundation* 2S0985-EB, Chair's Ruling on Preliminary Issues (June 2, 1995). Under EBR 14(B)(1), petitioner for party status has the burden to adequately demonstrate that its interests may be affected by the project at issue. This burden is not satisfied by unsupported assertions that vaguely defined interests may be affected, rather petitioner must first establish a connection between the project at issue and certain specified interests. Then, the petitioner must demonstrate that due to the connection, the specified interests may be affected. *Maple Tree Place Associates* #4C0775-EB Interlocutory Appeal (October 11, 1996).

All of the Neighbors except for Peggy List are petitioning for party status pursuant to EBR 14(A)(5).

Criterion 1(B): Judy Stout

Under Criterion 1(B), an applicant must demonstrate that the development will meet any health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. The Neighbors contend that the Project lies along and within a floodway zone. The Project relies on storm water retention basins and dry wells to dispose of storm water.

Judy Stout contends that if the basins and dry wells fail, her property will be subject to flooding from the Project's storm water runoff. Moreover, she states that whatever is in the sedimentation basins and dry wells will be deposited on her property.

The Permittee responds that the pictures Judy Stout submitted of the Project site in a flooded condition were from a 500 year flood event and that they are only required not to exacerbate flooding.

Judy Stout has a reasonable interest concerning the increased likelihood of flooding from the Project and the possibility of harmful substances from the dry wells or sedimentation basins being deposited on her property. Therefore, Judy Stout is entitled to party status for Criterion 1(B) pursuant to EBR 14(A)(5).

Criterion 1(D): Judy Stout, Tony Kryzak, and Peggy List

Judy Stout, Tony Kryzak, and Peggy List have petitioned for party status for Criterion 1(D). Judy Stout and Tony Kryzak have petitioned for party status pursuant to EBR 14(A)(5) and Peggy List pursuant to EBR 14(B)(1). The Permittee does not object to the petition for party status for those Neighbors for Criterion 1(D). The above Neighbors have made a prima facie case because the construction of a large impervious surface could divert water from the flood plain to their property. Therefore, Judy Stout and Tony Kryzak shall be granted party status on Criterion 1(D) pursuant to EBR 14(A)(5) and Peggy List shall be granted party status on Criterion 1(D) pursuant to EBR 14(B)(1).

Criterion 1(G): William and Jan Sander and Constance Edwards

William and Jan Sander and Constance Edwards claim that a portion of the Project tract is located in a wetland. In support of their assertion, they cite the Cambridge Municipal Development Plan ("Town Plan") which references concentrated areas of wetlands including "along the Lamoille River (east and west of Jeffersonville) and north along the North Branch River." Town Plan at 27. The Neighbors add that in light of the function wetlands serve to temporarily store floodwater or storm water runoff, the Project could have a direct impact on their property.

The reference to the wetlands in the Town Plan is vague. The Town Plan only states that there are concentrated areas of wetlands in certain locations. There is no indication what the actual boundaries of the wetlands are and whether the Project site is located on wetlands. Therefore, the Board finds that

William and Jan Sander and Constance Edwards have not established that the Project may have a direct affect on their property concerning this Criterion and denies their request for party status.

Criterion 4: Thomas Latshaw and Peggy List

Neighbors Thomas Latshaw (EBR 14(A)(5)) and Peggy List (EBR 14(B)(1)) have petitioned for party status for Criterion 4. Permittee does not object to the granting of party status to Thomas Latshaw and Peggy List on Criterion 4. Thomas Latshaw and Peggy List have made a prima facie case for party status for Criterion 4 because the Project tract has high water tables and the addition of a large impervious surface could impact their interests under Criterion 4. Therefore, Thomas Latshaw shall be granted party status on Criterion 4 pursuant to EBR 14(A)(5) and Peggy List shall be granted party status on Criterion 4 pursuant to EBR 14(B)(1).

Criterion 5: William and Jan Sander, Constance Edwards, and Peggy List

William and Jan Sander, Constance Edwards, and Peggy List contend that the Project will increase the risks of accidents in an already hazardous traffic area. They state that the area near the intersection of Routes 15 and 108 can be hazardous in either direction and that the Project will interfere with the Neighbors safe use of Main Street.

The Permittee responded that only Judy Stout's property is next to the Route 108 entrance to the Project and that she already has party status on this Criterion. The Permittee argues that the other Neighbors will not be directly impacted. The Permittee's argument is hard to fathom since all the Neighbors live within a block of the Project and will be directly impacted from the Project's traffic. For example, the Neighbors point out that left turning movements from the Project on to Main Street will interfere with the Neighbors' safe use of Main Street. Therefore, William and Jan Sander and Constance Edwards' shall be granted party status for Criterion 5 pursuant to EBR 14(A)(5). Peggy List is granted party status for Criterion 5 pursuant to EBR 14(B)(1).

Criterion 6: William and Jan Sander, Constance Edwards, and Tony Kryzak

William and Jan Sander, Constance Edwards, and Tony Kryzak contend that the Project would result in a significant population growth that otherwise would not occur that would place an economic burden on the Neighbors. Specifically, they allege that the Project will increase the number of students

which will increase the municipality's burden to provide educational services and ultimately raise the Neighbors' taxes.

Under Vermont's school financing system, non-capital costs of additional students would be financed by the State Education Fund. If the Project resulted in the need to expand the facilities at the school to accommodate new students, the capital costs would be the responsibility of the local taxpayers.

The Permittee argues that the Neighbors' situation is no different than any other local taxpayer. The Neighbors point out that the Board has granted party status to citizens groups for fiscal criteria such as 6, 7, and 9(A). *St. Albans Group and Wal*Mart Stores, Inc.* #6F0471-EB, Memorandum of Decision at 5-6, (April 15, 1994).

Although the Neighbors are correct that citizens groups can qualify for party status on fiscal Criteria such as 6, 7, and 9(A), they still need to demonstrate the development may have a direct affect on their interests for the Criterion at issue. The issue in Criterion 6 is whether the development will cause an unreasonable burden on the ability of a municipality to provide educational services. A party status petition for Criterion 6 needs to address the burden on the municipality to provide educational services, not the burden on local taxpayers.

The Neighbors' party status petition is based on the impact to the Neighbors' taxes and does not address the burden to the municipality. It only contains general allegations that the Project will increase the number of students and raise the Neighbors' taxes. Specifically, there was insufficient information in the party status petition on the capacity of the school and the likelihood that the Project would require additional capital investment. Therefore, William and Jan Sander, Constance Edwards, and Tony Kryzak's petition for party status for Criterion 6 is denied.

Criterion 7: William and Jan Sander and Constance Edwards

William and Jan Sander and Constance Edwards contend that the Project will increase the population of Jeffersonville and Cambridge which will increase the burden on municipal government to provide services and ultimately, raise their taxes. The Permittee argues that there is adequate water and sewage capacity and that the Neighbors' interests are no different than other taxpayers. As previously discussed, under *St. Albans Group and Wal*Mart Stores, Inc.* citizens groups can qualify for party status on fiscal Criteria if they demonstarte

that the develpoment may have a direct affect on their interests under the Criterion at issue.

Criterion 7 addresses whether the Project will place an unreasonable burden on the ability of local government to provide municipal or governmental services. The Neighbors' party status petition only contains general allegations concerning the increase in population increasing the burden on the local government and raising their taxes. Like Criterion 6, Criterion 7 addresses the burden on the local government, not the taxpayer. The Neighbors did not provide sufficient information on the capacity of the municipality to provide additional services and how specifically the Project would burden its ability to provide those services. Therefore, William and Jan Sander and Constance Edwards' petition for party status for Criterion 7 is denied.

Criterion 9(A): Constance Edwards

Criterion 9(A) focuses on the rate of growth that Jeffersonville and Cambridge will experience both with and without the Project, and the ability of the municipalities to pay for this growth as it relates to costs for education, highway access and maintenance, sewage disposal, water supply, police and fire services, and other factors relating to public health, safety, and welfare. Constance Edwards disputes the Permittee's premise that the Project will only redistribute the population. She is an adjoining property owner and a taxpayer concerned about the fiscal impacts of the Project.

Permittee argues that Constance Edwards has no special interests and is just like any other taxpayer. As discussed above, in order to obtain party status she must demonstrate that the Project may have a direct affect on a particular interest under the Criterion. According to the party status petition, Constance Edwards interests under this Criterion are that as a taxpayer, she will have to pay for the fiscal consequences of the Project. However, like the other fiscal Criteria discussed above, Criterion 9(A) focuses on the ability of the municipality to pay for the growth, not the individual taxpayer. She did not provide sufficient information in the party status petition concerning how the Project will affect the municipality ability to pay for the growth. Therefore, Constance Edwards is denied party status under Criterion 9(A).

Criterion 10: Judy Stout

Judy Stout seeks party status for Criterion 10 because she relies on the Town Plan and the Lamoille County Regional Plan ("Regional Plan") to protect

her interests. Judy Stout references both the Town Plan and Regional Plan goals of protecting natural resources, minimizing storm water runoff, discouraging development in flood hazard areas, etc.

The Permittee responds that Judy Stout has no standing to request party status for Criterion 10. The Permittee alleges that Judy Stout withdrew her request for party status for Criterion 10 and attempted to revive it after the District Commission had already considered the issue. The Permittee also argues that even if she has standing to request party status, she failed to demonstrate a direct affect on her interests distinguishable from the general public and that she has no special knowledge.

In order to appeal a criterion to the Board, an adjoining property owner or permitted party must obtain party status before the District Commission on that Criterion, or have been denied party status on that Criterion by the District Commission, appealed the Criterion to the Board, and then been granted party status by the Board. *Gary Savoie d\b\a WLPL and Eleanor Beamis* #2W0991-EB, Memorandum of Decision, October 11, 1995).

Judy Stout's withdrawal of her party status request extinguished her original request and her subsequent request came too late to qualify as a party status request since the District Commission had already heard the evidence on that Criterion. Therefore, since she did not obtain party status before the District Commission or make a timely request for party status that was denied, she cannot now request party status before the Board and her request is denied.

III. ORDER

1. The Neighbors' request that the case be remanded back to the District Commission because of alleged errors concerning final party status determinations, a condition subsequent, and improper service is denied.

2. The Neighbors' request that JCHLP be required to be a co-applicant is denied.

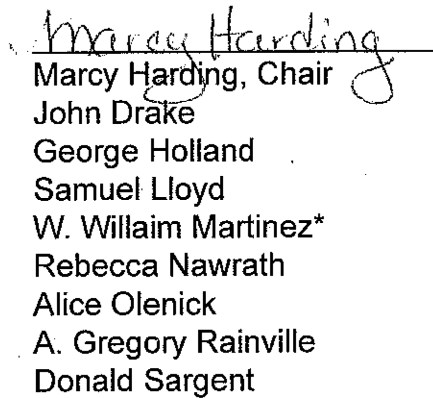
3. Parties do not have to submit pre-filed testimony for witnesses appearing pursuant to a subpoena.

4. The requests for party status are granted or denied as set forth in Section II.

5. Section III of the PCRO is amended to include Criterion 1(B) as an issue on appeal. Criteria 1(G), 6, 7, and 10 will not be considered as part of the appeal.

Dated at Montpelier, Vermont this 18th day of September, 2000.

ENVIRONMENTAL BOARD



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John Drake
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Alice Olenick
A. Gregory Rainville
Donald Sargent

*W. William Martinez did not participate in the second deliberation but he has reviewed this Memorandum of Decision and concurs with the decision.

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