

TOWN OF GREAT BARRINGTON WETLANDS PROTECTION BYLAW

Chapter 168. WETLANDS

168 - 1. Purpose

A. The purpose of this bylaw is to protect the wetlands, water resources, and adjoining land areas in the Town of Great Barrington by controlling activities deemed by the Conservation Commission likely to have a significant or cumulative effect upon resource area values, including but not limited to the following: public and private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water quality, water pollution prevention, wildlife habitat, rare species habitat including rare plant species, agriculture, and aquaculture (collectively, the “resource area values protected by this bylaw”).

B. The regulatory procedures and paperwork system employed by the Conservation Commission to administer this bylaw are similar to those employed under the Wetlands Protection Act (M.G.L. Ch. 131, Sec. 40) and Wetlands Regulations (310 CMR 10.00). This Wetlands Bylaw and the Wetlands Protection Act and Regulations share much terminology in common. In both cases, an application for permission to do work in or near a wetland resource area is known as a Notice of Intent (hereinafter NOI) and the document issued by the Commission that allows that work to go forward, subject to certain conditions, is known as an Order of Conditions (hereinafter OOC).

C. There are however differences between this Wetlands Bylaw and the Wetlands Protection Act and Regulations. Notably, this bylaw is intended to utilize the Home Rule authority of Great Barrington to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Wetlands Protection Act and Regulations thereunder.

168 - 2. Jurisdiction

A. Except as permitted by the Conservation Commission or as provided in this bylaw, no person shall remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following wetland resource areas: any freshwater wetland; marsh; wet meadow; bog; swamp; vernal pool; bank; reservoir; lake; pond; river; creek; intermittent stream; water within water bodies and land under water bodies; land subject to flooding or inundation by groundwater, surface water, or storm flowage; and the following lands abutting wetland resource areas: land within 100 feet of any freshwater wetland, marsh, wet meadow, bog, swamp, vernal pool, bank, reservoir, lake, pond or intermittent stream (hereinafter Buffer Zone); land within 200 feet of the mean annual high water line of perennial rivers and streams (hereinafter Riverfront Area); land within 500 feet of any lake, pond, river or stream that is a public or private water supply; and land within 200 feet of any lake or pond that is a tributary to any public or private water supply (collectively, the “wetland resource areas protected by this bylaw”).

168 - 3. Conditional Exceptions

A. The NOI from an applicant and the OOC issued by the Conservation Commission that are 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, sanitary or storm sewers, or public drinking water systems, provided that written notice has been given to the Commission prior to the commencement of work, and provided that the work conforms to performance standards and design specifications in regulations adopted by the Commission.

B. The NOI and OOC required by this bylaw shall not be required for work performed for normal maintenance or improvement of land which is lawfully in agricultural use at the time the work takes place.

C. The NOI and OOC 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 prior to commencement of the 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 an NOI 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.

D. The NOI and OOC required by this bylaw shall not be required for the exemptions under the Rivers Act amendments to the Wetlands Regulations [see 310 CMR 10.58(6)].

E. The exceptions under 168-3 A thru D above are the only exceptions to the requirements under this bylaw for an applicant to submit an NOI and the Commission to issue an OOC.

168 - 4. Notices of Intent, Orders of Conditions and Requests for Determination

A. An NOI shall be filed with the Commission by the person seeking to perform activities affecting resource areas protected by this bylaw. The NOI shall include such information and plans as are specified in the Regulations of the Commission to describe proposed activities and their effects on the resource areas protected by this bylaw. No activities shall commence without the applicant receiving and complying with an OOC issued pursuant to this bylaw.

B. The Commission may accept as the NOI and plans under this bylaw the Notice of Intent and plans filed under the Wetlands Protection Act (M.G.L. Ch. 131, Sec. 40) and Regulations (310 CMR 10.00).

C. 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 (hereafter RDA) shall include information and plans as are deemed necessary by the Commission to locate the subject property, understand the proposed work and make the requested determination. The Commission may accept as the RDA and plans under this bylaw the Request for Determination of Applicability and plans filed under the Wetlands Protection Act (M.G.L. Ch. 131, Sec. 40) and Regulations (310 CMR 10.00).

D. At the time of submission of an NOI or an RDA to the Commission, 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 (M.G.L. Ch. 131, Sec. 40) and regulations (310 CMR 10.00). The filing fee shall be commensurate with the reasonable expenses incident to the Commission's process of permitting.

E. Upon receipt of an NOI or an RDA, or at any point during its deliberative process, as provided by M.G.L. Ch. 44, Sec. 53G, the Commission is authorized to impose upon the applicant a reasonable fee, to be collected in advance, and estimated to be sufficient to pay for the employment of outside consultants, engaged by the Commission, for specific expert services deemed necessary by the Commission to come to a final decision on the NOI or RDA. This fee is called the "consultant fee." The specific consultant services may include, but are not limited to, performing or verifying the accuracy of resource area survey and delineation; analyzing resource area functions and values, including wildlife habitat evaluations, hydro geologic and drainage analysis; and researching environmental or land use law. The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision. Any unexpended portion of the consultant fee shall be returned to the applicant.

F. The Commission may waive the filing fee, consultant fee, and any other costs or expenses associated with processing an NOI or an RDA filed by a government agency.

168 - 5. Notice and Hearings

A. If an RDA is submitted to the Commission by a person other than the owner of the subject property, the RDA shall include certification that the owner of the subject property has been notified that a determination is being requested.

B. Within 21 days after the date of receipt of a completed RDA, the Conservation Commission shall hold a public meeting to consider issuing a Determination of Applicability. Notice of the time and place of the public meeting shall be given by the Conservation Commission not less than five days prior to such meeting by publication in a newspaper of general circulation in Great Barrington and by mailing a notice to the person making the request and the owner. Notice shall

also be given in accordance with the open meeting law, M.G.L. Ch. 39, Sec. 23B. The determination shall be issued within 21 days of the closing of the Commission's deliberations, unless the matter is continued to a date and time certain, announced at the meeting, and by consent of the Commission and the person making the request. Said determination shall be signed by a majority of the Conservation Commission, and copies thereof shall be sent by the Commission to the person making the request and to the owner. Delivery of the copy to the person making the request shall be by hand delivery or certified mail. Said determination shall be valid for three years from the date of issuance.

C. Any person filing an NOI with the Commission at the same time shall give written notice thereof, by certified mail, by hand delivery or by certificates of mailing, to all abutters at their mailing addresses shown on the most recent certified 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 applicant, including any in another municipality or across a body of water. The notice to abutters shall have enclosed a copy of the NOI with plans, or shall state where copies may be examined and whom to contact for additional information or to obtain a copy of the NOI. An affidavit of the person providing such notice, with a copy of the abutters list and the notice mailed or delivered, shall be filed with the Commission.

D. The Commission shall conduct a public hearing on any complete NOI it receives, with written notice given no less than five business days prior to the hearing in a newspaper of general circulation in Great Barrington. The Commission shall commence the public hearing within 21 days from receipt of a complete NOI unless an extension is authorized in writing by the applicant. The Commission shall have the authority to continue the hearing, with the consent of the applicant, to a certain date and time announced at the hearing, for reasons stated at the hearing, which may include the anticipated or requested receipt of additional information from the applicant or others deemed necessary by the Commission in its discretion. In the event that the applicant objects to a continuance, the hearing shall be closed and the Commission shall take action on such information as is available. The Commission shall issue an OOC in writing within 21 days of the close of the public hearing, unless an extension is authorized in writing by the applicant.

E. The Commission may combine its hearing under this bylaw with the hearing conducted under the Wetlands Protection Act (M.G.L. Ch.131, Sec.40) and Regulations (310 CMR 10.00).

168 - 6. Coordination with Other Boards

Upon receipt of a complete NOI, the Commission shall provide a brief summary thereof, with information as to where the complete NOI may be reviewed, to the Planning Board, Board of Health, and Building Commissioner. If the NOI pertains to property within 300 feet of a neighboring municipality, the Commission will also send a copy of the same summary to the Conservation Commission of the neighboring municipality. The Commission shall not take final action until the above boards and officials have had 14 days to file written comments and recommendations with the Commission, which the Commission shall take into account but which shall not be binding on the Commission.

168 - 7. Determinations and Conditions

A. The Commission shall have the authority, after a public meeting, to determine whether a specific parcel of land contains or does not contain resource areas protected under this bylaw. If the Commission finds no such resource areas are present, it shall issue a negative determination.

B. If the Commission, after a public hearing, determines that the activities which are the subject of an NOI, or the land and water uses which will result therefrom, are likely to have a significant individual or cumulative negative effect upon the resource area values protected by this bylaw, the Commission may disapprove the activities or uses proposed within 21 days of the close of the hearing. If the Commission approves the activities or uses proposed, the Commission shall impose conditions which it deems necessary or desirable to protect those resource area values, and all activities shall be done in accordance with those conditions. The document issued by the Commission which includes its approval and imposed conditions is known as the OOC.

C. The Commission is empowered to disapprove an NOI for failure to meet the requirements of this bylaw; 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 resource area values protected by this bylaw; and where no conditions are adequate to protect those values. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.

D. Lands adjacent to 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 other resource, either immediately, as a consequence of construction, or over time, as a consequence of daily operation or existence of the activities. These adverse impacts from construction and use can include, without limitation, erosion, siltation, loss of groundwater recharge, poor water quality and loss of wildlife habitat. The Commission therefore may require that the applicant maintain a strip of continuous, undisturbed vegetative cover within, or in some instances up to the full extent of the 200-foot riverfront area or 100 foot buffer zone.

E. To prevent wetlands loss, the Commission: shall require applicants to avoid wetlands alteration wherever feasible; shall require applicants to minimize wetlands alteration; and, where alteration is unavoidable, shall require full mitigation. Because of the high likelihood of failure of replication, the Commission may authorize or require replication of wetlands on a two-to-one basis as a form of mitigation, but only with adequate security (see 168-10 below) and with professional design and monitoring by a licensed wetlands specialist to assure success.

F. An OOC shall expire three years from the date of issuance. Notwithstanding this, the Commission at its discretion may issue an OOC 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 prior to such work. At the Commission's discretion, an OOC may be renewed for up to an additional 3 year period, provided that a request for a renewal is received in writing by the Commission more than 30 days prior to expiration. Notwithstanding the above, an OOC may contain requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection (e.g., a conservation restriction or easement) is in place, and shall apply to all owners of the land.

G. For good cause, the Commission may revoke or modify an OOC issued under this bylaw after public notice to the holder of the OOC, notice to the public and town boards pursuant to 168-5 and 168-6 above, and a public hearing.

H. The Commission may combine the OOC or determination issued under this bylaw with the Order of Conditions or Determination of Applicability issued under the Wetlands Protection Act (M.G.L. Ch. 131, Sec. 40) and Regulations (310 CMR 10.00).

I. No work proposed in any NOI shall be undertaken until the OOC 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 OOC notifies the Commission of its recording and provides the relevant book and page references.

J. Upon completion of work proposed in any NOI and undertaken according to an OOC issued by the Commission, the holder of the OOC shall submit to the Conservation Commission a written request for a Certificate of Compliance with the recorded OOC. If the NOI included plans prepared and signed by a licensed professional(s), the request for Certificate of Compliance must include signed statement(s) by said licensed professional(s) that the work has been completed in substantial compliance with the final plans. If the Commission determines that all work has been completed according to the OOC, it shall issue a Certificate of Compliance, which the holder of the OOC shall have 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 the holder of the OOC shall notify the Commission of its recording and shall provide the relevant book and page references.

168 - 8. Promulgation of Rules and Regulations

After public notice and public hearing, the 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. The Commission may amend the rules and regulations after public notice and public hearing. 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. Unless otherwise stated in this bylaw or in the rules and regulations, the definitions, procedures, and performance standards of the Wetlands Protection Act (M.G.L. Ch.131, Sec. 40) and regulations (310 CMR 10.00) as most recently promulgated shall apply.

168 - 9. Definitions

A. The following definitions shall apply in the interpretation and implementation of this Bylaw (For additional definitions, see Wetlands Regulations 310 CMR 10.04 and Regulations promulgated by the Great Barrington Conservation Commission):

B. 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, Town of Great Barrington, and any other legal entity, its legal representatives, agents, or assigns.

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

- (1) Removal, excavation, or dredging of soil, sand, gravel, clay, minerals, or aggregate materials of any kind
- (2) Changing of preexisting drainage characteristics, flushing characteristics, sedimentation patterns, flow patterns, or flood retention characteristics
- (3) Drainage, or other disturbance of water level or water table
- (4) Dumping, discharging, or filling with any material which may degrade water quality
- (5) Placing of fill, or removal of material, which would alter elevation
- (6) Driving of piles, erection or repair of buildings or structures of any kind
- (7) Placing of obstructions or objects in water
- (8) Destruction of plant life including cutting or clearing of grasses, shrubs or trees
- (9) Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters
- (10) Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater
- (11) Incremental activities which have, or may have, a cumulative adverse impact on the resource areas protected by this bylaw.

168 - 10. Security

- A. As part of an OOC issued under this bylaw, in addition to any security required by any other municipal or state board, agency, or official, the 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:
- (1) By a proper bond or deposit of money or negotiable securities 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 Certificate of Compliance for work performed pursuant to the OOC.
 - (2) 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 this municipality 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.

168 - 11. Enforcement

- A. 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 an OOC or an enforcement order issued pursuant to this bylaw.
- B. The Commission, its agents, officers, and employees shall have authority to enter upon privately owned land for the purpose of performing their duties under this bylaw and 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 of Massachusetts.
- C. The Commission shall have authority to enforce this bylaw, its regulations, and permits issued thereunder by violation notices, administrative orders, 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.
- D. Upon request of the Commission, the Selectboard and the town counsel 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.
- E. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement.

- F. Any person who violates any provision of this bylaw, or regulations, administrative orders issued thereunder, or has failed to obtain the necessary Commission approval, may be punished by a fine of not more than \$300 per each offense. 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.
- G. As an alternative to criminal prosecution, the Commission may elect to utilize the non-criminal disposition procedure set forth in M.G.L. Ch. 40, Sec. 21D and Section 1-5.1 of the Town General Bylaws, in which case the Conservation Commission and its agent shall be enforcing persons.

168-12. Burden of Proof

The person who submits an NOI to the Commission shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the NOI will not have unacceptable significant or cumulative effect upon the resource area values protected by this bylaw. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to disapprove proposed work or other activities or to approve proposed work or other activities with strict conditions.

168-13. Appeals

A decision of the Commission under this wetland bylaw shall be reviewable in the Superior Court in accordance with M.G.L. Ch. 249, Sec. 4.

168-14. 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 (M.G.L. Ch. 131, Sec. 40) and Regulations (310 CMR 10.00) thereunder.

168-15. 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 or determination which previously has been issued.

168-16. Effect of Bylaw Change on Pending Applications

A project for which the NOI was filed or final OOC was issued prior to the effective date of a change to this bylaw shall be subject to the previous provisions of the bylaw.