Box 12
West Tisbury, Massachusetts 02575

Wednesday the 1st
March, 2023

Members of the Planning Board
Ms. Virginia C. Jones, Chairman
Mr. Matt Merry, Board Member
Ms. Leah Smith, Board Member
Ms. Amy Upton, Board Member
Mr. John Rau, Associate Member
Mr. Heikki Soikkeli, Board Member
Town of West Tisbury
West Tisbury, Massachusetts 02575

Board Members:

Although we have "zoom attended" the Board meetings in the matter of the Merry Farm Road, Form C / Open Space (Section V) subdivision plan application with some attention, our best efforts to understand the proceedings have left us with several questions. In the interest not only of our own understanding, we write to ask them.

We are aware that we have no specified right to ask questions in a letter, nor are you obligated to answer. It is our thought, however, that this is an informal and at least semi-agreeable means to accomplish what might otherwise be relegated to proceedings more formal, complicated (if not over-complicated), ungainly and uncomfortable. If you can bear to forward to us some "straight" answers, reasonably soon, we ask you to do so. Thoughtfully considered, the substantive matters involved in this case are not small, not inconsequential, and not necessarily "easy."

Observing the hearing sessions, we recognize they have not been a success. The applicant talks about himself and being a member of many committees. The surveyor does a lot of presenting, less surveying, and omits relevant measurements. A kind of "fuzzy math" permeates the proceedings, often ungrounded to the bylaw provisions. We're not saying we can fix or change any of it (much as we would like to be able to make things actually better), but write in an effort at least to improve our understanding. The state of affairs has become super-tangled. The applicant Monday evening appears to have told us that the lawyer who represented the MARCMerry Trust seller, restriction holder, is now the applicant's lawyer – odd, to be sure. Lot 2, from a mere 17,336 square feet is then further reduced in envelope area by an unspecified amount of "open space," and the "septic diagonal distance" correspondingly shortened by an unknown amount. First a building is slated to be moved, then torn down; three lots morph into four – without relevant substantiated bylaw calculation. And so on. And on.

It would be great to be able to write to you and ask the questions we very much would like to have answered in a simple, short letter. We've tried, and unhappily cannot figure out how we could. The "tangle" has managed to confute several efforts. We write nonetheless -- and it isn't short -- trying at least to get enough clarity into place to lead to a reasonable understanding of the questions, and to reasonable answers.

1. We have several times heard the meme that the Planning Board should not consider (or should actively disregard) "matters having to do with title" (in and to property). Every time we hear it, we cringe. (We cringe twice when cited for this proposition is some advice in who-knows-what circumstances given by some lawyer in another matter in another town. We cringe three times when the "must disregard" is applied – we believe improperly – to a Planning Board orchestrated exchange, bylaw prescribed, which is in substance a transaction in real property title, as in the case in which a described real property restriction in title is to be granted upon a described permit allowance.)

We fully agree that the Planning Board is not the Land Court, and should not in any way try to be. We fully understand and support the notion that any of various forms of enforcement regarding property rights are better left to other institutions.

Perhaps it won't work as an analogy, but may I just quickly try a separate somewhat comparable, if crude, outline? Let's say we have a grocery store (in DesMoines) that, like all grocery stores used to do, sells apples and lettuce for cash, printed paper money. The grocery store is not the Secret Service (the U.S. Government entity that polices against and prosecutes counterfeiting of U.S. currency). But the grocery store wants to stay in business, and to use its receipts from the sale of apples and lettuce to stock up on more of them and other goods, Cheerios and sorbet, and so it takes a look at the money it receives as paid, if nothing else to make sure the image thereon is of Alexander Hamilton, and not Daffy Duck. Put simple, to transact in any thing regarding which there is any reasonable question of genuineness or validity is inherently to require that some reasonable ascertainment of validity or value be involved.

So, our question(s): Is it the Planning Board's view, or process, that it will accept any form of described restriction in an Article V / Form C proceeding without inquiry into or regard respecting the actual substantive ("land title") validity of it? If not, is there a particular respect in which the Planning Board considers its relationship to and conduct regarding land title should differ from the other entities in the society, both "public" and "private," purchasers and mortgagees, sellers and so forth?

2. As has been previously noted, the present owner of the premises involved in the permit application, Merry Farm LLC, took title on June 17, 2022 subject to a "Restriction Agreement" of the same date. (A copy of the Restriction Agreement is attached to this letter).

Among other things, the Restriction Agreement provides: "At least 3.99 contiguous acres of the Burdened Premises which shall abut Lot 1 on the Plan shall be used only for conservation or agriculture or passive recreational purposes and shall not contain any structures or improvements except for fencing as may be necessary for agricultural purposes (the “Open Space Area”). (We believe there is no doubt that this restriction applies and took effect on June 17, 2022. Please agree that there is no question about knowledge or notice, etc. The document is signed by Jefrey Dubard, notarized, and put on the public record.)

It is true that from the document we know only that the 3.99 acres are contiguous, and that they abut Lot 1. That said, all possible such areas are shown on the Plan presented to the Planning Board on the evening of January 30th, apparently as "open space" and being part of the "...land required to be set aside as open space in connection with any Open Space Development [that] shall be so noted on any approved plans and shall be restricted under either G.L. Section 31, Chapter 184..." (Section 5.5-2 of the Zoning By-Law).

So, our question(s): Is it the Planning Board's view that "Section 5.5-2 land" (used to get an Article V permit) can be land that is already preserved as open space, that is already (in the past, in the land records) subject to a restriction (that is, at least in this instance) equal to (or greater) in scope than the Article V requirement)? If so, can the restriction regarding that land be derived from a transaction any amount of time previous – say five or ten or more years ago? If prior restricted land counts as now being set aside land, how does an applicant specifically know (or the Planning Board decide) validity and applicability? Is it also the Planning Board's view that the permit-enabling open space set-aside can be in a restriction that is not held by anu of the described entities specified in 5.5-2 of the zoning bylaw?

3. As "cringeworthy" to us as the talk about disregarding matters of title when considering transactions in real property are the statements made by the applicant to the effect that the Restriction Agreement doesn't matter, that the only relevant fact is that Rob McCarron happens to be at the moment in Vermont, or that Joshua Steiner is such a "good friend" that it is just as well to ignore him in legal affairs.

The Restriction Agreement ("RA") is also specifically to be noted in its several features that would tend to keep it in place, a described "friend" with a quick pen on a release document notwithstanding. First, the RA doesn't just talk about "Benefited Parties," it also talks about "Benefited Property." That, in itself, (and as coupled with other features) strongly suggests that the provisions (particularly the land restriction provisions) should be understood as "running with the land." (The way, say, road easements do. Think "permanent" or "perpetual.") Further, the owner of Lot 1 on June 17th became, and is now, the Land Bank. The Land Bank cannot release any conservation restriction or similar easement without an Act, passed by both houses of the state legislature and signed by the Governor of the Commonwealth. Put more simply, the applicant would need many more friends even than he describes having, actually to release legally and fully the Restriction Agreement. Second, the RA itself contains provisions that avoid expiration. Without getting into the details of the last paragraph, they avoid the "thirty year rule" twice over.

Curiously (to us), Members of the Planning Board have made suggestions, for example, to require year round rental, occupancy restrictions, short-term rental restrictions, and price restriction of certain property in this matter, that are not unrelated to various of the provisions in the Restriction Agreement, but have done so without observing a relation to the RA provisions.

So, our question(s): Does the Planning Board as a whole, or do various of the Members, suggest the Restriction Agreement, either in whole or in part is "going away" of and by the allowance of a permit from the Planning Board, or in a somehow otherwise related way? We understand who does and does not have standing to sue, and we understand that there may be forbearance on the part of persons or entities who have standing. On the other hand, if the Restriction Agreement doesn't just go away, forbearance at a time isn't the only question. Has the Planning Board given any thought to the ugliness / awkwardness of trying to enact an "un-merger" of the provisions of the Restriction Agreement by means of a subdivision permit?

4. And then there is another "restriction," sort of a Russian doll, you might call it, inside the Restriction Agreement. It reads:

> To further assure the perpetual enforceability of the foregoing restrictions contained in this Restriction Agreement, each of the restrictions set forth above (the “Restrictions”) shall be made permit conditions in any special or comprehensive permit obtained for the Burdened

Premises. The Benefited Parties shall have the right to review and approve all permit conditions required hereunder to be offered by the owner of the Burdened Premises to the permit granting authority prior to such application being made, which approval shall not be unreasonably withheld.

The applicant in this matter has entered into the application process first by ignoring both the requirement that every restriction become a permit condition and by ignoring the prior approval rights of the Benefited Parties and, second, by claiming to the Board that all of the Benefitted Parties are his "friends" and 1) that he can obtain (just for a smile) any and all releases he might ever want or need, and 2) that, whatever he is doing now, he doesn't need any release of any kind yet. Among many other things, what the applicant says about releases actually just begs the question why he didn't get a full set of releases before making any permit application.

Again, we are not saying that the Board's role is that of independent "police" to repair and recover from all of a given applicant's various evasions.

Nevertheless, our question: Is it the Board's view that, the RA, being a document of public record, and of which the Board has specific and direct knowledge, and requiring that the restrictions become permit conditions, and the required prior approval by the "Benefited Parties" being perfectly clear, the Board can, properly and with immunity, issue a Permit (in what might informally be called "collaborative denial" with the applicant) plainly contrary to the terms of the Restriction Agreement? Yes, it is the applicant who is the directly "burdened" party, but the restrictions have everything to do with permitting. Does the Board say that, legally, he just leaves the restrictions outside the door when he comes to the Board's office?

5. As noted, the list of issues and problems with this application and the way it has been handled is a mile long, but meaningfully curious to us, while observing, is to listen to many forms of talking about "affordable housing" while a form of structure, if imperfect, but right in front of everybody's nose, that specifically has to do with housing and its affordability, is roundly ignored.

The applicant wants to try to sneak away from parts of paragraph 2, and all of paragraphs 3, 4,and 5 of the Restriction Agreement with a little help from releases from his "friends" in order to sell sub-sized lots (with more money spent on them to move buildings and install enhanced treatment septic systems, etc.) to people who will have mortgages at now-current (comparatively high) rates, while repeating over and over and over that he is the most absolute bosom "advocate" of affordable housing that can be found this side of the Mississippi River.

We understand the differences between renting and owning; and we also understand that leases can vary in duration and in their provisions.

Even without getting out a pencil, any observer can readily say with surety that the amount of money spent by or for the same people to live in these premises will be significantly less – the housing, as housing, can be MORE affordable – if none of what the applicant is proposing in the (original or as amended) permit application is ever done. The opportunity to make an economic good available at an agreeably fair price is not enhanced by adding underlying costs to it – which everything the applicant is doing and proposes to do entails. This, not to mention the benefit to affordability if the provisions of the Restriction Agreement remain in place.

Thus, our question(s): Other than repeating the words "affordable" and "housing" as and when the situation seems to call, or even more often, does the Board actually have among its objectives in this matter the provision of genuinely affordable housing to anyone who might live at the premises and, if indeed it does, may we ask the Board to explain:

-- Why the Board shows no interest in suggesting that the provisions variously regarding affordability in the Restriction Agreement really can't be made just to vanish, and many or all of them or something very like them can or should become permit conditions?

-- Why the Board doesn't do something that might be called an "affordability effect calculation" taking reasonable estimates of development costs, legal and financing costs, and the difference in cost of financing at increased interest rates, and using said calculation to help to inform itself as to the verity (or not) of claims as to the accomplishment of a stated "affordability" objective?

-- Why the Board is smiling blandly at the applicant's claims about other and further "private" affordability provisions that, one may presume, will have no greater persistence in the applicant's frame of reference than the provisions of the existing public record Restriction Agreement (which do of themselves describe that they mean to "further assure the[ir] perpetual enforceability" but are proposed to be swiped away in releases from "friends" to be replaced by arrangements described, on the one hand, as just the applicant's business and, on the other, as the most gracious gifts to affordability ever divined)?

6. To us the "affordability" mysteries are accompanied in their several inscrutabilities (and at a similar level of incredulity) by the "Definitive Plan / Permit" weirdnesses. We think the Board acted rightly and gracefully at the end of the session on the 19th of December when the applicant, and others with him, asked that a kind of "Prospective Approval of an Approximate / Offered Plan" (which in fact in very many respects did not qualify to be voted on as a "Definitive Plan" under zoning law. lacking many details, for but one example, as to the location of certain plan components -- including "open space" as requisite to bylaw provisions).

On the 30th of January, similarly, the "plan" brought before the Board was at best a kind of informal "site outline," again, for repeated example, failing to locate or size qualifying open space for a qualifying transfer to a qualifying entity. Similarly, at a minimum, as described above, the plan was deceptive and un-real in the sense that the 3.99 acres that are within land of unknown precise location and size that are supposed to be "set aside" and become Restricted Open Space as part of and accompanying a Definitive Plan have already been set aside and should not be included or presented as Section V qualifying. It is maybe a small detail, but the plan also, for example, shows a set aside for open space land belonging to an abutter "DZ Capital LLC" not listed as a party to the application. (Other examples available. Tell us if it helps you to have a longer list.)

Motion or no motion, the Board does not have the legal power to vote "prospectively," that is to say the Board cannot legally conduct a vote that says, in effect "we approve / disapprove something different than what is before us, what is before us somehow turning into that other thing." This is true whether that different thing is one in which that the open space set aside is actually located and shown to be of bylaw conforming size and type, or that different thing is a full set of releases from Restriction Agreement requirements, pointed straight at the permit application, that get written and recorded and prove to be sufficiently effective with respect to all involved parties. Neither does the Board have the power to vote on something that <u>is</u> before the Board that is not and does not qualify as a "Definitive Plan" as if it were a Definitive Plan.

Put more plainly, the vote taken on January 30th, however intended it may have been to get a difficult hearing over with, or to make politics regarding affordable housing, only opens the Board and its actions up to question and doubt it does not serve the Board to be subject to.

Moreover, as has been only very partially noted in this letter, but it is the core truth, what has happened before the Board in connection with this application is nothing good. Proceedings regarding the application have just been a mess that have made a mess. The applicant tells stories about the use density of the neighborhood in which he was a child, as if his childhood neighborhood (likely not on an island situated as Martha's Vineyard is, out in Vineyard Sound) should become our zoning principle. The applicant makes pronouncements saying that he is asking so little, just a couple of small houses tucked into some little lots he wants to make, but much more significantly what is happening, if only this case is considered here on a very "micro" scale, is a kind of "pushed citification" that the Island does not have the nature, or resources, or infrastructure, or inclination to give general support. Despite all the talk, the proposal definitely does nothing "affordable" for affordable housing. (The developer, gets some, probably still not enough, money.) The "proposed wells" right next to the road lack a certain charm. The Planning Board gets to deal with others who, at a minimum, say that if this developer can, then I, too, can do a so-called "open space development" using already restricted open space, I, too, can drag some extra "open space" square footage from an adjoining undersize lot into the plan to make my numbers, etc. On and on.

This case isn't really "small potatoes." The spuds here are not numbers of square feet or dwelling units, this is about when and where it is good enough to "cut corners" or "cheat a little" and where it really is not. Section V of the Zoning Bylaw has been little used in West Tisbury. Zoning is, by nature, a very imperfect affair and process, but this is a matter in which decisions about how and when and where it is best not to abuse the process need to be made.

And if we really are ever going to do something intelligent (that doesn't just make more traffic on roads that we can't come to widen) and do better with housing, including affordable housing, it will likely have to do with a much more sophisticated and "crafted" version of something somewhat like Article V, that will include more, and be more connected, but will also only be successfully administered with even greater diligence, fidelity, and attention.

So, then, one final question: If each Member of this Board gives herself or himself the serious opportunity to think about it, isn't it very much in the Board's interest to let this applicant go on and on, however he must, about how wonderful and how altruistic he is, but to make decisions in this case that instead pay serious attention to what the case – and the Board -- does (and doesn't) stand for?

Yours,

s/
Katharine Sterling
Benjamin Reeve

attachment

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RESTRICTION AGREEMENT

This Restriction Agreement (the "**Agreement**") is made as of this 15 day of June, 2022, by and between Robert M. McCarron, Trustee of MARC Merry Farm Road Trust, u/d/t dated November 10, 2015 and recorded with the Dukes County Registry of Deeds (the "**Registry**") in Book 1398, Page 202 (the "**Trust**") and Merry Farm LLC, a Massachusetts limited liability company (the "LLC").

RECITALS

Whereas, the Trust is the owner of the real property located 138, 140 and 155 Merry Farm Road, West Tisbury, Dukes County, Massachusetts as more particularly described in a deed of Susan E. Trees dated February 8, 2016 and recorded with the Registry in Book 1398, Page 207 (the "**Property**"); and

Whereas, in contemplation of the sale of the Property to the LLC or its nominee and as a condition of said sale, the Trust desires and the LLC has agreed to impose certain restrictions upon that part of the Property more particularly described as Lot 2 on a plan entitled "Plan of Land in West Tisbury, Mass. Surveyed for Jefrey DuBard May 25, 2022 Scale 1" = 80'" by Vineyard Land Surveying & Engineering and recorded with the Registry in Plan Book 19 , Page 129 (the "**Plan**"), and containing 8.81 acres more or less according to the Plan (the "**Burdened Premises**"); and

Whereas, the restrictions contained herein below (the "**Restrictions**") are intended to be for the benefit of (i) Joshua L. Steiner, individually, and the Trust, which in their capacities as private parties benefiting from the Restrictions may be referred to as the "**Benefited Parties**"; and (ii) for the real property now or formerly owned by the Trust and shown as Lot 1 on the Plan and Lot No. 1-A shown on a plan of land entitled "Plan of Land in West Tisbury, Mass. Surveyed for Douglas A. & Joyce S. Cabral, September 8, 1984, scale 1 in. = 100 ft., Vineyard Land Surveying, Box 1548, Norton Ave., Vineyard Haven, MA 02568, Revised – Sept. 13, 1984, Being a subdivision of Lot 1 'Hilltop Farm' ", filed with the Registry as West Tisbury Case File No. 274, to which plan reference is hereby made for a more particular description (collectively, the "**Benefited Properties**"); and

Whereas, in furtherance of the Trust's and the LLC's intent to effect the Restrictions, the Restrictions shall remain in full force and effect irrespective of the doctrine of merger and may only be modified or amended by all of the Benefitted Parties and all of the owners of the Benefited Properties.

Now therefore, in consideration of the recitals set forth above and other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, the Trust hereby imposes the following restrictions to and for the benefit of the Benefitted Parties and the Benefitted Properties:

1. At least 3.99 contiguous acres of the Burdened Premises which shall abut Lot 1 on the Plan shall be used only for conservation or agriculture or passive recreational purposes and shall not contain any structures or improvements except for fencing as may be necessary for agricultural purposes (the "**Open Space Area**").

2. That part of the Burdened Premises outside of the Open Space Area shall only be used for residential and agricultural infrastructure purposes, with the number of "dwellings", as that term ("dwelling") may be then defined or contemplated under the West Tisbury Zoning By-laws, at the Burdened Property shall not exceed six (6). Each dwelling shall be within structures existing as of the date hereof or additions thereto, as the same may be renovated, restored or improved. Existing structures shall not be demolished and/or replaced to accommodate new or additional dwellings without the prior consent of the Benefitted Parties, which consent shall not be unreasonably withheld.

3. At least one dwelling will be restricted to use as a primary residence (not rented by the resident to third parties for short term or seasonal use) by persons aged fifty-five years or older.

4. The main house (being the westerly most structure labelled "Existing Dwelling" on the Plan) may be rented at fair market value rates and terms each year during the high season beginning Memorial Day weekend and ending Labor Day weekend, but otherwise shall be available to one or more families for the remainder of the year at a rental rate which shall not exceed 140% of median rents for Dukes County as calculated and adjusted for the tenant's household size from time to time by HUD.

5. All remaining dwelling units at the Premises will be restricted to use as a primary residence (not rented by the resident to third parties for short term or seasonal use) by persons earning not more than 140% of the median household income for Dukes County as calculated and adjusted for household size from time to time by HUD..

To further assure the perpetual enforceability of the foregoing restrictions contained in this Restriction Agreement, each of the restrictions set forth above (the "**Restrictions**") shall be made permit conditions in any special or comprehensive permit obtained for the Burdened Premises. The Benefited Parties shall have the right to review and approve all permit conditions required hereunder to be offered by the owner of the Burdened Premises to the

permit granting authority prior to such application being made, which approval shall not be unreasonably withheld.

The Trust and the LLC intend that Joshua L. Steiner be and hereby is a third party beneficiary of this Agreement with full right and authority to extend and enforce the Restrictions contained herein.

In the event that any one or more of the Restrictions shall for any reason be held to be invalid, illegal or unenforceable to any extent, such invalidity, illegality or unenforceability shall not affect any other restriction contained herein (or the restriction in question to the extent not invalid, illegal or unenforceable).

To the extent that any Restrictions are deemed to constitute restrictions subject to the limiting provisions of M.G.L. Chapter 184, Sections 26 through 30, then all such restrictions shall be binding upon the grantors and grantee for a term of one hundred fifty (150) years from the date of recording hereof and shall remain in full force and effect in accordance with the provisions of M.G.L. Chapter 184, Section 27, as it may be amended from time to time, or as provided in similar successor provisions, which provision of M.G.L. Chapter 184, Section 27 permit the extension of the period of enforceability of said restrictions by the recording of an extension in accordance with the provisions of said law before the expiration of the first thirty (30) years from the date of recording hereof, and before the expiration of each succeeding twenty (20) year period thereafter, or for such other maximum further periods of time as may be allowed by any amendments of said law or by any successor provisions.

Executed as a sealed instrument on this 15th day of June, 2022.

Merry Farm LLC

Robert M. McCarron,
Trustee as aforesaid

By: Jeffrey Byrne DuBard, Manager

COMMONWEALTH OF MASSACHUSETTS

County of Dukes, ss

On this 15 day of June, 2022, before me, the undersigned notary public, personally appeared Robert M. McCarron, proved to me through satisfactory evidence of identification of the principal, which was personal knowledge, to be the person whose name is signed on the preceding or attached document, and as Trustee as aforesaid acknowledged to me that he signed it voluntarily as his free act and deed for its stated purpose

CAROLINE R. FLANDERS
Notary Public
Commonwealth of Massachusetts
My Commission Expires
November 11, 2022

Notary Public
My commission expires:

COMMONWEALTH OF MASSACHUSETTS

County of Dukes, ss

On this 15 day of June, 2022, before me, the undersigned notary public, personally appeared Jefrey Byrne DuBard, proved to me through satisfactory evidence of identification of the principal, which was personal knowledge, to be the person whose name is signed on the preceding or attached document, and as Manager of the Merry Farm LLC acknowledged to me that he signed it voluntarily as his free act and deed for its stated purpose

CAROLINE R. FLANDERS
Notary Public
Commonwealth of Massachusetts
My Commission Expires
November 11, 2022

Notary Public
My commission expires:

ATTEST: Paulo C. DeOliveira, Register
Dukes County Registry of Deeds