PLANNING COMMISSION EXHIBIT #66

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January 13, 2011

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

RE: Old Saybrook Planning Commission - Preserve, Amendment to Special Exception - Additional Comments Following Public Hearing of December 1, 2010
FILE NO: 3029/10-141

Dear Chairman McIntyre:

I have reviewed my notes of the December 1, 2010 public hearing on the above-captioned application, and also the draft Minutes which I received from the Commission's Clerk; the response letter from River Sound, LLC dated December 29, 2010; the review letter from the Commission's Consulting Engineer, Geoffrey Jacobson, dated December 30, 2010; and my notes of the second public hearing on January 5, 2011.

I think it would be helpful to supplement my original review comments of November 23, 2010. I am hoping that by commenting now, I can help the Commission and the parties to focus the discussion at the continued public hearing of January 19, 2011.

Valuation of Assets of River Sound, LLC

Veterans on the Commission may recall that during the 2004 Special Exception application, Charles Rothenberger, Esq., speaking on behalf of the Connecticut Fund for the Environment, urged the Commission to deny the Special Exception so as to make the property more affordable for open space purchase. I sternly admonished Atty. Rothenberger that the Commission would not and could not abuse its regulatory authority to drive down the value of River Sound's property and that any such

comments were irrelevant and out of order. The sole criteria for evaluating the application were those contained in the Zoning Regulations.

Now, in 2010, Atty. Royston, speaking on behalf of River Sound, opened his remarks of December 1, 2010, by observing that The Preserve was the sole asset of a River Sound, which was an asset of a bankrupt corporation, Lehman Bros. The subtle suggestion was that River Sound's financial future, and in part that of Lehman Bros., hinged on the value of this sole asset of River Sound. In retrospect, I should have admonished Atty. Royston in 2010 just as sternly as I did Atty. Rothenberger in 2004. The financial problems experienced by Lehman Bros. or River Sound are not the fault of the Old Saybrook Planning Commission nor the Old Saybrook Zoning Commission, both of which Commissions have granted every application sought by River Sound. The Zoning Commission adopted the regulations which River Sound drafted and proposed, and more recently approved amendments to extend the period during which subdivision and/or PRD applications could be filed. The Planning Commission *granted* the Special Exception and then assigned me, at taxpayer expense, to successfully defend it in Superior Court.

The Commission's regulatory review is not for the purpose of driving *down* the value of corporate assets, nor is for the purpose of driving *up* the value of corporate assets. Any further discussion, however indirect, of the impact of the Commission's review on the value of River Sound's property, up or down, is irrelevant; should be utterly disregarded; and should be ruled out of order if it recurs.

Scope of Wetlands Evidence *vis a vis* Scope of the Application

Toward the end of the first public hearing, Atty. Rothenberger indicated that in support of his client's Notice of Intervention, he would be providing evidence from the Inland Wetlands and Watercourses Commission hearings of the adverse impacts of The Preserve on protected natural resources. This is both the right and the duty of an intervener. However, when I asked Atty. Rothenberger about the comments already received from the Inland Wetlands and Watercourses Commission (Exhibit 24), and why the interveners felt the need to address wetland issues which the wetlands commission had not. His response was: "We think that report only focuses on the changes to the Special Excerption plans, not to the whole plan. So we will want to

supplement what they said with comments on the whole plan. "[1] In fact, Atty. Rothenberger opened his comments by saying, "The issue is not what has changed, but what has not. Environmental issues were raised and we were told that those would be addressed at the level of greater of detail later on." The "later on" that Atty. Rothenberger references is the *subdivision and/or PRD application* stage; *not* at the Special Exception stage, be it the original 2005 Special Exception or this current application to amend it. The Superior Court agreed that the Special Exception allows *no construction* and is merely a first step toward an actual, detailed development plan. To their credit, the focus of the Intervenor's presentation at the January 5, 2011 hearing was the changes sought by the modification, e.g., the substitution of on-site effluent disposal systems and private wells for public water and sewer and the alleged impacts of that change. However, other speakers seemed to think that this was a second chance to attack the approved Special Permit.

The pending application is to *amend* the approved Special Exception; it is *not* an opportunity to reopen, reargue, and re-litigate the entire 2005 Special Exception. The Inland Wetlands and Watercourses Commission *properly* focused its comments in Exhibit 24 on the *changes* to the Special Exception which this application presents. While those changes may have impacts on the balance of the land (such as traffic flow, utilities, recreation opportunities, pedestrian circulation, etc.) that is not the same thing as starting from square one and treating this as a second chance to attack the approved Special Exception. To the extent that the proposed modifications have environmental impacts on other portions of The Preserve, they are fair game. However, I will urge the chair to rule out of order any comments that are directed to the original Special Exception approval. This is the case for environmental testimony as well as any other, such as traffic, community character, etc. Most of the public comments on January 5, 2011 ignored my guidance on this point, causing the hearing to extend late into the night with testimony that the Commission cannot use in making a decision.

Open Space Dedication

During the applicant's presentation, there were no comments about the disposition of open space until Robert Doane, P. E., stated, "We were asked to look at the three outlying parcels, each of which is a standalone proposal that meets all the requirements

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[1]Whenever quotations marks are used in this letter, they are comments from my personal typed notes of the public hearing, and may not be *exact* quotes, but are very close.

of your open space regulations." I questioned Mr. Doane about how it could be said that each of the outlying parcels "stands alone" under the open space regulations when this remains a single Special Exception approval and Section 56.6.8 requires that *all* open space depicted on the approval Preliminary Plan be conveyed at the time of the first phase of development.

Atty. Royston objected to my directing this question to Mr. Doane instead of to him, but the fact is that I addressed the question to the only person who had addressed the topic so far. The first public hearing closed without any clarification by the applicant concerning Section 56.6.8 or how it would relate to the application now before the Commission. The applicant's written response of December 29, 2010 (Exhibit #43) states that phasing of the development "is not the purpose and intention of the requested Modification." (Emphasis original.) The response goes on to say,

> Rather it is a request to allow the "stand alone" development of each of the three separate areas identified in the Application (herein referred to as "pods") as an Open Space subdivision, provided each pod complies independently with the Open Space Subdivision Regulations, while remaining consistent with the March 23, 2005 Special Exception approved Preliminary Open Space Plan (hereinafter referred to as "full development"). (Emphasis original.)

Allowing the "stand alone development of each of the three pods" is allowing a phased development and no amount of linguistic acrobatics can change that fact. This triggers the requirements of Section 56.6..8 that all open space be conveyed in the first phase. The applicant says, in its response:

> It is the applicant's position that this requested modification is not a proposal for a phased development as contemplated under Section 56.6.6.8 [*sic*], but rather is a request for separate, stand-alone development.

If that is the case, then the balance of the Special Exception must be voided. The applicant cannot have it both ways: the first three pods as a "stand alone development" but the retention of Special Exception that was approved as a comprehensive plan for the total Preserve property. This is either a "stand-alone development" of the pods, and the "full development" Special Exception is void, allowing for a new plan and a new application for that land; or we still have one single unified Special Exception and the first three pods are "phases" of the approved plan.

The entire reason why Section 56.6.8 exists is to prevent exactly what is being proposed in this application. The concept of Section 56 and the Conservation Zone was to create a comprehensive, unified vision and plan for the entire Preserve property, rather than fragmented piecemeal development. The overall plan was supposed to provide a network of interconnected open space, trails, bicycle paths, utilities, habitats, roads, and amenities. The Planning Commission made a finding that the Special Exception achieved that goal, approved the application, and successfully defended it before the Superior Court. If that plan is no longer viable, River Sound should ask that it be voided. If that plan is viable, then they should have no objection to conveying all the open space at this time and do the balance of the full development later. If River Sound doesn't know whether the overall plan is or will be viable, then they should withdraw this application and wait until they *do* know.

The applicant's response cites to language in Sections 5.8 and 3.4.7 of the Subdivision Regulations and argues that "the provisions of the Zoning and Subdivision Regulations should be read together and reconciled as a coherent whole." I do not agree. Subdivision regulations must comply with zoning regulations. *Lewis v. Planning and Zoning Commission of the Town of Ridgefield*, 76 Conn. App. 280 (2003). Section 56.6.89 of the Zoning Regulations does not speak of "individual subdivisions" or "pods" or "components." On the contrary, it says "the area *covered by an Open Space Subdivision Plan* may be submitted for final approval in phases, if any land to be reserved for *open space* is so reserved in the first phase." (Emphasis added). The area "covered by" this Special Exception for Open Space Subdivision is the entire parcel. If the applicant seeks final approval for any part of that area, that would be the first phase and all the open space for the "area covered by the Open Space Subdivision Plan" must be conveyed upon the granting of that final approval.

In order to avoid any claim of ambush, let me say now: I will recommend to the Commission that, if it sees fit to approve this modification to the Special Exception, it expressly confirm in such approval the existing requirement that all open space (including fee simple open space and conservation easements depicted on the approved Preliminary Plan) be conveyed to the Town upon the approval of the first subdivision or PRD application filed pursuant to this modified Special Exception, as mandated by Section 56.6.8. If the applicant rejects such an interpretation, the Commission should seriously examine if this modification should be approved at all.

Nature of the Application

I had hoped that the public hearing would clarify the actual character of this application, but I was disappointed. The applicant's presentation indicated serious (and legitimate) doubts about whether the current Special Exception remains economically viable. Atty. Royston pointed out:

> A lot has changed since 2005. When you read the comments, please remember that when this application was made to amend the regulations in 2003, and the application in 2004, circumstances were much different than they are today. The idea of a full and comprehensive development of the property was considered to be economically sound due to the need for tertiary community septic system, the need for water infrastructure, and why the entirety was needed was in order to be able to develop that property as one entire whole. Times have changed. "

Later, Atty. Royston said:

> To go back to a more comprehensive development does not recognize where we are today. We have been told, 'it's disingenuous to look at small parts when we don't know what will happen to the whole.' We showed you a plan for the whole. To think that we know what will happen to the rest of the property, if anyone here knows, let me know, let Mr. Levine know.

These comments need to be put in perspective. When River Sound approached the Town in 2003, they offered two starkly contrasting visions: One was a conventional subdivision that would fragment the open spaces on The Preserve, create sprawl development due to the required separating distances for septic systems and private wells, and offer limited, if any, amenities. The other was for a comprehensive development plan that, due to its scale and unified planning, could support community effluent disposal and public water. This, in turn, would allow for meaningful clustering, recreational amenities, substantial contiguous open spaces and natural habits, and a vehicular and pedestrian circulation system that actually improved both public safety and traffic flow. The Zoning Commission and the Planning Commission embraced this vision and took the steps necessary to make it a reality.

Now, the applicant returns and says that they can't "go back to a more comprehensive development" because it "does not recognize where we are today." If that is the case, then the applicant needs to bring in a new vision, a new comprehensive development plan that *does* recognize where we are today.

At one point, Mr. Royston said, "The application has been called uninspired, disingenuous and we believe those are editorial comments that are off the mark if you look at what we are trying to do." This begs the question, "Then just what *are* you trying to do? What *is* the overall plan if the current one is no longer viable?" If the applicant lacks the funds to create that new vision, that is understandable. But then it should acknowledge that fact and abandoned the current Special Exception so that, when the market is right, this developer or a new one can write on a clean slate for the whole property. Piecemeal planning and development is not the appropriate response to an outdated comprehensive plan.

My concern here is drawn from a seminal case in Constitutional law, *Lucas v. South Carolina Council*, 505 U.S. 1003 (1992). In that case, a developer acquired land along the South Carolina Coast.

> In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. *Id.*

The phrase "toward the close of the development cycle" obscures the true facts of the case. Lucas and his partners developed all the buildable land in the tract that they had bought, selling many valuable house lots along and near the beach, until only a swamp was left over. It was that swamp that was then "purchased" by Lucas from himself and his partners "for his own account." South Carolina adopted a Beachfront Management Act (similar to our own Coastal Area Management Act and Tidal Wetlands Act) which prohibited development on certain "critical areas," which included Lucas' swamp. Lucas argued that he was being deprived of all economic value for his property. The Coastal Council responded that Lucas and his partners had derived substantial economic value from the total tract, and he had acquired only the unbuildable dregs.

The Supreme Court did not agree. They addressed Lucas' property in isolation, as if he and his partners had never owned or developed the vast areas around it. The Council argued that the harm to the coastal ecology outweighed Lucas' rights to build on his property, and that some level of regulation to protect the South Carolina coast was essential.

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may

> subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

The Court held that Lucas had been deprived of all right to use his two lots and that the Council had to allow him to build houses on them or purchase the property.

My concern is that we are facing a comparable situation here. If River Sound can develop the most accessible portions of its property, leaving only the forest core that, apparently, could only be developed with public utilities, we run the risk that the forest core will be acquired by some other owner–including a partner of River Sound–who would then claim that a rejection of further development in the forest core, regardless of the harm involved, would constitute a taking of the property. The Commission would not be able to defend by pointing out the development that *was allowed* in the perimeter portions of the property because that approval will have been granted to a different owner. The Commission could be compelled to allow some level of development of the forest core, without public utilities, in order to avoid a takings claim. I have discussed this dilemma with the applicant's attorney and I remain hopeful that he can provide a constructive response.

Type of Open Space

There was a part of the applicant's presentation that confused me. Mr. Doane stated, "I know these plans have been criticized as not being consistent with the open space plans that we have. In the Conservation District the lots must be 60,000 square feet in the conventional layout, and in the Open Space layout you must have 50% Open Space, but you can reduce lot size if you have sewer and water. But if not, you can't reduce the minimum lot area. In order to address that, we have added Conservation Easements." I asked Mr. Doane if there were any septic systems located within Conservation Easements, and he responded that though the detailed plans had not been completed, he was not planning on having septic systems within Conservation Easement Areas.

This essentially means that open space that was to be deeded to the Town is being converted to less desirable Conservation Easements because of the artificial requirement for a 60,000 square foot minimum lot size for lack of sewer and water. It might be more desirable for both the applicant and the Town to seek a text amendment that would allow lot size reductions where the health code would allow it. The Preserve's approved Preliminary Plan assumed sewer and water for the entire parcel,

so the applicant never thought to ask for a lot size reduction without it. But, as Mr. Royston observed, times have changed. Perhaps the regulations should change, too.

At the same time, the applicant cannot shield itself from the implications of its own decisions. It is not the Commission or the Zoning Regulations that have triggered the 60,000 square foot minimum lot size but rather the fact that the applicant has decided not to proceed with public water and sewer. One of the claimed benefits of the 2005 Special Exception was that public utilities would allow for a greater level of clustering than could be supported by on-site wells and septic systems. The applicant says that the current economic conditions do not warrant the installation of public utilities, but that begs the question. If public utilities are not viable, then the entire Special Exception is not viable. I question the premise that because the applicant is not financially able to install public utilities at this time, the Commission should abandoned the clustering that the original plan provided and allow a less clustered plan to proceed around the perimeter. Perhaps the same amount of preservation can be achieved, even with the 60,000 square foot lot size, if the number of lots is reduced.

Traffic Circulation

I cannot overemphasize that traffic improvements, whatever they will be, *must* be addressed in *this Special Exception application.* The law is now absolutely clear: the Commission cannot, under its subdivision powers, require *any improvements to existing public roads whatsoever*–not widening, not drainage, not sidewalks, not bike paths–**nothing**. Mr. Royston's statement that traffic issues can be addressed at the subdivision or PRD review stage is just wrong. In keeping with my comments at the beginning of this letter, the applicant need not revisit the traffic issues for the overall development because those issue were addressed in the 2005 Special Exception approval. However, the applicant must address the traffic issues for the modification, which means the possibility that the three proposed roadways will never connect. In its response letter, the applicant states:

> the Applicant is taking the position that the pod development for Bokum Road and the pod development for Ingham Hill Road do not require the off-site improvements that would be needed to address the "increased traffic burdens" of full development.

Similarly, the response says:

> It is the Applicant's position that providing the required right of way for the three

potential "access point" roadways is sufficient to accommodate the potential full development under the Special Exception.

This may be the applicant's position, but that position has so far not been supported by any expert testimony. At the last public hearing, Mr. Hillson urged the applicant to consider an emergency access, perhaps in conjunction with a bike path, and the response was that it would be "considered" but not constructed. The latest submission offers the Commission a "feasibility study" of such a bike path/emergency access. A study provides no safety benefits, and the "feasibility study" could be a single sentence: "Such a bike path/emergency access is not feasible."

The CEPA Intervention

The Commission has heard expert testimony that, in that expert's professional opinion, certain aspects of the current application are reasonably likely to "unreasonably impair, pollute, or destroy the public trust in the air, water, or other natural resources of the state." The applicant has not provided contrary expert testimony, but I expect that they will do so. The applicant will also need to introduce expert testimony to the effect that there are no feasible and prudent alternatives to the development as proposed and, presumably, the intervenors will introduce testimony indicating otherwise. The credibility of witnesses is for the Commission to determine and, when hearing conflicting expert testimony, it is free to accept or reject the testimony of one witness or the other as it sees fit.

Conclusion

As always, there is something in this letter that will displease both the applicant and the opposition, but my goal is neither to please nor to displease, but only to identify issues that must be addressed. My overall concern is that the applicant is seeking to retain the *benefits* of the Special Exception for the forest core, but it not willing to live up to the *obligations* of that Special Exception in terms of public utilities, road improvements, open space, recreation amenities, public facilities, or the clustering that public utilities allow. The Commission is precluded from voiding the Special Exception for the forest core, but the applicant can surrender it at will, leaving a clean slate for a large area of rugged land from which the most accessible land has been severed. That inconsistency is troubling and I hope that the applicant can find a way to make it less so.

As note above, nothing in this letter should be construed as recommending either approval nor denial of the present application.

Very truly yours,

Mark Branse

cc Christine Nelson, AICP
Chris Costa
Geoffrey Jacobson, P.E.
Bruce Hillson, P.E.

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