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MEMORANDUM

PLANNING COMMISSION EXHIBIT #18

To: Robert A. Landino, P.E.
From: Dwight H. Merriam, FAICP, CRE
Date: January 7, 2005
Subject: Supplemental Information on Crossing of Railroad Right-of-Way

In his letter of January 6, 2005 to the Town of Old Saybrook's Planning Commission (the "Commission") on behalf of The Town of Essex, Attorney Matthew Ranelli disagreed with the position taken in my memo of December 22, 2004, with respect to whether the Commission can make its approval of the pending application of River Sound Development LLC ("RSD") subject to the construction of a crossing over the railroad track and right-of-way that traverses RSD's property (the "Railroad Track Easement").

The essence of Attorney Ranelli's argument is that in determining whether to modify and approve RSD's application by requiring RSD to obtain the Railroad Track Easement, the Commission should neither assess the probability that RSD will obtain the Railroad Track Easement, since that is a "matter of pure negotiation" between RSD and the Department of Environmental Protection ("DEP"), nor accept that the Railroad Track Easement, like an STC permit, can be a matter to be resolved after local approvals are obtained because there is no law or regulation that prohibits the Railroad Track Easement from being obtained before local approvals. Instead, Attorney Ranelli insists that "the Commission should deny River Sound's application without prejudice until such time as it has the State's consent to pursue an application involving the use of the Valley Railroad State Park Trail."

I stand by my original position that requiring RSD to obtain the Railroad Track Easement would be a valid modification by the Commission, and reject the view that all permits and approvals which are not by law or regulation prohibited from being sought prior to approval of a special exception application must be obtained prior to such application. Most importantly, however, the Commission should not deny RSD's application because RSD has met the standard Attorney Ranelli himself proposes: RSD has obtained DEP's consent to pursue an application for the Railroad Track Easement.

RSD Has DEP's Consent to Pursue an Application for the Railroad Track Easement

Consistent with the realities of land development, the appropriate standard for approval of RSD's application, at least with respect to the railroad crossing issue, is DEP's receptiveness to an application by RSD of an appropriate easement. Requiring anything more in this case would set a dangerous precedent that would impose prohibitive up-front costs that would stifle development and invite inconsistency in planning commission decisions.

The design process for a railroad bridge overpass is time consuming and complicated, requires specifics which at this early stage are premature, and would be a senseless waste of time and money until a decision has been reached as to the basic layout of this proposal. On the other hand, since the railroad crossing is an important element of the application, it is not unreasonable for the Commission to expect that some level of receptiveness by the proposed grantor of the Railroad Track Easement be shown by RSD. In fact, DEP has expressed such receptiveness. In response to our inquiry as to DEP's willingness to grant the Railroad Track Easement, Elizabeth Brothers, Assistant Director of DEP's Land Acquisition and Management Division, stated the following in a voicemail message to me on December 22, 2004:

"Good morning Dwight. This is Beth Brothers at the DEP calling, calling with response to you, your call the day before yesterday with regard to a railroad crossing for The Preserve property. If you could, I would need to run that through our property management review team. What I would need would be a location map of where the crossing is being requested. If you could send some type of a sketch map along with a justification for the need for the crossing and we will put it through our property management review team and we will get an answer back to you. You can address that to myself, Elizabeth Brothers, at the DEP Land Acquisition and Management Division, 79 Elm Street, Hartford, CT 06106. Okay. Thank you very much. Bye, bye."

Ms. Brothers response clearly indicates DEP's "consent" for RSD "to pursue an application using the Valley Railroad State Park Trail." This is an encouraging first step. Upon approval by the Commission it would be appropriate to prepare the materials Ms. Brothers suggests and the detailed design and engineering documentation that will inevitably be required.

For illustrative purposes only, I am attaching as exhibits to this memo (a) a summary of the review process for railroad bridge overpasses that the Department of Transportation of Texas employs and (b) a summary of the requirements of RailAmerica and Amtrak, both of which own railroad tracks in Connecticut and routinely process such applications. I focused on Texas for the simple reason that its process is the most detailed we found in the course of a brief national survey of publicly available materials and nothing comparable exists, so far as we can find, in Connecticut.

Requiring the Construction of the Crossing Over the Valley Railroad is a Valid Potential Modification by the Commission of the RSD Application

As I stated in my memo dated December 22, 2004, the Commission may modify and approve RSD's application by imposing on RSD a condition that is either within the control of RSD or involves an approval by another governmental agency, which approval "appears to be reasonably probable." *Carpenter v. Planning and Zoning Commission*, 176 Conn 581, 592-593, 597 (1979). Upon this authority, the Commission can approve RSD's application subject to the requirement that RSD construct a crossing over the Valley Railroad.

Attorney Ranelli argues in his January 6, 2005 letter that DEP is not obligated to grant the Railroad Track Easement since the Railroad Track Easement is a contract right that DEP would grant in its capacity as a property owner. This argument overstates the holding in *Carpenter*.

Satisfaction of the requirement need not be a clear certainty nor must the subject agency be under an obligation to grant its approval. The issue for the Commission is not whether DEP is under an obligation to grant the Railroad Track Easement, but whether, given the specific facts of this development, it appears reasonably probable that such a grant would be forthcoming from DEP if RSD takes the steps that are within its control to satisfy DEP.

There are procedures in place and a history of decision making for analogous railroad crossing easements which will lead any rational person to conclude that there is a strong certainty that a party seeking such an easement would be successful provided it submits a proper design. Though we have diligently searched for precedents in Connecticut over the last two weeks, we are unable to identify a single instance where a properly-designed roadway overpass has ever been denied.

Attorney Ranelli's unsupported assertion that DEP rejected a request by RSD's predecessor in interest is inconsistent with DEP's representations to date. If, however, Attorney Ranelli is referring to Tim Taylor's proposal, those familiar with the history of the site will recall that that proposal was for an at-grade crossing located approximately a mile from the site RSD currently proposes, and is therefore completely irrelevant to the matter before the Commission.

The reason no such denials occurred in the past few decades is obvious: a properly-designed overpass has no impact on railroad operations and provides a valuable source of revenue that benefits the property owner granting the easement, regardless of whether that owner is a public or private entity.

For further guidance as to whether DEP's willingness to grant the Railroad Track Easement appears to be "reasonably probable," the Commission need look no further than Ms. Brothers' invitation to RSD to submit materials for DEP's consideration and RSD's significant commitment to date, both in terms of time and money, to provide thorough and detailed analysis with respect to the myriad issues raised by the Commission, the intervenors and the general public. In addition, Mr. Curt Proud, a national expert on railroad crossings,¹ has opined that approval of a properly-designed overpass is a virtual certainty and that the issues that railroads tend to focus on are all matters that are resolved through the ordinary course of negotiations.²

Furthermore, as summarized in Exhibit B, both RailAmerica, a private corporation whose subsidiary, Connecticut Southern Railroad, operates and owns a railroad between New London and Vermont, and the National Railroad Passenger Corporation (a.k.a. Amtrak), which is wholly

¹ Mr. Proud, whose remarks were also included in my December 22, 2004 memo, has over twenty-five years of relevant experience with Williams Pipe Line Company. From 1984 to 1994 he was the manager of land records and claims and has held other relevant positions with the pipeline such as contract administrator and real estate representative for the northern region. He has been with ProSource Technologies, Inc., of Coon Rapids, Minnesota for approximately a year and now handles real estate and right-of-way issues for the state highway department, cities, regional sewer systems, electrical transmission utilities, and pipeline companies. He has also seen different sides of railroad issues in connection with his work for the City of Shoreview planning commission.

² For example, facility design, indemnity and hold harmless provisions, railroad specific insurance policies, naming the owner as an additional insured on the grantee's existing general liability insurance policy, relocation of the crossing if the crossing impairs a future railroad expansion, and the time period covered by the crossing agreement.

owned by the federal government and owns the tracks on which it operates northeast of New Haven to Boston via Providence and north from New Haven to Vermont via Hartford, have established policies and procedures for granting crossing easements. Amtrak, for example, is in the process of reviewing one such easement application in Guilford. There is simply no reason to expect that DEP would be any less willing to grant an easement for a properly-designed railroad bridge overpass than either a private corporation like RailAmerica or a public corporation like Amtrak. To take Attorney Ranelli's position and suggest otherwise, to argue in effect that it is not reasonably probable that DEP would act like other similarly-situated public and private owners of railroad tracks, flies in the face of DEP's representations to date and any reasonable expectation as to how DEP manages its real property assets.

If the Commission were to accept that the granting of the Railroad Track Easement would not be an "approval" in the sense intended by the court in *Carpenter*, it should still approve RSD's application subject to RSD constructing the railroad crossing. The Railroad Track Easement is analogous to a sewer line easement, which is both a necessary pre-condition to construction and exclusively at the discretion of the grantor of the easement and yet is never a prerequisite for zoning approval. The underlying reasons for this are simple: 1) there is no reason to assume the applicant will be unable to obtain the easement and 2) the impracticality of requiring a final easement agreement in advance far outweighs any need for absolute certainty at such a preliminary juncture.

What the Town of Essex seems to misunderstand is that this preliminary stage of approval does not allow any construction. It only enables a subsequent detailed site plan submission.

As "a matter of pure negotiation," the Railroad Track Easement could only be obtained if RSD satisfies DEP's demands. Whether RSD does so or not is purely a matter within RSD's control. To suggest that DEP's demands would be so outrageous that RSD would be unwilling or unable to meet them is again to argue in effect that DEP would not act like other similarly-situated owners of railroad tracks. The Commission should not assume such irrationality on the part of DEP.

From a practical standpoint, the determination as to whether an agreement between RSD and DEP is "reasonably probable" can and should be based only on the preliminary representations of the two parties, from which at this point it is clear that a deal is reasonably probable. If the two parties do ultimately agree to mutually satisfactory terms for the Railroad Track Easement after RSD submits the appropriate design materials consistent with the specifics of an approved subdivision plan, then the concern raised by the Town of Essex will have been resolved. If not, and no easement to cross the Valley Railroad is granted, then the project simply will not be built.

Any suggestion that the Commission should demand evidence of greater certainty than the preliminary representations of RSD and DEP invites the perverse result that an applicant for a special exception to authorize such applicant to submit a final Open Space Subdivision Plan must first prepare advanced designs and engineering reports and conduct specific environmental tests for permission for an easement that may not be the precise easement required by the final Open Space Subdivision Plan that is subsequently approved. Not only is it infeasible in the case now

before the Commission, it would set a paralyzing precedent in future matters before the Commission.