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Exhibit #145

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January 6, 2005

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

RE: Old Saybrook Planning Commission - The Preserve RS Open Space Subdivision Special Exception Application - Response to River Sound Development's Reply Materials #3 and #4
FILE NO: 3029/04-207

Dear Chairman McIntyre:

I have reviewed Responses #3 and #4 as submitted to the Commission by River Sound Development, LLC, ("RSD"). For the most part, my comments of past review letters remain applicable. It is possible that testimony at the final public hearing of January 12 will provide additional evidence concerning my analysis, but I am committed to be in Bolton that night and cannot be present. In fairness to all parties, I have decided to submit these comments in advance of the hearing, recognizing that they will be subject to modification after the final hearing closes. Specific comments are as follows (not in any order of priority):

Procedural Aspects of the Application, Conventional Layout Approval:

In Appendix J to Response #4, Attorney Dwight Merriam alludes to an interpretation of the Zoning Regulations initially presented to me outside the public hearing by

Attorney Charles Rothenberger of the Connecticut Fund for the Environment.[1] The basic argument made by Attorney Merriam is that, contrary to my statements to the Commission in the past, the Commission cannot approve any conventional layout in this proceeding. Attorney Merriam reviews the text of Section 56 of the Zoning Regulations and concludes that the Commission could approve, or modify and approve, the pending Special Exception application, or could deny it, but such denial would not and could not constitute approval of any conventional layout. That could not happen unless and until RSD requests a waiver of the mandatory open space provisions of Section 56.1.

Without reviewing Attorney Merriam's and Attorney Rothenberger's arguments in detail, I would conclude that the CFE and RSD positions are correct and I would endorse their position. Denial of the pending application would not, automatically, approve any conventional subdivision plan. RSD would have to apply for a new Special Exception unless and until they seek a waiver of the cluster requirement. This simplifies the Commission's task because it need not review or act on the conventional layout as a subdivision application in and of itself.

Procedural Aspects of the Application, Requirement for an Inland Wetlands Application: In Appendix J to Response #4, Attorney Merriam presents his arguments for why the pending Special Exception application does not require a permit application (as opposed to an advisory referral) to the Old Saybrook Inland Wetlands and Watercourses Commission. Without repeating those arguments, I would simply say that I concur that no permit application is required to the Wetlands Commission at this time. Such an application would be a necessary prerequisite to any future application that involved actual construction, such as a subdivision application or the golf course Special Exception.

Procedural Aspects of the Application, Right to Cross the Railroad "Right of Way:" In Appendix J to Response #4, Attorney Merriam presents his arguments as to why the Commission can approve the pending application subject to a condition that RSD obtain the right to cross the State-owned railroad line that separates the Pianta parcel

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[1]Contrary to Atty. Merriam's memorandum, Atty. Rothenberg has not "taken the position" discussed. Atty. Rothenberg only presented his ideas to me in a verbal conversation and has never presented them to the Commission on the record. Atty. Merriam is essentially "replying" to an argument that has not yet been made. Nevertheless, now that it has been raised, I will address it.

from the balance of the RSD land. Attorney Merriam states that RSD "proposes development on both sides of the railroad right-of-way[2] but none within the railroad right-of-way, *with the exception of a flyover crossing for the spine road".* (Emphasis added). This is one rather significant exception. The fact is that the State owns this land and the air rights that go with it. They can refuse to allow their land to be used for a flyover crossing if they wish and, like any other property owner, they don't even have to explain why. Without that connection, the property depicts no full-service road connection in Old Saybrook at all. This is a critical element of the application.

More important, I question whether the Commission can make this a condition of approval. I concur with Attorney Merriam's analysis that distinguishes between conditions that are within the control of the applicant and those that are conditioned on the action of another government agency. The problem is that the right to cross the rail line is not under the control of the applicant. It is under the control of another government agency. As Attorney Merriam points out, the question then becomes: Is that approval "reasonably probable". The discussion of probability in terms of *permits* from other agencies does not address the situation where the State is a *property owner.* The State is governed by its own regulations when it grants or denies a permit application. There are no regulations for what the State must allow on its own land. The discussion of Mr. Proud's experience[3] with *railroads* does not necessarily indicate what the *State* would do in a comparable situation. The Commission might find that Mr. Proud's experience is sufficient indication of what the State would do, but I would prefer to hear more concrete evidence. Note that I raised this question during informal staff reviews and formally in my review letter of December 1, 2004.

As of the writing of this letter, I know that Attorney Merriam has had some discussions with the Office of Property Management and Acquisition of the Connecticut Department of Environmental Protection and that he may have some indication that the State is prepared to negotiate the crossing of its railroad line. Such an indication provide support for the validity of a condition of approval for that crossing.

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[2]Although the term "right-of-way" is often used to describe rail and utility lines, it must be remembered that in this case, the property upon which the railroad line exists is *owned in fee simple* by the State. It is not a "right-of-way" at all.

[3]The applicant may have intended to attach some kind of report by Mr. Proud in this booklet, but I did not see it.

Procedural Aspects of the Application, Right to Build Town Road into Westbrook: As noted above, Appendix J to Response #4 includes arguments as to why the Commission can condition an approval on consent from the State to allow a crossing of the railroad tracks. However, Response #4 does not address the extension of the proposed Town road into Westbrook. Approval of this application would have to be conditioned on the action of another government agency, which Attorney Merriam acknowledges that the Commission cannot do unless that approval is "reasonably probable". Based on the letter received from the Old Saybrook Board of Selectmen, it is not looking very probable at this time. The Applicant must address this in some manner.

Procedural Aspects of the Application, Notice of Intervention: In Appendix I to Response #4, Attorney Merriam presents his arguments concerning the Notice of Intervention by the Connecticut Fund for the Environment ("CFE"). I concur with Attorney Merriam's statements under the "Introduction," "Commission Review Process," and "Intervention" headings.

I do not, however, concur entirely with the "Analysis" portion of this Memorandum. In Subsection A, Attorney Merriam argues that the allegations of 4(a) (concerning fragmentation of forest and water quality impacts) raises issues which are outside the Commission's jurisdiction because the Planning Commission is not a wetlands agency. While that statement is true, the fact remains that the pattern of development could have some impact on natural resources, which include both forests and water quality. Section 56.2 makes the protection of various environmental features an element of the Special Exception review process. While I express no opinion about the *validity* of CFE's claims, I do not think that they raise issues which are outside the Commission's jurisdiction.

In Subsection B.1, Attorney Merriam emphasizes the preliminary nature of the pending application and that it, even if approved, will not authorize the construction of anything. That will await future applications. From this fact, Attorney Merriam argues that the pending application *cannot have* any impact on natural resources. I think this is an oversimplification that could confuse the Commission. I concur with Attorney Merriam that because this application is preliminary, the applicant need not address, and the Commission cannot evaluate the precise impacts of future improvements such as roads, lots, septic systems, golf course fairways, etc. Therefore, the Intervenors must establish that *in general, the pattern of development proposed* will have the adverse impacts which they allege. Again, I express no opinion as to whether the pattern

proposed by RSD will, in and of itself, have the alleged unreasonable impacts, but it is still a topic that the Commission must address in its deliberations.

In Subsection B.2, Attorney Merriam correctly discusses the concept of "unreasonable" impact. *Any* development involves *some* adverse impact on natural resources and the question is whether the pending Special Exception inherently involves impacts which are *unreasonable.* As with preceding sections, I express no opinion as to whether CFE has met its burden of proving such impacts.

In the second Subsection B.1 on 6 (there are two Subsections B, which is confusing), Attoreny Merriam addresses feasible and prudent alternatives. I concur that the Commission can consider the Tim Taylor plan as one possible alternative that was rejected. However, I do not agree with the implication that just because RSD "started over from 'square one'" and performed what they modestly characterize as "a complete, comprehensive and thorough analysis of all development alternatives for the property" that this is some kind of substitute for an analysis of feasible and prudent alternatives in this proceeding. RSD must review the evidence that they have placed on the record in *this public hearing* that demonstrates their consideration of feasible and prudent alternatives. This is done to a much greater extent in Response #3 than in Response #4.

Similarly, the second Subsection B.2 on page 7 claims that Section 56 *itself* constitutes some kind of feasible and prudent alternatives analysis because it requires a comparison of two plans submitted by the applicant. I respectfully disagree. First, the submission of one particular open space plan and another totally different conventional plan cannot possibly constitute any examination of alternative designs for *the submitted open space plan.* Second, Attorney Merriam writes that "When the Commission decides on one plan or the other–the conventional or the conservation open-space cluster–the Commission is choosing from among the alternatives."[4] This is wrong because choosing between two "either/or" options does not constitute a complete evaluation of feasible and prudent alternatives. Note also that this argument is directly contrary to Attorney Merriam's claim in the very next Memorandum of this Appendix that the Commission cannot approve a conventional subdivision design in this proceeding.

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[4]Note that this statement is not even grammatically correct: One does not choose from "among" two presented options. This underscores that a "this one or that one" choice is not an evaluation of all possible feasible and prudent alternatives.

Since I have concurred with Attorney Merriam's analysis in his next Memorandum, I cannot accept a contrary argument in this one. Just submitting an application under Section 56 does not, in and of itself, constitute any kind of feasible and prudent analysis.

In Subsection B.3 on p. 8, Attorney Merriam argues that the "objectives of the Applicant are to have a golf course and residential community which is marketable, profitable and approvable. The golf course is an essential marketing and economic element which has independent economic value . . . This property cannot be economically developed without the golf course and the enhanced residential value". Assuming, *arguendo*, that this statement is true, it does not establish that a different development program or design is not "feasible" or "prudent". The opposition has argued at length that RSD's application should be denied because the land should be open space. I have consistently said that such an argument is irrelevant to the issues before the Commission because its task is to shape a *development plan*, not to appropriate funds for open space. However, it is just as true that the developer's "objectives" or its view of what is "economical" are also irrelevant. The Commission is examining whether this open space subdivision, as presented, should be approved and if so, with what (if any) modifications or conditions. Neither the desirability of acquiring this land for open space nor RSD's target profit margin have any bearing on those issues.

Disturbed Area Calculation:
In Response #4, RSD has provided the Commission with maps that compare the disturbed area between their proposed Open Space Subdivision layout and their proposed conventional subdivision layout. The maps indicate that the Open Space Subdivision, even with the golf course, would leave 626.5 acres of undisturbed land (70.1% of the total) while the conventional subdivision would leave 588.2 acres (or 66% of the total). These maps therefore indicate that, even with the golf course, the Open Space Subdivision would create 38.2 more acres of undisturbed land.

However, I do not think that the methodology employed is valid. The fact is that the Open Space Subdivision proposes 248 lots while the conventional layout proposes 293 lots–45 additional lots. Thus, the maps compare two subdivisions that contain dramatically different numbers of lots. This is not an "apples to apples" comparison.

If we take RSD's figures, we can see that the conventional layout involves an average of 1.04 acres of clearing for each house lot (305 acres of clearing ÷293 lots). If that factor is multiplied by 248 lots (rather than 293) we get 257.92 acres of disturbance, instead of 305. Thus, if a 248 lot open space subdivision were compared to a 248 lot

conventional subdivision, the results would be 626.5 acres undisturbed for the open space subdivision and 635.28 acres (893.2 - 257.92) for the conventional subdivision, or 8.78 additional acres above the open space plan. This is still an improvement, but just not as large as the one presented.

Whether this more accurately calculated difference in disturbed area is sufficient to defeat the Special Exception application is the Commission's decision upon which I make no recommendation. But I do not intend to the have the Commission mislead into comparing disturbed areas for two subdivision layouts with a different number of lots in each one.

Golf Courses Safety:
In Response #3, Section III, Mr. Hills states that "the dimensions that Mr. Branse cited in his report are **incorrect.**" (Emphasis original). Mr. Hills goes on to explain that, in fact my measurements *were correct*, but that he opted to measure the ULI recommended setbacks from the "centerline/line of play". The ULI materials do not say to measure from the "centerline/line of play". They say to measure from the "greens and landing areas." I am not sure how a "landing area" is determined, though one could safely assume that it is an area where a golf ball aimed at the green is likely to land.[5] It could be considered as the outermost perimeter of the sand traps around the green, but I considered that too imprecise. To be conservative, I measured from the outer edge of the green. Whatever the "landing area" might be, it surely must be somewhere outside the perimeter of the green. Otherwise, there would have been no point in the ULI specifying setbacks from *both* "greens" and "landing areas". Unless someone can demonstrate that the ULI definitions of "greens" and "landing areas" mean the centerline of the fairway, I stand by my measurements as accurate and conservative.

I am also unpersuaded by the claim that the ULI standards are "not a standard, rule or code but rather a recommendation". However characterized, these are the safety standards that Mr. Hills himself provided to the Commission, and that he claimed to have followed. If these standards were not valid ones, he should have placed them into the public hearing record. It should also be pointed out that the ULI standards/recommendations were *minimums*.

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[5]Even a professional golfer does not hit the ball onto the green first time, every time.

Status of Road A as Town Versus Private Road:
As of this time, the Board of Selectmen have not voted on the alternative road specifications that have been recommended by Town staff. Regardless of the outcome of that vote, however, I note that the staff recommendation includes making Road A a private road, presumably so that, among other reasons, the Town will not have the burden of repairing and/or replacing the three bridges that Road A requires. Mr. Peace spoke at length about the cost of bridge replacement. RSD responded by stating that replacement cost was not as high as Mr. Peace indicated and that, in any event, there was State funding for 80% of the replacement cost.

However, this raises another question: If the cost of bridge replacement is remotely near what Mr. Peace thought it was, and State grants are not available (as they would not be to a private association), then will the homeowners association at The Preserve have the assets to replace the bridges when required? A question also arises about public use of Road A: Will Old Saybrook and Westbrook residents be able to use Road A as a through road if it is private? If not, one of the public benefits of having the road is lost. The planning for a municipal system of public and private roads is one of the central functions of a planning commission in Connecticut. Unfortunately, there is no longer time for the Planning Commission and the Board of Selectmen to discuss the pros and cons of public versus private road status for Road A, nor for either agency to examine the feasibility of bridge replacement by a private association, nor the implications of the association's failure to replace a bridge when necessary.

This is a major issue that is arising late in the approval process. The best that can be done now is for the Planning Commission to specify the status of the road as it desires from a planning perspective. If that decision is at odds with the Board of Selectmen's decision on the matter, then later on the two agencies will have to resolve the issue in concert with the applicant.

Road Configurations:
If the Board of Selectmen vote to accept the staff recommendations on alternative road standards, Mr. Hillson advises me that there will be a need for substantial redesign of Road A in terms of both its grading and its horizontal alignment. The Commission will not have before it, the grading and other potential impacts of that redesign. While it is possible that such redesign will not influence the Commission's decision about the *desirability* of the conceptual Open Space Plan, it does make it harder to evaluate the *plan itself* for modifications or environmental impacts. This may be a question to pose to both Mr. Hillson and RSD's design engineers.

Conclusion:
It now appears that, by the close of the public hearing, the Commission will have before it sufficient testimony to support almost any decision that it chooses to make in this application. As your counsel, I view this as a good thing because it protects the Commission's prerogatives and options, and allows the Commission to do what it considers to be in the best interests of the Town as a whole. You are the finders of act. It is for you to determine which witnesses to believe or not to believe, and which testimony and evidence you find more relevant, credible, and persuasive. As always, nothing in this letter should be construed as a recommendation on any decision that you may reach. Among other things, my role is to highlight issues that present themselves and to scrutinize all the arguments and evidence, from any party, that is placed before you. It is not my role to tell you how to vote.

I hope that these comments are of help to the Commission in reaching a decision, and I regret that I will not be able to join you on January 12, 2005.

Very truly yours,

Mark K. Branse

MKB:ta

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