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OF COUNSEL  
JENNIFER S. RAKO

MEMORANDUM

To: West Tisbury Affordable Housing Committee and Planning Board  
From: Ron Rappaport and Isabelle Lew  
Re: Flat Point Farm - Proposed Subdivision  
Date: March 21, 2018

I. Background.

Eleanor D. Neubert, Jean F. O'Reilly, Arnold M. Fischer, Jr., and the Martha's Vineyard Savings Bank, Trustee of the Priscilla P. Fischer 1994 Trust (the "applicants") filed a Form B plan for their property located a Flat Point Farm. The West Tisbury Planning Board reviewed the Form B on December 4 and December 11, 2017 and referred the matter to the Martha's Vineyard Commission. The Planning Board and Affordable Housing Committee have requested an opinion on the number of affordable housing lots required by the West Tisbury Zoning Bylaws (the "Bylaws").

II. Form B Preliminary Plan.

The Form B plan submitted by the applicants is entitled "Preliminary Plan in West Tisbury, Mass. Prepared for 'Flat Point Farm' The Priscilla P. Fischer 1994 Trust, Scale 1" = 200' September 20, 2016, Rev: May 19 2017" (the "Form B plan") and attached hereto as Exhibit "A". The Form B plan displays eighteen (18) parcels. Three (3) of the parcels on the Form B plan are not owned by the applicants: 1) Assessors Map 35, Parcel 4, is owned by Ann Fischer; 2) Assessors Map 35, Parcel 5, is owned by the O'Sullivans; 3) and Assessors Map 35, Parcel 3.1A, is owned by the Land Bank. These three lots are not part of the Form B.

A Form B preliminary plan is not a subdivision plan. See G. L. c. 41, §81S ("[e]xcept as is otherwise provided, the provisions of the subdivision control law relating to a plan shall not be applicable to a preliminary plan, and no register or deeds shall record a preliminary plan"). Rather, a Form B preliminary plan enables an applicant, the Planning Board, the Board of Health and other municipal agencies to discuss the proposed plan prior to the submission of a definitive plan. Further, a Form B plan freezes zoning bylaws and regulations so that a definitive plan submitted within seven months is governed by the zoning bylaws in effect at the time of the Form B submission. See G. L. c. 40A, §6. Once the Planning Board acts on the Form B, an

applicant may or may not elect to proceed with the submission of an Approval Not Required (ANR) plan or a Form C subdivision plan.

### III. Zoning Bylaws.

Section 4.4-6 of the Bylaws requires that:

“In any **subdivision**<sup>1</sup> containing three or more lots developed over any five year period, at least 20% of the lots shall qualify as affordable housing as defined in this bylaw. . . . Fractional units of less than .5 shall be rounded down and .5 or more shall be rounded up.” (Emphasis added).

Section 14.2 of the Bylaws defines a “lot” as:

“An area of land in one ownership with definite boundaries, used or available for use as the site of one or more buildings.”

Section 14.2 of the Bylaws further defines a “building” as:

“A structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or property.”

### IV. Agricultural Preservation Restrictions.

The Form B plan contains two parcels labeled “Field” and “Agricultural Preservation Parcel”. The “Field” is currently restricted by an APR recorded in the Dukes County Registry of Deeds in Book 1329, Page 350. The “Agricultural Preservation Parcel” does not yet have an APR on record, but we assume that the APR will be similar to the APR encumbering the “Field”. The Field APR permits only temporary structures for agricultural uses, fences, and non-habitable accessory agricultural structures less than seven feet high.

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<sup>1</sup> The term “subdivision” is defined in G. L. c. 41, §81L as “the division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth, or the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision”.

A hyper-technical reading of the Bylaws might qualify the restricted “Field” and “Agricultural Preservation Parcel” as land capable of siting a “building”, and therefore countable as a lot under the Bylaws. However, such a reading would be inconsistent with the purpose of section 4.4-6 of the Bylaws. We therefore are not including those lots in our calculations.

V. Lot Calculation of a Form C.

If the Form B advances directly to a Form C, the subdivision would create thirteen (13) lots: the lots that are owned by the applicants exclusive of the two APR lots. Thus, under the Bylaws, the applicants could be required to provide three (3) affordable housing lots.

VI. Proposal from Eric Peters.

According to a letter submitted to the Planning Board on March 16, 2018 by Eric Peters, attorney for the applicants, which letter is attached hereto as Exhibit “B”, the applicant intends to proceed as follows:

- ANR plan which will create five lots around existing structures (Lots A through E on the Form B plan), and four lots from the reconfiguration of four lots currently in existence (Lots 4A, 5A, 6A and 7A on the Form B plan). The ANR plan will also include two parcels labeled “Field” and “Agricultural Preservation Parcel”, both of which will presumably be restricted by a recorded APR.
- Form C plan which will create four new lots (shown as Lots 4B, 5B, 6B and 7B on the Form B plan).

Pursuant to G. L. c. 41, §81P and L, an ANR plan is not a “subdivision” plan. Assuming the applicants proceed as Mr. Peters has outlined above, the subdivision, as shown on a Form C plan, will contain four (4) lots, and the applicants must provide one (1) affordable housing lot under the Bylaws.<sup>2</sup>

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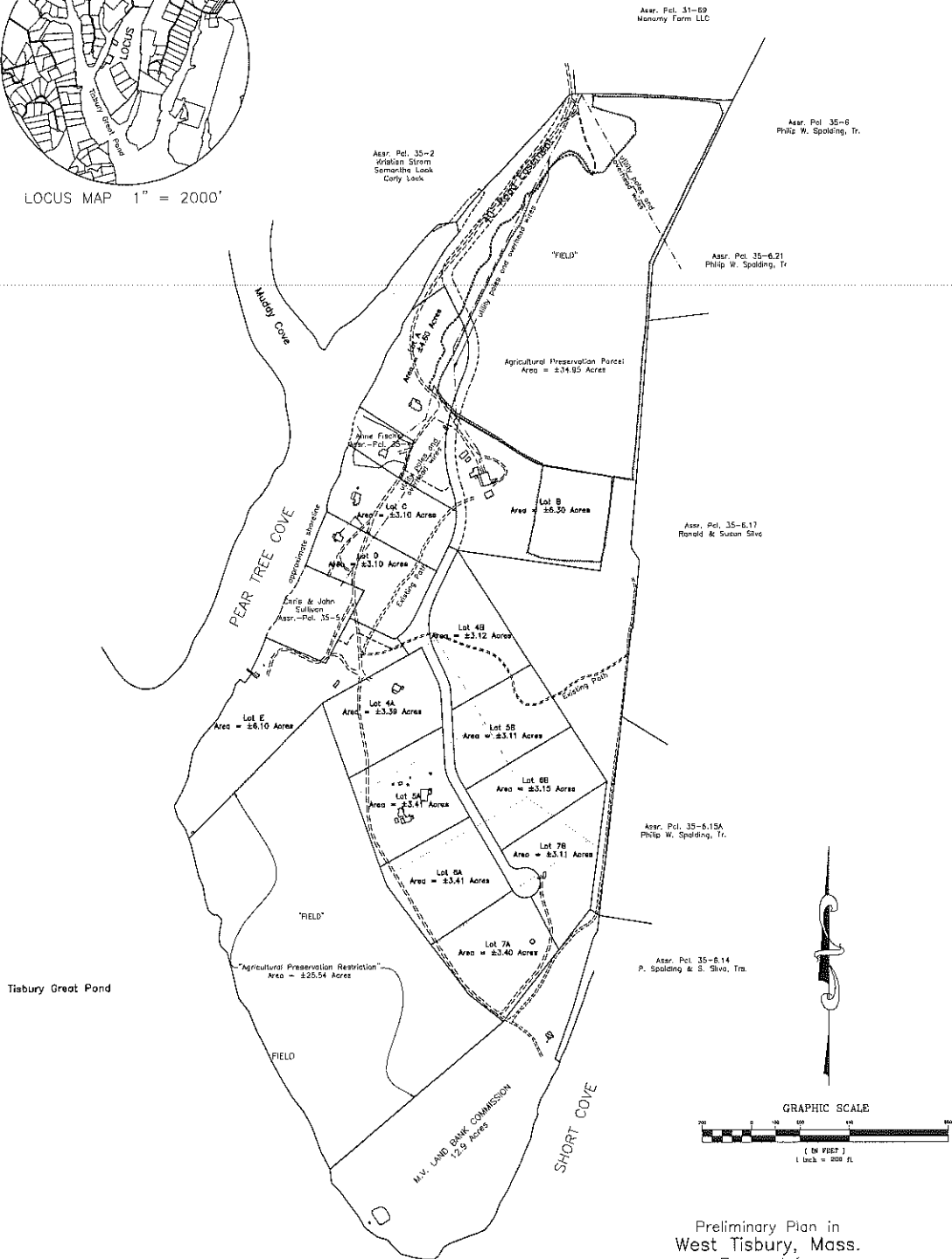
<sup>2</sup> Even if, arguendo, the two APR lots are counted as lots subject to the Bylaws, the required number of affordable housing lots would not be affected irrespective of whether the applicants proceed under a Form C plan (the number of lots would increase from thirteen (13) to fifteen (15), resulting in three (3) affordable housing lots) or an ANR plan (the number of lots would increase from four (4) to six (6), resulting in one (1) affordable housing lot).

# **EXHIBIT A**

# PRELIMINARY PLAN



LOCUS MAP 1" = 2000'



LOT SUMMARY:  
Total Area = 109.8 Acres  
Area in Preservation 60.5 Acres (55%)  
Area of existing and proposed development 49.3 Acres (45%)  
Number of proposed Lots = 13  
Proposed Lots around existing buildings = 7  
Proposed Lots available for building = 6

Preliminary Plan in  
West Tisbury, Mass.  
Prepared for  
"Flat Point Farm"  
The Priscilla P. Fischer 1994 Trust

Scale 1" = 200'  
September 20, 2016  
Rev: May 19, 2017

**VINEYARD**  
LAND SURVEYING  
& ENGINEERING  
12 Cummis Road  
P.O. Box 421  
West Tisbury, MA 02275  
P: 508-693-3774 F: 508-629-0440  
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## **EXHIBIT B**

LAW OFFICES  
**ERIC L. PETERS**  
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Telecopier (508) 693-8830

Street Address:  
53 LEONARD CIRCLE  
VINEYARD HAVEN, MA 02568

Mailing Address:  
POST OFFICE BOX 1117  
EDGARTOWN, MA 02539

March 16, 2018

Mrs. Virginia C. Jones, Chair  
West Tisbury Planning Board  
P.O. Box 278  
West Tisbury, MA 02575

Via Email

Re: Flat Point Farm

Dear Mrs. Jones:

I wanted to follow up on my letter of March 6, 2018 concerning the Form B plan filed for Flat Point Farm, for a point of clarification.

The Form B plan of Flat Point Farm that has been filed is a conceptual plan and a preliminary plan that shows the effect of both the intended final Form A plan and the intended final Form C plan that will both be filed by The Priscilla P. Fischer 1994 Trust after final review of the preliminary plan.

The conceptual framework of the Form B plan is to also satisfy MVC concerns regarding "incremental development" by showing the effect of both plans together as to the entire property.

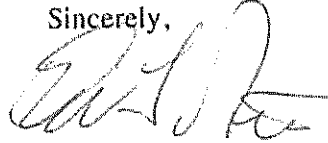
The final Form A plan will include the five lots with existing structures (Lots A through E on the Form B plan), the four existing lots that will be reduced in size (Lots 4A, 5A, 6A and 7A on the Form B plan), and the two parcels not available for building ("Field" and "Agricultural Preservation Parcel" on the Form B plan), all as outlined in my letter of March 6, 2018.

The final Form C plan will show the relocation of the access road (Road to Great Neck) and the four new lots which will be available for building (Lots 4B, 5B, 6B and 7B on the Form B plan), also as outlined in my letter of March 6, 2018.

The two final plans will be filed together and we intend to seek joint review of these two plans once filed with the Planning Board and referred to the Martha's Vineyard Commission.

The issue of affordable housing and the requirements of West Tisbury Zoning Bylaw Section 4.4-6 "Affordable Housing Requirement" will be part of the review of the final Form C plan, once it is filed.

Sincerely,

A handwritten signature in dark ink, appearing to read "Eric L. Peters", written in a cursive style.

Eric L. Peters

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cc: Eleanor D. Neubert  
Jean F. O'Reilly  
Arnold M. Fischer, Jr. (by email)  
Martha's Vineyard Savings Bank, Trustee (by email)  
Paul Foley, Martha's Vineyard Commission (by email)  
Reid Silva, VLSE (by email)