

## CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION

In the Matter of the Violations of Article 57 of the  
Environmental Conservation Law of the State of  
New York (“ECL”)

## ORDER ON CONSENT

No. CPBJPPC 1-2011

by

## THE TOWN OF BROOKHAVEN

(Suffolk County) Respondent.

WHEREAS

1. The Central Pine Barrens Joint Planning and Policy Commission (hereinafter referred to as "the Commission") has jurisdiction over land use activities within the Central Pine Barrens as defined in Article 57 of the ECL.
  2. The Town of Brookhaven (hereinafter referred to as "the Respondent") is a municipal corporation with offices at One Independence Hill, Farmingville, New York.
  3. The Respondent owns a piece of property known as Bartlett Pond Park bordered on the south side by new York State Route 25 (a/k/a Middle Country Road) and on the west side by Bartlett Pond Park in the Hamlet of Middle Island as identified as Suffolk County Tax Map Number District 200, Section 432, Block 1, Lots 8.2 and 8.4, consisting of 6.31 acres used as a public park.
  4. Bartlett Pond Park is located in the "compatible growth area" of the Central Pine Barrens area as defined in ECL §57-0107(12), and as such is under the jurisdiction of the Commission.
  5. Pursuant to Article 57 of the ECL, the Commission has promulgated the Comprehensive Land Use Plan which, among other things, prescribes standards to which development activities in the compatible growth area must adhere.
  6. In March of 2011, Commission staff became aware of clearing of vegetation at Bartlett Pond Park in violation of Article 57 of the ECL and the Comprehensive Land Use Plan and conducted an investigation.
  7. The Respondent, as a result of that investigation, admits to clearing certain vegetation at Bartlett Pond Park in violation of Article 57 of the ECL and the Comprehensive Land Use Plan.
  8. ECL §57-0136(2-b), states for any violation that takes place in the "compatible growth area" of the Central Pine Barrens area, any person who violates any provision of ECL Article 57, the land use plan adopted by the Commission, any regulation promulgated by the Commission, or the terms or conditions of any order, permit, or determination issued by the Commission pursuant to ECL Article 57 shall be liable for a civil penalty of not more than ten thousand

dollars for each violation and an additional civil penalty of not more than one thousand dollars for each day that such violation continues.

9. Respondent desires to resolve the violations through this Order on Consent rather than to engage in litigation on the issues.
10. The Commission agrees to settle the within matter through this order on Consent with Respondent rather than to engage in litigation on the issues.
11. Respondent, represented by counsel, affirmatively waives its right to a public hearing in this matter in the manner provided by law, and consents to the entering and issuing of this order, and agrees to be bound by the terms and conditions contained here.

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

- I. Cease and Desist. Respondent shall immediately cease and desist any and all further activities in violation of any provision of the ECL in relation to clearing of Bartlett Pond Park, particularly Article 57 of the ECL and the Comprehensive Land Use Plan.
- II. Relief.
  - A. Suspended Penalty. With respect to the violations identified in paragraphs "1" through "10" of this Order, the Commission assesses against Respondent TOWN OF BROOKHAVEN a civil penalty in the sum of FIFTEEN THOUSAND (\$15,000) DOLLARS, of which FIFTEEN THOUSAND (\$15,000) DOLLARS is suspended pending complete compliance with the terms and conditions of this Order on Consent.
  - B. Method of Payment. If payment should become due and payable, payment shall be made in accordance with the following three paragraphs.
    - i. The payable portion of the penalty is to be paid by bank check made payable to "Central Pine Barrens Joint Planning and Policy Commission," as the case may be.
    - ii. Payment to the Department must have written on its face: CPBJPPC 1-20111/Town of Brookhaven.
    - iii. Payment to the Commission shall be delivered to: Central Pine Barrens Joint Planning and Policy Commission  
3525 Sunrise Highway  
P.O. Box 587  
Great River, New York 11739-0587
  - C. Respondent, within ninety (90) days, shall prepare or cause to be prepared, a revegetation plan for Bartlett Pond Park which shall include and adhere to the following elements and requirements:

- i. The Respondent shall have the revegetation plan prepared by a qualified professional, such as a Registered Landscape Architect, who is familiar with Central Pine Barrens native plant species and their propagation, planting and care. In preparing the revegetation plan, the qualified professional shall provide to the Respondent and the Commission a good faith estimate of the total cost of plants, materials and labor required to implement the revegetation plan.
- ii. The Respondent shall have a survey of the Bartlett Pond Park site prepared by a Licensed Land Surveyor which includes a depiction of the boundaries of the area which was cleared and shall provide the size of the area which was cleared and which is to be revegetated. Once completed, the survey shall be submitted to the Commission and shall be used as a base map for the revegetation plan.
- iii. The Respondent shall hire a qualified arborist who shall inspect all remaining trees within the area to be revegetated and shall provide to the Respondent and the Commission a professional assessment as to what measures need to be undertaken to enhance the survival and viability of the remaining trees, which shall be protected and retained on the revegetation site. These measures shall be reflected on and incorporated into the revegetation plan.
- iv. All remaining trees within the area to be revegetated shall be located on the revegetation plan and identified by species and diameter at breast height.
- v. The revegetation plan shall only utilize species of trees, shrubs, groundcovers and other vegetation which are native to the Central Pine Barrens and at sufficient densities, sizes and diverse arrangements (no monocultures) to approximate and mimic natural conditions within existing natural vegetation communities in the Central Pine Barrens. Native species shall be of Long Island genotype. The revegetation plan shall provide planting specifications.
- vi. The revegetation plan shall provide for appropriate ground preparation including regrading, amelioration of existing soil compaction and incorporation of appropriate soil amendments, prior to revegetation, to render the soil in the area to be revegetated as conducive as possible to growth and regrowth of native species in the revegetated areas.
- vii. Vegetation to be planted shall be planted at a time of year appropriate and suitable for planting, such as fall or spring.
- viii. The revegetated area shall be properly irrigated on a regular basis, to be prescribed and included on the revegetation plan, to ensure survival.
- ix. The revegetated areas shall be guaranteed by Respondent at an 85% survival rate for a minimum of 3 years (with the 3-year time period commencing after the last plant is planted).
- x. The four-foot-wide walking trail shall be incorporated into the revegetation plan.

- xi. The revegetation plan shall identify and depict temporary staging, mobilization and storage areas required for the revegetation. All such areas shall be located outside the regulatory limits of the pond and associated freshwater wetlands located within or near Bartlett Pond Park.
  - xii. The Respondent shall have its qualified professional determine whether or not a temporary ground cover is required to stabilize the revegetation site until the permanent revegetation can be completed. If the determination is such that a ground cover is required, the Respondent shall have its qualified professional develop and prepare a prescription for said temporary ground cover. The temporary ground cover shall be comprised of native herbaceous plant seed mix.
  - xiii. Once the revegetation plan has been prepared, the Respondent shall submit the revegetation plan to the Commission for its review and approval. Until approved by the Commission, no physical work activity on such revegetation plan may commence at Bartlett Pond Park.
- D. Respondent, within one-hundred-fifty (150) days of approval of the revegetation plan by the Commission, or a mutually acceptable time frame, consent to which will not be unreasonably withheld by the Commission, shall commence implementation of the revegetation plan for Bartlett Pond Park and shall complete the revegetation within sixty (60) days of its commencement. In implementing the revegetation plan, the Respondent shall authorize its qualified professional, or his designee, to serve as the on-site coordinator and shall him/her the authority to direct all work associated with the revegetation..
- E. Prior to the commencement of activities within Bartlett Pond Park, the Respondent must:
  - i. Stake the limits of the revegetation project area and delineate all staging, storage and mobilization areas for inspection by Commission Staff prior to commencement of physical activity.
  - ii. Provide to the Commission the cell phone number and other pertinent contact information for the on-site coordinator/director.
  - iii. Notify the Commission's Compliance and Enforcement Coordinator a minimum of forty-eight (48) hours in advance of initial site disturbance to inspect the project site.
- F. Respondent, within ninety (90) days, shall prepare or cause to be prepared a post-revegetation Invasive Species Monitoring Plan to be approved by the Commission. The Invasive Species Monitoring Plan must:
  - i. Ensure that the revegetated area is kept free of invasive species.

- ii. Provide an invasive species monitoring schedule.
  - iii. Ensure that invasive species are manually removed.
  - iv. Require Commission approval if herbicides or other chemicals are proposed for use to control invasive species.
  - v. Once the Invasive Species Monitoring Plan has been prepared, the Respondent shall submit the Invasive Species Monitoring Plan to the Commission for its review and approval. The Commission will review and provide reasonable amending proposal to be made by the Respondent and will not unreasonably withhold consent to acceptance.
  - vi. Once the Invasive Species Monitoring Plan has been approved by the Commission, it shall be implemented within a reasonable period of time following completion of the revegetation.
- G. Respondent; within ninety (90) days, shall prepare or cause to be prepared a Monitoring and Reporting Plan. The Monitoring and Reporting Plan must:
- i. Set forth a schedule for submitting reports, on a biannual basis for the four years following completion of the revegetation, to the Commission concerning the status and success of the Revegetation Plan.
  - ii. Set forth the Monitoring and Reporting Plan elements including, but not limited to the date and time of inspection, name and qualifications of person conducting inspection, color digital photographs of the revegetated area taken at the time of each inspection, relative health of revegetated area including whether or not an 85 percent survival rate of native species is being attained and, if not, corrective methods to be employed and whether or not invasive species are present and, if so, name of invasive species and corrective methods to be employed.
  - iii. Establish a schedule of on-site pre, operational and post-revegetation project meetings, which shall include Commission staff.
  - iv. Commission Staff must be permitted site access to perform inspections during the minimum four year Monitoring and Reporting period.
  - v. Once the Monitoring and Reporting Plan has been prepared, the Respondent shall submit the Monitoring and Reporting Plan to the Commission for its review and approval. The Commission will review and provide reasonable amending proposal to be made by the Respondent and will not unreasonably withhold consent to acceptance.

- vi. Once the Monitoring and Reporting Plan has been approved by the Commission, it shall be implemented within a reasonable period of time following said Commission approval.
  - H. At the completion of the four-year Monitoring and Reporting period described in Paragraph II. G., Respondent must certify to the Commission that the revegetation is complete and that Commission conditions have been fulfilled. Upon review by the Commission and adoption of a resolution certifying that the revegetation has been completed pursuant to this Order, the terms of this Order shall have been satisfied.
  - I. Once the Commission has adopted a resolution certifying that the Respondent has complete the revegetation and has fulfilled the Commission conditions, the Respondent shall protect and preserve the revegetated area in its naturally revegetated state in perpetuity. Following adoption of the aforesaid Commission resolution, the Respondent shall file a restrictive covenant on Bartlett Pond Park to this effect in favor of the Commission. Prior to filing said covenant, the Respondent shall first submit the covenant language to the Commission for its review and approval. The covenant shall not be filed until it has been approved by the Commission.
  - J. Respondent, within ninety (90) days, shall remove from the Bartlett Pond Park site and properly dispose of off-site, the existing land clearing debris consisting of branches, natural woody material, cleared vegetation and soil, located along the western boundary of the property. Following completion of this removal work, Respondent shall submit a letter to the Commission certifying this work has been completed.
  - K. With the exception of the work described herein, Respondent shall not undertake nor cause to be undertaken any construction activity, alteration of vegetation or change in topography, and no "development" as defined by Section 57-0107(13) of the ECL on Bartlett Pond Park, unless prior to commencement of such activity the same receives all applicable approvals including those required pursuant to Article 57.
  - L. Within sixty (60) days, Respondent shall arrange for a workshop/training meeting involving managers and foremen of the Town of Brookhaven Department of Parks, Recreation, Sports and Cultural Resources ("hereinafter Department of Parks") and staff of the Commission to familiarize Department of Parks management with ECL Article 57 and the Comprehensive Land Use Plan in an effort to ensure that activities within the Central Pine Barrens, such as the violation described herein, do not occur again.
- III. Future Compliance Standard. The Commission shall, for purposes of determining future compliance with the maximum clearing standard of 25% for the compatible growth area as described in Table 5-1 of the Comprehensive Land Use Plan, consider the Bartlett Pond Park site to include all land on Suffolk County Tax Map Number District 200, Section 432, Block I, Lots 8.2 and 8.4 under the ownership of the Town of Brookhaven as of March 31, 2011.

IV. Settlement and Reservation of Rights.

- A. Upon completion of all obligations created in the Order, this Order settles only all claims for civil and administrative penalties concerning the violations described in Paragraphs "1" through "10" this Order against Respondent and its successors (including successors in title) and assigns.
- B. Except as provided in Subparagraph IV.A. of this order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the civil, administrative, or criminal rights of the Commission or authorities with respect to any party, including Respondent.

V. Failure, Default and Violation of Order.

- A. Respondent's failure to comply fully and in timely fashion with any provision, term, or condition of this Order shall constitute a default and a failure to perform an obligation under this Order and under the ECL and shall be deemed to be a violation of both this Order and the ECL, and shall constitute sufficient grounds for revocation of any permit, license, certification, or approval issued to Respondent by the Commission.

VI. Indemnification.

Respondent shall indemnify and hold harmless to the extent permitted by law the Commission and their representatives and employees 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 Order by Respondent and their successors (including successors in title) and assigns.

VII. Binding Effect. The provisions of this Order shall inure to the benefit of and be binding upon the Commission and Respondent and their successors (including successors in title) and assigns.

VIII. Modification. In those instances in which Respondent desires that any of the provisions, terms or conditions of this Order be changed, each shall make written application, setting forth the grounds for the relief sought, to the Commission at P.O. Box 587, 3525 Sunrise Highway, Great River, New York 11739-0587. No change or modification to this order shall be made or become effective except as set forth by a written order of the Commission.

IX. Access and verification. For the purpose of insuring compliance with this Order, and with applicable provisions of the ECL and regulations promulgated thereunder, representatives of the Commission shall be permitted access to the Bartlett Pond Park property without prior notice at reasonable hours and intervals in order to inspect and determine the status of the property, as well as access to relevant records in order to inspect and/or perform such tests as may be deemed appropriate to determine the status of Respondent's compliance.

X. Force Majeure. Respondent shall not suffer any penalty under any of the provisions, terms and conditions hereof, or be subject to any proceedings or actions for any remedy or relief, if it cannot comply with any requirements of the provisions hereof, because of an Act of God, war,

riot or other catastrophe as to which negligence or willful misconduct on the part of Respondent was not a proximate cause, provided, however, that Respondent shall immediately notify the Commission in writing when Respondent obtains knowledge of any such condition and request an extension or modification of the provisions hereof.

- XI. Entire Order. The provisions of this Order constitute the complete and entire Order issued to Respondent concerning resolution of the violations identified in Paragraphs "1" through "10" of this Order. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound, pursuant to paragraph XII of this Order. No informal oral or written advice, guidance, suggestion or comment by the Commission regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.
- XII. Effective Date. The effective date of this Order shall be the date upon which it is signed by the individual authorized by the Commission to do so on behalf of the Commission.

Dated: Great River, New York  
August 8, 2011

Commissioner \_\_\_\_\_ of

CENTRAL PINE BARRENS JOINT PLANNING  
AND POLICY COMMISSION

By: 

Name: Peter A. Scully  
Title: Chairman

### **CONSENT BY MUNICIPAL CORPORATION**

Respondent, TOWN OF BROOKHAVEN, acknowledges the authority and jurisdiction of the Commission Chair of the Central Pine Barrens Joint Planning and Policy Commission to issue the foregoing Order, waives public hearing or other proceedings in the matter, accepts the terms and conditions set forth in the Order and consents to the issuance thereof and agrees to be bound by the provisions, terms and conditions contained therein.

TOWN OF BROOKHAVEN  
Respondent

By: 

Name: Mark Larko

Title: Supervisor

an individual duly authorized by the respondent municipal corporation to sign on behalf of the municipal corporation and who may bind respondent municipal corporation to the terms and conditions contained herein.

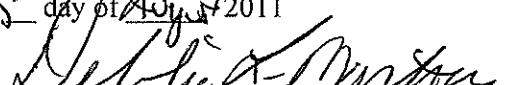
Date: 8/5/11

### **MUNICIPAL CORPORATE ACKNOWLEDGMENT**

STATE OF NEW YORK)  
) ss.:  
COUNTY OF SUFFOLK)

On the 5<sup>th</sup> day of August in the year 2011, before me personally came Mark Larko to me known, who, being duly sworn did depose and say that s/he resides at Setauket, New York that s/he is the Supervisor of the TOWN OF BROOKHAVEN, the municipal corporation described herein and which executed the above instrument; and that he signed his name thereto with full corporate authority so to do.

Sworn to before me this  
5<sup>th</sup> day of August 2011

  
Debbie L. Masterson  
Notary Public

DEBBIE L. MASTERSON  
NOTARY PUBLIC, State of New York  
No. 01MA4694984, Suffolk County  
Term Expires February 28, 2014