

## Article XIV. Wetlands Protection By-Law

[HISTORY: Adopted 5-11-1999 Annual Town Meeting, Art. 75. Amendments noted where applicable.]

### **GENERAL REFERENCES**

Zoning By-law — See Article VIII.

Subdivision Rules and Regulations — See Article XIII.

### § 1. Purpose.

The purpose of this by-law is to protect the wetlands, related water resources and adjoining land areas in the Town of Andover by controlling activities likely to have a significant or cumulative effect upon the important public values of those areas, which include, without limitation, the following: public or private water supply, groundwater supply, flood control, erosion and sedimentation control, storm damage prevention, protection of surrounding land and other homes or buildings, prevention of pollution of groundwater and surface water, fisheries, wildlife habitat, recreation and the historic and natural scenic character of wetland resource areas, watercourses, lakes and ponds (collectively, the "values protected by this by-law").

### § 2. Jurisdiction.

Except as permitted by the Conservation Commission or as provided in § 3 of this by-law, no person shall remove, fill, dredge, build upon, degrade or otherwise alter the following resource areas: any bank, freshwater wetland, marsh, wet meadow, bog, swamp, vernal pool, reservoir, lake, pond, creek, river or stream, or any land under said waters, or any land within 100 feet of any of the aforesaid resource areas, or any land subject to flooding or inundation by groundwater or surface water, or within 200 feet of any river (collectively, the "resource areas protected by this by-law").

### § 3. Exceptions.

The application and permit required by this by-law 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 and used to provide electric, gas, water, sewer, telephone, telegraph and other telecommunication services, or the installation of new municipal utilities, provided that written notice has been given to the Commission prior to the commencement of the work, and provided that the work conforms to performance standards and design specifications in any regulations adopted by the Commission.

The application and permit required by this by-law shall not be required for work performed for normal maintenance or improvement of land in agricultural use.

The application and permit required by this by-law shall not apply to 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 prior to commencement of work or within 24 hours after 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 by-law. 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.

The application and permit required by this by-law shall not be required for work which is performed in connection with the ordinary maintenance or improvement of a single- or two-family house lawfully in existence or for which a

building permit had been issued on or before January 1, 1999, including, but not limited to, building additions, septic system replacements and sewer connections, and the conversion of lawn to accessory uses such as decks, sheds, patios and pools; except the application and permit required by this by-law shall apply to the construction of freestanding structures which have a footprint greater than 500 square feet. **[Amended 4-23-2007 ATM, Art. 53]**

The application and permit required by this by-law shall not be required for the maintenance and repair of buildings, other structures, driveways, roads, parking areas, drainage structures and basins, lawns or athletic fields in existence on January 1, 1999, provided that such work is conducted in conformity with any general guidelines or performance standards which the Conservation Commission may, by regulation, adopt to protect the interests identified in § 1 of this by-law.

Other than stated in this section, the exceptions, exemptions and grandfathered activities provided in the Wetlands Protection Act, MGL c. 131, § 40, and regulations, 310 CMR 10.00, shall not apply under this by-law.

## § 4. Applications for permits and requests for determination.

Written application shall be filed with the Commission to perform activities affecting resource areas protected by this by-law. The permit application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on the resource areas protected by this by-law. No activities shall commence without receiving and complying with a permit issued pursuant to the by-law.

The Commission in an appropriate case may accept as the permit application and plans under this by-law the notice of intent and plans filed under the Wetlands Protection Act, MGL c. 131, § 40, and regulations, 310 CMR 10.00.

Any person desiring to know whether or not a proposed activity or an area is subject to this by-law may, in writing, request a determination from the Commission. Such a request for determination shall include information and plans as are deemed necessary by the Commission. The Commission may determine that a proposed activity or an area is not subject to this by-law subject to the observance of conditions by the applicant.

## § 5. Fees.

- (a) Administrative fee. The Commission is authorized to include in any regulations adopted under this by-law a fee schedule imposing fees for permits, determinations and certificates of compliance. Such fees must be based on a reasonable estimate of the actual costs incurred by the Commission in carrying out its duties under this by-law, taking into account any fees provided under the Wetlands Protection Act. Failure to pay any fee required by regulations duly promulgated by the Commission shall be grounds for denial of the application.
- (b) Consultant fees. Pursuant to Massachusetts General Laws Chapter 44, Section 53G and any rules and regulations thereunder, the Commission is authorized to require the applicant to pay the reasonable costs and expenses borne by the Commission for specific expert engineering and consulting services deemed necessary by the Commission to review any application.  
[Amended 4-28-2010 ATM, Art. 39]

The Commission may also impose fees when requested to make a determination of the boundary line of any resource area to be performed by an agent for the Commission pursuant to a request for determination of applicability, notice of intent or abbreviated notice of resource area delineation relative to any wetlands boundary exceeding 250 linear feet. **[Amended 4-28-2010 ATM, Art. 39]**

- (c) Waiver/nonapplicability of fees. No application or consultant fees shall be due from the Town of Andover or the Commonwealth of Massachusetts in connection with any project performed by the town or on its behalf, or from any person having no financial connection with a property which is the subject of a request for determination.

## § 6. Notice and hearings.

Any person filing a permit application or a request for determination with the Commission at the same time shall give written notice thereof, by certified mail (return receipt requested) or hand delivered or by certificates of mailing confirmed by the United States Postal Service, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors. The notice to abutters shall enclose a copy of the permit application or request,

with plans, or shall state where copies may be examined and obtained by abutters. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. When a person requesting a determination is other than the owner, the request, the notice of the hearing and the determination itself shall be sent by the Commission to the owner as well as to the person making the request. **[Amended 4-28-2010 ATM, Art. 38]**

The Commission shall conduct a public hearing on any permit application or request for determination, with written notice given at the expense of the applicant, not less than five business days prior to the hearing, in a newspaper of general circulation in the Town of Andover.

The Commission shall commence the public hearing within 21 days from receipt of a completed permit application or request for determination unless an extension is authorized, in writing, by the applicant.

The Commission shall issue its permit or determination, in writing, within 21 days of a 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 by-law with the hearing conducted under the Wetlands Protection Act, MGL c. 131, § 40, and regulations, 310 CMR 10.00. Notice of a hearing so combined shall not be considered defective solely because it fails to make reference to this by-law.

The Commission shall have authority to continue the hearing to a date certain announced at the hearing, for reasons stated at the hearings, which may include receipt of additional information offered by the applicant deemed necessary by the Commission in its discretion, or comments and recommendations of the boards and officials listed in § 9. In the event the applicant objects to a continuance or postponement, the hearing shall be closed and the Commission shall take action on such information as is available.

## § 7. Burden of proof.

The applicant shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the permit application will not have unacceptable significant or cumulative effect upon the values protected by this by-law. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny such permit or to grant a permit with conditions.

## § 8. Permits and conditions.

If, after said hearing, the Commission determines that the activities which are subject to the permit application are likely to have a significant or cumulative effect upon the values protected by this by-law, the Commission, within 21 days of the close of the public hearing or such further time as the Commission and the applicant shall agree on, shall issue or deny a permit for the activities proposed. If it issues a permit, the Commission shall impose conditions which it deems necessary or desirable to protect those values, and all work shall be done in accordance with those conditions.

The Commission is empowered to deny a permit for failure to meet the requirements of this by-law; for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the values protected by this by-law; and where no conditions are adequate to protect those values. The Commission may waive the provisions of this by-law upon the written request of any applicant for a determination or permit, when, in its judgment, such action is consistent with the purpose and intent of this by-law, and when strict enforcement of the requirements of this by-law would result in hardship to the applicant.

Lands within 200 feet of rivers, and lands within 100 feet of other resource areas, are presumed important to the protection of these resources because activities undertaken in close proximity to resource areas have a high likelihood of adverse impact upon the wetland or watercourse, either immediately, as a consequence of construction, or over time as a consequence of daily operation or existence of those activities. In addition, such areas are often vital to the preservation of species that depend on wetlands for food or reproduction. The Commission may therefore require that the applicant maintain a continuous strip of continuous, undisturbed vegetative cover within the two-hundred-foot (or one-hundred-foot) area, unless the applicant demonstrates that the area or part of it may be disturbed without harm to the values protected by this by-law.

In reviewing proposed activity in areas within 200 feet of rivers, no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the otherwise applicable requirements of this by-law, has proved by a preponderance of the evidence that there is no practicable alternative to the proposed project with less

adverse effects and that such activities, taking into account proposed mitigation measures, will have no significant impact on the values protected by this by-law. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed use of the property, the overall project purpose (e.g., residential, institutional, commercial or industrial purpose), logistics, existing technology and costs.

To prevent wetlands loss, the Commission shall require applicants to avoid wetlands alteration wherever feasible, to minimize wetlands alteration and, where alteration is unavoidable, to incorporate mitigation measures into the project design.

A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a permit of unlimited duration 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 for one or more additional periods of up to three years, provided that a request for a renewal is received in writing by the Commission at least 30 days prior to expiration.

For good cause the Commission may revoke or modify a permit or determination issued under this by-law after notice to the holder of the permit or determination, notice to the public, abutters and town boards, pursuant to §§ 5 and 6, and a public hearing.

The Commission in an appropriate case may combine the permit or determination issued under this by-law with the order of conditions or determination of applicability issued under the Wetlands Protection Act, MGL c. 131, § 40, and regulations, 310 CMR 10.00.

No work proposed in any permit application shall be undertaken until the permit 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 permit has been recorded.

## § 9. Coordination with other boards.

Any person filing a permit application or request for determination of applicability shall give notice thereof, by certified mail or hand delivery to the Planning Board, the Board of Health and Select Board. If a permit is required from the Board of Appeals, the applicant shall also furnish a copy to that Board.

The Commission shall, to the extent practicable, coordinate with any other board reviewing the project, and having similar authority to recover its consulting fees from the applicant, in an effort to avoid duplication of consulting services.

## § 10. Security.

As part of a permit issued under this by-law, the Commission may require, in addition to any security required by any other town or state board, commission, agency or officer, that the performance and observance of the conditions imposed hereunder be secured wholly or in part by one or more of the methods described below:

- (a) By a proper bond or deposit of money or negotiable securities, sufficient in the opinion of the Conservation Commission to secure performance of the conditions and observance of the safeguards of such permit, to be released upon the issuance of a certificate of compliance for work performed pursuant to the permit; or
- (b) By 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 the Commission, whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed.

## § 11. Regulations.

The Commission shall promulgate after due notice and public hearing rules and regulations to effectuate the purposes of this by-law, including rules requiring the maintenance of an undisturbed vegetated buffer of not more than 25 feet from the edge of any bank, freshwater wetland, marsh, wet meadow, bog, swamp, reservoir, lake, pond, creek, river or stream, or any land under said waters, except in the Fish Brook/Haggetts Pond Watershed Protection Overlay District, and/or a vernal pool, where such rules may require an undisturbed vegetated buffer of not more than 50 feet from those resource areas. 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 invalidate or suspend the effect of this by-law.

## § 12. Enforcement.

No person shall remove, fill, dredge, build upon, degrade or otherwise alter resource areas protected by this by-law, or cause, suffer or allow such activity to continue or allow such fill or other alteration to be left in place, without the required authorization pursuant to this by-law.

The Commission, its agents, officers and employees shall have authority, with prior approval from the property owner or pursuant to court process, to enter upon privately owned land for the purpose of performing their duties under this by-law and may make or cause to be made such examinations, surveys or sampling as the Commission deems necessary.

The Commission shall have authority to enforce this by-law, its regulations and permits issued thereunder by violation notices, administrative orders and civil and criminal court actions. Any person who violates provisions of this by-law may be ordered to restore the property to its original condition and take other action deemed necessary to remedy such violations.

Upon request of the Commission, the Town Manager and Town Counsel, with the approval of the Select Board, may 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.

As an alternative to criminal prosecution in a specific case, the Commission may issue citations under the noncriminal disposition procedures set forth in Massachusetts General Laws Chapter 40, Section 21D. Any person who violates any provision of this by-law or regulations issued thereunder shall be punished by a fine of \$200. 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 by-law, regulations, permit or administrative order violated shall constitute a separate offense. **[Amended 4-23-2002 ATM, Art. 29]**

## § 13. Relation to Wetlands Protection Act.

This by-law is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule Statutes, independent of the Wetlands Protection Act, MGL c. 131, § 40, and regulations, 310 CMR 10.00, thereunder.

## § 14. Severability.

The invalidity of any section or provision of this by-law shall not invalidate any other section or provision thereto, nor shall it invalidate any order of conditions which has previously become final.

## § 15. Effective date.

This by-law shall take effect as provided in MGL, c. 40, § 32, and shall apply to any activity described herein which occurs after its effective date, except that this by-law shall not apply to any activity described in a notice of intent or request for determination of applicability filed with the Conservation Commission under the Wetlands Protection Act on or before the date of its adoption by Town Meeting vote, provided that such activity is subsequently approved in a final order of conditions or determination of applicability issued under the said Act.

## § 16. Definitions.

The following definitions shall apply in the interpretation and implementation of this by-law:

**ABUTTER**

The owner of any land within 100 feet of the property line of the land where the activity is proposed, as determined by the most recent Assessors' records, including any land located directly across a street, way, river, stream or pond.

## **ALTER**

To change the conditions of any area subject to protection by this by-law and shall include but not be limited to one or more of the following actions upon areas described in this by-law:

- (a) The removal, excavation or dredging of soil, sand, gravel or aggregate material of any kind.
- (b) The changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood storage retention areas.
- (c) The drainage, disturbance or lowering of the water level or water table.
- (d) The dumping, discharging or filling with any material which could degrade the water quality.
- (e) The driving of piling, erection of buildings or structures of any kind.
- (f) The placing of any object or obstruction whether or not it interferes with the flow of water.
- (g) The destruction of plant life, including the cutting of trees.
- (h) The changing of water temperature, biochemical oxygen demand and other natural characteristics of the receiving water.
- (i) Any activities, changes or work which pollutes any body of water or groundwater.
- (j) The application of pesticides or herbicides.

## **CUMULATIVE EFFECT**

An effect that is significant when considered in combination with other activities that have occurred, are going on simultaneously or that are likely to occur, whether such other activities have occurred or are contemplated as a separate phase of the same project, such as the build-out of a subdivision or an industrial park, or unrelated but reasonably foreseeable actions, including other development projects that are currently under construction, under review or that may be expected to come forward.

## **FRESHWATER WETLAND, MARSH, WET MEADOW, BOG or SWAMP**

Includes any area bordering a water body or, if not bordering a water body, consisting of at least 5,000 square feet, where surface or groundwater, or ice, at or near the surface of the ground support the presence of hydric soils and/or a plant community dominated (at least 50% by wetland species). To avoid inconsistencies in delineation of such resource areas under this by-law and the Wetlands Protection Act, the method for determining the edge of any such wetland shall be the same as that approved by the Massachusetts Department of Environmental Protection for delineating the edge of bordering vegetated wetlands under the said Act, as such rules or regulations may be amended from time to time.

## **GROUNDWATER**

All subsurface water contained in natural geologic formations or artificial fill, including soil water in the zone of aeration. Activities in or within 100 feet of resource areas shall not significantly alter the existing quality or elevation of naturally occurring groundwater.

## **PERSON**

Any individual, group of individuals, association, partnership, corporation, business organization, trust, estate the Commonwealth of Massachusetts when subject to town by-laws, any public or quasi-public corporation or body when subject to town by-laws or any other legal entity, including the Town of Andover or its legal representative, agents or assigns.

## **PRIVATE WATER SUPPLY**

Any source or volume of surface or groundwater demonstrated to be in private use or shown to have potential for private use, including ground or surface water in the zone of contribution around a private well. Activities in or within 100 feet of a resource area shall not have a significant effect on the quality of a private water supply.

## **PUBLIC WATER SUPPLY**

Any source or volume of surface or groundwater demonstrated to be in public use or approved for water supply pursuant to MGL c. 111, § 160, by the Department of Environmental Protection Division of Water

Supply, or demonstrated to have a potential for public use, in addition to all surface and groundwater in zones of contribution. Activities subject to the Commission's jurisdiction under this by-law shall not have a significant effect on the quality of a public water supply.

#### **WILDLIFE HABITAT**

An area that provides breeding and nesting habitat, shelter, food and water to animal species. Includes areas identified as containing rare, threatened or endangered species as listed by the Massachusetts Natural Heritage Program. Structures and activities in any resource area shall not have a significant adverse effect on wildlife habitat.

Except as otherwise provided in this by-law or in regulations of the Commission, the definitions of terms in this by-law shall be as set forth in the Wetlands Protection Act, MGL c. 131, § 40, and regulations, 310 CMR 10.00, thereunder.