PLANNING # 82
COMMISSION

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January 19, 2011

Old Saybrook Planning Commission
302 Main Street
Old Saybrook, CT 06475

Re: Application for Modification of Special Exception for Preliminary Open Space Subdivision Plan by River Sound Development, LLC

Dear Commissioners,

This memo serves as an accompaniment to the remarks delivered at your last public hearing on January 5, 2011 (attached). The intention of this memo is to clarify and amplify the comments presented at that time.

I had intended to address two topics on January 5th. The first was to clarify why issues with respect to the core of the property are valid. The second was to briefly highlight a few areas of concern regarding the specifics of the proposed modifications within the three so-called pods. Although Sigrun Gadwa presented evidence regarding the reasonably likely adverse impacts that can be expected as a result of the applicant's current proposed modifications to its Special Exception, I focused my oral comments on the first part of my prepared presentations. Frankly, given the comments made by the applicant during its presentation I wondered if I had somehow inadvertently reviewed the initial maps rather than the revised maps provided by the applicant.

During my review of the prepared maps, I identified several areas that raised concerns in my mind (and that have been and will be addressed by REMA Ecological Services). Of particular concern was the proximity of proposed development activities to two vernal pools (#16 and #31) and wetland #9 in the Ingham Hill portion of the proposal. The applicant stated that they had pulled the development back from the vernal pools to meet the concerns raised by the Wetlands Commission in its initial review. That didn't comport with my recollection of the plans, so I have gone back and rechecked the maps. In fact, the proposed development of lots #11 and #12 still raise concern about likely impacts to the two vernal pools. While the development has been pulled back from within the Upland Review Area of those two verbal pools, it remains directly adjacent to that Upland boundary. It appears that the applicant has done the bare minimum to attempt to avoid review by the Wetlands Commission by attempting to circumvent its jurisdictional authority, but it has done little to lessen the likely adverse impacts to those verbal pools from erosion and sedimentation. This appears to be particularly the case with respect to the steep slopes along the southern boundary of lot #12 and the eastern boundary of lot #3 (which remains within the Upland Review Area of wetland #9).

I would respectfully suggest to the Planning Commission that, under the Open Space Subdivision regulations, your jurisdictional authority to assure the protection of natural resources on the site is broader than that which might constrain the Wetlands Commission. Specifically, you are not limited to reviewing only applications which contain activities within the 100 foot upland review area. You are specifically tasked with looking at the site as a whole and making the appropriate determinations and recommendations to meet the goals of the Conservation C District. Therefore, the fact that the applicant has withdrawn some (although not all) lot boundaries outside the Upland Review Area does not preclude your ability to assess the likely impacts to those wetland resources from the proposed activity.

The *Lucas v. South Carolina Council* issue raised by Attorney Branse in his memo dated January 13, 2011, seems to me to be a corollary to the concern that CFE raised during the January 5 public hearing. Regardless of whether ownership of the central core is transferred to a different (or related) party, there is a very real possibility that prior development of the exterior pods will, at a minimum, both limit the ability of any subsequent development of the interior core to avoid adverse wetlands impacts and also limit the options that might otherwise be considered by a reviewing wetlands commission.

The issue regarding the dedication of open space appears to me to raise an additional practical difficulty not noted by Attorney Barnes in his memo. If Attorney Branse's analysis of Section 56.6.8 of the Open Space Subdivision regulations is correct (and it appears to me to be so), then there is yet another likely and troubling outcome.

If the dedication of open space is to be made at the time that the first phase of development is begun, it would appear to be prudent for the applicant, if not strictly a necessity, for that open space dedication to be made only after final subdivision approval for the entire parcel is secured. Put another way, the first phase of development (the actual construction activity) and associated open space dedication would not occur until the final approval for the entire project.

If this approach was not followed, then we would face a situation where, for example, upon application to the wetlands commission for one or more of the pods, certain prudent and feasible alternatives to the siting of specific features related to the development of subsequent pods – or the central core - would be precluded because of the prior dedication of the open space in that area to the town. Regardless of whether this circumstance is one of the applicant's own doing, I suspect that the applicant will object to the loss of building lots or the proposed golf course, to avoid wetlands impacts.

Given the previous rejection of the current development layout by the Wetlands Commission, the applicant will be obligated to present an alternative layout to the Wetlands Commission that attempts to meet the concerns raised by that commission. How will the applicant achieve that if its ability to change the layout is prevented by a prior dedication and transfer to the town of the currently identified open space areas?

The Proposal Is Reasonably Likely to Cause an Unreasonable Impairment of Natural Resources in Violation of General Statutes 22a-19 and Reasonable, Prudent Alternatives Exist

Connecticut's Environmental Protection Act (CEPA) is premised on the declared

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legislative policy that "the air, water, land and other natural resources [are]...finite and precious" and that "human activity must be guided by and in harmony with the system of relationships among the elements of nature." General Statutes Sec. 22a-1. The Connecticut Supreme Court has affirmed the polices declared in General Statutes Sec. 22a-1 and ruled that the state's natural resources include wildlife and trees, belong to the public at large rather than to private individuals, and are not defined narrowly by private economic interests. *Paige v. Town Plan and Zoning Commission*, 235 Conn. 448 (1995).

In furtherance of the policy underlying CEPA, General Statutes Sec. 22a-19(b) requires a local administrative body to consider an intervenor's claims that a proposed development will unreasonably impair or destroy a natural resource. General Statutes Sec. 22a-19(a). If the administrative agency finds that such impairment or destruction is "reasonably likely", it must disapprove the proposal "so long as, 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." A reasonable and prudent alternative is one that is "economically reasonable in light of the social benefits derived from the activity." *Levine v. Conservation Commission*, 1997 Conn. Super. LEXIS. 667, citing *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 595 (1993).

On the basis of the expert testimony presented by George Logan and Sigrun Gadwa during the public hearings on the proposal, it is clear that that impairment and/or destruction of natural resources is, at a minimum, "reasonably likely" if the proposal is approved. The Commission must therefore explore the question of whether a more reasonable and prudent alternative exists—that is, an alternative that is "economically reasonable in light of the social benefits derived from the activity." In other words, if an alternative scheme would provide greater social benefits-- including the public policy embodied in CEPA and the values sought to be achieved with protection of open space and natural resources-- and still allow the owner a reasonable economic return on its investment, then such an alternative is a reasonable and prudent one.

CFE submits that many such alternatives exist. For example, REMA has noted that realigning the roadway on the Bokum section of the property will reduce adverse ecological impacts while only requiring the elimination of two lots. That roadway alignment is in keeping with what was proposed (and approved by this Commission) in the original application. With respect to the Ingham Hill section, the applicant itself has recognized that keeping that entire area as open space is both warranted by the value of the natural resources present in that area and is a prudent and feasible alternative to development, since that is in fact what was proposed (and approved by this Commission) during the original application. The fact remains that this area is but one part of a much larger parcel and must be evaluated in the context of that larger parcel. Regardless of the scope of the proposed modifications, the analysis of prudent and feasible alternatives will appropriately consider the options open to the applicant for the property as a whole.

While River Sound will no doubt object to alternatives of this kind, you must keep in mind that its economic return need only be reasonable to satisfy constitutional concerns. It is your job as a public agency to prevent the destruction of significant natural resources which serves no public interest and merely advances private economic gain. Where other commissions have denied land use approvals on CEPA grounds, with findings adequately supported by the record, courts have accorded deference and upheld such decisions. See e.g. *Pinney v. Granby Inland Wetlands and Watercourses Commission*, 2004 Conn. Super. LEXIS 584; *Levine v. Conservation Commission*, 1997 Conn. Super. LEXIS. 667.

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In sum, CFE urges the Commission to carefully apply CEPA to the record before it and on that basis deny River Sound's application and require it to reapply with a more prudent, reasonable and feasible alternative.

Very Truly Yours,

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