

September 6, 2016

Amanda Lessard, Town Planner
Town of Windham
8 School Road
Windham, ME 04062

Re: Proposed Subdivision Amendment to Otterbrook Estates

Dear Amanda:

Thank you for having the applicant for the proposed subdivision submit application to the MDEP to properly amend the original permit. While we, as does our legal team, believe the MDEP permit can be change as it has now been, the Deed Restrictions are independent and can be and shall be defended regardless of the permit. Case law in support of the Deed restrictions is abundant and, if necessary, the residents of Otterbrook Estates will defend these restrictions.

We can appreciate that the Planning Board and Town Staff may feel that they are doing the right thing to try and fix what is now being viewed as an unlawful issuance of a building permit for a garage, but the Planning Board simply does not have the authority to approve a request for a subdivision amendment if the dimensional standards of the zoning ordinance are not met. If the Planning Board grants approval of a subdivision amendment that does not meet the dimensional requirements of the Land Use Ordinance, which cannot be waived by the Planning Board, an appeal to the Maine Supreme Judicial Court would likely overturn such an approval, which the Town would then have the burden to defend at the cost of the Windham tax payers.

We have performed additional research regarding the above referenced project including a review of the public records and discussions with attorneys and other land use professionals and we believe the application before the Planning Board related to Lots 26 and 27 of the Otterbrook Subdivision fails to address many issues, some of which are summarized below.

1. Lots 26 and 27 are non-conforming lots of record. Lots could not be created under the Town's current ordinances for cluster subdivisions that have land areas of 100,554 SF and 92,755 SF because lots are only allowed to be a maximum of 50,000 SF, with one lot in the subdivision up to 60,000 SF. The proposal does not make the lots more non-conforming related to square footage because the land swaps maintain the existing non-conformity, but since Lot 26 has no dwelling on it is our understanding that it loses its "grandfathering" status if the lot dimensions change from what was actually grandfathered and that lot could not be developed with a single-family dwelling because that use does not exist on the lot today (except as an expansion of Lot 27, which the Town is saying they now no longer support). If the lot lines change on Lot 26, a building permit for a single-family residence should not be allowed to be issued for that lot.
2. Lots 26 and 27 are also non-conforming in regard to street frontage, since they have less than the 200 feet required in the Farm Zone. The proposal is to reduce the street

frontage on Lot 27 to 100 feet, which is allowed under the current standards for a Cluster Subdivision, but the applicant cannot only utilize the provisions of the current subdivision ordinance that benefit their cause and ignore the other requirements of the ordinance (maximum lot size, for example). We understand that the current lots are “grandfathered” because they are part of a previously approved subdivision plan, but again if the lot lines change and the lot no longer meets the Town’s dimensional requirements, the lot owner should not be eligible to receive future building permits or establish a new use on the lot. If the lot lines stay just as they were originally approved, this issue goes away.

3. The proposal is to restrict the development of Lot 26 with an easement that essentially creates more open space. The Town’s ordinances require that land not suitable for development be deducted from the net residential density calculation. If an easement is put into place over the portion of the land on Lot 26 that was originally shown as the “build site” for Lot 26, the applicant should be required to perform a calculation that satisfies the Board that available Net Residential Area is not impacted after deducting the 400’ by 150’ restrictive easement.
4. Again, in regard to the non-conformity of the lots, the proposal is to allow a reduction of building setbacks to the current standards for Cluster Subdivisions. The applicant cannot pick and choose which standards to apply to the lot and which ones to ignore – either the lots meet all dimensional requirements to be eligible for amendment or they have to remain as “grandfathered” lots of record from a previously approved subdivision. The MDEP Site Location Order indicates in section 13 that “Buffer Strips are delineated on the plan entitled *Subdivision Plan – Preliminary, Otter Brook*” and our review of the plan clearly shows setback lines on that plan that are shown to be buffers. Allowing development to encroach on those buffers to within 10 feet of the side yard is a violation of the Site Law permit order Condition of Approval #6 (and neighborhood covenants) and creates an additional non-conformity of the lot that is not currently “grandfathered” because setbacks on the previously approved plan are larger than what is proposed.
5. The applicant is proposing to eliminate the development potential of the large knoll of land on Lot 26 by encumbering the area in a no-disturbance easement. The result is an extremely small building window for Lot 26. The applicant should be required to demonstrate that lot 26 can be developed within the very small building window while meeting the neighborhood covenants for building size, required privacy buffers, etc. A grading plan should be developed showing the building, driveway, turnaround area, septic system and other improvements that do not impact the wetlands or required side yard buffers.
6. The Town’s ordinance requires that tree-clearing limits be shown on the plan, and that those limits must be maintained for a period of 5 years. This is not addressed in the current application and must be addressed.

The perception is that the lot line adjustment is necessary to remedy a permit that was issued by the Town in error for the detached garage. The lot owners showed clear intent to violate the building setbacks through issuance of a letter to the Code Enforcement Office and to

consider lots 26 and 27 as one lot. Allowing the lot lines to be adjusted around the garage may seem like a simple fix to the issue, but it creates a number of complexities and non-conformance issues, specifically dimensional standards, and other issues noted above that are not addressed in the application. The lot owners clearly knew of these issues and have chosen to attempt a non-conforming “pick & choose” approach to solving their problem, instead of properly correcting their non-conformance.

We respectfully request that this application be rejected as the proposal before the Planning Board does not properly or legally maintain the Town’s Dimensional Standards, meet MDEP permit conditions and Windham’s Land Use Ordinances, therefore it does not correct the current non-conformance.

Sincerely,
Laurie and Matt Noel
9 Rocklinn Drive
Windham, Maine 04062