

NE 0553-07  
Variance

Nauti Goose Saloon  
A-2007-06-V Restaurant

51829-6638

Martin O'Malley  
Governor

Anthony G. Brown  
Lt. Governor



Margaret G. McHale  
Chair

Ren Serey  
Executive Director

STATE OF MARYLAND  
CRITICAL AREA COMMISSION  
CHESAPEAKE AND ATLANTIC COASTAL BAYS

1804 West Street, Suite 100, Annapolis, Maryland 21401

(410) 260-3460 Fax: (410) 974-5338

[www.dnr.state.md.us/criticalarea/](http://www.dnr.state.md.us/criticalarea/)

November 18, 2011

Ms. Bethany Hollars  
Town of North East  
PO Box 528  
106 South Main Street  
North East, MD 21901-0528

Re: Nauti Goose Improvements  
Variance

Dear Ms. Hollars,

Thank for you for forwarding the site plan for the above referenced variance request. This lot is located in the Intensely Developed Area (IDA) and is 33,540 square feet. This property was the subject of a 2007 violation and variance. It is my understanding from the materials sent, and from speaking with you and the applicants, that deck renovations are proposed. The major components of these renovations include: adding a covering over the existing deck; replacing "in kind" (same foot print, raising and/or replacing) portions of the existing deck; and slightly changing the configuration of the existing band platform from 10 feet-by-11 feet to 12 feet-by-13 feet (where areas of vegetation may be impacted). 10% phosphorus stormwater management calculations have not been provided. Due to the disturbance to the 100-foot Buffer, a variance is required for the proposed work.

In order to grant a variance, the Board must find that each and every one of the following variance standards are met under Section 9-17 of the Town of North East Zoning Ordinance and the Natural Resources Article 8-1808(d)(4):

1. *That special conditions or circumstances exist that are peculiar to the land or structure within the jurisdiction's Critical Area program that would result in an unwarranted hardship to the applicant. [Note: State law defines "unwarranted hardship" to mean that the applicant must prove that, without the requested variance, the applicant would be denied reasonable and significant use of the entire parcel or lot.]*
2. *That a literal interpretation of this subtitle or the local Critical Area Program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the local jurisdiction.*

3. *The granting of a variance will not confer upon an applicant any special privilege that would be denied by this subtitle or the local Critical Area program to other lands or structures within the jurisdiction's Critical Area.*
4. *That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition conforming, on any neighboring property.*
5. *The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's Critical Area, and that the granting of the variance will be in harmony with the general spirit and intent of the Critical Area law and the regulations.*

In reviewing these standards, and in evaluating the information provided by the applicant, we recommend that the Board give particular consideration as to whether the proposed deck canopy meets the definition of unwarranted hardship. Furthermore, we recommend that the Board consider whether if, by covering the existing pervious deck with a canopy and not providing stormwater management for the deck, the variance meets the general spirit and intent of the Critical Area law.

Should the Board determine that the applicants have met each of these variance standards, a variance may be granted. However, this office recommends that any approval be conditioned with a stormwater requirement. Given the proximity of the deck to the water, any roof type covering would allow stormwater to enter North East River untreated. As there is not currently area sufficient to install a best management practice in the area between the deck and the water, we recommend that the applicants be required to meet the 10% pollutant removal requirement for the entire site. Providing stormwater management for this site would provide an overall improvement of water quality.

In addition to aforementioned condition, should the Board grant the request, mitigation is required for disturbance to the Buffer at a ratio of 3:1. A fee in lieu may be collected should there not be adequate area to conduct all plantings on site, per COMAR 27.01.09.01-04.

Please include this letter as part of the record in this variance application. Also, pursuant to Md. Code Ann. Nat. Res. II, § 8-1808(d)(5)(i), please notify the Commission in writing of the decision in this case. Should you have any questions regarding this letter, please call me at (410) 260-3476.

Sincerely,



Julie Roberts  
Natural Resources Planner

NE 553-07

**DOUGLAS F. GANSLER**  
ATTORNEY GENERAL

**KATHERINE WINFREE**  
CHIEF DEPUTY ATTORNEY GENERAL

**JOHN B. HOWARD, JR.**  
DEPUTY ATTORNEY GENERAL



STATE OF MARYLAND  
**OFFICE OF THE ATTORNEY GENERAL**  
DEPARTMENT OF NATURAL RESOURCES  
580 TAYLOR AVENUE C4  
ANNAPOLIS, MARYLAND 21401  
FAX: (410) 260-8364

**JENNIFER L. WAZENSKI**  
ASSISTANT ATTORNEY GENERAL  
PRINCIPAL COUNSEL

**RACHEL L. EISENHAUER**  
ASSISTANT ATTORNEY GENERAL  
DEPUTY COUNSEL

WRITER'S DIRECT DIAL NO.  
(410) 260-8352

[pcucuzzella@dnr.state.md.us](mailto:pcucuzzella@dnr.state.md.us)

September 1, 2010

Sent via facsimile (410 287-8267)

Betsy Vennell  
Office of Planning and Zoning  
Town of North East  
P.O. Box 528  
North East, Maryland 21901-0529

**Re: Nauti Goose Variance**

Dear Ms. Vennell:

I write regarding the above-referenced matter, which I understand is to be heard by the Planning Board this evening. I have been informed by staff from the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission") that there may be some uncertainty within the Board as to whether the newly adopted Critical Area Buffer Regulations, COMAR 27.01.09.01, and the mitigation requirements set forth therein, are applicable to this variance request. It is the Critical Area Commission's considered view that the Buffer Regulations apply in the manner as set forth in Nick Kelly's letter to the Office of Zoning and Planning dated August 30, 2010.

In 2008, the General Assembly amended the Critical Area Law, Md. Code Ann., Nat. Res. ("NR") § 8-1801-8-1817, empowering the Critical Area Commission to adopt regulations regarding "Buffer establishment, maintenance, measurement, mitigation, and enforcement." NR § 8-1806(b). The Buffer Regulations were adopted earlier this year pursuant to this authority. As such, the Buffer Regulations apply to, among other things, variance applications pending or acted upon at the time of or subsequent to adoption. See *Yorkdale Corporation v. Powell*, 237 Md. 121, 126-27 (1963) (changes in land use and zoning law apply to matters pending consideration at the time the change is enacted). The Court of Appeal's recent decision in *McHale v. DCW Dutchship Island*, \_\_\_ Md. \_\_\_ (No. 123, Sept. Term 2009, file July 22, 2010), wherein the Court found that changes made to the

September 1, 2010  
Betsy Vennell  
Page 2

Critical Area Law by the General Assembly in 2008 do not apply retroactively to "violations" that occurred prior to the effective date of the enactment, has no bearing here because the Board is not considering enforcement of a violation, but rather a pending application for a variance.

Please note that this is not meant as, nor should it be considered, an official opinion of the Attorney General. As stated, this reflects only the Critical Area Commission's considered view of the applicability of the Buffer Regulations to this matter.

Very truly yours,

Paul J. Cucuzzella  
Assistant Attorney General

cc: Nick Kelly

Martin O'Malley  
Governor

Anthony G. Brown  
Lt. Governor



Margaret G. McHale  
Chair

Ren Serey  
Executive Director

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August 30, 2010

Ms. Betsy Vennell  
Office of Planning and Zoning  
Town of North East  
PO Box 528  
North East, Maryland 21901-0528

Re: **Nauti Goose Variance - UPDATED**

Dear Ms. Vennell:

Thank you for providing information on the above-referenced variance request. The applicant is requesting an after-the-fact variance to the 110-foot stream Buffer for a newly constructed deck. The parcel is 33,540 square feet in size and is designated as an Intensely Developed Area (IDA). The property was the site of a Maryland Department of the Environment (MDE) violation for the filling of tidal wetlands. The applicant and MDE have executed a Consent Decree regarding this violation, in which the applicant will pay civil penalties, compensation payments, mitigation payments, and install plantings along the shoreline of the North East Town Park.

Based on our review of the information provided, we do not oppose this variance request. However, we do have the following comments:

1. Regulations concerning the 100-foot and expanded Buffer (COMAR 27.01.09.01) are now effective. Since this project is covered by the new State regulations, the project must meet the requirements found in the aforementioned sections of COMAR in order to be approved by the Town. In particular, we note that the applicant must provide the following:
  - a. 4:1 mitigation for all Buffer disturbance is required due to the after-the-fact nature of this variance request; the definition of disturbance includes the area of the deck;
  - b. A Buffer Management Plan shall be completed in accordance with COMAR 27.01.09.01;
  - c. This office supports locating the Buffer plantings within the 100-foot Buffer at the North East Town Park *in addition to* the plantings required from the above-referenced Consent Decree;

- d. The applicant cannot receive a permit for the proposed deck until the Buffer Management Plan has been approved by the Town of North East.
2. As a condition of approval, this office recommends that the Town require the applicant to provide stormwater management for the newly proposed addition. Stormwater management options that are permissible within the 100-foot Buffer may include rain barrels and dense plantings of native vegetation.
3. Please note that this office would not support any future variances to create or expand existing decks within the Buffer on this property. We recommend that a condition be included prohibiting the future construction of any deck waterward of the dwelling and in perpetuity.

Thank you again for providing information on the above-referenced request. Please include this letter in your file and submit it as part of the record for this request. Also, please notify the Commission in writing of the decision made in this case. If you have any questions, please feel free to contact me at (410) 260-3483.

Sincerely,



Nick Kelly  
Natural Resource Planner

cc: NE 533-07

Martin O'Malley  
Governor

Anthony G. Brown  
Lt. Governor



Margaret G. McHale  
Chair

Ren Serey  
Executive Director

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August 23, 2010

Ms. Betsy Vennell  
Office of Planning and Zoning  
Town of North East  
PO Box 528  
North East, Maryland 21901-0528

Re: **Nauti Goose Variance**

Dear Ms. Vennell:

Thank you for providing information on the above-referenced variance request. The applicant is requesting an after-the-fact variance to the 110-foot stream Buffer for a newly constructed deck. The parcel is 33,540 square feet in size and is designated as an Intensely Developed Area (IDA). The property was the site of a Maryland Department of the Environment (MDE) violation for the filling of tidal wetlands. The applicant and MDE have executed a Consent Decree regarding this violation, in which the applicant will pay civil penalties, compensation payments, mitigation payments, and install plantings along the shoreline of the North East Town Park.

Based on our review of the information provided, we do not oppose this variance request. However, we do have the following comments:

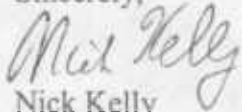
1. Regulations concerning the 100-foot and expanded Buffer (COMAR 27.01.09.01) are now effective. Since this project is covered by the new State regulations, the project must meet the requirements found in the aforementioned sections of COMAR in order to be approved by the County. In particular, we note that the applicant must provide the following:
  - a. 4:1 mitigation for all Buffer disturbance is required due to the after-the-fact nature of this variance request; the definition of disturbance includes the area of the deck;
  - b. A Buffer Management Plan shall be completed in accordance with COMAR 27.01.09.01;
  - c. This office supports locating the Buffer plantings within the 100-foot Buffer at the North East Town Park *in addition to* the plantings required from the above-referenced Consent Decree;



- d. The applicant cannot receive a permit for the proposed deck until the Buffer Management Plan has been approved by the Town of North East.
2. As a condition of approval, this office recommends that the County require the applicant to provide stormwater management for the newly proposed addition. Stormwater management options that are permissible within the 100-foot Buffer may include rain barrels and dense plantings of native vegetation.
3. Please note that this office would not support any future variances to create or expand existing decks within the Buffer on this property. We recommend that a condition be included prohibiting the future construction of any deck waterward of the dwelling and in perpetuity.

Thank you again for providing information on the above-referenced request. Please include this letter in your file and submit it as part of the record for this request. Also, please notify the Commission in writing of the decision made in this case. If you have any questions, please feel free to contact me at (410) 260-3483.

Sincerely,



Nick Kelly

Natural Resource Planner

cc: NE 533-07

Martin O'Malley  
*Governor*

Anthony G. Brown  
*Lt. Governor*



Margaret G. McHale  
*Chair*

Ren Serey  
*Executive Director*

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September 26, 2007

Ms. Melissa B. Cook-MacKenzie  
Town Administrator  
Town of North East  
PO Box 528, 106 South Main Street  
North East, Maryland 21901-0528

Re: Nauti Goose Saloon Variance Request

Dear Ms. Cook-MacKenzie:

I am writing in regards to above referenced variance request scheduled to be heard by the Board of Appeals on September 27, 2007. It is the understanding of this office that the applicant will be called by the Board, but at the consent of both the Town and the applicant, the hearing will be delayed until outstanding legal issues are resolved. Given the nature of those outstanding legal issues, this office concurs with this course of action.

Thank you for your attention to this matter and conveying this information to the Board of Appeals.

Sincerely,

A handwritten signature in cursive script that reads "Kate Schmidt".

Kate Schmidt  
Natural Resource Planner

Cc: Marianne Dise, Commission Counsel  
Mary Ann Skilling, MDP

DOUGLAS F. GANSLER  
Attorney General

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



Kate  
MARIANNE E. DISE  
Assistant Attorney General  
Principal Counsel

SAUNDRA K. CANEDO  
Assistant Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL  
CRITICAL AREA COMMISSION FOR THE  
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338  
September 20, 2007

WRITER'S DIRECT DIAL NO. (410) 260-3466  
mdise@oag.state.md.us

Ms. Betsy Vennell  
Town of North East  
PO Box 528, 106 South Main Street  
North East, Maryland 21901-0528

Re: Buffer Variance Request - Nauti Goose Saloon

Dear Ms. Vennell:

I am writing on behalf of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays regarding the variance application submitted to the Town of North East by the Nauti Goose Saloon. The applicant is requesting an after-the-fact variance to the Critical Area Buffer requirements to legalize an accessory structure (expanded deck) in the 110-foot Buffer. It is the position of the Attorney General's Office that the Town of North East may not process a variance application for this structure.

The site is located in the Intense Development Area (IDA) and is developed with a commercial restaurant facility. The applicant recently constructed a bulkhead and boardwalk that exceeded the scope of a permit for in-kind replacement issued by the Maryland Department of the Environment (MDE). The deck extension, which is the subject of the after-the-fact Buffer variance, was constructed on top of the new fill and up to the edge of the new bulkhead. For the violations of the MDE permit, MDE has issued Site Complaint No. SC-O-08-0582 (August 29, 2007). The Site Complaint requires corrective action within 30 days, including removal of the expanded deck, the new bulkhead, and the fill that was placed in tidal waters.

To reiterate, the applicant illegally expanded the pre-existing deck, and now seeks a variance from the Town in the face of an order from the State to remove the illegal structure. It is the position of this Office that the Town may not entertain this application while the State is pursuing enforcement action against this applicant.

Very truly yours,

A handwritten signature in cursive script that reads "Marianne E. Dise".

Marianne E. Dise

IN THE MATTER OF  
EAST

**RECEIVED**

BEFORE THE NORTH

THE APPLICATION OF

SEP 10 2010

CRITICAL AREA COMMISSION  
Chesapeake & Atlantic Coastal Bays

BOARD OF APPEALS

T. T. S. CORPORATION

CASE NO.: A-2007-06-V

(Variance)

**OPINION**

Application of T.T.S. Corporation for a variance from the Zoning Ordinance pertaining to the critical area Buffer requirements within the 110' buffer zone for the authorization for a 1,025 square foot deck which has already been constructed on the property known commercially as the Nauti Goose located at 200 Cherry Street, being parcel 505 on tax map 401, zoned VM.

Under the provisions of Section 9-19 of the Town of North East Zoning Ordinance, effective at the time of the violation, variances may be granted by the Board of Appeals. In addition, due to special features of a site or other circumstances where a literal enforcement of the provisions relating to the Critical Area District would result in unwarranted hardship to the property owner, the Board of Appeals may also grant a variance within the Critical Area District.

Paragraph 2 of Section 9-19 requires the Board to examine all facts of the case and render

a decision based upon the following criteria:

- a. That special conditions or circumstances exist that are peculiar to the land or structure involved and that a literal enforcement of provisions and requirements of the Town's Critical Area Program would result in unwarranted hardship.
- b. A literal interpretation of the provisions of the Critical Area Program and related Chapters will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area.

- c. The granting of the variance will not confer upon the applicant any special privilege that would be denied by this Ordinance to other owners of like property and/or structures within the Critical Area District.
- d. The variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use either permitted or non-conforming on any neighboring property.
- e. The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area District, and that the granting of the variance will be consistent with the spirit and intent of the Town's Critical Area Program and associated ordinances.
- f. That greater profitability or lack of knowledge of the restrictions shall not be construed as sufficient cause for a variance.

This Application started back in July, 2007. Applicant contracted with All Tides Marine Contracting, LLC, a professional marine contracting company, to reconstruct a bulkhead and deck at the Nauti Goose and also install a floating dock parallel to the bulkhead. The contractor applied for and received a State Tidal Wetlands license from the State of Maryland (07-GL-0408) authorizing the contractor to replace in-kind an existing 70' x 12' deck/boardwalk and the installation of the bulkhead and floating dock. No application was made at the time for the required variance from the Town of North East for the deck replacement/addition. Subsequent to the construction of the above items it was alleged by the State of Maryland that the constructed bulkhead extended channel ward approximately 18" inches beyond the previous riprap and the license permitted. It was also determined at this time that the Applicant, or its contractor, did not apply for or receive the necessary variance for construction of the new deck.

Applicant filed for the variance in July, 2007 (although Applicant's application requests a variance for both the bulkhead and deck replacement, all parties agree that the

variance application, and this Board's decision, is solely for the new deck, the bulkhead and floating dock being under the jurisdiction of the State of Maryland). Subsequent to the filing of the variance application it was agreed by all parties that Applicant's variance application would be held in abeyance pending resolution of the above issues with the State of Maryland.

The Applicant and the State of Maryland resolved all issues regarding the bulkhead and floating dock by way of a Consent Decree filed, or to be filed, in case no.: C-09-162 in the Circuit Court for Cecil County. Applicant now appears before the Board seeking a variance to allow the previously constructed 1,025 square foot deck within the 110' foot Critical Area Buffer zone.

Introduced and made a part of the record are the following three letters: August 30, 2010 letter from Nick Kelly, Natural Resource Planner, Critical Area Commission; September 1, 2010 letter from Paul J. Cucuzzella, Assistant Attorney General; and, September 1, 2010 memo from Betsy Vennell, Director of Planning, Town of North East.

Thomas L. Kemp, Esquire, appeared and testified on behalf of the applicant. In addition to the above history regarding this application Mr. Kemp testified that when the new deck was constructed it was also built approximately 18 inches wider than the width of the original deck and boardwalk. Mr. Kemp indicated that the new deck was a replacement of an existing deck, albeit 18 inches wider, and therefore should not be considered a new structure (i.e., one that did not exist before) or use. Mr. Kemp further testified that the granting of the variance will not confer any special privileges upon his client; that the variance request was the result of errors on the part of the contractor and not the applicant; and, that the granting of the variance will not adversely affect water

quality or adversely impact fish, wildlife or plant habitat. He went on to point out that water quality and habitat would actually be better as a result of the bulkhead versus the previous riprap and the stormwater management that was incorporated into the construction of the bulkhead per the State license.

Fran Abrams, an adjoining property owner appeared and testified in favor of the application.

No one appeared in opposition to the application.

From the evidence presented the Board is satisfied that the criteria set forth in Section 9-19 has been met and makes the following findings:

1. The variance request is based upon a situation where because of special conditions or circumstances (this application is for the replacement and construction of a new deck albeit the use has changed from the original deck/boardwalk to solely a deck) and a literal enforcement of the provisions and requirements of the Town's Critical Area program would result in unwarranted hardship.
2. A literal interpretation of the provisions of the Critical Area Program and related Chapters will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area. Other variances have been granted by the Board.
3. The granting of the variance will not confer upon the applicant any special privilege that would be denied by this Ordinance to other owners of like property and/or structures within the Critical Area District.

4. The variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use either permitted or non-conforming on any neighboring property. As noted previously the conditions or circumstances surrounding this matter were caused by the contractor and not the applicant.
5. The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area District, and that the granting of the variance will be consistent with the spirit and intent of the Town's Critical Area Program and associated ordinances. The Board finds that if the bulkhead was constructed as represented the stormwater management plan incorporated into the construction of the bulkhead will improve the water quality and habitat.
6. That the application is not based upon greater profitability or lack of knowledge by the applicant of the restrictions.

For the reasons stated, by a vote of 4 in favor, 1 opposed, the application for a critical area buffer variance is hereby **GRANTED** upon the following conditions:

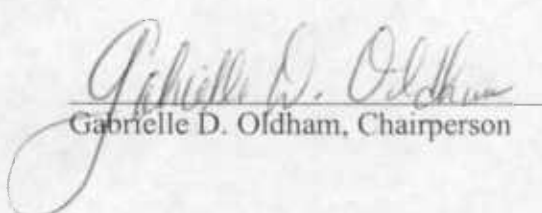
1. Incorporation of the conditions outlined in the letter from Nick Kelly, Natural Resource Planner, Critical Area Commission, dated August 30, 2010 with the following exceptions: item 1.a. shall be changed to indicate the required mitigation shall be reduced from the stated 4:1 ratio to 3:1 ratio; and, the Town acknowledges that the stormwater management required under item 2 may have been satisfied during construction of the bulkhead.



2. A seating/table plan shall be submitted to the Town of North East. At such time as the number of additional seats is known, the owner shall apply for a water allocation from the Town of North East. Upon approval of the application, the owner shall execute a water service agreement along with all applicable connection fees and major facility fees.
3. Said seating/table plan outlined in number 2 above shall also be submitted to the Cecil County Department of Public Works. Said Department shall evaluate the requirements for additional sewer allocation. A copy of any Public Works Agreement executed with the Department shall be provided to the Town.
4. Applicant shall post signs at the steps leading from the constructed deck into the Town Park notifying patrons that alcohol is prohibited within the Town Park.

Date:

Sept. 7, 2010

  
\_\_\_\_\_  
Gabrielle D. Oldham, Chairperson

STATE OF MARYLAND  
IN THE CIRCUIT COURT FOR CECIL COUNTY

STATE OF MARYLAND, DEPARTMENT OF  
THE ENVIRONMENT,

v.

Case No. C-09-162

T.T.S. PROPERTIES, INC., *et al.*

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**CONSENT DECREE**

Plaintiff, the State of Maryland, Department of the Environment (hereinafter "MDE" or "the Department"), Defendant, T.T.S. Properties, Inc. ("TTS"), and the Town of North East ("Town") hereby represent and acknowledge that they agree to enter into this Consent Decree regarding certain alleged violations of State environmental laws arising out of the alleged filling of tidal wetlands in connection with the construction of a bulkhead at the commercial property located at 200 Cherry Street, North East, Cecil County, Maryland, 21901 (the "Site").

**EXPLANATORY STATEMENT**

**State Regulation of Tidal Wetlands**

A. The State's regulatory scheme regarding State tidal wetlands is contained in the Tidal Wetlands Act, set forth at Title 16 of the Environment Article ("the Act"). The law prohibits the dredging or filling of State wetlands without a license. Md. Code Ann., Envir. § 16-202(a); COMAR 26.24.02.01.

B. "State tidal wetlands" means any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide. Md. Code Ann., Envir. § 16-101(n); COMAR 26.24.01.02(52). The State owns all State tidal wetlands not patented into private ownership prior to 1862 and holds them in trust for all Maryland citizens.

C. "Mean high water line" means the line where the land meets the water surface at

the elevation of mean high water. COMAR 26.24.01.02(32).

D. "Filling" means (a) the displacement of tidal water by the depositing into State or private wetlands of soil, sand, gravel, shells, or other materials, including pilings, piers, boathouses, deadweights, or riprap; (b) the artificial alteration of tidal water levels by any physical structure, drainage ditch, or otherwise; and (c) storm drainage projects which flow directly into tidal waters of the State. Md. Code Ann., Envir. § 16-101(f); COMAR 26.24.01.02(18).

E. "License" means written authorization by the Board of Public Works under § 16-202 of the Environment Article to dredge, fill, construct structures, or conduct certain other activities involving State tidal wetlands. Once issued, a license conveys a limited property interest in the submerged lands. COMAR 26.24.01.02(27).

F. MDE assists the Board of Public Works in rendering licensing decisions and, pursuant to COMAR 23.02.04.04A, the Board has delegated to MDE its authority to issue licenses and other authorizations for a variety of structures, including piers and pilings. *See also* COMAR 26.24.01.03.

G. MDE has promulgated regulations governing the dredging, filling, and placement of structures in State wetlands. *See generally* COMAR 26.24.01.01 *et seq.* With respect to shore erosion control, MDE has established an order of preference, beginning with non-structural measures such as marsh creation, proceeding on to stone revetments, and ending with bulkheads as the least preferable means of shoreline stabilization. COMAR 26.24.04.01C(5).

H. MDE enforces the Act in accordance with § 16-502 of the Environment Article. Section 16-502(a)(1) provides for the imposition of civil penalties up to \$10,000 for any violation of Title 16, or any regulation, permit, license or order issued thereunder. Section 16-502(b) authorizes MDE to seek injunctive relief to require a person to cease any violation of the

Act and restore the area unlawfully dredged or filled.

### FACTUAL BACKGROUND

I. The Site is an approximately 0.76-acre commercial lot within the Town of North East and fronting on the North East River, a tidal, navigable water that flows into the Chesapeake Bay. TTS owns the Site and leases it out to a tenant, who operates the Nauti Goose Saloon on the Site.

J. On or about December 19, 2006, the Department issued State Tidal Wetlands License No. 07-GL-0408 authorizing TTS “[t]o replace in-kind, an existing 70-foot long by 12-foot wide timber boardwalk and construct and backfill 120 feet of replacement bulkhead within a maximum of 18 inches channelward of a deteriorated bulkhead as depicted on the attached plans dated September 20, 2006” (“2006 License”).

K. TTS arranged with All Tides Marine Contracting LLC, a professional marine contracting company, to reconstruct a bulkhead and deck at the Nauti Goose Saloon and install a floating dock parallel to the bulkhead.

L. In the Complaint filed in this matter, the Department alleges that the bulkhead TTS and All Tides Marine Contracting LLC constructed extended channelward of the previously existing bulkhead by more than the 18 inches authorized by the 2006 License. The Department also alleges that Defendants widened a previously existing pedestrian walkway and elevated it over the new bulkhead so as to create a second outdoor seating deck.

M. In filing the Complaint, the Department was prepared to seek a civil penalty of \$20,000 from TTS under § 16-502(a) of the Environment Article and an injunction pursuant to § 16-502(b) of the Environment Article ordering TTS to remove the unauthorized bulkhead.

N. The Department and TTS wish to settle the allegations of the Complaint with this Consent Decree without the expense and inconvenience of further litigation and without the

admission, imposition, or adjudication of liability or guilt. Further, TTS disputes and denies any and all liability and nothing in this Decree should be construed as an admission of liability.

O. The Town of North East owns parkland adjacent to the Site ("Parkland") upon which an existing stone revetment has deteriorated to the point that the land has become a source of erosion and sedimentation of the North East River. The Town has future plans to carry out improvements to the shoreline to reduce erosion, including the replacement of revetment or an approved alternative method of reducing erosion, along with plantings along the upper shoreline to filter stormwater runoff from adjacent areas. As a condition of this Consent Decree, TTS has agreed to fund the planting portion of the shoreline improvement project in an amount not to exceed \$2,200. The Town wishes to be a party to this Consent Decree in order to ensure that the plantings are installed in a manner consistent with its requirements. Toward that end, the Town consents to the Court's exercise of jurisdiction over it for purposes of this Consent Decree.

P. In lieu of further litigation in the above referenced cases, before any testimony has been taken, and without trial or adjudication of any issue of fact or law involved herein, and without this Consent Decree constituting evidence against, or admission by, either party to this Consent Decree or in any other proceeding referenced herein, the parties have agreed, in full settlement of this proceeding, to the entry of this Consent Decree, as provided for in Md. Rule 2-612.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED  
AS FOLLOWS:**

**CIVIL PENALTIES, MITIGATION, AND COMPENSATION**

1. TTS shall pay a single civil penalty in the total amount of ten thousand (\$10,000) dollars, payable within 10 calendar days of the execution of this Consent Decree by the Circuit Court.

2. Payment of the civil penalty assessed under paragraph 1 shall be by check made payable to the "Maryland Tidal Wetlands Compensation Fund," and shall be sent c/o the Maryland Department of the Environment, P.O. Box 2057, Baltimore, Maryland 21203-2057. The check should include in the lower left hand corner the notation, "PCA 13762/8964."

3. In addition to the civil penalty identified in paragraph 1, TTS will, within 10 days of entry of this Consent Decree, pay twelve thousand eight hundred and sixty-eight (\$12,868) dollars in compensation and mitigation for the amount of State-owned submerged land that the Department alleges was filled by TTS's activities. Payment shall be by a single check or money order for the entire amount of the mitigation/compensation payment made payable to the Maryland Department of the Environment, Tidal Wetlands Compensation Fund. The payment shall be mailed to the Fiscal Services Division, Cash Receipts/Advances Unit, P.O. Box 2057, Baltimore, Maryland 21203-2057. The check should include in the lower left hand corner the notation: "PCA 13762/8964."

#### WORK TO BE PERFORMED

4. In addition to the penalty, mitigation, and compensation payments identified above, TTS shall be responsible for installing plantings along the shoreline of the Town Parkland located adjacent to the Site ("Plantings"). The Plantings shall be installed at TTS's sole expense (not to exceed \$2,200 under this Decree) and in accordance with the plans attached hereto as Exhibit A. In the event that the Plantings require a permit from any governmental entity, TTS understands that the application for authorization of the Plantings may require payment of an application fee and it will be responsible for the payment of that fee.

5. TTS shall install the Plantings, or arrange to have them installed, in accordance with the terms and conditions of the any permits required therefore and in accordance with the Town's requirements. TTS shall complete installation of the Plantings within 180 days after

execution of this Consent Decree. One month prior to installation, a pre-construction meeting shall be held with the Town and Town's inspector to review the planting requirements with TTS or their installer. TTS shall initiate said meeting.

#### STIPULATED PENALTIES

6. In the event that TTS fails to apply or obtain any necessary permits for, or install, the Plantings as required above, it will be in default of this Consent Decree and agrees to pay stipulated penalties to MDE as set forth below:

- a. Upon written demand by the Director of the Water Management Administration, the Defendant in default shall pay to the Department a stipulated penalty of one hundred dollars (\$100.00) a day for each day beyond the milestone date required by paragraphs 4 and 5 until the requirement is met.
- b. Any stipulated penalty due pursuant to this Consent Decree shall be by check made payable to the Tidal Wetlands Compensation Fund, c/o the Maryland Department of the Environment, P.O. Box 2057, Baltimore, Maryland 21203-2057. The check should include in the lower left hand corner the notation, "PCA 13762/8964." The Administration may in its discretion reduce or waive a stipulated penalty if it determines that noncompliance is beyond the reasonable control of the Defendant in default as set forth in this Consent Decree.
- c. The Defendant in default shall make payment of any stipulated penalty no later than thirty (30) days after receiving written demand from the Director of the Water Management Administration.

NOTIFICATION

7. All notifications required under this Consent Decree shall be in writing and be sent to the following people:

For the Maryland Department of the Environment

Ms. Carol Coates  
Chief, Enforcement Division  
Water Management Administration  
Maryland Department of the Environment  
1800 Washington Boulevard  
Baltimore, Maryland 21230

For TTS

Mr. Thomas Trainer  
P.O. Box E  
North East, Maryland 21901

and

Thomas L. Kemp, Esq.  
Kemp & Kemp, P.A.  
141 East Main Street  
Elkton, Maryland 21921

For the Town of North East

Melissa B. Cook-MacKenzie  
Town Administrator  
P.O. Box 528 / 106 S. Main Street  
North East, Maryland 21901-0528

PERSONS BOUND BY ORDER

8. This Consent Decree shall be binding upon MDE, TTS, and the Town, and each party shall ensure that their respective agents, employees, successors and assigns comply with the terms hereof.

9. The transfer of ownership or other interest in the Site shall not alter or relieve TTS of its obligation to comply with all of the terms of this Consent Decree. During the period when this Consent Decree is in effect, at least fifteen (15) days prior to any transfer of ownership or other interest in the Site, TTS shall provide written notice and a true copy of this Consent



Decree to his successors in interest and shall simultaneously notify MDE at the addresses specified in paragraph 10 above that such notice has been given. As a condition to any such transfer, TTS shall reserve all right to comply with the terms of this Consent Decree.

NO ADMISSIONS OR WAIVERS

10. This Consent Decree is understood and intended by all parties to be without any admission of liability or fact, and nothing in this Consent Decree shall be considered as an admission by any Party in these proceedings. Nothing contained herein shall constitute a waiver of the rights of either party to proceed in an administrative or civil action to enforce the terms of this Consent Decree or any other violations of Maryland law not alleged in the Complaint filed in the action governed by this Consent Decree. Nor shall anything set forth in this Consent Decree be deemed to be a waiver of TTS's right to contest such proceedings.

DELAY

11. If any event occurs which causes, or which TTS reasonably expects to cause, a delay in the achievement of any requirement imposed by this Consent Decree, TTS shall notify the Department, in writing, within ten (10) working days of obtaining knowledge of the occurrence of such event and of its impact on timely compliance. The notice shall identify the cause of the delay, an estimate of the anticipated length of delay, the measures taken and to be taken by TTS to prevent or minimize the delay and an estimate of the date by which such measures will be completed. TTS shall promptly implement all reasonable measures to prevent or minimize any such delay and to comply with all requirements of the Consent Decree as soon as reasonably possible. TTS may request, in writing, an extension of any deadline at least ten (10) working days prior to such deadline. The Department may grant an extension upon such a request, such extension not to be unreasonably withheld. If such an extension is granted, any stipulated penalty, if applicable, shall not accrue.

12. An event occurs which causes, or which TTS reasonably expects to cause, a delay in the achievement of a requirement imposed by this Consent Decree may not include the failure of TTS to obtain any local permits necessary to carry out the Restoration Work.

FORCE MAJEURE

13. TTS shall perform the requirements of this Consent Decree in the manner and within the time limits set herein, unless the performance is prevented or delayed by events that constitute a force majeure. TTS shall have the burden of proving such a force majeure. A force majeure is defined by any event or circumstance arising from causes not reasonably foreseeable and beyond the control of TTS, which cannot be avoided or overcome by due diligence and which delays or prevents performance in the manner or by a date required by this Consent Decree.

14. Circumstances beyond the control of TTS include earthquake, hurricane or tropical storm, flood, or other act of God, war, riot, injunction, fire, freight embargo, or strike. Such circumstances do not include increased costs of performance, changed economic circumstances, or normal inclement weather.

15. Within ten (10) working days after becoming aware of any event that TTS believes constitutes a force majeure, TTS shall notify the Department of such event in accordance with paragraph 10 herein. Failure to comply with the notice provision of this section shall constitute a waiver of TTS's rights to assert a force majeure claim.

16. If the Department determines that the event or anticipated event that has caused or will cause the delay constitutes a force majeure, the Department may extend in writing the time for performance for an appropriate period of time as determined by the Department.

### SUBSEQUENT MODIFICATION

17. This Consent Decree contains the entire agreement of the Parties and shall not be modified by any prior oral or written agreement, representation, or understanding. This Consent Decree may not be modified except by written agreement of the Parties and shall be effective upon signature by the Department. A Party shall not petition the Court for modification without having first made a good faith effort to reach agreement with the other parties on such modification.

### NOT A PERMIT

18. This Consent Decree is not and shall not be interpreted to be a license or permit or modification of any existing license or permit.

### SEVERABILITY

19. If any provision or authority of this Consent Decree or the application of this Consent Decree to any party or circumstance is held by any judicial or administrative authority to be invalid, the application of such provision or authority to other parties or circumstances and the remainder of this Consent Decree shall not be affected thereby and shall remain in full force.

### CONTINUING JURISDICTION

20. This Court shall have jurisdiction to enforce the terms and conditions of this Consent Decree, to modify the Consent Decree upon petition of any party, and to resolve disputes arising under this Consent Decree.

### TERMINATION

21. This Consent Decree shall remain in force and effect until all obligations and terms referred to herein have been completed or satisfied.

IT IS SO DECREED this \_\_\_\_\_ day of \_\_\_\_\_, 2010:

\_\_\_\_\_  
Judge, Circuit Court for Cecil County

IT IS SO AGREED AND CONSENTED TO:

ON BEHALF OF T.T.S. PROPERTIES, INC.:

August 10 2010      Thomas W. Draines, Pres  
Date

ON BEHALF OF THE TOWN OF NORTH EAST:

8/10/10      Melvin Cook-MacKenzie, Administrator  
Date

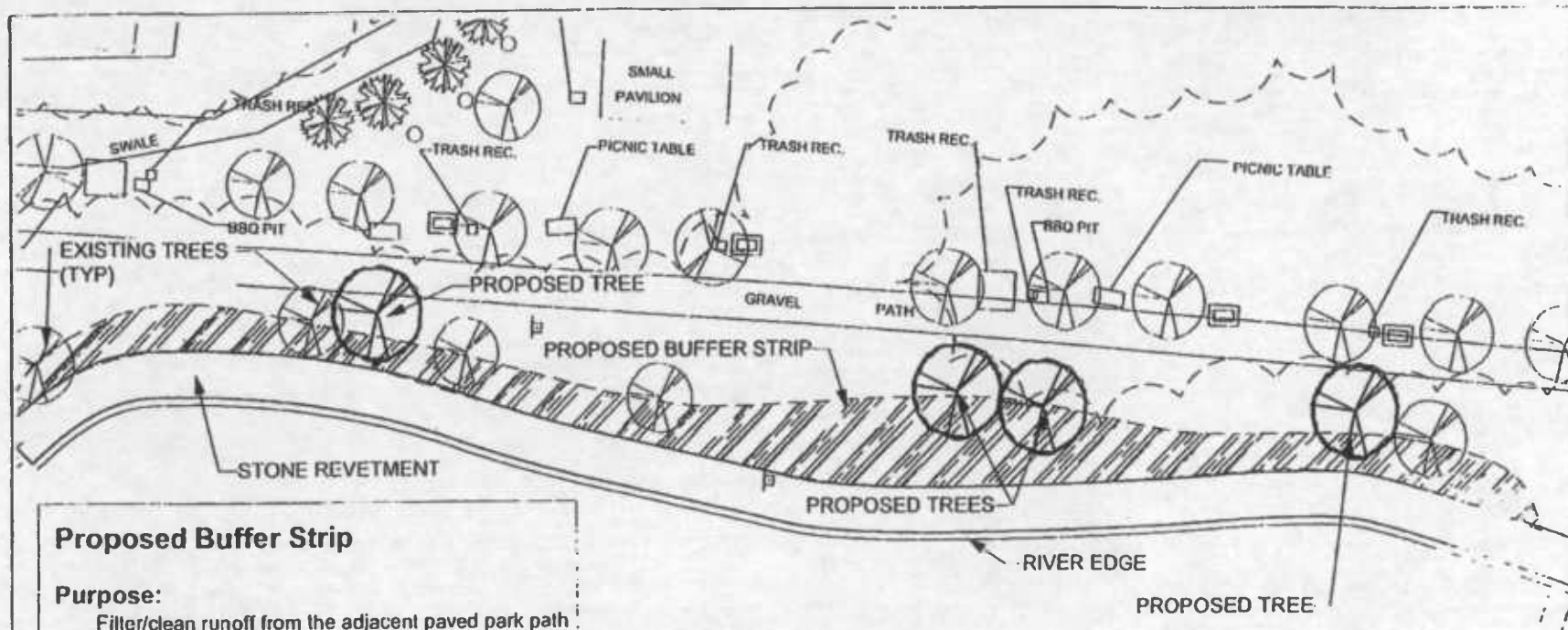
ON BEHALF OF THE MARYLAND DEPARTMENT OF THE ENVIRONMENT:

8/10/10      \_\_\_\_\_  
Date      Jay G. Sakai  
Director, Water Management Administration

APPROVED AS TO FORM:

August 10, 2010      \_\_\_\_\_  
Date      Thomas D. Kemp, Esq.

8/9/10      \_\_\_\_\_  
Date      Adam D. Snyder  
Assistant Attorney General

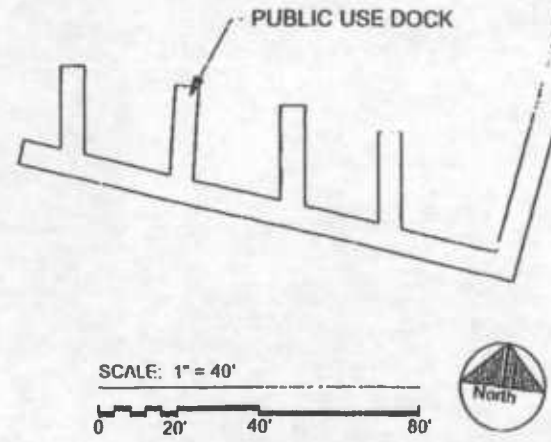


**Proposed Buffer Strip**

**Purpose:**  
 Filter/clean runoff from the adjacent paved park path  
 Slow water movement to prevent erosion  
 Limit pedestrian access to the stone revetment  
 Keep open the view to the North East River

**Existing Conditions:**  
 Very sparse turf grass cover, mowed weekly, (3) Crabapples, (2) Red Maple  
 Area: 5500 sf Slope 1-3%  
 Adjacent to a paved pedestrian (and occasionally vehicular) path  
 Surrounded by a heavily used public park

**Proposed Buffer Planting:**  
 Native grasses to be seeded over the existing grass (a mix of *Andropogon virginicus*, *Chasmanthium latifolium*, *Panicum amarum*, *Panicum virgatum*, and *Schizachyrium scoparium*)  
 (4) native trees (*Nyssa sylvatica*, *Quercus prinus*)  
 Buffer Strip width varies 8-24'; approx. 370' long



**EXHIBIT A**

**BUFFER STRIP PLAN**  
 North East Town Park  
 TOWN OF NORTH EAST, MD  
 Cecil County, MD

Date: 5/20/10  
 Rev: 6/15/10  
 Project No. 09002.03

**PATRICIA LEMMERMAN, ASLA**  
 REGISTERED LANDSCAPE ARCHITECT  
 PO Box 64, North East, MD 21001 Telephone: (410)287-0167

# MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore Maryland 21230 - 1708  
(410) 537-3000 • 1-800-633-6101 • <http://www.mde.state.md.us>

## SITE COMPLAINT

SITE COMPLAINT NUMBER: SC-O-08-0582

Date Issued: 08/29/2007

NAME OF VIOLATOR: Edward Trainer TTS Properties, Inc.

ADDRESS: 200 Cherry Street

CITY: North East, Maryland 21901

TELEPHONE: 410-287-8280

FACILITY NAME: Nauti- Goose Saloon

PERMIT: 07-GL-0408

VIOLATION TYPE: Wetlands and riparian rights; Article – Environment, Section 16-10 through 16-310, and 16-501 through 16-503.

SPECIFICALLY: TTS Properties, Inc. and it's contractor have constructed a bulkhead and boardwalk that has exceeded permit #07-GL-0408 authorizations for the replacement of in-kind structures as outlined within the permit. This activity has occurred at the Nauti- Goose Saloon in North East, Cecil County. As a result of your construction you are in violation of Section 16-202(a) of the Environmental Article of the Maryland Annotated Code.

YOU ARE HEREBY ADVISED THAT THE FOLLOWING CORRECTIVE ACTIONS ARE NECESSARY. COMPLIANCE WITH THE CORRECTIVE ACTIONS CONTAINED HEREIN DOES NOT PRECLUDE THE DEPARTMENT FROM IMPOSING FURTHER REQUIREMENTS. IN ADDITION, THE DEPARTMENT RESERVES THE RIGHT TO IMPOSE SANCTIONS OR PENALTIES FOR THE UNDERLYING VIOLATION(S).

The following corrective actions should be preformed within the next 30 days:

- 1.) All work shall cease and desist immediately other than noted below.
- 2.) The new bulkhead shall be removed and located no further than 18 inches channel-ward of the old deteriorated bulkhead, as permitted.
- 3.) The attached unauthorized floating dock running parallel to the new bulkhead shall be removed.
- 4.) The expanded deck shall be removed and restored to the original boardwalk length and width not to exceed 6.0 feet channel-ward from the old remaining deck and awning structure. The 6.0-foot boardwalk shall be placed at the original step-down grade elevation as per the previous condition.
- 5.) All fill material that was placed within tidal waters shall be removed and restored to the original grade elevation. Fill materials shall be hauled to an approved site location.
- 6.) All areas disturbed during restoration shall be seeded and permanently stabilized.
- 7.) MDE shall be contacted at the completion of the site construction and restoration for a final inspection.

THE ABOVE DESCRIBED VIOLATION(S) MAY RESULT IN THE DEPARTMENT SEEKING LEGAL SANCTIONS AGAINST YOU, INCLUDING THE IMPOSITION OF CIVIL AND/OR CRIMINAL PENALTIES. CONTINUATION OF THE VIOLATION(S) OR FAILURE TO TAKE THE CORRECTIVE ACTIONS DESCRIBED ABOVE MAY RESULT IN ADDITIONAL SANCTIONS OR PENALTIES FOR THE UNDERLYING VIOLATION(S).

PLEASE BE ADVISED THAT YOU ARE ENTITLED TO A HEARING BEFORE THE ADMINISTRATION AS A RESULT OF THIS ORDER. IF YOU WISH TO SCHEDULE A HEARING ON THIS MATTER, THE ADMINISTRATION MUST BE SO NOTIFIED IN WRITING WITHIN TEN (10) DAYS.

"I HEREBY ACKNOWLEDGE RECIEPT OF THIS SITE COMPLAINT BY MY SIGNATURE, WHICH IS NOT AN ADMISSION OF GUILT."

PERSON ISSUED TO: \_\_\_\_\_

TITLE: NP

ISSUED BY: \_\_\_\_\_

PHONE: 410-287-8280

David L. Bramble  
Inspector Name

AUTHORIZED BY: Shari Wilson



Nauti Goose Saloon

Pictures 7-10-2007

Photos of the Violations construction of the of bulkhead, decking, porches, docks, etc.

Violation of the Chesapeake bay critical area buffer, Chesapeake Bay Critical Area Program, No permit from the Corp of Engineers, MDE floodplain, Electrical floodplain requirements



previously  
under  
old  
deck

filled out 12-feet

added  
new deck



















Photo of Nauti Goose Saloon's prior deck. The blue canopy shows the location of where the pre-existing deck was located.





7-10-2007

Photos of the new deck. The blue canopy over the old deck identifies the location of the existing deck and the new deck.



