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**Privileged and Confidential –**  
**Attorney Work Product/Attorney-Client Communication**

**Via Email and First Class Mail**

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

Re: Rudy's Site Plan Amendments

Dear Maureen:

I understand that the applicant in the above-referenced matter raised three legal issues at the outset of the Board's discussion at the October 21, 2014 Planning Board meeting. I further understand the Board voted to table the matter pending a public hearing on November 18, 2014. You have asked for our comments as to the legal issues raised by the applicant in advance on the November 18 meeting.

I believe the three legal issues raised by the applicant are:

1. That a Board member violated due process by taking an unauthorized "site visit" on the subject property;
2. That a Board member violated due process by conducting internet research; and
3. That a Board member who had past conflicts with the applicant's principal is biased.

With respect to items 1 and 2 – which are premised on due process concerns – let me say that at the moment I do not think there are any present problems. Stated very generally, due process essentially serves to ensure that the government does not deprive someone of a liberty or property interest without advanced notice and an opportunity to be heard. Since the Board has not made any substantive decisions yet on the application to amend, it has not adversely affected any liberty or property interest of the applicant.

I would make a similar observation about the assertion of bias. Since no decision has been made yet, I think it would be impossible to argue that it has been affected by bias (assuming such bias exists).

Having said this, I would offer the following to assist the Board in proceeding so that any due process or bias concerns are alleviated:

### **Issue 1 – Site Visit**

As I am sure you know, in general site visits should occur in an organized fashion so that everyone affected by a project has an opportunity to attend. It is the easiest and most effective way of ensuring that everyone has the same information about the property. To avoid any due process concerns, this should be the paradigm.

If it happens that a Board member is driving by a property and chances to notice something, that does not necessarily mean that a due process violation has occurred. Under such a circumstance, any information obtained through such an incident should be publicly disclosed to the applicant and interested parties at a time when the applicant and those parties have an opportunity to address any new information. As long as the decision made by the Board is based upon information that the applicant and the public are aware of and have a meaningful opportunity to comment upon, the Board has provided due process.

In this matter, if the Board member's viewing of the property could be considered a "site visit" – which seems tenuous under the circumstances – there are steps that can be taken to ameliorate any due process concerns. As I understand it, the most basic step I could recommend has already occurred – namely, a formal site visit. Given the recent opportunity to review the site with everyone present, the Board would appear to have afforded the applicant ample due process in this regard. To the extent the Board member who stopped by the site earlier saw something that was not present during the group site visit, I think all the Board member would need to do is disclose that information to the applicant and the public at the next meeting so that the applicant and the public have an opportunity to respond.

### **Issue 2 – Internet research**

Like the site visit issue, the due process touchstone with regard to internet searches by or on behalf of the Board is notice and a meaningful opportunity to respond. I do not believe that an internet search by a board member is a *per se* violation of due process, but a town must always be careful to ensure that any factual information used by a board to decide an issue be part of the record. In addition, the applicant and the other interested parties must have an opportunity to respond to such information at a meaningful juncture in the proceedings.

To minimize the possibility that some information outside of the record might affect a board's decision, it is probably best to employ a regular procedure for the collection and disclosure of information derived from internet searches. Ideally, the board would vote at a meeting to specifically charge one individual (in the context of a Planning Board proceeding, I would think the Town Planner would be the obvious choice) with the responsibility to perform such a search. The person would then provide copies of web site pages (or a list of links to those pages) to the public and the applicant in advance of any public meeting in which a decision would be made. In this way, the information derived from that search would be part of the

record and the applicant and other interested parties would have the opportunity to review that information in advance and present any comments about the information before the record closes.

**Issue 3 – Bias**

Since it does not appear that there are any allegations of bias that would fall under the conflict-of-interest statute, the primary concern in this regard would be ensuring that all Board members evaluate the record evidence with an open mind. Past conflicts between board members and applicants do not necessarily indicate bias – in fact, in most instances they do not. However, if a past dispute leads a board member to reject a project out of spite and not based on an evaluation of the record evidence under the relevant legal standards, then bias would be a concern.

Since the applicant in the above-referenced matter has raised an issue of bias with regard to one of the Board members, I would suggest that the Board resolve the issue at the outset of the upcoming public hearing. The Board member should explain the past dealings with the applicant and indicate whether he or she feels that those dealings will cause him or her to predetermine a decision on the matter. The applicant should be given an opportunity to explain why it believes there may be a problem with bias. The Board should then vote on the issue. If the Board believes that the pertinent member can be fair and impartial about the project and that he or she will decide the matter based on the evidence presented and the terms of the ordinance, then it should vote to allow the member to continue to participate in the decision-making process.

Please let me know if I can provide you with any further comments on these issues.

Very truly yours,

/s/ John J. Wall, III

John J. Wall, III