

**Motion for Denial of Application of The Preserve
Modification of the 2005 Special Exception**

EXHIBIT

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The Commission has given careful consideration to this application dated October 8, 2010 for modification of the Special Exception for Open Space Subdivision in accordance with Section 56 of the Old Saybrook Zoning Regulations (the "Modification Application") as filed by River Sound Development, LLC (the "Applicant.") The Modification Application sought to amend the existing Special Exception as approved by the Commission in 2005 ("the 2005 Special Exception"), appealed to Superior Court, and affirmed. The Commission members have heard exhaustive testimony-expert, anecdotal, and otherwise-during many hours of testimony. They have received numerous plans, reports, staff memoranda, and other documents. In reaching this decision, the Commission members have relied exclusively on the evidence and testimony in the record and, where appropriate, their own knowledge of the Town of Old Saybrook, their personal inspection of the property, and topics within their individual or collective expertise. The Commission has also considered the Notice of Intervention filed by Intervenors under Conn. Gen. Stats. §22a-19. Further, the Commission has considered the Motion for approval of this Modification Application drafted by its staff.

The Intervention

One of the fundamental changes from the 2005 Special Exception is that development of the three "pods" is to be done with individual on-site septic systems and (except for the West PRD) private wells, rather than a community sewerage system as proposed in the 2005 Special Exception. Intervenors have presented testimony that while the community sewerage system collected the nutrients and other contaminants from the dwelling units for central treatment in an optimal location on the site, the Modification Application would require the discharge of such nutrients and other contaminants into more fragile areas of the site, causing unreasonable adverse impact to vernal pools and other wetlands resources. The Commission finds such testimony credible.

The Commission members have also walked the property and observed the topography where dwellings are proposed to be located in the Western PRD and the Ingham Hill Road area. The Commission members have observed septic system standpipes, indicating septic system test locations and dwelling locations, in small pockets of land surrounded by significant ledge outcrops, steep grades, and wetlands. This roughly 1000 acre parcel has apparently remained undeveloped over the centuries while surrounding land was developed because of the challenging terrain and difficult topography. The installation and operation of individual septic systems, and the drilling of individual wells, in such rugged topography appears reasonably likely to cause disturbance of natural resources which were not present in the 2005 Special Exception.

There is a feasible and prudent alternative, which is to continue with the community sewerage system and extension of public water as proposed in the 2005 Special Exception. The Commission has received no testimony indicating that the community

sewerage system or the extension of public water has become infeasible since the 2005 Special Exception approval.

In addition, the Commission has heard testimony from several experts about the presence of Box Turtles on the site, a State Species of Special Concern. While the experts appear to believe that there are protocols or methods to avoid adverse impacts to this species from development of The Preserve, no party has placed on the record what such protocols or methods are or if they are feasible in light of the plan as depicted in the Modification Application. The Commission finds that it is reasonably likely that construction activities for The Preserve will unreasonably impair or destroy the Box Turtle and its habitat and that there are feasible and prudent alternatives to address such impacts which have not been placed on the record.

In summary, the Commission finds that the Modification Application involves conduct which is reasonably likely to have the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water, or other natural resources of the state.

The Substance of the Application

The Comprehensive Vision of The Preserve. The Commission accepted the Applicant's arguments in 2005 that The Preserve represented a unique parcel of land that called for a unique development plan. The parcel is the largest of its kind in coastal Connecticut, but is also characterized by numerous vernal pools (more than 30), the rare cedar swamp known as Pequot Swamp, large ledge outcrops, steep slopes, and other challenges to conventional development. The Applicant presented the Commission with a comprehensive vision for the development of the total parcel that used public water and community sewer to maximize clustering in the least fragile areas of the site; development where the land was most conducive to it; a substantial area of interconnected natural open spaces; public access to a trails system and bikeways; and a private recreational amenity in the form of a golf course and country club complex. The Commission approved this vision in 2005 and successfully defended it before the Superior Court on appeal.

In the Modification Application, the Applicant has told the Commission that the plan for the "forest core," with its village, golf course, country club, and other amenities, is no longer viable due to changes in the economy. However, despite that statement, the Applicant desires to retain the 2005 Special Exception for that area exactly as approved. The Applicant has changed only the three perimeter "pods" to eliminate community sewers and (except for the West PRD) public water and relocated the active recreation fields to an area where the topography is steeper and less suitable for such fields than those approved in the 2005 Special Exception.

If the vision of The Preserve that the Commission approved in 2005 is no longer viable, then it is incumbent upon the Applicant to provide the Commission with a new vision that *is* viable. The Commission is reluctant to allow development on private septic systems and wells, and to allow the location of recreation fields in less desirable

locations, when the 2005 Special Exception provided a superior plan for utilities and recreational amenities.

Initially, the applicant's request was to develop the "pods" individually, in any order, and separate from the development of the forest core, while arguing that such a request did not constitute "phases" as that term is used in Section 56.6.8. The Applicant withdrew that request at the final public hearing, but the plans before the Commission still show cul de sac turnarounds and other features of the initial "phased" plan. In examining the approval motion drafted by staff, the Commission notes that many significant changes to the plan will have to occur after the Commission's vote, and be reviewed by staff without further Commission or public comment. This is not a desirable situation and one that could have been prevented had the Applicant presented a realistic and candid application from the outset concerning the phasing of the project. Much of the staff review, intervention testimony, and Commission attention was spent on the issue of "phasing" which was withdrawn by the applicant at the final public hearing, diverting review time and attention from the modifications as elements of the total plan. The result is evident from the draft approval motion with its numerous items to be address in the future through staff review.

Furthermore, the fact remains that the Applicant has stated repeatedly that the total plan for The Preserve is not viable, causing the Commission to question how the requested modification to the "pods" will lead to, or even facilitate, the implementation of the overall plan as depicted in the 2005 Special Exception. Essentially, the Commission embraced the vision of The Preserve as presented in 2005 and is not prepared to fragment or undermine that vision without a substitute vision of equal or better quality, as measured by the criteria of Section 56.

Access Rights

In 2005, the Commission was prepared to accept the Applicant's representation that access via a public highway from Westbrook and a public highway from Bokum Road over the State-owned railroad line was likely to be obtained, and had not as of that time been denied. Since that time, the Town of Westbrook and the Connecticut Department of Environmental Protection, as agent for the State of Connecticut, have granted no such approval during the intervening six years and the Connecticut Department of Environmental Protection has expressly denied such access. While it remains possible that the such approvals will be forthcoming in the future, the Commission now has cause to question the viability of The Preserve as depicted on the approved 2005 Special Exception and is reluctant to allow development of the "pods" with private on-site septic systems that would allow them to be built without the three interconnected access points that was a requirement of the 2005 Special Exception.

The Commission has heard extensive testimony, both expert and anecdotal, about the serious public safety risks posed by further extension of the Ingham Hill cul de sac. While the applicant has abandoned its quest for "stand alone" development of the three "pods," the Commission cannot understand why, if the development is to be done as a

single unified plan, there is a need to change development of the "pods" from community sewers to individual septic systems. This inconsistency in the proposal suggests that the Applicant will still pursue development of the "pods" without the interconnected roads and without any secondary relief access route. A future application may clarify this inconsistency, but on this record the Commission is not prepared to amend the 2005 Special Exception without a better grasp of what the overall plan really is.

Decision

The Commission hereby denies the Modification Application for the reasons stated above, but in addition for such other reasons as may appear in the record. The Commission has not attempted to scrutinize the record to compile an exhaustive list of reasons for denial, but has set forth only the most salient in this Motion. The motion for approval drafted by staff also indicates both the number and substance of issues that remained outstanding as of the close of the public hearing, and the Commission is not prepared to act favorably when so many significant items are unresolved.

This denial does not mean that the Commission will reject any and all revisions to the 2005 Special Exception, but only that this Modification Application failed to establish that the criteria of Section 56 were being met to an equal or greater extent than the current 2005 Special Exception.

Dated at Old Saybrook this 16th day of March, 2011.

Old Saybrook Planning Commission

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