Box 12
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Monday the 8th
January, 2024

Members of the Conservation Commission
Town of West Tisbury
West Tisbury, Massachusetts 02575
By e-mail: concomm@westtisbury-ma.gov

Commissioners:

We write to consider with you the request being made by Jefrey Dubard that the Conservation Commission accept a certain proposed Conservation Restriction for the purposes of enabling an "Open Space Development" plan at 140 Merry Farm Road.

The reasons that the Conservation Commission should not accept the Restriction are many. Because the request is legally moot in at least two ways (both of them substantive, and properly determinative), in this letter we will focus on simple dismissal of the request. That said, the reasons the proposed Restriction is the ugly spawn of ugly purposes should neither be ignored. The land in question is more directly described as the remains of a residential area (within 13 feet of an "existing shop, 12 feet of an "existing shed," and 31 feet from an "existing swimming pool") and the scheme by which the land has been managed, first by subdivision and sale and next by propositions about value and uses, is much less than conservationally agreeable.

The public land record shows a document executed April 27th, 2023 titled a "Permanent Open Space Restriction & Covenant." The document provides that "The Covenantor shall record this covenant with the Plan and Special Permit." The document recites that "... a copy of which [the Special Permit] is attached hereto as Exhibit B," but there is in fact no Exhibit B attached to the document in the public record, and nothing anywhere else of record resembling the relevant Special Permit. (Further, this is a document that some people living with the burdens of some education in land use law might look at as an exercise in what is sometimes called impermissible "contract zoning," *Cf. McLeod v. Town of Swampscott,* 2014 WL 869538 (Massachusetts Land Court 2014).

In any event, as a form of agreement the "Covenant" contains a provision that reads: "The Covenantor shall have six (6) months from the date of the effective date of the Covenant to obtain the permanent restriction referred to in this paragraph." Six months from April 27th, 2023 is something like November 27th, 2023 – a date now past.

Put simple, perhaps the Planning Board would now, contravening the provisions of the covenant, "forget" that time has passed. But not an especially good idea. The Board is unquestionably better off, having in a certain sense "contracted" around the provisions in the by-law in the first place, not then going on to "forget" about the provisions of the deal. Not to mention having gone through the hearing and decision process, then working to contradict the results of that process, rather than staring again with a hearing (and, maybe, a somewhat improved application). The Planning Board thus now has no obligation (and is not in any way well-advised), to "take" a restriction arrangement, even if the Conservation Commission might choose to forward one (through the process including State acceptance, etc.). Because there does not now exist a genuinely "live" application for "open space" zoning, whether or not the Conservation Commission wants to "conservation restrict" the land shown on the proffered Plan is moot, in fact decides nothing at all – sorta like playing to catch a ball that you missed during the game

after the game is over -- and, further, it is probably an exercise not really in the best interests of the Con Comm, either. Therefore, the request should just be denied.

The fact that the "scheme" for the restriction to enable the sought-for zoning involves two different properties (and four separate lots, one of them four tenths of an acre that is mined for a one tenth of an acre "conservation" restriction area) also indicates, in legal and technical terms, and in moral terms (as we shall consider in a moment), that the right result is just to send the request back. Are we all so unaware as to suppose that the septic system for any improvement on that four tenths of an acre lot won't next be wedged into what we would say we were "conserving"?

Mr. Dubard has shown up with a proposed "Grant of Conservation Restriction" that is just a mess, law or logic considered. (Two different owners of two different properties convey in the same document that is full of gotta do this and can't do that-s and there is no good way to figure out which really applies and how to what.) Never minding that mess for the moment, however, more basically, by a deed at Book 1652 Page 1048 on or about April 21, 2023 Merry Farm LLC conveyed to Casey Blum and Ian Ridgeway a certain "Lot 1-A" (138 Merry Farm Road), upon delivery of which Blum/Ridgeway became owners in fee simple of that property. There is no provision in the deed reserving any part of the premises for any future "conservation restriction" to anyone. There is no other document on the public record of any kind doing any such thing. And, upon information and belief, there is no written agreement anywhere else of any kind that says that Blum/Ridgeway are in for the conveyance of a restriction.

Land use regulation entities that are thinking about what they are doing universally require that applicants in fact have a genuine legal interest in the subject premises. In the present matter Blum/Ridgeway are just getting dragged along by Mr. Dubard's paper and his talkings at Board meetings. Dubard needs the .36 acres (cross-hatched on the Plan) on the Blum/Ridgeway to propose even to come close to his (already much "adjusted") "conservation" number. (Additionally, another mess in the shambles has the Covenant with the Planning Board specifically requiring a "6.16 acre portion of Lot 1 identified on the Plan," although, even with the short distances to buildings and the swimming pool, etc. the Lot 1 area barely stretches to 5.7 acres.) And all the while, Mr. Dubard is "offering" something he has no standing right to at 138 Merry Farm Road. Unless and until the applicant for the sought-for zoning has a genuine right in the subject, the application is properly described as "moot" (meaning, again, there is no actual "there" there to be processed / decided upon, etc.) And, therefore, the Con Comm should just say thanks and "take a pass."

In closing this letter, already too long, we come to what is, in basic terms, the most offensive part of the whole mess. We do not know Blum or Ridgeway very well, have said hi to Ian, know that he likes boats, and we have done a little boating, too. They can, and should, decide and act and write on behalf of themselves, and we should mostly tend (and weed) our own gardens. We do not propose nor want to "police" so much as make some quantum of sense, and provide maybe a little bit of help.

Most people do not read their mortgage documents. All the stuff in twenty-odd pages about "funds" and "foreclosure" and "insurance" just makes for glaze-over. (Probably Blum//Ridgeway's experience – and that's fine.) The good news is that all the mortgages say much the same thing, and, for no particularly good reason, we have a sense as to what that is. In the instance of the Blum/Ridgeway mortgage, of record at 1653 / 399, there are some relevant sections we would quote:

> Borrower mortgages, grants, and conveys to Lender, with power of sale, the following described property located in the County of Dukes:...which currently has the address of 138 Merry Farm Road, West Tisbury TOGETHER WITH all the improvements now or subsequently erected on the property, including replacements and additions to the improvements on such property, all property rights, including, without limitation, all easements, appurtenances, royalties, mineral rights, oil or gas rights or profits, water rights, and fixtures now or subsequently a part of the property. All of the foregoing is

referred to in this Security instrument as the “Property.” BORROWER REPRESENTS, WARRANTS, COVENANTS, AND AGREES that: (i) Borrower lawfully owns and possesses the Property conveyed in this Security Instrument in fee simple or lawfully has the right to use and occupy the Property under a leasehold estate; (ii) Borrower has the right to mortgage, grant, and convey the Property or Borrower's leasehold interest in the Property; and (iii) the Property is unencumbered, and not subject to any other ownership interest in the Property, except for encumbrances and ownership interests of record. Borrower warrants generally the title to the Property and covenants and agrees to defend the title to the Property against all claims and demands, subject to any encumbrances and ownership interests of record as of Loan closing. ...

19. Transfer of the Property or a Beneficial Interest in Borrower. ... If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument.... If Lender exercises this option, Lender will give Borrower notice of acceleration. The notice will provide a period of not less than 30 days from the date the notice is given in accordance with Section 16 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to, or upon, the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower and will be entitled to collect all expenses incurred in pursuing such remedies, including, but not limited to: (a) reasonable attorneys’ fees and costs; (b) property inspection and valuation fees; and (c) other fees incurred to protect Lender's Interest in the Property and/or rights under this Security Instrument.

Put simple, as a legal matter, Blum/Ridgeway's signatures on Mr. Dubard's wacky "Grant of Conservation Restriction" document could readily lead, quite directly, to mortgage foreclosure on the rather modest, simple but charming (sorta expensive, though) house that they are living in. Who knows what Mr. Dubard has said to them, but, again on information and belief, we somewhat doubt that Mr. Dubard has been forthright with regard to requirements or consequences.

Maybe they could find another lender to step in and just keep paying their monthly. Maybe not. In practical terms, to us the feckless conscription to jeopardy is unfair and wrong, and just shouldn't happen. Not that we are trying to do any special pleading for Blum/Ridgeway.

To us, the whole show makes mockery of all the talk made about "providing affordable housing" and all the meaningless "virtue signalling" about various forms of "conservation." Again, in plain terms, at the center of this fiasco are several and various results that nobody should want.

Yours,
Katharine P. Sterling
Benjamin Reeve

Copies: Members of the Planning Board
Casey Blum / Ian Ridgeway