

Wednesday the 14th
December, 2022

The Planning Board
Town of West Tisbury
West Tisbury, Massachusetts 02575
by e-mail: planningboard@westtisbury-ma.gov

Members of the Board:

We write to request that the application of Merry Farm LLC of November 23, 2022 regarding land at "Merry Farm Road" be denied.

First: Acknowledged and accepted principles of land use regulation provide that the zoning permit applicant bears the responsibility to set forth in its application a description that shows specifically that the relevant and applicable provisions of the by-law will be fulfilled if the application is allowed. (And, if any part(s) of the by-law are not practically possible to fulfill, to provide a detailed description of the reasons they cannot be satisfied and to request waiver(s) consistent with the terms of the by-law as a whole and the intent it expresses.)

In this case, Merry Farm LLC has applied to subdivide a certain Lot of 8.81 acres specifically according to the terms of Article V [5] of the West Tisbury By-Law, but the application does not, among several other similar omissions, in any manner show: 1. The "net acreage" calculation required by Section 5.2-1, nor set out, in support of a calculation, the specific portions of the 8.81 acres that are variously land types as described in 5.2-1 ("flood plains, watercourses (including ponds)..." etc.) 2. The "Minimum Preserved Open Space" calculation that would show that development according to the application "...shall preserve a minimum of 60%..." [of the applied for 8.81 acre lot] "... as open space." "Open space" is defined in the by-law as "An area of land not developed with structures." 3. Similarly, the application does nothing to show that "At least 50% of the land [of the 8.81 acres that are the subject of the application] set aside as preserved open space shall be buildable land, and the remainder of the land preserved as open space may include wetlands, steep slopes, shore zone, and other unbuildable land."

The fact that the application is at such a distance from making the required basic demonstrations, we submit, is cause sufficient for denial.

Second: Although the application specifies that it pertains to the 8.81 acre parcel ("Lot 2 " on the Plan at Bk 19 Pg 129, May 25, 2022) and the Plan that accompanies the application only shows that 8.81 acre parcel, a letter forwarded by Mr. Reid Silva PLS PE, in the paragraph numbered "1." refers to an abutting 18.01 acre lot, as does a "Narrative for Planning Board" submitted by Mr. Jeffrey Dubard.

By a deed dated June 17, 2022, recorded at Bk 1629 Pg 157 in the Dukes County Registry of Deeds that land ("Lot 1") was sold to the Martha's Vineyard Land Bank Commission for \$2,500,000. Merry Farm LLC no longer owns that land, and has no legal rights in it. In fact, it is the other way around: the Land Bank Commission has certain rights as the owner of that Lot 1 that run with land and constitute rights in Lot 2 (the application lot). (*cf* "Restriction Agreement" attached.)

Another very basic, and not too complicated, land use law principle holds that an entity has to own the land to have the right to make a zoning application for it. (Many of the Form C Application forms for other Massachusetts Towns require applicants to be owners who sign a notarized certification on the

form.) Simply said, this applicant has no right to make a Form C application that involves any title outside or beyond the 8.81 acres owned. And, unless the application can be amended to fulfill the by-law requirements within the 8.81 acres, for this reason as well the application must be denied.

Third: The Planning Board says that it can't review or consider land title. Perhaps regrettably, as such this is an unrealistic proposition, even as the Board is not at all asked to join as part of the "Registry Gang." The zoning by-law itself deals repeatedly in certain descriptions of particular land (e.g. "buildable", "residential" -- as meaning having residences built upon it, and so forth) Those descriptions cannot be fairly applied in disregard of the law and the particulars of the condition of title. In fact the application made in this instance is significantly incomplete in that it makes no mention whatsoever of a certain "Restriction Agreement" of June 17, 2022, of public record (Book 1629 Page 130).

This "Restriction Agreement" contains several provisions. Some of them may not be binding (for reasons not important here), and several are not relevant. But the Agreement also "burdens" the 8.81 acre parcel in question with covenants on 3.99 acres of the parcel that, in the understanding of most people familiar with land and zoning, would lead to the view that an application under by-law Article 5 could only possibly be made with regard to 4.82 acres of the parcel (even before considering built-upon areas that are not "open space.")

For the purposes of this letter, it may be enough just to say that the existence of the Restriction Agreement is reasonably material to consideration of the application, and thus should be available in the Board's consideration of the application. Without it, the application should be denied.

Fourth: As will be further discussed below, the application inherently makes several general, large, overarching propositions that, if caused to become true, even approximately true, would be (further) very significantly damaging in overall matters of land use and zoning and to the community. To conclude this list, we would mention just two (among several possible) that illustrate what we mean: 1. The proposition that land sold in fee absolute any amount of time ago can be eligible for later creating Article 5 treatment for abutting land; 2. The proposition that an applicant's account of an orally described intention at a prior Planning Board meeting or hearing can create rights to a specific outcome for a later application.

If it were true that land already sold can be the "raw material" to enable Article 5 treatment, every parcel of land in the whole Town that sits next to an amount of restricted open space would thereby, in theory entailed, immediately become the justified site for the reduced dimensional requirements and increased density provisions of Article 5. Instead of "preserving" open space, Article 5 would become the by-law vehicle to surround open space with (more or less) three times denser than otherwise land use. The only thing that the 8.81 acres that are the subject of this application "do" is that they merely *abut* a parcel of open space.

In a narrative written to the Planning Board approval is requested as the Board is informed by the applicant that "... we explained that we intended to come back with the proposal for 2 small lots where existing dwellings will be sited and under the open space bylaw." Perhaps since the communication is described just as a "narrative," the remark would better be just ignored. On the other hand, there is a quality to it that might be called "presumptuous." If nothing else, it doesn't focus on the interests and questions naturally raised by a land use proposal, but would make a kind of "announcement" perhaps intended to bypass them -- not to mention that it offends such basic legal ideas as that we will deal with each other in writings and evidence and facts and records in regard to land and land use.

It is to say that it puts the application on terms the Board should not (really cannot) accept. The Board has more than enough reason to decline an application that, rather than fairly dealing in actual land and lots

and so forth, comes to say, in effect "once upon a time we told you we wanted this – so now give it to us."
(And, as a more general matter, if "application" of the sort becomes regular...)

In Conclusion: It is not our job to discern the underlying purposes of the Merry Farm LLC application. That said, it appears that there are motives involved to move one building and to sever two lots for later sale. It may be that those ends can lawfully and fairly be accomplished. Without more, we wouldn't presume to have anything like an opinion.

We believe it important specifically to say that we would leave many of the matters, both directly and collaterally included in any application, to the sound and considered discretion of the Planning Board. Our purpose in writing this letter is not to judge regarding things, for just an example, as whether the requirement for a forty foot way should be reduced to a thirty foot way in a particular instance. The honest among us recognize that some rules are meant to be broken. We do not intend in the least to substitute our take for the considered analysis of the Board.

However, we think that there are some bigger principles that collectively we transgress at our peril, and that this application seriously disrespects far too many of them.

Yours,

(signed)

Katharine P. Sterling
Benjamin Reeve

attachment



2022 00004059

Bk: 1629 Pg: 130 Doc: REST

Page: 1 of 4 06/17/2022 11:16 AM

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 Jeffrey 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 Benefited 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 Benefitted 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




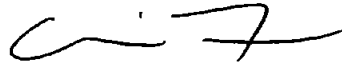
By: Jeffrey Byrne DuBard, Manager

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




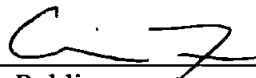
Notary Public
My commission expires:

COMMONWEALTH OF MASSACHUSETTS

County of Dukes, ss

On this 15 day of June, 2022, before me, the undersigned notary public, personally appeared Jeffrey 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