 XC: PC

PLANNING COMMISSION EXHIBIT #21

BRANSE, WILLIS & KNAPP, LLC
148 EASTERN BOULEVARD
GLASTONBURY, CONNECTICUT 06033
TELEPHONE: (860) 659-3735
FAX: (860) 659-9368

MARK K. BRANSE
MATTHEW J. WILLIS *
ERIC KNAPP
BRENDAN SCHAIN
*ADMITTED IN MASSACHUSETTS

OF COUNSEL:
RONALD F. OCHSNER

E-Mails:
mbranse@bransewillis.com
mwillis@bransewillis.com
eknapp@bransewillis.com
bschain@bransewillis.com

rochsner@bransewillis.com

By facsimile only: (860) 395-1216

November 23, 2010

Robert McIntyre, Chairman
Old Saybrook Planning Commission
302 Main Street
Old Saybrook, CT 06475

RE: Old Saybrook Planning Commission - Preserve, Amendment to Special Exception
FILE NO: 3029/10-141

Dear Chairman McIntyre:

This letter is in response to the Commission's request for review dated November 4, 2010. As the Commission is aware from past reviews, I am less concerned with whether any particular application is approved or denied, which is usually a policy decision, than with insuring that the Commission *knows* what it is being asked to approve and will actually get the development that the members and the public envision. In this application, the greatest challenge is sorting out what is changing and what is not.

Major Change vs. Minor Change

Case law addresses when a Special Exception is being modified, and mandates a new proceeding, with a public hearing, when the change is "substantive" or "substantial." It is my opinion that the change proposed in the approved Special Exception are substantive and do trigger a new application and public hearing. I don't think this is disputed by the applicant.

Compliance with Outstanding Approval

The applicant has stated that its revised plans and Statement of Use comply with the current Special Exception, except as modified in this pending application. That does not appear to be the case. It is critical that the revised Preliminary Plan now before the Commission be in conformance with the approved Special Exception approval except in the ways expressly identified in the current application because if/when the revised Preliminary Plan is approved, it will control the subsequent subdivision and PRD applications filed pursuant to that Preliminary Plan. See Section 54.5.

1. As noted above, the current Special Exception contained the following requirement as Condition A:

> A minimum of three (3) public access points are required for this development in the locations shown on the Preliminary Plan, except as modified in this Motion: Ingham Hill Road, Bokum Road, and Route 153 in Westbrook.

The preliminary plan now before the Commission depicts cul de sacs at each of the three access roads far from any possible point of interconnection. Those cul de sacs don't even extend to the boundaries of each construction phase.

2. The Commission also required the following:

> The existing Ingham Hill Road shall be realigned at the north end across Lots 73 and 79 as shown on the original Conventional Subdivision Plan to eliminate the sharp curve on Ingham Hill road, also as recommended by Mr. Hillson. The Applicant should also address improvements to Ingham Hill Road to accommodate any additional traffic produced by this connection, including improved pedestrian movement.

I do not see that the identified curve has been addressed, nor is it clear that the detail plans even reserve adequate land and slope rights to allow the realignment to be completed in the future. As noted above, this is a classic example of the tension between a phased development--a term avoided by the applicant--and a "stand alone" development which may or may not proceed. I am especially concerned because under recent case law, the Commission *cannot* require any improvements to Ingham Hill Road under its subdivision powers. Such improvements can *only* be required in connection with this Special Exception application. Therefore, the Preliminary Plan *must* depict the road realignment and, if it is to be performed in the future, assure that adequate property rights have been preserved and the work fully bonded.

3. The Special Exception contained the following requirement as Condition B:

> The Commission finds the Preliminary Open Space Plan should be modified to require that Road H should become a public road and the bike path should be extended from Road A, along Road H to Ingham Hill Road.

It is not clear, based on the scale of the overall drawing, that this condition is reflected in the revised Preliminary Plan. The road appears to be of exactly the same width and configuration as the original approval.

4. Condition C required certain changes to the golf course design. Again, at this scale, it is not clear to me that those changes are reflected in the current submission.

5. Condition D addressed the Estate Lots as follows:

> For those lots abutting proposed public open space or undisturbed areas such as areas adjacent to railroad tracks or utility easements, Building Envelopes shall be limited to one (1) acre, with the remainder of the lot to be preserved by perpetual conservation easements, located on the side of each lot where it abuts proposed public open space or other undisturbed areas.

Atty. Royston had indicated that the Estate Lots now depict limits of clearing to reflect this condition, but there are no detailed plans depicting the location of the easement lines. Without a map of the easement lines, they are impossible to describe in a legal document or to quantify.

6. Condition E required a "level area for active recreation at least ten (10) acres in area shall be dedicated and improved for use by all residents of the Town of Old Saybrook." The location and design of this active recreation area was to be subject to the review and approval of the Commission. I see no such location designation or design. On the contrary, Town Planner Christine Nelson indicates that the recommended location for this active recreation area was in the area where lots are now sought at the end of Ingham Hill Road.

7. Condition F required that the "maintenance facility shall be relocated to a less environmentally sensitive location that is not immediately up-gradient of vernal pools or wetlands." I do not see that the new location has been identified or reviewed with staff.

8. Condition G required that "the Applicant shall present a design for the preservation of the area around the Ingham Homestead, which design shall protect and preserve the historic character of the site and provide for interpretive aides for the visitor." Has this been done? Is it depicted on the revised Preliminary Plan?

9. Condition H required the following:

> The Applicant shall submit plans for improvements to Ingham Hill Road and Bokum Road that acknowledge and address the increased traffic burdens that The Preserve will create for these roads. Such improvements shall include both vehicular safety improvements and pedestrian and/or bicycle travel.

I have not seen these plans. As noted above, if the applicant is taking the position that the "phase 1" development does not require such improvements, then that needs to be demonstrated; and, further, the Preliminary Plan must either be revised or the condition must be acknowledged to remain outstanding.

It is very difficult to determine how the three (3) identified areas of development relate to the approved Special Exception and its Preliminary Plan, as conditioned, modified, and approved. I am very concerned about having the Commission approve this modification, and approve the revised Preliminary Plan, without a very clear statement of *which conditions of the original approval are reflected in the current Preliminary Plan, which ones remain to be met, and until what time frame or triggering event is applicable to the outstanding conditions.*

None of this is intended to suggest that the current application should be denied, but only that there are a lot of essential questions that must be addressed. For example, I would be much more comfortable if the applicant were willing to convey *all* the open space and conservation easements upon the approval of the first subdivision or PRD approval. That, at least, would preclude a future owner from reneging on the Special Exception requirements while still allowing the applicant to develop in accordance with the Preliminary Plan when market conditions so permitted. Similarly, I would be more comfortable if the road, recreation, pedestrian, bicycle, and other site improvement were tied to the schedule of this "phase one" development so that those occupants would be able to benefit from them and we would not run the risk of never getting them built at all.

Nature of the Application

The applicant has provided the Commission with a copy of the approval of its original Special Exception in the form of a plan entitled, "Plan per March 23, 2005 Approval." Section 54.5 mandates that the ultimate subdivision application be in conformance with the approved Preliminary Plan.

The modified Preliminary Plan now before the Commission depicts cul de sacs at the end of each of the access roadways. Each of those cul de sacs is located some distance from the terminate of the construction "phase" which it serves. This means that extending those roadways will require construction work that produces no greater access for the "first phase" development areas and thus would need to be supported by the "interior" development areas. Essentially, infrastructure costs that serve future development in this construction

phase are being shifted to that future phase, making it less likely that such development will occur at all. From a traffic and planning perspective, the Commission must consider whether this modified Preliminary Plan makes sense if it constitutes the entire development of the parcel.

I put the terms "phase" and "interior" in quotation marks because the Statement of Use avoids those labels, referring only to a "phased development." In speaking with the applicant's attorney, he insisted that this is not "phased" development but only, as the Statement implies, that these are merely changes in the overall, total approved Preliminary Plan.

Yet, the cul de sacs indicate otherwise, and on page 3, the Statement requests that the applicant "be permitted to apply for final subdivision approval of the three areas (West PRD, Ingham Hill Road and the Pianta Parcel) either as one application, or as separate applications, and in such sequence as chosen by the Applicant." If those three development areas are being moved from "Preliminary Plan" to "final subdivision" in advance of the "interior" areas, then what we in fact have is a phased development which could contain anywhere between two and four phases. The Commission must consider the ramifications of each individual phase of construction on the overall plan.
We have no idea if those first three development areas would ever interconnect; if they would ever be served by a golf course or driving range; if the open space that was part of the approved Preliminary Plan would ever be conveyed to the Town; if the fire house that was offered would ever be built; and a host of other similar questions that the Commission would not want to inadvertently preclude by not asking the applicant to provide at this stage of review.

I do not understand how the Commission can approve the current modification, with the clear depiction of a road pattern designed to serve only the three (3) "phase one" development areas, while at the same time leaving intact the Special Exception approval for the "interior areas" that rely on access–and interconnection–via those same roadways. The questions are many and the answers so far are few:

- Is the applicant going to bond the extension and interconnections of those roads? This must be addressed in the subdivision application, but it should also be discussed now because of the impact on the road interconnections.
- If so, is the Town prepared to undertake such a massive construction operation by the use of bond money? That is, of course, the purpose of bonding but in this case, we are talking about the construction of bridges and other major work on private property. This is not something to be undertaken lightly.
- Has the Inland Wetlands and Watercourses Commission approved those roadways such that they *can legally be* constructed? Again, this is a central issue in the later subdivision review, but is relevant now because it bears on the feasibility of the "interior" portion of the Preliminary Plan for which the applicant seeks to retain the

current approval.

- Does the Town have the consent of the Town of Westbrook and the Connecticut Department of Environmental Protection to construct the roads depicted on the Preliminary Plan? Like the preceding question, this may be a subdivision issue but it bears on whether the approved Preliminary Plan (without or without the requested modifications) is still viable.
- Is the applicant actually proposing a phased development without using the term?
- If so, has it established that these three (3) development areas are in compliance with the applicable criteria of the Zoning Regulations and, ultimately, the subdivision and PRD regulations, assuming that the development ends at these points?
- If and when the applicant proceeds to subdivision approval for any of the "phase one" development areas, will the open space areas depicted on the entire Preliminary Plan be conveyed to the Town or just the open space for each phase? The Statement of Use implies that it would *not* be all the open space by saying that "each parcel exceeds the 25 acres [in size] and each in individually meets the applicable 50% open space requirement. " If this is the case, then what remains of the Preliminary Plan? Does it still govern the future development of the entire property or doesn't it?
- If bikeways, sidewalks, road realignment, and other improvements are not made *before* these homes are built and occupied, will the Town and the applicant encounter resistance from the new owners who may not want such amenities located near their properties? The Eden Harbour public walkway comes to mind.
- Most critical, if the applicant divides the "phase one" development from the balance of the property, what assurances do we need to put in place in order to ensure that development of this nearly one thousand acre parcel will proceed in a unified and comprehensive way? The applicants drafted the required regulations and obtained approval of those regulations and the Preliminary Plan based on the argument that such a unique and fragile parcel should not be developed piecemeal, but rather should be addressed as an organic whole. The Commission granted the Special Exception predicated upon the vision represented by the Preliminary Plan, as modified in the final approval motion. What happens if the applicant proceeds with this "phase one" development, abandons the Special Exception for the balance, and comes in with some less creative and more intrusive development pattern for the "interior" land? I do not know how a land use agency can deny an applicant the right to surrender an approved Special Exception and, per Section 56.5, this Special Exception could terminate as soon as the Commission denies an extension of time on the subdivision application.

As noted above, none of this is intended to suggest approval or denial of the pending application, but only that the Commission needs to understand the implications of its decision.

<u>Access Per the Approved Special Exception</u>

At the time of the original application, the applicant did not have approval from the Connecticut Department of Environmental Protection or the Town of Westbrook for the access roads depicted on their Special Exception plan from State Route 153 or Bokum Road (over the railroad line). However, the applicant produced testimony to indicate that approval from those independent government agencies was probable. On appeal of the approval of the Special Exception, the Superior Court noted:

> . . . there is no evidence in the record to concerning any action by the DEP with respect to the easement. Moreover, the plaintiff's argument on this subject is dependent upon the completely unsupported assumption that River Sound will be unable to develop the Preserve property absent such an easement.

Since that decision was published, the facts have changed. As of this date, the Town of Westbrook still has not approved a new public highway originating within their jurisdiction. The letter from the Westbrook Board of Selectmen to the Commission dated December 7, 2004 indicated that such approval was remote at that time and would require Town Meeting approval. The Connecticut Department of Environmental Protection has denied the request for permission to cross their railroad corridor which parallels Bokum Road and controls access from that road. We should anticipate that the letter from the Town of Westbrook and the denial by the DEP will be entered into the record.

I know that the applicant's response is that the DEP denial is not final and immutable, but constitutes merely a denial of access rights *at this time*. As noted, the Town of Westbrook had reached no formal decision, nor could it without a decision by its Town Meeting to accept the proposed new public highway within its boundaries. However, just as the facts have changed, so has the law, and I no longer think that the issue of finality of the DEP or the Town of Westbrook decisions is a controlling issue.

The issue of conditional approvals has always been a thorny one in land use law, with some cases upholding approvals conditioned upon other government action and some not. This confusion has been resolved in the case of *CMB Capital Appreciation, LLC v. Planning and Zoning Commission of North Haven*, 124 Conn. App. 379, published on October 12, 2010. This case is truly the latest word on the subject of conditional approvals. While the decision involved an affordable housing application under Conn. Gen. Stats. §8-30g, the analysis of conditional approval did not rely on that aspect of the case. The *CMB Capital Appreciation* decision draws a distinction between two types of conditional approval:

- approvals in which the approving agency *assumed* that the other government action would occur, and predicated its approval upon the occurrence of that approval when there was no evidence that the approval was probable, e.g., *Jarvis Acres, Inc. v. Zoning Commission*, 163 Conn. 41, 50 (1972); *Wilson v. Planning and Zoning Commission*, 162 Conn. 19, 25 (1971); and other cases cited in the *CMB Capital Appreciation* decision. In these cases, the conditional approval cannot be upheld

unless it appears that there is a reasonable probability that the condition (the government approval) will be met.

- approvals in which a special permit or special exception is approved *but does become effective* until the other government agency approval is granted. In these cases, the Court held that "where an exception or a special permit is granted and the grant is otherwise valid except that it is made reasonably conditional on favorable action by another agency or agencies over which the zoning authority has no control, its issuance will not be held invalid solely because of the existence of any such condition." *CMB Capital Appreciation, supra,* p. 386, quoting from *Lurie v. Planning & Zoning Commission*, 160 Conn. 295, 307 (1971).

The preceding analysis makes it clear that a Special Exception approval is valid if it is conditioned upon, and does not become effective without, the government approval or other condition upon which it is predicated. In the original approval, the Commission made a finding that "at this stage of review, where only a preliminary, conceptual plan is being approved, final State approval is not required in order to evaluate the suitability of the plan before it." The same finding was applied to the access to Route 153 in Westbrook. Those same findings apply to the current modification application. Furthermore, the approval of the current Special Exception was made expressly conditional upon the following:

> A minimum of three (3) public access points are required for this development in the locations shown on the Preliminary Plan, except as modified in this Motion: Ingham Hill Road, Bokum Road, and Route 153 in Westbrook.

Therefore, under the analysis of *CMB Capital Appreciation*, both the original Special Exception and this proposed modification would be valid *provided that the Special Exception does not become valid unless and until the three points of access are obtained.* This was the clear condition of the original approval Motion and it is one which must be retained in this modification *if the full preliminary plan is to remain approved.*

Naturally, the applicant could proceed with seeking subdivision/PRD approval for only the three (3) development areas addressed in its current application without compliance with the three-access condition provided, first, that the Commission determined that road access was suitable for those three areas even without interconnection and, second, that the applicant abandoned the balance of the Special Exception approval.

Role of the Inland Wetlands and Watercourses Commission

When the Commission approved the original Special Exception in 2005, the appeal to Superior Court was predicated, in part, on a claim that the Commission could not have acted unless and until the Old Saybrook Inland Wetlands and Watercourses Commission has granted an approval for the regulated activities depicted on the Preliminary Plan. In

dismissing this argument, the Superior Court addressed it as follows:

> The plaintiffs next allege that River Sound should have submitted an application to the Old Saybrook Inland Wetlands and Watercourses Agency prior to or at the same time it applied for the Special Exception to file its Open Space Subdivision Plan. Plaintiffs assert that the "wetlands first" rule is mandated by Connecticut General Statutes §§ 8-3c and 8-26 .
>
> The plaintiffs have admitted in their Reply Brief that Section 8-26e does not refer to the "wetlands first rule." That section directs that a Planning Commission must abide by the public hearing requirements of Section 8-7d and must refer to Section 8-26d for timing limitations on when a decision must be made. Section 8-26d, in turn, again directs the Planning Commission back to Section 8-7d, which provides that extensions of time necessary to await a report by an Inland Wetlands agency do not apply to Planning Commission actions on special exceptions because Section 8-7d(e) specifically omits all mention of Planning Commissions in this context.
>
> Connecticut General Statutes § 8-3c requires that the Planning Commission receive a "report" from the Inland Wetlands and Watercourses Commission and that it consider that report. In this case, the Inland Wetlands and Watercourses Commission of Old Saybrook filed a report. The Commission clearly considered the report because it was expressly referenced in the Commission's Motion for Approval of the Special Exception.
>
> Contrary to the plaintiffs' position, River Sound was not required to obtain a permit from the Inland Wetlands and Watercourses Commission because the Special Exception granted by the Commission did not permit the building of anything. Moreover, the Inland Wetlands Commission properly determines when a wetlands application is necessary. *Queach Corp. v. Inland Wetlands Commission*, 258 Conn. 178, 200, 779 A.2d 134 (2001) ; *Mario v. Town of Fairfield,* 217 Conn. 164, 171-72, 585 A.2d 87 (1990) . In this case the town attorney noted to the Commission that River Sound submitted its plans to the Inland Wetlands and Watercourses Commission, a report had been received from that commission and that commission did not assert jurisdiction.

My understanding from Town Planner Christine Nelson is that the current application has been referred to the Inland Wetlands and Watercourses Commission, following exactly the same procedure as the one used for the original Special Exception application. Assuming that the Inland Wetlands and Watercourses Commission is consistent with its past practice, we should expect a finding of no jurisdiction based on the holding summarized above. The Commission should consider any forthcoming report from the Inland Wetlands and Watercourses Commission regarding the proposed modification, just as it did in the original Special Exception application.

While it is not essential to this process, it seems advisable for the applicant to revise the golf course design in those ways identified by the Inland Wetlands and Watercourses in denying the most recent permit application, as such revisions would relate to the Preliminary Plan approved by the Planning Commission in the original Special Exception. I understand from Atty. Royston that the conflicts between the golf course and the wetlands are resolvable by an amended golf course plan. It would seem prudent, for both the applicant and the commission, to have on the table a Preliminary Plan that reflects the realities of a future Inland Wetlands and Watercourses approval rather than one that we all know has been denied, and that denial upheld by the Connecticut Appellate Court.

Conclusion

Nothing in this report should be construed as recommending either approval or denial of the pending application. There are simply some very critical questions that the applicant must answer in order to reconcile the approved Special Exception and its conditions/modifications of approval with what is now on the table. There are gaps and conflicts here which simply must be resolved.

I hope these comments have been of help to the Commission in reaching a decision on this application. As always, if you have any questions, please do not hesitate to contact me.

Very truly yours,

Mark Branse

Christine Nelson, AICP, Town Planner
Geoff Jacobson, P.E.
Bruce Hillson, P.E.
Chris Costa, Zoning Enforcement Officer
Sandy Prisloe, Environmental Planner
David Royston, Esq.

MB

G:\Old Saybrook\The Preserve RS\Amendment to SX 2010 Review#1 REV.ltr.wpd