



Attorneys at Law

TEN FREE STREET
P.O. BOX 4510
PORTLAND, MAINE 04112-4510
(207) 775-7271 (Phone)
(207) 775-7935 (Fax)

www.jbgh.com

KENNETH M. COLE III
NICHOLAS S. NADZO
DAVID J. JONES
MICHAEL A. NELSON
RICHARD H. SPENCER, JR.
LAWRENCE R. CLOUGH
ALAN R. ATKINS
RONALD A. EPSTEIN
WILLIAM H. DALE
JOSEPH H. GROFF III
F. BRUCE SLEEPER
DEBORAH M. MANN
LESLIE E. LOWRY III
PATRICIA M. DUNN

MICHAEL J. QUINLAN
R. LEE IVY
ROGER P. ASCH
FRANK K. N. CHOWDRY
NATALIE L. BURNS
SALLY J. DAGGETT
BRENDAN P. RIELLY
SUZANNE R. SCOTT
LORAIN L. HITE
MARCIA G. CORRADINI
NICHOLAS J. MORRILL
KATHLEEN T. KONKOLY
MARK A. BOWER
JENNIFER W. PETERS

MERTON G. HENRY
FRANK H. FRYE
OF COUNSEL

RAYMOND E. JENSEN
(1908-2002)

KENNETH BAIRD
(1914-1987)

M. DONALD GARDNER
(1918-2003)

YORK COUNTY
OFFICE

11 MAIN STREET, SUITE 4
KENNEBUNK, MAINE 04043

(207) 985-4676 (Phone)
(207) 985-4932 (Fax)

October 27, 2011

[Via email and regular mail to M.O'Meara]

Ms. Elaine S. Falender, Chair
and
Planning Board Members
Town of Cape Elizabeth
320 Ocean House Road
Cape Elizabeth, ME 04107

**RE: Request for Reconsideration of October 18th Vote on Amended Minor Subdivision,
Golden Ridge Lane**

Dear Chair Falender and Board Members:

We represent Golden Ridge Lane LLC and appeared before your Board at your meeting of October 18th when the Golden Ridge Lane project was voted upon by the Board. As you recall, my client was adamantly opposed to the imposition of a condition requiring him to grant an easement to the public across his property. The recommendation for the trail was made by the Conservation Commission only a few days before the Board meeting and was a surprise requirement from my client's perspective. The short notice and change left us only a small opportunity to prepare and articulate objections.

We understand your Board has a reconsideration process. Reconsideration must be voted upon within 30 days of the original decision. We understand that your next meeting is November 15th, which is within the 30 day window. Only a Board Member who voted in the majority is permitted to make a motion for reconsideration. Therefore, we are respectfully requesting that a Member who voted in the majority make a Motion for Reconsideration of the approval granted on October 18th; if such a Motion is made, we hope a majority of the Board will vote to reconsider. As you know, my client's only concern with the approval is with respect to the requirement or condition of approval requiring the grant of a trail easement.

In particular, we believe this Board will want to evaluate the trail easement requirement in light of the limitations of the Open Space Impact Fee provisions of §16-3-1 (q) of the Subdivision Regulations. The State of Maine allows municipalities to use impact fees in connection with development proposals. The impact fee requirements, found in 30-A M.R.S.A. § 4354, relate to the construction of off-site capital improvements or the payment of an impact fee instead of the construction. The statute authorizes a municipality to enact such an ordinance under its home rule authority. However, because the statute is part of the zoning enabling law, it serves as a limitation upon home rule authority. As a result, an impact fee ordinance, even if adopted pursuant to home rule authority, must comply with the requirements of the statute.

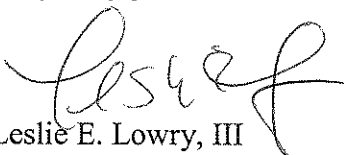
If the Town wishes to collect impact fees to acquire publicly owned open space (including trails) on a formula providing for contributions by development proposals, that would appear completely consistent with the authorizing statute. However, in the application and wording of the Cape Elizabeth ordinance, the impact fee has been utilized to force an on-site "exaction" from the project. As you know, we did not object to the monetary impact fee requirement since it would be consistent with what State law allows.

In addition, as the Board and Staff discussed at the meeting of the 18th, the need for the trail is not a need created by this project. This is a trail that is believed to be needed to serve other neighborhoods desiring a shorter route of access to your trail networks. As we noted at that meeting, there is no relationship between the trail easement condition imposed and the impacts of this project. If the project had been denied, then there would still be no trail.

Finally, even if the Board is satisfied that its Ordinance provisions are lawful, we respectfully request that the Board grant this project a waiver under §16-3-5 from the requirement to grant a trail easement.

We look forward to meeting with the Board on the 15th, and we hope that a Motion for Reconsideration will be put forward and approved by the Board.

Very truly yours,



Leslie E. Lowry, III

cc: Ms. Maureen O'Meara, Town Planner; Mr. John Mitchell; Mr. Sheldon Goldman