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Via Email and First Class Mail

Maureen O'Meara, Town Planner
Town of Cape Elizabeth
P.O. Box 6260
Cape Elizabeth, ME 04107

Re: Reconsideration Request by Golden Ridge Lane LLC

Dear Maureen:

I have reviewed Attorney Lowry's letter of October 27, 2011 concerning the above-referenced matter. I understand you would like our opinion as to Attorney Lowry's assertion that the Planning Board's requirement of a dedication of an easement as part of the subdivision amendment is unauthorized or is contrary to State law. It is our opinion that Cape Elizabeth's subdivision ordinance is consistent with State law and fully authorizes the easement requirement.

In my opinion, Attorney Lowry's reliance on 30-A M.R.S.A. § 4354 is misplaced. The Planning Board is not attempting to require an *off-site* capital improvement, which is the subject of Section 4354. The statute does not restrict a municipality's ability to exact on-site dedication of land as part of the conditions of a permit approval.

Perhaps part of the confusion raised by Attorney Lowry's letter is occasioned by the fact that the subdivision ordinance refers to a dedication of land within a development as an "impact fee." Technically, such a dedication is more like an "exaction" than a classic "impact fee", as the Maine Municipal Association explained many years ago in an article in the *Maine Townsman*:

The major difference between exactions and impact fees is that exactions have been used primarily to require developers to make on-site improvements such as constructing streets, sewers and stormwater

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drains in new subdivisions and then dedicating these improvements to the municipality for public use and maintenance, while impact fees are more directed at off-site infrastructure improvements. Exactions have a longer legal history than impact fees and should be more defensible in court.

“Impact fee”, as that term is used in the subdivision ordinance, is more inclusive than the historical use of the term (and perhaps the use to which the term was put in Section 4354). But the bottom line is that Section 4354 seeks to circumscribe the use of impact fees to require off-site capital improvements. In our opinion, that section, by its terms, does not restrict the Town’s exaction of land within the development as part of the approval process.

Please let me know if I can provide you with any further comments on this issue.

Very truly yours,

/s/ John J. Wall, III

John J. Wall, III