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VIA ELECTRONIC MAIL  
AND FIRST CLASS MAIL

David O. Douglas, Chairman  
Town of West Tisbury  
Planning Board  
c/o  
Simone DeSorcy, Board Administrator  
P.O. Box 278  
West Tisbury, MA 02575-0278

RE: Application of Crow Hollow Realty Trust for an Endorsement  
of Approval Not Required pursuant to M.G.L. c. 41, §81P;  
Lot 7A, "Road to Great Neck", West Tisbury, Massachusetts

Dear Simone:

Through you, the Planning Board (the "Board") has sought my opinion as to (1) whether the provisions of Section 4.4-6 (Affordable Housing Requirement) ("Sec. 4.4-6") of the Town's Zoning By-Laws apply to the above-referenced land division; (2) whether the applicant is required by Sec. 4.4-6 to create any affordable housing lots within the subject subdivision; and (3) whether the creation of a Homesite Lot under Section 4.4-7 of the Town's Zoning By-Laws can satisfy the affordable housing requirement of Sec. 4.4-6 ? For the reasons discussed below, the short answer to all three of the Board's questions is yes.

#### FACTS

The subdivision in which the above referenced parcel of land is located is shown on a definitive subdivision plan entitled "Plan of Land in West Tisbury, Mass. Prepared for Crow Hollow Realty Trust, dated June 11, 1991, prepared by Schofield Brothers of Martha's Vineyard (the "Subdivision Plan"). On June 11, 1991, Crow Hollow Realty Trust (the "Applicant") filed an application with the Board for approval of the Subdivision Plan. In its application, the Applicant proposed to created a seven

lot residential development on approximately 57.4 acres of land on and off Tiah's Cove Road. Before the Board acted on the Subdivision Plan, the proposed development was referred to the Martha's Vineyard Commission ("MVC") as a Development of Regional Impact ("DRI"), as required by Chapter 831 of the Acts of 1977, as amended. On September 12, 1991, the MVC issued a decision approving the development, with conditions. Among the conditions included in the MVC's was a requirement that the Applicant comply with the Flexible Zoning provisions of the Town's Zoning By-Laws, including the Residents Homesite requirement. The Board issued a certificate of approval of the Subdivision Plan on October 1, 1991. The Board's decision included a condition incorporating the MVC's decision. No one appealed the MVC's decision or the Board's certificate of approval.

The development of the subdivision has extended over more than a five-year period and is not complete, as evidenced by the above-referenced application. Since the Subdivision Plan was approved, no moratorium on construction, the issuance of permits or utility connections has been imposed on the subdivision by any governmental body or court. On February 8, 1993, the Board endorsed a plan pursuant to M.G.L. c. 41, §81P (an "ANR Plan") which modified the lots lines of Lots 6 and 7 and renumbered these lots as Lots 6A and 7A, respectively.

The Applicant filed the above-referenced application on or about November 30, 2009 in which it proposes to divide Lot 7A into two building lots through an ANR Plan. The Board referred the application to the MVC as a modification of an approved DRI. Neither the Board nor the MVC have taken any action on the application.

#### THE LAW

##### The Zoning Act - Grandfather Protection

M.G.L. c. 40A, §6 ("§6") provides for protections or "grandfathering" for preexisting lots, uses and structures from certain zoning changes. For land shown on an approved subdivision plan, §5 of §6 provides in pertinent part that:

If a definitive plan...is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ... by-law, the land shown on such plan shall be governed

by the applicable provisions of the zoning...by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval... [S]uch period...shall be extended by a period equal to the time which a...town imposes or has imposed upon it by a state, a federal agency or a court, a moratorium on construction, the issuance of permits or utility connections.

¶5 of §6 protects the land shown on definitive subdivision plans from all subsequent changes to zoning by-laws for eight year after approval. Mullen Lumber Co. v. Board of Appeals of Marshfield, 7 Mass. App. Ct. 917 (1979).

With respect to land shown on an ANR Plan, ¶6 of §6 provides in pertinent part that:

[w]hen a plan referred to in section eighty-one P of chapter forty-one has been submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of the land shown on such plan shall be governed by applicable provisions of the zoning...by-law in effect at the time of the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal referred to in said section, and for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required, or words of similar import.

The grandfather protection afforded to land shown on ANR Plans under ¶6 of §6 differs from the protection provided by ¶5 of §6 to land shown on definitive subdivision plans in that the "freeze" period under ¶6 is shorter (3 years vs. 8 years) and the protection extends to zoning changes which affect the use of the land and not other zoning changes (e.g., intensity of use, dimensional requirements, etc.). Falcone v. Zoning Board of Appeals of Brockton, 7 Mass. App. Ct. 710, 712 (1979).

Approval of a definitive subdivision plan cannot be "piggybacked" onto an ANR Plan endorsement (or vice versa)

in order to "stack" or increase freeze period. Wolk v. Planning Board of Stoughton, 4 Mass. App. Ct. 812 (1976).

When the applicable freeze period ends, the land shown on the land division plan becomes subject to the zoning provisions then in effect and all subsequent changes.

#### The Town's Zoning By-Laws

When the application for approval of the Subdivision Plan was filed, the Town's Zoning By-Laws contained a provision for Flexible Residential Development (former Section 5.0), which included requirements for the provision of affordable housing (former Section 5.2). On May 24, 2000, Section 5.0 was replaced with Sec. 4.4-6. Section 4.4-7 was adopted on October 26, 2004.

Sec. 4.4-6 provides that: "[i]n any subdivision 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. By Special Permit, the Planning Board may exempt from this requirement lots created for the use of family members, if it finds that suitable resale restrictions are in place."

Section 4.4-7 allows the construction of residence on undersized lots, provided that (among other requirements) they are used for affordable housing purposes. In Section 14.2 of the Town's Zoning By-Laws, the term "affordable housing" is defined as: "[h]ousing units priced at a level determined by the West Tisbury Affordable Housing Committee to be appropriate for rental or purchase exclusively by persons who will make such housing their primary residence (defined as their actual year-round domicile) and whose annual household income is not more than 140% of the Dukes County median income, as established by the Dukes County Regional Housing Authority. To qualify as affordable housing, the units must be subject to permanent deed restrictions that the West Tisbury Affordable Housing Committee deems adequate to ensure that tenants and future owners will continue to meet income eligibility and residency requirements." In order to insure that a Homesite Lot is used for affordable housing purposes, such lots must comply with the following requirements (as well as other requirements not related to affordable housing) under Section 4.4-7:

"-the lot's purchase price is established by the Affordable Housing Committee;

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- the lot shall be owned or leased by an Eligible Purchaser or Eligible Lessee, as defined herein, who meets the qualification of the Affordable Housing Committee guidelines in effect at the time of filing of the necessary Special Permit application;"

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- ...the owner of the lot [must] grant... an Affordable Housing Covenant burdening said lot to the Town of West Tisbury, in the form utilized by the Town of West Tisbury at the time of filing the special permit application, and records said covenant in the Dukes County Registry of Deeds at the time the special permit is granted.

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#### B. Distribution of Homesite Lots:

1. Homesite Lots created by the Town shall be awarded by lottery, limited to Eligible Purchasers or Eligible Lessees as defined herein. Such lottery shall be held at a public meeting of the Board of Selectmen.

2. Homesite Lots created by a property owner shall be limited to Eligible Purchasers or Eligible Lessees as defined herein. Selection of the Eligible Purchaser or Eligible Lessees shall, at the option of the property owner, be made by the property owner or by lottery to be held at a public meeting of the Board of Selectmen.

3. Homesite Lots may be sold or donated to a non-profit organization, which organization may hold the lot for resale or lease without profit. Any such sale or lease may only be made to an Eligible Purchaser or Eligible Lessee selected by lottery to be held at a public meeting of the Board of Selectmen.

#### C. Initial Conditions for Homesite Lots:

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2. Cost of a Homesite Lot: The maximum purchase price or lease amount of Homesite Lots (improved or unimproved) shall be established annually by the Affordable Housing Committee and set

forth in the Affordable Housing Committee Implementation Guidelines.

3. Recipient of a Homesite Lot: a Homesite Lot may only be created for a recipient who is an Eligible Purchaser or Eligible Lessees qualified under the Affordable Housing Committee Implementation Guidelines.

4. Special Permit from Zoning Board of Appeals: The ZBA may approve a Special Permit for a substandard lot to be buildable as a Homesite Lot provided that the following standards and criteria are met:

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e. The proposed Homesite Lot is available for purchase or lease only to an Eligible Purchaser or Eligible Lessee as defined herein, and approved by the Affordable Housing Committee. Such eligibility shall be certified in writing by the Affordable Housing Committee;

f. The proposed Homesite Lot shall be subject to terms and limitations in accordance with the perpetual Affordable Housing Covenant approved by the Affordable Housing Committee in effect at the time of award of the Homesite Lot;

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#### D. Use, Resale and Transfer of Homesite Lots;

The use, resale and transfer of each Homesite Lot created pursuant to this section of the bylaws shall be governed by the Affordable Housing Covenant recorded at the time the special permit is granted, and the West Tisbury Affordable Housing Committee Guidelines in effect and as revised from time to time at the discretion of said Committee. The Covenant and the Guidelines shall be enforceable by the Town of West Tisbury, or its designee, and shall limit, in part, the following:

1. The initial cost of the land;
2. The time within which to secure a building permit;
3. The use of the property to one dwelling, which shall be the owner's/lessee's primary residence;
4. The maximum allowable rental time per year;
5. The rental guidelines and exceptions, if any;
6. The resale value to an affordable formula; and

7. The resale or transfer to Eligible Purchasers/Lesseees and heirs, or family members for whom the property is their primary residence as further defined in the Affordable Housing Covenant."

### DISCUSSION

The provisions of former Section 5.0 of Town of Zoning By-Laws were in effect when the Applicant filed its application for approval of the Subdivision Plan. By operation of §6, ¶5, the land comprising the subdivision remained subject to Section 5.0 until October, 1999, when the freeze period ended. The Board's endorsement of the ANR Plan relative to former Lots 6 and 7, did not extend the 8-year freeze period. Nor was this freeze period extended by any appeals, litigation or moratoria. The condition in the MVC's decision requiring compliance with the Flexible Housing provisions of the Town's Zoning By-Laws does not operate to freeze the provisions of former Section 5.0.

Without any zoning freeze in effect on May 24, 2000, when Sec. 4.4-6 was adopted, Sec. 4.4-6 became applicable to the land in the subdivision at that time. Sec. 4.4-6 is fully applicable to Lot 7A. The fact that the proposed division of Lot 7A is by an ANR Plan is of no legal consequence. The land comprising Lot 7A is part of the subject subdivision. Likewise, it is no legal consequence that Lots 1 and 2 on the Subdivision Plan, which abut Tiah's Cove Road, a public way, could have been created through an ANR Plan. Land divisions involving lots on public ways which are not within the definition of a "subdivision" include only those land divisions where all of the lots within the tract divided have legal frontage on public way. See M.G.L. c. 41, §81L. Since all of the lots shown on the Subdivision Plan do not have such frontage, all seven lots are subdivision lots.

The proposed division of Lot 7A into two building lots will result in a subdivision containing 8 lots developed over a much longer period than five years. Applying Sec. 4.4-6 to this development, two (20% of 8; 1.6 rounded up) affordable housing lots must be provided.

The provisions of Section 4.4-7 contain numerous provisions that require Homesite Lots to be used for affordable housing purposes. The requirements for restrictions on purchase prices established by the West Tisbury Affordable Housing Committee and the imposition permanent restrictive covenants on the lots insure that the lots will be used for "affordable housing" purposes within the meaning of the Town's Zoning By-Laws.

Clearly, Homesite Lots created under Section 4.4-7 qualify as "affordable housing" lots which meet the affordable housing requirements of Sec. 4.4.-6.

SUMMARY AND CONCLUSION

For all of the foregoing reasons, it is my opinion that (1) the provisions of Sec. 4.4-6 apply to the Applicant's proposed division of Lot 7A; (2) under Sec. 4.4-6, a least two of the lots in the subject subdivision must qualify as affordable housing lots within the meaning of the Town's Zoning By-Law upon the creation of the eighth lot; and (3) Homesite Lot(s) created under Section 4.4-7 qualify as affordable housing lots which can be used to meet the affordable housing requirement of Sec. 4.4-6.

If you or the Board have any questions about this matter, I will be available to discuss them at the Board's convenience.

Very truly yours,

MARK J. LANZA

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MJL/ms