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PLANNING COMMISSION EXHIBIT #148

January 5, 2005

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:

Connecticut Fund for the Environment herein replies to points made by the applicant in response to issues we have raised.

Briefly stated, we submit that (1) the applicant's characterization of the issues the Commission must decide is both incorrect and misleading, and (2) our intervention petition is properly pleaded, appropriate for decision at this time and raises valid issues that are well within the Commission's jurisdiction.

A. The Analytical Framework Presented by the Applicant is Incorrect and Misleading

In each of its response booklets, the applicant asserts that there are six questions for the Commission to determine in ruling on the application. CFE takes issue with this analytical framework for several reasons.

In the first place, Question 1 (whether the site is more conducive to an Open Space Subdivision [OSS] or a conventional subdivision) is improper because the Commission need not and should not be making such a comparison. The Zoning Commission has already considered the general question of which type of subdivision is preferable, decided in favor of an Open Space Subdivision, and zoned the property as a Residence C Conservation District. Accordingly, the sole permissible use of the property is an Open Space Subdivision.

Further, the only purpose of the conceptual standard plan is to determine density of the OSS. Open Space Subdivision Regulations (OSSR) Par. 56.4. The regulations nowhere permit or require the Commission to revisit the question of which type of subdivision is more appropriate for the site. The applicant's repeated insistence that the Commission engage in this exercise is simply a tactic designed to bolster the merits of its application.

205 Whitney Avenue, 1st Floor • New Haven, Connecticut 06511 • 203-787-0646 • Fax 203-787-0246 • www.cfenv.org
28 Grand Street • Hartford, Connecticut 06106 • 860-524-1639

Question 3 (whether the application should be approved as submitted or modified and approved) is misleading because it fails to mention the option of denial. State law and the OSSR provide the Commission with the authority to approve the application, modify it and approve it as modified, as well as to deny it. General Statutes Sec. 8- 26. Despite the applicant's disingenuous mischaracterization of the issues, then, the Commission must duly consider the option of denying the application.

Question 5 (whether the proposal would impair/detroy natural resources in comparison with a conventional subdivision) is improper for the same reasons discussed in relation to Question 1. General Statutes Section 22a-19(a) requires that the Commission determine whether the proposed subdivision is reasonably likely to unreasonably pollute, impair or destroy natural resources, *not in comparison with a conventional subdivision, but in absolute terms*. Again, the conventional subdivision option is not before you and should play no part in your deliberations under Section 22a-19.

The applicant's suggested analytical framework also ignores the most critical question that *is* before you—that is, whether the application satisfies the regulatory standards set forth in the OSSR. It is well settled under Connecticut law that a special permit may be granted only if it satisfies the criteria set forth in the applicable regulations and conversely, must be granted if it does so. General Statutes Section 8-2; *Municipal Funding LLC v. Zoning Board of Appeals*, 270 Conn. 447, 454-55 (2004).

Accordingly, CFE submits the following as an appropriate framework for approaching the application:

1. Does the conceptual standard plan accurately represent the number of lots that "constitute a reasonable subdivision of the land conforming to these Regulations and the Subdivision regulations," under OSSR Par. 56.4?
2. If not, what number of lots is appropriate?
3. Does the proposal (modified if necessary to appropriate density) satisfy the regulatory criteria stated in OSSR Par. 56.2 and 56.6?
4. Is the proposal (modified if necessary to appropriate density) reasonably likely to cause unreasonable pollution, impairment and/or destruction of natural resources?
5. If the answer to Question 4 is yes, is there a "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare?" If so, the application must be denied.

CFE has elsewhere addressed the merits of Questions 3 through 5; see Letter of CFE dated 12/8/2004; but would briefly reiterate here that the proposal fails to satisfy the regulatory standards for a special permit because the Open Space Plan does not provide contiguous open space area(s) of suitable size, location and character to satisfy the stated purposes—that is, protection of natural and scenic resources and recreation. OSSR. Par.56.6.6(B), 56.6.6 (F)(14). Specifically, the plan fails to protect (1) the large intact forest and mature woodlands, (2) productive and biologically diverse wetlands, and (3)

wildlife that depends on these resources, including species of special concern. OSSR Par. 56.6(F) (2), (5), (7), (13). There is also a serious question as to whether the proposal satisfies even rudimentary safety concerns, such as keeping stray golf balls well away from buildings and hiking trails, and is dependent on access points of unproven availability. Letter of Attorney Branse, dated 12/01/2004, Memorandum of Christine Nelson, dated 11/17/2004.

B. CFE's Environmental Claims Are Properly Presented at an Appropriate Timely And Within the Commission's Jurisdiction

The applicant has asserted that CFE's intervention petition is insufficiently specific to satisfy *Nizzardo v. State Traffic Commission*, 259 Conn. 131 (2002), that its claims are inappropriate because the approval sought is merely preliminary and that the issues raised are outside a planning commission's jurisdiction. These contentions are wholly without merit.

In *Nizzardo,* the Supreme Court found a petition filed pursuant to General Statutes Section 22a-19(a) insufficiently specific where it merely quoted the stated legal standard (unreasonable pollution, impairment or destruction of a natural resource) and failed to include any supporting factual allegations.

Such is hardly the case here. In Paragraph 4(a), CFE's petition alleges a number of facts to support the claim that the application is reasonably likely to cause unreasonable pollution, impairment and/or destruction of natural resources. Specifically, the petition states that the Preserve site is a scarce and important continuous tract of habitat for diverse species of wildlife, including neotropical migrant birds and mammals that require large ranges, that the high quality system of wetlands and watercourses support amphibians that persist only in unfragmented habitats, that the proposal would destroy existing forest and replace it with roads, cluster development, golf course and estate homes and that the extensive fragmentation of the forest habitat caused by the proposal would drastically reduce wildlife abundance and diversity. Similarly, Paragraph 4(b) alleges that the proposed construction would pollute, impair and alter the hydrological characteristics of Class A watercourses, including those forming the headwaters of the Oyster River. These allegations are fully sufficient under *Nizzardo.* They are also sworn to or "verified", as required by Section 22a-19. The petition is thus proper.

CFE's claims are also plainly within the Commission's jurisdiction. The Open Space Subdivision regulations themselves are replete with references to environmental considerations. At their very outset, the listed purposes of the regulations include "protection of natural streams, ponds or water supply," "conservation of soils, wetlands, beaches or tidal marshes," "conservation of forest, wildlife, agricultural and other natural resources."OSSR Par. 56.2. As CFE has already discussed, the specific standards for a special permit also repeatedly direct the commission to review the proposal under specific environmental criteria, including preservation of mature forests, wetlands, state

listed species, wildlife habitat. See OSSR Par. 56.6.6(B), (F)(1), (2), (3), (4), (5), (8), (14). See discussion in CFE's letter dated 12/08/2004.

State statutes also authorize planning commissions to use environmental standards in exercising their powers. Both General Statutes 8-2 and 8-25(c) provide for the adoption of cluster subdivision regulations, defined as "a building pattern concentrating units on a particular portion of a parcel so that at least one-third of the parcel remains as open space to be used exclusively for recreational, *conservation* and agricultural purposes... . Gen. Stat. Sec. 8-18 [emphasis added]. Thus, conservation of natural resources, as delineated in OSSR Par. 56.2 and 56.6.6, is within the Commission's delegated powers. Moreover, planning commissions for towns abutting Long Island Sound enjoy enhanced regulatory powers to give "reasonable consideration for restoration and protection of the ecosystem and habitat of Long Island Sound." Gen. Stat. Sec. 8-23. And all planning commissions are charged with devising a town plan of conservation and development, and again, given specific authority to designate land as suitable "for residential recreational, commercial, industrial, *conservation* and other purposes..." . Gen. Stat. Section 8-23 [emphasis added].

Accordingly, there can be no question that the Commission has statutory and regulatory authority to consider the pollution, impairment and/or destruction of natural resources in a proposed cluster subdivision.

The environmental issues of fragmentation and habitat destruction caused by the golf course and other aspects of the proposal are properly raised here and not in the final approval stage. It is the overall design and layout of the project which would result in the adverse impacts we have described. And once the overall concept has been approved in the "initial procedure" under OSSR Par. 56.4, it will be impossible to prevent the negative impacts caused by the subdivision's design.

CFE has elsewhere addressed the merits of its environmental claims and will not repeat such discussion here. We refer you to the substantial record evidence supporting our 22a-19 petition, including reports submitted by Wendy Goodfriend of the Connecticut River Coastal Conservation District, Robert Craig of Bird Conservation Research, Inc., Patrick Comins, Director of Bird Conservation, Audubon Connecticut, the Eastern Connecticut Environmental Review Team, testimony of Geoffrey Hammerson, speaking at the hearing of November 10, 2004, and the reports, testimony and exhibits presented by Rema Environmental Services, submitted at the hearings of December 8, and December 15, 2004 and January 5, 2005.

The applicant also argues that there is no feasible, prudent alternative to its proposal because the option of a conventional subdivision has already been rejected under the OSSR. This argument has no factual or legal basis. As stated above, the option of a conventional subdivision was rejected by the Zoning Commission when it rezoned the site. This action was taken without regard to the specific proposal before you. What this Commission must now determine is whether there is a feasible and prudent

alternative to the applicant's particular proposal that will not cause unreasonable impairment and destruction of natural resources.

This question must be answered in the affirmative. CFE has demonstrated that, if the golf course is removed, there is sufficient buildable land to accommodate ample density without damaging natural resources. The record fully supports denial of the application on this ground.

In conclusion, CFE thanks the Commission for its patience and consideration of the points raised herein.

Respectfully submitted,

Carolyn K. Longstreth, Esq.

Charles Rothenberger, Esq.