

9/25/06 - 13

AGREEMENT

THIS AGREEMENT is made this 12th day of September, 2006, by, between and among **YIN PEET** and **CREIGHTON PEET** of 157 School Street, Wayland, MA (hereinafter referred to as the "Peets"), on behalf of themselves, and their affiliates, heirs, administrators, beneficiaries, successors and assigns, and the **TOWN OF ACTON**, a municipal corporation, having its principal office at Town Hall, 472 Main Street, Acton MA 01720, acting by and through its Board of Selectmen (hereinafter referred to as the "Town").

WHEREAS by Deed dated October 31, 2003, recorded in the Middlesex South Registry of Deeds as instrument number 189 on December 12, 2003, the Peets own the real property located at and known as Quarry Road Rear, Acton, MA, which is shown as Parcel 11 on Assessors' Map C-5 ("Parcel 11"), and also a strip of land which is shown as Parcel 17 on Assessors' Map C-5 ("Parcel 17").

WHEREAS by Order of Taking dated December 29, 1975, and recorded on January 6, 1976 in the Middlesex South Registry of Deeds at Book 12918, Page 397, and by Deed recorded therein at Book 12940, Page 132, the Town owns the real property located at and known as 70 Quarry Road, Acton, MA, which is shown as Parcel 3 on Assessors' Map C-5 ("Parcel 3").

WHEREAS by Deed recorded in the Middlesex South Registry of Deeds at Book 43751, Page 66, the Town also owns the real property located at 22 Alexander Way and known as Open Space A of the North Acton Woods PCRC, Acton, MA, which is shown as Parcel 24 on Assessors' Map C-5 ("Parcel 24").

WHEREAS the Town has under agreement the right to acquire the real property located at and known as the Magee Property, Quarry Road, Acton, MA, which is shown as Parcel 25 on Assessors' Map C-5 ("Parcel 25").

WHEREAS the Peets propose to develop a Planned Conservation Residential Community ("PCRC") on Parcel 11 pursuant to G.L. c. 40A, § 9, and Section 9 of the Acton Zoning Bylaw (the "Quarry Woods PCRC").

WHEREAS Parcel 11 has no frontage on a public way.

WHEREAS the Peets propose to access Parcel 11 from Quarry Road over a private drive to be constructed on Parcel 26 (the Valente property), Parcel 17 (the Peets' strip), and Parcel 24 (Town property) on Assessors' Map C-5.

WHEREAS by instrument dated March 6, 2006, recorded in the Middlesex South Registry of Deeds at Book 47181, Page 290, the Peets have secured a Private Way and Maintenance Agreement with the current owners of Parcel 26, providing a right of access utilities and drainage between Quarry Road and Parcel 17.

WHEREAS the Peets claim to hold an access easement extending over Parcel 24 in one or more branches from Parcel 17 to Parcel 11 (the “Peets’ Access Easement”).

WHEREAS for purposes of and on the terms set forth in this Agreement only, the Town does not dispute the existence of the Peets’ Access Easement over Parcel 24; provided however that the Town insists on the relocation of the easement under *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87 (2004).

WHEREAS the Peets acknowledge that the Town is entitled to relocate the Peets’ Access Easement in the terms set forth herein and that (a) the terms of the Peets’ Access Easement do not expressly prohibit such relocation, and (b) the change in location will not significantly (i) lessen the utility of the easement, (ii) increase the burdens on the Peets’ use and enjoyment of the easement or (iii) frustrate the purpose for which the easement was created.

WHEREAS a substantial portion of Parcel 11 was formerly used as a quarry, and Parcel 11 has an extensive deep water quarry pond located on the property (the “Quarry Pond”).

WHEREAS Parcel 11 is situated across Quarry Road from the Town’s North Acton Recreation Area (“NARA”), a unique and valuable Town recreation area used by thousands of Town citizens, residents and visitors each year for various forms of outdoor recreation including aquatic activities.

NOW THEREFORE, for one dollar and other adequate consideration the receipt and sufficiency of which are hereby acknowledged, the Peets and the Town agree as follows:

I. RELOCATION OF THE PEETS’ ACCESS AND UTILITY EASEMENT OVER PARCEL 24

The Town and the Peets agree that:

- The Peets’ Access Easement over Parcel 24 shall be relocated and limited to the 20’ wide strip extending from Parcel 17 to Parcel 11 and labeled “Peet Easement Area” as shown on the sketch plan attached hereto as Exhibit A.
- Within 30 days after the expiration of any statutory appeal period following the final approval of the Quarry Woods PCRC, the Peets shall cause to be prepared a recordable plan, acceptable to the Town Manager and Town Engineer, depicting the relocated Peet Easement Area consistent with the previous bullet (the “Relocated Easement Plan”).
- Within 30 days thereafter, the Peets shall record the Relocated Easement Plan along with a mutually acceptable document entitled “Relocated Access and Utility Easement” describing the scope of the Peets’ non-exclusive, relocated access and utility easement

over Parcel 24 (including the right to construct, operate, install, maintain, pass and repossess over, across, under and along the relocated Peet Easement Area by all means and for all purposes for which public ways are used in the Town of Acton), and reserving to the Town and its successors and assigns all rights of the fee owner of Parcel 24 not inconsistent therewith (including without limitation the right to construct, operate, install, maintain, pass and repossess over, across, under and along the relocated Peet Easement Area by all means and for all purposes for which public ways are used in the Town of Acton).

- The Town shall be responsible for and agrees to pay or to reimburse the Peets for paying all recording fees associated with the recording and/or registration of the Relocated Access and Utility Easement and the Relocated Easement Plan.

II. ACCESS AND UTILITY EASEMENT TO TOWN OVER PARCEL 17

At the same time that the Relocated Access and Utility Easement and the Relocated Easement Plan are recorded (or at the Town's option at a later time to be designated by the Town by written notice to the Peets tendered on or before December 31, 2008, or at such further time as the parties may agree), the Peets shall convey to the Town and its successors and assigns, a non-exclusive Access and Utility Easement over, across, under and along Parcel 17, from property currently owned by the Town to property now owned or hereafter acquired by the Town, the scope of which shall include the right to construct, operate, install, maintain, pass and repossess over, across, under and along Parcel 17 by all means and for all purposes for which public ways are used in the Town of Acton (the "Town's Access and Utility Easement over Parcel 17").

The Peets agree that they shall execute and deliver to the Town, upon written request, a recordable instrument setting forth the Town's Access and Utility Easement over Parcel 17, and reserving to the Peets and their successors and assigns all rights of the fee owner of Parcel 17 not inconsistent therewith.

The Town shall be responsible for and agrees to pay or to reimburse the Peets for paying all recording fees associated with the recording and/or registration of the Town's Access and Utility Easement over Parcel 17.

III. WATER RIGHTS AND EASEMENT TO BE CONVEYED BY PEETS TO TOWN

At the same time that the Relocated Access and Utility Easement and the Relocated Easement Plan are recorded (or at the Town's option at a later time to be designated by the Town by written notice to the Peets tendered on or before December 31, 2008, or at such further time as the parties may agree), the Peets shall convey to the Town and its successors and assigns a Water Rights, Access and Utility Easement over, across, under and along (a) Parcel 11, (b) the relocated Peet Easement Area over Parcel 24, (c) Parcel 17, and (d) to the extent permitted by law the Easement Area covered by the Private Way and Maintenance Agreement referenced above over Parcel 26 (the "Water Rights, Access and Utility Easement").

The Water Rights, Access and Utility Easement shall (a) authorize the Town to withdraw water from Quarry Pond in accordance with a water withdrawal procedure designed, based on a pump test performed by the Town, with the goal that the Town not draw down the water level in Quarry Pond to a level more than one foot lower than the historic natural low water level of Quarry Pond or such other level as the Town and the Owners may agree based on the results of the pump test, (b) include all necessary easements for access, utilities and water distribution purposes relating thereto, extending from Quarry Pond on Parcel 11 to the public way known as Quarry Road. Said easement shall be for the benefit of property now owned or hereafter acquired by the Town including without limitation the Town's North Acton Recreation Area.

The Water Rights, Access and Utility Easement shall be memorialized in a mutually acceptable recordable instrument entitled "Town of Acton Water Rights, Access and Utility Easement." To promote expeditious, cooperative, and coordinated installation of utilities under the Town's Water Rights, Access and Utility Easement and the Quarry Woods PCRC, the Town's easement shall provide, without limitation, as follows:

- The Town's right to install subsurface water utilities under the easement shall lapse on the later of (a) six (6) months after the expiration of the appeal period for the Quarry Woods PCRC special permit (provided that the Peets shall have obtained a building permit for the Quarry Woods PCRC during that period; or (b) six (6) months after the issuance of a building permit for the Quarry Woods PCRC (if the Peets have not obtained a building permit for the Quarry Woods PCRC during the period specified in clause (a)); or (c) such further time as the parties hereto may agree in writing; provided, however, that in no case shall the Town's right to install subsurface water utilities within the easement lapse before the date that is two months after the conclusion on the first Annual or Special Town Meeting held after the execution of this Agreement, and provided further that any lapse of the Town's right to install subsurface water utilities under the easement shall not abrogate or diminish any other rights of the Town under the easement.
- If and to the extent the Town excavates a trench to install its subsurface utilities within its easement, the Town shall (a) provide advance notice to the Peets of the Town's intention to do so, and (b) allow the Peets to place their utilities in same trench while the excavation is open provided that such installation by the Peets shall conform to generally accepted engineering standards for installation and separation of subsurface utilities and shall not interfere with the Town's installation.

The Town shall be responsible for and agrees to pay or to reimburse the Peets for paying all recording fees associated with the recording and/or registration of the Town of Acton Water Rights, Access and Utility Easement.

IV. **TOWN MEETING**

The Board of Selectmen agrees to place any Warrant Articles required to accomplish the purposes of this Agreement on the warrant for the next available Annual or Special Town Meeting (the "Town Meeting"), to see if the Town will vote to pass the measures set forth in this Agreement, or take any other action relative thereto.

V. **ACCESS AND INFORMATION**

The Town agrees that, effective on the final approval of the Quarry Woods PCRC, the Town shall provide the Peets and their authorized agents, employees, contractors and representatives full and complete access to the relocated Peet Easement Area on Parcel 24, at reasonable times and on reasonable notice, for the purposes of performing tests, measurements and inspections necessary to design and construct the driveway and utilities for the Quarry Woods PCRC.

The Peets agree that, effective on the execution of this Agreement, they shall:

- Provide the Town and its authorized agents, employees, contractors and representatives full and complete access to Parcel 11, Parcel 17, and Quarry Pond, at reasonable times and on reasonable notice, for the purposes of performing tests, measurements and inspections including but not limited to pump tests of the Quarry Pond, soil and water quality tests of Parcel 11 and the Quarry Pond, and all other tests, measurements and inspections deemed necessary by the Town with respect to the foregoing easements; and
- Provide to the Town any and all reports, test results, and other documents in the Peets' possession, custody or control regarding the environmental quality of Parcel 11, Parcel 17, Quarry Pond, and/or any soil, surface water or groundwater at, on, beneath or from Parcel 11 or the Quarry Pond.

VI. **SUBORDINATION**

The Peets agree to use their best efforts to ensure that any mortgagee of Parcel 11 and/or Parcel 17 shall agree to hold its mortgage(s) subject to the foregoing Town easements and shall agree that the Town easements shall have the same force and effect as though executed and recorded before the grant of the mortgage(s).

VII. **ENFORCEMENT**

In the event that the Peets fails to perform any of the foregoing in a timely manner, the Peets consent to jurisdiction of the Middlesex Superior Court in an action by the Town for

specific performance of the Peets' obligations hereunder, and the Peets acknowledge that there is no adequate remedy at law with respect thereto.



VIII. TERMINATION

This Agreement, and all actions taken hereunder, shall terminate and shall be null and void and shall have no force and effect if the Peets or their successors and assigns have not applied for and obtained a building permit for the construction of any portion of the Quarry Woods PCRC within two years from the grant of the special permit for the Quarry Woods PCRC (which two year period shall not include the time required to pursue or await the determination of an appeal referred to in G.L. c. 40A, § 17); provided, however, that if the Town has before that date installed any utilities pursuant to the Water Rights, Access and Utility Easement, the Town's rights under the Water Rights, Access and Utility Easement and under the Town's Access and Utility Easement over Parcel 17 shall be vested and shall not terminate.

IN WITNESS WHEREOF, the undersigned has caused this Agreement to be executed on the dates set forth below.

TOWN OF ACTON, MASSACHUSETTS,
By its Board of Selectmen,

Walter M. Foster, Chairman

Peter K. Ashton

Lauren Rosenzweig

F. Dore' Hunter

Andrew Magee

THE PEETS,

Yin Peet

Creighton Peet

TOWN ACKNOWLEDGEMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

On this ___ day of _____, 2006, before me, the undersigned Notary Public, personally appeared each of the foregoing named members of the Board of Selectmen of the Town of Acton, each of whom proved to me through satisfactory evidence of identification, which was: examination of _____, to be the person whose name is signed on the preceding document, and acknowledged to me that each signed it voluntarily for its stated purpose as the foregoing named member of the Board of Selectmen of the Town of Acton, a municipal corporation.

_____ (official signature and seal of notary)

My commission expires _____

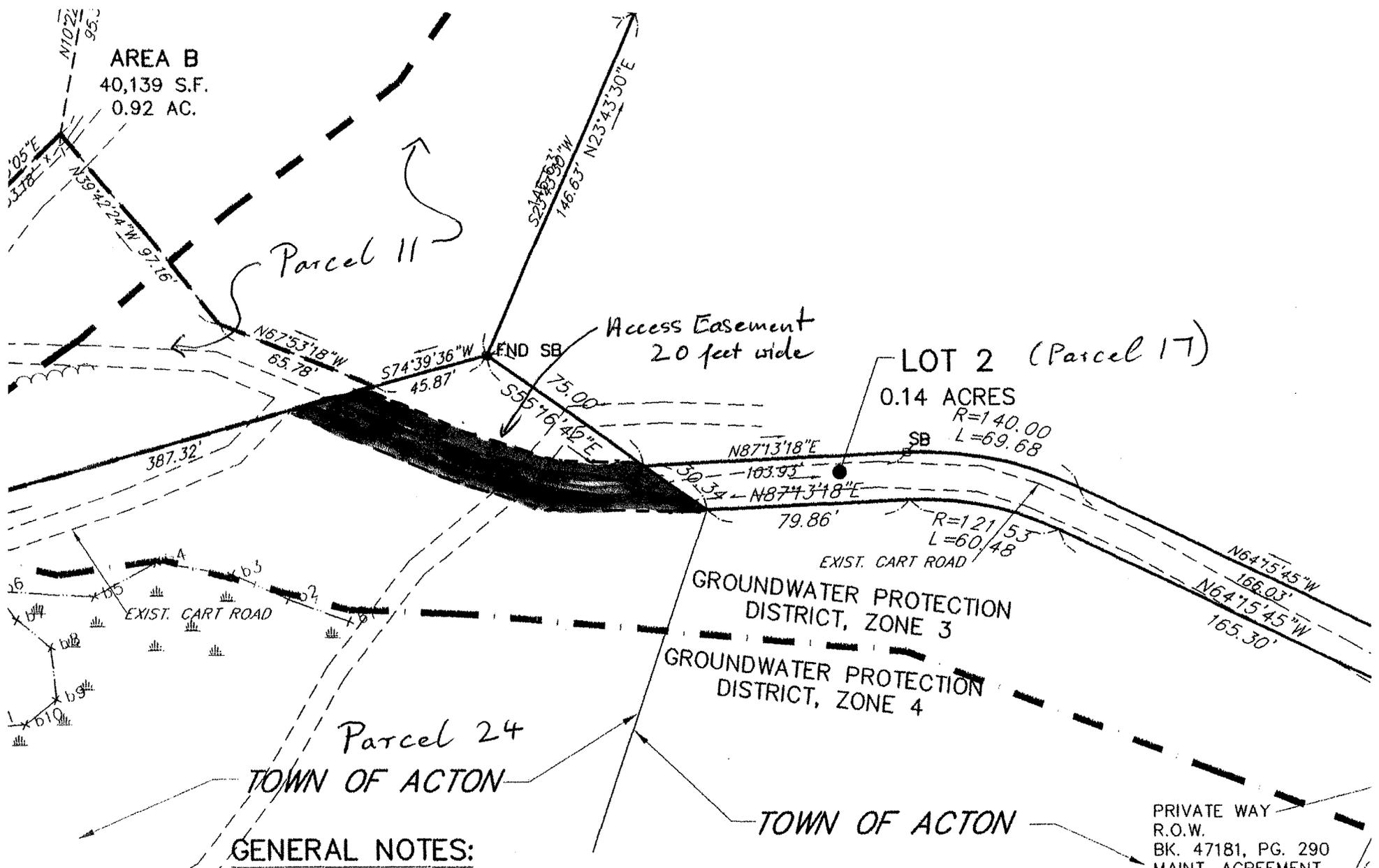
OWNER ACKNOWLEDGMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

On this ___ day of _____, 2006, before me, the undersigned Notary Public, personally appeared Yin Peet and Creighton Peet, proved to me through satisfactory evidence of identification, which were _____, to be the persons whose name is signed on the preceding or attached document, and acknowledged to me that each signed it voluntarily for its stated purpose.

_____ (official signature and seal of notary)

My commission expires _____



GENERAL NOTES:

- 1.) ZONING: RESIDENCE 10/8
- OVERLAY DISTRICT:
- AFFORDABLE HOUSING, SUB-DISTRICT A
- GROUNDWATER PROTECTION DISTRICT, ZONE 3 & 4

PLAN REFERENCES:

- 1.) PLAN REFS.:
- PLAN 1456 OF 1967
- PLAN 14771 OF 1988