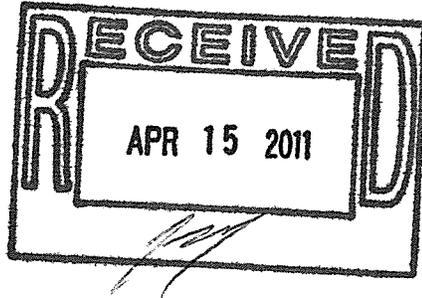


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CONCENTRATING IN
REAL ESTATE
ELDER LAW
ESTATE PLANNING
WILLS & TRUSTS
BANKRUPTCY & BUSINESS



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HON. MORRIS N. GOULD
1918-1987

H. MITCHELL GOULD, ESQ.
April 14, 2011 1947-1987

Town of Acton
Planning Department
472 Main Street
Acton, Ma 01720

✓ Town of Acton
Conservation Commission
472 Main Street
Acton, Massachusetts 01720

Re: Filing by Hawthorne Homes, LLC - Conservation Filing January 26, 2011
Reference: Nonset Path Site Plan by Stanski and McNary dated January 26, 2011

Gentlemen,

This office is counsel to Mr. Ziping Jiang and his wife, Ms. Weihua Ke, who are abutters to the above project, currently in review before the Conservation Commission. My clients own Lot 16, (outlined in yellow), which is shown on the attached "Record Plan of Land on Nonset Path, dated July 18, 1980, a copy of which is annexed as Exhibit "A".

My clients oppose the project currently in review before the Conservation Commission for the following reasons:

1. The access was originally intended to provide access and egress for only 3 lots: Lot 14, 15 and 16, as shown on a Plan of land in 1980. (Exhibit "A").
2. The access is not of suitable adequacy, width and grade to provide safe access and egress to the number of homes the applicant is proposing, having a width of only 14.82 feet from Nonset Path, a linear distance of 119.99 feet. (Exhibit "B").
3. The deeds do not clearly reserve rights over this access and egress to the developer's parcel. It should be carefully reviewed by the Planning Board to

determine whether there was a restriction on the number of homes which could be accommodated as it was clearly a shared driveway off a private way, when created in 1980.

4. There is insufficient width to provide safe access and egress to children, elderly, pedestrians and animals having to use the access to exist the development for school, shopping or other pedestrian trips.
5. The addition of the number of daily trips over the yards of the three lots in question would seriously affect the quality of life of those homeowners.
6. There are sensitive wetlands and flooding issues in this vicinity.

The Plans submitted to support the application are intentionally misleading to the Conservation Commission, to the abutters and to the presentation process, in the following regards (See Plan annexed as Exhibit "C". We have noted the discrepancies with red notations as follows:

1. The Plan depicts a 20' right of way from Nonset Path, over Lots 14A* (shown on the Plan as #107), 15 (shown on the Plan as #109) and 16 (shown on the Plan as No. 111). In fact, the right of way is only 14.82' wide from Nonset Path in a westerly direction a linear distance of 119.99. The right of way was originally designed to be 20 feet in width, but was modified to 14.82' along Lot 14A in 1984. (This is confirmed by the Plan of Land owned by Purvis Realty Trust, dated September 18, 1984, recorded with Middlesex Deeds in Book 1192 of 1984, a copy of which is annexed hereto as Exhibit "B"). The Developer's plan conveniently neglects to reference the 1984 plan and the narrowing of the mouth of the right of way. The modification to sideline of Lot 14A was necessary to effect a lot line adjust of Lot 14A when the builder placed the garage in violation of the Acton zoning setback, and was required to convey the fee in a portion of the right of way & utility easement to the Lot 14A owner to remedy the setback so that the garage would be 32' from the edge of lot line.

It is further confirmed by a Superior Judgment of the Land Court of the Commonwealth of Massachusetts when the owner of Lot 16 brought an action against the Lot 15 owner to establish his rights to the access easement in 1991. In that decision, the Judge affirmed that the "twenty (later reduced to fourteen and 82/100) foot....strip...provides the plaintiffs (Lot 16 owners) with access to and egress from their land and Nonset Path". See Exhibit "E", Page 2.

**for purposes of this letter Lot 14 and 14A are one and the same lot, the original number being 14, but the changed configuration to adjust the lot line resulting in the new lot number 14A*

2. The Plan bears a legend that the current right of way and utility easement is 20' and that the pavement can be "widened and resurfaced to improve access". Because the first 119.99 feet is owned by the Lot 14A owner (see above), the right of way cannot be widened any more than that from Nonset Path a linear distance westerly for 119.99 feet. The rest of the right of way similarly is restricted to a 20 foot width and the developer has no right to increase that width.

3. The developer's Plan depicts a 50' "Wide **Utility** Easement" as shown on a Plan of 1978. This is intentionally misleading to suggest that it is limited to utilities and there are no alternative rights of way for the Developer to access the development. In fact, the more recent plan in 1980 (Exhibit "A") changed this 50' strip from "utility" only and denoted it as "Right of Way and Utility Easement" precisely because it was intended that this developer access his land over the 50' right of way and utility easement directly from Nonset Path and not through the house lots numbered 14A, 15 and 16.

4. The Plan states that all construction methods and materials shall conform to the Acton Zoning Bylaw. The property however proposes to use a drive in an R-2 zone to access development in the R-A zone, which the Town Planning Director, Roland Bartl, concluded was not in conformity.

There are additional legal arguments supported by the chain of title and the law of easement that also suggest the developer may not have rights of access over this right of way, which are reserved for presentation before the Planning Board or the Zoning Board of Appeals as the process moves through the various permitting stages.

This letter is written with the intent that the Planning Board become involved in the early stages to discourage and deny the development of this number of homes having their only means of access and egress through a 14.82 foot wide driveway alongside and through the property of the three landowners.

Thank you for your consideration.

Very truly yours,

SHERRILL R. GOULD

B 2 1 3 9 9 P 5 0 5

"D"

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COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL)

DEPARTMENT OF THE TRIAL COURT

Middlesex, ss.

Miscellaneous
Case No. 154394

RICHARD R. KEENAN and]
LINDA M. KEENAN,]
Plaintiffs]

vs.]

PRASAD R. KOMMINENI and]
REKHA C. KOMMINENI,]
Defendants]

ORDER GRANTING THE
PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

In this action the plaintiffs, Richard R. Keenan and Linda M. Keenan, seek a permanent injunction restraining the defendants, Prasad R. Kommineni and Rekha C. Kommineni, from obstructing the right of way by which the plaintiffs pass and repass to and from their home and Nonset Path in Acton in the County of Middlesex and a declaration as to their right to use, maintain and enjoy the common driveway serving their home on Lot 16 on a plan entitled "Record Plan of Land on Nonset Path Great Road and Henley Road, Acton, Mass.", dated July 18, 1980, drawn by Nolan Engineering Service, 21 Davis Road, Acton, MA 01720, and recorded in Middlesex South District Registry of Deeds, Book 14184, Page 114. Lot 15A is owned by the defendants and shown on a plan entitled "Plan of Land in Acton, Mass., Owned by Purvis Realty Trust, Scale: 1" = 20', dated September 18, 1984, revised October 5, 1984, revised January 15, 1985, David W. Perley, Civil Engineer, Concord, Mass."

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16
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recorded with said Deeds, Book 15822, Page End and also by the owners of Lot 14A on the latter plan.

The plaintiffs moved for summary judgment, and their motion was argued by their counsel on May 23, 1991 at which hearing neither the defendants nor their counsel appeared. After consideration of the oral argument, the memorandum of law filed on behalf of the plaintiffs and the documentary evidence, it is

ADJUDGED and ORDERED that there are no controverted issues of material facts, and summary judgment properly may be granted; and it is also

ADJUDGED and ORDERED that the plaintiffs' motion be granted.

The plans in the chains of title to the three properties served by the common driveway show a twenty (later reduced to fourteen and 82/100) foot and a thirty foot wide strip of land running from Nonset Path across Lots 14A, 15A and 16. The plans denominate the strip as a "Right of Way and Utility Easement". The common driveway was constructed by the developer within the right of way, and it provides the plaintiffs with access to and egress from their land and Nonset Path. It is apparent on the ground. The portion of their Lot 16 which fronts on Nonset Path has wetlands constrictions so use of the right of way is vital.

The defendants acquired title to their home from Marlborough Co-operative Bank by deed dated September 14, 1988 and recorded with said Deeds, Book 19347, Page 498 and had actual notice of the existence of the right of way to which accordingly they take

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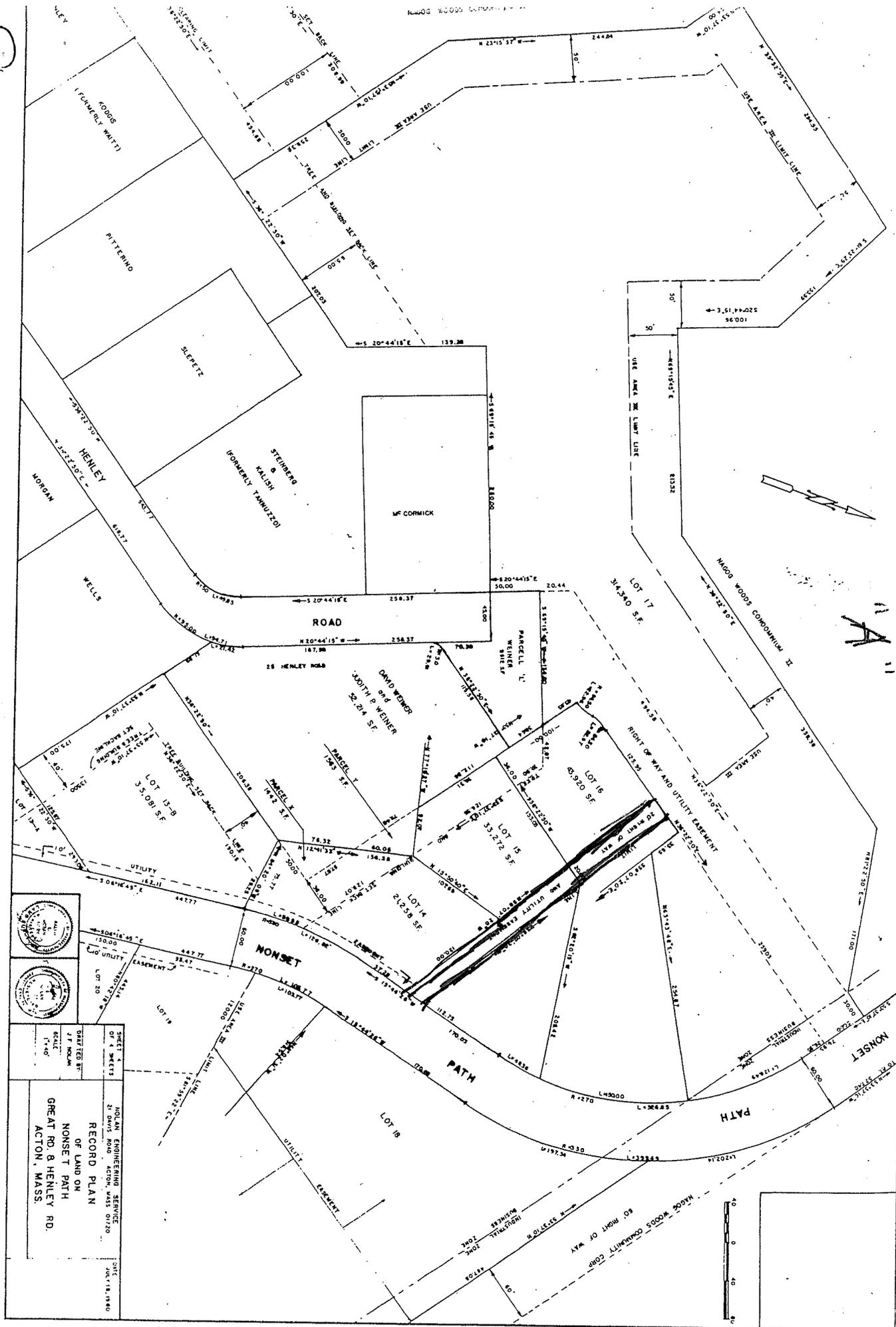
subject. Anderson v. DeVries, 320 Mass. 127, 132 (1950). The right of way also shows on the plans in the chains of title; the deeds and the plans are read together in construing the right of the parties.

Since the plaintiffs have the right to use said way for all purposes, G.L. c. 187, §5, the defendants cannot interfere with their use or obstruct the way in any manner. Texon, Inc. v. Holyoke Machine Co., 8 Mass. App. Ct. 363, 365 (1979). The plaintiffs also have the right to make reasonable repairs and improvements to the way, Hodgkins v. Bianchini, 323 Mass. 169, 173 and cases cited (1948), Glenn v. Poole, 12 Mass. App. Ct. 292, 296 (1981). Moreover, the owner of the servient estate may not interfere with the making of repairs "reasonably necessary to the proper use and enjoyment of the easement" by the benefitted estate. Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 298 Mass. 513, 514 (1937).

While the owners of the servient tenement, the defendants cannot interfere with the plaintiffs' use; the long standing rule in this Commonwealth insulates the owner of the land, absent some covenant or agreement, from any duty of repair, Jones v. Percival, 5 Pick (22 Mass.) 485 (1827), except where such owner undertakes to resurface the easement, in which case it must "be equally safe and suitable for passage as was the way when originally created." New York Central Railroad v. Ayer, 242 Mass. 69, 75 (1922).

(1)

PLANNING BOARD RECORDS



SHEET 1 OF 4 SHEETS
 NOLAN ENGINEERING SERVICE
 21 DRAVING ROAD, ACTON, MASS 01720
 DATE: JUN 18, 1980
 PREPARED BY: J.F. NOLAN
 CHECKED BY: J.F. NOLAN
 RECORDED BY: J.F. NOLAN
 REGISTERED PROFESSIONAL ENGINEER
 LICENSE NO. 11400
 OF LAND ON
 NONSET PATH
 GREAT RD. & HENLEY RD.
 ACTON, MASS.

11 A
 11

B 2 1 3 9 9 P 5 0 8

To the extent, however, that the driveway is situated on Lot 14A, then the defendants are obligated to share in the cost of any repairs proportionate to their use of it.

By the Court (Sullivan, J.)

Attest:

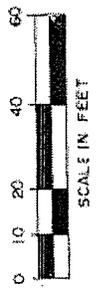
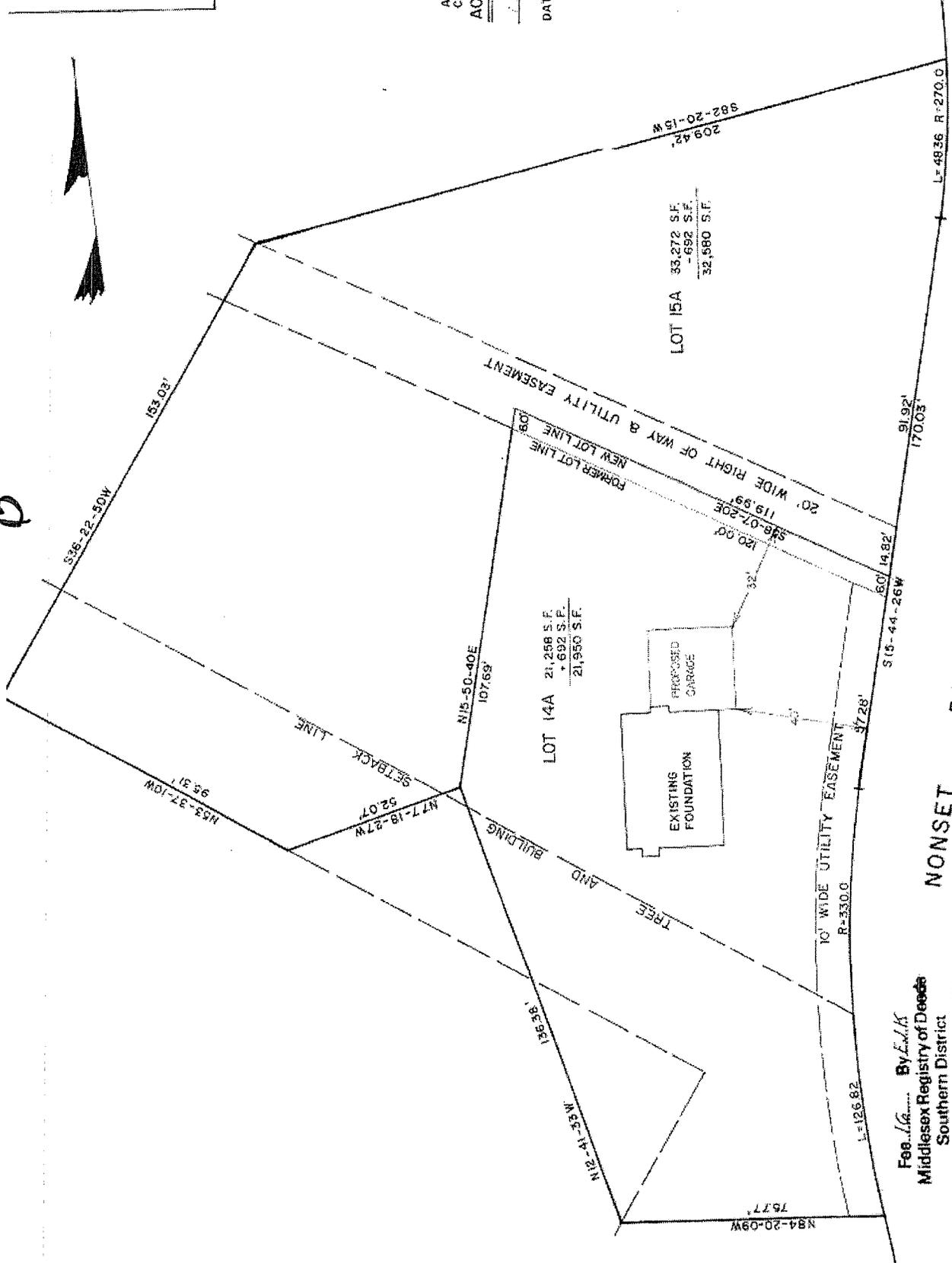
Charles W. Trombly, Jr.
Recorder

Dated: May 30, 1991

ATTEST:

Charles W. Trombly, Jr.
Recorder

11 B



I CERTIFY THAT THIS PLAN
 CONFORMS TO THE RULES
 AND REGULATIONS OF THE
 REGISTERS OF DEEDS

David W. Perley

APPROVAL UNDER THE SUBDIVISION
 CONTROL LAW NOT REQUIRED
 ACTON PLANNING BOARD

David W. Perley
 DATE 10-10-84

PLAN OF LAND IN
ACTON, MASS.

OWNED BY
**PURVIS REALTY
 TRUST**

SCALE: 1" = 20'
 SEPT 18, 1984
 REV 10/25/84

DAVID W. PERLEY
 CIVIL ENGINEER
 CONCORD, MASS.

Fee 16 By ELK
 Middlesex Registry of Deeds
 Southern District
 Cambridge, Massachusetts
 Plan No. 1192 of 1984
 Rec'd OCT 10 1984
 at 3:02pm Rm Doc No. ---
 Rec'd, Bk. 15822 Pg. END
 Attest *John F. Grogan*
 Registrar

