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December 27, 2013

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;  
and Need for Remand to DRB*

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

I write on behalf of Responsible Growth Hinesburg and its many Hinesburg residents. As you know, these residents have testified and provided expert witnesses to testify against the proposed Hannaford store proposal of Martin's Foods of South Burlington.

The testimony by the applicant before the DRB in that matter included proposed land development on the Automotion-Giroux lot. RGH objected that no permit application had been filed for that lot, and there had been no public notice of any proposed land development on that lot. Nonetheless, the DRB approved of the proposed supermarket, including the proposed use of Giroux lands outside of Lot 15. The matter is now on appeal to the Environmental Division of the Superior Court.

It has come to our attention that Martin's Foods of South Burlington and Hannaford Brothers, with the Giroux, have now filed applications for land development and/or boundary line changes for the Automotion-Giroux lot and the Firehouse Plaza lot. Both sets of changes are for the purpose of accommodating the proposed supermarket on Lot 15. Neither set of changes has any independent utility. These changes would not be proposed but for the supermarket proposed for Lot 15. With regard to the Giroux-Automotion lands, the proposed development is part of what we objected to as lacking any application and lacking public notice. These changes should have been proposed together with the Lot 15 application for review by the DRB at that time, as these projects are being proposed to accommodate the supermarket.

The town has no jurisdiction to consider these supermarket-related projects now because the supermarket application is on appeal to the Environmental Division. *Kotz v. Kotz*, 134 Vt. 36 (1975).

Environmental Court Rule 5(i) states "At the request of the tribunal appealed from, the court, at any time prior to judgment, may remand the case to that tribunal for its reconsideration." (The Reporter's Notes to the Rule state that the Environmental Court

“presumably” can do so on its own motion as well.) This rule is a reflection of the general rule of appellate jurisdiction in Vermont, addressed in *Kotz*, that once a matter is appealed the tribunal appealed from loses jurisdiction over the matter. If the lower tribunal, or the parties, wish to have the lower tribunal take up the matter again, it is necessary to seek a remand.

You may be aware that in important respects the project as submitted to the Act 250 District Commission is different from the project for which a zoning application was filed. For example, we now know that inherent in the proposed project is continued flooding of Dark Star Properties’ land (Lot 11). The applicant’s engineer, Mr. O’Leary, testified before the District Commission that if Dark Star were to fill in its land to prevent flooding, just as Martins Foods proposes to fill in parts of Lot 15 and the Giroux lands to allow the proposed Farmer’s Market to occur on dry ground, there would be no basis for his projections that the storm water discharge plan for the project as a whole would succeed. In other words, the Martin’s Foods project uses the Dark Star Properties’ lands. Without continued use of Dark Start Properties’ lands, the project would fail the Town’s zoning ordinance (as well as the stormwater regulations). This is “land development” on Dark Star Properties within the meaning of Article 10 of the ordinance.

We have also learned that during peak storm events (those exceeding the once-in-ten-years standard), the stormwater being piped from the project would be discharged into the small wetland and detention pond on Lots 1 and 2 (Jolley and Tailhook) in such quantity and force that it would erode those wetlands. The eroded sediments from the Jolley and Tailhook lands would be flushed into Patrick Brook. This too is “land development” within the meaning of Article 10. That is, this project will be using, or extending or changing the use of, those lands.

Therefore, RGH asks that the Town refrain from processing the applications for the Giroux-Automotion and Firehouse Plaza land development. Instead, RGH asks that the DRB request of the Environmental Division that the Environmental Division remand this matter to the DRB so that the DRB may consider all of the proposed development connected with the supermarket project as a whole at one time. This should include the use of the Jolley, Tailhook, Firehouse Plaza, Giroux and Dark Star lands as well as Lot 15. The DRB should then render a decision on the project as a whole.

Sincerely,

*James A. Dumont*

James A. Dumont, Esq.

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