

**DECLARATION OF ACCESS AND UTILITY EASEMENT AND MAINTENANCE AGREEMENT**

**THIS DECLARATION OF ACCESS AND UTILITY EASEMENT AND MAINTENANCE AGREEMENT** (this "Declaration") made this \_\_\_\_ day of \_\_\_\_\_ 2006, by **MICHAEL G. COLES and SUSAN M. COLES**, with an address of 18 East Lansing Road, Groton, New York 13073, ("Declarant").

A. Declarant is the owner of certain real property consisting of approximately 7.81 acre parcel of land known as lands of "Michael G. Coles and Susan M. Coles" located at 3555 Lydius Street, Town of Guilderland, New York (the "Subject Property").

B. Declarant has subdivided the Property into three (3) lots as shown on Exhibit A attached hereto and made a part hereof each of which shall be deemed a Parcel, and collectively, the Parcels.

C. Declarant recognizes that for the most favorable development of the Parcels it is desirable that the Parcels share (i) a common driveway to be known as "Common Driveway" to be constructed within a 20 foot easement area, the dimensions and location of which are as substantially shown on Exhibit A (the "Easement Area") to provide pedestrian and vehicular ingress and egress (the "Access Easement") which shall inure to the benefit of and bind the Subject Property, including the owner(s) therefore from time to time, and their respective successors and assigns (collectively the "Owners"); and (ii) a nonexclusive utility easement within the Easement Area for the purpose of installing, maintaining, repairing or replacing gas, electric, phone and cable lines, pipes and services (collectively the "Utilities") to benefit the Subject Property or any portion thereof.

**NOW, THEREFORE**, for and in consideration of the Introductory Statement, which is deemed a material and substantive part of this Declaration, and Ten Dollars (\$10.00) and other good and valuable consideration, Declarant hereby declares, grants, covenants and agrees as follows:

1. **Driveway Easement.** Declarant hereby establishes and grants the following non-exclusive perpetual driveway Access Easement to provide unobstructed vehicular and pedestrian ingress and egress upon and as to each of the Parcels which shall benefit and burden each Parcel respectively, and all such easements, covenants, rights, benefits, obligations and liabilities created in this Declaration shall be deemed covenants and easements running with and binding upon the land as appurtenances to the dominant estates. The estate of the fee and easement created herein shall not be merged by reason of the same person or entity acquiring, owning or holding title to both.

(i) The common curb cut and driveway as hereafter constructed within the Easement Area for purposes of ingress, egress, passage and delivery, by vehicles and pedestrians (the "Access Easement").

(ii) The Access Easement shall be kept open and unobstructed at all times, and nothing shall allow any Owner, or invitee thereof (collectively the “Permittees”) any right to work on or otherwise obstruct access within the Easement Area.

(iii) The Access Easement shall be for the benefit of, but not restricted solely to, the Owners and Permittees for the duration of such occupancy, but same is not intended nor shall it be construed as creating any rights in or for the benefit of the general public nor shall it affect any real property outside of the Parcels.

2. **Utility Easement.** The Declarant does further grant a perpetual nonexclusive utility easement on, over and through the Easement Area for the purpose of installing, maintaining and/or repairing gas, electric, phone and cable utilities lines, pipes, services and all necessary appurtenances thereto (the “Utility Easement” and collectively with the Access Easement, the “Easements”), subject to the covenants and conditions contained herein.

3. **Construction, Maintenance and Repair.**

(i) Unless otherwise agreed between the Owners, the owner of Lot # 3 as shown on Exhibit A (the “Lot # 3 Owner”) is designated to have the responsibility to arrange for the improvements within the Easement Area to be maintained, repaired and replaced, all so as to keep such areas at all times in a safe, sightly, good and functional condition including without limitation the following: snow and ice removal; repave, re-strip and replace markings on the surface of the driveway from time to time as and when necessary so as to provide for the orderly flow of vehicles. **The owner of Lot # 1 shall be responsible for 12%; the owner of Lot # 2 shall be responsible for 44%; and the owner of Lot # 3 shall be responsible for 44%** of all costs and expenses incurred by the Lot # 3 Owner in connection with the repair, replacement, and maintenance of improvements or lines, pipes or conduits within the Easement Area (collectively, the “Maintenance”), which costs shall be paid to the Owner of Lot # 3 within 30 days following presentation of an invoice for same.

(ii) All work done in connection with the installation, maintenance or repair of any improvements, shall be performed in a good and workmanlike manner, and such work shall be done expeditiously so as not to unreasonably interfere with or hinder the use and enjoyment of the Easement Area by any person or entity having a right to use the easements.

(iii) Declarant hereby grants and establishes temporary easements for the installation of improvements and for incidental encroachments upon the Parcels which may occur as a result of any construction work performed in the development, repair or maintenance of the Parcels, so long as such encroachments are kept within the reasonable requirements of construction work which is expeditiously pursued, and so long as customary insurance is maintained protecting the Owner of the Parcel on which work is being performed from the risks involved.

4. **Default.**

(i) In the event that any Owner fails to perform any provision in accordance with the requirements set forth herein, or provide insurance as required herein, or fail to pay or to perform any other obligation set forth within ten (10) days following written notice thereof, the remaining Owner(s) shall have the right, but not the obligation, to enter upon such other Parcel and perform said maintenance, repair or replacement and acquire said insurance, make payment or perform such obligation for the account of the non performing party (the "Defaulting Party"). The foregoing right to cure shall not be exercised if within ten (10) day notice (i) the Defaulting Party cures the default, or (ii) if the default is curable, but cannot reasonably be cured within that time period, the Defaulting Party begins to cure such default within such time period and thereafter diligently pursues such cure to completion. The ten (10) day notice period shall not be required if, using reasonable judgment, the Non-Defaulting Party deems that an emergency exists. In the event of such an emergency, the Non-Defaulting Party shall give notice reasonable under the circumstances to the Defaulting Party. Within ten (10) days following written demand, including copies of paid invoice, the Defaulting Party shall reimburse the Non-Defaulting Party any sum reasonably expended by the Non-Defaulting Party to cure the default. If such amounts are not paid within thirty (30) days of billing, then such amounts shall accrue interest at the annual rate of 9% per annum until paid, and the Defaulting Party shall be responsible for reasonable attorneys' fees and costs in the enforcement and collection thereof. The parties hereto shall also have the right to restrain by injunction any violation or threatened violation by the other party hereto of any of the terms, covenants, or conditions hereof, or to obtain a decree to compel performance if any such term, covenant, or condition is not adequate. All remedies are cumulative and shall be deemed additional to any and all other remedies to which any Owner or Permittee may have at law or in equity.

(ii) In the event a lien is filed against all or any portion of the Property in connection with any Maintenance, the lien must be bonded, satisfied or removed by the Owner responsible for said Maintenance within thirty (30) days following the filing thereof.

(III) This Declaration may be enforced by the Owners or the successors and assigns thereof against any person or entity having obligations hereunder. The non-defaulting Owner(s) of a Parcel shall be entitled forthwith to full and adequate relief by injunction and/or all such other legal and equitable remedies for the consequences of such breach. If any party or person benefited hereby, institutes any litigation to enforce any of the terms, covenants, conditions, easements and set out in the Declaration, the prevailing party in such litigation shall be entitled to collect court costs and reasonably attorneys' fees from the non-prevailing party.

5. **Insurance.** Each Owner shall obtain and maintain during the term of this Agreement general liability insurance including public liability and property damage in commercially reasonable amounts covering the Easement Area which names the other Lot Owners as additional insureds on a primary and noncontributing basis. All insurance required by this agreement shall contain a provision that coverage may not be canceled or materially changed in the scope or amount of coverage unless thirty (30) days advance written notice is given to the additional insured at their address as set forth above or such other address as the additional insured shall specify.

6. **Notices.** All notices, requests, claims, demands, and other communications hereunder shall be in writing and shall be personally delivered or mailed (registered or certified mail, postage prepaid, return receipt requested) at their addresses as set forth above, or such other address or such additional recipient as any party may have furnished to the others in writing in accordance herewith. All notices shall only be effective upon receipt.

7. **Modifications: Cancellation.** This Declaration may be amended, modified or terminated (in whole or in part) from time to time by written documents executed and acknowledged by all Owners and duly recorded in the Albany County Clerk's Office.

8. **Binding.** This Declaration shall be binding upon and inure to the benefit of Declarant, the Owners and Permittees of the Parcels, and their respective personal or legal representatives, successors and assigns.

9. **Governing Law.** This Declaration shall be governed by the laws of the State of New York.

10. **Severability.** If any term or provision of this Declaration or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Declaration shall not be affected thereby, and each term and provision of this Declaration shall be valid and enforceable to the fullest extent permitted by law.

11. **Mortgages.** Any mortgages encumbering all or any portion of the Subject Property shall at all times be subordinate to the terms of this Declaration and any party foreclosing any such mortgage, or acquiring title by deed in lieu of foreclosure or trustee's sale, shall acquire title subject to all of the terms and provisions of this Declaration.

**IN WITNESS WHEREOF**, the undersigned has hereunto set its hand as of the date first above written.

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Michael G. Coles

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Susan M. Coles