

# Permitting & Case Law: The Year in Review (2017)



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# Vermont Supreme Court 2017 Decisions of Note



- *Atwood PUD* (Statement of Questions/Public Notice Requirements)
- *Langlois/Novicki* (Government Estoppel and Enforcement)
- *Hinesburg Hannaford* (Multiple Site Plan and Act 250 Issues)

# *In re Atwood PUD*

## 2017 VT 16 (Mar. 17, 2017)

### Scenario:

- Aug. 2014: Atwood applies for PUD in Jericho for 6-unit subdivision on 28 acres carved out of larger farm
- Hearing notice posted on tree along road next to larger parcel, but not on road closest to the proposed project site
- Hearing notice also published and mailed to abutters
- All neighbors participated in Sept. 25 hearing
- PUD approved on Oct. 27, 2014
- On appeal, single all-encompassing question, followed by amended statement raising several inter-related issues



# *In re Atwood PUD*

## 2017 VT 16 (Mar. 17, 2017)

### Court Rulings:

- With broad questions in amended statement, the Environmental Court is obligated either to decide them or to further clarify them on remand
- While various notice requirements are mandatory, a defect does not invalidate board action “where reasonable efforts are made to provide adequate posting and notice.” 24 V.S.A. § 4464(a)(5)
- Posted notice location not a problem since other notice procedures followed, actual notice provided, neighbors participated, and zoning officer approved location



# *In re Langlois/Novicki Variance Denial*

## 2017 VT 76 (Aug. 25, 2017)

### Scenario:

- Neighbors own homes on Maquam Shore
- 2014: Langlois approached contractor about building pergola on preexisting patio
- Bylaws allow one accessory structure <100 sq ft, 10 ft in height, and 5+ feet from lot lines
- Approached ZA/friend w/ sketch showing pergola over 10 ft high
- After reviewing bylaws, ZA said no permit needed
- \$33,000 spent on structure, within 1 ft of line, but no complaints
- After complaint, Selectboard required application, which was then denied, as was a request for variance – NOV followed



# *In re Langlois/Novicki Variance Denial*

## 2017 VT 76 (Aug. 25, 2017)

### Court Rulings:

- Can the town enforce after ZA twice indicated that no permit was required?
- Equitable estoppel: Other party must know know relevant facts; other party must intend conduct to be acted upon; claimant must be ignorant of true facts; and claimant must rely to his detriment
- Estoppel vs. gov't difficult to prove – 5th prong: Injustice from denying estoppel must outweigh negative impact on public policy if estoppel applied
- 3-2 decision: Majority believes \$33K investment based on ZA's comments and no complaint during construction = estoppel
- Dissent believes public's right to depend on the integrity of the process should have outweighed investment



# *In re Hinesburg Hannaford Act 250 Permit and Site Plan Approval*

2017 VT 106 (Nov. 9, 2017)

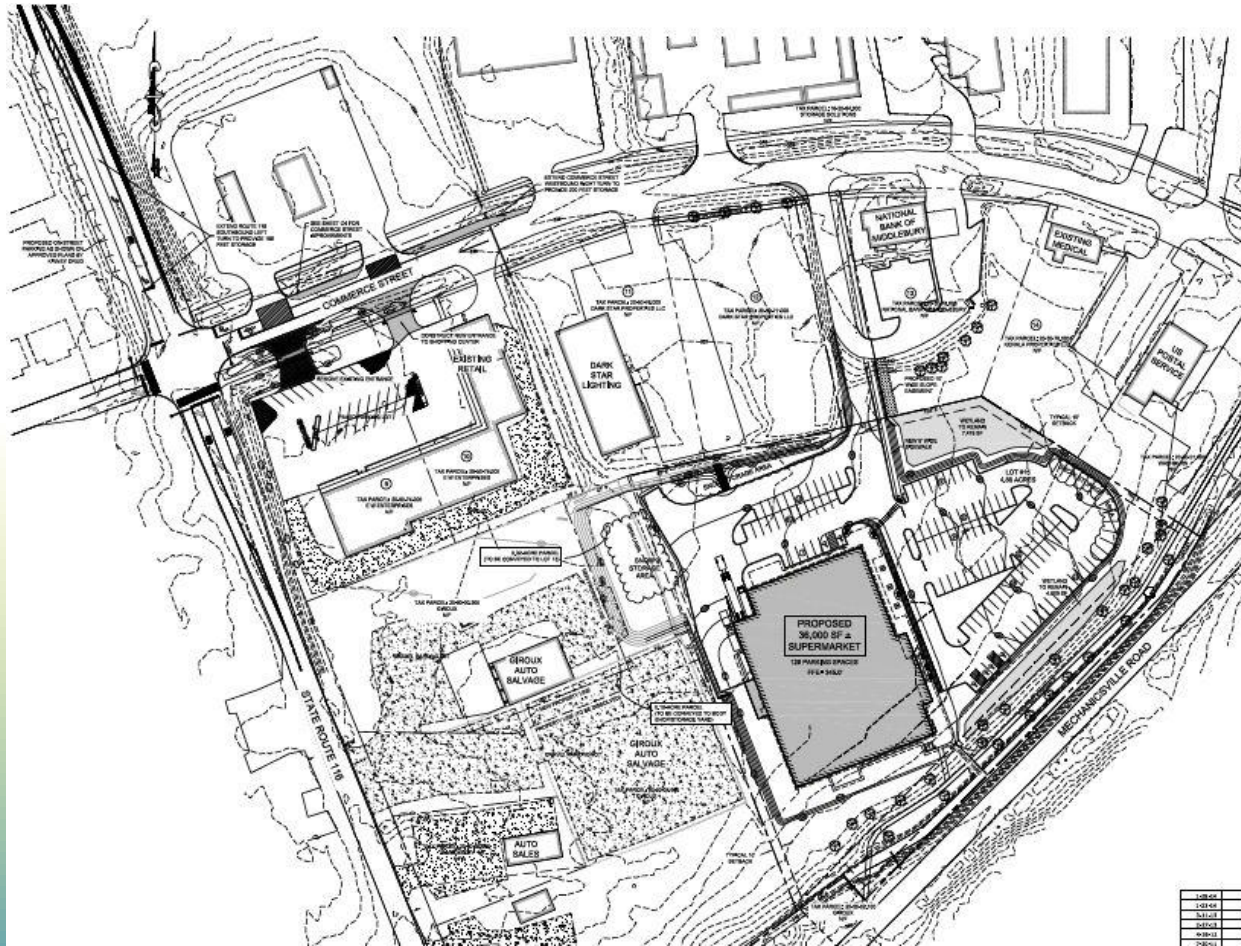
## The Project:

- 2010: Hannaford files first town permit application for 36,000 s.f. grocery store/pharmacy
- Lot 15: Largest and last undeveloped lot in Hinesburg's Commerce Park
- Literally the only lot in town allowing for store of this size
- Unique design after community charrettes
- 8 combined appeals to Env'tl Court 2012-14 (zoning, Act 250, ANR)
- Stormwater design changes while pending before court to address abutters concerns regarding scope of drainage easement
- 2016: Favorable Env'tl Court decision, then only Act 250 and site plan approvals appealed to Vermont Supreme Court



# In re Hinesburg Hannaford Act 250 Permit and Site Plan Approval

## 2017 VT 106 (Nov. 9, 2017)





# *In re Hinesburg Hannaford Act 250 Permit and Site Plan Approval*

2017 VT 106 (Nov. 9, 2017)

## Site Plan Scenario:

- 1987 subdivision approval for Commerce Park with lot, canal and brook setbacks on one sheet, but referenced nowhere else
- Multiple brook and lot setbacks occupied by other commercial buildings over the decades
- Setbacks never raised with respect to the other 14 lots within the commercial park
- Odd-shaped lot with access drive from Commerce Street, buildings between store and Commerce Street, industrial canal and sidewalk between store and Mechanicsville Road



# *In re Hinesburg Hannaford Act 250 Permit and Site Plan Approval*

2017 VT 106 (Nov. 9, 2017)

## Court Rulings on Site Plan:

- Setback lines sufficiently clear on approved plat to be enforceable
- Subdivision compliance is a condition of site plan approval
- Extrinsic evidence regarding noncompliance throughout Commerce Park irrelevant if plat expressly imposes setback
- Town zoning limits parking in “front yard,” defined as the area between the building and the street
- Appellants argued parking near doors and access is “front yard”
- Environmental Court ruled that zoning implements policy of less parking between street and building wall facing the street



# *In re Hinesburg Hannaford Act 250 Permit and Site Plan Approval*

2017 VT 106 (Nov. 9, 2017)

## Act 250 Scenario:

- Original Act 250 application in 1987 described park as including “primarily local small scale and start-up businesses”
- In the 1990s, the Town invested over \$100,000 to construct sidewalk on other side of canal from Mechanicsville Road
- Before trial, stormwater swale moved from existing drainage easement to Lot 15 – no ANR permit at time of Env'tl Court trial
- Rte 116/Mechanicsville Rd. intersection long failing – court required signal before project despite lack of VTrans approval
- Court required, then rescinded, post-development traffic study



# *In re Hinesburg Hannaford Act 250 Permit and Site Plan Approval*

2017 VT 106 (Nov. 9, 2017)

## Court Rulings on Act 250:

- Even if enforceable, “primarily small scale” expressly anticipated some bldgs that are small scale, especially on largest lot
- Under Criterion 9(K), project would not “materially interfere” with public use and enjoyment of canal sidewalk due to commercial context and landscaping
- Absent presumption, Hannaford failed to present evidence that complying w/ ANR regs results in design that “would likely work as intended” – requires remand
- Requiring signal w/out VTrans assent contrary to 10 V.S.A. § 6087(b) (Criterion 5 can support reas. conditions, but not denial of project)
- Remand to consider mitigation w/ VTrans (e.g., alternatives study)
- Remand to consider post-dev. traffic study that complies w/ Treetop



# QUESTIONS?

## SPEAKER



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