

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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TOWN OF BROOKHAVEN,

Plaintiff,

Index No.: 26936-2013
(and consolidated case Index No.
007031-2014)

-against-

JOSEPH MARCARIO, MARIEN MARCARIO
a/k/a MARIEN R. MARCARIO, JULEE E.
AMSLER, ALLEN T. SWEZEY, GREEN
HORIZON ENTERPRISES, INC., JETSON
ENTERPRISES, INC., GREEN VISION
MATERIALS, INC., MMCCAS HOLDINGS,
INC., JETSON ENTERPRISES, INC., GREEN
VISION MATERIALS, INC., "JOHN DOE#1"
through "JOHN DOE #10", the last ten names being
fictitious names being and intended to be all other
persons or entities participating in the acts described
in the Verified Complaint,

Defendants.

**STIPULATION OF
SETTLEMENT**

Trial Justice Assigned:
Hon. Arthur G. Pitts

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RECITALS:

A. Plaintiff, Town of Brookhaven ("Town") commenced these actions, now consolidated by Order dated April 10, 2015 (Hon. Arthur G. Pitts, J.) [the "Actions"] against the defendants enumerated in the caption hereof (other than defendant Julee E. Amsler, a former owner against whom no relief is sought), [the "Defendants"] who currently own or operate (or formerly owned or operated) a mulch and composting facility (the "Mulch/Compost Facility") in Middle Island, Town of Brookhaven, New York on a 14-15 acre parcel, known as 132 Swezey Drive, Middle Island, New York located on the south side of Middle Country Road and described under Suffolk County Tax Map as District 0200, Section 431-00, Block 0.3.00, Lot 021-002 (the "Mulch/Compost Facility").

B. The Town contends in the Actions, inter alia, that the operations of the Mulch/Compost Facility are not a permitted use in the residential zone in which it is located, that permits and other approvals required by the Brookhaven Town Code (“Town Code”) have not been obtained, that the dimensions of the mulch and compost piles at the Mulch/Compost Facility are in excess of limits imposed by the Town Code, that multiple fires have occurred at the Mulch/Compost Facility, that no Site Plan has been obtained, that the Mulch/Compost Facility constitutes a public/private nuisance, and asserts related claims;

C. The Town has made a motion (pending Decision before the Court) seeking leave to further amend its Complaint in the Actions so as to further assert a claim for monetary damages and permanent injunctive relief pursuant to the “Nuisance Abatement Law” contained in Town Code Chapter 49B (the “Nuisance Law Claim”);

D. Defendants have denied all allegations asserted by the Town in the Actions, and contend, inter alia, that the operations of the Mulch/Compost Facility are permitted and are not subject to the zoning provisions of the Town Code because they constitute a “*pre-existing non-conforming use*”, i.e., a use alleged to precede the 1937 enactment of the Brookhaven Zoning Code (the “Pre-Existing Use Claim”);

E. The Actions are currently on the calendar of this Court (Hon. Arthur G. Pitts, J.) for trial on April 25, 2016 (the “Trial”); and

F. The parties have agreed to settle and resolve any and all claims asserted in the Actions and concerning the operations of the Mulch/Compost Facility, including the Pre-Existing Use Claim and the Nuisance Law Claim, upon terms and conditions set forth below.

IT IS THEREFORE STIPULATED by and among the undersigned parties and their counsel that the within Actions shall be settled and resolved (but not discontinued, as provided below) upon the following terms and conditions:

1. Immediately following the execution of this Stipulation, the Defendants, their agents, servants, employees, and all other persons or representatives acting on their behalf or in concert with them, shall cease to import to the mulch or compost or fill or soil, or concrete or tires, or to accept the importation or introduction of any further wood, brush, trees, vegative waste, and any and all other mulching and composting materials which are utilized for the purpose of the manufacture of mulch or compost, except as specifically provided in paragraphs “2”, “3”, “4” and “5” below, and not otherwise.

2. No later than August 31, 2018, time being of the essence (unless extended by the Town in writing), the Defendants shall cause the removal to a properly zoned, permitted or licensed facility, of all of the mulch, compost, and mulching and composting materials, including soil, RCA, concrete, stone, wood, and brush now being manufactured or stored at the Mulch/Composting Facility (the “Mulch Site”), whether by means of the sale to third-persons, or by means of physical removal from the Mulch Site so that no more than 3,000 cubic yards of compost, in the aggregate, including component materials, shall remain on the Mulch Site for sale to other, plus compost to be utilized with the nursery operation hereafter referred to as the “Permitted Material”.

3. The removal of mulch, compost and mulching composting materials, soil, RCA, tires, concrete, and other materials, from the Mulch Site shall, to the maximum extent feasible, be undertaken in such a manner which shall minimize disruption and interference with nearby residential areas and streets, and shall in no manner be performed or undertaken in a manner

which results in interference with traffic or otherwise creates any public safety hazard to the surrounding streets and communities.

4. Defendants agree that no trucks over 10,000 lbs shall be utilized to deliver grass or leaves to the premises. Only pickup trucks with landscape trailers no larger than 76' x 18' shall be permitted to bring grass and leaves to the premises. In addition, no more than 1,000 cubic yards of brush may be imported to the site from the date of this stipulation until 7/1/18. No other materials shall be imported to the mulch site. No tractor trailers shall be permitted to deliver materials to the premises. The defendants further agree that upon the so-ordering of this stipulation, they shall cease the import of concrete, RCA, and soil. Processed mulch for resale may be imported to the site, if a nursery business is located on the property, and so long as the aggregate amount of processed mulch is no more than 500 cubic yards at any one time, and is stored in five three-sided cement bins.

5. Except for the storage or the manufacture of compost (which, in the aggregate, and including component materials, shall not exceed 3,000 cubic yards in total for sale to others plus compost used for the nursery nor shall it be stored at any height greater than 10 feet or in any piles greater than 150 feet in width and 250 feet in length), no compost or component materials shall be stored, maintained or manufactured by Defendants at the Site. No mulch or RCA shall be manufactured at the site.

6. The remainder of the Site shall be utilized solely and exclusively as an agricultural or landscaping nursery (the "Nursery"), or for the operation of a "farm" or for related agricultural uses as set forth and defined in §85-925 of the Town Code (the "Farm Site"), and including only the manufacture and storage of organic material which is composted and utilized at the Nursery or Farm Site, or for sale to others as defined by §85-925(C)(12) or any other

permitted residential uses under the Brookhaven Town Code, and provided further that the Defendants shall in no manner engage in a commercial mulching operation. Defendants shall apply to the Town of Brookhaven for clearing permits prior to clearing any additional land.

7. Within 30 days of the so-ordering of this Stipulation of Settlement, the Defendants shall remove the concrete pile, pile of RCA, tires, pile of masonry, and all trailers. Twelve roll off containers may remain on the site until 8/31/18, at which time they shall be removed.

8. Within 60 days of the so-ordering of this Stipulation, the Defendants shall remove or dispose of the portion of the soil pile that is above the berms.

9. Within 30 days of the so-ordering of this stipulation, Defendants shall use RCA/soil mix onsite for roadways and dispose of the remainder of RCA/soil mix at a licensed disposal site.

10. Within 180 days of the so-ordering of this Stipulation of Settlement, the Defendants shall obtain a demolition permit for the frame garage and remove the same; and obtain a certificate of compliance for the barn, garage and office.

11. Immediately upon the so-ordering of the Stipulation, Defendants shall post 15 mile per hour signs on Swezey Drive to limit dust. Defendant shall moisten unpaved surfaces and material handling areas, to keep dust at a minimum.

12. Immediately upon the so-ordering of this Stipulation, the mulch and compost adjoining the eastern and northern berms must be moved so that the berms can be stabilized in this area. This shall be completed within 3 months.

13. The 15,700 cubic yards (cy) of wood and brush must be removed or sold as follows:

1. 5,000 cy by 10/30/16
2. 5,000 cy by 10/30/17
3. Remainder of brush by 8/31/18

All such materials shall be moved and remain below the levels of the berms while being processed or sold.

14. No further materials shall be placed upon the berms. The slope of the northern berm shall be immediately reduced to reduce potential of slope failure.

15. Each of the foregoing paragraphs “1” through “14” of this Stipulation are and shall be deemed to constitute material obligations of the Defendants. In the event of any violation thereof by the Defendants (a “Default”), which Default shall continue for a period of five (5) business days following service of a Notice of Default upon their counsel, Welby, Brady & Greenblatt, LLP, by email to asinger@wbglp.com, and by overnight delivery by a recognized overnight courier service such as Federal Express or UPS (unless a different recipient is designated in writing by the Defendants), then and in such event:

a. The Town shall be authorized to seek relief before the Court in the Actions, including both prohibitory and mandatory injunctive relief upon such notice as the Court may direct and to impose such fines and seek such additional remedies under the Town Code as are authorized and permitted by law;

b. The Defendants specifically acknowledge and agree that injunctive relief, (both prohibitory and mandatory) is a necessary and proper remedy for the enforcement of this Stipulation. Defendants further agree that if the materials are not removed by Defendants pursuant to this Stipulation, the Town of Brookhaven may enter upon the site, remove the same and charge the costs as a clean-up lien on the real property tax bill.

c. The Defendants shall be deemed to have consented to the amendment of the Town's Complaints in the Actions to include the Nuisance Law Claim and for the Town to place the Town's claim for monetary damages and injunctive relief upon the Calendar of the Court for Trial (which Defendants shall be entitled to oppose, defend, and assert all other available defenses to);

d. The Town may pursue such other claims against the Defendants pursuant to the terms of this Stipulation, or which are available by law and equity; and

e. The foregoing remedies shall be deemed to be cumulative.

16. The Defendants agree that representatives of the Town Department of Public Safety, Fire Marshall's Office, and Law Department shall, at all times, be permitted physical access to the Mulch Site and Farm Site, during regular business hours, for the purpose of inspecting the Mulch Site/Farm Site and for ascertaining compliance with the terms of this Stipulation (the "Inspections"), provided however that the Inspections shall in no manner interfere with the lawful conduct of the Defendants' business operations at the Mulch Site/Farm Site. These inspections shall be scheduled quarterly; however, Town personnel may also enter the premises for emergencies and for inspections for demolition permits and certificates of zoning compliance.

17. No provision of this Stipulation shall relieve or shall be deemed to relieve the Defendants of their obligation to comply with any and all other provisions of law applicable to the operations of the Mulch Site and Farm Site, including, without limitation, other provisions of the Town Code, the New York State Building and Fire Prevention Code, Environmental Regulations such as the Environmental Conservation Law and its Regulations, or any and all

other provisions of law, statute, rules and regulations otherwise applicable to the ownership and conduct of any business, including a Nursery or Farm at the Mulch Site or Farm Site.

18. Jurisdiction of the Court shall be retained, in the Action, for the purpose of specifically enforcing, interpreting or resolving any dispute or controversy arising under this Stipulation.

19. This Stipulation shall be submitted to Hon. Arthur G. Pitts (or to another Justice of this Court) to be "so ordered" by the Court.

20. Each of the counsel executing this Stipulation represents and warrants his or her authority to enter into this Stipulation on behalf of, and to bind their respective clients.

21. This Stipulation may be executed in counterparts, and by email or facsimile, each of which shall be deemed to constitute a duplicate original hereof.

Dated: May 11, 2016

ROSENBERG CALICA & BIRNEY LLP

By: 

Robert M. Calica

*Special Counsel to Brookhaven Town Attorney
Annette Eaderesto, Attorneys for Plaintiff
Town of Brookhaven*

WELBY BRADY & GREENBLATT, LLP

By: 

Alan D. Singer, Esq.

*Attorneys for Defendants
11 Martine Avenue, 15th Floor
White Plains, New York 10606*

Joseph Marcario

Marien Marcario a/k/a
Marien R. Marcario

Julie E. Amsler

Allen T. Swezey

GREEN HORIZON ENTERPRISES, INC.

JETSON ENTERPRISES, INC.

By: _____

By: _____

GREEN VISION MATERIALS, INC.

By: _____

MMCCAS HOLDINGS, INC.

By: _____

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LLP

By: 

Robert M. Calica

Special Counsel to Brookhaven Town Attorney

Annette Eaderesto, Attorneys for Plaintiff

Town of Brookhaven



Joseph Marcario

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~~Julie E. Amsler~~

WELBY BRADY & GREENBLATT.

By: 

Alan D. Singer, Esq.

Attorneys for Defendants

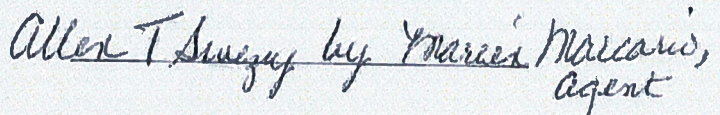
11 Martine Avenue, 15th Floor

White Plains, New York 10606



Marien Marcario a/k/a

Marien R. Marcario

 by *Marien Marcario,*
Agent

Allen T. Swezey

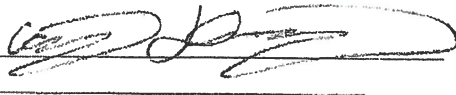
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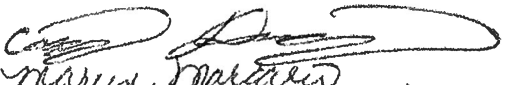
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GREEN VISION MATERIALS, INC.

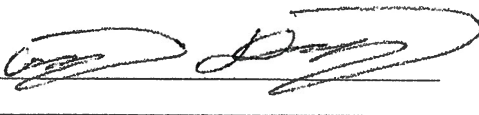
MMCCAS HOLDINGS, INC.

By: 

By: 
Marion Marcano
Allen T. Saizy by Marion Marcano
Agent.

JETSON ENTERPRISES, INC.

GREEN VISION MATERIALS, INC

By: 

By: 