

Exhibit # 135

Christine Nelson

From: Goderre, Dennis [DGoderre@blcompanies.com]
Sent: Tuesday, December 28, 2004 1:29 PM
To: Christine Nelson; crothenberger@cfenv.org; mbranse@bransewillis.com
Subject: Supplemental Information

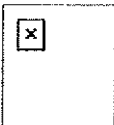
Christine/Mark/Charles,

Attached are two memorandums from Appendix J of the response Dated December 23. The first memorandum was missing the final page and the second memorandum omitted our discussion regarding Access to Route 153. Please delete the two memos in the appendix J and replace with the attached. Please reply to me to confirm that you received this message and the attachment. Thank you!

Dennis G. Goderre, ASLA, AICP

Manager, Landscape Architecture
BL Companies
355 Research Parkway
Meriden, CT 06450

V: 203.427.2547
F: 203.630.2615
Cell: 860.306.4334



MEMORANDUM

To: Robert A. Landino, P.E.
From: Dwight H. Merriam, FAICP, CRE
Date: December 22, 2004
Subject: Conditions and Standing Concerning Crossing of Railroad Right-of-Way and Access to The Preserve from Route 153

Concerns have arisen that the Department of Environmental Protection ("DEP") has not granted permission to River Sound Development LLC ("RSD") for crossing the railroad track and right-of-way that traverses RSD's land. These concerns in turn raise the issues of whether the Town of Old Saybrook Planning Commission ("Planning Commission") may condition its approval of RSD's pending application on the construction of a crossing, and whether the ownership of the railroad right-of-way somehow defeats RSD's standing to present its pending application.

At the outset, we must bear in mind that approval of RSD's application for a special exception is only a preliminary approval that authorizes RSD to submit a final Open Space Subdivision Plan as provided in Section 56.5 of the Town of Old Saybrook Zoning Regulations. A favorable decision from the Planning Commission at this stage of the application does *not* authorize RSD to develop anything. Thus, the railroad crossing is a hypothetical issue at best.

No standing issue exists with respect to RSD's application. The application proposes development on both sides of the railroad right-of-way but none within the railroad right-of-way, with the exception of a flyover crossing for the spine road. The crossing in no way changes the development within or use of the right-of-way. RSD has designed the crossing to comply with all requirements of the Department of Transportation for railroad crossings.

The Planning Commission can impose as a condition of approval of RSD's application the requirement that construction of the railroad crossing occur to provide access to The Preserve. See *Nicoli v. Planning & Zoning Commission*, 171 Conn. 89, 90-94 (1976). Such a condition is within the control of the applicant, making the Planning Commission's decision a modification and approval under Conn. Gen. Stat. § 8-26. See *Carpenter v. Planning and Zoning Commission*, 176 Conn. 581, 592 (1979). However, approval of a subdivision cannot be conditional upon approval by another governmental agency, unless that approval by the other agency appears to be reasonably probable. *Carpenter v. Planning and Zoning Commission*, 176 Conn. at 592-593, 597. Discretionary review by the Town of Old Saybrook Zoning Commission or land use agencies in other towns would not have a reasonably probable outcome and could not operate as a condition of approval.

On the other hand, where requirements of a governmental agency are straightforward and can be met by an applicant within a reasonable period of time, approval by that agency can be a proper condition of approval. For example, where a subdivision application was approved

conditional on approval of its water system by the Department of Public Utility Control, and that approval was reasonably probable because the five requirements of the DPUC were not difficult to satisfy and were within the control of the applicant and could be fulfilled within a reasonable time, the commission properly modified and approved the application under C.G.S. § 8-26. *Timber Trails Corp. v. Planning and Zoning Commission*, 222 Conn. 380, 390-93 (1992). Here, approval by the DEP is reasonably straightforward and can be obtained within a reasonable period of time. The DEP has a review process that its property management review team provides. Based on a map depicting the crossing's proposed location and a narrative justification for the need for the crossing, the property management review team will evaluate the crossing and provide an answer. Elizabeth Brothers, Director of the DEP Land Acquisition and Management Division, left me a voice mail message to that effect today.

Absent serious railroad-related engineering or land use problems, railroads allow crossings of their rights-of-way, in the opinion of Curtis Proud, an expert in railroad crossings at ProSource Technologies, Inc. In recent communications with me, Mr. Proud said that he saw no reason why this crossing would not be permitted. In fact, he could not recall an overpass ever being denied. Mr. Proud has over 25 years of experience with the Williams Pipe Line Company. From 1984 to 1994, he was the manager of land records and claims, and he held other positions with the pipeline, such as contract administrator and real estate representative for the northern region. He has been with ProSource Technologies now for approximately a year and handles real estate and right-of-way issues for the state highway department, cities, regional sewer systems, electrical transmission utilities, and pipeline companies. In the negotiation of crossing agreements, railroads tend to focus on the amount of compensation, design of the crossing facility, indemnity and hold harmless provisions, insurance policies that protect the railroad, being named as an additional insured on the existing general liability insurance policy of the party seeking the crossing, relocation of the crossing if it impairs future expansion of the crossing, and the time period covered by the crossing agreement (or a unilateral right of the railroad to revoke the crossing agreement). RSD and the Planning Commission can readily conclude that approval of the crossing is reasonably probable.

Probably the best way to look at this situation is to think of the requirement by the Connecticut Department of Transportation State Traffic Commission ("STC") for a Certificate of Operation, which you as a traffic engineer know better than most, and which we need to build this project. We have not applied for one. State law prohibits a local building official from issuing a building permit until the Certificate is issued. The STC will not take an application until the zoning is in place. In short, you cannot get a Certificate until you are done locally – exactly the same posture as this situation where we need to get through the initial local approval process before it makes sense to negotiate the terms of the crossing.

The provision of access to Route 153 in Westbrook might be similarly misconstrued to implicate similar concerns. Again, approval of the Planning Commission at this stage of the application does *not* authorize RSD to develop anything. Implicit in the application is the existence of westerly access from The Preserve to Route 153, without which the development cannot move forward. If the Planning Commission harbors concerns about whether the access will be provided, it may include as a condition of approval the provision of this access. To do so would be surplusage, however, because the circulation plan is part of the proposal and

memorialized in the submission. RSD will address the details of the access, including the issuance of any necessary federal, state, and local permits, when it submits its formal subdivision application.

MEMORANDUM

To: Robert A. Landino, P.E.

From: Dwight H. Merriam, FAICP, CRE

Date: December 22, 2004

Subject: Application Process for Open Space Subdivisions under the Zoning Regulations of the Town of Old Saybrook

Attorney Mark Branse, counsel for the Town of Old Saybrook Planning Commission ("Planning Commission"), has articulated an expansive position with respect to the action the Planning Commission can take on the application for a Special Exception for an Open Space Subdivision Plan that River Sound Development LLC ("RSD") has submitted. Attorney Branse believes that the Planning Commission has three possible options: (1) approval of a conventional subdivision (not necessarily the one depicted in RSD's application); (2) approval of an open space subdivision as presented in RSD's application; and (3) approval of an open space subdivision modified from what RSD presented in the application. Attorney Branse believes that if the Planning Commission were to conclude that the land to be subdivided was not conducive to clustering, it could direct RSD to the conventional subdivision approach in the present proceeding.

On behalf of the Connecticut Fund for the Environment ("CFE"), Attorney Charles Rothenberger has taken the position that if the Planning Commission were to deny RSD's application, the denial would have the effect of rejecting only the Open Space Subdivision Plan now under consideration and could not constitute any decision on a conventional plan. He has, in effect, stated that the Planning Commission could approve a conventional subdivision plan only if RSD affirmatively applied for a waiver of the clustering requirement as part of its application and the Planning Commission acted favorably on the waiver. A denial of a waiver would require RSD to apply again for a Special Exception for an Open Space Subdivision Plan different from the one previously denied. Attorney Branse fears this approach could "trap RSD in an endless cycle of open space applications, each one being denied, with RSD being required to continue applying."

While Attorney Branse is correct in recognizing the policy implications of Attorney Rothenberger's positions, under the express terms of the pending application as submitted, the Planning Commission cannot approve a conventional subdivision. The current application neither seeks approval of a conventional subdivision nor requests a waiver of the clustering requirement in accordance with the requirements of the Subdivision Regulations of the Town of Old Saybrook ("Subdivision Regulations"). On the other hand, Attorney Rothenberger ignores the flexibility of Planning Commission's authority to approve RSD's application with modifications, as well as the Planning Commission's obligation under Conn. Gen. Stat. § 8-26 to state its reasons for denying the application, as barriers to an endless cycle of applications. If the Planning Commission refuses to approve an open space subdivision, even with modifications,

and takes the position that only a conventional subdivision is appropriate on the land to be subdivided, it must articulate its position in its denial of RSD's application.

Absent a waiver by the Planning Commission, only clustered subdivisions are possible in the Residence C Conservation District. According to Section 27.1 of the Zoning Regulations of the Town of Old Saybrook ("Zoning Regulations"), the purpose of the Residence C Conservation District is "[t]o cluster residential development amid open spaces at a density and in configurations suitable to preserve natural and cultural resources." Section 27.11 requires the clustering of subdivision lots in the Residence C Conservation District:

For any subdivision located within the Residence C District, the applicant for such subdivision shall be required by the Planning Commission to apply for a Special Exception pursuant to Section 56 Open Space Subdivision of these Regulations, unless the Planning Commission waives this requirement where the size, shape, or character of the property makes it unsuitable for Open Space Subdivision treatment. The area, shape, bulk, coverage and other requirements for such lots shall be in accordance with Section 56 when such Special Exception application is required.

Section 56.1 of the Zoning Regulations imposes a parallel requirement:

... In accordance with Section 27.10 of these Regulations, *no subdivision* shall be approved in the Residence C Conservation District *other than as an Open Space Subdivision* under this Section; provided, however, that the *Planning Commission may waive this requirement* where the size, shape, or character of the property makes it unsuitable for Open Space Subdivision treatment. The Planning Commission will follow the procedures herein specified, and before granting a Special Exception, will find that the standards and conditions herein specified have been met and that the Special Exception will accomplish the open space purpose set forth in Paragraph 56.2 and will be in harmony with the purpose and intent of the Zoning Regulations. (Emphasis added.)

Section 56 of the Zoning Regulations makes approval of an Open Space Subdivision a two-step process for approval of an application for a Special Exception for an Open Space Subdivision Plan. Section 56.3 of the Zoning Regulations requires the application to include a Conceptual Standard Plan, a Preliminary Open Space Plan, and a written statement concerning the Open Space Subdivision. The Conceptual Standard Plan and the Preliminary Open Space Plan must meet certain requirements under Section 56.3.1. The written statement must describe the open space resources of the parcel and the specific open space purposes of Section 56.2 that the application will accomplish; the proposed method of preservation, disposition, ownership, and maintenance of the open space land; and the proposed method of providing water supply and sewage disposal.

The Planning Commission receives the application for a Special Exception for an Open Space Subdivision Plan. Under Section 56.4, it reviews the Conceptual Standard Plan to determine the number of lots that will constitute a reasonable subdivision of the land in compliance with the Zoning Regulations and the Subdivision Regulations of the Town of Old

Saybrook ("Subdivision Regulations"). The total of these lots, including dwelling units for lots proposed for development under Section 55 of the Zoning Regulations for a Planned Residential Development ("PRD") sets the maximum number of lots that may be created on the land proposed for open space subdivision ("Total Lots"). At this state of the proceeding, the Planning Commission may approve the application, approve it subject to modifications, or disapprove it. Approval requires the Commission to find that the application accomplishes the purposes in Section 56.2 and meets the standards in Section 56.6, and that the Open Space Subdivision Plan will not be detrimental to the public health and safety and property values. Approval constitutes preliminary approval and authorizes the applicant to submit a final Open Space Subdivision Plan as provided in Section 56.5.

By the terms of the application and the Zoning Regulations, only an Open Space Subdivision is before the Planning Commission for decision. The Conceptual Standard Plan is submitted for the determination of the Total Lots, that is, maximum density of any Open Space Subdivision Plan. The Planning Commission has authority to approve, modify, or deny the Preliminary Open Space Plan. The Planning Commission may not approve a conventional subdivision for two reasons. First, the application does not seek approval of such a subdivision, and the modifications that the Planning Commission make to the Preliminary Open Space Plan do not encompass the transformation of the plan into a conventional plan. Were this not true, the Zoning Regulations could allow the Old Saybrook Zoning Commission to approve an application for a special exception to build a drive-through, fast food restaurant with modifications that would require construction of a sit-down, white tablecloth restaurant, for example.

Second, approval of a conventional subdivision in a Residence Conservation C District requires a waiver of the Open Space Subdivision requirement. Conn. Gen. Stat. § 8-26 includes a provision allowing a planning commission to waive certain requirements of zoning regulations:

The [planning] commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations. Such regulations may contain provisions whereby the commission may waive certain requirements under the regulations by a three-quarters vote of all the members of the commission in cases where conditions exist which affect the subject land and are not generally applicable to other land in the area, provided that the regulations shall specify the conditions under which a waiver may be considered and shall provide that no waiver shall be granted that would have a significant adverse effect on adjacent property or on public health and safety. The commission shall state upon its records the reasons for which a waiver is granted in each case.

While Section 56.1 of the Zoning Regulations allows a waiver of the Open Space Subdivision requirement in accordance with Conn. Gen. Stat. § 8-26, the Subdivision Regulations, which govern the Planning Commission's actions, impose further requirements on a waiver. Indeed, the Subdivision Regulations must provide additional requirements. See *Ghent v. Planning Commission of the City of Waterbury*, 219 Conn. 511, 519 (1991). Among the requirements for a waiver in the Subdivision Regulations is that an applicant must present a

request for waiver to the Planning Commission in writing at the time it submits its application. Subdivision regulations may require that a request for a waiver be submitted in writing. See *Shailer v. Planning and Zoning Commission of the Town of Haddam*, 26 Conn. App. 17, 22-23 (1991). RSD has not requested a waiver as part of its pending application, and the Subdivision Regulations governing the Planning Commission's issuance of a waiver do not allow it to approve such a waiver as part of this proceeding. Section 3.4 of the Subdivision Regulations sets forth a detailed procedure for the waiver of subdivision requirements.

When the Commission finds that extraordinary hardships or practical difficulties may result from compliance with these Regulations, the Commission may, by a three-quarters vote of all members of the Commission, approve waivers to these Regulations, provided such waivers shall not conflict with the intent and purposes of these Regulations. The Commission shall state upon its records the reason for which a waiver is granted in each case.

3.4.1 The Commission shall not approve a waiver unless it finds in each specific case that:

- A. The granting of a waiver will not have a significant adverse impact on adjacent property or on public health and safety;
- B. The conditions upon which the request for a waiver are based are unique to the proposed subdivision for which the waiver is sought and are not applicable generally to other potential subdivisions;
- C. The waiver will not create a conflict with the provisions of the Zoning Regulations, the Plan of Conservation & Development, Town ordinances, or regulations of other Town boards or commissions.
- D. A request for any such waiver *shall be presented in writing by the applicant at the time when the subdivision application is first submitted*. The request shall state how the proposed waiver meets the requirements stated above.
- E. Any waiver granted shall not be a precedent for any future waiver, and the Commission may attach any reasonable condition to the grant of the waiver. (Emphasis added.)

Although the Planning Commission lacks the authority to approve a conventional subdivision plan as part of RSD's application, it may approve the Open Space Subdivision Plan with modifications short of transforming it into a conventional plan. If the Planning Commission denies RSD's application, it must explain itself. Conn. Gen. Stat. § 8-26 requires a planning commission to give reasons for its denial of a subdivision application. The reasons assigned for the denial are subject to review for their validity. *RK Development Corp. v. City of Norwalk*, 156 Conn. 369, 377 (1968); *Blakeman v. Planning Commission*, 152 Conn. 303, 306 (1965); *Crescent Development Corp. v. Planning Commission*, 148 Conn. 145, 150 (1961). Thus, if the Planning Commission determines that only a conventional subdivision is suitable for RSD's

parcel, the Planning Commission must say so as a reason for denying RSD's application. Contrary to Attorney Rothenberger's position, the requirements of Conn. Gen. Stat. § 8-26 prevent the application process under Section 56 of the Zoning Regulations from becoming a game of "blind man's bluff" between the Planning Commission and RSD.

Finally, the Supreme Court has held that a prolonged series of land use applications and denials by a land use agency in which the agency never explains the nature of development that it will approve on a parcel of land is grounds for finding a taking of the applicant's property. See *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). The Fifth Amendment imposes the definitive limitation on the cycle of open space applications.