

Horace W. Horton
Andrew W. Sparks
Paul E. Peck
Roger P. Asch
Scott E. Herrick
Christopher E. Pazar
Nathaniel R. Huckel-Bauer
Danelle R. Milone
Misha C. Pride
Thomas E. Schoening III
William J. Kennedy
Matthew K. Simone



Drummond & Drummond

A Limited Liability Partnership
Counselors At Law

One Monument Way, Portland, Maine 04101
Phone: (207) 774-0317 Fax: (207) 761-4690

Wadleigh B. Drummond
1885-1979
Josiah H. Drummond
1914-1991
Philip P. Mancini
1963-2016

Of Counsel
Arthur A. Cerullo
David J. Marchese
Robert C. Santomenna
Paul M. Koziell

(207) 775-7346
tschoening@ddlaw.com

October 6, 2021

SENT VIA EMAIL ONLY – Jon Rioux jgrioux@windhammaine.us
Town of Windham
Zoning Board of Appeals
8 School Street
Windham, ME 04062

RE: ZBA 21-007 CONDITIONAL USE APPLICATION: 86 TANDBERG TRAIL

Dear Members of the Windham Zoning Board of Appeals:

This firm has been retained by Day One - Smart Child and Family Services (collectively the “Applicant”), with respect to the Application before the Zoning Board of Appeals (the “Board”) to modify the use of the Applicant’s property at 86 Tandberg Trail, Windham, Maine (the “Property”) from an outpatient substance abuse treatment center to include conditionally permitted residential substance abuse treatment services (collectively hereinafter the “Application”).

The purpose of this letter is to provide a response to the Board following the Board meeting on September 15, 2021, wherein discussion and review of the Application was tabled and postponed to the next meeting of the Board scheduled for October 7th, 2021.

This letter contains the following:

- I. A short summary of the September 15th meeting of the Board;
- II. Supporting materials related to the Public Safety and Sewage Disposal Review Criteria for Conditional Uses under Section 516(H)(5&7) of the Town of Windham Land Use Ordinance (the “Ordinance”);
- III. Response to concerns raised by the Board that the proposed change of use will negatively impact the value of nearby properties (Section 516(H)(1) of the Ordinance);
- IV. Raise Potential Conflict of Interest of Board Member related to the Application.

I. Summary of September 15th meeting of the Board.

1. The Board deemed the Application completed.
2. The Board held a properly noticed public hearing to discuss the Application. Public comment was opened and closed without any members of the public offering comment on the Application.
3. The Board discussed the Application using the review criteria set forth in Section 516(H) of the Ordinance.
4. Board Member, Christopher McDonald (“McDonald”) spoke at great length regarding his opposition to the Application based on: (a) concerns related to public safety and security; (b) McDonald’s belief that the proposed use of the Property as a residential treatment facility for Mainer’s between the ages of 12-18 years of age would depreciate the value of nearby properties (specifically properties within an 1/8th of a mile of the Property).
5. Board Member, James Cobb, made a motion to vote on whether to approve the Application. Board Member and Chairperson, Chuck Fleck, stated that “[he] did not believe the chair could second [the motion].” Receiving no second, the motion to vote on whether to approve the Application failed.

In the interest of clarity under Section E(5) of the Rules of the Windham Planning Board (the “Municipal Rules”), the Roberts Rules of Order shall supplement said Municipal Rules, and control where specific items are not covered by the Municipal Rules. The Robert Rules of Order include specific rules for small boards, wherein the chairperson has the same rights as other members, including the right to make motions, second motions, and vote. A second merely implies that the seconder agrees that the motion should come before the Board and not that the seconder necessarily favors the matter which is up for vote.

6. The Board resolved to table discussion on the Application for the night and to continue discussions at the next Board meeting, in order to allow the Applicant to respond to Board concerns related to (a) public safety, (b) sewage disposal; and (c) whether the proposed use of the Property would diminish the value of surrounding properties.

II. Supporting Materials for Public Safety and Sewage Disposal (Review Criteria 5 and 7 under Ordinance).

Kevin Schofield, Chief of Police for the Windham Police Department, stated that he was not concerned that the residential treatment center would have an adverse impact on the local police department (see email from Chief Schofield attached hereto as **Exhibit A**).

Brent Libby, Chief of the Windham Fire and Rescue, stated that he did not anticipate that the residential treatment center would impose an increased burden on the Windham Fire and EMS services (see email from Chief Libby attached hereto as **Exhibit B**).

The private septic system serving the Property was inspected on September 23, 2021. Please see a copy of the Septic System Inspection report attached hereto as **Exhibit C** (the “Septic Report”). The Septic Report indicated the Property is served by a septic system comprised of two septic tanks (one new and one old) both draining to a common field. The report noted: the new tank to be in good condition; the old tank to be in satisfactory condition; the drain field to be in very good condition; and the entire system requiring no repairs or replacements. The report also indicated that the septic system is located in an area with ideal drainage, for the likely intended usage by 6-8 full time residents. Further, the Applicant will make any modifications to the sewage disposal system that are recommended as part of the permit review and approval process.

III. Response to McDonald’s Concern of the Proposed Use Reducing Nearby Property Values (Review Criteria 1 under Section 516(H) of the Ordinance).

At the September 15th Board meeting, McDonald communicated his concern that modifying the existing use of the Property as an outpatient substance abuse treatment center to include residential substance abuse treatment services would decrease the value of nearby properties. McDonald stated that “the proposed use . . . I believe will depreciate the value of [nearby] properties.”¹ McDonald appears to have based his belief on personal experience and bias which lead him to conduct his own research. McDonald’s research lead him to rely on an article from 2014, entitled ““Not in My Backyard”: The Effect of Substance Abuse Treatment Centers on Property Values” published in the Journal of Sustainable Real Estate, a copy of which is attached hereto as **Exhibit D** (hereinafter “2014 Article”).² The authors of the 2014 Article concluded that the introduction of a new substance abuse treatment center into a residential neighborhood would result in decreased nearby home sale prices, and specifically, homes within 1/8th of a mile of a new substance abuse treatment center could sell for approximately 8% less than otherwise comparable homes.

The Applicant does not agree with McDonald’s belief and asserts that McDonald’s reliance on the 2014 Article is not relevant or persuasive to the Board’s review of the Application for the following reasons:

1. The 2014 Article focuses on new treatment centers that are embedded in residential neighborhoods. The Property at 86 Tandberg Trail is not embedded in a residential neighborhood, in contrast, it is situated within the Commercial 1 Zoning District (“C-1 District”) and in the middle of the main commercial strip of downtown Windham. Unlike introducing a new treatment center into the heart of a quiet residential neighborhood, the conversion of an existing outpatient treatment center within the C-1 District to include residential substance abuse treatment services will not impact the value of surrounding properties whatsoever.

2. The analysis contained in the 2014 Article does not delineate between outpatient treatment centers and residential treatment centers. Smart Child & Family Services has operated the Property as a treatment and counseling center (in one form or another) since 1996. Modifying the use of the Property from an outpatient only treatment center to include residential substance abuse treatment services will not have any impact on the value of nearby properties. The 2014 Article also

¹ Video of Zoning Board of Appeals Meeting, link: [ZBA - Sep 24th, 2021 \(granicus.com\)](#) at 1:38:53.

² Claire La Roche, Bennie Waller & Scott Wentland (2014) “Not in My Backyard”: The Effect of Substance Abuse Treatment Centers on property Values, Journal of Sustainable Real Estate, 6:1, 63-92, DOI: [10.1080/10835547.2014.12091865](#)

does not address the impact of modifying an existing treatment center from an outpatient treatment center to include residential treatment services.

3. The conclusions reached by the authors of the 2014 Article are strongly disputed by the findings of an article entitled “Substance Use Disorder Treatment Centers and Property Values”, published in January 2019 by the National Bureau of Economic Research, a copy of which is attached hereto as **Exhibit E** (the “2019 Article”).³ The 2019 Article suggests that the findings and conclusions of the 2014 Article are at best unclear and overstated. Further, the 2019 Article indicates that the conclusions reached by the 2014 Article are likely based on stigma and NIMBYism (“*Not in my Back Yard*”). The authors of the 2019 Article concluded that the introduction of a new substance abuse treatment center into a local area produces no statistically significant evidence of changes to nearby property values.

4. Aside from the heavy reliance on articles to evaluate McDonald’s belief that the change of use proposed by the Applicant will diminish the value of nearby properties, the Board must also consider whether the proposed change of use would have any more significant impact on surrounding property values than the existing uses of other nearby properties. Nearby uses include:

- (Abutter left) 89 Tandberg Trail – Veterinary Hospital
- (Abutter right) 92 Tandberg Trail – Industrial Excavation Contractor
- 92 Tandberg Trail – Forever Two Wheels Motorcycle Shop, Garage Storage/ Rental
- 95 Tandberg Trail – Pitman’s Redemption Center and Agency Liquor Store
- 104 Tandberg Trail – Massage and Spa
- 741 Roosevelt Trail – Walgreens

The Applicant asserts that modifying the use of the Property from the existing outpatient substance abuse treatment center to include residential substance abuse treatment services will not depreciate the value of nearby properties.

IV. Potential Board Member Conflict of Interest Related to the Application.

The issue of whether the proposed change of use of the Property will diminish the value of nearby properties has been raised by the Board. If the Board agrees that the change of use will depreciate the value of surrounding properties, then any Board member who owns property nearby the Property would have a pecuniary conflict of interest.

A conflict of interest is defined in the Rules of the Windham Planning Board, The Windham Municipal Code of Ethics, and M.R.S.A 30-A §2605. Pursuant to the Windham Municipal Code of Ethics “No Town official shall, in such capacity, participate in the deliberation or vote, or otherwise take part in the decision-making process, on any agenda item before his/her collective body in which he/she or a member of his/her immediate family has a financial or special interest of a pecuniary nature...” A pecuniary interest is an interest involving a reasonable expectation of financial gain *or loss*. Further, under M.R.S.A 30-A §2605(6) “Every municipal and county official shall attempt to avoid the appearance of a conflict of interest by disclosure or by abstention.”

³ Substance Use Disorder Treatment Centers and Property Values, Brady P. Horn, Aakrit Joshi, and Johanna, Catherine Maclean. NBER Working Paper No. 25427. January 2019. JEL No. H0,I1,R3.

If the Board agrees that the modified use will depreciate the value of surrounding properties, and a member of the Board owns property nearby the Property (Example: within 1/8th of a mile of the Property), then it follows that such a Board member would expect to realize a financial loss if the Application were approved (a direct pecuniary interest).

If any Board member owns property near the Property this potential conflict of interest must be disclosed to the Board. Any Board member may raise the issue of a potential conflict of interest. Upon disclosure of a potential conflict of interest, the Board member must either immediately abstain from further review of the Application, or the Board must hold a vote (excluding the conflicted Board member) to determine whether: (a) there exists either a conflict of interest or appearance of a conflict of interest; and (b) to immediately excuse the conflicted Board member from participating in further review of the Application.

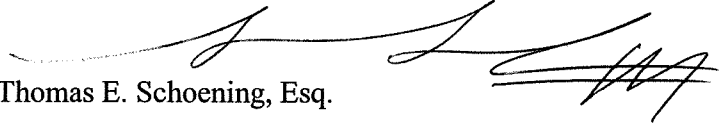
Conclusion.

In summary, the proposal to change the use of the Property from the existing outpatient substance abuse treatment center to a facility which also offers substance abuse treatment services within a residential facility will not overburden the local police, fire, and rescue services; will not exceed the capacity of the private sewage disposal system serving the Property; and will not result in a depreciation of nearby property values. For these reasons together with the discussion and findings of fact set forth at the September 15th Board meeting, the Board should vote to approve the Application.

Finally, The Applicant is adamant that the proposed change of use will not negatively impact the value of nearby properties, however, if the Board disagrees, and any Board member owns property nearby the Property, then such Board member would have a pecuniary conflict of interest which must be disclosed to the Board. Any Board member determined by the Board to have a conflict of interest (or the appearance of a conflict of interest) must abstain from further review of the Application.

Thank you sincerely for your time and thoughtful consideration of this Application.

Sincerely,


Thomas E. Schoening, Esq.

CC (VIA EMAIL ONLY)

- Greg Bowers, Day One - gregb@day-one.org
- Becky Humphrey, Day One - beckyh@day-one.org
- Derrick Stephens, Code Enforcement Officer - dstephens@windhammaine.us
- Kelsey Ledoux, Administrative Assistant - kmluce@windhammaine.us