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Distributed for ZBA meeting of 2-22-2022

DOCKET NO. HHB-CV18-6049166-S	:	SUPERIOR COURT
	:	
COMMERCE STREET HOLDINGS, LLC	:	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
	:	
v.	:	AT NEW BRITAIN
	:	
ZONING BOARD OF APPEALS OF	:	
TOWN OF BERLIN	:	_____, 2022

STIPULATION FOR JUDGMENT

1. The plaintiff, Commerce Street Holdings, LLC (“Plaintiff”) is the owner of the real property known as 30-36 and 86 Commerce Street, East Berlin, Connecticut (“Subject Properties”).

2. As alleged in part at paragraphs 5 and 6 of Plaintiff’s Complaint, the Zoning Enforcement Officer of the Town of Berlin, Maureen Giusti (“Ms. Giusti”), sent a “Final Notice of Continuing Zoning Violation Cease and Desist Order” on September 4, 2018 (“Final Notice”) which Final Notice recited the zoning violations (the “Violations”) and actions need to correct same as identified in a Cease and Desist Order previously issued against the Subject Properties by Ms. Giusti on October 3, 2016 (“2016 Cease and Desist Order”). A copy of the Final Notice is attached as Exhibit A.

3. The Defendant maintains that the issuance of the 2016 Cease and Desist Order had been previously upheld on appeal to the defendant Zoning Board of Appeals of the Town of Berlin (“ZBA” or “Defendant”) on November 29, 2016. In response to the mailing of the Final Notice, the Plaintiff filed appeal applications with the ZBA, which were received on September 18, 2018, to appeal the “Final Notice” and the Violations which formed the basis thereof, and of the 2016 Cease and Desist Order. The ZBA directed Town staff not to schedule a hearing on the Plaintiff’s appeal applications on the asserted basis that, *inter alia*, it had already heard and decided an appeal

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of the 2016 Cease and Desist Order. A letter detailing the Board's aforementioned decision was sent to Plaintiff's counsel and is attached as Exhibit B.

4. The Plaintiff disputes and denies the ZBA's assertions and maintains that it possesses additional defenses to the ZBA's Final Notice.

5. It is the intent of the Plaintiff and the ZBA to resolve this matter without the time and expense of further litigation and without any admission of liability or fault.

6. The Plaintiff and Defendant may collectively be referred to hereinafter as the "Parties."

7. The Parties stipulate that Judgment should enter in this matter in accordance with the terms and conditions contained herein.

8. The Parties agree that the terms of the Judgment, subject to approval of this Court, shall be as follows:

(a) **GENERAL PURPOSE OF TERMS AND CONDITIONS**

The general purpose of the specific terms and conditions of the Stipulation is to address the Violations issued in the 2016 Cease and Desist Order and referenced in the Final Notice.

(b) **SPECIFIC TERMS AND CONDITIONS**

(1) **PERMITTED USES**

- (a) Subject to the terms and conditions of this Stipulation, the Plaintiff shall comply with the ZBA's use variance and automobile uses location approvals for the Subject Properties at 86 Commerce Street, Berlin ("Approvals"). A copy of the use variance and automobile uses location approvals, recorded at Vol. 625 Pg. 456 and Vol. 626 Pg. 802, respectively, and related letters of decision, is attached as Exhibit C. A copy of the site plan approved in connection with the use variance is attached as Exhibit D ("Approved Plan").

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- (b) Accordingly, the Plaintiff shall use the subject property at 86 Commerce Street, Berlin in a manner that is consistent with the Approvals and the Approved Plan, subject to the terms of this Stipulation.
- (c) The Plaintiff acknowledges and agrees that the ZBA is the agency that is responsible for issuing use variances and certificates of approval of location for motor vehicle dealers and repairers pursuant to Connecticut General Statutes Sec. 14-54, and, accordingly, to the extent that that Plaintiff seeks any prospective modification or amendment to the Approvals, the Plaintiff acknowledges that the ZBA is the agency responsible for review and approval of any proposed modification or amendment of each of the Approvals. The Plaintiff also acknowledges and agrees that any proposed modification or amendment to the Approvals may also require application to the Planning and Zoning Commission pursuant to applicable Zoning Regulations.

(2) **PARKING AREA AND VEGETATIVE BUFFER**

- (a) To resolve the alleged Violations, the Plaintiff has submitted a plan entitled “Vegetative Buffer Restoration Plan” prepared for the Subject Properties of the Plaintiff by to design, New Britain, CT, dated May 7, 2021 and revised through September 21, 2021 (“Restoration Plan”) and a plant list quote from Wygant, East Berlin, CT (“Plant List Quote”). A copy of the Restoration Plan is attached as Exhibit E and a copy of the Plant List Quote is attached as Exhibit F.
- (b) The Planning and Zoning Commission of the Town of Berlin (“Commission”) has reviewed the Restoration Plan and Plant List Quote and at its regular meeting held on October 7, 2021, the Commission voted to unanimously to approve the Restoration Plan with staff comments which comments include the following:
 - 1. The Plant List Quote be updated to reflect the corrected plant sizes and installation notes shown on the Restoration Plan and cost.
 - 2. Bonding be submitted per Zoning Regulations and held for plant maintenance and viability.

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3. Restoration Plan be noted with maintenance to include removal of tree anchors once trees established.

A copy of the Notice of Decision is attached as Exhibit G.

- (c) The Plaintiff shall submit a revised Restoration Plan and Plant List Quote to the Town Planner for approval within thirty (30) days of an order of the Court approving this Stipulation for Judgment in compliance with the aforementioned staff comments (“Revised Restoration Plan and Plant List Quote”).
- (d) The Plaintiff shall submit a full bond estimate in accordance with the Zoning Regulations to the Town Engineer and Town Planner for approval within thirty (30) days of an order of the Court approving this Stipulation for Judgment in compliance with the aforementioned staff comments (the “Bond Estimate,” which collectively with the Revised Restoration Plan and Plant List Quote, is hereinafter referred to as the “Plaintiff Deliverables”).
- (e) Within thirty (30) days of receipt of the Plaintiff Deliverables, the Defendant shall render to Plaintiff in writing either (i) an approval of such Plaintiff Deliverables as to form and substance, or (ii) issue comments indicating with specificity any deficiency with respect to same requiring correction and resubmission. Plaintiff shall thereafter have a period of fifteen (15) additional days to correct any such deficiencies and thereafter resubmit some or all of the Plaintiff Deliverables to Defendant for final review and approval.
- (f) The Plaintiff shall complete all site improvements and install all plantings in accordance with the Revised Restoration Plan and Plant List Quote by no later than April 29, 2022 unless such deadline is extended by mutual agreement of the Parties and a performance bond is posted by the Plaintiff for any and all incomplete site improvements and plantings by no later than the aforementioned completion deadline of April 29, 2022.
- (g) The Plaintiff shall post the maintenance bond in the amount approved by the Town Engineer and Town Planner at the time of completion of all site improvements and installation of all plantings or by no later than April 29, 2022 unless

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such deadline is extended by mutual agreement of the Parties as provided in paragraph 8(b)(2)(f) above.

(c) **OTHER EXISTING SITE CONDITIONS**

The ZBA acknowledges that the Plaintiff has removed vehicles from the area that was not included as parking on the Approved Plan to allow for restoration of the buffer area. The Plaintiff shall not introduce any vehicles into the areas contemplated for plantings and for the non-disturbance of undergrowth pursuant to the final Restoration Plan. The Parties acknowledge that, upon the satisfaction of the Parties' respective obligations under this Stipulation, there shall remain nonconformities between the Approved Plan and the existing conditions at the Subject Properties (as modified by the final Restoration Plan). A site inspection was performed on January 14, 2022, and the Parties have agreed that the following nonconformities which must be addressed include the following:

1. Unapproved extension of parking area to the south of the existing building towards the easterly property line and in the grass area, as identified on the Approved Plan, at the southwest corner of the building and
2. Unapproved connecting driveway between 36 Commerce Street and 86 Commerce Street.
3. Unapproved gravel parking area at the southeast corner of the warehouse building located on 36 Commerce Street.

The Plaintiff shall remedy these nonconformities ("Cure") within six (6) months of the date of this Agreement ("Compliance Deadline") by effectuating any of the following, at Plaintiff's election:

- i. By seeding and restoring the identified grass area and parking setback buffers consistent with its condition at the time of the Approved Plan, ceasing all parking in said grass area, and eliminating and ceasing to use the unapproved parking area on 36 Commerce Street and connection driveway between the two parcels by no later than the Compliance Deadline; or
- ii. Submitting to and obtaining approval of a modified site plan by the Planning and Zoning Commission before the Compliance Deadline; or
- iii. A combination of (i) and (ii).

Upon Plaintiff's Cure, the Subject Properties shall be deemed in substantial compliance with the Approved Plan. The Compliance Deadline identified herein above may be extended by agreement of the Parties and the Berlin Planning and Zoning Commission. The Plaintiffs must submit any request to extend said Compliance Deadline within not less than one (1) month prior to the Compliance Deadline for consideration and action thereon. Notwithstanding any subsequent change to property or use which results in new violations, no enforcement action shall be taken by the Town pending a determination on a request that is timely made.

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9. The ZBA represents and warrants that there are no fines and penalties pending against the Plaintiff and that no fine or penalties shall be assessed against the Plaintiff upon Plaintiff's satisfactory performance of the above-referenced obligations.

10. Upon Plaintiff's satisfactory performance of the above-referenced obligations, the Defendant shall state in writing that the Plaintiff has complied with its obligations hereunder ("Completion Notice").

11. At the time of issuance of the Completion Notice, separate correspondence shall issue with explicit confirmation that the 2016 Cease and Desist Order and the Final Notice thereof have been lifted by the Zoning Enforcement Officer and the substance of the Plaintiff's claims shall have been resolved hereunder.

12. It is the intent of the Parties that each of the Parties hereto shall pay their own legal fees, attorneys' fees and litigation expenses, including those incurred in connection with the 2016 Cease and Desist Order, the above-referenced matter and the preparation of this Stipulation.

13. In the event that it is necessary for any Party to file a Motion to Enforce any provision of this Stipulation, said Party shall be entitled to recover all costs incurred in connection with enforcement, including reasonable attorney's fees.

14. This Stipulation for Judgment will be recorded on the Berlin land records following entry of judgment in accordance therewith by the Court in the above-captioned action.

15. This Court shall maintain continuing jurisdiction over this matter for purposes of enforcing the rights and obligations of the Parties as set forth herein.

16. The terms and provisions of this Stipulation shall inure to the benefit of and be binding upon the Parties and their respective heirs, legal representatives, successors, and assigns.

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17. This Stipulation is absolute and unconditional and constitutes the full, complete and entire understanding and agreement between the Parties with respect to the subject matter hereof and supersedes any prior negotiations, commitments, agreements, representations, promises, statements, warranties, covenants, or understandings, whether oral or in writing, that any party hereto may claim exists, all of which negotiations, commitments, agreements, representations, promises, statements, warranties, covenants, or understandings are expressly merged herein. No other representations, promises, statements, warranties, covenants, or understandings or other prior or contemporaneous negotiations, commitments, or agreements, oral or written, respecting such matters that are not specifically incorporated herein shall be deemed in any way to exist or to bind any of the Parties hereto. Each of the Parties hereto acknowledges and affirms that it has not executed this Stipulation in reliance upon any representations, promises, statements, warranties, covenants, or undertakings not contained within this Stipulation. The Parties acknowledge that they were represented by legal counsel of their choice in connection with the review and negotiation of this Stipulation. This Stipulation may not be amended, modified, altered, changed, limited or terminated, except by a writing signed by all of the Parties hereto. This Stipulation contains the entire agreement between the Parties with respect to the matters set forth herein, and may not be changed or terminated orally.

18. In accordance with the Rules of Practice, the ZBA published notice of its consideration of this Stipulation in a newspaper of general circulation on _____, 2022 advising interested members of the public that they could appear and offer public comment on same at one or more regular meeting. After review and consideration of the Stipulation at said meeting, the ZBA voted to authorize undersigned counsel for the ZBA to execute the Stipulation on its behalf.

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19. This Stipulation may be executed by signature transmitted via facsimile or by e-mail in PDF format, each of which shall be an original signature. The Stipulation may be executed in any number of counterparts, each of which, when so executed and delivered, shall be an original, but all of which together shall constitute one agreement binding upon all of the Parties hereto.

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THE PLAINTIFF –
COMMERCE STREET HOLDINGS, LLC

THE DEFENDANT –
ZONING BOARD OF APPEALS OF
TOWN OF BERLIN

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