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MARTHAS VINEYARD COMMISSION

MEMORANDUM

April 5, 2004
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TO: Brian Lafferty
FROM: James G. Ward
RE: Interim and Permanent Restrictions

You have asked me to describe certain environmental, conservation, aesthetic and affordable housing restrictions (both interim and permanent) by which the development concept, described below, of the Preserve at the Woodlands can be implemented. The development concept is to take the 290[±] acres owned by Down Island Golf Club and Corey Kupersmith in the Southern Woodlands, sell 190[±] acres to the Martha's Vineyard Land Bank Commission ("Land Bank") and on the remaining land develop 26 house lots, open space, a pond, horse stables and covered riding ring (the "Project"). The Project is currently pending approval as the settlement of litigation before the Martha's Vineyard Commission ("MVC") and will soon be submitted to the Oak Bluffs Planning Board for subdivision and other zoning approvals. Among other conditions precedent, the sale to the Land Bank is subject to such approvals as well as the ability

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Attachment "B"



to create effective interim and permanent environmental and conservation restrictions as discussed in this memorandum.

To accomplish this, I propose that we create a “Common Scheme” pursuant to M.G.L. c.184, §27, whereby the restrictions mentioned above would be created by the recording with the Dukes County Registry of Deeds a “Declaration of Covenants, Conditions, Restrictions and Easements” (“Declaration”) imposing the restrictions prior to developing the Project.

The entities that will need to be created and the mechanics of carrying out restrictions created in the Declaration are as follows:

ENTITIES:

1. *Homeowners Association.* This entity will be a nonprofit corporation and will be deeded the fee in the common areas, such as the roadways and open space, but excepting the area designated for the riding stables and ring (see below). The Homeowners Association will have specific architectural and environmental review rights, the power to facilitate the granting and acceptance of necessary easements and the power to impose assessments on each homeowner for open space maintenance and repair costs, as well as road maintenance and other incidentals. In addition, the Homeowners Association would have the joint authority and obligation to enforce the affordable housing restrictions (discussed



below) through a “lien release” mechanism that will be included in the Declaration. Likewise, the Homeowners Association will have the authority and obligation to record the permanent Conservation Restriction pursuant to M.G.L. c.184, §31 once the final home sites and other improvements are built.

Membership in the Homeowners Association will be the lot owners and the entity created to own and run the stables and riding ring as described below. Initially, and until a significant majority of the house lots are sold, the Declarant of the Declaration will control the Homeowners Association.

2. *Stables and Riding Ring.* As noted above, after the recording of the Declaration, the parcel of land upon which the stable, riding ring and pond are located will be deeded to a separate limited liability corporation (for the purposes of discussion “Stables LLC”). The reason for this is that it is anticipated that not every lot owner will own horses using the stable or riding ring. As such, the total maintenance of the property should fall on those using it, with only “oversite” controls and maintenance coming from the Homeowners Association. Nonetheless, Stables LLC will be subject to the restrictions in the Declaration (with the exception of the affordable housing restrictions) and will be required to pay into the common maintenance fund, but will generally be obligated to



maintain its property to the standards set forth in the Declaration. Stables LLC will be given some level of a “weighted” vote in the association at a level not yet determined.

3. *Affordable Housing.* To fulfill the affordable housing obligation set forth in the Declaration (and described below) we will create the Kupersmith Housing Trust Corp. (the “Kupersmith Trust”) as a Massachusetts nonprofit corporation. All money collected pursuant to the Declaration will be deposited with the Kupersmith Trust to be disbursed for the creation of affordable housing as determined by the Kupersmith Trust Board of Directors. The Board of Directors will be controlled by a three (3) person Board, one appointed by the Oak Bluffs’ Board of Selectmen, one by the Martha’s Vineyard Commission and initially, Corey Kupersmith (or his designee), with Mr. Kupersmith (or his designee) serving for the first five (5) years, after which every third (3rd) year, the other Directors shall select a third (3rd) Director. It is proposed that the money collected by the Kupersmith Trust be used to offer various programs to enhance access to affordable housing, including “soft second loans,” grants for feasibility studies, “seed” money for affordable developments and other similar programs the Directors deem feasible and consistent with the purposes of the fund.



MECHANICS:

As noted above, we will create a “Common Scheme” through the Declaration to establish the framework within which the restrictions will be enforced. As the current fee owners of the property, Down Island and Corey Kupersmith would become the “declarant” by establishing the restrictions governing the property upon which the Project is located. (Down Island and Kupersmith hereinafter the “Declarant”)¹. The Declaration would not impact the land to be sold to the Land Bank, other than the “pass-thru” of some reserved easement rights that will be in the deed to the Land Bank.

The Declaration will provide detailed substantive standards and the administrative procedure by which restrictions are enforced, assessments are collected, common areas used and maintained and association governance determined. In addition to the usual restrictions governing aesthetics and architectural issues relating to the common areas and house lots, there are some additional restrictions that warrant additional discussion.

As noted above, to ensure that the Project will be developed in harmony with the environmental conditions imposed by the various regulatory authorities the Declaration will impose an “interim” conservation restriction that would track the substance of the actual conservation restriction to be approved eventually by the Executive Office of Environmental

¹ It is likely that the Declarant might transfer the portion of the property on which the houses will be located to a separate entity, simply for ease of conveying from one entity rather than two (2).



Affairs (“EOEA”). The Declaration would require (and reserve to the Declarant the right and obligation through the Homeowners Association) that the interim restrictions be superseded by the final conservation restriction and that the interests of all subsequent owners and mortgages be subordinated to the final conservation restriction and any amendments to it. To enforce the conservation restriction, in addition to the Homeowners Association, and independent third party acceptable to the MVC and Planning Board of Oak Bluffs would be named as the beneficiaries of the interim conservation restriction². At that time, the Homeowners Association and third party beneficiary each would have the power to enjoin or cure any violations and to assess fines and penalties and to impose liens for any outstanding payments. Ultimately, once all the Project improvements are constructed and an “as built” plan can be created the Declarant will create and obtain approval of EOEA for the permanent conservation restriction pursuant to M.G.L. c.184, §31. As with the interim conservation restriction, the permanent one would name a third party beneficiary satisfactory to the MVC and the Planning Board.

The Project also includes an affordable housing component which will create a fund and funding source from which affordable housing can be created. The Declaration will provide that for each initial house lot sold, the Declarant shall pay the Kupersmith Trust (the creation and membership described above) the amount of Ten Thousand (\$10,000.00) dollars. Further, and in

² Section 7.3.4.3 of the Oak Bluffs Zoning bylaws requires that the open space for an “Open Space Community” be preserved for recreation, conservation or otherwise through the dedication of the open space in one of the ways set forth in subsection a through c. As of the date of this memorandum we do not know which way will be acceptable to the Oak Bluffs Planning Board.

Brian Lafferty
April 5, 2004



addition to the initial donation the Declaration will provide for and require that each house lot deed will contain a restriction that will accrue the amount of Five Hundred (\$500.00) dollars per year owned, the total accrued amount to be paid to the Kupersmith Trust upon the subsequent sale. To assure that the payments are made the Declaration will provide (as will each house lot deed) that such payment shall be secured by a lien on the property³ dischargeable by a "lien release" issued by the Kupersmith Trust and Homeowners Association. It would function similar to a "6D" certificate in a condominium.

Moreover, the Declaration would provide that after fifteen (15) and every ten (10) years thereafter, the Homeowners Association will have the option of increasing the base five hundred (\$500.00) dollars accrued yearly amount, to account for inflation and/or other factors. However, no decrease will be allowed.

The affordable housing restriction is intended to be a restriction in perpetuity to provide funding for affordable housing *in futuro*. Cognizant of M.G.L. c. 184, §§ 26-30, to ensure perpetuity the Declarant will try to get the affordable housing restriction portion of the Declaration approved by the Department of Housing and Community Development ("DHCD") pursuant to M.G.L. c.184, §31. Should such DHCD approval not be forthcoming, the Declaration will provide that, at a minimum, the affordable housing restriction be rerecorded

³ The lien would be subordinate to the conservation restriction and any mortgages.

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within the statutory time period and the Declarant will provide that the Kupersmith Trust will have sufficient appurtenant land interests to allow it enforcement rights as a “dominant estate” enforcing a restriction over the “servant estate” (e.g., the Homeowners Association and individual lot owners). Other than enforcing the affordable housing restriction of the Declaration, the Kupersmith Trust will have no other enforcement role or rights regarding the Project or Homeowners Association.

Finally, since the documents contemplated herein and the associated state agency approvals will take some time to work through, I would expect that both the MVC and the Planning Board could approve the Project incorporating into the approvals, as a condition, the concepts in this memorandum leaving to either one’s attorneys the right reasonably to review and approve the actual language of the various documents as being consistent with this outline.

JGW:jg

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