PLANNING COMMISSION EXHIBIT #99

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TO: **Robert McIntyre, Chairman, Old Saybrook Planning Commission**
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(860) 395-1216 and (860) 388-9270, respectively

FROM: **Dale Ann Sylvester for Attorney Mark Branse**

DATE: **December 1, 2004**

RE: **Old Saybrook PC - Open Space**
Old Saybrook ZC - The Preserve

TOTAL NUMBER OF PAGES INCLUDING THIS PAGE: **11**

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December 1, 2004

Robert McIntyre , Chairman
Old Saybrook Planning Commission
302 Main Street
Old Saybrook, CT 06475

- and -

Madeleine B. Fish, Chairwoman
Old Saybrook Zoning Commission
302 Main Street
Old Saybrook, CT 06475

RE: Old Saybrook Planning Commission - Open Space Subdivision Special Exception
Old Saybrook Zoning Commission - The Preserve, Future PRD Application
FILE NO: 3029/04-207

Dear Chairpersons McIntyre and Fish:

This letter is to reply to those documents entitled, "Response to Town Review Comments" and "Response to Town Review Comments #2" dated November 10 and November 17, 2004, respectively, as submitted by River Sound Development ("RSD" or "the Applicant"). Where necessary to reference these documents, I will identify them as "Response #1" and "Response #2".

Application Structure.

The Pianta Parcel: I commend the applicant for including the Pianta parcel in its plans and in its application. What remains is to include the various habitat inventories and other information for the Pianta parcel so that the general pattern of development can be understood in the context of the total development. Detailed plans for the Pianta parcel (as for the other multi-family parcels) are not required because that will be the subject of future review by the Zoning Commission in the PRD process. What matters

at this stage is for the Planning Commission to be able to visualize the development pattern on the Pianta parcel and how it relates to and integrates with the balance of River Sound's property.

The Conventional "Yield" Plan.

The Yield Plan, Wetlands: RSD is correct that the 100-foot upland review area is not a "no build" area. See Response #1, pp. 2-3 and Response #2, heading II. Therefore, what the Commission must evaluate is whether the various encroachments are likely to be approved if they were actually filed with the Inland Wetlands and Watercourses Commission. Such an evaluation of what another agency might do is inherently speculative and will vary with each encroachment. The goal is to keep the Open Space Subdivision density neutral[1]–neither creating bonus units nor penalizing the subdivider based on standards that are not typically applied to actual applications. The Commission must rely on its technical advisors and its own experience in this regard.

The Yield Plan, Vernal Pools: Again, RSD is correct that vernal pools are "watercourses"[2], and, are, thus, governed by the same standards and the same upland review area as for any other areas regulated under the Inland Wetlands and Watercourses Regulations. Vernal pools do have increased sensitivity to disturbance and that is why greater protection is usually sought for them. However, it is correct that no fixed "no build" area can be imposed for them by the Inland Wetlands and Watercourses Commission. The Applicant also makes a valid point that the purpose of the Open Space Subdivision is to promote a higher level of environmental protection than is possible under the conventional pattern. The fact, remains, however, that the Town's reviewers have not imposed the recommended 750-foot "no disturbance" standard to vernal pools. They have applied only the more conservative 100-foot vernal pool envelope for these areas. This appears to be a conservative approach.

The Yield Plan, The Golf Course/Club: RSD mis-states the case when it characterizes Town staff comments as suggesting that "other permitted uses be shown on the Conceptual Standard Plans". Response #1, p. 3. No one has made such a statement, and there is no requirement in Section 56 that an applicant include a golf course in its plans. Similarly, RSD is correct that the "legislative history" indicates that RSD always intended to have a golf course as part of its final development, along with a club house,

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[1]RSD claims that "it has been the history of conservation plans to receive . . . a [density] bonus." Response #2, Section I. Based on more than 30 years in land use, and currently representing land use agencies in seventeen (17) towns, I respectfully disagree. The only examples I have seen of such bonuses is for inclusion of affordable housing units (Hebron).

[2]They say that vernal pools are wetlands, but that is not correct. Vernal pools meet the definition of a "watercourse," not that of a "wetland."

tennis courts, and many other commercial recreational uses. The question raised is not whether a golf course can or should be included in the development, **but, rather, the density credit to be accorded to that land.**

Conventional subdivisions provide individual lot owners with private yards that they can use for active and passive recreation, privacy, gardening, and other pursuits. The concept of any open space or cluster subdivision is that disturbance of the land should be reduced by taking the same number of dwellings as could be spread across the entire parcel and placing them on smaller lots. The resulting pattern provides smaller yards, and, hence, less space for private activities but creates common open space for the benefit of the subdivision as a total community. Part of the land for private lots; part of the land for common or public open space.

However, in this case, the land is being divided into three (3) ultimate uses: Part of the land for private lots; part of the land for common or public open space; part of the land for commercial buildings (restaurant, pro shop, maintenance, pool, etc.), fairways, greens, and other golf-related uses. The lot owners cannot use this third class of land the way they can use their private yards, and they cannot use it the way that they can use common or public open space. If they don't pay a separate fee, they cannot use it *at all.* Land for a commercial use is being taken from *some other part of the land use program.* RSD argues that they have met and exceeded the 50% open space requirement even without counting the golf course but that is not the point. The land from which the golf course is created has been taken from the private homeowners who lose yard space with no compensatory benefit (other than to look wistfully at a golf course that they cannot use without paying extra for it).

Further, the golf course involves its own disturbances of the land. RSD correctly states attributes to Section 56 "the goal of preserving as much undeveloped land as possible, particularly and with sensitive natural and cultural resources". The problem is that the golf course frustrates rather than furthers that goal. This is not to say that a golf course is not a valid use (it is permitted in the zone by Special Exception) but only that it is its own profit center, its own use of land, and so perhaps it should not be "double counted" to create additional residential density. That is the point that the various speakers have made, and I leave the ultimate decision to the Commission.

RSD states (Response #1, p. 4), as I already pointed out, that they could get more units by the use of a PRD but could not divide the property into lots. They then argue, "It is a principle of land use law that land use regulations are concerned with the <u>use</u> of land not with the <u>form</u> of ownership of the land." (Emphasis original). This statement ignores the simple fact that the Connecticut General Statutes distinguish between subdivisions in which the land is divided into lots and other forms of development where the land is not so divided. If RSD wishes to apply for a PRD for the entire parcel and forgo division into lots, they have the option to do so.

<u>Yield Plan, Cultural Resources:</u> RSD argues that the Commission has "only very limited tools with which to review plans for properties containing resources such as stone walls,

scenic areas and trails". Response #2, Section I. This statement is flatly wrong. Section 5.1.2 of the Subdivision Regulations expressly requires the protection of these very resources. The authority of a Planning Commission to consider and protect such resources has been upheld by our Supreme Court. Smith v. Greenwich Zoning Board of Appeals, 227 Conn. 71 (1993) (denial of subdivision was proper to protect historic street scape, because historic factors are natural resources, and commission could consider protection of natural resources). Removal of cultural and historic areas from development is well within the Commission's authority in both the conventional and the open space subdivision designs.

Yield Plan, Soils/MABL: This is largely an engineering matter, and, I, therefore, leave it to Mr. Jacobson to address the substance of it. However, I must dispute the statement by RSD that "the staff has performed a more stringent review of the Yield Plan than the new ordinance language required or even intended to require". Response #2, Section 1. Mr. Jacobson could, under the Regulations, have simply ignored the test data provided by RSD and applied the Soil Conservation Service soils survey mapping and characteristics to the entire property. This would have produced a far lower number of lots than by accepting the test data where available to demonstrate compliance and applying the theoretical soils characteristics only where no such data existed.

The purpose of the new regulation is to approximate, based on existing data, how many house lots could *realistically* be developed on the subject property. Certainly if one were willing to blast ledge, build retaining walls, flatten hills and fill in low areas, a septic system could be located just about anywhere–but that is not *realistic*. RSD is asking the Town staff to assume engineered septic systems and other approaches which, in a conventional subdivision, would be discouraged (if not denied outright). There is no reason to operate under such assumptions.

The RSD argument also violates the letter of the Zoning Regulations. The Applicant states (Section I, page 6 of the November 10 response) that it is permitted to design septic systems for land where ledge is within 24" of the surface (rather than the 48" of existing cover used by the Town Engineer in his analysis), citing to the letter from Mr. Martinson of February 6, 2001. This argument ignores the plain text of Section 7.2.1.E, which excludes from inclusion in MABL land where "ledge [is] at a depth of less than four (4') feet below the natural ground surface as observed by *soil* testing; **unless an area of suitable size and location has been identified through *soil* testing which demonstrates the suitability of *soil* in that area for the sewage system placement in accordance with the requirements of the Connecticut Public Health Code . . .**" (Emphasis added). Thus, Section 7.2.1E provides two alternative methods of demonstrating compliance: test pit data showing 48 inches to ledge or a detailed design approved by the Sanitarian. In the case of Section 1 of The Preserve, Mr. Martinson obtained the data that he needed to certify compliance with MABL under the second alternative method, allowing the Planning Commission to approve those lots. In this application, Mr. Martinson has expressly stated that *he does not have* the data that he requires (Exhibit 41) and so *will not* certify MABL compliance.

In summary, Mr. Jacobson's method of soils analysis was in complete compliance with the text of the Zoning Regulations and was a more generous analysis than would have been the case if he had used record soils data alone.

Yield Plan, Road Specifications: Again, this is an engineering matter which I leave to Mr. Hillson. However, with regard to the road specifications to be applied in his review, Mr. Hillson really has no choice: He *must* use the standards now contained in the Subdivision Regulations and the adopted road specifications. Although it may be true that the Board of Selectmen have approved alternative road specifications in the past, and, although they may approve them in the future, Mr. Hillson simply cannot speculate about what the Board might or might not do.

The Open Space Plan.

Access to Bokum Road: RSD has acknowledged (November 17 Public Hearing) that they do not currently have permission to cross the rail line to provide access to Bokum Road via the Pianta Parcel. Obviously, any approval of the Open Space Plan would have to be conditioned on obtaining such permission, but there is case law indicating that a land use agency cannot condition an approval on an action by some other agency unless there is some indication that such action is likely to occur. Therefore, RSD should review the status of negotiations with the Connecticut Department of Environmental Protection and provide some evidence (including verbal statements) that the right to cross the rail line will be granted in some form or another.

Access to Route 153 in Westbrook: The same comments as noted above apply to the 153 connection. I know that there have been discussions with Westbrook officials and that a report has been received from the Westbrook Planning Commission; however, in the area of road acceptance, the Planning Commission is only an advisory agency, so some statement from the Board of Selectmen is needed.[3]

Road Specification Issues: Mr. Peace, on behalf of the Board of Selectmen, has stated that Bokum Road is designated as a "high hazard road" and that past proposals to improve Bokum Road have been opposed by residents. Mr. Peace asked if the developer would make improvements to Bokum Road in order to make it safe for the projected traffic burdens; how they would handle the need for additional right of way, if required; and, if all road improvements would be completed prior to the commencement of construction and/or occupancy of the dwellings. Mr. Peace asked that all such improvements be completed before the occupancy of units.

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[3] I realize that the final decision on road acceptance actually lies with the Town Meeting, but the Board of Selectmen must initiate the process and provide a recommendation.

Mr. Peace also predicted that even if the access to Ingham Hill Road (south) were gated, the new residents of The Preserve would press for it to be made into a full access thereby increasing the traffic burdens on that road as well.

Lastly, Mr. Peace estimated the cost of maintaining and ultimately replacing the three (3) bridges which RSD is proposing in order to minimize impacts on adjacent wetlands. He offered the opinion, based on his years with the Connecticut Department of Transportation, that the expense could be considerable and opined that it should not be borne by the Town.

Unfortunately, all of these comments, while valid, raise issues that are within the *jurisdiction and authority of the Board of Selectmen, not the Planning Commission.* Whichever pattern of development the Planning Commission designates for The Preserve, the question of off-site improvements will still arise.[4] The acceptance of new public highways, the specifications for constructing them, and the financial resources available for maintaining them are all matters entrusted to the Board, not the Commission.[5] All that the Planning Commission can do in the application is, if it elects to approve the Open Space Subdivision, defer the issue of road specifications to the Board of Selectmen. See the review memorandum of Mr. Hillson which addresses this issue.

Golf Course as Element of the Open Space Plan: Much confusion has been engendered by depicting the golf course as an integral element of the Open Space Subdivision (which was necessary and proper for RSD to do). Because RSD considers the golf course to be an integral part of the Open Space Subdivision, it is appropriate for them to address why the total development as they propose it is preferable to the conventional subdivision layout. Part of that presentation included reasons why a golf course would not involve substantial adverse environmental impacts, and this presentation probably went into more detail than was necessary at this stage. The public speakers have responded by challenging RSD's claims and arguing that the golf course will adversely impact groundwater quality and quantity, vernal pools, habitat, etc.–also addressed in more detail than is necessary at this stage. The result is that there has been a lot of time spent on the

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[4]The preliminary traffic projections indicate that there would be less traffic from a conventional subdivision than for the combined open space subdivision and golf course/country club development. However, whether such a reduction would reduce or eliminate the need for improvements to Bokum Road and/or Ingham Hill Road is something that the Town's and the Applicant's traffic engineers would have to address *with the Board of Selectmen*, who have jurisdiction over these roads.

[5]The Planning Commission does, in my opinion, have the authority to require off-site improvements that bear a nexus to the burdens imposed by the development, but even then, the Commission would have to rely on the Board to identify road improvement priorities, to acquire additional rights of way where needed, and to designae the specifications under which such work must be performed.

chemicals used in golf courses and the water demands of golf courses etc., despite my repeated efforts to focus the dialogue on *a comparison between the two alternative design approaches to subdividing the property.*

The simple bottom line is that the Planning Commission cannot and will not approve a golf course. It can't. Only the Zoning Commission has the authority to hear and decide that application and it hasn't even been filed yet. The Applicant recognizes this but must obviously design its Open Space Subdivision so as to include a golf course if that is what they intend to build. Therefore, the questions before the Planning Commission are:

> **Recognizing that golf courses involve impacts of some sort on the land, is the Open Space Subdivision with golf course better than the conventional subdivision without one?;**
>
> **Or, should the Preliminary Open Space Plan be modified in some way (which could include modifying or eliminating the golf course from the plan)?**

It is not necessary in answering the preceding questions to know the exact details of the golf course's design or management. Just as all other aspects of the proposal are *conceptual* at this stage (soils and septic designs, road designs, house locations, etc.), so the design of the course and the evaluation of its impacts must be *conceptual*, and the decision which the Planning Commission must make can and must be made at this *conceptual* level of review. However, it would be helpful for the Commission to know the extent of land impacted by the conventional and open space subdivisions. I have asked at public hearing for a comparison of disturbed area for each development. The applicant should provide a response for consideration by the Commission.

It is obviously possible that the Planning Commission could approve the Preliminary Plan with a golf course depicted in it and the Zoning Commission could then deny the required Special Exception. In that event, RSD will have to return to the Planning Commission with some other proposal. Such eventualities lie in the future. For now, the issue presented is a planning issue about which *conceptual* form of development is preferable and how, if at all, it should be modified or conditioned.

Golf Course Safety: Arthur Hills/Steve Forest and Associates have responded to my concern about the proximity of the golf course to developed areas (houses, roads, etc.). That response attached selected pages from the Golf Course Development and Real Estate by The Urban Land Institute. Unfortunately, the pages provided do not support the assurances provided by the Applicant.

The ULI publication points out:

> A well-hit golf ball can reach an initial velocity of 250 feet per second or over 170 miles per hour and a range of 250 yards or more. The golf ball has the potential for

> greater speed and range than a bullet from a shotgun and the potential for injury can be considerable. This factor is augmented by the wide range of physical and psychological variables inherent in any golf course and the range of players' abilities. Golf is not easily mastered, and even the most accomplished players can hit a ball poorly. People have been seriously, even fatally, injured by errant golf balls, golf clubs, and golf cars.

Following these introductory remarks, the ULI document sets out certain minimum design criteria for golf course design, including the following:

> From a golf course hole or landing area to a road right of way: The ULI recommends a minimum of 150 feet of separation between any hole or landing area and a road right of way. Looking at Sheet ON-2, the green for the tenth hole scales at 110 feet from the road and the green for eighteenth hole scales at 100 feet.
>
> From a golf course hole or landing area to adjacent development: The ULI recommends a minimum of 210 feet from a hole or landing area to "adjacent development". This term is not defined so it is not clear if the reference is to *buildings* or just private property (such as yards). Being conservative, I scaled from the green or landing area to *buildings* and got 180 feet for tenth hole, 160 feet for the eighteenth hole (both from Sheet ON-2), and exactly 210 feet for the third hole (from Sheet ON-3).
>
> From any portion of a golf course fairway to adjacent development: The ULI recommends 185 feet from the centerline of areas other than landing and green areas, e.g., fairways. The centerline of the tenth hole and eighteenth hole fairways scale off at 150 feet (closest point), again measured to a *building*, not its yard.

The golf course as designed does not appear to meet the minimum safety standards submitted by the Applicant's own expert. This reinforces the observations of other review team members that the Central Village is essentially shoe-horned between two critical fairways, the Pequot Swamp, and the community septic system leaching area (driving range). The long, narrow pattern of the Central Village is responding not so much to topography, as stated by Professor Arendt, but to the demands of the golf course in the *context* of that topography. In the tug-of-war between competing demands in the central part of the development, all the design elements are suffering. The Applicant needs to decide which design elements it wants to maximize: golf course, housing, or environmental protection. It apparently cannot meet minimum standards for all three elements, and the Commission should not allow the environment to be sacrificed to housing or golf course demands.

Central Village, Vernal Pool Buffer: Professor Klemens stated at the November 10, 2004, Public Hearing that the southernmost 5 lots in Central Village are within his designated 750' buffer. It is hard to see why for the sake of only 5 lots, the buffer that he, himself, recommends is not retained.

Items Raised by Intervenors or Other Parties.

Requirement for Permit Application to the Inland Wetlands and Watercourses Commission: The Applicant has submitted its plans to the Old Saybrook Inland Wetlands and Watercourses Commission for comment, and the "report" required by Conn. Gen. Stats. § 8-3c(b) has been received (Exhibit 37). However, Attorney Carolyn Longstreth, representing the CFE, has stated that the report is not sufficient and that RSD should have applied to the Inland Wetlands and Watercourses Commission for an actual permit, not just an advisory report. I respectfully disagree for two (2) reasons:

First, whatever decision the Commission reaches on the pending application, RSD will have no authorization to *build anything*. Therefore, the approval (or denial) of the pending application cannot have any immediate impact on any regulated areas. Only subsequent applications for final subdivision and golf course/country club construction can raise the potential for such impacts. Requiring the Applicant to file for a Wetlands Permit at this time would require detailed engineering plans which (as noted above) are not appropriate or necessary at this conceptual stage of review.

Second, only the Inland Wetlands and Watercourses Commission can determine the scope of its own jurisdiction. The Planning Commission has no authority to tell the Wetlands Commission what activities require permits and which ones do not. The Wetlands Commission has provided the Planning Commission with its report. That report *could have said*, "We have determined that the application pending before the Planning Commission requires a permit application to this Commission." The report *does not say that*. That ends our inquiry.

Fiscal Impact: The Intervenors have submitted their own fiscal impact study to dispute the one submitted by the Applicant. The rules of administrative law allow the submission of almost anything into the record, regardless of its ultimate relevance. In this case, both studies are irrelevant to the issue before the Commission and should not be considered in reaching a decision.

Conclusion:

The Commission has heard a great deal of testimony and received a great many reports. While such a volume of material is daunting, it has the benefit of giving the Commission the widest possible range of discretion in its ultimate decision. The Commission could approve the Special Exception as submitted; it could deny the application as submitted, thereby requiring a conventional subdivision application; it could deny the application as submitted and require the submission of a new Special Exception application for an Open Space Subdivision without a golf course included in the "yield" plan or with other possible changes; it could approve the Special Exception with a lesser number of lots or any other possible changes in the plans; or any combination of the above.

The one thing that the Commission cannot do is prohibit any development of the property at all, which is what many of those speaking at the public hearing desire. The acquisition of this land for open space is within the province of other State and local agencies, not the Planning Commission.

I hope these comments have been of help to the Commission in reviewing this application.

As always, if you have any questions, please do not hesitate to contact me.

Very truly yours,

Mark K. Branse/das

Mark K. Branse

MKB:das
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