COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
5636 Southern Boulevard, Virginia Beach, Virginia 23462
(757) 518-2000 Fax (757) 518-2103
www.deq.virginia.gov

L. Preston Bryant, Jr.
Secretary of Natural Resources

David K. Paylor
Director

Francis L. Daniel
Regional Director

STATE WATER CONTROL BOARD ENFORCEMENT ACTION
SPECIAL ORDER BY CONSENT
ISSUED TO
New Town Associates, LLC and AIG Baker Williamsburg, L.L.C.
VWP Individual Permit No. 05-2948

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §62.1-44.15(8a) and §62.1-44.15(8d), between the State Water Control Board and New Town Associates, LLC and AIG Baker Williamsburg, L.L.C. for the purpose of resolving certain violations of environmental law and/or regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.

2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality.

5. "Order" means this document, also known as a Consent Special Order.

6. "New Town" means New Town Associates, LLC, certified to do business in Virginia, and its affiliates, partners, subsidiaries, and parents.

7. "AIG Baker" means AIG Baker Williamsburg, L.L.C., certified to do business in Virginia, and its affiliates, partners, subsidiaries, and parents.

8. "WEG" means Williamsburg Environmental Group, Inc., consultants for New Town Associates, LLC and AIG Baker Williamsburg, L.L.C.

9. "Property" means the New Town Development, located in James City County, Virginia at the intersection of Monticello Avenue and Ironbound Road, which consists of a mixed-use development and associated roads, stormwater management facilities, and utilities.

10. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.

11. "Permit" means VWP Individual Permit No. 05-2948, which became effective May 1, 2007 and will expire April 30, 2022.

SECTION C: Findings of Fact and Conclusions of Law

1. New Town and AIG Baker are partners in the development of the Property. The Property contains wetlands and streams that drain into an unnamed tributary of Chisel Run and thereby Powhatan Creek and the James River, state waters of the Commonwealth of Virginia.

2. The Permit authorized 554 linear feet of stream impacts, to be compensated on-site through preservation in perpetuity of a 0.55 acre "small whorled pogonia" plant colony, 4.08 acres of small whorled pogonia upland buffer immediately surrounding the colony, and 13.87 acres of non-Resource Protection Area ("RPA") upland buffer adjacent to seven stream reaches associated with the property.

3. The small whorled pogonia (*Isotria medeoloides)* is an orchid plant species listed as threatened by the U.S. Federal Government and endangered by the Commonwealth of Virginia.

4. On October 15, 2007 DEQ received e-mail correspondence and supporting documentation from WEG indicating that portions of the preserved upland buffers had been cleared, grubbed and graded, reportedly due to inaccurately placed flags (flags indicate areas not authorized for impacts). Based on WEG's calculations, unauthorized impacts included 0.05 acres of non-RPA buffer adjacent to wetlands, and 0.22 acres of small whorled pogonia buffer. DEQ staff confirmed the unauthorized impacts and inaccurate flagging by site inspection on October 18, 2007.

5. Part I.C.23 of the Permit states that all non-impacted wetlands, streams, and designated upland preservation areas must be clearly flagged for the life of the construction activity, and contractors made aware that no activities are to occur in these marked areas. New Town and AIG Baker violated Part I.C.23 of the Permit by failing to clearly and accurately mark the boundaries of the non-RPA upland buffer and small whorled pogonia buffer.

6. Part I.I.2 of the Permit outlines the acceptance of non-RPA upland buffers, small whorled pogonia colony, and small whorled pogonia buffer all preserved in perpetuity by deed restriction or conservation easement as mitigation for authorized stream impacts. New Town and AIG Baker violated Part I.I.2 of the Permit by clearing, grubbing and grading non-RPA upland buffer and small whorled pogonia buffer preserved in perpetuity via deed restriction.

7. On November 1, 2007 DEQ issued Notice of Violation No. W2007-10-T-0003 to Mr. John McCann of New Town and Mr. Phillip McAfee of AIG Baker, advising of the above listed facts and applicable regulatory citations.

SECTION D: Agreement and Order

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders New Town and AIG Baker, and New Town and AIG Baker agree, to perform the actions described in Appendix A of this Order. In addition, the Board orders New Town and AIG Baker, and New Town and AIG Baker voluntarily agree, to pay a civil charge of $21,060.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note that it is being made pursuant to this Order and shall include New Town and/or AIG Baker's Federal Identification Number. Payment shall be made by check payable to the "Treasurer of Virginia," delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 10150
Richmond, Virginia 23240

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of New Town and AIG Baker, for good cause shown by New Town and AIG Baker, or on its own motion after notice and opportunity to be heard.

2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to New Town and AIG Baker by DEQ on November 1, 2007. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any

additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, New Town and AIG Baker admit the jurisdictional allegations, factual findings, and conclusions of law contained herein.

4. New Town and AIG Baker consent to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. New Town and AIG Baker declare they have received fair and due process under the Administrative Process Act, Va. Code §2.2-4000 *et seq.*, and the State Water Control Law and they waive the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by New Town and AIG Baker to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. New Town and AIG Baker shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. New Town and AIG Baker shall show that such circumstances were beyond their control and not due to a lack of good faith or diligence on their part. New Town and AIG Baker shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;

   b. the projected duration of any such delay or noncompliance;

c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

9. This Order shall become effective upon execution by both the Director or his designee, and New Town and AIG Baker. Notwithstanding the foregoing, New Town and AIG Baker agree to be bound by any compliance date which precedes the effective date of this Order.

10. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to New Town and AIG Baker. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve New Town and AIG Baker from their obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

11. By their signature below, New Town and AIG Baker voluntarily agree to the issuance of this Order.

And it is so ORDERED this day of July 30, 2008.

Maria R Nold

~~Francis L. Daniel~~ Maria R Nold
Deputy Regional Director

New Town Associates, LLC voluntarily agrees to the issuance of this Order.

By: _____
EXECUTIVE DIRECTOR

Date: 6/9/08

Commonwealth of Virginia
City/County of HENRICO

The foregoing document was signed and acknowledged before me this 9TH day of JUNE, 2008, by JOHN P. McCANN, who is
(name)
EXECUTIVE DIRECTOR of New Town Associates, LLC on behalf of the Company.
(title)

Joanne D Monday
Notary Public

My commission expires: 12/31/08

JOANNE D. MONDAY
Notary Public
Commonwealth of Virginia
140484
My Commission Expires Dec 31, 2008

AIG Baker Williamsburg, L.L.C. voluntarily agrees to the issuance of this Order.

AIG BAKER WILLIAMSBURG, L.L.C.

By: AIG BAKER SHOPPING CENTER PROPERTIES, L.L.C.

~~By:~~ ~~Date:~~

ALEX D. BAKER, PRESIDENT

DATE: 6/6/08

STATE OF ALABAMA

~~Commonwealth of Virginia~~

City/County of Shelby

The foregoing document was signed and acknowledged before me this 6th day of June, 2008, by Alex D. Baker, who is
(name)

President of AIG Baker ~~Williamsburg, L.L.C.~~ SHOPPING CENTER PROPERTIES, L.L.C. on behalf of the Company.
(title)

Notary Public

My commission expires: 4-16-11.

APPENDIX A

New Town and AIG Baker shall:

1. Mail all submittals and reports required by this Appendix A to:
   Francis L. Daniel, Regional Director
   DEQ, Tidewater Regional Office
   5636 Southern Boulevard
   Virginia Beach, VA 23462

2. By June 30, 2008 submit an approvable preservation and restoration plan and implementation schedule for the impacted wetland buffers specified in Sections C.4 and C.5 of this Order.

3. Initiate the final preservation and restoration plan and implementation schedule within 30 days of approval by DEQ staff.

4. Comply with all conditions of the Permit.