

**Town of West Newbury
Conservation Commission**

WETLANDS PROTECTION BYLAW

I. Purpose

The purpose of this bylaw is to protect the wetlands, water resources, flood-prone areas, and adjoining upland areas in the Town of West Newbury by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect on resource area values, including but not limited to the following: public or private water supply, groundwater supply, flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, prevention and control of pollution, fisheries, shellfisheries, wildlife habitat, rare species habitat including rare plant and animal species, agriculture, aquaculture, and recreation values, deemed important to the community (collectively, the "resource area values protected by this bylaw").

This bylaw is intended to utilize the Home Rule authority of West Newbury to protect the resource areas under the Wetlands Protection Act (G.L. Ch.131 §40; the Act) to a greater degree, to protect additional resource areas recognized by the Town as significant, to protect all resource areas for their additional values beyond those identified in the Act, and to impose, in local regulations and permits, additional standards and procedures in addition to those of the Act and regulations thereunder (310 CMR 10.00, *et seq.*), subject, however, to the rights and benefits accorded to agricultural uses and structures of all kinds under the laws of the Commonwealth and other relevant bylaws of the Town of West Newbury.

II. Jurisdiction

Except as permitted by the Conservation Commission no person shall remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following resource areas: any freshwater or coastal wetlands, isolated wetlands, marshes, wet meadows, bogs, swamps, vernal pools, banks, reservoirs, lakes, ponds of any size, beaches, dunes, estuaries, and lands under water bodies; lands adjoining these resource areas out to a distance of 100 feet, known as the buffer zone; rivers, streams, brooks and creeks whether perennial or intermittent; lands adjoining these resource areas out to a distance of 200 feet, with the exception of intermittent streams running alongside both public and private roadways where the jurisdictional land adjoining those streams shall extend out to a distance of 100 feet; lands subject to flooding or inundation by groundwater or surface water; and lands subject to tidal action, coastal storm flowage, or flooding (collectively the "resource areas protected by this bylaw"). Said resource areas shall be protected whether or not they border surface waters.

The jurisdiction of this bylaw shall not extend to uses and structures of agriculture that enjoy the rights and privileges of laws and regulations of the Commonwealth governing agriculture, including work performed for normal maintenance or improvement of land in agricultural or aquacultural uses as defined by the Wetlands Protection Act regulations, found at 310 CMR 10.04.

III. Exemptions and Exceptions

The applications and permits required by this bylaw shall not be required for work performed for normal maintenance or improvement of land in agricultural and aquacultural use as defined by the Wetlands Protection Act regulations at 310 CMR 10.04.

The applications and permits required by this bylaw shall not be required for maintaining, repairing, or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public to provide electric, gas, water, telephone, telegraph, or other telecommunication services, provided that written notice is provided to the Conservation Commission before the commencement of work, and

provided that the work conforms to any performance standards and design specifications in regulations adopted by the Commission.

The applications and permits required by this bylaw shall not be required for minor activities in a buffer zone per 310 CMR 10.02(2)(b)(2)(g) –(p) provided that written notice is provided to the Conservation Commission before the commencement of work and provided that the work also conforms to any performance standards and design specifications in regulations adopted by the Commission.

The applications and permits required by this bylaw shall not be required for emergency projects necessary for the protection of the health and safety of the public, provided that the work is to be performed by or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof; provided that advance notice, oral or written, has been given to the Commission before the commencement of work or within 24 hours after the commencement; provided that the Commission or its agent certifies the work as an emergency project; provided that the work is performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency, and provided that within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided by this bylaw. Upon failure to meet these and other requirements of the Commission, the Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

Other than as stated in this bylaw, the exemptions provided in the Wetlands Protection Act (G.L. Ch. 131 §40) and regulations (310 CMR 10.00) shall not apply under this bylaw.

The Commission may waive provisions of this bylaw provided the applicant demonstrates that the proposed project will not adversely impact any of the interests protected by this bylaw.

IV. Applications and Fees

A written application shall be filed with the Conservation Commission to perform activities that may impact resource areas protected by this bylaw. The permit application shall include such information and plans deemed necessary by the Commission to describe proposed activities and their effects on the resource areas protected by this bylaw. No activities shall commence without receiving and complying with a permit issued pursuant to this bylaw.

The Commission may accept as the application and plans under this bylaw any application and plans filed under the Wetlands Protection Act (G.L. Ch. 131 §40) and regulations (310 CMR 10.00) where they are sufficient to meet the requirements of the bylaw and any regulations promulgated thereto, but the Commission is not obliged to do so..

Any person desiring to know whether or not a proposed activity or an area is subject to this bylaw may request, in writing, a determination from the Commission. Such a Request for Determination of Applicability (RDA) or Abbreviated Notice of Resource Area Delineation (ANRAD) filed under the Act shall include information and plans deemed necessary by the Commission.

At the time of an application, the applicant shall pay a filing fee specified in the regulations of the Commission. The fee is in addition to that required by the Wetlands Protection Act and regulations. The Commission may waive fees required by West Newbury regulations for applications filed by a government agency, including a municipal department, board, and/or committee, a not-for-profit organization, or for projects the Commission finds have a net benefit to wetland resources and a primary purpose of restoring wetland ecological functions.

According to G.L. Ch. 44 §53G and regulations promulgated by the Commission, the Commission may impose reasonable fees upon applicants to secure outside consultants including engineers, wetlands scientists, wildlife biologists, or other experts to aid in the review of proposed projects presenting technical issues requiring

additional expertise to assist in protecting resource areas. Such funds shall be deposited with the town treasurer, who shall create an account specifically for this purpose. Additional consultant fees may be requested where the requisite review is more expensive than initially calculated or new information requires additional consultant services.

Only costs relating to consultant work done in connection with a project for which a consultant fee has been collected shall be paid from this account, and expenditures may be made at the sole discretion of the Commission. Any consultant hired under this provision shall be selected by the Commission and report exclusively to the Commission. The Commission shall provide applicants with written notice of the selection of a consultant, identifying the consultant, the amount of the fee to be charged to the applicant, and a request for payment of that fee. Notice shall be deemed to have been given on the date it is mailed or delivered. The applicant may withdraw the application or request within five (5) business days of the date notice is given without incurring any costs or expenses.

The entire fee must be received before the initiation of consulting services. Failure by the applicant to pay the requested consultant fee within ten (10) business days of the payment request shall be grounds for the Commission to declare the application administratively incomplete and deny the permit without prejudice, except in the case of an appeal. The Commission shall inform the applicant and Department of Environmental Protection (DEP) of such a decision in writing.

The applicant may appeal the selection of an outside consultant to the Select Board, which may disqualify the consultant only if the consultant has a conflict of interest or is not adequately qualified. The minimum qualifications shall consist of either an educational degree or three or more years of practice in the field at issue or a related field. The applicant shall make such an appeal in writing and it must be received within ten (10) business days of the date that the Commission requested consultant fees. Such appeal shall extend the applicable time limits for action upon the application.

V. Notice and Hearings

Any person filing a permit or other application, or Notice of Intent (NOI), or ANRAD, or other request with the Conservation Commission shall give written notice thereof, at the time of filing, by certified mail (return receipt requested) or hand delivery, or by certificates of mailing, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way, and abutters to the abutters within 300 feet of the property line of the property where work is being proposed, including any in another municipality or across a body of water. Mailing at least seven days prior to the public hearing shall constitute timely notice.

Any person filing an RDA shall give written notice thereof, at the time of filing, by certified mail (return receipt requested) or hand delivery, or by certificates of mailing, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way, and abutters to the abutters within 100 feet of the property line of the property where work is being proposed, including any in another municipality or across a body of water. Mailing at least seven days prior to the public hearing shall constitute timely notice.

In addition, the notices required shall provide a brief description of the project or other proposal and the date of any Commission hearing or meeting date if known. The notice to abutters also shall state where copies of the application and plans may be examined and obtained by abutters. An affidavit of the person providing such notice attesting that such notice was provided, with a copy of the notice mailed or delivered and a copy of the certified abutters list obtained from the Assessor's Office shall be filed with the Commission. When a person requesting any determination or permit is someone other than the property owner, the person making the request must provide the property owner with a copy of the request, the notice of the hearing, and the determination itself and submit proof of provision of those documents to the Commission.

The Commission shall conduct a public hearing on any permit application, NOI, RDA, or ANRAD with written notice given at the applicant's expense, at least five business days before the hearing, in a newspaper of general circulation in the municipality. The Commission shall commence the public hearing within 21 days from receipt of a completed permit application, NOI, RDA, or ANRAD unless an extension is authorized in writing by the applicant. The Commission shall have authority to request that the applicant agree to continue the hearing to a specific date announced at the hearing, for reasons stated at the hearing, which may include the need for additional information from the applicant or others as deemed necessary by the Commission in its discretion, based on comments and recommendations of the boards and officials listed in §VI. An applicant's refusal to agree to a requested continuance shall be grounds for denial of the application.

The Commission shall issue its permit, other order, or determination in writing within 21 days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant. The Commission in an appropriate case may combine its hearing under this bylaw with a hearing conducted under the Wetlands Protection Act (G.L. Ch.131 §40) and regulations (310 CMR 10.00).

VI. Coordination with Other Boards

Any person filing a permit application, NOI, RDA, or ANRAD with the Conservation Commission shall provide written notification to the planning board, board of health, and building inspector at the time abutter notification is provided. An affidavit of the person providing notice attesting that such notice was provided, with a copy of the notice provided, shall be filed with the Commission. The Commission shall take into account written comments and recommendations from the above boards and officials but they shall not be binding on the Commission. The applicant shall have the right to receive any comments and recommendations and respond to them at a hearing of the Commission before final action.

VII. Burden of Proof

The applicant shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the application will not have significant or cumulative adverse effects on the interests protected by this bylaw. Failure to provide the Commission with adequate evidence supporting a determination that the proposed work will not have such adverse effects on the interests protected by this bylaw shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions, or, at the Commission's discretion and with the applicant's permission, to continue the hearing to another date to enable the applicant or others to present additional evidence upon such terms and conditions the Commission deems reasonable.

VIII. Permits and Conditions

If the Conservation Commission, after a public hearing, determines that the activities which are subject to the permit application, or the land and water uses which will result therefrom, are likely to have a significant individual or cumulative effect on the resource area values protected by this bylaw, the Commission, within 21 calendar days of the close of the hearing, shall issue or deny a permit for the activities requested. The Commission shall take into account the extent to which the applicant has avoided, minimized and mitigated any such effect.

If it issues a permit, the Commission shall impose conditions that the Commission deems necessary or desirable to protect said resource area values. All activities shall be conducted in accordance with those conditions. Where no conditions are adequate to protect said resource area values, the Commission is empowered to deny a permit for failure to meet the requirements of this bylaw. It may also deny a permit: for failure to submit necessary information and plans requested by the Commission; for failure to comply with the procedures, design specifications, performance standards, and other requirements in regulations of the Commission; or for failure to avoid, minimize or mitigate unacceptable significant or cumulative effects upon the resource area values protected by this bylaw. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing. Upon written request, the Commission may waive specifically

identified and requested procedures, design specifications, performance standards, or other requirements set forth in its regulations, provided that: the Commission finds in writing after said public hearing that there are no reasonable conditions or alternatives that would allow the proposed activity to proceed in compliance with said regulations; that avoidance, minimization and mitigation have been employed to the maximum extent feasible; and that the waiver is necessary to accommodate an overriding public interest or to avoid a decision that so restricts the use of the property as to constitute an unconstitutional taking without compensation.

In reviewing activities within the buffer zone, the Commission shall presume the buffer zone is important to the protection of other resource areas because activities undertaken in close proximity to the resource area have a high likelihood of adverse effect, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. These adverse effects from construction and use can include, without limitation, erosion, siltation, loss of groundwater recharge, poor water quality, alteration of vegetation, and loss of wildlife habitat. The Commission may establish, in its regulations, design specifications, performance standards, and other measures and safeguards, including setbacks, no-disturb areas, no-build areas, and other work limits for protection of such lands, including without limitation strips of continuous, undisturbed vegetative cover, unless the applicant convinces the Commission that the area or part of it may be disturbed without harm to the values protected by the bylaw.

In reviewing activities within the riverfront area, the Commission shall presume the riverfront area is important to all the resource area values unless demonstrated otherwise. No permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this bylaw, has proved by a preponderance of the evidence that (1) there is no practicable alternative to the proposed project with less adverse effects, and that (2) such activities, including proposed mitigation measures, will have no significant adverse effect on the areas or values protected by this bylaw. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g., residential, institutional, commercial, or industrial), logistics, existing technology, costs of the alternatives, and overall project costs.

To prevent resource area loss, the Commission shall require applicants to avoid alteration wherever feasible; to minimize alteration; and, where alteration is unavoidable and has been minimized, to provide full mitigation. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with specific plans, professional design, proper safeguards, adequate security, and professional monitoring and reporting to assure success, because of the significant likelihood of failure of replication.

The Commission may require a wildlife habitat study of the project area, to be paid for by the applicant, whenever it deems appropriate, regardless of the type of resource area or the amount or type of alteration proposed. The decision shall be based upon the Commission's estimation of the importance of the habitat area considering (but not limited to) such factors as proximity to other areas suitable for wildlife, importance of wildlife "corridors" in the area, or actual or possible presence of rare plant or animal species in the area. The work shall be performed by an individual who at least meets the qualifications set out in the wildlife habitat section of the Wetlands Protection Act regulations (310 CMR 10.60).

The Commission shall presume that all areas meeting the definition of "vernal pools" under §X of this bylaw, including the area surrounding vernal pools not to be disturbed, perform essential habitat functions. This presumption may be overcome only by the presentation of credible evidence, which, in the judgment of the Commission, demonstrates that the basin or depression does not provide essential habitat functions. Any formal evaluation should be performed by an individual who at least meets the qualifications under the wildlife habitat section of the Wetlands Protection Act regulations (310 CMR 10.60).

A permit, Determination of Applicability (DOA), or Order of Resource Area Delineation (ORAD) shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a

permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one-year period, provided that a request for a renewal is received in writing by the Commission at least thirty days prior to expiration. Notwithstanding the above, a permit may identify requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all present and future owners of the land.

For good cause the Commission may revoke any permit, DOA, or ORAD or any other order, determination or other decision issued under this bylaw after notice to the holder, the public, abutters, and town boards, pursuant to §V and §VI, and after a public hearing. Good cause is established where the permit, DOA, ORAD, or any other order, determination, or other decision issued under this bylaw has been improperly granted, or the holder has failed to comply with its terms and conditions.

Amendments to permits, DOAs, or ORADs shall be handled in the manner set out in the Wetlands Protection Act regulations and policies thereunder.

In an appropriate case, the Commission may combine the decision issued under this bylaw with the Order of Conditions, DOA, ORAD, or Certificate of Compliance (COC) issued under the Wetlands Protection Act and regulations.

No work proposed in any application shall be undertaken until the permit or ORAD issued by the Commission with respect to such work has been recorded in the registry of deeds or, if the land affected is registered land, in the registry section of the land court for the district wherein the land lies, and until the holder of the permit certifies in writing to the Commission that the document has been recorded or registered.

IX. Regulations

After public notice and public hearing, the Conservation Commission shall promulgate rules and regulations to effectuate the purposes of this bylaw, effective when voted by the Commission and filed with the town clerk. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effect of this bylaw. At a minimum, these regulations shall reiterate the terms defined in this bylaw, define additional terms and requirements not inconsistent with the bylaw, provide for undisturbed vegetative buffers extending from the edge of resource areas, and impose filing and consultant fees.

X. Definitions

The following definitions shall apply in the interpretation and implementation of this bylaw.

The term "agriculture" shall refer to the definition provided by G.L. Ch. 128 §1A.

The term "alter" shall include, without limitation, the following activities when undertaken to, upon, within, or affecting resource areas protected by this bylaw:

- A. Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind
- B. Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics
- C. Drainage, or other disturbance of water level or water table
- D. Dumping, discharging, or filling with any material which may degrade water quality
- E. Placing of fill, or removal of material, which would alter elevation
- F. Driving of piles, erection, expansion, or repair of buildings, or structures of any kind
- G. Placing of obstructions or objects in water

- H. Destruction of plant life including but not limited to cutting or trimming of trees, shrubs, and other vegetation
- I. Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters
- J. Any activities, changes, or work that may cause or tend to contribute to pollution of any body of water or groundwater
- K. Incremental activities which have, or may have, a cumulative adverse effect on the resource areas protected by this bylaw.

The term "bank" shall include the land area which normally abuts and confines a water body; the lower boundary being the mean annual low flow level, and the upper boundary being the first break in the slope observed in the field or the mean annual flood level, whichever is higher.

The term "cumulative adverse effects" shall include the adverse effects of activities regulated under this bylaw which may be individually insignificant to the interests and values under this bylaw, but when considered in relation to other past or present activities in a given area may be significant to said interests and values in the aggregate.

The term "isolated wetlands" means freshwater wetlands not bordering on a water body at least 1000 square feet in surface area.

The term "person" shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the Commonwealth or political subdivision thereof to the extent subject to town bylaws, administrative agency, public or quasi-public corporation or body, this municipality, and any other legal entity, its legal representatives, agents, or assigns.

The term "pond" shall follow the definition of 310 CMR 10.04 except that the size threshold of 10,000 square feet shall not apply.

The term "rare species" shall include, without limitation, all vertebrate and invertebrate animals and all plant species listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife or the United States Fish and Wildlife Service, regardless of whether the habitat in which they occur has been previously identified by the Massachusetts Division of Fisheries and Wildlife.

The term "rare species habitat" means an area subject to protection under this bylaw which, due to its plant community, composition and structure, hydrologic regime or other characteristics, provides important food, shelter, migratory or overwintering areas or breeding areas for rare species.

The term "vernal pool" shall include, in addition to scientific definitions found in the regulations under the Wetlands Protection Act, any confined basin or depression not occurring in existing lawns, gardens, landscaped areas or driveways which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, contains at least 200 cubic feet of water at some time during most years, is free of adult predatory fish populations, and provides essential breeding and rearing habitat functions for amphibian, reptile or other vernal pool community species which have been found in the basin/depression, regardless of whether the site has been certified by the Massachusetts Division of Fisheries and Wildlife. The boundary of the area surrounding vernal pools not to be disturbed shall be 100 feet outward from the mean annual high-water line defining the depression.

Except as otherwise provided in this bylaw or in associated regulations of the Conservation Commission, the definitions of terms and the procedures in this bylaw shall be as set forth in the Wetlands Protection Act (G.L. Ch. 131 §40) and regulations (310 CMR 10.00).

XI. Security

As part of a permit issued under this bylaw, in addition to any security required by any other municipal or state board, agency, or official, the Conservation Commission may require that the performance and observance of the conditions imposed thereunder (including conditions requiring mitigation work) be secured wholly or in part by one or both of the methods described below:

- A. By a proper bond, a deposit of money or negotiable securities under a written third-party escrow arrangement, or other undertaking of financial responsibility sufficient in the opinion of the Commission, to be released in whole or in part upon issuance of a COC for work performed pursuant to the permit.
- B. By accepting a conservation restriction, easement, or other covenant enforceable in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of West Newbury whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed. This method shall be used only with the consent of the applicant.

XII. Enforcement

No person shall remove, fill, dredge, build upon, degrade, or otherwise alter resource areas protected by this bylaw, or cause, suffer, or allow such activity, or leave in place unauthorized fill, or otherwise fail to restore illegally altered land to its original condition, or fail to comply with a permit or an enforcement order issued pursuant to this bylaw.

The Conservation Commission, its agents, officers, and employees shall have authority to request authorization to enter upon privately owned land to perform their duties under this bylaw subject to the constitutions and laws of the United States and the Commonwealth. They may make or cause to be made such examinations, surveys, or sampling as the Commission deems necessary, subject to the constitutions and laws of the United States and the Commonwealth. The refusal to authorize entry in connection with review of an application for a permit, RDA or ANRAD shall be grounds for denial of that application.

The Commission, its agents, officers, and employees shall have authority to enforce this bylaw, its regulations, permits, and determinations issued thereunder by letters, phone calls, electronic communication and other informal methods, violation notices, non-criminal citations under G.L. Ch. 40 §21D, and civil and criminal court actions. Any person who violates provisions of this bylaw may be ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations, or may be fined, or both.

Upon request of the Commission, the Select Board may authorize town counsel to take legal action for enforcement under civil law. Upon request of the Commission, the chief of police may take legal action for enforcement under criminal law.

Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement.

Any person who violates any provision of this bylaw, or regulations, permits, determinations, enforcement or other administrative orders issued thereunder, shall be punished by a fine set by the Commission of not more than \$300. Each day or portion thereof during which a violation continues, or unauthorized fill or other alteration remains in place, shall constitute a separate offense, and each provision of the bylaw, regulations, permits, or administrative orders violated shall constitute a separate offense.

As an alternative to criminal prosecution in a specific case, the Commission may issue citations with specific penalties pursuant to the non-criminal disposition procedure set forth in G.L. Ch. 40 §21D, which West Newbury has adopted in §XXVIII of the bylaws of the Town of West Newbury.

XIII. Appeals

A decision of the Conservation Commission shall be reviewable in the superior court of the Commonwealth of Massachusetts in accordance with G.L. Ch. 249, §4.

XIV. Relation to the Wetlands Protection Act

This bylaw is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act (G.L. Ch. 131 §40) and regulations (310 CMR 10.00 *et seq.*) thereunder. It is the intention of this bylaw that the purposes, jurisdiction, authority, exemptions, regulations, specifications, standards, and other requirements shall be interpreted and administered as stricter than those under the Wetlands Protection Act and regulations.

XV. Severability

The invalidity of any section or provision of this bylaw shall not invalidate any other section or provision thereof, nor shall it invalidate any permit, approval or determination which previously has been issued.

XVI. Effective Date

The effective date of this bylaw shall be January 1 of the year following approval of the bylaw by the Attorney General. Projects approved prior to the effective date will not be subject to the Bylaw.