

**Town of North Castle
Organic Recycling Study Group**

**Preliminary Report
April 14, 2010**

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Supervisor William Weaver
Town of North Castle
15 Bedford Road
Armonk NY 10504

Dear Supervisor Weaver,

Part of the Organic Recycling Study Group (SG) assignment (paragraph III of the Mission Statement – Exhibit A) is to give an opinion with respect to the validity and enforceability of the Westwood License agreement (Exhibit G). The SG due diligence on this topic is ongoing – but we have compiled enough evidence at this point to conclude that the License agreement may not be valid, and may not be enforceable.

Furthermore, Westwood’s management of the recycling site construction process appears to be so negligent, that the SG believes Westwood is in default of the License agreement, giving the TB the right to cancel the License. We have asked independent attorneys to review the current findings.

According to Roland Baroni, Town attorney, the failure to follow the requirements of the SEQRA process clearly enables the town to nullify the License agreement with Westwood. The SG will leave the explanation of this issue to Mr. Baroni.

As a result of its due diligence to date, the SG is able to present the following information and related recommendations for consideration by the Town Board:

Westwood’s proposal does not to comply with the Town’s RFP requirements:

Westwood’s response to the Town’s Organic Recycling RFP fails to comply with almost every requirement specified in the RFP. In addition, there appears to be several procedural irregularities in the Town’s management of the RFP process. As a consequence, the SG believes the resulting License Agreement may be invalid or unenforceable.

The second sentence of the RFP distributed by the Town on September 11, 2009, contained specific language concerning what was required of a respondent (Exhibit C). It

reads, “Those firms wishing to prepare a proposal for the work **shall be required** to comply with the information provided below.”(Emphasis added).

The three-page RFP sets forth 18 specific requirements that must be met by any respondent. The only response received was from Westwood – but that response failed to comply with 15 of the specific requirements. Based on this analysis, the SG has concluded that acceptance of the Westwood RFP response may have invalidated the RFP process because the Town improperly accepted a non-compliant response without giving notice to all other potential respondents that the Town was agreeable to a substantial reduction in the rules.

It seems more than likely that if a second RFP had been circulated, eliminating 15 difficult requirements, that some, or all, of the firms that declined to answer the first RFP, may have taken another look at the project. The result could have been a healthy competition for the business – and a much better deal for North Castle taxpayers.

Below is a summary of the 18 RFP requirements (“in quotation marks”) compared to Westwood’s response (**in underscored bold type**). SG comments (*in italic type*):

1. “The contractor shall be responsible for the process of grinding, handling and transferring of the **Town and its residents’ organic material** brought to the site.” (*The concept, we believe, was modeled after the Bedford, NY, license with Westwood (Exhibit M), wherein the recycling center can only be used to process local material – proof of Bedford residency required.*) **The Westwood RFP response does not limit its operation to a local facility, serving only North Castle residents. Westwood’s response expands this right to permit the company to operate a regional center, with the right to accept organic material that is trucked in from anywhere.**
2. “Organic material shall be defined as clean brush, leaves, grass, logs, stumps, wood chips and other natural yard wastes”. (*Soil is not included on the Town’s list, which is wise since it is particularly difficult to determine where soil has come from and determine if it contains contaminated material.*) **The Westwood response adds soil to the list of material that may be dumped.**
3. “Processed material shall be made available to the Town **as necessary**”. (*We take “as necessary” to mean that the Town intended to have a right to use as much of the processed material as it needs.*) **The Westwood response limits the amount of material available to the Town to 500 yards each of the three processed products.**
4. “Include a schedule for Town Residents, not contractors, to pick up material at no cost.” **The Westwood response did not include this required schedule.**
5. “Include a list of equipment to be used on site, the equipment must be demonstrated to be necessary for the proposed operation.” (*This is a good control*

- measure – it would prevent the contractor from using the recycle yard as a storage facility for non-essential construction and processing equipment.)* **The Westwood response provides a vague list of equipment – but no information as to the exact number of pieces. The response provides no information to demonstrate that the listed equipment is necessary for its operation.**
6. “Include utility requirements needed to perform the required operation.” **The Westwood response included this information.**
 7. “Include a yard waste recycling plan detailing how you will handle and dispose of all the Town’s organic yard waste”. (*Note the reference to “the Town’s waste”. At this point the RFP was not contemplating receiving or processing out-of-town waste.*) **The Westwood response did not provide the required recycling and disposal plan.**
 8. “Detail the days and hours of operation – no work on weekends or holidays.” **Westwood’s response included this information.**
 9. “What site improvements, if any, will be necessary to operate this program.” (*This may be one of the more important requirements because it would have alerted TB members to the size and scope of land disturbance.*) **The Westwood response makes no mention of site improvements, and the required site plan is not included.**
 10. “Include how dust, smell and noise will be controlled”. **Westwood’s response did not address control measures for dust, smell or noise.**
 11. “Include a detail of how material will be disposed and details of how proof of proper disposition will be demonstrated to the Town.” **Westwood’s response does not provide this information.**
 12. “All work must be shown to comply with the current DEC approvals, volumes and rules and regulations.” **Westwood’s response did not address this issue.**
 13. “A mandatory pre-bid meeting will be required for an on-site inspection and meeting with Craig Useted. At this meeting a site plan with limits of disturbance shall be provided, this map will need to be resubmitted with a yard layout plan for Town Review.” **The Westwood response did not include the required site plan showing limits of disturbance – and no plan was resubmitted with a yard layout. Therefore, there could have been no relevant or substantive review made by the Town.**
 14. “Insurance requirement and documentation.” **The insurance certificate provided by Westwood (Exhibit H) does not meet Town requirements as set forth in the License agreement.**

15. A performance bond in the amount of \$150,000 is required to restore the site to its original condition and to continue the operation for the remainder of the year. **The Westwood response did not agree to a \$150,000 performance bond.**
16. “A current Westchester County Solid Waste License must be in force.” **We are told that Westwood is in compliance.**
17. The respondent is required to agree to certain language indemnifying the Town. **Westwood has agreed with this requirement.**
18. The submission deadline is September 21, 2009, at ten AM. (*We note that the submission deadline is less than 10 calendar days after the RFP was mailed out.*) **Westwood’s response was submitted in time.**

On September 22, 2009, one day after receipt of Westwood’s response to the RFP, Rich Fon sent a memo to Reese Berman recommending that the Westwood proposal be approved. This is a fast review and approval by any standard. Did anyone (Building Department, Highway Department, Town Attorney, Town Supervisor, Town Board member) review the Westwood response to verify whether or not it was in compliance with the RFP requirements? It appears that no review or analysis was conducted.

Two Town officials sent letters in response to the Westwood response and proposal to operate the recycle center: Sal Misiti, assistant superintendent of the North Castle Sewer and Water Department, September 25, 2009 (Exhibit F) and John Kellard, Consulting Town Engineer, dated February 9, 2010 (Exhibit L). Both letters attempt to alert Town officials with respect to certain potential problems, or recommended action, in connection with the recycle center. However, it appears that the suggestions and recommendations received from Mr. Misiti and Mr. Kellard have not been addressed by Town officials.

Procedural irregularities in the Town’s management of the RFP process:

The Study Group believes that the RFP management process was so flawed that the resulting License may be invalid. A summary of concerns:

1. **Inadequate distribution.** The RFP was mailed to only four potential bidders, far fewer than would be expected for a project of this size. The Study Group has identified six local firms that should have been given an opportunity to answer the RFP. Obviously, taxpayers would be better served if more potential bidders were given an opportunity to participate in the process. Why were so few bidders invited to participate?
2. **Short response time.** The RFP was mailed to potential respondents on September 11, 2009, requiring an answer by 10 AM on the 21st. This timeline left only five business days for a potential bidder to research the project, inspect the

site, prepare a survey of the property, meet with town officials and prepare a detailed response. This is an unreasonably short time requirement to impose on potential bidders, considering a project of this size and complexity. Why was the response deadline so tight?

3. **A single response.** Having received only one reply to the RFP, we think the Town should have required a re-bidding process designed to solicit competitive responses. Why was a renewed effort to solicit competitive bids not taken?

4. **Significant changes were made in the RFP-offered deal.** Shortly after Westwood delivered the sole response to the RFP, more than a dozen changes were made to the required deal terms, all for the benefit of Westwood and to the detriment of the Town. The more significant changes include:

(a). **Site Change.** Town officials determined that the Middle Patent site was unsuitable and quickly changed the proposed location from Middle Patent Road to the Town highway facility – a much more convenient and desirable location for Westwood, but much less desirable from the Town’s perspective.

(b). **Bond Change.** The requirement that a \$150,000 bond be posted was dropped. We understand that a Town representative agreed to lower the bond to \$30,000 – a major benefit to Westwood while at the same time reducing the Town’s protection. The SG is fairly certain that altering this provision was improper.

(c). **Permitted Use Change.** The size of the permitted use was significantly expanded beyond collecting and processing yard waste from North Castle residents only. The deal was changed to allow Westwood to operate a regional recycle center which is permitted to collect, process and sell the by products from organic waste, including soil, that can be trucked in by anyone, from anywhere. The sudden expansion of marketing area confers a major operational benefit to Westwood – while insuring that the Town will suffer from an increase in traffic, noise, dust, and odors. Since there is no possible benefit to the Town, why was the scope of work changed and approved?

(d). **Site Plan Requirement Dropped.** This is a big relief for a potential RFP respondent. Preparing a site plan is a costly and time-consuming project. And, practically speaking, this is an impossible condition to meet under the extremely short response deadline. It is not reasonable to expect that a potential bidder could engage a licensed surveyor to do the necessary site work and prepare a drawing in 5 business days.

Each of these significant changes in the RFP requirements were made after Westwood had submitted its first response and without notification to other potential bidders. The Study Group believes that making such substantial changes in the business terms obligates the Town to resubmit a new RFP to the original prospects.

It seems clear that the Town would have received many more than one bid to operate the recycle center if it had published a revised RFP with significantly reduced bid requirements; permitted a reasonable time for response; and distributed the RFP to a wider audience. Failure to follow these reasonable procedures eliminated any possibility that the Town would receive competing bids – an obvious disservice to all North Castle taxpayers.

Did the RFP process, and resulting License agreement, meet legal requirements?

There is some evidence that the process was so flawed that it may be illegal.

In his letter dated February 15, 2010, John Halloran, an attorney and resident of Armonk, suggests that it may be illegal to operate a recycle center at the highway yard location because it fits the definition of a public nuisance. He states, *“A large commercial enterprise of this type – located immediately adjacent to three residential communities, a nursery school, a sensitive watershed area, two gas stations, a church and two New York State roads – is a classic example of a public nuisance that will inevitably injure the property, health, safety, and comfort of a considerable number of persons.”*

Attorney Halloran further cautions, *“There is a substantial question whether the contemplated agreement with the private contractor abridges the “gift and loan clause” of the New York State Constitution.”*

He concludes with a request that. *“The Town Board instruct the Town attorney to provide a legal opinion on whether: (1) the contemplated recycling facility constitutes a public nuisance under New York law; (2) the bidding process and Board approval process complied with controlling law; and (3) the “lease” arrangement, and Town’s apparent commitment to facilitate and maintain access to the operation, together or separately constitute an unconstitutional gift to a private undertaking.”*

The SG concurs with the conclusions and recommendations made by Mr. Halloran. The full text of his letter is attached as Exhibit K.

The Town’s RFP also failed to include standard agreements that are normally required of any company that wishes to do business with the Town. There are at least three standard agreements normally included in any RFP distribution (Exhibit N): (1) A Non Collusion Certificate; (2) An Anti-Discrimination Clause and (3) An Insurance Binder. RFP respondents are normally required to provide signed copies of these agreements in order for their bid to qualify. Westwood was not required to provide these assurances.

The possibility that the recycling center contractor selection may have been, in effect, a one-bid-procedure, came to mind following an interview with Charles Dockter, one of the recipients of the RFP. According to Dockter, when he read the RFP requirements and

took note of the short response time frame, he assumed that a decision had already been made by North Castle.

Its not hard to understand why Dockter reached his conclusion. It probably would not be hard to build a case, based on circumstantial evidence, that the selection of Westwood to operate the recycle center was inevitable. Was the selection of Westwood deliberate – or just the result of bad management by all hands involved in the RFP selection process? The answer is unclear.

It is clear, however, that Westwood has been the beneficiary of unusually favorable treatment by the Town from the outset. Westwood was permitted to answer the RFP twice (Exhibits D and E). In its second RFP response, business terms more favorable to Westwood, and less favorable to the Town, were added.

The most significant change is a provision added to the end of the section captioned “Town of North Castle Will Provide the Following”. New Item (12): *Tree companies disposing of materials at facility must show job ticket issued from the town describing what type & size of trees [are being dumped].* This requirement was not part of Westwood’s first RFP response.

This late additional provision would seem to not only shift the burden of monitoring every load of waste that enters the facility to the Town – but it also suggests that the Town will be considered liable for any damage that may be caused by the dumping, or handling, any unapproved or contaminated waste. We have asked Rich Fon to provide a plan for how the Town plans to comply with this responsibility and to estimate the annual cost for whatever Town personnel or outside monitors that may be needed to do this job. We have not received his report – but we are guessing this represents a significant expense to the Town.

Who negotiated and agreed to these changes? Why was Westwood permitted to ignore, or amend in its favor, 15 specific RFP requirements? Was the former TB kept abreast of the changing deal terms? Did anyone among our Town employees, consultants, volunteer boards or TB members realize that Westwood had been given the go-ahead to rip up 2+ acres of Town property at will -- without a plan, without public knowledge, without regard to the environmental impact?

It is clear that the RFP distribution and contractor selection process was so poorly managed, and has raised so many questions concerning the integrity of the process, that the SG urges the TB to initiate a thorough independent investigation, if for no other reason than to discover how and why the process was so badly handled and to institute procedures designed to prevent a repeat of the same mistakes.

Is Westwood in default of its License agreement?

Paragraph (5) of the License agreement places responsibility for the care and protection of the recycling site, and the neighboring property, squarely on Westwood. The language is unequivocal: “Licensee shall be responsible for and take all precautions for the protection of all persons and of real and personal property using the Property or situated on the perimeter adjacent to or abutting the Property.”

Paragraph (6) of the License provides that the agreement: “may be terminated by Licensor at any time for a breach of this Agreement.”

It should be clear to the TB that Westwood’s excavation and construction activity on the Property has been reckless and conducted without regard to basic safety precautions, in violation of its obligations under the License agreement.

The list of improper and unsafe acts by Westwood is long and troubling:

1. Westwood conducted site excavation work without preparing or obtaining a site survey and without using a licensed surveyor to locate and place property corner boundary stakes. This is a standard procedure and precaution that all excavation contractors are obligated to follow.
2. Westwood proceeded to excavate and disturb well over one acre of property without an environmental SEQRA review. As an experienced excavation contractor, Westwood knew, or should have known, that without an environmental review, its construction activity was improper and potentially unsafe.
3. Deep excavation activity was conducted in violation of NY State law commonly known as “Call Before You Dig” – a standard safety precaution required by local utilities. Ignoring this well known safety measure is not only reckless – it is illegal.
4. Excavation activity has extended well beyond town-owned property boundaries – causing extensive damage to abutting and adjoining property.
5. Excavation for, and placement of, retaining walls is in violation of State and local set back requirements. The violation of property boundaries and zoning setbacks is so blatant that the encroachment is obvious, without referring to a site survey. Once a survey has been prepared, a precise measurement of the improper excavation and construction will be possible.
6. Hundreds of lineal feet of large cement-block walls, higher than four feet, have been constructed without regard to basic safety standards and in violation of Town codes: (i) no subsoil tests were made to verify stability; (ii) no engineering drawings were prepared or followed; (iii) no inspections of footings or of construction procedures were made by the Town Building Department. As a

- result, there is no way to know if these walls are safe – presenting an unacceptable risk to employees or others using the site.
7. Improper grade cuts (too deep and too steep) have been made leaving unsafe and unstable embankments along the boundary with Route 22. The unstable cuts appear to be on NTSDOT property.
 8. The extensive site work was done without preparing (much less adhering to) a storm water pollution prevention plan. Westwood knew, or should have known, that such a plan is required by the NY State DEC. Without such a plan we can be fairly certain that Westwood, and the Town, is in violation of DEC regulations. A site visit by the DEC Division of Water will confirm this.
 9. A portion of the Property contains wetlands, a condition that should have been obvious to Westwood. Yet Westwood carried out extensive site excavation and construction work without installing wetland protection. Basic protection measures such as the use of hay bales and filter fabric to control silt migration into the Wampus and Byram Rivers were not used – subjecting the on-site stream and wetland area to potential damage.
 10. Westwood operated on the site, collecting organic material and making mulch for several months. The process involves grinding stumps and chipping logs, branches and other yard waste. The pile of processed mulch on site contains, by Westwood’s estimate, 3000 cubic yards of material. The License agreement requires that a water source be installed on site to be used to control the dust generated by the recycling process. Currently, there is no source of water available on the Property. Therefore, it is reasonable to assume that improper dust control measures were implemented during the processing of this material. By ignoring this safety requirement, Westwood may have created a hazard for employees or others who have been in proximity of the site while the processing was underway.
 11. The License agreement requires that tree companies disposing materials at the recycling facility must show a job ticket, issued by the Town, to indicate what materials are being dumped. Presumably Westwood is obligated to stop all truck drivers entering the site with material to dump – to verify that the driver has been issued the required job tickets – and keep copies of those tickets. There is no evidence that job tickets were ever issued by the Town and no evidence that Westwood has kept any records to indicate what waste materials have been dumped at the site since it began operating.
 12. Westwood is in violation of the insurance coverage required by the Town as set forth in paragraph (7) of the License agreement.
 13. Westwood is in violation of paragraph (1) of the License agreement, which grants Westwood, “a non-exclusive license (the “License”) to enter the Property for the

Permitted Use. Since imposition of the Town's stop-work order on March 10, 2010, Westwood has parked its on site construction equipment in such a way as to effectively block access to the majority of the Town owned property. Westwood has, in effect, given itself "exclusive license" to access to the Property, in violation of the agreement.

Westwood's negligent construction and operational activity not only violates terms of the License agreement, it is contrary to the most basic standards that a responsible contractor would take in the conduct of its business.

Why has Westwood been allowed to ignore the rules? Or, the larger question: "Why wasn't Westwood shut down long before the imposition of the recent stop-work order?"

The SG is not ready to file its final report. However, it is clear at this point that almost everyone involved in the organic recycling center project has failed to follow reasonable procedures and/or failed to exercise reasonable business judgment. Problems that we see clearly today can be traced to failures of oversight by members of the North Castle professional staff, lack of due diligence and attention to detail by the previous Town Board and overreaching, perhaps reckless, actions by Westwood. There is plenty of blame to go around.

As a result of errors committed by the previous TB, the current TB finds itself with a complicated mess on its hands -- a perfect environment for endless, expensive and non-productive litigation in which there is likely to be no winner.

To diffuse the predictable and nascent legal posturing, which we see developing in connection with the recycle center, a negotiated solution must be found that is satisfactory to all constituents: Westwood, the Town Board and, most importantly, the residents of North Castle.

At this point -- before opposing attorneys have a chance to make matters worse, the SG is cautiously optimistic that a compromise can be negotiated that is acceptable to Westwood and that will result in relocating the recycle center to a more appropriate location.

We also respectfully submit that a satisfactory resolution to the current standoff between Westwood and the TB is more likely to happen if the three TB members who previously voted to approve the Westwood License do not take a leading role in the negotiation process. Since Diane Roth has recused herself, the TB should authorize John Cronin to take the lead role in further negotiations, with assistance from other TB members and the SG.

The SG appreciates the support from Supervisor Weaver and council members John Cronin, Diane Roth and Mike Schiliro, each of whom cast votes to approve our

recommended stop-work order. It was the right thing to do. Nothing has changed in the past month or so that should make you question that decision.

And we are also encouraged by a comment made by Becky Kittridge at a recent meeting. It may not be an exact quote but she said, in effect, “Its obvious that we (meaning the TB) have made a mistake here, and we now need to fix it.” Recognizing that errors have been made at the TB level is necessary step.

The SG recommends that the Town Board take the following actions:

1. Authorize Roland to bring in special council to assist in the review of the myriad legal issues and provide advice to the TB with respect to all issues relating to the RFP process and the resulting Westwood License – particularly the legal concerns raised by attorney John Halloran.
2. Authorize John Cronin to take the lead in representing the TB, in negotiations with Westwood. The SG believes it can be of great assistance to the TB in bringing about a compromise agreement.
3. Reserve any decisions going forward until the SG has finished its work and submitted its final report.
4. Don't lose sleep over where the Town can put wood chips. In spite of Highway Department protests, there is plenty of room to store them, on a temporary basis, at the Middle Patent yard. This is a minor issue at best – and it should not instigate legal action by the Town.
5. Authorize whatever expense is necessary to get the required site survey and as-built site plan completed as soon as possible. Nothing can be accomplished until we have this information in hand.
6. The SG also recommends that in the event a full environmental SEQRA process is contemplated, that the TB not accept responsibility as lead agency in the SEQRA process. Another Town agency, probably the Planning Board, would be better suited for this role.

The SG continues to work toward finishing its report. We have asked for an extension of time in order that our work can be more complete. Please note that as of this date, the SG has not received all of the information requested from Westwood and from Rich Fon (see Exhibits I and J). This information will be needed to file a complete report.

Please let us know if you have any questions concerning the information presented in this preliminary report.

Respectfully submitted;

The North Castle Organic Recycling Study Group

/s/

Howard Arden, Co-chairman

Robert Greene, Co-chairman

Michael Fareri

John Fava

Karen Gordon

Ken Narva

George Pouder

Cc: North Castle Town Board

Roland Baroni

Enclosures:

- A. Organic Recycling Study Group Mission Statement
- B. Modified Stop-Work order issued on March 10, 2010
- C. Request for Proposal distributed by the Town on September 11, 2009
- D. Westwood's first response to the RFP, dated September, 21, 2009
- E. Westwood's revised response to the RFP, dated September 30, 2009
- F. Letter from Sal Misiti, NC Sewer & Water Department, dated September 5, 2009
- G. North Castle License Agreement with Westwood, dated October 6, 2009
- H. Certificate of Liability Insurance from Westwood, dated March 29, 2010
- I. Questions submitted to James Scoli, dated March 19, and April 3, 2010
- J. Questions submitted to Rich Fon, dated March 20, 2010
- K. Letter from John Halloran, dated February 15, 2010
- L. Letter from John Kellard, PE, Consulting Town Engineer, dated February 9, 2010
- M. Bedford license agreement with Westwood
- N. Town of North Castle, General Conditions, Non Collusion Certificate. Anti Discrimination Clause and Insurance Binder