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September 19, 2016

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

RE: Lots 26 and 27, Otterbrook Estates

Dear Amanda:

At the request of the Planning Board at the September 12, 2016 Planning Board meeting, I am responding to the question of whether or not Lots 26 and 27 are two separate lots or if they merged into one lot.

A review of the records at the Cumberland County Registry of Deeds shows that the Otterbrook Estates Subdivision was approved in 1989 as a 42 lot cluster subdivision. The approved subdivision plan was recorded in the Cumberland County Registry of Deeds in Plan Book 177, Page 8 and shows Lots 26 and 27 as two separate and distinct approved lots. On June 2, 2000, Graylin and Diane Dyer were conveyed Lot #26 by Easter Rolfe and then by a deed dated March 2, 2001, the Dyers bought Lot #27 from William Thompson. The applicant, KP Gagnon Company, LLC, took title to the property in 2016 by two separate deeds from the Dyers – one deed for Lot #26 and one deed for Lot #27.

The neighbors who oppose this subdivision amendment have contended that the previous owners (Dyer) showed their intent to merge the lots in 2000 for tax purposes when William Thompson submitted a letter to the Code Enforcement Department following the construction of a garage and therefore the lots have lost its "grandfathering" status.

The neighbors arguments are flawed on many counts and their facts are also unsubstantiated for the following reasons:

A letter from Mr. Thompson may have been appropriate for construction; however, it does not officially merge two lots. Only the Planning Board could have accomplished the merger. There have been no further subdivisions or plans recorded that change the status, size or location of Lots 26 and 27. Nor have there been any conveyances on record at the Registry of Deeds to



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indicate that the lots have merged. Furthermore at the time of the letter in 2000, the Dyers only owned Lot #26 and Thompson owned Lot #27, so any thoughts on what the Dyers were thinking is purely speculative.

The Otterbrook Subdivision was approved in 1989 for 42 single family residential homes. Contrary to the neighbors arguments, the intended use has not and will not change by keeping Lots 26 and 27 as two separate and distinct lots. The subdivision amendment will still show 42 residential lots, which was the intent of the original plan.

A review of Section 200 ("Nonconforming Provisions") of the Town of Windham's Land Use Ordinance confirms our position on this matter. Section 204 deals specifically with nonconforming lots of record. Section 204.A. and 204.B. deal with dimensional standards and single ownership and support many of the neighbors' contentions; **however**, Section 204.C. specifically states that "Lots in subdivisions approved by the Windham Planning Board after February 7, 1972, are exempt from the provisions of Section 204.A. and Section 204.B.above." Based upon the Town's Land Use Ordinance, Lots 26 and 27 are separate and distinct; not substandard; and comply with the Ordinance.

Although the original subdivision did not have a maximum size limitation on clustered lots, the current town ordinance does have a maximum size limitation of 50,000 square feet. Both lots 26 and 27 are currently larger than 50,000 square feet. If lots 26 and 27 were to be combined, the new combined lot would be larger and more non-conforming in area due to changes in town zoning. Contrary to the desire of the opponents, the Planning Board does not have the authority to make a non-conforming lot more non-conforming.

Attorney Bower told the Board at the September 12<sup>th</sup> meeting that the Maine Law Court case Day v. Town of Phippsburg supported the opponents' argument and position regarding merger of nonconforming lots. The facts in the Day case are very different and distinguishable from our present case. Of note, the Day case involves a Town's Shoreland Zoning Ordinance that does not have the same language that Windham has in Section 204.C. of Windham's Land Use Ordinance. Windham's Shoreland Zoning Ordinance is similar to Phippsburg, however, the Otterbrook Subdivision is not in the Shoreland Zone.

Attorney Bower also represented to the Board that the current amendment must be decided upon by the Zoning Board of Appeals. The Zoning Board of Appeals hears and decides administrative appeals and variance appeals, not amendments to a subdivision plan. The applicant is requesting an amendment to a subdivision plan and does not need a variance or a special exception; therefore, the Planning Board is the appropriate forum for this applicant.

Mr. Gagnon did a thorough investigation prior to purchasing the two lots. He hired First Choice Title Company to do a title search and they confirmed that the record at the Registry of Deeds showed two separate and distinct lots. Ken Lefebvre, President of First Choice, also



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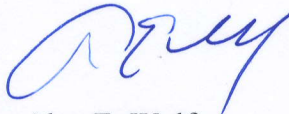
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communicated in writing with Heather McNally, the Director of Code Enforcement and Zoning Administration, who confirmed that Lots 26 and 27 were two separate Lots. If the Town's CEO had not given that assurance, Mr. Gagnon would never have purchased the property.

Mr. Gagnon has worked with the Town and followed their advice and directions throughout the whole approval process. He has changed his plans to show a land swap. He has sought and received approval from the Department of Environmental Protection. And he has submitted a plan that was approved by the Town Planner. At this point all Mr. Gagnon wants to do is alter the lot lines between Lots 26 and 27 and swap 5,658 feet between the lots so that the garage currently on Lot 27 will meet the setback requirements. The subdivision amendment would also place an easement on Lot 26 to benefit Lot 23, so that no building can be placed on the easement. The amendment would alter the building envelope on Lot 26 to reflect the proposed lot configuration and remove the restriction that Lot 26 must have a peat filtration septic system. All of these requests comply with the law and the Town's ordinance and do not affect the intent of the 42 lot subdivision that was approved in 1989.

If you or the Town's counsel has any questions, please let me know.

Very truly yours,



Alan E. Wolf

AEW/ah

cc: Kevin Gagnon