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March 19, 2014

Chairperson Wainer
Hinesburg DRB Members
Town of Hinesburg
10632 Route 116
Hinesburg, VT 05461

Re: Hannaford Giroux/Commerce Park Subdivision Applications

Dear Chairperson Wainer and Hinesburg DRB Members:

This letter responds to legal concerns that were discussed at the hearing held on Tuesday, March 4, 2014, regarding split lot zoning and the Town's Official Map. These concerns result from the subdivision amendment application to include an additional 0.32 acres in Commerce Park Lot 15. While it is our understanding that the DRB intends to retain counsel to investigate these issues independently, please consider this letter to supplement our February 10, 2014, submission in light of the continuing concerns expressed in the staff report and by this DRB at the March 4 hearing.

SPLIT LOT ZONING ANALYSIS

The first issue regards how the Town is to regulate so-called split zoned lots that lie within two zoning districts. The rule of law in Vermont, first established by the Supreme Court's decision in *McLaughry v. Town of Norwich*, 140 Vt. 49, 54-55 (1981) and subsequently affirmed by the Court in *In re: Windjammer Hospitality*, 172 Vt. 560 (2001), provides that (i) zoning compliant split zoned lots are lawful and, (ii) the use of split lots is to be governed by the respective underlying zoning district.

The proposed amendment to Lot 15, although resulting in a split zoned lot, remains fully compliant with all applicable zoning criteria and regulations and is thus lawful. Only if a split zoned property is to be subdivided so that any resulting parcel is non-compliant with applicable

zoning requirements should an application be denied. That circumstance is not presented by this application.

Only if a split lot that fails to meet the dimensional requirements for all zoning districts occupied is it considered to be a nonconforming lot. *See, e.g., Myers 2-Lot Subdivision Final Plat*, No. 121-6-09 Vtec, slip op. at 3-4 (Vt. Envtl. Ct. Apr. 28, 2010) (Durkin, J.) (denying a subdivision application because a portion of the resulting split lot was undersized for the district in which it was located.) A nonconforming, undersized lot may not be developed unless it qualifies for the limited exemption afforded preexisting undersized lots. *See, In re Mastelli Const. Application* No 2009-072, slip op. at 2 (Vt. Sept 4, 2009 (unpub. Mem.) (noting that small lots are considered nonconforming uses). *See also, In re Champlain Oil Co. Inc., Conditional Use Application*, No. 200-10-09 Vtec (Durkin, J.) (July 16, 2010) (development of wastewater and stormwater systems on a 9.4 acre lot is disallowed because minimum lot size in applicable Conservation District is 25 acres.) However, with the pending applications no nonconformity is presented. As the boundaries are proposed to be newly amended by the subdivision applications, the Giroux lot, the Automotion lot, and Lot 15 each fully satisfies every applicable regulatory requirement of the Hinesburg Zoning Regulations. Consequently, there is no regulatory basis for withholding or denying approval of the pending applications.

Under the law of other jurisdictions, but not yet established in Vermont, property owners of split zoned properties are afforded significant development flexibility by allowing the aggregation of lot size or the frontage (or other applicable zoning criteria) from both zones to satisfy zoning conformity for the minimum frontage and lot size requirements to promote a unification of use. *See, e.g., Tofias v. Butler*, 523 N.E.2d 796, 799 (Mass.App.Ct. 1988) (landowner permitted to build structure on commercial portion of split lot using residential portion for purpose of calculating lot coverage requirements under zoning ordinance); *Moore v. Town of Swampscott*, 530 N.E.2d 808, 809 (Mass.App.Ct. 1988) (landowner permitted to use more restrictive zone of split lot to satisfy bylaw space and frontage requirements of less restrictive zone for purpose of building single family residence on combined parcel). As the Court affirmatively cites to these decisions in *Windjammer*.

“In both of those cases, landowners were permitted to make a passive use of the more restricted zone to meet zoning requirements for active improvements planned for the less restricted portion of the lot. However, those cases are distinguishable from the instant case in that the landowners in both *Tofias* and *Moore* were attempting to aggregate parcels for a single, unified use of the land. *See Tobias*, 523 N.E.2d at 799 (noting underlying “desire to permit land owners to enjoy the use of their entire properties as single units”); *Moore*, 530 N.E.2d at 809 (permitting frontage in more restrictive district to meet bylaw requirements for a building in the less restricted district where neither lot alone is sufficient to meet zoning requirements in which they are located); *see also, Forest City, Inc. v. Payson*, 239 A.2d 167, 169 (Me. 1968) (also noting desire to permit use of split lot properties as single units).” In contrast, *Windjammer* seeks to subdivide

a split lot, which is currently in compliance with the City's bylaws, rendering one of the resulting lots noncompliant." *Windjammer* at 562.

As is demonstrated above, there is no aspect of the pending proposal that presents any non-conformity. However, even if non-conformity were presented, the law of Vermont may be construed to foster flexibility that promotes a unified use as is now presented.

The remaining and second relevant inquiry is thus how the Town should regulate use of the split zone lot. The Supreme Court in *Windjammer* affirms that uses on a split lot must comply with the zoning requirements for the district in which each portion of the split lot is located.

In *In re: Windjammer Hospitality*, 172 Vt. 560 (2001), a 54-acre parcel located in South Burlington was proposed to be subdivided into two proposed lots, Lot 1 being a 1.47 acre lot and Lot 2 being a 52.876 acre lot. The property lay within two zoning districts: The southern half of the property, containing a motel, conference center and restaurant buildings, located in the C-1 Commercial Zoning District and the northern half, which is unimproved, located in the R-4 Residential Zoning District. Under the proposed subdivision, Lot 1 would fall entirely in the C-1 District and Lot 2 would remain split between both the C-1 and R-4 districts. The Supreme Court in *Windjammer* affirms that uses on a split lot must comply with the zoning requirements for the district in which each portion of the split lot is located.

The *Windjammer* decision expressly follows the Supreme Court's prior determination in *McLaughry v. Town of Norwich*, 140 Vt. 49, 54-55 (1981). In *McLaughry*, the Court holds that property existing split between two districts with differing use requirements must comply with the use provision in each and rejected an effort to expand a commercial use into the residential portion of a split lot, for there was "no evidence to indicate that the property could not be used for two different purposes; that is, that part of it which lies within the business district could be used for business purposes, and that part of the property lying within the residential district could be used for residential purposes." *Id.* Together, the Vermont precedents of *Windjammer* and *McLaughry* plainly establish that split zoning is recognized under Vermont law and that the use of split zoning lots is to be determined by the underlying zoning district for each respective portion of the subject property. Other jurisdictions too recognize this well established law. For example, in Massachusetts, *Boulter Bros. Const. Co. v. Zoning Bd. Of Appeals of Norfolk*, 697 N.E.2d 997, 999 (Mass. App.Ct. 1998) similarly affirms that the use within each zone of a split lot must remain in conformity with each respective district's use requirement.

OFFICIAL MAP ANALYSIS

Peter Erb's Memorandum to this DRB dated February 28, 2014, raises the following concern:

"As I was reviewing the applicant's response to our questions I realized that there is an official map issue that apparently no one was aware of. The enabling legislation for the Official Map, Title 24, Chapter 117 section 4421 reads as follows: 2) *Changes to the official map. After adoption of the official map, the*

recording of plats that have been approved as provided by this chapter, or the adoption of any urban renewal plan under chapter 85 of this title, shall, without further action, modify the official map accordingly. Minor changes in the location of proposed public facilities may also be made to particular sections of the official map if the change is recommended by a majority of the planning commission and approved by resolution of the legislative body. This process may take place concurrently with review of development or subdivision of a parcel that is proposed to be subject to a map change.

“The subdivision application to make lot # 15 larger to accommodate the official map is based on relocating the mapped public facility both from the lot that it was proposed for, and also into a different district. While the DRB can, and has, deemed that the relocation of the facility into the proposed location would accommodate the official map, they can’t ratify the changes to the map. That can only be done via the process as described in the legislation.

“The legislation does anticipate that this situation may arise, and clearly states that it can take place concurrently with this review before you now. There has been, however, no application made for the minor change to the map. Since any approval of this subdivision application would enable the recording of a plat, final approval of this subdivision application should wait until the relocation has received the necessary approval.”

This concern then became a topic of disagreement and discussion at the hearing on March 4, 2014, but the concern is without basis and reflects a miscomprehension of how the Official Map statute, 24 V.S.A. §4421, functions.

Section 4421 provides municipalities with the opportunity to designate lands on an Official Map that are intended for future public utility or improvements so that such lands may be acquired prior to development. No zoning permit may be issued for any land development “within the lines” of such designated lands unless the designated facility is accommodated or the Map is changed. Section 4421(4) and (5). Only if a permit is sought for land development within the lines of a designated facility does the Official Map statute become applicable. Except in this fashion, the statute does not function as a zoning overlay or otherwise limit, prohibit or mandate the manner in which property may be used or developed. The now pending applications propose no land development within the lines of any designated facility, so Section 4421 is not applicable.

Notwithstanding continuing objection to the Town’s use of the Map despite its lack of adequate specificity, this application to annex additional land area to Lot 15 is for the purpose of enhancing the farmers’ market setting as directed and determined previously by this Board in regard to the development of Lot 15. There is no question that the permit at issue accommodates the farmers’ market designation on the Map. No request or application is made, or necessary, to relocate any Official Map location to do so. Official Map designation only serves to prohibit

development that is inconsistent within the lines of any designated facility. No change is necessary to allow designated uses, only to prohibit inconsistent ones.

Moreover, the Town cannot now unilaterally act to change the Official Map with respect to the property even if it wanted to, for the applicant has a vested right to proceed under the regulatory scheme as it existed at the time the application was filed. *See, Smith v. Winhall Planning Commission*, 140 Vt. 178, 436 A.2d 760 (1981) and *In re Taft Corners Associates*, 171 Vt. 135 (2000) (“We have no doubt that a subdivision application creates a vested right that the subdivision permit be evaluated under the regulatory law in effect at the time of the application.”)

The February 28, 2014 Memorandum errors in two other fundamental respects too. First, the assertion that the subdivision application is “to make Lot #15 larger to accommodate the official map” is factually wrong. The Hannaford site plan application for Lot 15 demonstrated that the development for Lot 15 did in fact accommodate the farmers’ market as a public facility pursuant to the Official Map. At the Town DRB’s request and direction, Hannaford agreed to further enhance the farmer’s market offering by expanding the lot via the now pending subdivision, but such enhancement was not a prerequisite for any accommodation of the public facility under the Official Map. Lot 15 does not require additional lands to accommodate a farmers market.

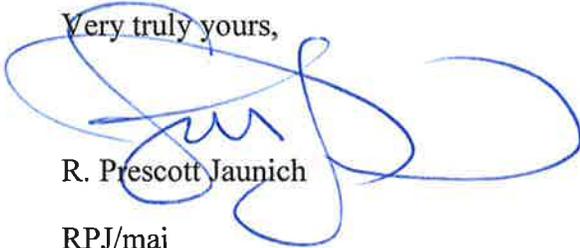
Second, Peter Erb incorrectly asserts that “the DRB has deemed that the relocation of the facility to the proposed location would accommodate the official map.” The DRB has never discussed or approved any relocation of the facility. Pursuant to Section 4421(5), only if development or subdivision cannot accommodate the mapped public facility is a change in the map required to avoid denial. Under the Official Map, Lot 15 is designated for the accommodation of public facilities. The land to be annexed to Lot 15 does not require an Official Map designation to be added to a lot already designated to accommodate a farmers’ market facility under the Official Map and to be used for the same purpose. Pursuant to Section 4421(5), only if the facility could not be accommodated would a change in the location of the facility be necessary to remove the effect of the Official Map from Lot 15. That scenario is not presented and such consideration is beyond the proper scope of this application.

Finally, it must be noted that while the Town is not without legislative authority to regulate lands lying adjacent to its mapped facilities, it has failed to implement such specific ordinance. The Official Map statute at 24 V.S.A. §4421(4)(B) expressly authorizes towns to specify in their bylaws that structures within a specified area adjacent to lines of any public facilities shown on the Official Map may be regulated through conditional use review. However, Hinesburg has not implemented any specified regulatory mechanism requiring conditional use review pursuant to such authority and thus is without jurisdiction to now regulate the pending application in such fashion.

In conclusion, for all of the foregoing reasons, I respectfully submit that split lot zoning has a well-established and lawful basis and that any requirement for amendment of the Official Map prior to action upon the pending applications is contrary to both applicant's vested rights and the Official Map statute at 24 V.S.A. §4421.

Should you have any questions in this regard, please do not hesitate to contact me directly.

Very truly yours,



R. Prescott Jaunich

RPJ/maj

cc: Peter Erb and Alex Weinhagen, Hinesburg Planning and Zoning
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