


MEMORANDUM

To: Planning Commission, Town of Old Saybrook

From: Dwight H. Merriam, Esq. 

Date: January 5, 2005

Subject: River Sound Development LLC / The Preserve – Analysis of Intervention Petition
Filed Pursuant to General Statutes § 22a-19 by the Town of Essex

This memorandum supplements my previous memorandum of December 22, 2004 (included as Appendix I of the Applicant's Response to Comments dated December 23, 2004), in which I outlined the intervention provisions of § 22a-19 of the General Statutes, the procedures this Commission should follow upon receipt of a petition, and the standards the Commission should apply in considering a petition. My analysis in that memorandum concerned the allegations made by the Connecticut Fund for the Environment ("CFE") in its intervention petition. This memorandum focuses on the December 30, 2004 petition filed by the Town of Essex ("Essex"). The standards and procedures to be applied to the Essex petition are the same as those described in my previous memorandum and will not be repeated here. Similarly, Essex's petition contains many of the same fatal flaws as CFE's petition, and I will briefly note those deficiencies before turning to the substance of the petition.

First, Essex's petition should be rejected because it alleges issues which are not within the jurisdiction of this Commission in deciding on the application for Special Exception Use and Open Space Subdivision approval. The petition either raises concerns about wetlands, which are clearly not within the jurisdiction of this Commission, or raises concerns that seek to modify the purpose of this Commission in its review of this application. To do so, however, would be to alter the fundamental purpose of the Commission and improperly convert it into a "little environmental protection agency" charged with the regulation of environmental impacts in general. See *Connecticut Fund for Environment Inc. v. City of Stamford*, 192 Conn. 247, 250-51 (1984). The Commission, therefore, should reject the petition for this reason.

Second, this application, if approved, will not lead to any development or construction without subsequent approval from this and other agencies. As such, the conduct proposed by the Application – the approval of an open-space subdivision concept – cannot lead to the pollution or impairment to any natural resource as Essex alleges in its petition. This proceeding, while a necessary preliminary step toward the development of The Preserve, does not and will not, in and of itself, permit any construction or have any effect on natural resources. This Commission, sitting in its capacity to decide on the Special Exception application before it, cannot expand its jurisdiction to consider environmental concerns that are not within its purview. See *Nizzardo v State Traffic Commission*, 259 Conn. 131, 148 (2002). Therefore, the Commission should find that the conduct proposed in the application neither has, nor 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.

If, after considering the similar deficiencies in the petitions filed by both Essex and CFE, the Commission determines that Essex has alleged environmental issues within its jurisdiction, and that the application is more than a preliminary step in the approval process, it must then determine, based on the evidence presented during the course of the public hearing, whether the proposal will or will not cause unreasonable pollution or impairment to natural resources. Upon consideration of the substantial evidence in the record, however, the Commission should find that the conduct allowed by the application will not cause unreasonable pollution or impairment to natural resources. Whether certain conduct is reasonably likely to cause unreasonable pollution involves questions of fact to be determined by the Commission. See *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 71 (1981). The question of reasonableness is one of fact, and where the record supports the Commission's conclusion that the proposed development does not violate § 22a-19, a court on appeal must sustain the conclusion. See *Mystic Marineline Aquarium, Inc. v. Gill*, 175 Conn. 483, 502-03, (1978).

Essex's allegations, from Paragraph 7 of its petition, and the Applicant's responses are below:

7. River Sound's proposed application 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, as further described below:
 - a. The proposed development and 18 hole golf course would unreasonably destroy significant portions of the forested area of the site including trees and other vegetation and fragment the remaining open space in a manner that would negatively impact the sensitive wildlife and wildlife habitat associated with the site;

Response: The proposed open space/conservation subdivision and golf course have both been designed to minimize the removal of trees and other vegetation. Over 70% of the site will remain undisturbed and 64% of the total site will be protected. No wetlands will be filled. No watercourses will be culverted or diverted. The open space cluster plan protects all locations of state listed special concern reptiles – box turtles and ribbon snakes. The open space cluster plan provides an inter-connected system of wetlands and upland habitat for wildlife to move through the site, using those routes that have been scientifically determined by data placed in the record. As far as amphibians and reptiles are concerned, the open space plan protects sufficient multiple breeding sites of all species of amphibians and reptiles that presently occur on The Preserve, and will ensure the persistence of these species on this site post-construction. Additional measures have been proposed to provide for active management of the site after construction is complete, to promote wildlife use of the property.

- b. The proposed plan will unreasonably pollute, degrade, or destroy high quality vernal pools, streams, and wetlands and interrupt and impair the inter-related ecological system on- and off-site, and specifically holes 1-5, 8, 11,13, 15, and 16, individually and collectively, will unreasonable degrade or destroy such resources and their functions;

Response: The roads, home sites, and golf course have been laid out in a manner that allows the construction to occur without any filling, dredging, or culverting of wetlands or watercourses. All crossings will occur on bridges. The enhanced flexibility of the open space/conservation subdivision allows access throughout the site with only three wetland crossings, which are to be constructed on clear-span bridges. As shown on the Ecological Connectivity Map previously submitted into the record, access between habitat units for amphibians, the life form with the most restrictive habitat requirements and most sensitive to water quality impairment, will not be impaired. Furthermore, the petitioners have provided no evidence to support their definitive contention that this project will “pollute” water resources, whereas the Applicant has provided evidence to the contrary. This has been done using two different approaches, as follows. First, the Applicant’s Response to Town Review Comments - #3, Section V, consists of a paper that Dr. Stuart Cohen of Environmental & Turf Services coauthored with his staff and had published in the peer-reviewed scientific literature. It demonstrated that the frequency of ground water and surface water contamination by golf courses is very low. Indeed, most of the 36 golf courses included in that national study did not have the benefit of the proactive environmental stewardship program that the Applicant has offered for The Preserve. This program itself is the second approach to addressing environmental contamination concerns; i.e., the Applicant has developed an integrated and interdisciplinary natural resource protection program that consists of habitat conservation, turf chemical risk assessment, water quality monitoring, and integrated pest management.

- c. The proposed road network requires significant cutting and filling which will unreasonable impair the existing natural drainage systems and pollute the affected watersheds during and after construction;

Response: Construction of a road network to access a site with complex topography will require cuts and fills; however, the drainage network, as described in the Applicant’s previous submissions, preserves existing drainage patterns and duplicates existing discharge rates. Substantial measures have been included to treat stormwater and prevent pollution, including passive and active treatment systems.

- d. The proposed golf course will require significant drawdown of groundwater wells which is reasonably likely to cause unreasonable negative impact to or pollution of groundwater supplies especially during drought periods;

Response: There is no data or evidence to suggest that the irrigation wells will affect any existing wells or groundwater supplies in the area. The Applicant addressed the issues of irrigation demands, on-site wells and testing procedure, preliminary test data, and permitting procedure in its Response to Town Review Comments - #2, Section VI, and Response #3, Section II, Decision 6. The irrigation demands in the area are not high enough, in relation to the size of the aquifer, to cause anyone to be left without water. Furthermore, the project’s irrigation wells are so far from any wells in the area that the Applicant did not even have to monitor

any during testing. If there is, at a later date, a direct correlation between the use of the project's irrigation wells and the ability of an adjacent homeowner's well to produce adequate water, then several things could happen to remediate the problem, from drilling the homeowner's well deeper to the issuance of a cease and desist order by the Department of Environmental Protection. In addition, the stormwater management plan, integrated turf and pest management plans, and lawn management plan will prevent any significant impacts to groundwater resources.

- e. The subject parcel is located in a coastal flyway for avian species as detailed in the avian survey of the site referenced by River Sound and is reasonably likely to cause unreasonable damage and destruction to these avian populations and their habitats during and after construction;

Response: The so-called avian fly-way refers to a concentration of migrating songbirds along coastal areas. This is only a concern during migration, and as long as areas providing adequate shelter, food, and water are available, the "fly-way" will not be unreasonably impaired. The Open Space plan includes preservation of over 500 acres of wildlife habitat which will be suitable for use by birds during migration. The habitat requirements of birds during migration are more generalized than during breeding season, and the golf course and a significant portion of the developed area of the site will also be available to birds during migration.

- f. The proposed plan is reasonably like to create runoff which will unreasonably pollute or alter the Mud River Watershed during and after construction; and

Response: As discussed in the Applicant's December 23, 2004 Response to Comments on page 30, the developed portion of the site draining to Mud River is very small and the amount of impervious surfacing is minute (i.e., a cart path on a portion of one golf hole). There will be no increase in runoff from the site within this watershed. In addition, the stormwater management plan, integrated turf and pest management plans, and lawn management plan will prevent any significant impacts to surface or groundwater resources.

- g. The proposed plan is reasonably likely to unreasonably impair the scenic and aesthetic beauty of the environment and the views associated with the site.

Response: The proposed plan will conserve over 500 acres of open space, provide a trail network and nature center and allow public access to views and scenic vistas not presently available to the public. Therefore, the scenic and aesthetic beauty of the environment will be maintained.

As with CFE, Essex has also failed to meet its burden of proving that the proposal will cause unreasonable pollution. As discussed above, evidence that the proposal will have minimal impacts on the environment is chronicled in numerous memoranda, reports, and testimony presented by the Applicant and its consultants. As such, the Applicant has presented

overwhelming evidence that the proposal will not cause unreasonable pollution. Therefore, as required by § 22a-19, the Commission should make the explicit finding that the conduct proposed in the application “will *not* have, or is *not* 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.”

Finally, if the Commission were to assume, for the sake of argument, that Essex has satisfied its burden, the record is replete with substantial evidence that no feasible and prudent alternatives to the proposal exist. The analysis of alternatives in my December 22, 2004 memorandum is applicable to Essex’s petition and the same conclusion should be reached – because no feasible and prudent alternative exists, the Commission should approve this application for a Special Exception Use and Open Space Subdivision.