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PLANNING
COMMISSION
EXHIBIT 107

February 16, 2011

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

Re: Modification to Approved Special Exception for Preliminary Open Space Subdivision Plan
submitted by River Sound Development LLC, owner

Re: Dear Chairman McIntyre:

I represent The Alliance for Sound Area Planning. The Alliance is a broad-based, grassroots coalition that was created by concerned citizens from the towns of Old Saybrook, Westbrook and Essex in order to: (1) provide residents and land use decision makers with educational and informational resources; (2) and to promote fiscally, socially and environmentally sound land use decisions on the proposed development called "The Preserve". To further those goals, I am submitting this letter on behalf of the organization.

The change in facts supporting the original approval for the Special Exception authorizes the Planning Commission to reexamine and reverse its previous approval

Once there is a change in fact or law an administrative agency may change its previous decision. "Ordinarily, an administrative agency cannot reverse a prior decision unless there has been a change of conditions or other considerations have intervened which materially affect the merits of the matter decided." Grillo v. Zoning Board of Appeals, 206 Conn. 362, 367 (1988). Indeed, where information placed before an agency constitutes "both a significant change in conditions and intervening considerations" an agency acts properly when it "reverse[s] its prior decision." Consolini v. Inland Wetlands Commission, 29 Conn. App. 12, 17 (1992).

The facts supporting the original application have changed. The access to Bokum Road over property owned by the State of Connecticut under the control of the Department of Environmental Protection (DEP) has changed from "probable" to non-existent. When the original application for the Special Exception was filed, the applicant produced testimony that approval from the DEP for an easement over the railroad line to Bokum Road was probable. Since then, on the contrary, then-Commissioner of Environmental Protection Gina McCarthy turned down the applicant's request for a right-of-way bridge crossing of Valley Railroad State Park. Letter dated February 10, 2006 attached. The Commissioner's unwillingness to encumber the state property with an easement to the applicant was based both on the localized impacts of the crossing and the DEP's policy of not granting new right-of-way crossings along the entire Valley Railroad State Park. Commissioner McCarthy's decision was that of a landowner, not a regulatory body.

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The Planning Commission's attorney, Mark Branse, acknowledges this change in fact, but believes that a recent Appellate Court case disposes of this issue as a matter of law. Attorney Branse relies on the decision in CMB Capital Appreciation, LLC v. Planning and Zoning Commission, 124 Conn. App. 379 (2010).

That Appellate Court case is pertinent when considering conditions dependent on other agency action. The *CMB Capital Appreciation* case discussed the circumstances regarding conditional approvals. The entire discussion refers to actions of other agencies beyond the control of the agency processing the application. There is no regulatory action awaiting review by the DEP. The applicant sought permission from DEP to cross over property not within River Sound's ownership. It did not seek a regulatory permit. The DEP acted in its capacity as a landowner, not in its governmental capacity as a regulator acting on permit applications. As a result, the Appellate Court case is inapplicable to this situation. Moreover, on January 25, 2011, the Supreme Court granted the defendant Planning & Zoning Commission's petition for certification, 299 Conn. 925 (2011), meaning that the Supreme Court is accepting the appeal. Thus, even if this issue were pertinent to the facts before the Old Saybrook Planning Commission, the Appellate Court's decision is not the final word.

Would the Planning Commission entertain this application if there were no ownership interest in the property? The applicant has no property interest in the access to Bokum Road. There is no interest served by acting on an application which is at best, "academic."

The applicant comes before the Planning Commission for a modification to its Special Exception. The Special Exception was predicated on a fact, the probability that the DEP would grant an easement for access, that no longer exists. The time is ripe for the Planning Commission to deny the Special Exception as there is no support for the claim of access to the property. At such time as the applicant has access to the property, the Planning Commission may consider the Special Exception or any modification to it.

Sincerely,

Janet P. Brooks

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Enclosure



Gina McCarthy
Commissioner

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

79 ELM STREET HARTFORD, CT 06106-5127

PHONE: 860-424-3001
February 10, 2006



Mr. Dwight H. Merriam, Esquire
Robinson & Cole
280 Trumbull Street
Hartford, CT

RE: File A-05-154, Valley Railroad State Park

Dear Attorney Merriam:


The Connecticut Department of Environmental Protection (DEP) has completed its evaluation of River Sound Development, LLC's request for a right-of-way bridge crossing of Valley Railroad State Park. DEP's Property Review Team, comprised of representatives of DEP's various resources disciplines, reviewed the proposal.

The request proposed an overpass to be built over the existing train track at the centerpoint of the 100 foot wide path of the Valley Railroad State Park. It is unclear from the plans how wetlands, species at risk or local stormwater runoff would be affected by the proposed structure and associated roadway. It appears that a significant amount of fill will be required to meet the grading plan for the roadway as designed.

As a result of the uncertainties related to the physical impacts the overpass and roadway system would have on the Valley Railroad State Park, the resulting constriction of the park from its existing 100 foot wide path to a 20 foot wide passageway designed to pass a single train, the potential to further limit the use of this railway to trains of a certain width and height, and the overall negative aesthetic impact such an activity would have on this section of the State Park, the Connecticut DEP is unwilling to grant River Sound Development's request to construct an overpass over Valley Railroad State Park. As you may know, this position is consistent with DEP's practice of not granting new right-of-way crossings along the entire length of Valley Railroad State Park. State practice and policy is to protect its State Park system from such encroachments and to hold the State Park lands if acquires for public use and enjoyment.

If you have any questions regarding this matter, please feel free to contact Mr. Thomas Morrissey, Bureau Chief of Outdoor Recreation at (860) 424-3014 or Ms. Elizabeth Brothers, Assistant Director, Land Acquisition and Management Division at (860) 424-3016.

Yours truly,


Gina McCarthy
Commissioner

GMB/mm
cc: Thomas Morrissey
Elizabeth Brothers
Town of Old Saybrook

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