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October 12, 2004

FILE COPY

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RE: Town of Westbrook - The Preserve, River Sound Development, LLC

Dear Attorney Merriam:

This letter is in response to your letter dated June 30, 2004, concerning the extension of a public roadway from The Preserve in Old Saybrook to Route 153 in Westbrook written on behalf of River Sound Development, LLC ("RS"). We regret that discussion of this letter was delayed by the apparent failure of the listed recipients to receive the copies of the letter, but those copies have now been distributed by Mr. Northrup. In addition, the issues raised by your letter involve the Planning Commission, the Zoning Commission, and the Board of Selectmen, each of which have different staff and counsel. We have also been careful to avoid any prejudgment of a future application which your client may present to any of these agencies. Nevertheless, we know that the Town does need to respond to your overtures, and staff and counsel have held meetings and discussions during the past several months to arrive at a consensus response.

Background; Alternative Legal Procedures for Creation of a Public Highway

I want to review the background of the discussions, as I understand them, for the benefit of those who will receive copies of this letter, not all of whom may be aware of what has preceded it. In your original letter of August 15, 2003, you outlined two alternatives under which a public highway could be established from The Preserve to Route 153. In the response letter from Planning Commission counsel, Mark K. Branse, of September 16, 2003, he indicated that either of the two alternatives were workable, if accepted by the Board of Selectmen. He also indicated the need for a resubdivision application and also noted the continuing issue of zoning compliance. It was noted that if the Town accepted the entire two-acre parcel, together with a roadway located upon it, the use might be considered as a "town or municipal facility", and, hence, a Special Permit use under Section 4.13.01 of the Zoning Regulations.

Regardless of the procedure by which this roadway were to be accepted as a public highway, Attorney Branse has consistently maintained that a resubdivision application to the Planning Commission is the first step because the creation of a public road in an approved subdivision would constitute a "change in a map of an approved or recorded subdivision . . . [that] affects any street layout shown on such map". Conn. Gen. Stats. § 8-18. (This was the procedure followed the last time a preserve proposal was presented to the Town of Westbrook)

The main concerns of the Town, however, continued to be a lack of knowledge about exactly what development this proposed road would be serving. The preliminary nature of RS's development plans prevented them from telling the Town what, exactly, their proposal was. At a meeting with you on May 5, 2004, various town officials, including Messrs. Northrup and Branse, I believe you were told that before the Town could consider the procedural alternatives for establishment of a public roadway for The Preserve, the Town needed to know just exactly what was proposed; how the Town would be assured that The Preserve would be what it was presented to be; and what benefits could be offered to the people of Westbrook to compensate them for the responsibility of a new public highway with no property tax revenue attributable to it.

You confirmed the results of May 5th meeting by letter of May 19, 2004. Among other things, you indicated that final plans would be ready by July of this year and that preliminary traffic counts would also be available. That information has not been received by Westbrook to date. You followed up with the letter and attachments of June 30, 2004. We are responding to those documents in the context of the previous correspondence and discussions.

The Program

The Town had requested information on just what The Preserve development would consist of. In examining your June 30, 2004 letter and the attached Tab A, we have the following reactions (not necessarily in order of priority):

1. The Pianta Parcel: You state that your client has "no detailed plans for development of the Pianta parcel". Based on the year of study that has gone into the 892-acre parcel, including the design of a community sewage treatment system, environmental/habitat reviews, traffic studies, storm water management designs and other infrastructure, it is inconceivable that RS would not have prepared at least preliminary designs for the 31-acre Pianta parcel. However, it is constructive to see the agreement to no more than thirty-five (35) residential units, since Westbrook's primary concern is traffic from the development. It is implied that there will be a maximum of thirty-five (35) units and no other uses of the parcel. That implication should be made specific. We assume that when the promised traffic studies are provided, they will include the 35 units on the Pianta parcel. We would also note that such studies should have been completed by now, but have not been received. Please advise us as to the status of those studies.

2. Access to Trails and Golf Course: The offer of golf course use for the Westbrook High School golf team (existing or future) at no cost during off-peak hours is constructive. It is also positive that the trail system would be open to Westbrook residents.

3. Construction Traffic: You indicate that as of the date of your letter, detailed information on

construction traffic was not available. You indicated that, "Once we have this information, we will be sure to provide you with it." During the interim, RS has submitted a formal subdivision application to the Town of Old Saybrook which includes detailed grading plans, road profiles, and other construction details. Surely, at this point in time, the number of construction traffic trips can be determined. That, in turn, will allow a consideration of the routing, hours, and other management of such traffic (such as a flag person or other monitor at Route 153). We need this information immediately.

4. The Entrance Road: Your letter proposes that the land upon which the new road will be located be conveyed to the Town of Westbrook first, and then your client would construct a road upon it thereafter. There are benefits to this approach, because, once the land is owned by the Town, it can qualify as a "town or municipal facility" under Section 4.12.01 of the Zoning Regulations. However, with a road to be constructed on town-owned land, and since the road would ultimately be accepted as a Town road, the Town must have some assurance that the road will be completed, and in accordance with the approved construction specifications. The typical way in which this is achieved is through bonding, which we would require in this case.

The reservation of the right to place signs on the Town land appears to be reasonable. So does the proposal for an interlocal agreement with Old Saybrook or, alternatively, a commitment by the Association to maintain that section of roadway.

5. Distribution of Traffic, Access to Ingham Hill Road: All of Westbrook's officials who have reviewed the topic concur that full access to Ingham Road at both the south end in Old Saybrook and the north end in Essex is essential for both Westbrook *and* Old Saybrook. Westbrook's interest is in having the traffic flow divided into as many alternative routes as possible to reduce the impact on any one of them. For example, connecting to Ingham Hill Road in Essex would divert some of the traffic that would otherwise use the portion of Route 153 north of the Road A intersection to reach commercial facilities in Essex.

Old Saybrook's interest is, no doubt, the same, because access to the north and south via Ingham Hill Road would reduce the burden on Bokum Road. We understand that Old Saybrook also has an interest in integrating The Preserve into that community so that future residents will patronize Old Saybrook businesses and feel a part of that community when they vote, volunteer, and donate to community charities. While it is true that Ingham Hill Road is not of arterial quality, the same can be said of Bokum Road. The new Road A (formerly described as Sanctuary Drive) will allow east to west traffic from much of Old Saybrook into Westbrook. There is probably a need for this in light of the congestion on Route 1. However, the plan should also facilitate west to east flow from Westbrook to Old Saybrook and south via Ingham Hill Road and Bokum Road.

This is a critical item which Westbrook officials, including the former Town Planner, have been emphasizing for many years. It is an essential prerequisite for consideration of your proposed new public road into Westbrook. Evaluation requires a detailed professional analysis of total traffic volumes and origin and destination studies to determine the allocation of that traffic among the various access points. Only then can residents in both Westbrook and Old Saybrook evaluate what they are being asked to accept, and only then can off-site improvements be knowledgeably considered (see below).

6. Condition of Ingham Hill Road and Bokum Road: Theoretical connections to Bokum Road and Ingham Hill Road will be of little value if those roads are of such condition as to discourage their use by the future residents of The Preserve. In addition, adequate access for emergency vehicles must be provided so that Old Saybrook can promptly respond to the public safety needs of its future residents. Otherwise we see this burden increasingly falling upon Westbrook responders (see below). For a development of this size, RS must be prepared to address incremental improvements to both roads in order to handle the anticipated traffic increases. Only then will the traffic flow truly be distributed among them, especially for emergencies and during inclement weather. Under our review of current law, it appears that there is a clear nexus between the scale of The Preserve development and the need for off-site improvements to the roads that serve it. Your clients must address the issue now and resolve it.

7. Drainage Discharges: Your letter indicated that, as of that writing, your client did not have drainage discharge information but that, "Once we have completed our design, we will be pleased to share the results with you and with Westbrook." Now that a formal application has been submitted, that information must surely exist and Westbrook looks forward to receiving it.

8. Residential Units and Support Buildings: The unit counts and other information is helpful. There is a reference to up to 10,000 square feet in maintenance buildings, "but River Sound Development will reserve the right to construction additional maintenance space as necessary, so long as it is not open to public use". First, 10,000 square feet of maintenance building sounds excessive, since it is in addition to the buildings associated with the golf course. Second, the language about "open to public use" is ambiguous. It could be read to mean that so-called "self storage" space *for Preserve residents only* is permitted. We doubt that was the intent and would request that this be clarified.

The convenience store should actually serve to *reduce* traffic flows to surrounding roads and is a plus for this development.

9. Nature Center: The description of the Nature Center does not appear to present any significant potential for adverse impacts to Westbrook and may provide an amenity to the extent that Westbrook residents utilize the facility. Note that your letter says that the Nature Center will be owned by either the Town of Old Saybrook or another conservation organization. Theoretically, the Town could restrict use of the facility to Old Saybrook residents only. Therefore, a non-profit operator might be preferable. Alternatively, the conveyance to Old Saybrook could include a reservation of access rights to Westbrook residents, to which Old Saybrook would surely not object. No matter what entities the nature center may be conveyed to over time, there should be deed restrictions that would prohibit excluding Westbrook residents from its use.

10. The Golf Course Facility: The Program states that there will be 375 full members and 125 social members, or, "up to 168 if all are residents". This is not clear: will all residents be automatic social members? The letter indicates that they will not be, but the distinction between the 125 and the 168 is difficult to explain. This material also does not say if the potential 543 "members" are families or individuals. If it means families, 543 is a sizeable number of potential users of the facilities, especially including guests. This is where additional detail and traffic studies are critical.

The Program specifies that the facility will be rented for events not to exceed 25 persons. While this is a reasonable number, neither the Program nor the Restrictive Covenant provides any means of

monitoring compliance with it. Some additional assurance of compliance is needed. See the comments below concerning the Declaration.

It is difficult for us to grasp how a 75-seat restaurant, lobby, offices, locker rooms, etc. could possibly occupy 11,000 square feet of floor area, especially in light of an additional 5,000 square feet of cart and bag storage area and a maintenance building of unspecified square footage. It is assumed from your description that the restaurant facility and number of seats is inclusive of any lounge, snack bar or other area in which food or alcohol would be prepared and served. A floor plan for this building is absolutely essential to evaluate the claimed uses. The size and use of the maintenance building must also be provided.

Mr. Northrup has checked some representative golf courses, some with banquet facilities and some without:

- I. The Minnechaug Golf Course in Glastonbury is a public 9-hole golf course. It has a club house containing 2,400 square feet which does not include locker rooms; has a small restaurant that serves sandwiches; a pro-shop; a golfer registration/sales area; and restrooms.
- II. In East Haddam, the new Fox Hopyard Golf Course club house has a 6,000 square foot building without banquet facilities. It includes a bar that seats approximately 30; a restaurant that seats approximately 60; a full-size kitchen; and lockers and storage under the building. They have a separate pro-shop building that is less than 2,000 square feet. Thus, a facility seating 90 people (15 more than proposed for The Preserve) is only slightly more than half the size of what RS proposes.
- III. The Manchester Country Club, owned by the Town of Manchester as a public course, has a separate pro shop of 5,000 square feet. The main club house building has a registration area and a restaurant of 5,194 square feet. There is a separate floor to the building with a banquet facility and locker rooms with an additional 5,348 square feet. Thus, a restaurant, a separate banquet facility, locker rooms and registration area total 10,542. This is roughly equivalent to the 11,000 square feet proposed for The Preserve despite the statement that there won't be a banquet facility in that club house.

As noted above, a floor plan for the club house and other buildings is essential to confirm the statements made in The Program statement.

There is a limitation on tents over 200 square feet (roughly 14' x 14'). Such a tent size is reasonable, and, presumably, the material intends to restrict the use to *no more than one tent of 200 square feet* or no combination of tents totaling over 200 square feet—not an endless row of 200 square foot tents. This presumption should be spelled out. If the idea is multiple tents “for refreshments, registration tables, and other similar club functions”, then some maximum number must be assigned. It is also not clear what is intended by the restriction of tents as “generally prohibited at all places on the golf course grounds, including areas adjacent to the clubhouse”. Where, then, will they be? And what does “generally” mean? The intent is unclear.

The Program also states that the Club may “apply” to the Town of Old Saybrook and Westbrook for

special events: For Old Saybrook, such an “application” would presumably be a zoning application, but for Westbrook it would have to be a request made to the Town under the Declaration. The mechanics for this approval need to be explored and specified for the sake of all participants.

The scope of “charity tournament events” should also be spelled out. Many of these types of tournaments are small affairs where, as stated, only participants, volunteers, and the occasional visitor will attend. However, charity tournaments can also be “celebrity” events that draw thousands. The Applicant is implying that this is *not* its intent, but better language is needed to assure specificity and enforcement of what is being presented.

Again, the traffic data has not yet been provided.

11. Firehouse: As described, this sounds like a valuable amenity for the site, but without knowing what equipment will be housed there, the issue of whether Westbrook will be the first responder still remains. It would be helpful to know what equipment is to be housed at the facility, and to see plans for this building, since the Program states that it will be “designed so that it could be expanded”. This would be a desirable design feature.

However, we feel that the staffing of this fire house will be a key to its effectiveness. We understand that the fire house may include an accessory apartment reserved for a volunteer firefighter and his/her family. This is an innovative idea, but will be of little use if the firefighter occupant is employed in some distant location. Would RS be willing to agree that at least one employee of the golf course or Association maintenance crew would be a qualified volunteer firefighter and would reside in the firehouse accessory apartment? This would benefit both Towns, and also the future residents of The Preserve since it would assure an “on-site” individual to initiate use of the equipment at the firehouse until other volunteers could arrive.

12. Compensation for lost taxes: Early in our discussions, representatives of River Sound Development, LLC suggested some form of payment in lieu of taxes to Westbrook, in recognition of the fact this Town would sustain the majority of the adverse traffic impacts from this development but receive none of the property tax revenues. Your letter makes no mention of this offer. Remember that, no matter what the Board of Selectmen, the Planning Commission, or any other agency says, it will still be necessary to go to the Town Meeting for acceptance of Road A. We need to demonstrate to ordinary citizens that there is some compensation for the increased burdens that many of them will be experiencing. Therefore, this is an item that we expect RS to address, as promised earlier.

The Declaration of Restrictive Covenants

Many of the comments above also apply to the language of the Declaration. Specific comments are as follows:

Background: I assume that the reference to “NO MONETARY CONSIDERATION” (all capitals in original) represents a clerical error. The correct language would be, “FOR ONE DOLLAR AND OTHER GOOD AND VALUABLE CONSIDERATION”.

Section (b)(ii): There is a discrepancy in the language between the Program and the Declaration

regarding restaurant capacity: The Program says that “the number of seats will be limited to 75” while the Declaration says that “the restaurant shall have no more than 75 customer seats.” What is a “customer seat”? Does it not include, e.g., “member seats” or “guest seats”? The language should be revised to limit restaurants seats to 75 “Persons”.

Also in this paragraph, there appears to be an inconsistency concerning the total square footage of the Club facilities: The Program is quite clear that there will be an 11,000 square foot Clubhouse plus the “separate” 5,000 square feet for cart storage. However, the Declaration indicates that the 5,000 square feet of storage is a portion of the Clubhouse building. This represents a much more reasonable amount of space for the uses described. Again, there is no square footage provided for the “maintenance building” and there should be.

Section (b)(v): See the comments above about monitoring/enforcement of the use limitations.

Section (b)(vi): See the comments above about the number of tents under 200 square feet.

Section (b)(x): As noted above, there should be some maximum square footage for “maintenance buildings”. It can be generous, as long as there is some limit. Also, Mr. Northrup notes the language that such buildings will “not be open to the public”. That could be construed to mean that residents can use “maintenance” buildings for, e.g., “self-storage” space. The language should be clarified to indicate not that maintenance buildings are “not open to the public” but that they are restricted to access and use by maintenance personnel only.

Section ©: The 50-year period is not long enough. Declarations of this kind are typically drafted so that they renew, automatically, for successive time periods (50 years in this case) unless the parties agree to modify or terminate them. Similar language should be included here. Otherwise, at such time as the Declaration terminates, then it must provide that the Westbrook portion of Road A will be closed and removed at the expense of the Association. The Declaration is the clear *quid pro quo* for making this road part of the Westbrook road system, and there is no justification for allowing one without the other.

Section (d): Same comment as the preceding paragraph.

Section (f): This should be Section (e). This monitoring provision is a good start, but fails in several respects: First, the restriction to inspections “during business hours” ignores that most of the events that are sources of concern—golf tournaments, banquets, restaurant expansion of seats, etc.—will not occur during business hours. For the same reason, prior written notice will often not be practical. These are facilities which are open to large numbers of persons, if not the general public. With over 500 club members (or member families), there should be little “private” space in which Westbrook inspectors could possibly be intruding. Note that Section 3(a) of the Declaration requires a written notice of any claimed violation, which is a normal and reasonable requirement. This Section (f/e) needs to be significantly curtailed. Inspections should be at any time of the day when the facility is open to its members or guests; should require telephone notice and only when practical; and should extend to all portions of the facility open to members, plus staff-only areas.

Section 2, Parking: Parking for twelve cars seems to be a reasonable number for pedestrian use of the trail system. The language in subsection (b) about “authorized citizens” of Westbrook is unclear.

Who would the *unauthorized* citizens of Westbrook be? We presume the language was intended to simply refer to residents of Westbrook as authorized by this Declaration. Subsection (b) also allows the Association to adopt "reasonable rules and restrictions" on the use of the trails. It is not unusual to impose conditions such as dawn-to-dusk use only, no motorized vehicles or wheeled vehicles other than wheelchairs and strollers, dogs on leash only, etc. However, Subsection (b) should include a provision that no such rule or regulation shall apply to Westbrook residents in any manner that is different from any other user, including owners/residents of The Preserve. Otherwise, the Association could adopt a rule that only residents may use the trails, defeating the entire purpose of the Declaration.

Section 3, General Provisions:

Subsection (a): This subsection provides for a procedure where an alleged violation of the Declaration has occurred. This is a good provision because it allows the dispute to be aired and possibly resolved short of a formal legal action. However, this paragraph must state that it is an alternative to, and not a prerequisite for, a court enforcement action under subsection (f). There may be cases where the violation is so serious that Westbrook will feel the need to bypass the hearing process of subsection (a), however beneficial it may be in most circumstances.

Subsection (d): The 35-day period is simply not long enough for any municipality to respond to such a request. Many Boards of Selectmen don't even meet more than once a month. We would ask RS to consider what additional time would meet their legitimate needs for a prompt certification of no violation.

Subsection (f): This enforcement provision should include language that allows the prevailing party to recover its attorney's fees and costs. This protects both parties from frivolous or trivial claims or defenses.

Subsection (g): Note that there is no address for RS and that the address for Westbrook is incorrect (that is the old Town office building address). Use 866 Boston Post Road.

Have and to Hold: The phrase, "not as a public way nor to the citizens of Westbrook," is unclear and seems to contradict what is said earlier in the Declaration. We understand that RS does not want to create a right in the general public and that the rights accorded by the Declaration are granted to the municipal corporation known as the Town of Westbrook, as the representative of its residents and not directly to those residents. However, the language used here needs to be revised to more accurately reflect that intent.

We know--though you provided no advance notice to us--that you have already filed an application for Special Permit with the Old Saybrook Planning Commission for an Open Space Subdivision, and that a public hearing will open on November 3, 2004. We know that those plans depict a public roadway to Route 153, despite the lack of any resubdivision application to the Westbrook Planning Commission (as was filed by the previous developer). Presumably, the Town of Old Saybrook will be interested in knowing if the road connection to Route 153 has been finalized. As of this date, it has not. Please confer with your client and provide responses to the above items as soon as possible so that all parties will know if the Route 153 access will or will not be a part of your overall plan.

Westbrook understands the importance of the connection to Route 153 for RS, and is not attempting to obstruct reasonable development of your client's property. However, we expect your client to be as sensitive to Westbrook's needs and concerns as they would like us to be to theirs. In light of the November 3, 2004 public hearing, we will need a response to this letter by October 25th, 2004.

Sincerely,


John S. Bennet

cc: Tony Palermo, First Selectman
Mark K. Branse, Special Counsel
Westbrook Planning Commission
Westbrook Zoning Commission
Westbrook Inland Wetlands and Watercourses Commission
Michael A. Pace, First Selectman, Town of Old Saybrook
Christine Nelson, AICP, Town Planner, Town of Old Saybrook
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