

Proposed Amendments to the Code of the Town of Lexington Chapter 130, Wetland Protection

§ 130-1. Purpose. [Added 3-26-1997 ATM by Art. 25]

The purpose of this by-law is to preserve and protect the wetland resource areas and buffer zones of the Town of Lexington by regulation of, and control of, activities deemed by the Conservation Commission to have significant or cumulatively detrimental effect upon the following interests and values, including but not limited to: public or private water supply; groundwater supply; the prevention and control of flooding, erosion or sedimentation, storm damage, other water damage and/or pollution; the protection of surrounding land and other homes or buildings, aquatic life or wildlife, streams, ponds or other bodies of water, and recreation.

Section 130-2 of the by-law (with proposed new language underlined and deletions in blue strike-through)

130-2 Notice of Intent; Request for Determination of Minor Activity; Request for Determination of Applicability; Permit Required.

[Amended 3-25-1985 ATM by Art. 9; 3-26-1997 ATM by Art. 25; 3-24-1999 ATM by Art. 15]

A.

No person shall remove, fill, dredge, build upon or alter any bank, freshwater wetland, marsh, bog, wet meadow, swamp, creek, river, stream, pond, lake, vernal pool habitat, land under water bodies, land subject to flooding, or any land bordering thereon as hereinafter defined, or riverfront area other than in the course of 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, telephone, telegraph or other telecommunication services without first filing written notice of intent to so remove, fill, dredge, alter or build upon, including such plans as may be necessary to fully describe such proposed activity and its effect on the environment, and without receiving and complying with a permit issued by the Conservation Commission.

B.

If the proposed activity is in "land bordering thereon" but outside any other area specified in this section, and consists only of minor activities as hereinafter defined, the applicant may file a request for determination of applicability and of minor activity in lieu of the required notice of intent. In such a case, the Conservation Commission will determine 1) whether this bylaw is applicable to the proposed activity; 2) if so, whether the activity constitutes "minor activities" under this bylaw; or 3) whether a notice of intent is required under this bylaw. If the bylaw is inapplicable to the proposed activity, no further action is required. If the bylaw is applicable to the proposed activity, but constitutes minor activities, the Conservation Commission will consider whether the proposed activity, with or without conditions, will have significant adverse impact on any of the interests and values set forth in Section 130-1 of this by-law. If the Conservation Commission

determines that it will not have such impact, the Conservation Commission will issue a determination of minor activity and order of conditions imposing such conditions as are reasonably necessary for the protection of those interests and values, as described in Section 130-3(A) of this by-law. If the Conservation Commission determines that the proposed activity will have significant adverse impact on any interests and values set forth in Section 130-1 of this by-law, the Conservation Commission will require a Notice of Intent to be filed.

C.

To establish the extent of bordering vegetated wetland and other areas specified in this by-law, an applicant may file an abbreviated notice of resource area delineation for the confirmation of a delineated boundary of those areas on the site, prior to filing a request for determination of applicability and of minor activity, a request for determination of applicability or a notice of intent for proposed work. Alternatively, such boundary may be determined through the filing of a notice of intent, as set forth above.

DB.

Any request for determination of applicability and of minor activity, request for determination of applicability or notice of intent for proposed work ~~Said notice~~ shall be sent by certified mail to the Conservation Commission or filed at the Conservation Office in accordance with the general filing procedures. Each such notice or request shall be accompanied by a filing fee to be determined in accordance with a fee schedule adopted by the Conservation Commission payable to the Town of Lexington. Such notice or request may be sent before any or all permits, variances and approvals required by the Zoning By-Law or by the Subdivision Control Law and the regulations of the Planning Board thereunder have been obtained.

EC.

~~Upon written request of any person,~~ Within 21 days of the receipt of any request for determination of applicability and of minor activity, or any request for determination of applicability, the Conservation Commission shall ~~within 21 days~~ make a written determination as to whether this by-law is applicable to any land or work thereon. Where ~~the such~~ person requesting such a determination is other than the owner of the property at issue, notice of any such determination shall be sent to the owner and to the person making such request.

§ 130-3. Hearing; notice; right of entry. [Amended 3-26-1997 ATM by Art. 25; 3-24-1999 ATM by Art. 15]

The Conservation Commission shall hold a public hearing on the proposed activity within ~~2130~~ 21 days of the receipt of said request for determination of applicability and of minor activity or of a notice of intent in any case where this bylaw applies. Legal notice of the time and place of said hearing shall be given by the Conservation Commission at the expense of the applicant not less than five days prior to such hearing by publication in a newspaper of general circulation in Lexington, and by delivering or mailing a notice

thereof to the applicant, to the Board of Health, Board of Selectmen, the Town Engineer, Building Commissioner, Zoning Officer and the Planning Board, and to such other persons as the Conservation Commission may determine. Notice of the time and place of said hearing shall be given by the applicant, not less than five days prior to such hearing, to abutters within 100 feet of the property or lot (as determined by the most recent Assessor's records) on which the proposed activity is to take place. The Conservation Commission, the Town Manager, the Town Engineer, the Building Commissioner, the Zoning Officer, the Planning Board, their agents, officers and employees may enter upon privately owned land without liability of any kind for the purpose of performing the duties under this by-law.

A.

If considering a request for determination of applicability and of minor activity, after said hearing, the Conservation Commission shall determine whether the activity constitutes “minor activities” and whether a notice of intent is required, as described in section 130-2 (B) of this by-law. If the Conservation Commission determines that no notice of intent is required, the Conservation Commission will issue a determination of minor activity and order of conditions by written order, within 21 days or such further time as the Commission and the applicant shall agree on, either: 1) finding that the proposed work constitutes “minor activities” and that no conditions are required; or 2) to impose any such conditions as are reasonably necessary for the protection of the interests described herein and all work shall be done in accordance therewith. The conditions may include a condition that certain land or portions thereof not be built upon or altered, filled or dredged, that streams not be diverted, dammed or otherwise disturbed.

B.

~~A.~~ When reviewing a notice of intent, if, after said hearing, the Conservation Commission determines that the land on which the proposed work is to be done is probably significant to public or private water supply, to the groundwater supply, to flood control, to control of erosion or sedimentation, to storm damage prevention, to other water damage prevention, to the prevention of pollution, to the protection of surrounding land and other homes or buildings, to aquatic life or wildlife, to the protection of streams, ponds or other bodies of water, or to the protection of recreation, the Commission shall, by written order, within 21 days or such further time as the Commission and the applicant shall agree on, impose such conditions as are reasonably necessary for the protection of the interests described herein and all work shall be done in accordance therewith. The conditions may include a condition that certain land or portions thereof not be built upon or altered, filled or dredged, that streams not be diverted, dammed or otherwise disturbed. [Amended 3-25-1985 ATM by Art. 9; 3-26-1997 ATM by Art. 25; 3-24-1999 ATM by Art.15]

C.

When reviewing a notice of intent, if the Conservation Commission makes a determination that the proposed activity does not require the imposition of such conditions, the applicant and all others who have received notice of such hearing by mail shall be notified of such determination within 21 days after said hearing.

D.

The Conservation Commission shall not impose additional or more stringent conditions as a result of any hearing conducted by it pursuant to Massachusetts General Laws (M.G.L.) Chapter 131, Section 40 than it has imposed pursuant to the provisions of this by-law, nor shall it require from an applicant who filed a notice of intent pursuant to M.G.L. Chapter 131, Section 40 additional materials or data than is required of him pursuant to the application filed under this by-law. [Amended 3-26-1997 ATM by Art. 25; 3-24-1999 ATM by Art. 15]

§ 130-4. Exceptions. [Amended 3-25-1985 ATM by Art. 9; 3-24-1999 ATM by Art. 15]

This By-Law shall not apply to any emergency project as defined in M.G.L. Chapter 131, Section 40, to any mosquito control project authorized by any laws of the commonwealth or to any work performed for normal maintenance or improvement of land actively devoted to agricultural use at the time of application.

§ 130-5. Enforcement.

Any person who purchases, inherits or otherwise acquires real estate upon which work has been done in violation of the provisions of this by-law or in violation of any order issued under this by-law shall forthwith comply with any such order or restore such land to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person. The Town Manager and the Board of Selectmen shall, upon request of the Conservation Commission, instruct Town Counsel to take such legal action as may be necessary to restrain a violation of this by-law, and enforce the orders of the Conservation Commission hereunder, and the Town Counsel shall forthwith comply with such instructions.

§ 130-6. Rules and regulations.

The Conservation Commission may promulgate after due notice and public hearing rules and regulations to effectuate the purposes of this by-law. However, 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 by-law.

§ 130-7. Burden of proof. [Amended 3-26-1997 ATM by Art. 25; 3-24-1999 ATM by Art. 15]

The applicant requesting a determination of applicability and of minor activity shall have the burden of proving by a preponderance of the credible evidence that the work proposed by him will not cause significant individual or cumulative harmful effects to the interest sought to be protected by this by-law, as described in section 130-2 (B) of this by-law.

The applicant on a notice of intent shall have the burden of proving by a preponderance of the credible evidence that the work proposed by him in his notice of intent will not

cause significant individual or cumulative harmful effects to the interest sought to be protected by this by-law. In assessing cumulative harmful effects, the Commission may consider the likely long-term effects of the proposed work as well as the likely effects of the proposed work when taken in conjunction with any prior work and any contemplated future work in the affected area. Failure to provide to the Conservation Commission adequate evidence for it to determine that the proposed work will not cause significant harm to the interest sought to be protected by this by-law shall be sufficient cause for the Conservation Commission to deny such permit or to grant such permit with such conditions as it deems reasonably necessary or desirable to carry out the purposes of this by-law or to postpone or continue the hearing to another date certain to enable the applicant and others to present additional evidence, upon such terms and conditions as seems to the Commission to be just.

§ 130-8. Definitions. [Amended 3-25-1985 ATM by Art. 9; 4-4-1990 ATM by Art. 35; 3-23-1992 ATM by Art. 25; 3-26-1997 ATM by Art. 25; 3-24-1999 ATM by Art. 15]

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

A. The term "applicant" as used in this by-law shall mean a person giving notice of intent to build, remove, fill, dredge or alter or requesting a determination of applicability and of minor activity.

B. The term "person" as used in this by-law shall include any individual, group of individuals, associations, partnerships, corporations, business organizations, trust, estate, Commonwealth of Massachusetts when subject to Town by-laws, any public or quasi-public corporation or body when subject to Town by-law or any other legal entity, including the Town of Lexington or its legal representatives, agents or assigns.

C. Protected resource areas definitions.

(1) The terms "marsh," "freshwater wetland," "swamp," "wet meadow" and "bog" as used in this by-law shall be defined as set forth in M.G.L. Chapter 131, Section 40 and its regulations 310 CMR 10.04. Said resource areas shall be protected whether or not they border surface waters. The boundary of these wetlands is either the line within which 50% or more of the vegetation community consists of wetland plant species identified in M.G.L. Chapter 131, Section 40 or the line within which the soil conditions meet the technical criterion of a hydric soil as developed and revised by the National Technical Committee for Hydric Soils, whichever line or segment of line protects more wetlands in situations where two lines exist. [Amended 4-8-2002 ATM by Art. 22]

(2) The terms "river" and "riverfront area" as used in this by-law shall be defined as set forth in M.G.L. Chapter 131, Section 40 and its regulations 310 CMR 10.04.

(3) The terms "bank," "creek," "stream," "pond," "lake," "vernal pool habitat," "land under water bodies," and "bordering land subject to flooding" shall be defined as set forth in the regulations 310 CMR 10.04 of M.G.L. Chapter 131, Section 40. [Amended 4-8-2002 ATM by Art. 22]

(4) "Land bordering thereon" shall be defined including any land within either of the following:

- (a) One hundred feet horizontally lateral from the edge of any bank, freshwater wetland, bog, marsh, wet meadow, swamp, creek, river, stream, pond, lake, vernal pool habitat, land under water bodies or land subject to flooding.
- (b) One hundred feet horizontally lateral from the water elevation of the one-hundred-year storm or whichever is the greater distance of Subsection C(4)(a) or (b).

(5) The term "isolated land subject to flooding" shall mean an area, depression or basin that holds at minimum one-eighth acre foot of water to an average depth of at least six inches once a year. This shall not include swimming pools, artificially lined ponds or pools, or constructed wastewater lagoons. [Added 4-8-2002 ATM by Art. 22]

D. The word "alter" shall be defined as including but not limited to one or more of the following actions upon areas described in this by-law:

- (1) The removal, excavation or dredging of soil, sand, gravel or aggregate material of any kind;
- (2) The changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood storage retention areas;
- (3) The drainage or disturbance of the water level or water table, the dumping, discharging or filling with any material which could degrade the water quality;
- (4) The driving of piling, erection of buildings or structures of any kind;
- (5) The placing of obstructions whether or not they interfere with the flow of water;
- (6) The destruction of plant life, including the cutting of trees, which might result in environmental damage to the land or a part thereof rendered by this by-law;
- (7) The changing of water temperature, biochemical oxygen demand and other natural characteristics of the receiving water;
- (8) Any activities, changes or work which pollutes any stream or body of water, whether located in or out of the Town of Lexington.

E. The term “minor activities” as used in this by-law includes:

(1) Structures that add no more than 100 square feet of impervious surface and are located at least 50 feet from any area specified in Section 130-2.A except “land bordering thereon;”

(2) Landscape planting, tree removal, invasive species management, or utility connections, providing that all such activities take place at least 25 feet from any area specified in Section 130-2.A except “land bordering thereon;”

(3) Any minor activity listed in 310 CMR 10:02(2)(b)(1), provided that any structure listed there add no more than 100 square feet of impervious surface.

~~E.~~ F. The Conservation Commission may in its rules and regulations provide such other definitions, or terms used in this by-law, as it deems useful in order to carry out its obligations under this by-law.

§ 130-9. Fee for consultant services. [Added 3-24-1999 ATM by Art. 15]

A. Upon receipt of a permit application, the Conservation Commission is authorized to require an applicant to pay a fee for the reasonable costs and expenses borne by the Commission for specific expert engineering and other consultant services deemed necessary by the Commission to come to a final decision on the applicant. The specific consultant services may include but are not limited to resource area survey and delineation, analysis of resource area values, including wildlife habitat evaluations, hydrogeologic and drainage analysis, and environmental or land use law.

B. The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision in accordance with rules and regulations adopted by the Conservation Commission. The exercise of discretion by the Commission making its determination to require the payment of a consultant fee shall be based upon its reasonable finding that additional information acquirable only through outside consultants would be necessary for the making of an objective decision.

§ 130-10. Security.

The Conservation Commission may, as part of its order of conditions, 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 by one, or in part by one and in part by the other of the methods described in the following Subsections A and B:

A. By a proper bond or a 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 order of conditions.

B. By a covenant, executed and duly recorded by the owner of record, running with the land, whereby the conditions and safeguards included in such order of conditions shall be performed before any lot may be conveyed other than by mortgage deed.

§ 130-11. Order of conditions. [Added 3-26-1997 ATM by Art. 25; amended 3-24-1999 ATM by Art. 15]

A. All orders of conditions shall expire three years after the date of issuance. The Conservation Commission shall have the authority to extend an order of conditions for an additional period or may deny such extension, according to regulations promulgated under authority of this by-law.

B. For good cause, the Conservation Commission at a public hearing may revoke or modify an order of conditions, a determination of minor activity and order of conditions or a determination of applicability issued under this by-law, after notice to the holder of the order of conditions or determination of applicability, and notice to the public, abutters and town boards, pursuant to § 130-3. Good cause for such revocation or modification shall include the following:

- (1) Failure by the applicant or his successors to comply with the terms of the order of conditions, determination of minor activity and order of conditions or determination of applicability;
- (2) The receipt of new information relating to the project, which indicates that previous information presented to the Conservation Commission was inaccurate; or
- (3) Changes to the project after completion of the Conservation Commission's review.

§ 130-12. Violations and penalties. [Amended 3-25-1985 ATM by Art. 9]

Whoever violates any provision of this by-law shall be punished by a fine of not more than \$300. Each day or portion thereof of continuing violation shall constitute a separate offense. This by-law may be enforced by any town police officer or other officer having police powers.

§ 130-13. Severability. [Amended 3-25-1985 ATM by Art. 9]

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