

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF COMPLIANCE AND INSPECTION**

**In Re: Dedicated Builders LLC
JCM LLC
James C. McKee**

**File No.: C10-0083
AAD No.: 10-006/FWE**

CONSENT AGREEMENT

A. INTENT & PURPOSE

This Agreement is entered by and between the Rhode Island Department of Environmental Management (“RIDEM”) Office of Compliance & Inspection (“OC&I”) and Dedicated Builders LLC, JCM LLC, and James C. McKee (the “Respondents”). This Agreement is entered in accordance with Section 42-17.1-2 et seq. of the Rhode Island General Laws (“R.I. Gen. Laws”) for the purpose of resolving the administrative enforcement action set forth in a Notice of Violation (the “NOV”) issued to the Respondents by the OC&I on November 10, 2010.

B. STIPULATED FACTS

- (1) WHEREAS, the subject property is located approximately 580 feet south of Howard Road, approximately 500 feet southeast of the intersection of Howard Road and Louise F. Luther Drive, Assessor's Plat 23, Lots 10, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221 and 222 in the town of Cumberland, Rhode Island (the “Property”).
- (2) WHEREAS, Dedicated Builders LLC owns lots 213 and 214 on the Property. Dedicated Builders LLC and/or James C. McKee formerly owned all lots on the Property. Dedicated Builders LLC sold the remaining lots to new owners.
- (3) WHEREAS, on November 10, 2010 the OC&I issued a NOV to the Respondents alleging certain violations of Rhode Island’s Freshwater Wetlands Act, RIDEM’s Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, Rhode Island’s Water Pollution Act and RIDEM’s Water Quality Regulations.
- (4) WHEREAS, the Respondents requested an administrative hearing to contest the NOV.
- (5) WHEREAS, upon submission of an Application to Alter a Freshwater Wetland for lot 214 by the Respondents and/or James McKee to RIDEM’s Office of Water Resources (“OWR”) pursuant to Rule 10.00 of RIDEM’s Rules and Regulations

Governing the Administration and Enforcement of the Freshwater Wetlands Act, the OWR agrees to review and process said application in the normal course upon execution of this Agreement by the parties.

- (6) WHEREAS, this Agreement was negotiated and executed by the parties in good faith, and as a settlement of all claims which were denied and disputed as to validity and amount by the Respondents. RIDEM and the Respondents agree that neither this Agreement, nor any performance under this Agreement by the Respondents, shall constitute an admission by the Respondents of the factual or legal allegations contained in the NOV. Nor shall this Agreement by the Respondents constitute a waiver of, or act as a limitation to, any claims the Respondents may have against any third party. Due to the time limitations and the potential loss of sale of lot 213 on March 11, 2011, JCM, LLC and James C. McKee maintain that at all material times hereto Dedicated Builders LLC performed all work referenced in the NOV that is the subject of this Agreement. This Agreement should not in any way be construed as an admission of any wrongdoing on the part of JCM, LLC or James C. McKee.
- (7) WHEREAS, in lieu of proceeding to an administrative adjudicatory hearing on the NOV and to effect a timely and amicable resolution of the NOV, the OC&I and the Respondents hereby agree that it is in the best interest of the parties and in the public interest to resolve the issues raised in the NOV.
- (8) WHEREAS, the OC&I finds that this Agreement is a reasonable and fair settlement and adequately protects the public interest in accordance with Rhode Island's Freshwater Wetlands Act, RIDEM's Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, Rhode Island's Water Pollution Act and RIDEM's Water Quality Regulations.

C. AGREEMENT

- (1) JURISDICTION – RIDEM has jurisdiction over the subject matter of this Agreement and has personal jurisdiction over the Respondents.
- (2) FORCE and EFFECT – This Agreement shall have the full force and effect of a final compliance order of the Director issued after a full hearing on the merits pursuant to the Administrative Procedures Act, R.I. Gen. Laws Section 42-35-1 et seq. from which no timely appeal was taken, and which is enforceable in Superior Court in accordance with R.I. Gen. Laws Section 42-17.1-2(21)(v).
- (3) APPLICATION – The provisions of this Agreement shall apply to and be binding upon the RIDEM, the Respondents and its agents, servants, employees, successors, assigns and all persons, firms and corporations acting under, through and for the Respondents in the performance of work relating to or impacting the requirements of this Agreement.
- (4) RECORDING OF AGREEMENT AND RELEASE OF NOV – The Respondents shall record this Agreement with the town of Cumberland, Rhode Island and shall

provide a copy of the recorded Agreement to the OC&I. The OC&I shall issue a Release of the NOV **for solely lot 213** for recording to the closing attorney who is handling the sale of lot 213. The recordings shall be at the sole expense of the Respondents.

(5) CONDITIONS –

- (a) **By May 31, 2011** the Respondents shall ensure the following actions are completed to comply with the Order section of the NOV:
- (i) Install a continuous uninterrupted line of staked haybales or silt fence between those portions of the wetlands that have been altered without authorization and the undisturbed freshwater wetlands. These soil erosion and sediment controls must be regularly inspected and properly and continually maintained (and replaced, if necessary) during and following the completion of the required wetland restoration, and until such time that all surrounding areas are properly stabilized. At the discretion and direction of the OC&I, additional soil erosion and sediment controls must be installed on-site, as deemed necessary, to protect any and all freshwater wetlands.
 - (ii) Remove all sediment that has been discharged from the Property into the Riverbank Wetland and Abbott Run Brook.
 - (iii) Upon completion of the work in (i) and (ii) , all original grades within the Riverbank Wetland must be reestablished to their original pre-altered condition and all areas of disturbed surface soils shall be loamed (if necessary), seeded with a wildlife conservation grass seed mixture and covered with a mat of loose hay mulch. Hydroseed, containing the proper seed components and mixed with a proper tackifier (stabilizing mulch material), may be utilized in lieu of the above stabilization measures. If necessary, steeply sloping areas or denuded/disturbed areas to be left exposed for long periods of time must be covered with excelsior matting or jute mesh.
 - (iv) If any or all of the plantings that were observed by the OC&I on October 18, 2010 fail to survive at least one year, the same plant species shall be replanted and maintained until such time that survival is maintained over one year.
 - (v) All restored wetland areas, including replanted areas, must be allowed to revegetate naturally and revert to a natural wild state. No future clearing, mowing, cutting, trimming, or other alterations are allowed by you in the restored wetland areas, or within other freshwater wetlands on the Property, without first obtaining a permit from the OWR.
 - (vi) Upon stabilization of all disturbed areas all erosion and sedimentation controls (e.g., silt fences and silt curtains) must be removed from the

freshwater wetland. Staked haybales, spread hay mulch, and other naturally-based/bio-degradable erosion control measures may remain in place to decompose naturally. Prior to the removal of the controls and/or prior to the contractor vacating the site, all accumulated sediment must be removed to a suitable upland area and all disturbed surfaces must be stabilized as described above.

- (b) **Within thirty (30) days of execution of the Agreement**, provided the town of Cumberland has not already done so, the Respondents shall remove 12-18 inches of silt and sediment from the storm water basin located on lot 217 (the “storm water basin”) so that the basin functions as designed. The Department shall be present to observe and inspect said work. A copy of correspondence received by the OC&I from the owner of lot 217 agreeing to provide access to the property for such work has been attached hereto as Attachment A. Said work will be completed pursuant to the authority of the property owner to enter the property. Temporary matting shall be installed within the storm water basin to stabilize the basin slopes immediately after the sediment is removed to prevent further sediment from entering the basin.
- (c) The Respondents shall have portable pumps available and utilize the pumps as necessary within the storm water basin to prevent flooding on the Property until the work in Section C (5)(b) above is completed and until such time that the Respondents have completed all work on the basin pursuant to the approval by OWR described in Section C (5)(e) below.
- (d) **Within sixty (60) days of the execution of this Agreement**, the Respondents shall submit revised plans and calculations for the storm water basin (the “revised plans”) that satisfactorily address the Engineering Review Sheet prepared by the OWR, attached hereto and incorporated herein as Attachment B.
- (e) **Within thirty (30) days of approval of the revised plans by OWR**, the Respondents shall complete all work as approved.
- (f) The Respondents shall contact Ms. Stacey Kurbiec Pinto at 222-1360 ext. 7409 prior to the commencement of any restoration work to ensure proper supervision. No restoration work shall commence until such time that you have met in the field with a representative of OC&I.
- (g) Penalty – The Respondents shall pay to OC&I the sum of Seventeen Thousand Two Hundred Fifty Dollars (\$17,250.00) in administrative penalties as follows:
 - (i) **Upon the sale of lot 213**, the closing attorney shall forward to OC&I the sum of Four Thousand Dollars (\$4,000.00) out of the escrow funds.
 - (ii) The remainder of the penalty, Thirteen Thousand Two Hundred Fifty Dollars (\$13,250.00), shall be paid to OC&I in twenty-six equal and

consecutive quarterly installments of Five Hundred Dollars (\$ 500.00) with the final payment of Two Hundred Fifty Dollars (\$250.00) to be paid on the following quarter. All payments shall be made on the first day of each quarter.

- (iii) Penalties that the Respondents agree to pay in this Consent Agreement are payable to and for the benefit of the State of Rhode Island and are not compensation for actual pecuniary loss.
- (iv) In the event that the Respondents fail to remit to OC&I a payment on or before its due date, that payment will be considered late and the Respondents will be in default. If the payment is not received within thirty (30) days of its due date, interest shall begin to accrue on the entire unpaid balance at the rate of twelve percent (12%) per annum. Interest will accrue at this rate beginning with the day after the due date specified in this Agreement until such date all past due installment payments and interest owed are remitted. Interest shall be calculated using the following generally established accounting principle:

$$\text{Interest due} = (\text{number of days late}/365) \times (0.12) \\ \times (\text{entire amount of unpaid balance})$$

This provision does not preclude OC&I from seeking penalties according to Section D for failure to comply with the remaining provisions of this Agreement.

- (v) All payments must be in the form of a **certified check** made payable to the R.I. General Treasurer – Water and Air Protection Account. All payments shall be delivered to:

Chief, RIDEM Office of Compliance and Inspection
235 Promenade Street
Providence, RI 02908-5767

- (6) RIGHT OF ACCESS – The Respondents provide to RIDEM, its authorized officers, employees and representatives a right of access to lot 214, at all reasonable times for the purpose of monitoring compliance with this Agreement. The Respondents shall ensure that assignees, successors in interest, lessees, sublessees, tenants in possession and/or occupants of lots 214 shall provide the same access and cooperation as long as they control the lots. The Respondents shall provide a copy of this Agreement to any current lessee, sublessee, tenant in possession and/or occupant of lot 214, as of the effective date of this Agreement. Any subsequent leases, subleases, assignments or transfers of lot 214, or an interest in lot 214, shall include this right of access provision and shall otherwise be consistent with the terms of this Agreement, up to and until the terms and conditions are complied with and the NOV is released.

D. COMPLIANCE

- (1) EFFECT OF COMPLIANCE – Compliance with and fulfillment of this Agreement shall be deemed to resolve all issues raised in the NOV. Upon the Respondents successful completion of the requirements set forth in this Agreement, OC&I shall issue a Release and Discharge of the NOV and Consent Agreement as to all remaining lots to the Respondents for recording. The Respondents shall provide a copy of the recorded Releases to OC&I. The recordings shall be at the sole expense of the Respondents.
- (2) FAILURE TO COMPLY – In the event that the Respondents fail to comply with any of the items specified in Section C(5)(a), C(5)(b), C(5)(c), C(5)(d) or C(5)(e) of the Agreement in accord with the dates provided in Section C, the Respondents shall pay a stipulated penalty of Five Hundred Dollars (\$500.00) per month for each and every month during which the noncompliance continues after said dates, except that OC&I may, for good cause shown, defer or reduce such penalty. The payment of a penalty in accordance with this paragraph shall not preclude RIDEM from seeking any other appropriate remedy (i.e., injunctive relief in Superior Court).
- (3) COMPLIANCE WITH OTHER APPLICABLE LAWS – Compliance with the terms of this Agreement does not relieve the Respondents of any obligation to comply with any other applicable laws or regulations administered by, through or for RIDEM or any other governmental entity.
- (4) ADDITIONAL ENFORCEMENT ACTIONS – Upon a determination by the Director that there is a threat to the public health or the environment, or upon discovery of any new information, RIDEM reserves the right to take additional enforcement actions as provided by law or regulation, including, but not limited to, the issuance of “Immediate Compliance Orders” as authorized by R.I.G.L. § 42-17.1-2(21). This Agreement shall not restrict any right to hearing or other right available by statute or regulation that the Respondents may have regarding any new enforcement action commenced by RIDEM after the execution of this Agreement.
- (5) FUTURE ACTIVITIES AND UNKNOWN CONDITIONS – This Agreement shall not operate to shield the Respondents from liability arising from future activities, as of the date of execution of this Agreement.
- (6) NOTICE AND COMMUNICATION - Communications regarding this Agreement shall be directed to:

Harold K. Ellis, Supervising Environmental Scientist
RIDEM Office of Compliance and Inspection
235 Promenade Street
Providence, RI 02908-5767
401.222.1360 ext. 7401

Joseph LoBianco, Esquire
RIDEM Office of Legal Services
235 Promenade Street
Providence, RI 02908-5767
401.222.6607 ext. 2302

- (a) At any time prior to full compliance with the terms of this Agreement, the Respondents agree to notify RIDEM in writing of any change in ownership of lot 214, and provide the name and address of the new owner(s). Notice of any change in address/telephone/fax of either party shall be sent to all other parties by certified mail.
- (b) Communications forwarded to the above-referenced address by certified mail shall be deemed received.
- (7) DEFERRAL – The Director may, for good cause shown, defer any of the compliance dates prescribed herein. Good cause for deferral of any compliance date shall be forwarded to RIDEM in writing at least fifteen (15) days prior to the prescribed deadline.
- (8) AMENDMENT – The Agreement may be amended by mutual agreement of the parties in writing.
- (9) EFFECTIVE DATE – This Agreement shall be deemed entered as of the date of execution by all parties.

IN WITNESS WHEREOF, the undersigned consent to this Agreement in substance and in form.

For Dedicated Builders LLC:

By: _____ (Print Name)

Its: _____ (Title)

Dated: _____

In my capacity as _____ of Dedicated Builders LLC, I hereby aver that I am authorized to enter into this Agreement and thereby bind Dedicated Builders LLC to satisfy any obligation imposed upon it pursuant to said Agreement.

STATE OF RHODE ISLAND
COUNTY OF _____

In _____, in said County and State, on this _____ day of _____, 2011, before me personally appeared _____, the _____ of Dedicated Builders LLC, a Rhode Island corporation, to me known and known by me to be the party executing the foregoing instrument on behalf of Dedicated Builders LLC, and he/she acknowledged said instrument by him/her executed, to be his/her/ free act and deed in said capacity and the free act and deed of Dedicated Builders LLC.

Notary Public
My Commission Expires: _____

For JCM LLC:

By: _____ (Print Name)

Its: _____ (Title)

Dated: _____

In my capacity as _____ of JCM LLC, I hereby aver that I am authorized to enter into this Agreement and thereby bind JCM LLC to satisfy any obligation imposed upon it pursuant to said Agreement.

STATE OF RHODE ISLAND
COUNTY OF _____

In _____, in said County and State, on this _____ day of _____, 2011, before me personally appeared _____, the _____ of JCM LLC, a Rhode Island corporation, to me known and known by me to be the party executing the foregoing instrument on behalf of JCM LLC, and he/she acknowledged said instrument by him/her executed, to be his/her/ free act and deed in said capacity and the free act and deed of JCM LLC.

Notary Public
My Commission Expires: _____

For James C. McKee:

By: _____ (Print Name)

Dated: _____

STATE OF RHODE ISLAND
COUNTY OF _____

In _____, in said County and State, on this _____ day of _____, 2011, before me personally appeared James C. McKee to me known and known by me to be the party executing the foregoing instrument and he acknowledged said instrument and the execution thereof, to be his free act and deed.

Notary Public
My Commission Expires: _____

For the State of Rhode Island Department of
Environmental Management

David E. Chopy, Chief
Office of Compliance and Inspection

Dated: _____