COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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Doug Domenech
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STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
Home Associates of Virginia, Inc.
FOR
Sherwood Lakes Subdivision
Unpermitted

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Home Associates of Virginia, Inc., regarding the Sherwood Lakes Subdivision, for the purpose of resolving certain violations of State Water Control Law and the applicable regulations.

SECTION B: Definitions

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

1. "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.

2. "Compensation" or "Compensatory Mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resources.

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, as described in Va. Code § 10.1-1185.

5. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

6. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

7. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.

8. "HAV" means Home Associates of Virginia, Inc, a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries. HAV is a "person" within the meaning of Va. Code § 62.1-44.3].

9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.

11. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.

12. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.

13. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

14. "Property" means the Sherwood Lakes subdivision located west of the intersection of Princess Anne Road and Locksley Arch in Virginia Beach, Virginia, developed by HAV.

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

16. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*

17. "State Water Control Law" means Chapter 3.1(§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.

18. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

19. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.

20. "USACE" means the United States Army Corps of Engineers.

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

22. "VAC" means the Virginia Administrative Code.

23. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. HAV owned and developed the Property. The Property includes 180 single-family units, 53 townhouse units and two former borrow pits that were developed into two community lakes.

2. On December 29, 2010, DEQ received a report from the USACE of potential unauthorized excavation and filling of wetlands, a surface water, at the Property.

3. A review of DEQ files indicated that a DEQ Permit had not been issued nor had the USACE issued a permit authorizing excavation and filling of wetlands at the Property.

4. On October 25, 2012, the USACE issued a Jurisdictional Determination ("JD") confirming that 3.917 acres of wetlands had been significantly altered and degraded at the Property.

5. On December 5, 2012, HAV submitted to DEQ an exhibit titled "Sherwood Lakes Alleged Wetland Impact Analysis" confirming the USACE's JD.

6. On December 19, 2012, DEQ staff inspected the Property for compliance with the requirements of the State Water Control Law and the Regulations. The DEQ inspector observed that the 3.917 acres of wetlands documented as significantly altered in the JD resulted from the discharge of fill material, a pollutant, for the construction of at least seven single-family homes, roads, community open spaces and paved walking paths within wetlands located on a narrow strip on the western and northwestern side of the Property.

7. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 prohibit the excavation, filling or dumping, or new activities to cause draining or that otherwise significantly alters or degrades existing wetland acreage and function except in compliance with a permit. HAV does not have a Permit for the above activities.

8. On June 4, 2013, DEQ issued a NOV for the violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50.

9. Based on the results of the JD, the documentation submitted by HAV on December 5, 2012 and the December 19, 2012 inspection, the Board concludes that HAV has violated Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50, as described in paragraphs C(2) through C(7), above.

10. In order for HAV to return to compliance, HAV will purchase 11.751 compensation credits for the unauthorized impacts of 3.917 acres of wetlands from an approved wetlands mitigation bank in order to achieve no net loss of existing wetland acreage and functions in accordance with 9 VAC 25-210-116.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders HAV, and HAV agrees to:

1. Purchase 11.751 compensation credits (3-to-1 ratio) from an approved wetlands mitigation bank;

2. Provide proof of compensation credit purchase to DEQ within 30 days of the effective date of the Order; and

3. Pay a civil charge of $40,625.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

HAV shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, HAV shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of HAV for good cause shown by HAV, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in the NOV dated June 4, 2013. 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; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, HAV admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. HAV consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. HAV declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives 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 modify, rewrite, amend, or enforce this Order.

6. Failure by HAV 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. HAV 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 unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. HAV shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. HAV shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days 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 verbally within 24 hours and in writing within three business days, 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.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and HAV. Nevertheless, HAV agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

    a. The Director or his designee terminates the Order after HAV has completed all of the requirements of the Order;

b. HAV petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to HAV.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve HAV from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by HAV and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of HAV certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind HAV to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of HAV.

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, HAV voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2014.

_____
Maria R. Nold, Regional Director
Department of Environmental Quality

Home Associates of Virginia, Inc. voluntarily agrees to the issuance of this Order.

Date: 12/16/13 By: _____, PRESIDENT
(Person) (Title)
Home Associates of Virginia, Inc.

Commonwealth of Virginia
City/County of Virginia Beach

The foregoing document was signed and acknowledged before me this 16th day of December, 2013, by ROBERT L. PRODAN II who is PRESIDENT of Home Associates of Virginia, Inc., on behalf of the company.

Erica D. Powers
Notary Public

369616
Registration No.

My commission expires: 02/28/17

Notary seal:

ERICA G. POWERS
NOTARY PUBLIC
REGISTRATION # 369616
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
FEBRUARY 28, 2017