MEMORANDUM

PLANNING COMMISSION EXHIBIT #160

To: Robert A. Landino, P.E.

From: Dwight H. Merriam, FAICP, CRE

Date: January 11, 2005

Subject: Additional Analysis of Feasible and Prudent Alternatives under Section 22a-19 of General Statutes

---

This memorandum presents two additional points of analysis under Section 22a-19 of the General Statutes. In a letter dated January 6, 2005 to the Chairman of the Town of Old Saybrook Planning Commission ("Commission"), Attorney Mark K. Branse disputed the relevance of my analysis on behalf of River Sound Development LLC ("RSD") that The Preserve "... cannot be economically developed without the golf course and the enhanced residential value" that accompanies the golf course. Attorney Branse advised the Commission as follows:

> 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. (Emphasis in original.)

Although we agree that a developer's "target profit margin" has no bearing on the Commission's decision, RSD's objectives in developing The Preserve and the economics of its development are relevant under Section 22a-19 of the General Statutes. I offer this memorandum to further clarify and amplify the economic component of the analysis of "prudence." Your firm is addressing the engineering component of "feasibility."

As I explained in my memorandum concerning the Notice of Intervention by the Connecticut Fund for the Environment ("CFE"), if the Commission determines that RSD's proposed conduct (which remains purely conceptual in the current application) 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, the Commission may not approve the conduct if, "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." Conn. Gen. Stat. §22a 19(b). The Connecticut Supreme Court has defined the phrase, "feasible and prudent alternative," in the Environmental Protection Act of 1971, Conn. Gen. Stat.

§§ 22a-14 to 22a-20 ("CEPA"), of which Section 22a-19 is a part, in a way that expressly incorporates an economic dimension. *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 594-95 (1993); *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 62-63 (1981). Relying on the United States Supreme Court's interpretation of federal environmental legislation in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), the Court defined "feasible" to mean "'as a matter of sound engineering,'" *Manchester Environmental Coalition v. Stockton*, 184 Conn. at 62 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 411), and it construed "prudent alternatives" as "those which are economically reasonable in light of the social benefits derived from the activity," *Manchester Environmental Coalition v. Stockton*, 184 Conn. at 63; see also *Samperi v. Inland Wetlands Agency*, 226 Conn. at 594-95.

The Court interprets the phrase, "feasible and prudent alternative," as used in the Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §§ 22a-36 to 22a-45 ("Wetlands Act"), in a similar manner. *Samperi v. Inland Wetlands Agency*, 226 Conn. at 595; see *Gardiner v. Conservation Commission*, 222 Conn. 98, 109-11 (1992). In *Samperi v. Inland Wetlands Agency*, 226 Conn. at 592-93, the Court established the rule that, under the Wetlands Act, an inland wetlands and watercourses agency need only consider as many alternatives as it deems necessary to balance economic development and the protection of inland wetlands and watercourses. See also *Tarullo v. Inland Wetlands and Watercourses Commission*, 263 Conn. 572, 582 (2003). In 1996, the General Assembly essentially codified the foregoing definitions of "feasible" and "prudent" in the Wetlands Act. Under the Wetlands Act, "feasible" means "able to be constructed or implemented consistent with sound engineering principles." Conn. Gen. Stat. § 22a-38(17). "Prudent" means "economically and otherwise reasonable in light of the social benefits to be derived from the proposed regulated activity provided cost may be considered in deciding what is prudent and further provided a mere showing of expense will not necessarily mean an alternative is imprudent." Conn. Gen. Stat. § 22a-38(18). Summarizing my discussion, the economics of possible alternatives under Section 22a-19 are a proper and necessary factor in their consideration and bear on whether they are prudent.

The social benefits from development of The Preserve are significant. Insofar as RSD's objectives for The Preserve include the provision of these social benefits, they are relevant in the analysis of feasible and prudent alternatives under Section 22a-19. Among the social benefits of The Preserve are the preservation of more than 60 percent of the area of the land to be developed without any expense to the public; the availability of a variety of housing types, including dwellings for small households; substantial fiscal benefits for the Town of Old Saybrook; construction of a satellite fire protection facility; provision of a nature center and extensive trails interconnected with existing public open space for public use; construction of an east-west road connection between Route 153 and Bokum Road; the recreational and aesthetic benefits of a quality golf course not only to The Preserve community, but to the community at large; and the protection of vernal pools beyond what is possible under the existing jurisdiction of federal, state, and local agencies over inland wetlands. Alternatives to The Preserve, as presented by CFE, either eliminate one or more of the social benefits that the development offers or defeat the economics of the development, rendering it incapable of success in the housing market and therefore imprudent to develop. RSD again stresses the necessity of the golf course and the mix of housing types for The Preserve to be successful in the market.

Attorney Branse also stated in his letter that "RSD must review the evidence that [it has] placed on the record in this public hearing that demonstrates [its] consideration of feasible and prudent alternatives." Although a developer need not submit plans or drawings for all alternatives that it proposes, *Tarullo v. Inland Wetlands and Watercourses Commission*, 263 Conn. at 582; *Red Hill Coalition, Inc. v. Conservation Commission*, 212 Conn. 710, 726 (1989), RSD already has set forth alternatives to The Preserve that it has considered. Nonetheless, RSD will, by a separate memorandum from your firm, more specifically describe the alternatives that RSD considered in the course of creating the proposal for development of The Preserve, which render the final product a feasible and prudent alternative to the options it rejected.