

Memorandum of Decision

Application of New England Estates, LLC

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This is the formal, collective statement of the Branford Planning & Zoning Commission ("PZC," the "Commission," or "we"), giving its reasons for the denial of the application of New England Estates, LLC ("NEE" or the "Applicant").

1. Application

a. Procedural Background

NEE on June 27 and 28, 2003 submitted applications for (1) revisions to the Zoning Regulations of the Town of Branford, which revisions, if enacted, would have the effect of creating a new zone, a "Housing Opportunity District"; (2) a change of zone on 48-86 Tabor Drive (the "Parcel"), from Industrial to Housing Opportunity District; and (3) approval of a site plan and Coastal Area Management ("CAM") review.¹ The Applicant asserts that these applications are for "affordable housing" under Connecticut General Statutes ("Conn. Gen. Stat.") § 8-30g. These applications are collectively referred to herein as the "Application."

The Commission received the Application on July 10, 2003. Materials submitted by NEE in support of its Application include the following:

- "Application of New England Estates, LLC to Branford Planning and Zoning Commission for Text Amendment to Branford Zoning Regulation for New "Housing Opportunity District" ("HOD"); Rezoning of 76.9 Acres at Pine Orchard Road and Tabor Drive to HOD; and Application for Site Plan Approval for 354 Residential Units," dated June 26, 2003 and received June 27, 2003.
- "Submission of New England Estates, LLC to Branford Inland Wetlands Commission for Minor Amendment of Permit IW#01-10.2, in Connection with Residential Development of 76.91 Acres at Tabor Drive and Pine Orchard Road," dated June 26, 2003 and received June 27, 2003.
- "Submission Plans Based on Inland Wetlands Agency Approval for Regulated Activities –Issued May 9, 2002 Planning & Zoning – Development Plan Submission" dated June 18, 2003 and received June 28, 2003.(19 sheets)
- "Submission Plans Based on Inland Wetlands Agency Approval for Regulated Activities—Issued May 9, 2002" dated September 24, 2003 and

¹ NEE submitted an application in 2002 for a 268-unit condominium development and associated "executive" (9-hole) golf course on the Parcel. The Commission denied NEE's 2002 application for reasons entirely unrelated to the health and safety issues cited and discussed herein. In this proceeding, the Commission received into the record a letter dated November 6, 2003 from Anthony J. DaRos, the First Selectman of the Town. Exhibit 57. The Commission finds that Mr. DaRos' letter accurately sets forth the chronology with respect to the Commission's and the Town's awareness of the Parcel's environmental problems and their implications for residential development of the Parcel.

- received September 25, 2003 (51 sheets) (Note that all 1"=40' scale plans are marked "progress prints".)
- Sheets S5, G5, P1, P2, P3 and P4 from above plan set, marked "progress print" dated 10/1/03 and received 10/2/03.
 - "Submission Plans Based on Inland Wetlands Agency Approval for Regulated Activities—Issued May 9, 2002 Planning & Zoning – Development Plan Submission" dated October 30, 2003 and received October 29, 2003.
 - "Traffic Study, Fairways Village Estates, prepared by Barkan & Mess Associates, dated and received June 27, 2003.
 - "Affordability Plan for the Fairways Village Estates" dated June 26, 2003.
 - "Declaration of the Fairways Village Estates" dated October 2003, and received September 29, 2003
 - "Test Borings, The Fairways, Tabor Drive," dated and received 10/29/03.
 - "Existing Conditions (Coastal Resources) Test Pits/Borings," revised to 10/28/03 "Add Coastal Resources" and received 10/29/03.

The PZC, at the request of the Applicant (*see* Exhibits 1 and 2), heard the three-part Application together. The PZC opened a public hearing on the three-part Application on September 4, 2003 and the Applicant presented testimony on its Application on that date through counsel and through consultants Jeffrey Gordon of Codespoti & Associates, P.C., Milton Gregory Grew of Codespoti & Associates, P.C., David Sullivan, a traffic consultant, and David Bramley of Triton Environmental. (See Exhibit 4, "Presentation Outline" and transcript of September 4, 2003 public hearing.) At the September 4, 2003 public hearing, the Applicant submitted additional materials in support of its Application (*see* Exhibits 5 and 6) and those additional materials were received and marked as exhibits by the Commission. Additional documents were marked as exhibits, including a staff report from the Town Planner. At the end of the evening, as the Applicant did not have a permit from the Inland Wetlands Commission, the Commission referred the entire Application to the Inland Wetlands Commission for a report, as is permitted by Section 31.12.10 of the Branford Zoning Regulations.

With the consent of the Applicant (*see* Exhibit 9 and Tr. 10/2/03 at 9-10), the Commission continued the public hearing to October 2 and November 6. On the evening of October 2, 2003 the Commission received testimony from Dan Baughman, a member of the Branford Representative Town Meeting and the chairman of the Administrative Services Committee of the Representative Town Meeting. Mr. Baughman testified as to his committee's investigation of the request from the Board of Selectman for approval of the acquisition by the Town of the Parcel because of environmental concerns, *see* Exhibit 8, and the committee's unanimous decision to support the acquisition by the Town. The Commission also received testimony from Dennis Flanigan, the clerk of the Representative Town Meeting. Mr. Flanigan testified to the unanimous vote by the thirty-member Representative Town Meeting in

favor of acquisition. In addition to the two witnesses from the Representative Town Meeting, Peg Hall, the solid waste manager for the Town, presented evidence to the Commission on October 2. The Commission received reports from the Town Engineer, Stephen Dudley, and additional reports from the Town Planner, Shirley Rasmussen, and several documents, all of which were marked as exhibits. Among the documents marked as exhibits was a September 25, 2003 letter from the Inland Wetlands Commission (marked as Exhibit 19), reporting that the Applicant had declined to submit any materials to, or participate in any proceedings before, the Inland Wetlands Commission and that, therefore, a full review of the Applicant's proposal was not possible. The Commission heard from two members of the public. The Applicant submitted some plans at 40-scale – SP3, 4 and 6.² Tr. 10/2/03 at 117. The Applicant also submitted additional supplemental materials, which were marked as exhibits.

On November 6, 2003, the Commission heard testimony from David Hurley of Fuss & O'Neill, the Town's landfill engineers, and testimony from Penny Sharp, an environmental consultant. The Town Planner provided a staff report on housing in Branford and addressed the need for affordable housing³. The Town Attorney cross-examined the Applicant's counsel, who was the Applicant's witness on the affordability plan. Additional documents were received and made exhibits. Additional members of the public addressed the Commission, including Kurt Schwanfelder, a member of the Representative Town Meeting, Barbara Colley and John Morse, neighbors, Peter Kaminsky of the Branford Conservation and Environment Commission, Jim Monopoli, Director of the East Shore Health Department, and Bill Horne. A letter from the First Selectman, giving the chronology of the Town's awareness of the environmental problems with the site and explaining the Town's actions in seeking to condemn the Parcel, was received by the Commission and read into the record by the Chairman. The First Selectman's letter was marked as Exhibit 57. The hearing ended with the consultants for the Applicant summarizing the Applicant's proposal and responding to issues that had been raised by various witnesses and speakers. Carver Glezen of Triton Environmental responded to the presentation by David Hurley of Fuss & O'Neill. Dr. Ron Abrams of Dru Associates, Inc., an ecologist, responded to the presentation by Penny Sharp. Milton Grew, the Applicant's architect, submitted samples of building materials. David Sullivan, the Applicant's traffic consultant, responded to the remarks of Bill Horne. Jeffrey Gordon of Codespoti Associates addressed stormwater retention issues. Mr. Gordon stated that wetlands on the western portion of the site that the Applicant had previously classified as tidal wetlands were, instead, inland wetlands. Tr. 11/6/03 at 129, 130-31. The Town Attorney questioned Mr. Codespoti and Mr. Gordon regarding the Codespoti firm's financial interest in the project.⁴ The public hearing

² The Applicant initially submitted 100-scale plans. The Commission requested 40-scale plans, in order to allow a meaningful review.

³ The resume of Town Planner Shirley Rasmussen is Exhibit 40.

⁴ Mr. Codespoti testified that his firm was entitled to a payment after construction of the project. He characterized the payment as payment for the "several hundreds of thousands of dollars worth of work" that his

was closed at the end of the evening on November 6, 2003. A list of documents and materials marked as exhibits throughout the public hearing is attached hereto.

The Commission discussed the Application on November 20 and December 4. On January 8, 2004, the Commission again discussed the Application, and voted to deny the Application and to adopt this Memorandum of Decision as its collective expression of its reasons for the denial.

b. The Parcel and Applicant's Proposal for the Parcel

The Parcel is 76.91 acres in size and appears at Assessor's Map F8, Block 8, Lots 4, 5, and 6. The Parcel is located immediately north of the Town's former (the Zuwalick landfill) and present landfills.⁵ The Parcel is bounded on the north by the Amtrak railroad tracks. Access to the Parcel is through a reduced underpass on South Montowese, or across the railroad tracks, along Maple Street, Indian Neck Avenue, and Toole Drive. Access is hindered by periodic flooding of Tabor Drive. There is also access from Pine Orchard Road. The site is not served by public transit and is beyond safe walking distance from shopping and other services.

The property has been stripped of its soils and mined for gravel. The elevation of the Parcel is approximately ten to fifteen feet below surrounding road and parcel elevations. Because the topsoil has been removed from the Parcel, the groundwater is just four to seven feet below the surface. Tr. 9/4/03 at 35-36, 37, 44. Tr. 11/6/03 at 27, 34. Soil testing done in early 2003, and submitted by the Applicant on October 30, 2003, reveals water table readings within one foot of the surface. Bedrock is evident in many locations on the Parcel. Development of the Parcel will require bringing in, at a minimum, tens of thousands of cubic yards of subsoil and topsoil to replace the soil that has been removed. Tr. 9/4/03 at 37, 90.

NEE proposes to construct 354 condominium units, a community building and an "executive" golf course on the Parcel. Tr. 9/4/03 at 39, 48-49. NEE proposes to call the project "Fairways Village Estates." The project is intended by the Applicant to qualify as an "affordable housing development" under Conn. Gen. Stat. § 8-30g. The project consists of 248 "market rate" units and 106 "affordable units." According to the Applicant, one half of the affordable units are designed to be affordable for households with income of 60% of the area median income and the other half to be affordable for households with income of 80% of the area median.

firm had performed for a previous would-be developer of the Parcel who had gone bankrupt before making payment. Tr. 11/6/03 at 135-37.

⁵ The active municipal landfill dominates the Parcel. When finally closed, the top of the landfill will be at elevation 100; the present lowest elevation of the Parcel is at elevation 10. The Applicant's land use planner told the Commission that the reason a golf course was included in the plan for the development was that "it gives those who live here the opportunity to be adjacent to a golf course as opposed to saying, 'I live next to the landfill.'" Tr. 9/4/03 at 36 (Gordon).

2. *The Commission's Job*

The Applicant asserts that its Application is an affordable housing application under Conn. Gen. Stat. § 8-30g. At the outset of NEE's presentation to us on the first evening of the public hearing, NEE's counsel told us:

In my mind and experience, the most significant difference between an affordable housing application and a traditional zoning application, if I can call it that, is that you have an obligation as commissioners, if you see something in the application that you don't like, if you see a portion of the HOD regulation that you think is not appropriate, or you think is not the way it ought to be in the town of Branford, if you see something on this site plan [that] ought to be changed; your obligation is to bring it up, and we'll see if we can work with it and deal with it and address your concern. . . . [W]hat the legislature is trying to achieve, believe it or not, is that these applications get worked out at the local level without having to go to court. . . . [Y]ou have our commitment that if you will raise the issues, we will do our best to try to accommodate them. It's supposed to be a give and take in these types of applications, and that's what we try to achieve. . . .

Tr. 9/4/03 at 33-35 (Hollister).

Mindful of this obligation to "raise the issues," we have done so repeatedly. Exhibit 12 (10/1/03 staff report on site plan, concluding with 32 specific site-related questions); Exhibit 25 (9/29/03 fax to NEE's counsel, with questions on draft declaration provided by Applicant); Exhibits 26, 27, 28.

Now, in the decision-making phase, it is the Commission's obligation, based upon the evidence in the record, to make a decision, and to state the reasons for our decision. As we have denied the Application, we must also make a further determination, based upon the evidence in the record, *either* that

- (1) (A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider;
(B) such public interests clearly outweigh the need for affordable housing;
and
(C) such public interests cannot be protected by reasonable changes to the affordable housing development, *or*
- (2) (A) that the application would locate affordable housing in an area zoned for industrial use and which does not permit residential uses and
(B) the development is not assisted housing.

Under either scenario, the Commission has the obligation to state its reasons for the decision and to demonstrate that those reasons are supported by sufficient evidence in the record.

The Commission will, therefore, state its decision on the Application and the reasons for that decision. The Commission will then go on to demonstrate that its decision is necessary to protect substantial public interests in health, safety and other matters that the Commission may legally consider, that those public interests clearly outweigh the need for affordable housing, and that those public interests cannot be protected by reasonable changes to the affordable housing development. The Commission will also demonstrate that the Application would locate affordable housing in an area zoned for industrial use and which does not permit residential uses and that the development is not assisted housing.

3. The Commission Denies the Application

The Commission at its meeting of January 8, 2004, consistent with its prior discussions on November 20 and December 4, 2003, voted to deny the Application. The Commission took separate votes on (1) revisions to the Zoning Regulations; (2) change of zone; (3) site plan; and (4) CAM review. Each of these votes was made pursuant to a resolution. Each resolution is attached hereto.

The reasons for the Commission's denial are summarized in each of the relevant resolutions and are discussed below.

a. The Parcel Is Unsuitable for Residential Development

The Commission concludes that the Parcel is unsuitable for residential development; the Applicant's proposed residential development poses serious risks to the health and safety of the residents of the proposed units.

The primary concern of the Commission is for the health and safety of residents of any dwelling units that might be built on the Parcel. This concern is based on the testimony of Peg Hall⁶, the solid waste director for the Town, of David Hurley of Fuss & O'Neill, of Kurt Schwanfelder, a long-time Branford resident who is a trained mechanic and a member of the Representative Town Meeting, and of Jim Monopoli, the Director of the East Shore Health District.⁷ In addition, the Commission finds persuasive the recommendation of Dave McKeegan of the Department of Environmental Protection ("DEP") that the Town should maintain the Parcel as a buffer to the landfill. Exhibit 10.

Mr. Hurley expressly stated that the DEP would never allow the Town to site a landfill in its current location were the proposed 354-unit development (immediately to the north of the landfill site) already constructed on the Parcel. In other words, had the sites been developed in the opposite order, with the residential development

⁶ Peg Hall is well-qualified for her position. Her resume was marked as Exhibit 43.

⁷ Mr. Monopoli is the director of health for the Town of Branford. Tr. 11/6/03 at 87-88. He has an environmental background and a master's degree in public health. Tr. 11/6/03 at 90.

built in the 1950's and the landfill proposed in 2003 – the landfill would NEVER be approved. Mr. McKeegan's letter confirms Mr. Hurley's assessment of the DEP's likely decision on the matter. Exhibit 10. The two land uses are simply incompatible. Tr. 11/6/03 at 36. In this particular case, there is ample basis for concluding that it is unsafe to construct a residential development project on this Parcel.

The environmental engineering firm of Fuss & O'Neill has provided consulting services to the Town with respect to its landfill for more than fifteen years. David Hurley, who presented evidence to the Commission on November 6, 2003, has been involved in providing those services.⁸ Fuss & O'Neill has done extensive testing on the landfill site, and has assisted the Town in its obligation of providing quarterly reports to the DEP.

Mr. Hurley testified that the Branford landfill contains industrial waste, household hazardous substances (paint, paint cans, fuels), and sludges. Tr. 11/6/03 at 10-11, 50. Peg Hall also testified regarding the various sludges that have been deposited in the landfill. Tr. 10/2/03 at 17. Contaminated soil⁹ is used as daily cover at the landfill. Tr. 11/6/03 at 15. Tr. 10/2/03 at 13, 14-16. The landfill is not closed, and is still accepting bulky waste. Tr. 11/6/03 at 27. The Town expects to be able to continue depositing bulky waste in the landfill for another twenty years. Tr. 10/2/03 at 16. The landfill is a low-priority Superfund site. Tr. 10/2/03 at 17. The Town in 1991 was ordered by the DEP to put in public water service for the neighborhoods in the vicinity of the landfill. Tr. 11/6/03 at 74-75 (Schwanfelder).

The Branford landfill is adjacent to the Zuwalick landfill. The Zuwalick landfill evidently started as an open dump but eventually functioned as a municipal landfill from the 1950's to approximately 1977, according to the best records of the Town's solid waste manager.¹⁰ The EPA considers the Zuwalick landfill and the currently-operational Branford landfill to be one landfill. Tr. 10/2/03 at 11.

⁸ Mr. Hurley is a Licensed Environmental Professional. According to his resume, Exhibit 32, he has over 20 years of diversified environmental project experience, with emphasis on contaminant hydrogeology, investigative techniques and remediation. He has managed groundwater investigations and monitoring projects at over 35 landfills.

⁹ Regarding the nature of "contaminated soil," Peg Hall explained: "Now, contaminated soil, locally, it's a kind of special waste. And if I can explain this in lay terms, it's not hazardous, it's not clean, it's the stuff in between. So it might be minute quantities of some fairly nasty stuff, depending on what the project is. It may very easily be various hydrocarbons, gasoline, oils, those kind of products. But it also can be arsenic. It can be PCBs. It can be lead. It can be cadmium. We've taken all of those materials in. The DEP looks at all the landfills on a case by case basis to determine whether a particular material should be allowed to come in as cover for us or this landfill. If you've got – Now, I'm not a chemist. If you've got a material that's contaminated, and 10 parts per million are considered hazardous and anything less than 5 is considered to be clean; that doesn't mean if it's got 9, they're going to allow it in here. They might only allow it into us if it's 6. Every project has a determination made by DEP." Tr. 10/2/03 at 15.

¹⁰ Regarding the Zuwalick parcel's past as an open dump, Peg Hall reported an anecdote she had heard from the chairman of the conservation commission. The chairman's father was a dry cleaner in Branford. "He remembers one of his Saturday morning chores as going with two 5-gallon pails of slops of chemicals, dumping it in, and setting it on fire. This is how far back this property goes, into the days when that's how one managed the dump." Tr. 11/6/03 at 12.

Leachate is formed by the percolation of rainwater through the waste pile. Tr. 9/4/03 at 74 (Bramley); Tr. 11/6/03 at 9 (Hurley). As the rainwater percolates through the waste pile, it picks up contamination from whatever materials have been deposited in the pile. When leachate reaches the groundwater, it causes a plume of contamination. Exhibit 31. There is great variability in the make-up of the leachate from any particular landfill, because the containers of waste degrade at different rates. Tr. 11/6/03 at 10 (Hurley). Exhibit 31. Tr. 11/6/03 at 88 (Monopoli). Because of the variability, testing on one occasion is not sufficient for rendering an opinion on the constituents of the leachate from any particular landfill. (David Hurley provided clear evidence of this point with Table 3 of Exhibit 30, in which Fuss & O'Neill compared Triton's measurement of MW1 on 8/8/03 with measurements from that same monitoring well taken over a five year period. Tr. 11/6/03 at 22-23.)

The regulatory and scientific communities understand that leachate persists for many years. When a landfill closes, the current regulatory requirement is for thirty years of post-closure monitoring. With some landfills approaching thirty years since closing, the regulatory community is discussing extending the monitoring period beyond thirty years. Tr. 11/6/03 at 12. The 30-year monitoring period for the Branford landfill adjacent to the Parcel hasn't even started yet. Tr. 11/20/03 at 20.

Some constituents of landfill leachate don't readily dissolve in water. They tend to go up into the atmosphere. These are volatile organic compounds. They can be particularly toxic. Tr. 11/6/03 at 11. Tr. 11/6/03 at 89 (Monopoli). Volatile organic compounds can be carcinogenic. Tr. 11/6/03 at 25. Many volatile organic compounds are identified as asthma triggers, particularly for children. Tr. 11/6/03 at 89 (Monopoli). Volatile organic compounds can migrate from leachate in the groundwater to surrounding soil and then migrate through the soil and become trapped in basements and other surface structures. Tr. 11/6/03 at 12. The potential for volatile organic compounds to migrate to the surface at the Tabor Drive site is heightened because of the shallow water table on the site. Exhibit 31. It is this potential for volatile organic compounds to be released into structures located over the plume that makes it essential to accurately map the leachate plume from the Branford landfill. The Applicant's environmental witnesses were not persuasive that this mapping of the plume had been done with sufficient care and accuracy. Triton had not attempted to delineate the extent of the plume. Triton had taken samples from the five monitoring wells that had been previously installed on the site from which samples could be taken and then made inferences.

The standards by which the constituents of leachate are measured change over time, and tend to become more stringent, as knowledge grows and the methods of measuring become more precise. Mr. Bramley of Triton acknowledged that the remediation standards, upon which he relied to say that the Parcel was safe, only came into effect in 1996. He further acknowledged that the DEP is currently considering a revision to the volatilization formula. Tr. 9/4/03 at 94 (Bramley).

Leachate from the Branford landfill migrates radially in every direction. Tr. 9/4/03 at 72 (Bramley); Tr. 11/6/03 at 12 (Hurley). Volatile organic compounds have been detected in MW1, the monitoring well on the landfill property, but closest to the Parcel. The 1999-2003 measurements are shown on Table 4 of Exhibit 30. It is clear that there are volatile organic compounds in the leachate migrating from the landfill and on to the Parcel. Exhibits 30, 31. Tr. 11/6/03 at 112 (Glezen). The leachate plume has the potential to be picking up contaminants from both the Zuwalick and the Branford landfill. Tr. 10/2/03 at 19-20.

Residential development is a greater concern than industrial development on a site. Tr. 11/6/03 at 26. A change to residential use, with continuous occupation every day and around the clock, would heighten human exposure to potential contamination.

A by-product of the bacterial processes that take place in a landfill to decompose the waste is decomposition gas. Methane is a component of the decomposition gasses. Tr. 11/6/03 at 15. Methane is explosive in concentrations above five percent. Tr. 11/6/03 at 17. The landfill is generating methane. Levels in the landfill have been as high as 69 percent. Tr. 11/6/03 at 17; Exhibit 30 (Table 1). Up to 60% methane was detected at GP-4 in the vicinity of the landfill garage as recently as July 2003. Exhibit 31. Testing at the property line between the landfill and the Parcel detected methane at levels between four and five percent. Tr. 10/2/03 at 21 (Hall).

Methane travels through the path of least resistance. Tr. 11/6/03 at 15. Methane seeks preferential pathways (pathways where it's a little easier to travel). Utility trenches and areas where there has been any excavation or soil disturbance can be preferential pathways. Tr. 11/6/03 at 15-16; Tr. 10/2/03 at 21. At this time, the landfill is open to the atmosphere. Methane can easily vent to the atmosphere. When the landfill is closed, less of the methane can escape in this way, and more of the methane is likely to be forced through pathways in the soil. Tr. 11/6/03 at 26. Exhibit 31.

The concern with methane is its explosive nature and the fact that it can migrate into the basement of buildings. Methane can migrate at low concentrations but, if trapped, the concentration can rise to explosive levels. Tr. 11/6/03 at 16, 32. Because methane concentrations can build up in low areas where movement is restricted, compliance by the Town with the DEP requirement that concentrations at the landfill border be less than five percent is not a guarantee of the safety of residents on the Parcel. Methane can migrate across the boundary at concentrations lower than five percent, but, if trapped, build up to explosive concentrations on the Parcel side of the boundary.

The Applicant was singularly unconcerned about the threat that methane poses to the occupants of any residential units constructed on the Parcel. The Applicant's environmental consultant IES failed to investigate methane at all and the Triton

witnesses simply assumed that there would be no danger if the Town complied with the DEP requirement that methane levels be five percent or less at the property line. Tr. 11/6/03 at 112. Tr. 9/4/03 at 93-94 (Triton did not investigate methane migration at all.)

In addition to the concern about volatile organic compounds in the leachate plume and methane migration onto the Parcel, the environmental reports that have been done on the Parcel indicate that there are many on-site areas that may be the source of contamination. These "source areas" have not been investigated by the Applicant. Tr. 11/6/03 at 24. Exhibit 31. In addition to source areas that may have been created by past mining and quarrying activities on the site, the observations noted in the Casio Bechir 1995 Phase II report are consistent with dumping. Tr. 11/6/03 at 32-33. Exhibit 31. Mr. Schwanfelder also described dumping activity on the site. Tr. 11/6/03 at 72-77. Neither IES nor Triton (the Applicant's consultants) collected any samples to address potential on-site contamination sources. Tr. 11/6/03 at 37. Fuss & O'Neill provided a summary of volatile organic compounds and total petroleum hydrocarbons in soil at the Parcel. Exhibit 30.

Mr. Hurley of Fuss & O'Neill and Mr. Bramley of Triton (the Applicant's environmental consultant) each reviewed the existing reports of the environmental assessments that have been made of the Parcel. The reports reviewed by the two consultants were entered into the record. Exhibit 33. Fuss & O'Neill summarized the salient points of the reports in Exhibit 30. Mr. Bramley of Triton concluded, on the basis of his review and a one-time sampling of existing monitoring wells, that the "conditions at the Tabor Drive site are suitable for residential use." Letter dated 9/3/03 from David Bramley to Attorney Hollister, located at Tab 3 of Exhibit 5. Fuss & O'Neill, in a letter to the Town Planner dated November 3, 2003, stated:

On the contrary, we believe that the documented presence of impacted soil and groundwater in the area could cause risk to human health should the property be developed. The evidence supporting our conclusion includes the following:

Results of the limited site sampling indicate that both soil and groundwater have been impacted by historical activities. These impacts appear to have resulted both from the migration of leachate from the adjacent landfill property, as well as the deposition of contaminants on the Tabor Drive parcel. The full degree and extent of impacted environmental media is not known.

Landfill gases pose a potential risk to human health and safety. The long-term characteristics of gas migration from the landfill to the Tabor Drive parcel have not been determined.

On-site sources of contamination have not been investigated. Previous investigators reported the presence of a variety of potential contaminant sources, including wastes, construction debris, drums, tanks, stained soil, and construction equipment, throughout many areas of the property. The

importance of characterizing these areas is especially clear when it is noted that five out of ten soil samples collected and analyzed by IES (2003) were found to contain petroleum hydrocarbons, despite the fact that IEs did not specifically target potential on-site sources of contamination. These results suggest subsurface contamination by petroleum hydrocarbons may be widespread on the parcel.

In summary, we have three primary concerns:

1. Potential impacts from the adjacent landfill, including the migration of leachate and methane through the subsurface onto the 48-86 Tabor Drive Property, have not been adequately assessed.
2. Site impacts resulting from past site activities have not been adequately identified and evaluated.
3. Appropriate and relevant cleanup criteria have not been used to adequately evaluate potential risks to human health and the environment.

The Fuss & O'Neill letter report is marked Exhibit 31. It goes on to discuss in detail each of the three primary concerns.¹¹

The Commission finds Fuss & O'Neill's observations and characterizations of the Parcel to be substantially more credible than those of the Triton witnesses.¹² In particular, the Commission is persuaded that the concerns expressed by Fuss & O'Neill are substantial and alarming. It is self-evident that the potential dangers to human health and safety implicated by locating a 350-unit housing complex adjacent to a Superfund site with the potential for migrations of carcinogenic compounds and explosive gas should not be imposed on residents.¹³ This site simply is not amenable to residential development.

¹¹ Fuss & O'Neill expressed similar concerns in an earlier letter report, Exhibit 8, dated April 16, 2003. The April 16 letter was written without the benefit of a review of the prior environmental reports on the Parcel. The April 16, 2003 letter was served on NEE on April 17, 2003.

¹² One example of the lack of credibility of the Triton witnesses: David Bramley of Triton testified, "We wouldn't expect to get methane out of a bulky waste landfill, which has not been the case, according to all the data that's been developed." Tr. 9/4/03 at 76-77 Dave Hurley testified that methane measurements as high as 69% were taken at the bulky waste site. Tr. 11/6/03 at 17. See also, Table 1 in Exhibit 30, "Summary of Methane Monitoring Data at the Branford Landfill from 1993 to 2003." Another example: David Bramley testified that the solid waste landfill is "not affecting the [Parcel] at all." Tr. 9/4/03 at 21. He further testified that there is no leachate plume affecting the groundwater under the Parcel. Tr. 9/4/03 at 93. Two months later, on November 6, 2003, his Triton colleague, Carter Glezen acknowledged that not only is there a contaminated plume under some portion of the Parcel, but that the plume contains volatile organic compounds. Tr. 11/6/03 at 112.

¹³ The Commission's concern is for the health and safety of potential residents of the Parcel. The Commission is also aware of the potential liability for the Town of Branford, Exhibit 53, but bases its decision solely on the obvious potential for health and safety problems for would-be residents.

b. Drainage and Stormwater Control

As noted above, the site of the proposed development is nearly unique in the Northeast. It has been stripped of all soils. It perhaps most closely resembles a strip mine site. Given the highly unusual nature of the site, the Applicant needed to perform extensive studies and substantial work to explain how the site could be restored to a condition that would support native species and could provide drainage and stormwater control.

There is a potential for poor drainage and stormwater control on significant portions of the site, as the drainage system as depicted has major uncertainties. Exhibit 12. These uncertainties have a common source: the failure of the Applicant to adequately study the existing conditions and failure to adequately consider how to provide sufficient drainage and stormwater control, given the improvements necessary to restore the site to support buildings, landscaping and other site improvements.

The drainage and stormwater control measures proposed for this site direct the stormwater generally westward through the site to an eventual exit under Tabor Drive. Components of the system are catch basins, roof drains, grassed swales, stormwater piping through the site, infiltration systems, and a series of biofiltration basins.

The plans submitted with the Application on June 26, 2003 were devoid of specific information concerning the design of the drainage and stormwater control facilities. The Commission staff¹⁴ asked the Applicant to provide specific information in several memoranda, reflecting concerns raised during the public hearing. See, Exhibit 12 at 2 and questions 13-25. The Applicant's October 30, 2003 submission finally supplied some information concerning these facilities. Exhibit 39, Tab 5-E, p.3,11. However, this detailed information was based upon assumptions concerning site conditions, not upon actual site investigations.

The DEP in coastal zones requires that the first inch of runoff from a storm can be absorbed into the ground. The Branford Inland Wetlands Commission requires that projects meet this same criteria. In order to comply with this requirement, the Applicant must demonstrate that the design meets this criteria. Testing must be done to determine the parameters of the existing soils and depths to water table and ledge which would impact the design.

Water table information is critical to the design of the components of the drainage and stormwater control systems. The viability, degree of water impoundment, and final grading of the various portions of these systems are dependent upon the elevation of the maximum high water table for this site. Unfortunately, the soil tests submitted by the Applicant as the basis of the design for the plans were predominantly taken in the dry portions of the year. Generally accepted time frames

¹⁴ The resume of Town Engineer Stephen Dudley is Exhibit 41.

for the “wet” season of the year are from February to May, depending upon the rainfall in that particular year. Only one set of the soil tests submitted by the Applicant were taken in the wet season of the year. *Data submitted to PZC Office on 10/29/03.* These tests showed water table elevations as shallow as one foot below the surface. This set of tests also was general in nature and the tests were not site specific. Therefore, it is not known whether the drainage and stormwater control facilities, such as biofiltration basins and infiltrators, can actually work in the locations they are shown. Moreover, because of the paucity of testing, it is not clear that there are sufficient places on the site where such facilities can properly function.

Staff and commissioners posed questions to the Applicant concerning the amount of water which would be impounded in the biofiltration basins, and the duration of any impoundment. This information would help the Commission review the public health and safety issues concerning the construction and operation of the biofiltration basins, as well as to verify the stormwater design assumptions and calculations. The absence of basic and necessary information does not allow the Commission to make the necessary informed decision.

Infiltrators are shown on the plans to accept the roof drainage for the proposed structures and introduce this flow into the ground. Elevation of these infiltrators is dependent upon the elevation of the water table. In addition, the design and sizing of the infiltrators is subject to the ability of the existing soil to accept water, known as permeability. No permeability testing was submitted, though such information was requested of the Applicant. As the vertical impacts of the water table and the horizontal impacts of the permeability are unknown, it is not possible to determine if the runoff from the roofs of the structures can be adequately handled within the schematic areas shown by the Applicant. The Applicant’s response to these issues was simply “General details on infiltrators are provided... final design is not required until filing of CTDEP stormwater discharge permit”. Exhibit 39, Tab5-E, p.3.

All the detailed information omitted in the submission is required to be submitted under Section 31 of the Branford Zoning Regulations. While many of the noted items may be correctable, the Commission cannot be sure nor formulate proper conditions to address noted concerns without the basic information noted.

c. Site Restoration Concerns

Due to the paucity of specifics, there is a strong potential for a site which will not support the site improvements, including landscaping and trees. The Applicant’s landscape architect, Jeffrey Gordon of Codespoti, initially testified in his presentation that three to five hundred thousand cubic yards of topsoil or organic material would need to be brought to the site to replace the topsoil that has been stripped.¹⁵ On cross

¹⁵ Mr. Gordon testified: “One of the drawbacks we found in developing the site, of course, was the lack of any real good organic material on the site, which necessitates the bringing in [of] hundreds of thousands of yards of

examination, later in the evening, Mr. Gordon elaborated on NEE's plans to bring hundreds of thousands of cubic yards of soil amendments to the Parcel for site restoration:

Well, we'll probably going to bring in between three to five hundred thousand yards of material. If you'll hold on one second, we'd been studying different ways that this would need to be done. One possibility would be to bring in tens and tens of thousands of yards of topsoil. The organic material is gone, so what we've done is we've contacted a company called Agrisource which works with various municipalities and their compost and recycling plants, and what we've done is developed a dialogue about developing a facility here for bringing in compost, serious materials that would then be worked in with the material that was there, to tremendously upgrade the nutrient value. . . . Right now you can't support much of anything besides autumn olive, olive Russian, olive, and multiflora rose. And it will be expensive to do this, but it's something, again, that is necessary to turn around the degradation. . . . What we're doing is we're going to create an amendment for the soil that is there which is going to create a suitable planting material.

Tr. 9/4/03 at 90-91. At the next session of the public hearing, after the Applicant had received Town Counsel's 9/15/03 letter, Exhibit 27, and had been before the Inland Wetlands Commission and learned that the importation of such significant quantities of soil materials would create a new reason for the Commission to take a more thorough look at the Applicant's plans, the Applicant sought to "correct" this "hundreds of thousands of cubic yards" testimony through counsel.¹⁶ Counsel stated that the actual amount of organic material to be brought to the site was 60,000 cubic yards. Tr. 10/2/03 at 40-41. This lower amount is not enough to provide sufficient soil for trees. Tr. 10/2/03 at 41 (Dudley). Exhibit 34.

The submitted plans reflect final grades which would indicate minimal fill importation to the site. This is inconsistent with the soils data submitted, which indicates shallow bedrock in numerous areas on the site. Testimony given by the Applicant also indicates that the current soils on the site are incapable of supporting the development proposed without modification. Staff memos and Commission questions were presented to the Applicant to elicit information concerning the specifics of proposed soil augmentation, soil composition, and standards and criteria for soil placement for site restoration. Specific and detailed information was not provided by the Applicant.

soil amendment, compost, and organic material so as to be able to develop any plant growth that can be sustained, and then to fight off any of the invasives from establishing themselves." Tr. 9/4/03 at 37.

¹⁶ NEE's counsel emailed Town Counsel: "There seems to be confusion about the amount of fill. Jeff Gordon's consistent estimate has been approximately 60,000 cubic yards of material. The "soil amendments" were discussed in 2002 with the town agencies through the testimony of the Agresource witness. None of that has changed. In referring to "500,000," NEE or Gordon have been referring to the cost of fill and road construction as being \$500,000 – that may be the source of the confusion. Put another way, the grading plan has not changed from 2002 to 2003." Exhibit 29.

In order to review the site restoration proposed by the Applicant, environmental consultant Penelope C. Sharp was engaged¹⁷. Her review was summarized in a report to the Commission in which she stated "Any developer of this site faces a daunting task. The job that a developer faces is akin to that faced by someone seeking to restore an area that has been strip mined...The applicant evidently desires to turn this "moonscape" into some semblance of a typical CT woodland." *Exhibit 34*. Review of the proposed plantings revealed a need for a soil cross-section which would support growth as well as provide sufficient depth. The lack of normal subsoil layer ("A" horizon) as well as any topsoil, and the unknown depth and character of the existing soils were of concern for the long term viability of the proposed plantings.

The importation of material for soil augmentation was also questioned. "I stress the importance and the process of soil formation because it is doubtful that nutrient rich soil with the correct mineral balance, texture, moisture regime, etc. can be created quickly to support the proposed planting plan for this site, which includes 743 trees." *Exhibit 34, p.3*.

Detailed information concerning these items has not been submitted to date. Ms. Sharp concluded with "I continue to question the viability of the proposed planting plan". *Exhibit 34, p.5*. The lack of information precludes the Commission from evaluating the viability of the restoration plan and therefore is unable to formulate any proper conditions to insure proper site restoration.

d. No Wetlands Permit for the Project

The Applicant has not obtained a permit from the Branford Inland Wetlands Commission for the regulated activities that would necessarily be conducted on the Parcel should the proposed project be constructed.¹⁸ The Commission considers the decision of the Inland Wetlands Commission denying the application of NEE for a modification of permit IW#01-10.02 (see attachment to Exhibit 19) to be the "final decision" of the Inland Wetlands Commission. See Conn. Gen. Stat. § 8-3(g) ("The decision of the zoning commission shall not be rendered on the site plan application until the inland wetlands agency has submitted a report with its final decision.")

The Commission tried to overcome this lack of a permit by referring the project to the Branford Inland Wetlands Commission for a review. See Exhibit 18, Letter from S. Rasmussen to Daniel Shapiro dated September 8, 2003. Such a referral to the Inland Wetlands Commission is specifically permitted by Section 31.4.10 of the Branford Zoning Regulations. However, NEE refused to provide any materials to the Inland Wetlands Commission and refused to participate in any review by the Commission. See Exhibit 19, Memorandum from Diana Ross, Inland Wetland

¹⁷ Penny Sharp's resume is Exhibit 42.

¹⁸ "You have to under the statute give due consideration to the fact that we don't have a wetlands permit, but we have applied for one." Tr. 9/4/03 at 84 (Hollister).

Enforcement Officer to Shirley Rasmussen, Town Planner dated September 25, 2003 (“At the Inland Wetlands Commission meeting, prior to review by the commission, attorney Hollister stated that he believed the proceeding was not legal and that he and the applicant would not participate in the hearing, submitting no additional materials or comments.”) *See also*, Exhibit 29, an email from NEE’s counsel to Town Counsel (“Please note that we will object to the PAC receiving anything from the IWWC – the PZC already has a report, in the form of the August denial.”)

Despite the lack of cooperation by the Applicant, the Inland Wetlands Commission nevertheless reviewed the materials already in its possession from a prior application and also considered materials provided by the Town Planner. The Wetlands Commission provided the following comments:

1. The commission supports the DEP storm water management requirements (including the requirement for retention of the first inch) and would need to see it demonstrated, in a new application, that the proposal meets the minimum standards, as the commission would require in any other application.
2. If there is pollution underground, the commission does not want it to become hydraulically coupled to the wetland or discharged into surface waters.
3. Because the commission had no prior knowledge of the proposed fill (omitted in the previous applications) the commission would need to see additional information, including but not limited to the following:
 - a. Source
 - b. Distribution
 - c. Phasing

The commission also stated that the placement of this amount of fill would be considered a significant activity with definite potential impacts on water quality drainage off of the landscape.

Exhibit 19.

The lack of a thorough review by the Inland Wetlands Commission is especially troublesome because (1) the Applicant, on the final evening of the public hearing, stated that certain wetlands that it had previously classified as “tidal” wetlands were, in fact, inland wetlands, thus bringing potentially even more activities within the review of the Inland Wetlands Commission; (2) information developed during the public hearing regarding the shallow depth to the water table and the unsuitability of the Applicant’s proposed biofiltration basins for controlling runoff, Exhibit 45 (Gaucher letter dated October 28, 2003); and (3) the testimony of Dave Hurley of Fuss & O’Neill regarding the potential impacts of the contaminated groundwater plume on water hazards proposed by the Applicant for the golf course. Tr. 10/2/03 at 29-31. There is also a potential for human contact with the contaminated plume at the water hazards. Tr. 10/2/03 at 30-31.

The expressed concerns of the Wetlands Commission, the lack of in-depth review by the Wetlands Commission on the fundamental concerns referenced above, and the Applicant's non-cooperation are reasons in and of themselves to deny the Application.

4. *Weighing the Need for Affordable Housing Against Health, Safety and Other Issues the Commission May Legally Consider*

a. *The Need for Affordable Housing in Branford*

Conn. Gen. Stat. §8-30g, herein the "Affordability Housing Statute" was enacted to encourage the development of affordable housing in the state of Connecticut. Pursuant to this statute, the Commission is required to determine whether "substantial public interests in health, safety, or other matters which the commission may legally consider" are protected before granting any affordable housing application. If such interests clearly outweighs the need for affordable housing the application should be denied. We have reviewed the evidence presented to us in this proceeding regarding the need for affordable housing in Branford and have determined that the proximity of the site to the Town's landfill and the public's interest in health and safety as a result, clearly outweighs the need to build affordable housing at this location. The evidence that we considered included the following:

- 1.) Condition of location;
- 2.) Median sale prices in Branford between 1988-2003. Applicant's "Supplement Materials September 4, 2003," (Exhibit 5);
- 3.) Staff Report on Housing Issues. November 6, 2003, covering housing needs, condominium fees, deed restrictions, and market rate housing (Exhibit 36);
- 4.) U.S. Census Bureau. 2000, data on type of housing units and values in the Town of Branford (Exhibit 36);
- 5.) Multiple Listing Condominium Sales data for the Town of Branford (Exhibit 36);
- 6.) Example calculations for sale prices for affordable housing units (Exhibit 36); and
- 7.) 2002 Affordable Housing Appeals Procedure List (Exhibit 36).

i. Branford's Current Housing Stock

According to the 2000 U.S. Bureau of Census report, there are currently 13,342 housing units already in existence in the town of Branford. 64.8% (8,645) of them are single family units, including both attached and detached homes. Out of the 12,543 of Branford's existing housing units that are currently occupied; 6,797 of them are owner-occupied and 3,929 are renter-occupied. According to the same report, roughly 31.7% of Branford's owner-occupied units are valued at or below the affordable price of \$149,999 and 36.4% are rented at or below the affordable price of \$749 per month. With the maximum sales price of \$155,569 (according to NEE's Application) allotted for a 2 bedroom unit, for a family earning less than 80% of the

median, and a maximum rental price of \$886 a month, Branford is clearly not lacking affordably priced housing.

In addition to Branford's affordably priced single family units, Branford is also one of the leading towns in the state of Connecticut to house mobile homes. Percentage wise, it has the second largest mobile home population in the SCRCOG region of the state of Connecticut. *See Exhibit 36.* What Branford is lacking, however, are affordably priced single family detached lots suitable for families with children and the elderly. Currently, the Town of Branford is known for its high percentage of multi-family housing units. The Branford Zoning Regulations have provided for multi-family dwelling since zoning regulations were first adopted in 1956. Most of the multi-family units in Branford were constructed in the 1970s and 80s, with the percentage rising from 26% in 1970, to 42% in 1980, and then up to 50% in 1990. The median sale price for a Branford condominium in 2003 was \$145,700. *See Exhibit 36.* It is quite possible that because the number of multi-family dwellings is so high in Branford, the market price will remain affordable for these units, but even without relying on basic economics this number indicates that Branford's existing multi-family regulations can and do generate affordable housing units.

However, while thousands of condominium units were being constructed during this period, there was little growth in the moderately priced single family detached lots. A survey of realtors, conducted by the Branford Housing Partnership in 1990, found that the most difficult type of housing to find was the moderately priced single family detached homes suitable for working families with children. As a result, in January of 1995, the Branford affordable housing regulations were adopted to encourage the development of small lot single family homes. While these regulations have not yet been revised to reflect a recent change in the state statutes, which increased the required percentage of units and the duration of affordability, an applicant can voluntarily comply with the State statutes and the Town's affordable regulations simultaneously. New England Estates' has chosen not to do so.

ii. Affordable Housing in Branford

Connecticut General Statute Section 8-39a defines "affordable housing" as "housing for which persons and families pay thirty per cent or less of their annual income, where such income is less than or equal to the area median income for the municipality in which such housing is located, as determined by the United States Department of Housing and Urban Development [HUD]." HUD's 2003 median income for Branford was \$71,000 a year. *See Exhibit 5.* 30% of that median equals \$21,300, which would mean that a family earning the median income of \$71,000 a year could spend up to \$21,300 a year for housing. Branford's diverse population includes many families within this income bracket. *Today, roughly 30% of all occupied units in Branford are affordable to moderate income families earning 80% or less of the area median income for the Town. Roughly, 19% of these units are*

affordable to families earning 60% or less of the area median. Thus, Branford currently has ample housing that certainly qualifies as affordable.

The dictates of Connecticut General Statute Section 8-30g, however, exempts only municipalities in which 10% of the residential units are (a) subject to restrictions that require the units to be sold or rented to individuals or families having an income of 80% of area median income or less at a cost not in excess of 30% of income, or (b) are financed by CHFA or are “assisted” housing, or (c) consist of mobile homes or accessory apartments subject to comparable restrictions. Although Branford has ample affordably priced housing units, fewer than 10% of its units have deed restrictions, are CHFA mortgaged, or are governmentally assisted. Thus, the town of Branford does not meet this statute’s exemption.

According to the 2002 Affordable Housing Appeals Procedure List, only 3.98% of Branford’s housing qualifies toward the Affordable Housing Statute’s exemption. See Exhibit 36. Under the statute, this Commission must balance the need for affordable housing against the public’s interests, based on the existing affordable housing units that meet the statutory definition under Section §8-30g. While only 3.98% of Branford’s affordably priced housing qualifies under such, Branford is on board with the statute’s goal to encourage the development of affordable housing in the state of Connecticut. Out of the 86 other towns in Connecticut that have not yet meet the 10% statutory exemption, Branford ranks 11th in the total number of assisted housing units that do currently qualify under 8-30g. See Exhibit 36. And while a lack of restrictive covenants alone keeps Branford from being exempt from the Affordable Housing Statute, increasing Branford’s total number of §8-30g qualified assisted housing units by the applicant’s proposed 106 units, at the requested location, is outweighed by the public’s interest in “health, safety and other issues [that] the commission may legally consider.”

iii. New England Estates’ Contribution to Branford’s Affordable Housing

New England Estates’ proposed affordable housing development would contribute 106 deed restricted units to the Town of Branford but at a maximum sale prices of \$156,250, over \$10,000 higher than the Town’s current median for comparable units. None of these units would be single family detached lots suitable for families with children or Branford’s large elderly population. Having reviewed the record for relevant information the Commission has determined that the proposed “Housing Opportunity District” does not address the Town’s need for affordable housing for the following reasons:

- 1.) The Town already has a multi-family housing regulation and 6,222 multi-family units are already in existence, constituting 46.6% of Branford’s current housing stock, (U.S. Bureau of Census, Exhibit 36);

2.) There is no need for additional condominium units at the 80% affordable level (\$156,250) since the 2003 median sale price for a condominium in Branford was \$145,700, \$10,550 less than the proposed "affordable" units, (Exhibit 5);

3.) The Town needs affordable single family detached homes, not multi-family housing, given that the median sales price for a single family home in Branford is \$90,800 more than the median sales prices for a condominium (Applicant's Exhibit 5, tab 8) compared to a difference of only \$5,500 between single family and condominium homes nationwide (Applicant's Exhibit 5, tab 9);

4.) After considerable review of actual needs and consultation with the Branford Housing Partnership, the Commission adopted, on January 1, 1995, affordable housing regulations to provide for single family affordable housing, which the applicant did not attempt to follow; and

5.) The Applicants crafted the proposed HOD regulation to fit only their own property (transcript of September 4, 2003 public hearing, page 26). The HOD regulation is therefore self-serving, and has no utility for any other location in town.

b. Health, Safety and Other Issues

The issues include the potential danger to would-be residents of the site caused by uninvestigated "source areas" on the Parcel, the migration of a leachate-contaminated plume under the Parcel from the adjacent landfills and migration of methane across the Parcel boundary. Additionally, there is a potential for flooding and severe erosion, a site on which no trees will grow and additional problems that have not been adequately explored by the Inland Wetlands Commission. These issues are discussed in Section 3 of this Memorandum of Decision, above.

c. Weighing the Need for Affordable Housing Against Health, Safety and Other Issues the Commission May Legally Consider

The Commission has considered the Town's need for affordable housing and has weighed the need for affordable housing against the health and safety and other concerns discussed above and determines that the health and safety concerns clearly outweigh the Town's need for affordable housing.

d. Reasonable Changes Not Possible

The Commission has considered whether reasonable changes¹⁹ might be placed upon the project. The Commission came to three conclusions on this issue: *First*, the Commission concludes that the site is currently unsuitable for residential development: there are no reasonable changes to the project that will alter that conclusion. *Second*, the formulation of reasonable changes would require a factual underpinning not provided by the Applicant. Although the Commission and staff raised numerous fundamental issues concerning basic due diligence and site planning, the Applicant failed or refused to address them. Fundamental knowledge about the site is still missing. For instance, it is still unknown what the depth of the water table is in the wet season.²⁰ Without this basic information, it is impossible for the Commission to formulate conditions – even could such conditions exist. *Third*, as a practical matter, the Commission has been apprised by counsel and takes administrative notice of the fact that title to the Parcel transferred to the Town on January 5, 2004. The Town acquired the property through the exercise of its powers of eminent domain. The Town's reasons for acquiring the property were, at bottom, the same reasons the Commission is denying NEE's application – concern for the health and safety of residents who might purchase units in the Applicant's proposed development. *See*, Tr. 10/2/03 at 5-9 (Baughman) and 8-9 (Flanigan) and Exhibit 57 (First Selectman DaRos' letter dated 11/6/03).

¹⁹ The Commission understands the term "reasonable changes" to refer to conditions that would not have a "substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling units." Conn. Gen. Stat. § 8-30g(h). As part of its search for the outlines of what conditions might be "reasonable," the Commission repeatedly sought information from the Applicant regarding the economic underpinnings of the proposed project. Exhibits 14, 26. NEE adamantly refused to provide any such information. Tr. 11/6/03 at 141. The information that *was* available to the Commission strongly suggested that the development of Fairways Village Estates is not economically viable, even without the imposition of any conditions by the Commission. *See* Exhibits 13 and 64 and Tr. 10/2/03 at 35. Tr. 11/6/03 at 102-105. Moreover, the viability of the development seems speculative, at best, when the size of the subsidy to the "affordable" units by the market rate units is taken into consideration. Under the Applicant's calculations, the market rate units would subsidize the initial purchase price of the affordable units by \$100,000. On top of that, each month, the market rate units would have to absorb at least \$100 in maintenance fees from each of the "affordable" units – as the maintenance fees for the affordable units would be capped. Tr. 11/6/03 at 67.

²⁰ The Applicant also failed to submit calculations regarding the permeability of the soils, Tr. 10/2/03 at 29 (Dudley), provided no information of the quality of the groundwater that would be leaving the site and flowing into tidal wetlands, Tr. 10/2/03 at 30 (Dudley), submitted calculations that failed to include the effects of the high water table and the proximity of tidal wetlands, Tr. 10/2/03 at 29 (Dudley). The biofiltration basins, integral to the drainage and stormwater retention plans for the Parcel, were not connected to the storm drainage outlets in the plans submitted by the Applicant. Tr. 10/2/03 at 29 (Dudley). Some of the biofiltration basins appear to have been designed to require excavation into the water table. Tr. 10/2/04 at 29-30 (Dudley). NEE failed to submit a map showing the limits of state jurisdiction, despite a written request from John Gaucher of the DEP and the requirements of the Branford Zoning Regulations. Tr. 10/2/03 at 83. Such a map is necessary for determining whether the filling of wetlands proposed by NEE is subject to state or local approval. The map is also necessary for determining whether the proposed activities are consistent with coastal policies. Tr. 10/2/03 at 83.

5. *The Industrial Zone Exemption*

The Applicant claims that it has filed the various applications for this site pursuant to Conn. Gen. Stat. § 8-30g, the Affordable Housing Land Use Appeals Procedure Act.

Under Conn. Gen. Stat. § 8-30g(g)(2), the Commission is not subject to the heightened burden of proof set forth in § 8-30g(g)(1) if it can demonstrate that "the application which was the subject of the decision from which such appeal was taken would locate affordable housing in an area which is zoned for industrial use and which does not permit residential uses." Here, approximately 70 acres of the 76.91-acre site is in the General Industrial District No. 2 Zoning District (IG-2). The IG-2 district is one of two industrial districts within the Town. Area zoned IG-2 is "intended to be used for heavy commercial and industrial development Further development of . . . residential uses will be inconsistent with their purpose and the purpose of the districts. Any residential construction would occur under conditions unfavorable for residential occupancy." Regulations, § 23.12. A review of the uses allowed in our regulations demonstrates the IG-2 district allows a variety of light and heavy industrial uses not allowed in other districts, see Schedule A, Part C, while prohibiting new residential dwellings. See Schedule A, Part A, A-1 through A-5. Accordingly, the application comes within the Industrial Use Exemption in Conn. Gen. Stat. § 8-30g(g)(2).

The Applicant argues²¹ that the industrial zone exemption does not apply because the IG-2 district allows the letting of rooms. Regulations, Schedule A, Part A, A-8.²² However, a careful reading of the regulations demonstrates that no new residential uses are allowed in the IG-2 district. "The letting of rooms and/or the furnishing of board in a dwelling unit to a total of not more than four persons," is allowed in most districts, including industrial districts, subject to certain conditions. One of these conditions, however, is that "if dwellings are prohibited in the district, such use may be located only in a lawfully existing dwelling unit." (emphasis added.) Schedule A, Part A, Line A-8d. Since dwellings are in fact prohibited in the IG-2 district (see Schedule A, lines A-1 through A-5), it follows that no new residential dwellings are allowed in the IG-2 district under this provision. See also, Schedule A, Part A, use A-6 and A-7 (same limitations for offices in dwelling units and customary home occupations). Moreover, the land at issue is vacant, and contains no pre-existing nonconforming dwellings. Thus, no letting of rooms would be allowed if the parcel were to be developed under the IG-2 zoning standards.

²¹ See "Memo regarding industrial use exemption of Conn. Gen. Stat. § 8-30g(g); inapplicability to New England Estates' affordable housing/zoning application, prepared by Shipman & Goodwin, September 4, 2003," found at Tab 5 of Exhibit 5, Applicant's Supplemental Materials, September 5, 2003.

²² This section of the regulations was amended after the Applicant filed its Application. For purposes of our analysis, we are assuming the Applicant is correct in claiming that its Application should be governed by the law in effect at the time of the filing of the Application.

The Applicant also argues that the industrial zone exemption is inapplicable because certain uses set forth in Section 24, Schedule A, Part B, Community Facilities and Services Uses, are allowed in the IG-2 district, and these uses may contain residential components. We reject this contention. First, residential uses are set forth in the schedule of Uses, Part A, "Residential and Related Uses" rather than in Part B, "Community Facilities and Services Uses." As the designations states, "Community Facility and Services" uses are institutional and community facility uses rather than residential uses. These community facility uses include churches, lodges, nurseries, day camps, schools, and other similar uses. While these uses may, in certain circumstances, contain an ancillary residential component, their principle use is institutional or community facilities-related, rather than residential. We do not consider these uses to be residential uses, and have not grouped them within Part A, "Residential and Related Uses." We believe our treatment of such uses is in conformity with the vast majority of zoning commissions throughout the state, and do not find that the fact that certain community facility uses are allowed in the IG-2 district would remove these districts from the industrial zone exemption.

The Applicant also argues that because the property is located within a special development area, residential uses are allowed. The Applicant has misconstrued our zoning regulations with respect to special development areas. The designation of an area as a special development area does not change the underlying zoning district or the uses allowed within the underlying zoning district. Instead, this designation allows owners of property within this area to apply for a Planned Development District (PDD) for the property. Only after the approval of both general development plans and detailed development plans in a PDD application are the zoning regulations and zoning map modified. Regulations, § 35.6. Here, no planned development district is in effect on this property. In fact, the Commission, at the Applicant's request, deleted the former PDD designation in 2002. Because there is no PDD in effect, the IG-2 District is the only zoning district applicable to the Parcel and the IG-2 regulations govern the use of the site.

Accordingly, the Commission finds that the Application proposes to locate affordable housing in an area which is zoned for industrial use and does not permit residential uses. Furthermore, the proposal is not a proposal for assisted housing, as defined in Conn. Gen. Stat. § 8-30g(a).²³ Accordingly, the Commission finds that any appeal from this decision would not be governed by Conn. Gen. Stat. 8-30(g)(g)(1).

²³ The Commission repeatedly requested (Exhibits 14, 27; Tr. 10/2/03 at 35, 36) information from the Applicant regarding the financing and general economic basis for the Project, but the Applicant declined to provide such information. Tr. 11/6/03 at 141. At no time did the Applicant claim to be proposing an "assisted housing" project which, by definition, means housing with some form of governmental financial assistance. The Commission therefore concludes that the Applicant's proposal is not a proposal for assisted housing, as defined in Conn. Gen. Stat. § 8-30g(a).

6. Coastal Site Plan Review

In accordance with Conn. Gen. Stat. § 22a-106(d), the Commission must make written findings concerning the Application's compliance with applicable coastal policies and adverse impacts. The Commission discussed coastal policies and adverse impacts on December 4, 2003. *See also*, Exhibits 14, 20, 45, 54.

The tangible activities proposed by the Applicant that are inconsistent with coastal policies include the following:

- a. Filling, grading and construction of buildings will take place in and around on-site streams. These resources may be classified as "tidal wetlands," "general resources," or "inland wetlands and water courses." Submitted plans, showing elevations, but no identification of the type or extent of the coastal resource, clarify only that most of the stream system is below the high tide line and therefore subject to State jurisdiction.
- b. Importation of enough fill to cover the site to a depth of four feet, given the absence of appropriate erosion controls, will result in significant erosion and sedimentation, with consequent pollution of coastal waters and wetlands on and adjacent to the site. Exhibits 12, 13, 14, 50, 51.
- c. Flawed drainage system, Exhibits 12, 50, depending on depth to bedrock, depth to water table, and extent of intrusion of saltwater and/or landfill leachate could result in one or more of the following problems:
 - (1) excessive flow of freshwater drainage into tidal wetlands and coastal waters, with resultant reduction of salinity adversely impacting marine ecosystems.
 - (2) Creation of stagnant ponds in excavated locations identified as "biofiltration basins."
 - (3) Flooding of development site and/or adjacent roadways.
- d. Construction of 354 residential units and a golf course exceeds the capacity of the site to support such development. The site has been severely degraded, having been excavated to a depth of 10 to 15 feet below natural grade. The amount of fill which would be required to sustain normal residential landscaping as well as a high-maintenance golf course would result in problems with erosion, drainage and pollution described above as well as in Town Engineer's memo.
- e. Proposed development would create, not resolve, conflicts between conflicting uses, as required by "General Development" policy B. Existing uses which would conflict with the proposed residential use include the municipal landfill on adjoining land to the south of the site, industrial uses to the west of the site, and a high-speed railroad line to the north of the site.

Adverse Impacts: Given the problems described above, the following adverse impacts are expected:

- Degrading water quality through the significant introduction into either coastal waters or groundwater supplies of suspended solids, nutrients, toxics, heavy

metals or pathogens, or through the significant alteration of temperature, ph, dissolved oxygen or salinity.

- Degrading existing circulation patterns of coastal waters through the significant patterns of tidal exchange or flushing rates, freshwater input, or existing basin characteristics and channel contours.
- Degrading natural erosion patterns through the significant alteration of littoral transport of sediments in terms of deposition or source reduction.
- Degrading natural or existing drainage patterns through the significant alteration of groundwater flow and recharge and volume of runoff.
- Degrading or destroying essential wildlife, finfish or shellfish habitat through significant alteration of the composition, migration patterns, distribution, breeding or other population characteristics of the natural species or significant alterations of the natural components of the habitat.
- Degrading tidal wetlands, beaches and dunes, rocky shorefronts, and bluffs and escarpments through significant alteration of their natural characteristics or function.

Under the CAM Act, it is the Applicant's responsibility to "demonstrate that the adverse impacts of the proposed activity are acceptable and to demonstrate that such activity is consistent with the goals and policies" set forth in the Act. Conn. Gen. Stat. section 22a-106. The Applicant has failed to meet this burden. Applicant's proposal is not in compliance with the applicable coastal goals and policies and the adverse impacts of the proposed project are unacceptable. The Commission denies the coastal site plan based on the findings and reasons set forth above and in the coordinate resolution.

LIST OF EXHIBITS FROM PUBLIC HEARING

Exhibit 1: Letter from T. Hollister to E. McGuigan and S. Rasmussen, 8/6/03

Exhibit 2: Letter from P. Bellamy to T. Hollister, 8/25/03

Exhibit 3: Same as Exhibit 46

Exhibit 4: Applicant's Presentation Outline, 9/4/03

Exhibit 5: Applicant's Supplemental Materials, 9/4/03

Exhibit 6: Applicant's Building Footprint Comparison (impervious areas)

Exhibit 7: NEE v. P&Z 6/16/03 Return of Record [OVERSIZED BINDER]

Exhibit 8: Letter from C. Lapinski and D. Hurley of Fuss & O'Neill to S. Rasmussen, 4/16/03

Exhibit 9: Letter from T. Hollister to P&Z, granting an extension of time to and including November 6, 2003 to complete public hearing, 10/2/03

Exhibit 10: Letter from D. McKeegan, DEP, to P. Hall, 9/11/03

Exhibit 11: Email from P. Hall to D. McKeegan, 8/28/03

Exhibit 12: Memorandum from Town Engineer on Site Plan, 10/1/03

Exhibit 13: Memorandum from Town Engineer on Development Plan Costs, 10/2/03

Exhibit 14: Memorandum from Town Engineer on Coastal Site Plan, 10/2/03

Exhibit 15: Staff Report on Regulation Amendment, prepared for meeting of 9/4/03

Exhibit 16: Staff Report on Zone Change from IG-2 and R-3 to HOD, prepared for meeting of 9/4/03

Exhibit 17: Staff Report on Site Plan, prepared for meeting of 9/4/03

Exhibit 18: Letter from Town Planner to D. Shapiro, Chairman, IWC, referring NEE application under Section 31.4 for review, 9/8/03

Exhibit 19: Memorandum from D. Ross to S. Rasmussen, 9/25/03

- Exhibit 20: Staff Report on Coastal Site Plan Review prepared for meeting of 10/2/03
- Exhibit 21: Letter dated 10/2/03 from the Ponds Homeowners Association, Inc.
- Exhibit 22: Letter dated 10/2/03 from Almeda Ambrulevich and J. Ambrulevich
- Exhibit 23: Letter from T. Hollister to J. Gaucher, Office of Long Island Sound Programs, 9/26/03
- Exhibit 24: Applicant's Supplemental Materials, October 2, 2003
- Exhibit 25: Review of Draft Declaration of the Fairways Village Estates, provided by Town Counsel to Applicant on 9/29/03
- Exhibit 26: Letter from P. Bellamy to T. Hollister, September 30, 2003
- Exhibit 27: Letter from P. Bellamy to T. Hollister, September 15, 2003
- Exhibit 28: Letter from P. Bellamy to T. Hollister, September 23, 2003
- Exhibit 29: E-mail from T. Hollister to P. Bellamy, September 24, 2003
- Exhibit 30: Materials Prepared by Fuss & O'Neill for 11/6/03 Presentation
- Exhibit 31: Letter from Fuss & O'Neill to S. Rasmussen, November 3, 2003
- Exhibit 32: Resume of David Hurley, LEP, PG of Fuss & O'Neill
- Exhibit 33: Environmental reports reviewed by Fuss & O'Neill [(1) Letter from R. Beniwal of Applied Earth Technologies to W. Rice, Seaview Development Corp., 8/28/86; (2) Phase I Environmental Site Assessment by Cascio Bechir Engineers, 9/95; (3) Phase II Environmental Site Assessment by Cascio Bechir Engineers, 10/95; (4) Phase I Environmental Site Assessment by IES of Connecticut, 6/01; (5) Phase II Limited Subsurface Investigation by IES of Connecticut, 4/03; (6) Landfill Closure Plan Inactive Portion of the Branford Landfill, Tabor Drive, Branford, Connecticut, April 2002; (7) Letter Report by Triton Environmental, Inc. to T. Hollister, September 3, 2003, together with onsite groundwater analysis summary]
- Exhibit 34: Letter from Penelope Sharp to S. Rasmussen, October 31, 2003
- Exhibit 35: Same as Exhibit 34
- Exhibit 36: Staff Report—Housing Issues and MLS sales data, prepared for meeting of 11/6/03

- Exhibit 37: MLS Data on Two Bedroom Condo units and Monthly Common Fee Charges (6 pages)
- Exhibit 38: Two Bedroom Branford Units Sold Between \$240,000 and \$250,000
- Exhibit 39: Applicant's Supplemental Material, October 30, 2003
- Exhibit 40: Resume of Shirley Rasmussen, Town Planner
- Exhibit 41: Resume of Stephen Dudley, Town Engineer
- Exhibit 42: Resume of Penelope Sharp, wetland scientist
- Exhibit 43: Resume of Margaret Hall, Solid Waste Manager
- Exhibit 44: Same as Exhibit 41
- Exhibit 45: Letter from John Gaucher, OLISP, to PZC, October 28, 2003
- Exhibit 46: Memorandum from S. Rasmussen to PZC, August 29, 2003, enclosing P. Bellamy Memorandum on Affordable Housing, August 28, 2003
- Exhibit 47: Schematic TR 20 Existing Watershed Map with yellow tape line submitted by Applicant 9/4/03
- Exhibit 48: Triton Environmental map of test holes submitted 9/4/03
- Exhibit 49: Schematic TR20 Existing Watershed Map with red tape line submitted by Applicant 9/4/03
- Exhibit 50: Memorandum from Town Engineer on October 30 Site Plan, November 6, 2003
- Exhibit 51: Memorandum from Town Engineer Regarding Site Restoration Issues, November 6, 2003
- Exhibit 52: (1) Letter from P. Bellamy to T. Hollister, October 16, 2003; (2) Letter from T. Hollister to P. Bellamy and S. Rasmussen, October 21, 2003; (3) Letter from P. Bellamy to T. Hollister, October 22, 2003
- Exhibit 53: Newspaper articles regarding landfills/residential development/municipal liability and complaints in *Vaillancourt v. Town of Southington* and *Collins, et al. v. Olin Corporation and Town of Hamden*
- Exhibit 54: Tabbed index of Communications—CAM/IWC/ACOE

Exhibit 55: Letter from Conservation Commission to P&Z, November 6, 2003

Exhibit 56: Bill Horne testimony, November 6, 2003

Exhibit 57: Letter from Anthony J. DaRos to Chairman McGuigan, November 6, 2003

Exhibit 58: Fax from A. Forte to S. Miller of Levy, Miller & Moritz, November 12, 2002

Exhibit 59: Applicant's Supplemental Materials, November 6, 2003

Exhibit 60: Sample of siding material [OVERSIZE EXHIBIT]

Exhibit 61: Sample of roofing material [OVERSIZE EXHIBIT]

Exhibit 62: Memorandum from J. Gordon to J. Gaucher, November 6, 2003

Exhibit 63: "Accuracy of Vertical Readings at Wells"

Exhibit 64: Town Engineer's Comments on Development Plan Costs, Annotated by P. Bellamy on 11/6/03 [OVERSIZE EXHIBIT]

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