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February 15, 2018

Mr. Ewell Hopkins, Chair  
Oak Bluffs Planning Board  
Oak Bluffs Town Hall

**Hand Deliver**

Re: **Lagoon Ridge Subdivision Plan Form C Filing and Special Permit**

Dear Mr. Hopkins,

I am responding to the email to you of February 7, 2018 from Michael Goldsmith, Planning Board Counsel, which you read at the close of the public hearing on the Lagoon Ridge Definitive Plan on February 8, 2018. Mr. Goldsmith addressed questions you raised with respect to Section 7.3 of the Oak Bluffs Zoning Bylaw concerning Flexible Development.

It appears that Town Counsel misapprehends the Lagoon Ridge proposal concerning open space or has not been apprised of all of the relevant facts of the proposal. Many aspects of the Form B plan presented in 2014 and approved by the MVC in 2014 were the result of review by the Natural Heritage and Endangered Species division of Massachusetts Fish and Wildlife ("NHESP"). NHESP required 60% open space.

The Lagoon Ridge plan is designed to provide restricted open space in two manners. One is through the parcels of common land, primarily between Cluster A and C. The homeowner's association will own this land once it is established. The other area of restricted open space is provided by the areas around the development envelopes on the four lots in Cluster A and the four lots in Cluster B. These areas are restricted under the provisions of the common scheme Declaration of Covenants for the Lagoon Ridge subdivision (the "Subdivision Covenants").

NHESP has accepted and approved this arrangement for protecting open space and the environmental and ecological interests which it regulates. It has reviewed and approved the Form B Plan approved by the MVC in 2014 and the Definitive Plan approved by the MVC in 2016 and now before you. NHESP approval calls for a Declaration of Restrictions on the common land. The MVC approval in 2016 is consistent with this arrangement.

It is important to note that part of NHESP review of Lagoon Ridge included the proposed Subdivision Covenants and the necessary infrastructure, such as the shared septic system and the Water Company Right of Way. The NHESP approval in 2014 references the Form B Plan

prepared by Kristen Reimann and the Fitzgerald “Grading and Utility Plan.” NHESP approval allowed for these activities within the open space.

The Lagoon Ridge open space will provide *public access for recreation purposes* with the walking trails provided by the Bar Trail Road, Jib Stay Trail, the trail to be established along Double Ox Road, and the Water Company Right of Way to be established between the end of Double Ox Road and the end of Sage’s Way. These are provided for in the MVC Decision and the Subdivision Covenants. We believe that this open space also advances the other open space interests enumerated in Section 7.3.1.1 and .2 in that it will result in “the preservation of open land” and will “protect this natural environment,” among other things.

The restricted areas surrounding the development envelopes on the lots in Cluster A and Cluster B comprise 8.76 acres. These areas are regulated in the Subdivision Covenants at Section III.1.(5). As to the NHESP Declaration of Restrictions, they can also restrict and regulate the open space areas around the development envelopes. I have spoken with Jesse Leddick, the Endangered Species Review Biologist at NHESP, and he is in agreement that these areas around the development envelopes can be included in the Declaration of Restriction.

Accordingly, we believe that these areas in Clusters A and B provide “contiguous open space” under Section 7.3. Such contiguity is confirmed by the attached 2014 Form B plan showing the development envelopes in relation to the open space.

For your additional information, I enclose a copy of Mr. Leddick’s email to the MVC dated February 11, 2016 during the MVC review of the Definitive Plan confirming NHESP approval of the Definitive Plan.

I also note that Mr. Leddick confirmed to me that the habitat maps of NHESP have been revised since their approval in 2014 and the Lagoon Ridge area is no longer part of their priority habitat. Because no work has commenced on the property since 2014, the applicant is entitled to remove the property from NHESP review. However, if the Lagoon Ridge Plan is approved, the applicant will proceed to develop the property consistent with the terms of the Definitive Plan application, the MVC approval and the NHESP approval.

It is important to note two issues concerning these restricted areas in Clusters A and B to clarify Town Counsel’s comments regarding “required yards” as provided in Section 7.3.2.4. First, the setback in these lots in Clusters A and B as provided for in the Subdivision Covenants and consistent with Section 7.3.6 (“encouraging” modifications to lot requirements in Flexible Developments) is twenty-five (25) feet. The square foot areas of the development envelopes are defined on the Definitive Plan and limited to that area. The development envelopes are less than the area that would be allowed if development could occur on any portion of a lot up to the zoning setback lines. Therefore, there are obviously portions of these lots that could otherwise be developed between the development envelope and to the setback lines, but cannot, because of the Subdivision Covenants. NHESP and the MVC have approved this arrangement. These portions of the lots qualify as restricted open space.

Second, whatever the setback is under ordinary zoning, there are many activities that a lot owner can do within the line of the setback and the lot line. It is primarily buildings and structures that are restricted in conventional zoning within a setback area. One can otherwise clear-cut, landscape, pave, erect fences, maintain decks under 30 inches in height, park vehicles, and so forth. These activities are prohibited outside of the development envelopes under the Subdivision Covenants.

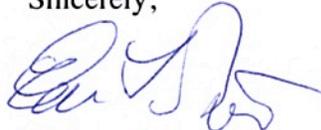
For these reasons, we do not believe that the assertion of “double-counting” the open space in the restricted areas of these lots is appropriate or correct.

Regarding Section 7.3.14 “Ownership of Contiguous Open Space,” the NHESP permit provides for the recording of a Declaration of Restriction running to NHESP and the MVC decision at Section 8 concerning “Habitat” follows this arrangement. A draft copy of the form used by NHESP is enclosed.

This Declaration of Restriction conforms to the requirements of Section 7.3.14.4. The common property will be retained by the Applicant and transferred to the Homeowners Association once it is created. This satisfies the requirements of Section 7.3.14.3.

For the above reasons we believe that the Definitive Plan and Special Permit application conforms to the open space requirements of Section 7.3 and the applicant is entitled to the appropriate bonuses under Section 7.3.8.

Sincerely,

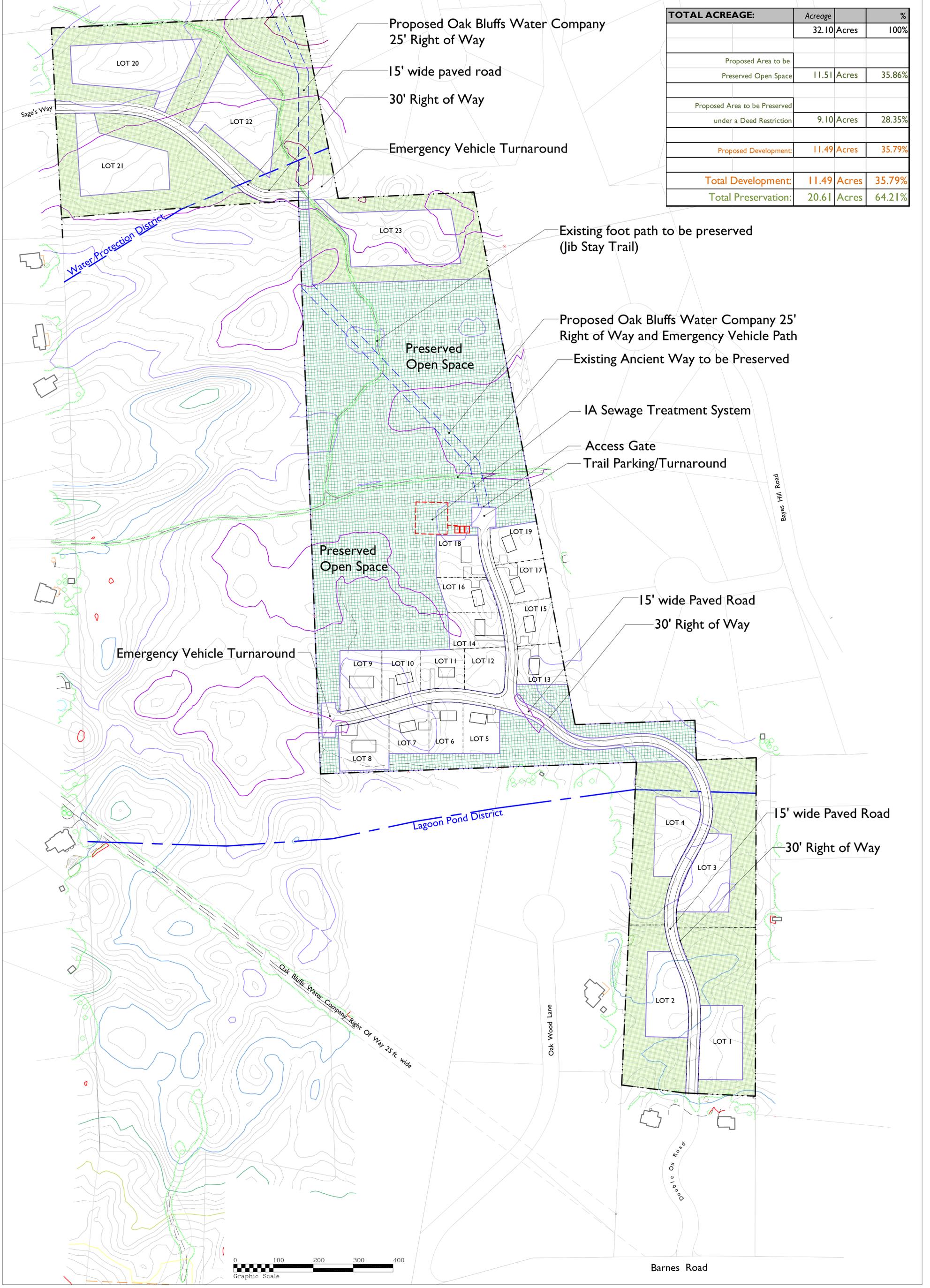


Eric L. Peters

Enclosures

cc: Michael Goldsmith, Esq. (by email)  
Davio Danielson, Manager, Lagoon Ridge LLC (by email)

TOTAL ACREAGE:	Acreage	%
	32.10 Acres	100%
Proposed Area to be Preserved Open Space	11.51 Acres	35.86%
Proposed Area to be Preserved under a Deed Restriction	9.10 Acres	28.35%
Proposed Development:	11.49 Acres	35.79%
<b>Total Development:</b>	<b>11.49 Acres</b>	<b>35.79%</b>
<b>Total Preservation:</b>	<b>20.61 Acres</b>	<b>64.21%</b>



**KRISTEN REIMANN**  
Landscape Architect

P.O. BOX 2091  
VINEYARD HAVEN  
MA, 02568  
508.696.4590  
kbr@kristenreimann.com

Civil Engineer  
Robert M. Fitzgerald, P.E.  
166 Mayflower Terrace  
South Yarmouth, MA 02664  
508.776.7556  
fitzgeraldcape@comcast.net

Project number: 201110  
Drawn by: IEW  
Checked by: KBR  
Scale: 1" = 100'-0"  
Date: 03.26.14

Revisions:  
For Review: 05.07.14

**LAGOON RIDGE**  
Oak Bluffs, Massachusetts

**SITE PLAN**

**From:** Leddick, Jesse (FWE) (FWE) <Jesse.Leddick@MassMail.State.MA.US>

**To:** Paul Foley <foley@mvcommission.org>

**Cc:** Eric Peters <ericlpetersesq@aol.com>; Davio Danielson <ddanielson40@gmail.com>; Holt, Emily (FWE) (FWE) <emily.holt@state.ma.us>

**Subject:** RE: NHESP 10-28567, Lagoon Ridge

**Date:** Thu, Feb 11, 2016 9:02 am

**Attachments:** Oak Bluffs\_10-28567\_reissue.pdf (1126K)

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Paul,

The Applicant (Davio Danielson) submitted updated site plans for the Lagoon Ridge Subdivision - entitled "Plan of Land in Oak Bluffs, Massachusetts" (dated August 26, 2015; prepared by Gregory Marcella, P.L.S.; the "Definite Plans") - to the Division in compliance with the Massachusetts Endangered Species Act (M.G.L. c.131A) and its implementing regulations (321 CMR 10.00) (MESA).

The Division finds that the minor updates to the site plans reflected in the Definite Plans referenced above do not change our previous determination that this project will not result in a prohibited "take" of state-listed rare species (321 CMR 10.18(2)(a)) and that the previous determination (dated June 3, 2014, attached) stands, provided that the Applicant adheres to the conditions outlined therein. Don't hesitate to contact me with any questions or comments.

Best regards,

.... Jesse

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Jesse Leddick  
Natural Heritage & Endangered Species Program  
Massachusetts Division of Fisheries & Wildlife  
1 Rabbit Hill Road, Westborough, MA, 01581  
Phone: 508-389-6386 | Fax: 508-389-7890  
[www.mass.gov/masswildlife](http://www.mass.gov/masswildlife)

-----Original Message-----

**From:** Davio Danielson [<mailto:ddanielson40@gmail.com>]

**Sent:** Saturday, February 06, 2016 11:05 AM

**To:** Leddick, Jesse (FWE)

**Cc:** Paul Foley; Eric Peters

**Subject:** NHESP 10-28567

**To:** Jesse Leddick  
Division of Fisheries and Wildlife, NHESP  
**Date:** February 5, 2016

**Topic:** Lagoon Ridge Subdivision, NHESP File No. 10-28567

Jesse, thanks for sending me a copy of the June 3, 2014 letter concerning Lagoon Ridge to the Martha's

Vineyard Commission. As required, it will be recorded at the Dukes County Registry of Deeds along with the Definitive Plan prior to the start of work on the Lagoon Ridge subdivision. Our Definitive Plan is now under MVC review, and they require a "sign-off of final Plan from the Natural Heritage and Endangered Species Program (NHESP)...". I've attached the Definitive Plan to this email for your review. [We are also still using the "Lagoon Ridge Grading and Utility Plan" (dated May 11, 2014; prepared by Robert M. Fitzgerald) that you referenced in your letter.]

Your review was based on Kristen Reimann's March 26, 2014 Lagoon Ridge site plan. The Definitive Plan by Gregory Marcella is an engineered plan for filing with the Dukes County Registry of Deeds that looks different but is virtually identical to Kristen's Plan. The layout of roads, lots and greenspace is the same and it still preserves over 60% of the acreage in its wild state. The central area still contains 9.1 acres of contiguous woods for which we are seeking a Conservation Restriction from the Town of Oak Bluffs. We will complete and sign a formal CR within a year as allowed in the letter from the Division of Fisheries and Wildlife.

Even though our area of Oak Bluffs was "unmapped" by the NHESP as priority habitat, strong provisions in the covenants to preserve habitat for and promote survival of rare moths were retained. These include rules for exterior lighting to preserve "dark skies", no streetlights, protection of pitch pines, and symbolic fencing to set the limit of work on all lots. I've attached the Covenants for your review. Perhaps they should be added to the Lagoon Edge files as well.

Jesse, if you are able to sign-off based on this information please send an email to Paul Foley with a copy to me ([ddanielson40@gmail.com](mailto:ddanielson40@gmail.com)). That should be enough for now. If you need more information I'll get it to you promptly or gladly make a trip to your offices to answer any remaining questions.

Once Paul has a response from you and a few open issues are settled the Definitive Plan will probably be approved by the MVC and the Oak Bluffs Planning Board. At that point our attorney will record the documents including the letter from Thomas W. French and then, as required, "provide proof to the Division of appropriate recordation within twelve (12) months of the start of Work."

Many thanks,

/s/

Davio Danielson

[ddanielson40@gmail.com](mailto:ddanielson40@gmail.com)

413-320-2395

Please make your changes using the "Track Changes" function by going to Tool/Track Changes).

## DECLARATION OF RESTRICTION

THIS DECLARATION OF RESTRICTION (hereinafter the "Declaration") is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ [owner of land], \_\_\_\_\_ [address of record for owner] (hereinafter the "Declarant").

### WITNESSETH

**WHEREAS**, Declarant is the owner of that certain parcel [or subdivision] of land known as \_\_\_\_\_ [name of parcel and subdivision] located in the Town of \_\_\_\_\_ [Town], \_\_\_\_\_ [County], Massachusetts (hereinafter the "Property"), shown on \_\_\_\_\_ [Title of recordable plan] dated \_\_\_\_\_ [date and last revision date of plan], prepared by \_\_\_\_\_ [Surveyor or engineering firm], and recorded in the \_\_\_\_\_ [County] County District Registry of Deeds at Plan Book \_\_\_\_\_ as Plan \_\_\_\_\_ (the "Plan"); and

**WHEREAS**, the Property contains important habitat, breeding sites, and migration routes for wildlife including the [insert species name] (*scientific name*), which at the time of this recording is listed as [insert status] pursuant to the Massachusetts Endangered Species Act (MESA) (G.L. c. 131A:3 and 321 CMR 10.23); and

**WHEREAS**, Declarant desires to protect a significant contiguous area of this rare species habitat as an integral part of the development of the Property; and

**WHEREAS**, the Property is subject to the terms and provisions of MA Endangered Species Act [G.L. c. 131A]; and

**WHEREAS**, Declarant desires and agrees that the \_\_\_\_\_ [legally describe portion of land to be protected, eg, "back portions of each of Lots 1-96, inclusive, shown on said Plan as "Open Space"], which Open Space in total contain approximately \_\_\_\_\_ [acreage of restriction] acres as shown on said Plan, shall be maintained in perpetuity as habitat and open space, subject to the Prohibited Acts and Uses and Reserved Rights set forth below;

**NOW, THEREFORE**, Declarant hereby voluntarily declares and imposes **in perpetuity** upon the Open Space the following covenants, conditions and restrictions for the benefit of Declarant, the Town of \_\_\_\_\_ [Town] [hereinafter the "Town"], and the Commonwealth of Massachusetts Division of Fisheries and Wildlife [hereinafter the "Division"], and said Property shall be held, transferred, sold, conveyed, occupied and used subject to the covenants, conditions, and restrictions hereinafter set forth.

1. **Prohibited Acts and Uses.** Subject to the exceptions set forth in Section 2 below, the following acts and uses are prohibited in the Open Space:
  - A. Construction or placing of any building, tennis court, landing strip, mobile home, swimming pool, fences, asphalt or concrete pavement, sign, billboard or other advertising display, antenna, tower, or other temporary or permanent structure or facility in, on, above or below said Open Space.

- B. Mining, excavating, dredging or removing soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit.
- C. Placing, filling, storing or dumping of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste or other substance of material whatsoever or the installation of underground storage tanks.
- D. Cutting, removing or otherwise destroying trees, grasses or other vegetation or disturbance of shrubs, ground, forest floor or leaf litter.
- E. The use of motorized vehicles of any kind, except as required by the police, fire department or any other governmental agents in carrying out their lawful duties.
- F. The further subdivision of the Open Space.
- G. Activities substantially detrimental to drainage, flood control, water conservation, erosion control or soil conservation.
- H. Any other use of or activity on the Open Space which would materially impair significant conservation interests thereon unless necessary for the protection of the conservation interest that are the subject of this restrictive covenant.

2. **Reserved Rights.** Notwithstanding any provisions herein to the contrary, Declarant reserves to itself and its successors and assigns the right to:

- A. establish, enforce, waive, alter and amend such additional rules, regulations, covenants, conditions and restrictions governing use of the Open Space as are not otherwise prohibited by this Declaration of Restriction as agreed to in writing by the Division and allowed by applicable federal, state or local law or regulation, and
- B. conduct or permit the following activities in the Open Space if such acts do not materially impair significant conservation interests:
  - 1) Selective cutting or pruning of trees and vegetation to maintain access to and over existing footpaths located thereon and for protection of persons and property from imminent risks of harm or damage to persons and structures.
  - 2) Construct fences or necessary boundary markers on the Open Space upon written consent by the Division, such consent not to be unreasonably withheld.
  - 3) Habitat management activities, including forestry, may be permissible with prior written approval from the Natural Heritage and Endangered Species Program of the Division of Fisheries and Wildlife (the "Division"), its successors and assigns;

3. **Monuments and Signage.** The Declarant and the Declarant's Successors shall maintain in good condition any, bounds, monuments, markers and signs shown on the Plan, demarcating the boundaries of the Open Space, and shall repair and or replace said monuments and signage on an as needed basis.
4. **Term - Binding Effect In Perpetuity.** This Declaration of Restriction and its provisions herein set forth shall run with the Open Space as shown on said Plan **in perpetuity** from the date of recordation in the \_\_\_\_ [County] District Registry of Deeds and shall be binding upon Declarant, Declarant's successors and assigns, and any other party having an ownership interest in said Open Space or claiming to have an interest with respect to said Open Space as tenants, invitees, licenses or otherwise, and all of the respective heirs, successors, grantees, mortgages, assigns, agents, contractors, subcontractors and employees of the foregoing.

This Declaration of Restriction is hereby intended and declared to be in perpetuity and no re-recordation of this Declaration of Restriction under G.L. c. 184, ss. 23-30 or any other law shall ever be necessary in order to maintain the full legal effect and authority hereof and Declarant and its successors and assigns, including but not limited to all subsequent owners of the Open Space, hereby waive all their legal right to and shall forego any action in law or equity of any kind whatsoever attempting to contest the validity of any provision of this Declaration of Restriction and shall not, in any enforcement action, raise the invalidity of any provision of this Declaration of Restriction.

Notwithstanding anything inconsistent or to the contrary set forth above, the Town and the Division are hereby authorized, jointly and severally, to record and file any notices and/or instruments that the Town and/or the Division deem appropriate to assure the legal validity and enforceability in perpetuity of this Declaration of Restriction and the Declarant, on behalf of itself and its successors and assigns, hereby appoints the Town and the Division as its and their attorney-in-fact to jointly or severally execute, acknowledge, deliver and record any such notice or instrument on its and/or their behalf. Without limiting the forgoing, the Declarant and its successors and assigns agree to execute any such notices and instruments upon request of the Town or the Division.

5. **Enforceability.** The Town and the Division, jointly and severally, shall have the authority and right to enforce this Declaration of Restriction and are a benefitted parties.

The Town and the Division, jointly and severally, shall have the right to enter the Open Space, in a reasonable manner and at reasonable times, for the purposes of (i) inspecting the Open Space to determine compliance with this Declaration of Restriction; (ii) enforcing this Declaration of Restriction; and (iii) taking any other action which may be necessary or appropriate.

The Town and the Division, jointly and severally, shall have the right to bring proceedings at law or equity against any party or parties violating or attempting to violate the terms of this Declaration of Restriction to enjoin them from so doing and to cause any such violation to be remedied, including but not limited to restoration of the portion of the Open Space adversely affected, after providing written notice to such

party or parties and all mortgagees of record if the names and addresses of such parties and mortgagees have been provided in writing to the Town and the Division.

6. **Severability.** If any court or other tribunal of competent jurisdiction determines that any provision of this Declaration of Restriction is invalid or unenforceable, such provision shall be deemed to have been modified automatically to conform to the requirements for validity and enforceability as determined by such court or tribunal. In the event the provision invalidated is of such a nature that it cannot be so modified, the provision shall be deemed deleted from this instrument as though it had never been included herein. In either case, the remaining provisions of this instrument shall remain in full force and effect.
7. **Non-Waiver.** Any election by the Town and/or the Division as to the manner and timing of its right to enforce this Declaration of Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.
8. **Access.** This Declaration of Restriction does not grant to the Town, the Division, the general public, or to any other person or entity any right to enter upon the Property except the right of the Town and the Division to enter the Property at reasonable times and in a reasonable manner for the purpose of inspecting the same to determine compliance herewith and enforcing this Declaration of Restriction as set forth in Section 5 above.
9. **Incorporation Into Deeds, Mortgages, Leases and Instruments of Transfer.** Declarant and Declarant's successors and assigns, including all subsequent owners of the Open Space or portions thereof, shall incorporate this Declaration of Restriction, in full or by reference, into all deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer by which an interest in and/or a right to use the Open Space or any portion thereof is conveyed. Any such deed, mortgage or other interest purporting to convey any portion of the Open Space without including this Declaration of Restriction in full or by reference shall be deemed and taken to include said Declaration of Restriction in full even though said Declaration of Restriction is not expressly described or referenced therein.
10. **Recordation/Registration.** Declarant shall record and/or register this Declaration of Restriction with the appropriate Registry of Deeds and/or Land Registration Office upon the later of (i) thirty (30) days of its date of execution or (ii) the conveyance of the first Lot located on the Plan to a *bona fide* purchaser.
11. **Amendment and Release.** No amendment or release of this Declaration of Restriction shall be effective unless it has been approved in writing by the Division [hereinafter the Division Approval] and said amendment or release and the requisite Division Approval has been recorded with the appropriate Registry of Deeds and/or Land Registration Office.

IN WITNESS WHEREOF, \_\_\_\_\_[name of signatory, owner of land], has caused these presents to be signed, acknowledged and delivered in its name and behalf this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

By: \_\_\_\_\_

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss. \_\_\_\_\_, 20\_\_

On this day before me, the undersigned notary public, personally appeared( name), proved to me through satisfactory evidence of identification, which was  photographic identification with signature issued by a federal or state governmental agency,  oath or affirmation of a credible witness,  personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public

SEAL

My Commission Expires:\_\_\_\_\_