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Ms. Zoe Wainer, Chairperson
and Members, Development Review Board
and Mr. Peter Erb, Zoning Administrator
Municipal Offices
Hinesburg VT 05461

*In re: Automotion-Giroux Site Plan Amendment, Firehouse Plaza Site Plan Amendment;
Boundary Adjustments and Subdivision*

Dear Chairman Wainer, Members of the DRB, and Mr. Erb:

I submit this letter on behalf of Responsible Growth Hinesburg and the many persons who have signed the Petition opposing these site plan, boundary adjustment and subdivision proposals. I write to address in particular the parking changes proposed for the Automotion-Giroux site and the Official Map.

1. THE PARKING SPACES SOUGHT WOULD VIOLATE THE ZONING ORDINANCE

At the last hearing, some present suggested that the DRB could approve of these proposals – even though the site plans submitted conflict with the existing permit and current zoning regulations -- because the DRB’s decisions would not preclude the Town from subsequently denying a change of use application or subsequently enforcing the 2005 permit. I respectfully submit that: 1) the zoning ordinance prohibits the requested changes; and 2) if the DRB were to approve of these applications, the Town will be barred forever from trying to enforce the 2005 permit conditions or current zoning regulations with respect to these parcels.

a. Giroux-Automotion Has A Protected Right under the 2005 Permit to 31 Parking Spaces with 9 in Front

The December 9, 2005 permit issued to “Victor Giroux and Automotion” authorized 31 parking spaces, 9 in front, 10 to the side, and 12 in the back. The permit was issued as a site plan review and conditional use. It specifically included both auto service and auto sales (see Findings of Fact #1 and #4).

Current regulations for a new building here would require all but 20% of the parking to be to the side and rear. See Zoning Ordinance §5.63. Under current regulations, Mr. Giroux and Automotion could have no more than 6 cars in front, given a total permitted number of 31.

Under current regulations, the DRB also would set the total number of spaces. See § 5.5.4. The Town's guidelines call for 1 space for every 400 square feet of floor area. Table 2 (page 67). Assuming that the DRB were to approve of 59 spaces, no more than 11 could be in the front unless a variance were granted. It is difficult to conceive of how the standards for a variance could be satisfied.

As I understand what Mr. Giroux said at the last hearing, his family has been using this property for many years to sell cars, with more cars parked in front than are permitted by the current regulations. It is not clear to me if Mr. Giroux also stated that he believes he has a grandfathered right to place more cars in front than were permitted by the 2005 permit.

I did not understand Mr. Giroux to say that historically his family used 59 parking spaces.

Under section 5.10 of the ordinance, Giroux-Automotion has a protected right to continue to use the site in accordance with the 2005 permit, regardless of current zoning. That is, they have the lawful right to continue to use 31 spaces, with 9 in front.

b. Sections 5.10 and 4.3 Prohibit Moving, Enlarging Altering or Extending the Grandfathered Permitted Use

However, section 5.10 of the ordinance says that “Non-conforming uses and non-complying structures shall not be moved, enlarged, altered, extended, reconstructed or restored (except as provided below).” None of the exceptions apply. The proposed applications seek to move, alter and/or extend this use. The applications seek: 1) approval of 28 additional parking spaces; and 2) placement of more than 9 parking spaces in front of the building.

Giroux-Automotion remains free to continue the permitted use. They cannot move, enlarge, alter or extend that use.

c. Approval of the Site Plan Would Forever Bar the Town from Challenging Violation of the Permit and Departure from the Grandfathered Use

Vermont law is not always clear in matters of zoning and planning. In this area, it is very clear: Any approval by the DRB of the site plan and boundary adjustments, would forever bar the Town from enforcing the 2005 permit or the current regulations. This is because the Supreme Court of Vermont has held, time and again, that any approval of a land use change by a Town either must be appealed to the Environmental Court under § 4472 or that change is forever insulated from enforcement of any kind. See, for example, In re Musty Permit, 191 Vt. 483 (2012) (even a permit that was illegal or ‘ultra vires,’ under 24 V.S.A. § 4472 once approved by the DRB and not appealed, governs all future proceedings); In re Barry, 189 Vt. 183 (2011) (under § 4472, even a permit that was void when issued, if not appealed, governs all future proceedings, and any ambiguity in the void permit will be construed in favor of the landowner.) Both cases are attached.

Once this site plan is approved, there will be no need for anyone to apply for a “change of use.” The change of use will have been approved. And, having been approved, neither the Town nor any citizen will be able to challenge it (other than to appeal it).

d. The Giroux-Automotion Grandfathered Rights Are Limited by the 2005 Permit

For the same reason, if Mr. Giroux believed that the 2005 permit was in error, because it failed to respect grandfathered rights, that was his opportunity to contest the limit of 31 spaces, with 9 in front. He did not appeal the ruling so it is now binding under § 4472.

2. THE OFFICIAL MAP WOULD NEED TO BE AMENDED BEFORE A FARMERS’ MARKET OUTSIDE OF LOT #15 IS APPROVED

The Town’s Official Map has designated the main project site, Lot 15, as the location for public facilities. That Map has not been amended to include the Giroux-Automotion lands as the site for any public facilities.

It would be a departure from the statute for the DRB to rule that Hannaford and Giroux-Automotion can meet the burden of satisfying the standard set forth in 24 V.S.A. §4421 that the project applicant “shall demonstrate that the mapped public facility will be accommodated by the proposed subdivision or development in accordance with the municipality’s by-laws” where use of lands outside of Lot 15 is proposed to accommodate the public facilities planned for Lot 15.

Conclusion

The DRB should reject any site plan, boundary adjustment or subdivision that departs from the 2005 permit. The DRB should reject use of lands outside Lot 15 to satisfy § 4421.

Sincerely,

James A. Dumont

James A. Dumont, Esq.

cc: Chris Roy & Scott P. Jaunich, Esq.
Ernest Allen, Esq.