



PLANNING COMMISSION EXHIBIT #W1

Connecticut Fund for the Environment

December 8, 2004

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

Re: River Sound Development LLC, Open Space Subdivision Preliminary Approval

Dear Mr. McIntyre:

As you know, Connecticut Fund for the Environment has intervened in the above-captioned proceeding under General Statutes Section 22a-19. For your convenience, CFE herein summarizes the legal grounds it has raised in opposition to the preliminary approval sought by River Sound Development LLC ("River Sound").

1. The Application Must Be Denied Because River Sound Has Not Applied for A Wetlands Permit as Required Under Applicable Statutes and Regulations

River Sound's application must be denied on the ground that the applicant has neither applied for nor received a wetlands permit for the Open Space Subdivision. The Connecticut General Statutes provide that no application for either a special exception or a subdivision approval may be granted before the rendering of a final decision on an application to the agency charged with regulation of inland wetlands and watercourses. General Statutes Sec. 8-3c; 8-26.

Specifically, Section 8-3c states

- (a) If an application for a special permit or special exception involves an activity regulated pursuant to sections 22a-36 to 22a-45, inclusive, the applicant shall submit an application to the agency responsible for administration of the inland wetlands regulations no later than the day the application is filed for a special permit or special exception.
- (b) The zoning commission or combined planning and zoning commission of any municipality ... shall not render a decision on the application until the inland wetlands agency has submitted a report with its final decision to such commission.

Similarly, Section 8-26 provides:

If an application [for subdivision approval] involves land regulated as an inland wetland or watercourse under the provisions of chapter 440, the applicant shall submit an application to the agency responsible for administration of the inland wetlands regulations no later than the day the application is filed for the subdivision or resubdivision. The commission shall not render a decision until the inland wetlands agency has submitted a report with its final decision to such commission. In making its decision the commission shall give due consideration to the report of the inland wetlands agency.

This statutory scheme assures that the wetlands agency shall be the first municipal agency to consider land use applications so that it may review development proposals unconstrained by prior approvals given by other agencies. This scheme not only gives priority to environmental concerns but also protects applicants from the hardship and expense that might result were a wetlands agency to mandate changes in a design that has already received zoning or planning approval.

In this matter, River Sound has chosen to seek preliminary approval of its Open Space Subdivision without first seeking a permit from the Old Saybrook Inland Wetlands and Watercourses Commission (IWWC). The report of the IWWC specifically states that its "review of this matter was general in nature, and related to the application for granting of a Special Exception to allow subdivision approval for the general site layout presented by the Applicant. *Detailed plans, reports, analyses and evaluations were neither provided to nor reviewed by the IWWC.*" [emphasis added]. Planning Commission Exh. 37. Moreover, a memo submitted by River Sound's attorney indicates its intent to seek preliminary approval under the Open Space Subdivision Regulations (OSSR) before applying for a wetlands permit. Planning Commission Exh. 6.

This procedure directly violates General Statutes Section 8-3c and 8-26, both of which, in the plainest wording, require the applicant to submit an application to the wetlands agency either before or at the same time he or she applies for a special exception or subdivision approval. The statutes are equally clear in requiring a planning commission to defer action on any application for special exception or subdivision approval prior to the issuance of a final decision by the wetlands agency. In our view, this serious defect invalidates any determination by this Commission of the appropriate number of lots which constitute a reasonable subdivision of the land" or any approval of the Preliminary Open Space Plan under OSSR Par. 56.4. See *Hertz v. Planning and Zoning Commission*, 1993 Conn. Super. LEXIS 3281 (non-compliance with Section 8-26 rendered commission's action null and void).

The fact that the present proceeding nominally entails an "Initial" or "Preliminary" stage of the Application does not render the statutory provisions cited above inapplicable or without effect. In the first place, the statutes require both an *application* to the wetlands agency and a *final decision* thereon. Regardless of the characterization of the approval being sought in this proceeding, it is plain that no application for wetlands approval has been filed. Therefore, the application is not in compliance with General Statutes 8-3c and 8-26.

Second, the Preliminary Open Space Plan constitutes a "subdivision" of land, as defined in both General Statutes and your own Subdivision Regulations because it proposes the division of the site into three or more lots. See Sheet No. SB-A, Open Space Subdivision Plan, Vol. II.

Third, regardless of the label, the "Initial Procedure" or "preliminary approval" process is a critical phase of the application process. The application required is detailed; See OSSR Par. 56.3; and, more importantly, the Commission will making the crucial determination as to whether the project satisfies the special exception standards in OSSR Par. 56.6.6. See OSSR Sec. 56.4. No such determination can be made prior to a full review by the wetlands agency, particularly for a project of this magnitude on such an environmentally sensitive site. The Preserve proposal entails at least three road crossings over wetlands and the construction of a golf course and housing units in close proximity to ecologically significant vernal pools and wetlands. Moreover, it is during the "preliminary" planning stage of a project such as the Preserve that the applicant and the Commission have the most flexibility to make adjustments so as to address the environmental and wetlands issues.

Finally, a preliminary approval given prior to full review by the IWWC will inevitably place pressure on the IWWC to approve what has already been approved by another agency, contrary to the intent of the legislature.

In sum, it appears that the applicant is seeking to make an "end-run" around the statutory scheme, which calls for the wetlands agency, not the Planning Commission, to give the first or preliminary review of the proposed development. This Commission should not countenance this effort and should insist on full compliance with the law, particularly here, where the public has taken such strong interest in protecting the wetlands and other natural resources on the site. In our view, this defect invalidates any determination by this Commission of the appropriate number of lots which "constitute a reasonable subdivision of the land" or any approval of the Preliminary Open Space Plan under OSSR Par. 56.4. See *Hertz v. Planning and Zoning Commission*, 1993 Conn. Super. LEXIS 3281 (non-compliance with Section 8-26 rendered commission's action null and void).

2. The Open Space Plan Fails to Meet the Regulatory Standards For Approval

The applicant for an Open Space Subdivision Plan must submit an Open Space Plan describing the open space resources of the premises and specifying which of the open space purposes listed in Paragraph 56.2 are to be accomplished. OSSR Par. 56.3.4. The Commission must approve such intended purpose(s); OSSR. Par. 56.6.6(A); as well as determine whether the plan satisfies the remaining standards set forth in Paragraphs 56.6(B), (C), (D) and (F).

River Sound asserts that the Plan will advance the goals of natural resource protection, including wetlands, streams and forests, outdoor recreation and preservation of cultural and scenic resources. See Planning Commission Exh. 1c. CFE takes no issue with the

desirability of protecting such resources but submits that the proposal falls far short of doing so.

In the first place, the Plan fails to adequately preserve natural resources. The "boundaries, access, shape, dimension, character, location and topography" of the designated open space area(s) are clearly unsuitable for such purpose, contrary to OSSR Par. 56.6.6(B). Similarly, the open space is not "reasonably contiguous", as required under OSSR Par. 56.6(F)(14). Rather than offering a large parcel that preserves the intact forest and interconnected wetlands, the open space proposed by River Sound Development is broken up into as many as seven odd, gerrymander-style patches, small avenues and remnant woodlands, with the golf course, roads and housing threaded around and through them. There are separate open space parcels consisting of 104 acres, 82 acres, 80 acres, 42 acres and several smaller patches. Several of these parcels are crossed by roadways. See Sheet No. SB-B, Preservation and Open Space Master Plan, Vol. II (Planning Commission Exh. 5d). As explained by several experts at the hearings, this design badly fragments the forest and interconnected vernal pool system, causing adverse ecological effects. See discussion, below.

Rather than sanctioning such a piecemeal approach to the preservation of open space, the Open Space Subdivision Regulations contemplate the setting aside of a contiguous open space area of at least 50% of the site. As noted previously, however, what is proposed here is a number of smaller patches surrounding and surrounded by a golf course and never far from roads, housing and other developed areas. We submit that on a site of almost 1000 acres, such configuration is not reasonably contiguous nor is it suitable to meet the objectives of natural resource protection. In short, contrary to River Sound's claims, the layout of the development will significantly impair the ecological functioning of the unfragmented forest and interconnected wetlands system.

For similar reasons, it also cannot be said that the proposal conserves the scenic values on the site. The fragmentation and destruction of the forest and wetlands will impair the "areas of scenic beauty"; OSSR Par. 56.2; and replace it with landscaped, manicured housing and country club. This outcome is contrary to the spirit and intent of the Open Space Subdivision Regulations, which is to preserve land in an undeveloped state for the benefit of natural ecosystems and to facilitate passive outdoor recreation. OSSR Par. 56.2. These purposes are not served where the open space is broken up into small patches, proximate to and dominated by roads and developed areas.

Moreover, even though it may conform to "alternate road standards" according to the town planner Christine Nelson; see Nelson memorandum dated 11/17/04; the east-west spine road will entail extensive cutting of mature trees and "not blend well into the surrounding terrain." In evaluating whether the proposal adequately protects scenic resources, the Commission should further consider whether the proposal "avoids setting new construction on prominent hilltops or ridges, by taking advantage of lower topographic features." OSSR Par. 65.6(F)(7).

It also appears that the recreational opportunities offered by the site are, like the objectives of natural resource protection and scenic preservation, seriously compromised by the golf course. Again, as pointed out by the town planner; Nelson Memorandum dated 11/17/04; the hiking trail frequently comes into close proximity with the fairways and doubles in many places as a cart path. This not only presents a safety issue; compare OSSR Par. 65.6.6(F)(13); but "the intertwining of the private country club lot with the open space lot fragments the remaining open space", thereby detracting from the ecological value of the Plan.

Paragraph 56.6.6 (F) sets forth additional standards governing the evaluation of an Open Space Plan and here again; the proposal falls short. It clearly fails to minimize impacts on large woodlands that contain mature trees and significant wildlife habitat. See OSSR Par. 56.6.6(F)(2), (5), as explained below. The overall design of the project will certainly have an adverse effect on the breeding populations of red bats, a species of special concern which, according to River Sound's Biological Survey, depends on large forest tracts. Biological Survey prepared by Environmental Planning Services, dated 10/27/04. The same can be said the box turtle, another species of special concern. According to the Herpetological Survey, the box turtle is declining in Connecticut precisely because of habitat fragmentation and road mortality. Herpetological Survey dated 10/26/04 at 8-9. In failing to protect the unfragmented habitats of these two species of special concern, the proposal fails to satisfy OSSR Par. 56.6.6(F)(8).

These objections to the Open Space Plan have been raised by numerous parties interested in this proceeding, including not only CFE but also Wendy Goodfriend of the Connecticut River Coastal Conservation District (Planning Exh. 30), the Old Saybrook Zoning Commission (Memo of 10/28/04), Robert Craig of Bird Conservation Research, Inc. (see letter and attached PowerPoint presentation); Letter of Patrick Comins, Director of Bird Conservation, Audubon Connecticut, Geoffrey Hammerson, speaking at the hearing of November 10, 2004 and Attorney Matthew Ranelli, speaking on behalf of the Town of Essex at the hearing of November 17, 2004. And although Eastern Connecticut Environmental Review Team evaluated the site prior to the present application, its report also warns of the adverse impacts of habitat fragmentation on wildlife. Report of Eastern Connecticut Environmental Review Team, dated July, 1999, pg. 46-48. The Commission should heed these many voices and find the Preliminary Open Space Plan deficient in that the designated open space is not reasonably contiguous, and it fails to sufficiently preserve the large, intact forest and interrelated wetland system and significant scenic resources.

3. The Proposal Is Reasonably Likely to Cause an Unreasonable Impairment of Natural Resources in Violation of General Statutes 22a-19 and Reasonable, Prudent Alternatives Exist

Connecticut's Environmental Protection Act (CEPA) is premised on the declared legislative policy that "the air, water, land and other natural resources [are]...finite and precious" and that "human activity must be guided by and in harmony with the system of relationships among the elements of nature." General Statutes Sec. 22a-1. The

Connecticut Supreme Court has affirmed the policies declared in General Statutes Sec. 22a-1 and ruled that the state's natural resources include wildlife and trees, belong to the public at large rather than to private individuals, and are not defined narrowly by private economic interests. *Paige v. Town Plan and Zoning Commission*, 235 Conn. 448 (1995).

In furtherance of the policy underlying CEPA, General Statutes Sec. 22a-19(b) requires a local administrative body to consider an intervenor's claims that a proposed development will unreasonably impair or destroy a natural resource. General Statutes Sec. 22a-19(a). If the administrative agency finds that such impairment or destruction is "reasonably likely", it must disapprove the proposal "so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." A reasonable and prudent alternative is one that is "economically reasonable in light of the social benefits derived from the activity." *Levine v. Conservation Commission*, 1997 Conn. Super. LEXIS 667, citing *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 595 (1993). Where an intervenor demonstrates to a planning agency the reasonable likelihood of impairment to natural resources, it is the Commission rather than the applicant which has the burden of raising and considering alternatives to the proposal. *Quarry Knoll II Corp. v. Planning and Zoning Commission*, 256 Conn. 674 (2001).

This statutory requirement operates independently of Old Saybrook's Open Space Subdivision Regulations and has nothing to do with the relative merits of a conventional versus an open space subdivision. Compare Memo of Attorney Branse, dated 11/17/04. Even an open space subdivision can cause unreasonable impairment of natural resources, particularly if it places development into and in close proximity to ecologically sensitive areas.

Additionally, Attorney Branse's comments to the effect that the Commission is only to determine whether an Open Space Subdivision is preferable to a conventional subdivision appears to overlook the fact that the Preserve site is zoned as a Residence C Conservation District. Under such classification, the applicant cannot build a traditional subdivision on the property. The question, and the proper comparison, is whether *this* Open Space proposal is the best that the Commission can envision for maintaining large, contiguous chunks of open space on the site.

This is an important point because the applicant has suggested that the metric by which the Commission should evaluate the amount of fragmentation is by comparison with a "traditional" subdivision. Such a traditional subdivision, however, is not eligible for the site, unless the Commission was expressly to permit such a use. The underlying zone requires an open space subdivision and a conventional subdivision may not be built on the site.

CFE also takes issue with Attorney Branse's suggestion that the Commission may not consider environmental impacts of the proposal at this stage of the application. General Statutes Section 22a-19(a) states in pertinent part that:

In any administrative... proceeding, ... any person, ..., association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding ... involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

Clearly, River Sound's application for preliminary approval of an Open Space Subdivision is an administrative proceeding and CFE has filed a verified pleading with the necessary allegations. Therefore, our claims are properly before you at this time. Moreover, regardless of the fact that further approvals will be necessary before actual construction begins, this Initial Procedure will culminate in the critical determinations of whether the overall layout satisfies the special exception standards for an Open Space Subdivision and the density of any such development. For these reasons, as discussed above, this proceeding is subject to CEPA, just as it is subject to General Statutes 8-3c and 8-26, requiring the Applicant to apply for and obtain a wetlands permit before seeking preliminary approval of an Open Space Subdivision.

The Preserve site is exceptionally rich in the resources that CEPA was designed to protect—specifically, large, unfragmented forest and wetlands and the wildlife that depend on them. For example, in evaluating the site for open space acquisition purposes, the Department of Environmental Protection assigned it unusually high scores in the wildlife (95/100) and forest categories (82/100). See Packet from DEP dated 11/9/04 at pg. 4. Dr. Klemens's herpetological report states that the large number of pools and the concentration of amphibian species on the property is notable. Several amphibian species that are declining statewide-- including the gray tree frog, the northern dusky salamander and the red-spotted newt-- are thriving on the Preserve site. These amphibians breed in the pools and spend the remainder of the year in the leaf litter surrounding the pools, utilizing as much as 750 feet of upland habitat surrounding the pools. Herpetological Survey dated 10/26/04 at 6-7,15-16.

As Dr. Geoffrey Hammerson explained at the November 10th hearing, the vernal pools are all of high quality and the applicant's assignment of as many of half of them as second tier is arbitrary and self-serving. Indeed, Dr. Klemens' report appears to agree with this assessment when it states that "almost all of the pools with [sic] the site can be classified as Tier One pools" based on criteria Dr. Klemens himself developed. Herpetological Survey, at pg. 11. Hammerson and Goodfriend both recommend that the area to the west of Pequot Swamp Pond be entirely preserved as an interrelated matrix of pools so that they remain connected with forested passageways for the amphibians and reptiles that inhabit them.

River Sound maintains that the amphibians will survive the loss and fragmentation of their forest habitat because they will be able to migrate across the golf course fairways, surviving the application of fertilizer and pesticides, and avoid being killed on roadways by using special tunnels. The Commission should reject this argument. It is contrary to both the letter and the spirit of CEPA to isolate thriving amphibian populations from their natural habitat and, after destroying such habitat, force them to navigate their way around

and through open, landscaped and paved areas, especially where more reasonable and prudent alternatives can be pursued.

Similarly, the record shows that the large scope of River Sound's proposal and its east-west orientation across the entirety of the parcel will cause significant fragmentation to an exceptionally large, intact mature forest. The forest resources on the site have been identified by many interested parties as of regional significance for bird life in our state. See Report and letter of Bird Conservation Research, Inc. (Robert Craig); Letter of Patrick Comins, Director of Bird Conservation, Audubon Connecticut, Report of Eastern Connecticut Environmental Review Team dated July, 1999 at pg. 46-48, Old Saybrook Land Trust Report, dated 6/18/1998. The detrimental impacts of fragmentation, such as introduction of predatory cats, raccoons, cowbirds, starlings and blue jays as well as invasive plant species, are documented in Mr. Comins's submission, the report of the Eastern Connecticut Environmental Review Team and the Town's own Plan of Conservation and Open Space. As noted above, several other reports in the record also criticize the proposed fragmentation of the forest, including that of Wendy Goodfriend of the Connecticut River Coastal Conservation District, the Old Saybrook Zoning Commission (Memo of 10/28/04) and the remarks of Attorney Matthew Ranelli, speaking on behalf of the Town of Essex at the hearing of November 17, 2004.

Accordingly, it would seem that any thorough and conscientious evaluation of the record points to the conclusion that impairment and/or destruction of natural resources is, at a minimum, "reasonably likely" if the proposal is approved. The Commission must therefore explore the question of whether a more reasonable and prudent alternative exists—that is, an alternative that is "economically reasonable in light of the social benefits derived from the activity." In other words, if an alternative scheme would provide greater social benefits-- including the public policy embodied in CEPA and the values sought to be achieved with the effective protection of open space-- and still allow the owner a reasonable economic return on its investment, then such an alternative is a reasonable and prudent one.

CFE submits that many such alternatives exist. Certainly there is room for a less ambitious Open Space Subdivision that clusters development closer to the existing forest edges at Bokum Road and perhaps on either side of the railroad right of way. Eliminating or scaling back the scope of the golf course would allow preservation of both the intact forest and the interconnected vernal pool system to the west of Pequot Swamp Pond. While River Sound would object to an alternative of this kind, you must keep in mind that its economic return need only be reasonable to satisfy constitutional concerns. It is your job as a public agency to prevent the destruction of significant natural resources, where such destruction serves no public interest and merely advances private economic gain. Where other commissions have denied land use approvals on CEPA grounds, with findings adequately supported by the record, courts have accorded deference and upheld such decisions. See e.g. *Pinney v. Granby Inland Wetlands and Watercourses Commission*, 2004 Conn. Super. LEXIS 584; *Levine v. Conservation Commission*, 1997 Conn. Super. LEXIS. 667.

In sum, CFE urges the Commission to carefully apply CEPA to the record before it and on that basis, deny River Sound's application and require it to reapply with a more reasonable and feasible alternative.

4. Preliminary Approval Should Not Be Granted in the Absence of Evidence that Access Via Bokum Road is Legally Available

While the Initial Procedure of the Open Space Subdivision Regulations does not specifically require the applicant to demonstrate legal availability of the proposed access to the site, it would be prudent in this case to require, at a minimum, some assurance that access can be obtained.

As the Commission knows, River Sound will have to get an easement from the Department of Environmental Protection over the railroad right of way in order to access the Preserve property from Bokum Road. In a previous application, the state denied such an easement. See DEP letter dated March 19, 1998. Even though the location of the proposed access in the present application differs somewhat from the earlier application, it is by no means assured that the current applicant will be successful in securing the necessary easement. Indeed, given the scale of the proposed project, it is likely that concern over the development's impact to state-listed species and their habitat would compel the DEP to reject such an easement during this round of applications as well.

Connecticut's Endangered Species Act is broadly worded to ensure that any action by the state will not result in adverse impacts to state-listed species. Specifically, the Act directs all state agencies to "conserve endangered and threatened species and their essential habitats, and . . . ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species . . ." Connecticut General Statutes § 26-310. In evaluating whether to grant the applicant an easement over state-owned property, the Department is, thus, required to weigh whether the granting of access would "result in the destruction or adverse modification of habitat designated as essential to such species." It is clear from the testimony provided to the Commission by the Town's own consultants, as well as experts introduced by CFE, that vital habitat for state-listed species will be adversely impacted by the proposed development of an eighteen-hole golf course and residential development complex. The certainty of these adverse impacts will likely compel the Department to deny any easement over state-owned property.

If the developer fails to gain the necessary approvals for access at either of the proposed locations, it could very well necessitate changes in the footprint of the development. Therefore, any approval of the conceptual open space subdivision plan should be considered premature until the applicant has demonstrated that the access it proposes is, in fact, legally available.

It is also significant that the applicant has expressly rejected the idea of providing any additional outlets to the Preserve to relieve traffic burdens. See letter from Dwight Merriam to Mark Branse dated June 30, 2004 (Planning Exh. 36).

In light of the number of concerns that have been raised by both Old Saybrook and Westbrook regarding access points and traffic concerns, this response is both troubling and raises serious doubt about the success of pending and future applications with respect to providing adequate access to the site.

Until the questions pertaining to access are resolved, the Commission cannot make the necessary finding that the proposal will not be detrimental to the public health and safety. OSSR Par. 56.4.

Conclusion

The proposal before the Commission presents numerous serious problems: (1) the applicant's failure to apply for and obtain a wetlands permit; (2) the proposal's deficiencies in relation to the criteria for approval of an Open Space Subdivision, (3) impairment of natural resources and the existence of reasonable and prudent alternatives, and (4) the need for an easement to access the site from Bokum Road. For all of these reasons, the Commission should deny the preliminary approval and urge River Sound to prepare another application that addresses these issues.

Respectfully submitted,

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