

April 10, 2018

VIA ELECTRONIC MAIL ONLY

Alex Weinhagen
Director of Planning & Zoning
Town of Hinesburg
10632 Route 116
Hinesburg, VT 05461

Re: Hannaford Site-Plan Application – Development Review Board Review

Dear Alex,

You have requested our opinion regarding the Town of Hinesburg (“Town”) Development Review Board’s (“DRB”) review of Martin’s Foods of South Burlington, LLC’s (“Hannaford”) January 26, 2018 application for site-plan approval for a 36,000 square-foot grocery store with associated improvements on Lot 15 of the Commerce Park subdivision (the “Site-Plan Application”). Please find our response to each of the questions below.

Question 1: Which Version of the Town’s Zoning Regulations Apply to the Site-Plan Application?

The DRB should review the Site-Plan Application as a new application under the standards in the current, October 3, 2016 Zoning Regulations. While Hannaford argues that the 2009 version of the Town’s Zoning Regulations applies to its application pursuant to the Vermont Supreme Court’s opinion in *In re Appeal of Jolley Assocs.*, 2006 VT 132, 181 Vt. 190, 915 A.2d 282, the Vermont Supreme Court stated otherwise in its opinion in *In re Hinesburg Hannaford Act 250 Permit; In re Hinesburg Hannaford Site Plan Approval*, 2017 VT 106.

In its November 9, 2017 opinion, the Vermont Supreme Court expected Hannaford to file “a new application for site-plan approval” after the Court’s denial of Hannaford’s 2010 site-plan application. *Id.* at ¶ 23. In addressing the Neighbors’ argument that the Hannaford 2010 site plan violated the Town’s limitations on “front yard” parking, the Court clearly stated that it was only addressing the “front yard” parking issue “because, unlike the other issues in the site-plan appeal, it is likely to reoccur in the context of a new application for site plan approval” *Id.*

(emphasis added). The Court also stated that, “[I]t would not make sense to force Hannaford to redesign its project in connection with a new application for site-plan approval, if it chooses to do so, with continued uncertainty as to the effect of the front-yard restriction on parking.” *Id.* (emphasis added). In light of the Court’s unambiguous and repeated references to Hannaford’s subsequent site-plan application as a “new application,” the DRB must treat the 2018 Site-Plan Application as a new application. Further, since the Site-Plan Application is a new application, the DRB is bound to review it under the zoning regulations in effect at the time it was filed, being the Town’s current, October 3, 2016 Zoning Regulations. *Smith v. Winhall Planning Commission*, 140 Vt. 178, 181-82, 436 A.2d 760, 761 (1981).

Hannaford’s reference to the Vermont Supreme Court’s *Jolley* opinion is correct in the sense that the current Site-Plan Application is properly characterized as a successive application. The 2018 Site-Plan Application is indeed the second application filed for the same project after the denial of Hannaford’s 2010 application for site-plan approval for violation of the 75-foot canal setback requirement. As a successive application, the Site-Plan Application may only be reviewed by the DRB if a substantial change of conditions has occurred or “other considerations materially affecting the merits of the request have intervened between the first and second application.” *In re Carrier*, 155 Vt. 152, 158, 582 A.2d 110, 113 (1990) (internal quotations omitted).

However, Hannaford does not have vested rights in and is not entitled to review of the 2018 Site-Plan Application under the Town’s former zoning regulations as was the case in *Jolley*. The critical difference between this situation and the facts in *Jolley* is that Hannaford’s 2010 application for site-plan approval was denied outright by the Vermont Supreme Court. In *Jolley* the Court found the applicant was entitled to vested rights in the former zoning regulations and could “refile” its application with the appropriate municipal panel below. *Jolley*, 2016 VT 132, at ¶ 15, 181 Vt. at 197, 915 A.2d at 289. Also, the Court stated that *Jolley*’s “reapplication would not require the sort of substantial revision that should dictate a loss of vested rights.” *Id.* at ¶ 16, 181 Vt. at 197-98, 915 A.2d at 288. Furthermore, the then-Environmental Court had denied *Jolley*’s conditional-use application on appeal and closed the appeal “without prejudice” to [the appeal] being reopened.” *Id.* at ¶ 3, 181 Vt. 192, 915 A.2d at 285.

In *Hannaford*, however, the Vermont Supreme Court expressly stated that it was not remanding Hannaford’s 2010 site-plan application, *Hannaford*, 2017 VT 106, ¶ 23, and instead expressly denied the 2010 site-plan application outright. *Id.* at ¶ 22. In denying the site-plan application, the Court also expressly left unaddressed a number of significant issues in the site-plan review: the east-west swale, stormwater control and traffic issues. *Hannaford*, 2017 VT 106, ¶ 23, n.5. As

a result of this decision and the Court's unambiguous statements, Hannaford's 2018 Site-Plan Application is a "new application" that must be reviewed under the regulations in effect when the application was submitted – the Town's current, October 3, 2016 Zoning Regulations.

Question 2: Which Provisions of the Zoning Regulations' Site Plan Review Standards Apply to the Site-Plan Application?¹

In light of our conclusion that Hannaford's 2018 Site-Plan Application is a new application, the DRB should apply all of the the applicable site-plan review standards in § 4.3.4 of the 2016 Zoning Regulations. Since the Vermont Supreme Court denied Hannaford's 2010 site-plan application outright in its November 9, 2017 opinion, Hannaford is not entitled to a limited review of its application before the DRB. Because the 2018 Site-Plan Application is to be reviewed under the current, 2016 Zoning Regulations as a new application, neither the DRB nor a court has previously rendered positive findings on the Site-Plan Application under any of the applicable site plan review criteria in § 4.3.4 of the Town's 2016 Zoning Regulations. Thus, the DRB should review the Site-Plan Application anew.

In its November 9, 2017 opinion, the Vermont Supreme Court was clear that it was "not actually remanding the site plan matter." *Hannaford*, 2017 VT 106, ¶ 23. If the site-plan application had been remanded by the Vermont Supreme Court, then Hannaford might arguably be entitled to a more limited review of its site-plan application. Since no party appealed the positive findings on certain site plan review criteria that were rendered in the Environmental Division of Vermont Superior Court's (the "Environmental Division") April 12, 2016 Decision on the Merits (for example, the court's finding that the site plan complied with 2009 Zoning Regulations § 4.3.4(3)), the DRB likely would have been bound by those positive findings if the site-plan application were remanded, like the conditional use application at issue in *Jolley*, 2016 VT 132, at ¶ 14, 181 Vt. at 196, 915 A.2d at 288.

However, in this instance there was no remand of Hannaford's earlier, 2010 site-plan application, and there has yet to be a final judgment on the current Site-Plan Application's compliance with any of the site plan review criteria of the 2016 Zoning Regulations. Therefore, the DRB should consider Hannaford's Site-Plan Application as a new application and apply all of the site plan review criteria of 2016 Zoning Regulations § 4.3.4.

¹ We provided different response to this question in our opinion letter, dated March 2, 2018. Upon further consideration, our opinion on this issue in the March letter was in error. We have revised our opinion on Question 2 in this letter, and our response to Question 2 in the earlier, March letter should be stricken.

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Question 3: Have the Other Six Approvals Related to Hannaford's Project Expired?

The six earlier DRB approvals that relate to Hannaford's project that normally would have expired under the Zoning Regulations remain valid, and the approvals should be reissued despite the time limits in Zoning Regulations § 8.5. In *Preseault v. Wheel*, the Vermont Supreme Court held, "[W]here a valid permit is issued for a specified period, and where actual construction is delayed by litigation, a permittee otherwise proceeding in good faith is entitled to reissuance of that permit, even where the zoning was meanwhile changed so that the project is nonconforming." 132 Vt. 247, 252-55, 315 A.2d 244, 247-48 (1974).

Here, Hannaford's project has been delayed by on-going litigation. Hannaford has proceeded expeditiously and in good faith notwithstanding the litigation. As a result, the six other zoning approvals related to Hannaford's project that would have otherwise expired under Zoning Regulations § 8.5 remain valid. Once litigation regarding the project is complete, the effective date of the six related approvals commences, and the approvals will then become subject to the time limits in Zoning Regulations § 8.5.

Question 4: Who Receives Notice of the DRB's Hearing on the Site-Plan Application?

Lastly, since the Site-Plan Application is to be treated as a new application, the Town should give notice of the DRB's hearing on the Site-Plan Application as it would for any other new application before the DRB. Essentially, the individuals or entities entitled to notice are those described in 24 V.S.A. § 4464(a)(2), including current owners of properties adjoining Lot 15 in Commerce Park.

We trust that the foregoing was responsive to the DRB's questions. Please contact us with further questions.

Sincerely,



David W. Rugh

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