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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, Mr. Weinhausen and Mr. Erb:

Due to a miscommunication, it was not until I attended the last hearing that I learned that the DRB had been awaiting briefing on four issues. Afterwards, as I reflected on the hearing, it seemed to me that there were actually five legal issues. The new plans submitted this past week for the Firehouse Plaza added a sixth issue. These are the six issues that I see, four of which no longer require briefing, as follows:

- 1) Whether the lot coverage requirements for Lot 15 are being met by use of the non-Lot 15 lands in the Village District. Hannaford has now clarified that the requirements of Lot 15 are satisfied without the additional land. Based on their factual representations, I will not address this.
- 2) Whether the Village District standards apply to the proposed 36,000 square foot store which will be served by the 'Farmers Market' site outside of Lot 15 on lands now owned by Giroux and within the Village District, because the Farmers Market is part of that proposed supermarket use. Attorney David Rugh's letter to you, citing to the Windjammer decision, appears to answer that question -- but does not. I will explain this below.
- 3) Whether stormwater treatment conditions may be imposed as part of the Firehouse Plaza application. I addressed this issue in my March 4, 2014 letter to you and need not repeat that discussion here.
- 4) Whether an amendment to the Official Map is required before the DRB can approve of lands outside of Lot 15 to meet the "accommodate" standard for public facilities under the statute, because the Official Map calls for a public facility on Lot 15. Attorney Rugh's letter appears to address this issue. However, the reasoning of Attorney Rugh's letter fails to take into account an issue that DRB members have already expressed concern about. I will address that issue below.

- 5) Whether under the ordinance the holder of a 2005 permit for a conditional use that specified the number and location of parking spaces can increase the number and location of parking spaces to a number that exceeds the Table 2 Guidelines and that changes the location in a manner that requires a variance under section 5.6.3 of the current zoning ordinance – and can do so by submitting only a site plan. I explained in my March 4, 2014 letter to you that your ordinance (section 5.10) prohibits such an alteration or extension of a nonconforming use. I also noted that an application for a variance from section 5.6.3 would be required, and could not be granted. Again, I refer you to that letter.
- 6) A new issue has been created by the submission of new plans for the Firehouse Plaza which call for the addition of ten parking spaces. The submission fails to address whether these ten additional spaces were authorized in the initial permit and if they were authorized in front of the building (contrary to current section 5.6.3, barring parking in front of the building). I have not had the opportunity to review the initial permit. If not authorized in the initial permit, this too would constitute an alteration or extension of a nonconforming use, contrary to section 5.10.

A. The Windjammer “split lot” precedent compels denial of the permit because the Farmers Market use will be only 85 hours a year; the proposed parking use is a conditional use, and Hannaford has not submitted a conditional use application.

Attorney Rugh’s letter correctly points out that under the Windjammer precedent, if the proposed use falls into two districts, the ordinance sections for each district apply to the use which is proposed to occur in each district. Since Farmers Markets are listed as a Permitted Use in the Village District, the proposed use would be lawful, the letter explains.

The Rugh letter (page 3, lines 2-5) suggests a permit condition barring any use that is not permitted in the Village District. This begs the question before the DRB. The question is whether use of this area *as proposed by Hannaford* – use as a *supermarket parking lot* and green space 348 days a year -- is a permitted use, a conditional use, or a prohibited use in the Village District.

The DRB’s Site Plan Approval for the Hannaford, at p. 10, determined that this area outside Lot 15 is intended by Hannaford to be a “parking lot and green space.” The paved area of this space will be used for parking of supermarket customer cars and for storage of plowed snow (Site Plan Approval, pages 6, 12 & 16). If this space is not used for a Farmers Market for five years, Hannaford will have the right to terminate all future Farmers Market uses on this space; from that point onward, it would function as a supermarket parking lot and supermarket green space 365 days a year.

Using the Windjammer analysis, the DRB must look at the use proposed to occur in that district, to see if it is permitted or not in that district. Farmer's Markets are permitted as-of-right commercial uses in the Village District, under section 3.5.5.(14). A nonresidential parking lot, however, is a conditional use in the Village District. Ordinance section 3.5.6.(22). In contrast, the parking area for a residence in the Village District is a Permitted Use as of right as an accessory use. Ordinance sections 3.5.4.(4), 5.8.

Hannaford has not submitted a conditional use application. It has requested site plan approval and subdivision approval. The application must be noticed for, and meet the standards governing, conditional use review. The present applications must be denied.

Common sense and the plain meaning of the "Customary Accessory Use" section of the ordinance, section 5.8, compel this conclusion. A parking lot for a farm in the Agricultural District would be lawful as an accessory use under section 5.8, since farm equipment parking areas are customary for farms. A cement-mixing truck parking area would be customary for a cement factory in the Industrial District. However, a parking lot for cement-mixing trucks would not be customary in the Agricultural District, even though the cement factory itself may be legal and proper in an adjoining Industrial District. By the same token, a parking lot for a large supermarket is customary for that type of business, so a parking lot for a large supermarket is permitted *in the Commercial District*.

In contrast, the parking to serve a 36,000 square foot supermarket, and the paved areas used to store snowed plowed from the parking lot needed to serve a 36,000-square foot supermarket, are not "customary accessory uses" to any use that is permitted as of right *in the Village District*. A conditional use application is required.

B. The DRB Now Has the Entire Project Before It, for Approval or Denial As a Whole.

Attorney Rugh's letter also points out that pursuant to 24 V.S.A. § 4421(2) a lot boundary can be changed by subdivision approval without going through a more formal map amendment process. Attorney Rugh points out that the DRB in 2012 "had not yet received an application form and had not yet reviewed" the present subdivision approval. The DRB "lacked sufficient details of Hannaford's proposal" to address whether a change to the official map was needed.

Now, the DRB does possess an application and does have access to "sufficient details."

For the first time in the history of these proceedings, all of the facts are on the table. For the first time, the DRB now knows that the project as a whole cannot be approved without breaching the rule of law set forth in the ordinance that nonconforming uses cannot be altered or extended, as the latest information now shows would be required (as addressed in counsel's March 4, 2014 letter). For the first time, the DRB now knows that

a variance from the existing parking ordinance would also be required (also addressed in the March 4 letter).

Attorney Rugh concluded that it is “unnecessary” for the DRB to revisit its site plan approval. He did not say that the DRB is precluded from doing so. On behalf of the many citizens of Hinesburg who have attended meeting after meeting in opposition to this project, we ask that you now do so. However, regardless of whether you revisit the prior approval, it is clear that the currently pending applications must be denied.

Sincerely,

James A. Dumont

James A. Dumont, Esq.

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