

01/25/05 TUE 10:08 FAX 8606599368

BRANSE&WILLISLLC

✓ XC: PC 1/26/05 002

**BRANSE & WILLIS, LLC**  
41-C NEW LONDON TURNPIKE  
GLEN LOCHEN EAST  
GLASTONBURY, CONNECTICUT 06033-2038  
TELEPHONE: (860) 659-3735  
FAX: (860) 659-9368

**FILE COPY**

**PLANNING  
COMMISSION  
EXHIBIT #184**

MARK K. BRANSE  
MATTHEW J. WILLIS \*  
ERIC KNAPP

\*ADMITTED IN MASSACHUSETTS

RONALD F. OCHSNER  
OF COUNSEL

[ROchsner@bransewillis.com](mailto:ROchsner@bransewillis.com)

VIA FAX ONLY (860) 395-1216

January 25, 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**  
**FILE NO: 3029/04-207**

Dear Chairman McIntyre:

Town Planner, Christine Nelson, has requested all of the Commission's consultants to comment on any new materials that were submitted in the final public hearing, or to make such other comments as would assist the Commission in its deliberations. With regard to the substance of the application, I believe that my past review letters continue to raise valid issues that deserve the Commission's analysis. I have not seen any new material that causes me to modify my past comments. The Commission now has my review letters (as well as those of its other consultants) and the responses of the applicant. It is now for the Commission to reach its own decisions on the issues presented.

What I would like to do is provide an outline to assist the Commission in its task. Toward that end, I will reproduce the six (6) issues what were first contained in my Memorandum of November 17, 2005, and will list beneath each one of the considerations or issues that I recall being presented. Nothing in this letter should be construed as recommending any particular decision or conclusion to the Commission.

01/25/05 TUE 10:08 FAX 8606599388

BRANSE&amp;WILLISLLC

003

Page Two  
Robert McIntyre, Chairman  
January 25, 2005

As I stated in my last review letter of January 6, 2005, the Commission is the finder of fact and has before it more than enough conflicting testimony (both expert and otherwise) to support virtually any conclusion that it might wish to reach. I, therefore, leave the resolution of all outstanding issues to the Commission's sound discretion.

**Procedural Issues:**

**#1. Who participates in the deliberations?**

The voting alternate(s) must be designated by the Chairman. Alternates are assigned to vote in rotation, but there is no precise legal formula for such rotation. Once deliberations begin, a voting alternate remains so, even if the full member returns mid-process. Weiner v. New Milford Zoning Commission, 14 Conn. L. Rptr. No. 8, 245 (July 10, 1995); Moskaluk v. ZBA of Watertown, 10 Conn. L. Rptr. No. 5, 154 (November 8, 1993). An alternate who is not seated for an absent full member cannot participate. At the deliberation stage, a non-seated alternate cannot participate in the discussions at all; he/she is just like any other member of the public when he/she is not seated for an absent Commission member. Id.

**#2. What can the Commission members consider?**

The Commission members can consider all of the testimony that they have heard, including all of the written exhibits, their view of the site (if they were present), the contents of the Zoning Regulations, special expertise that they possess; if they disclosed such expertise on the record of the hearing, and their general knowledge of the area of the development and the Town of Old Saybrook. You cannot consider any information which you may have received outside of the formal public hearing process, such as comments from friends, co-workers, etc., the newspaper or other media, your own special expertise unless you disclosed such expertise on the record, or your own personal research (unless placed on the record while the hearing record is open).

You cannot consider whether the State or the Town or some other public agency should buy this land for open space (or any other purpose). The application before you is for a particular development pattern which must stand or fall on its own merits and not by comparison to some other possible pattern by some other possible purchaser or owner. You cannot consider how your vote or decision would affect the selling price to some buyer, nor can you consider what profit margin the current owner considers necessary to achieve a particular financial result. All matters of ownership (present or future) are irrelevant to what is before you.

Page Three

Robert McIntyre, Chairman  
January 25, 2005

After the close of the public hearing, the Commission may receive guidance from its own staff and consultants, or objective public agencies that serve in an advisory capacity comparable to that of staff provided, that those staff and consultants do not submit new data or raise new issues. They may clarify or elaborate on issues or testimony already raised during the public hearing process.

**#3. How many votes does it take to act?**

A majority of the quorum present. Before any motion is made, the Commission should seek a consensus that will guide its staff in preparing a comprehensive motion for the Commission's consideration.

**Substantive Issues:**

**#1: Is the site more conducive to an Open Space Subdivision in general conformance with the plan proposed by the applicant, or is it more conducive to development as a conventional subdivision?** The applicant is *required*, under the new Subdivision Regulations, to present both a conventional subdivision design and an open space subdivision design. The preferred approach is the open space subdivision unless the Commission concludes that the parcel would be better developed without clustering of dwellings onto smaller lots and/or multi-family buildings with a golf course. In that case, the Commission would deny the Special Exception application and RSD would either return with a revised application or it would seek a waiver of the cluster requirement in order to pursue a conventional subdivision.

- Does the plan submitted preserve land for the purposes stated in Section 56.2? Does it preserve it in the right locations, quantities, and pattern?
- Does the application establish that adequate provisions have been made for sewer and water, per Section 56.6.3? Has the Commission received an adequate from the Water Pollution Control Authority and the local water company?
- Does the open space comply with the standards of Section 56.6.6?
- Is the application complete? Does the applicant have the requisite authority and property rights to file this application? Is it reasonably probable that the applicant has, or can obtain, the rights of access from the State to cross the rail line and from the Town of Westbrook to access Route 153 with a Town Road?

01/25/05 TUE 16:09 FAX 8606599368

BRANSE&amp;WILLISLLC

005

Page Four  
Robert McIntyre, Chairman  
January 25, 2005

Is it reasonably probable that the Board of Selectmen will approve alternative road specifications? Is the Commission comfortable with approving an open space plan with this basic road pattern but without seeing the grading and disturbance appurtenant to the road construction which will result from whatever extent of alternative road specifications that the Board of Selectmen approve?

**#2. If the site is more conducive to an open space subdivision, what is the proper number of lots to be derived from the yield plan?** The Regulations recognize that the conventional layout need not be fully engineered and that a demonstration of its compliance with conventional zoning and subdivision regulations will therefore involve the use of incomplete or inconclusive data and reliance on some assumptions and "judgment calls" by the Commission. The applicant has provided even more information than the Regulations require, but there are still going to be questions about how many lots could *realistically* be developed on this parcel as a conventional subdivision. The Commission has the authority to answer those questions in its decision.

- The Commission should refer to the listing of each lot in the conventional layout and the summary of issues raised by each consultant. Which (if any) of these lots should be excluded from the yield plan?
- Should the land to be occupied by the golf course be counted toward residential density?

**#3. Once those yield plan numbers are determined, should the proposed Preliminary Plan be approved as submitted or should it be modified/conditioned and approved?**

- Are there questions of golf course safety that would support the elimination or relocation of dwelling unit areas, fairways, tees, or greens?
- Are there portions of the golf course that should be modified to reduce impacts on natural resources, such as vernal pools?
- Should the golf course component be retained in the plan? What are its benefits? What are its negative aspects? How do these balance?
- Should the roadway connection to Ingham Hill Road be emergency only, as proposed, or a full-service connection?

01/25/05 TUE 16:00 FAX 8608599388

BRANSE&amp;WILLISLLC

008

Page Five

Robert McIntyre, Chairman

January 25, 2005

- Should areas for active recreation be provided? If so, where?
- Is the road pattern in the various areas of the site suitable?
- Is the pattern of the village/high density housing suitable? Is the location of the proposed country club appropriate? Is the pattern of small-lot and mini-estates lots suitable for the parcel and the overall development?

**#4. If conditioned/modified, in what ways?** Depending on how many lots the Commission accepts from the yield plan, it may require any level of changes to the Preliminary Open Space Plan, including the rearrangement or elimination of streets, lots, or unit clusters, rearrangement of roads, trails, open space, golf course elements, or other refinements. Like the Preliminary Plan itself, these modifications or conditions can be general or conceptual, and need not be detailed.

- Should any approval be conditioned on the approval of alternative road specifications by the Board of Selectmen?
- Should any approval be conditioned on the approval of the State of Connecticut for the right to cross the rail line, with it being made clear that any such approval shall not be used as the basis for a Constitutional claim if such State approval is denied?
- Should any approval be conditioned on the approval acceptance of the road to Route 153 as a public highway in the Town of Westbrook, or upon approval as a private road is the Board of Selectmen of Old Saybrook so designated Road A?
- Should any approval be conditioned on the approval of alternative road specifications by the Board of Selectmen, and upon the submission and review of any changes in road grading, alignment, or site disturbance resulting from the Board's decision?
- Should any approval be conditioned on making the connection to Ingham Hill Road a full-service connection? If so, should there be changes in the road pattern within the development?
- Should any approval be conditioned on off-site improvements, such as road or sidewalk improvements, and if so, what?

01/25/05 TUE 16:10 FAX 8606599368

BRANSE&amp;WILLISLLC

007

Page Six  
Robert McIntyre, Chairman  
January 25, 2005

- Should the provisions for pedestrian or bicycle circulation be changed and if so, how?
  - Should the protection of archaeological or cultural sites be improved and if so, how?
  - Should the golf course pattern be modified, reduced, or eliminated? The driving range? The Club house parking, buildings, and other components? The maintenance and service area? The water tower?
  - Should buffer areas for fragile natural resources, such as vernal pools, be increased and if so, to what extent?
  - Should there be better access, for vehicles and/or pedestrians, to adjoining public lands?
  - Should there be requirements for additional data, studies, or monitoring?
- #5. Is the open space subdivision as proposed by the applicant (i.e., with golf course, road pattern, etc.) "reasonably likely to unreasonably impair, pollute, or destroy the public trust in the air, water, or other natural resources of the State?" as compared to a conventional subdivision or to some other open space subdivision design?** This is tricky. At this stage, the Commission is only evaluating which pattern is preferable, conventional or open space subdivision, and the *general* pattern of this open space subdivision. No actual subdivision plan, and no golf course proposal, is going to receive an approval and nothing can be built after this Special Exception decision is made. Therefore, while the absolute impacts of the open space subdivision and golf course will be relevant when RSD actually *applies* for the final subdivision and the golf course, at this stage the only environmental issues that can be considered relate to the relative impact of one plan versus the other, and the general impact of the proposed conceptual plan itself as presented by RSD.
- Is this open space subdivision plan, as presented (with golf course, road pattern, density patterns, etc.) reasonably likely to unreasonably impair, pollute or destroy the natural resources of the site? Note the two (2) aspects of the inquiry about "reasonableness:" All development causes some damage to the environment. The question is if it is reasonably likely that this proposal will cause damage that is unreasonable? In determining what is "reasonably likely" you may rely on the

01/25/05 TUE 10:10 FAX 8606599368

BRANSE&amp;WILLISLLC

008

Page Seven  
Robert McIntyre, Chairman  
January 25, 2005

testimony of all of the experts that you have heard and events that are naturally foreseeable based on the facts presented to you.

- You need not evaluate the details of specific adverse impacts at this conceptual stage of review. No golf course application has been filed and when it is, it will be with the Zoning Commission, not you. Thus, for example, you need not decide if the applicant's integrated pest management plans or irrigation plans are "reasonably likely" to cause or not cause adverse impacts. You may review the plan, as an overall concept, and consider such impacts. For example, golf courses do use various chemicals. And golf courses do seek to manage them in ways that avoid adverse environmental impacts. The Commission must determine, based on what it has heard, if in general this preliminary plan, with its golf course, is "reasonably likely" to discharge chemical in such a way as to "unreasonable pollute" ground and surface waters. The same is true for the location of housing units/groupings, road pattern, off-site impacts, etc.

**#6. Are there feasible and prudent alternatives that would reduce or eliminate any unreasonable adverse impacts that are found to exist?** This test would be applied primarily to the Commission's consideration of the preliminary plan and its pattern of development. The determination of unit yield could also have a "feasible and prudent alternatives" element *if, and only if*, it can be shown that the elimination of lots will reduce or eliminate the identified unreasonable adverse impacts. Last (and most tangential), the choice of development pattern, conventional vs. open space, could have some "feasible and prudent alternatives" element to it, though this is much harder to quantify. Such a determination would have to involve a consideration of whether the conventional layout, in the abstract, constitutes a "feasible and prudent alternative" to any adverse impacts identified in the open space subdivision plan, in the abstract. The Courts have generally been reluctant to allow consideration of adverse impacts from a conceptual determination on the grounds that such initial determinations don't allow anyone to actually build anything, and so, by definition, there can be no possible impact. For example, interventions in zone change applications have not been successful because it could not be demonstrated that the mere type of development theoretically permitted in one zone versus another zone had *any* demonstrable environmental impacts--it's just lines on a map.

- If there are feasible and prudent alternatives, what, in general, are they? "Feasible" means able to be constructed or implemented consistent with sound engineering principles. "Prudent" means economically and otherwise reasonable in light of the social benefits to be derived from the proposed . . . activity

01/25/05 TUE 10:10 FAX 8606599388

BRANSE&amp;WILLISLLC

009

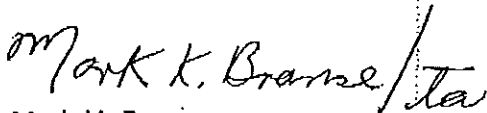
Page Eight  
Robert McIntyre, Chairman  
January 25, 2005

provided cost may be considered in deciding what is prudent and further providing a mere showing of expense will not necessarily mean an alternative is imprudent. [Both definitions from Conn. Gen. Stats. §22a-38].

- Why would such alternatives be better, environmentally, than what has been proposed? What adverse impacts would be reduced or eliminated?

I hope this outline is of help to the Commission. As always, if you have any questions, please do not hesitate to contact me.

Very truly yours,



Mark K. Branse

MKB:ta

cc Christine Nelson, AICP, Town Planner @ (860) 395-1216  
Geoffrey L. Jacobson, P.E., Town Engineer @ (860) 526-5416  
Bruce Hillson, P.E., Consulting Traffic Engineer @ 659-0625  
Wendy Goodfriend, Ph.D. @ 346-3284  
Richard Snarski @ 295-1022  
Alan J. Plattus, AIA @ (203) 432-7175  
Dwight Merriam, Esq. @ 275-8299  
Matthew Ranelli, Esq. @ 251-5318  
Charles Rothenberger, Esq. @ (203) 787-0246  
David Royston, Esq. @ (860) 395-6349