7/12 (17)

AGREEMENT

THIS AGREEMENT is made this _____ day of _____, 2004, by, between and among **YIN PEET** and **CREIGHTON PEET** of 157 School Street, Wayland, MA (hereinafter referred to as the "Owners"), 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 Owners 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").

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 6734, Page 596, the Town also owns the real property located at and known as the Town Forest, Quarry Road, Acton, MA, which is shown as Parcel 34 on Assessors' Map B-5 ("Parcel 34").

WHEREAS in conjunction with a duly qualified and established 501(c)(3) educational corporation, the Owners propose to develop an educational sculpture park, studio and related residence on Parcel 11 pursuant to G.L. c. 40A, § 3, and Section 3.4.2 of the Acton Zoning Bylaw (the "Sculpture Park").

WHEREAS Parcel 11 has no frontage on a public way.

WHEREAS Parcel 11, while extensive in area, lacks an appropriate usable area for septic system purposes sufficient for the Sculpture Park.

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.

WHEREAS Parcel 11 is situated in a Residence 10/8 ("R-10/8") Zoning District.

WHEREAS Parcel 11 is located adjacent to Parcels 3 and 34.

WHEREAS Parcel 3 has extensive frontage on a public way (Quarry Road).

WHEREAS Parcel 3 has substantial usable area suitable for septic system purposes, which area abuts Parcel 11.

WHEREAS Parcels 3 and 34 are situated in an Agricultural, Recreation, Conservation ("ARC") Zoning District.

WHEREAS the Owners desire to acquire from the Town, by a combination of fee and easements, sufficient real property rights for purposes of frontage, septic area, storm water detention, and related sculpture park purposes, and to re-zone the same from ARC to R-10/8, to enable the development of the Sculpture Park on Parcel 11.

WHEREAS in addition to recognizing the benefits of the proposed Sculpture Park for a diverse, multi-cultural, and educationally vibrant community, the Town desires to acquire from the Owners a combination of (a) approximately 5.2 acres of the rear portion of Parcel 11 which abuts other Town land, (b) water rights in the Quarry Pond for use in connection with NARA, and (c) a 51' access strip to the 5.2 acre portion of Parcel 11 in conformity with Section 5.2.3 of the Acton Zoning Bylaw.

WHEREAS to enable the Town to consider all of the Warrant Articles required to accomplish the purposes of the Town and the Owners in relation to the foregoing, the Board of Selectmen has determined to place these articles 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.

WHEREAS the Supreme Judicial Court has held in Durand v. IDC Bellingham, 440 Mass. 45, 55 (2003), that "conditioning otherwise valid zoning enactments on agreements reached between municipalities and landowners that include limitations on the use of their land or other forms of mitigation for the adverse impacts of its development" does not constitute illegal contract zoning.

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

I. TOWN MEETING

The Board of Selectmen agrees to place the 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.

II. IDENTIFICATION OF REAL PROPERTY INTERESTS PROPOSED TO BE CONVEYED

A. Attached hereto as Exhibit A is a Site Plan (Sheet A-1) for the proposed Yin Peet Studio and Residence on Quarry Road, Acton, MA, prepared by Norman C. Wang, Architect, dated _____.

B. The Site Plan depicts the following areas proposed to be conveyed by the Owners to the Town:

1. Area 1, a 5.2 acre +/- land area to be conveyed in fee from the Owners to the Town;

2. Area 2, the Water Rights Easement Area, consisting of water rights in the Quarry Pond as well as all necessary easements for access and water distribution purposes relating thereto, proposed to be conveyed from the Owners to the Town; and

3. Area 3, a 51' +/- access strip proposed to be conveyed in fee from the Owners to the Town, subject to an easement for access and art display purposes to be reserved by the Owners, which easement shall not interfere with the Town's use of the fee in Area 3. The purpose of Area 3 is to provide a 51' access strip to the 5.2 acre portion of Parcel 11 so as to conform with Section 5.2.3 of the Acton Zoning Bylaw. The strip shall run parallel to the correct surveyed boundary of the Sculpture Park Property and shall be adjusted in width at any curves or corners to conform with Section 5.2.3 of the Acton Zoning Bylaw along its full length. The easement to be reserved by the Owners shall provide that the Owners may fence and use a 40' wide portion of the 51' access strip (measured from the line that is 51' northerly and westerly of the North Acton Woods lot line and, in no case crossing over the property line as defined by the North Acton Woods recorded plan) for access and art display purposes provided, however, that said easement shall be subordinate to the Town's right to use the reserved easement area of Area 3 as necessary to conform with Section 5.2.3 of the Acton Zoning Bylaw. Upon 90 days prior written notification from the Board of Selectmen, the Owners shall remove or relocate the fence and any objects that may otherwise interfere with the Town's access needs under Section 5.2.3 of the Acton Zoning Bylaw.

C. The Site Plan depicts the following areas proposed to be conveyed by the Town to the Owners, subject to the covenants and restrictions set forth herein:

1. Area A, the land area proposed to be conveyed by quitclaim deed from the Town to the Owners for frontage, access, and storm water detention purposes;

2. Area B, the land area proposed to be conveyed by quitclaim deed from the Town to the Owners for septic system purposes; and

3. Area C, an Access Easement Area proposed to be conveyed from the Town to the Owners (a small triangle over the Town Forest lot).

III. PREPARATION FOR THE TOWN MEETING

A. In preparation for the Town Meeting, the Town will take the following steps:

1. Perform a title search sufficient to satisfy itself that Parcels 3 and 34 are unrestricted as to use. (This title search shall be solely for the benefit of the Town and may not be relied upon by the Owners for any purpose whatsoever. The Owners shall perform whatever title search they consider appropriate for their own purposes.)

2. Subject to the results of that title search, request the custodian of Parcels 3 and 34 to make a finding under G.L.c. 40, § 15, that the fee in Areas A and B and the easement rights in Area C proposed to be conveyed by the Town to the Owners are no longer required for public purposes.

3. Draft in a form satisfactory to the Board of Selectmen and Town Counsel proposed warrant articles for the Town Meeting including the following:

a. Articles to re-zone Areas A, B, and C from the ARC to the R-10/8 Zoning District, and an Article to re-zone Areas 1 and 3 from the R-10/8 to the ARC Zoning District;

b. An Article to authorize the Selectmen to convey the fee in Area A and Area B to the Owners, subject to the restrictions and conditions set forth in this Agreement;

c. An Article to authorize the Selectmen to convey an access easement in Area C to the Owners, subject to the restrictions and conditions set forth in this Agreement;

d. An Article to authorize the Selectmen to accept from the Owners the fee in Area 1, a 5.2 acre +/- land area;

e. An Article to authorize the Selectmen to accept from the Owners an easement and water rights in Area 2, the Water Rights Easement Area, consisting of water rights in the Quarry Pond as well as all necessary easements for access and water distribution purposes relating thereto, in accordance with a water withdrawal procedure designed, based on a pump test performed in accordance with this Agreement, 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;

f. An Article to authorize the Selectmen to accept from the Owners the fee in Area 3, subject to an easement for access and art display purposes to be reserved by the Owners, which easement shall not interfere with the Town's use of the fee in Area 3;

g. An Article to authorize the Selectmen to petition the General Court to adopt a Home Rule Act authorizing the Town to convey and acquire the foregoing interests in real property notwithstanding the requirements of the Uniform Procurement Act, G.L. c. 30B, and any general or special law, rule or regulation to the contrary, and, if and to the extent necessary, to change the use of Areas A, B, and C pursuant to Article 97 of the Massachusetts Constitution; and

h. An Article to ratify the Board of Selectmen's execution of this Agreement on behalf of the Town.

B. In preparation for the Town Meeting, the Owners shall take the following steps:

1. Cause a qualified wetlands scientist to flag all wetlands and vernal pools (if any) on Parcel 11 and on or within 100 feet of Areas A, B, and C (including on any abutting land now or formerly of North Acton Woods);

2. Cause any such wetlands, vernal pools, and their respective buffer zones to be depicted on a stamped plan of the property;

3. Cooperate with the Town in all respects regarding proposed zoning amendments to re-zone Areas A-C from ARC to R-10/8;

4. Attend with qualified consultants and participate in the Planning Board's required public hearings on the proposed zoning change under Chapter 40A, § 5;

5. Provide any and all material information reasonably requested by the Town to assess the feasibility of the proposed Sculpture Park;

6. Cause revised site plans to be prepared by a qualified architect and engineer to reflect mutually acceptable constructive changes resulting from the public hearing process leading up to Town Meeting;

7. Provide timely comments on the proposed Warrant Articles prepared by the Town as set forth above;

8. Provide the Town and its authorized agents, employees, contractors and representatives full and complete access to Parcel 11 and the Quarry Pond, through the proposed closing, 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 Parcel 11 and the Quarry Pond;

9. Provide to the Town any and all reports, test results, and other documents in the Owners' possession, custody or control regarding the environmental quality of Parcel 11, the Quarry Pond, and/or any soil, surface water or groundwater at, on, beneath or from Parcel 11 or the Quarry Pond.

IV. PARTICIPATION AT TOWN MEETING

The Owners and their qualified consultants shall attend the Town Meeting and make a concise presentation of the proposed Sculpture Park and the related Warrant Articles as set forth above.

The Town shall have the right, but not the duty, to make presentations regarding the proposed Sculpture Park and the related Warrant Articles as set forth above.

The Owners acknowledge and understand that any favorable recommendation of the Board of Selectmen or other Town Board or official is not binding upon Town Meeting and that a majority or 2/3 affirmative vote of Town Meeting is required for the various proposed warrant articles to pass.

The Owners further acknowledge and understand that the approval of the Attorney General is required before any proposed re-zoning article can take effect.

The Owners further acknowledge and understand that the approval of the General Court and the Governor is required before any proposed special legislation can take effect.

The Owners further acknowledge and understand that the approval of 2/3 of the General Court and the Governor is required before any proposed Article 97 legislation can take effect.

V. OBLIGATIONS UPON ADJOURNMENT OF TOWN MEETING

In the event that the Town Meeting adjourns without favorable action having been taken on all or any of the warrant articles identified in Section III(A)(3) above, this Agreement shall terminate and shall have no further force or effect unless all parties hereto shall in writing agree to the contrary.

In the event that the Town Meeting adjourns with favorable action having been taken on all of the warrant articles identified in Section III(A)(3) above, and in the event the Attorney General approves the proposed re-zoning, then the Owners and the Town shall negotiate in good faith reciprocal Purchase and Sales Agreements to effectuate the exchange of the real property interests in Areas 1, 2 and 3 for Areas A, B, and C identified in Section II above; provided however that the Town shall have no obligation to execute or perform on any such Purchase and Sales Agreements unless each and every one of the following conditions is met in the unlimited discretion and to the full satisfaction of the Board of Selectmen:

A. The form and content of the Agreements are satisfactory to the Board of Selectmen and Town Counsel;

B. Home Rule Legislation satisfactory in form and substance to the Board of Selectmen and Town Counsel has been adopted authorizing the Town to convey and acquire the foregoing interests in real property notwithstanding the requirements of the Uniform Procurement Act, G.L. c. 30B, and any general or special law, rule or regulation to the contrary, and, if and to the extent necessary, to change the use of Areas A, B, and C pursuant to Article 97 of the Massachusetts Constitution;

C. The environmental condition of Parcel 11 and the Quarry Pond is satisfactory to the Board of Selectmen , including but not limited to the results of any pump tests of the Quarry Pond, any soil and water quality tests of Parcel 11 and the Quarry Pond, and any and all other tests, measurements and inspections deemed necessary by the Town with respect to Parcel 11 and the Quarry Pond;

D. The location, scope and terms of the easement rights in Areas 2, 3, and C are satisfactory to the Board of Selectmen and Town Counsel (including without limitation a provision that the Owners' rights in the reserved easement in Area 3 for art display purposes shall be exercised consistently with the Town's obligations under the First Amendment to the United States Constitution and shall not be used for the display of any religious or obscene art, object or material);

E. The Owners have agreed to execute and deliver at the closing in a form and content satisfactory to the Board of Selectmen and Town Counsel (1) a covenant to develop, construct, operate for a period of at least 12 years from the execution of this Agreement and maintain the Sculpture Park in conjunction with a duly qualified and established 501(c)(3) educational corporation or corporations, except for reasons beyond the reasonable control of the Owners, (2) a right of reverter exercisable at the option of the Board of Selectmen in the event the Owners fail to develop, construct, and commence operations of the Sculpture Park within three years from the closing or such further time as the Board of Selectmen may allow, (3) a right of first refusal in the event the Owners determine to sell or convey all or any portion of Parcel 11 and/or Areas A, B, or C after the closing, and (4) a restriction in a form recordable at the Middlesex South Registry of Deeds, which shall (i) run with the land for the benefit of the Town for a period of 50 years from the closing, (ii) prohibit any subdivision of the land comprised of Parcel 11 and Areas A and B, (iii) prohibit any commercial quarry use of the land comprised of Parcel 11 and Areas A and B, (iv) prohibit the development of any project under G.L. c. 40B on the land comprised of Parcel 11 and Areas A and B, and (v) prohibit any other use by the Owners or their successors and assigns of Parcel 11 and/or Areas A, B, or C (other than the Sculpture Park as defined above, including the Owners' residence) which is not in full and complete conformity with the requirements of the R-10/8 Zoning District (and the Owners shall execute and deliver to the Town Manager all necessary recordable Notices of this restriction for recording in the Middlesex South Registry of Deeds pursuant to M.G.L. c. 184, § 27);

F. Under no circumstances shall the Town be required to convey an access easement in Area C to the Owners, unless the Owners are unable to obtain permission from the Acton Conservation Commission to access the Sculpture Park over Area A by virtue of the proximity of a vernal pool on Parcel 11 and/or Area A-C;

G. The Town's Board of Selectmen shall have design review over the buildings to be placed on Parcel 11 and/or Areas A-C;

H. The Owners shall cause a stamped, surveyed Approval Not Required Plan ("ANR Plan") to be executed and submitted to the Acton Planning Board for endorsement representing the meets and bounds of the land and interests to be transferred by the Town to the Owners and *vice versa*, which ANR Plan shall be filed with the Town Clerk and the Planning Board upon execution of the Purchase and Sale Agreements referenced in Section V of this Agreement and recorded in the Registry of Deeds contemporaneously with the closing in accordance with the Purchase and Sale Agreements referenced in Section V of this Agreement;

I. Given the proximity of the proposed Sculpture Park to significant Town-owned recreation land frequented by numerous families with minor children, the Owners

shall agree to a perpetual recordable restriction running with the Sculpture Park Property for the benefit of the abutting Town-owned property which shall provide that (1) the Owners shall plant and maintain permanent live evergreen vegetation sufficient to screen from view any art, sculpture, object or material so that it is not visible to a public way or any abutting Town-owned land used for recreation purposes, and (2) upon the written request of the Acton Board of Selectmen, the Owners shall forthwith relocate or further screen to the satisfaction of the Board of Selectmen, using permanent live evergreen vegetation or a suitable alternative means of natural screening acceptable to the Board of Selectmen, any such art, object or material so that it is not visible to a public way or any Town-owned land used for recreation purposes;

J. While a Sculpture Park operated as an educational use in conjunction with a duly qualified and established 501(c)(3) educational corporation may involve occasional incidental sales of art objects created and displayed on the premises, the Owners shall in a recordable covenant agree not to permit the Sculpture Park Property to be operated as a commercial enterprise or to involve sales other than occasional incidental sales of art objects created and displayed on the premises; and the Owners shall not display any commercial sign or advertising whatsoever on the Sculpture Park Property;

K. In the event the Sculpture Park ceases to operate on the Sculpture Park Property, the Owners shall not thereafter permit any sales whatsoever at or from the Sculpture Park Property except as may be in strict conformance with the Acton Zoning Bylaw~~.~~;

L. The Town's use of the Water Rights Easement Area shall be subject to the requirement that any permanent above-ground installation of water withdrawal equipment by the Town shall be subject to the Owners' approval, which shall not be unreasonably withheld, conditioned or delayed.

VI. GOVERNMENTAL PERMITS AND APPROVALS

The Owners acknowledge and agree that favorable action by the Town Meeting on all or any of the warrant articles identified in Section III(A)(3) above shall not constitute approval by the Town of the proposed Sculpture Park itself or of any building, structure, improvement or use associated or proposed to be associated therewith. The Owners shall have the continuing responsibility to apply for, obtain and comply with all necessary governmental permits and approvals for the proposed Sculpture Park itself and any building, structure, improvement or use associated or proposed to be associated therewith. In addition, the Owners shall have the continuing responsibility to comply with all applicable federal, state and local laws, rules and regulations applicable to the proposed Sculpture Park itself and any building, structure, improvement or use associated or proposed to be associated therewith.

VII. **ENFORCEMENT**

In the event that the Owners fails to perform any of the foregoing in a timely manner, the Owners consent to jurisdiction of the Middlesex Superior Court in an action by the Town for specific performance of the Owners' obligations hereunder, and the Owners acknowledge that there is no adequate remedy at law with respect thereto.

IN WITNESS WHEREOF, the undersigned has caused this Agreement to be executed this _____ day of _____, 2004.

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

_____
Walter H. Foster, Chairman

_____
Peter K. Ashton

_____
William H. Shupert, III

_____
F. Dore' Hunter

_____
Robert A. Johnson

THE OWNERS,

_____
Yin Peet

_____
Creighton Peet

TOWN ACKNOWLEDGEMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

On this ___ day of _____, 2004, 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 _____, 2004, 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 _____