

FINAL

CENTRAL PINE BARRENS JOINT
PLANNING AND POLICY COMMISSION

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In the Matter of the Violation of Article 57 of the
Environmental Conservation Law of the State of
New York (ECL)

ORDER ON CONSENT

No. CPBJPPC 5-2021

by

DLV Quogue Owner, LLC and DLV Quogue, LLC
Respondents
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WHEREAS:

1. The Central Pine Barrens Joint Planning and Policy Commission (the "Commission") has jurisdiction over development, as the term is defined in Article 57 of the New York Environmental Conservation Law (the "ECL"), in the Central Pine Barrens region. The Long Island Pine Barrens Protection Act (the "Act") is codified in Article 57 of the ECL. The Commission adopted and now implements the Central Pine Barrens Comprehensive Land Use Plan (the "Plan"). The Act and the Plan govern "Development" as the term is defined in the Act, in the Central Pine Barrens region.

2. DLV Quogue Owner, LLC and DLV Quogue, LLC (hereinafter collectively referred to as "Respondents" or "DLV"), and affiliates are owners of approximately 608± acres of undeveloped property in the hamlet of East Quogue, Town of Southampton, New York (the "Property"). Respondents propose to develop the Lewis Road Planned Residential Development, a 118-lot/unit residential subdivision, 12 workforce rental housing units and 18-hole golf course with ancillary recreational facilities, on the Property (the "Project").

3. The Project constitutes Development and cannot proceed unless it conforms with the Act and provisions of the Plan. The Commission, pursuant to Section 57-0123 of the ECL, asserted jurisdiction over the Project. On January 20, 2021, the Commission issued a decision containing conditions finding that the Project conformed with the Standard and Guidelines in the Plan (the "Decision").

4. Respondents were required to satisfy the Decision's conditions before commencing any Development activity on the Property.

5. As of July 26, 2021, Respondents had not satisfied any of the conditions of the Decision.

6. On July 26, 2021, Commission office received notification of alleged clearing activity on the Property.

7. On July 27, 2021, Commission staff met Respondents' representative Jessica Insalaco on the Property to inspect the alleged clearing. The inspection revealed that Respondents, or its contractor, cleared or caused a portion of the Property to be cleared. The Commission maintains that the clearing constituted Development and was not permitted because Respondents had not satisfied the Decision's conditions. Respondents maintains that a contractor employed by Respondents had cleared foliage to provide access to locations on the Property designated for installation of water quality monitoring wells. Respondents were directed to immediately terminate the activity.

8. On July 28, 2021, notwithstanding being directed to cease activity on the Property, the Respondents or its contractor recommenced activity on the Property. On July 28, Respondents met with representatives of Southampton on the Property. The Town representatives directed the Respondents to stop the activity.

9. On August 18, 2021, the Commission issued a Notice of Violation to the Respondents for engaging in Development, including clearing and disturbance activity on the Property that was not consistent with the Decision. The Notice was issued pursuant to Environmental Conservation Law Section 136.

10. On August 25, 2021, Commission staff held a compliance conference with the Respondents' representatives including Mark Hissey and Jessica Insalaco, its consultant, Charles Voorhis, of Nelson Pope & Voorhis and its local counsel, Wayne Bruyn, of O'Shea Marcincuk & Bruyn, to discuss the Notice of Violation. During the call, Respondents advised staff, without any admission of guilt or liability that the alleged site disturbance occurred along areas adjacent to dirt paths for the purpose of installing groundwater monitoring wells to gather baseline water quality data. The Respondents maintain that the clearing of the portions of the Property was either not Development proscribed by the Act or if considered "Development," the clearing was inadvertent, de minimis and the result of a contractor's unintentional errors in the field.

11. The Commission has determined that the Respondents' clearing of portions of the Property was proscribed conduct.

12. In total, Respondents cleared, or allowed to be cleared portions of the Property in multiple locations that collectively aggregate to approximately 0.33 acres of the Property. Of that 0.33 acres, a total of approximately 0.16 acres of clearing occurred in the portions of the Property that are to remain natural under the Decision. The remainder of the clearing, 0.17 acres, was in areas that are designated to be disturbed and cleared under the Decision.

13. To avoid the costs and uncertainties of litigation, the parties have agreed to the terms of a settlement as set forth below.

NOW, therefore, it is hereby stipulated and agreed as follows:

14. Respondents' execution and complete satisfaction of the terms of this Consent

Order shall resolve the Notice of Violation issued by the Commission on August 18, 2021 for Respondent's violation of the terms of the Decision and for knowingly recommencing the activities after being directed to terminate them.

15. In consideration of the settlement of all claims arising from or related to the alleged violations set forth in the Notice of Violation, Respondents agree to pay to the Commission a civil penalty in the amount of EIGHTY-TWO THOUSAND FIVE HUNDRED DOLLARS (\$82,500.00) as follows:

- (a) The payment shall be paid by bank check made payable to "Central Pine Barrens Joint Planning and Policy Commission.
- (b) The payment to the Commission must have written on its face: CPBJPPC 5-2021/DLV-Lewis Road PRD.
- (c) The payment to the Commission shall be delivered to:
Central Pine Barrens Joint Planning and Policy Commission 624 Old Riverhead Road, Westhampton Beach, New York 11978,

via certified mail, overnight express delivery, or hand delivery no later than Thirty (30) Days following the Effective Date of this Consent Order.

16. Within Thirty (30) days of the Effective Date of this Consent Order, Respondents must submit to the Commission a revegetation plan ("Revegetation Plan") for the 0.16 acre portion of the Property that Respondents cleared and that was not designated for clearing. The Revegetation Plan must comport with the revegetation guidelines (the "Guidelines") attached hereto as Schedule A. The revegetated area must remain as natural open space as depicted in the Lewis Road PRD Master Plan dated November 17, 2020, stamped received by the Commission office on November 18, 2020, referenced in the Commission's Decision.

17. The Commission, through its Executive Director, shall review, approve, or required modifications to the Revegetation Plan within Twenty (20) days of its receipt. If modifications are required, Respondents have Twenty (20) days to make them and submit a modified Revegetation Plan to the Commission. This cycle shall continue until the Commission approves the Revegetation Plan.

18. Upon approval, the Respondents must, at its own cost and expense, implement the Revegetation Plan. Respondents' failure to comply with any provision of the Revegetation Plan will constitute a violation of this Consent Order. Respondents may implement the Revegetation Plan without further satisfying the conditions of the Decision. Respondents may not undertake any other activity on the Property that does not conform with the conditions of the Decision.

19. Respondents must immediately cease and desist all further activities in violation of any provision of the Act or the Plan or both on the Property.

20. Respondents' compliance with this Consent Order settles all claims arising from

or relating to the alleged violations set forth in the Notice of Violation.

21. The Commission has proposed Plan Amendments that, as of the date of this Consent Order, are being reviewed under State Environmental Quality Review Act. The amendments propose a new Section 6.7.6.8, *Issuance of Pine Barrens Credits to a Parcel with a Land Use Violation*. The proposed section states, “No Pine Barrens Credits shall be issued for any property where land use conduct has occurred or is occurring that violates the Act, this Plan, any regulation promulgated by the Commission, or any order, determination or permit condition issued by the Commission.”

The Commission represents that upon the satisfaction of Respondents’ obligations under this Order, the alleged violations will not be deemed to be land use conduct that has occurred or is occurring that violates the Act, the Plan, any regulation promulgated by the Commission, or any order, determination or permit condition issued by the Commission in the event Respondents apply to the Commission for Pine Barrens Credits for the Property.

22. Except for resolving the matters described herein, nothing contained in this Consent Order shall be construed as barring, diminishing, adjudicating or in any way affecting any civil, administrative, or criminal rights of the Commission with respect to other action of the Respondents that violates the Act or the Plan or both no matter when it occurred.

23. Respondents expressly waive its rights to bring or pursue any lawsuit, grievance, arbitration, or administrative proceeding, upon any claims it may have or has had against the Commission, its members, staff, representatives, or agents (collectively the “Commission Parties”) arising from the alleged violations, the Notice of Violation, or this Consent Order. Respondents irrevocably and unconditionally release and forever discharge the Commission Parties from any actions, charges, causes of action, suits, obligations, promises, agreements, damages, debts, complaints, liabilities, claims, grievances, arbitrations, costs, losses, rights, expenses or any controversies, or any combination of the same in law or equity of any nature whatsoever asserted or unasserted, known or unknown, suspected or unsuspected, which Respondents ever had or now has against the Commission Parties about the alleged violations, the Notice of Violation, or this Consent Order.

24. Respondents covenant not to sue, bring, or pursue any lawsuit, grievance, arbitration, or administrative proceeding, upon any claims it may have or has had against the Commission Parties in law or equity of any nature about the alleged violations, the Notice of Violation or this Consent Order.

25. Respondents’ failure to materially comply and in timely fashion with any provision, term, or condition of this Consent Order shall constitute a violation under the Act and shall be deemed to be a violation of both this Consent Order and the Act. Upon such failure to comply, the Commission may commence any action it deems appropriate to resolve the violation.

26. Respondents shall indemnify and hold harmless to the extent permitted by law the Commission Parties for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Consent Order by Respondents and its successors and assigns (including successors in title).

27. If Respondents desire that any of the provisions, terms or conditions of this Consent Order be changed, Respondents must make written application, setting forth the grounds for the relief sought, to the Commission at 624 Old Riverhead Road, Westhampton Beach, New York 11978. No change or modification to this order shall be made or become effective except as set forth by a written order of the Commission.

28. No informal oral or written advice, guidance, suggestion, or comment by the Commission Parties regarding any report, proposal, plan, specification, schedule, comment, or statement made or submitted by Respondents will be construed as relieving Respondents of its obligations under this Consent Order to obtain the approvals or consents required for the Project.

29. The Effective Date of this Order shall be the date upon which it is signed by the Commission's Executive Director or her designee.

30. Respondents acknowledge the authority and jurisdiction of the Commission to issue the Notice of Violation and enter this Consent Order, accepts the terms and conditions set forth in the Consent Order and consent to the issuance thereof and agrees to be forever bound by the provisions, terms and conditions contained therein.

31. Each of the undersigned persons represents and warrants that he or she is fully authorized to enter this Consent Order and execute this Consent Order on his or her own behalf and on behalf of the Party or Parties he or she represents.

DLV Quogue Owner, LLC

By: 

Name: EDWARD DIVITA

Title: AUTHORIZED REP.

Date: 8/12/22

DLV Quogue, LLC

By: 

Name: EDWARD DIVITA

Title: AUTHORIZED REP.

Date: 8/12/22

Acceptance by the Commission

The Commission authorizes entering this Order on Consent.

CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION

By: Judith Jakobsen
Judith Jakobsen, Executive Director

Date: 8/18/2022

Schedule A - Revegetation Plan guidelines

- A. Revegetation Plan and Implementation.
 1. Prepare a Revegetation Plan for 0.16 acres of disturbed area.
 2. The Plan shall depict the surveyed area of disturbance that will be revegetated.
 3. The Plan shall be reviewed by Commission staff and revised until it is in a form acceptable to implement
 4. Timeline
 - a. Submit the plan for review within 30 days of the execution of this consent order.
 - b. this seems to repeat below
 - c. Commence planting activity in spring and/or fall 2022
 - d. Complete planting by the end of the fall planting season in the year 2022
 5. Plantings
 - a. Utilize species native to the Central Pine Barrens, composed of species similar to that which was removed and likely to be found in ecological communities on or in the vicinity of the property and at sufficient densities, sizes and diverse arrangements to mimic natural conditions.
 - b. Identify locations of each species, sizes and spacing
 - c. List the source(s) of plant material
 - d. Trees shall be a minimum size of two (2) gallon container size. Trees shall be planted in a staggered grid or naturalistic planting design with spacing to be determined based on selected species (but no less than 30 feet on center)
 - e. Understory, shrubs and groundcovers shall be planted between trees in a naturalistic planting design.
 6. Survival and maintenance
 - a. Identify a temporary water source, if necessary
 - b. Guarantee 85% survival of plantings for three years
 - c. Remove and replace dead, dying and diseased plants during the three-year guarantee period as necessary
 - d. Monitor and control invasive species in the revegetation area. Invasive plants shall be removed by hand with non-chemical methods.
 7. Reporting
 - a. Notify the Commission in writing when revegetation commences and when it is complete
 - b. Submit reports by June 30 of each year for three years
 - c. Upon completion of revegetation, submit an 'As Built' survey to confirm the list and locations of plantings that were installed. Minimal substitutions are acceptable. Significant changes require review.
 - d. Report replacements when survival requirements are not met. No extension of the reporting period shall be necessary regardless of replaced plantings. Respondents are expected to ensure survival and quality of revegetation.
 - e. Monitor the area and submit to the Commission an annual narrative report for three years concerning the status and success of the revegetation.
 - f. Color photographs shall be included and taken from the same viewpoint each year to show progression.
 - g. Annually certify that the 85% survival rate is achieved.

- h. Commission staff will perform a physical inspection with two days advance notice once per year between spring and fall seasons.
- 8. Protection
 - a. Delineate the boundaries of the revegetated area with fencing and/or stakes that allow free wildlife movement, without entanglement, to ensure the area remains protected and not subject to disturbance. Once revegetation is complete the demarcation may be removed so long as one modest sign is installed to identify the area as protected. The sign shall be no larger than 9 inches by 12 inches on a post no more than six feet. It shall contain the language “protected natural area” or “protected restored area” or similar language.
 - b. The revegetated area must be permanently protected and included in the conservation easement or covenants and restrictions for the site including in the event the Property changes ownership, use and/or is redeveloped.