

# DRAFT AMENDMENT

## Chapter 95 – Wetlands

### GENERAL REFERENCES

Zoning — See Ch. 97.

### **Chapter 95A – Plum Island**

**[HISTORY: Adopted by the Special Town Meeting of the Town of Newbury 9-25-2001 by Art. 2; amended in its entirety by the Annual Town Meeting 4-26-2005 by Art. 14. Subsequent amendments noted where applicable.]**

#### § 95A-1 Purpose.

A. **Purpose of the Massachusetts Wetlands Protection Act.** The State Wetlands Protect Act, G.L. c. 131, § 40, is intended to further the following purposes:

1. protection of groundwater supply;
2. protection of public and private water supply;
3. flood control;
4. storm damage prevention
5. prevention of pollution;
6. protection of land containing shellfish;
7. protection of fisheries; and
8. protection of wildlife habitat.

B. **Special Purpose of this Wetlands Bylaw.** This Bylaw is intended to utilize the Town of Newbury's Home Rule authority to protect additional resource areas, for additional values, with additional standards and procedures stricter than those set forth in the State Wetlands Protection Act, G.L. c. 131, § 40 and, specifically, to provide enhanced protection to the Plum Island Barrier Beach for the following purposes.

1. To prevent storm damage including coastal storm flowage and to minimize environmental damage, loss of life, resulting from storms' flooding and erosion;
2. To minimize public health threats resulting from storm damage, including prevention of water pollution and protection of water quality;
3. To prevent loss or diminution of the beneficial functions of the values of storm and flood damage prevention or reduction and pollution prevention provided by wetlands, beaches, dunes, barrier beaches, and coastal banks;
4. To maintain vegetative buffers to wetlands and water bodies so as to reduce and/or eliminate runoff and other non-point discharges of pollutants to protect public health and preserve environmental resources; and
5. To maintain vegetative cover so that the integrity and stability of coastal dunes and banks are maintained and so that the coastal dunes and banks can fulfill their functions and promote the interests identified in § 95A-1A; and
6. To provide enhanced protection of the velocity zones and primary dunes of the Plum Island Barrier Beach and in other hazard-prone areas of the Plum Island Barrier Beach, consistent with Executive Order 181.

#### § 95A-2 Jurisdiction.

Except as permitted in writing by the Commission or as provided in this Bylaw, no person shall engage in the following activities ("activities"): removal, filling, dredging, discharging into, building upon, discharging into or otherwise altering or degrading any barrier beach as defined in 310 CMR 10.00 et seq., as the same may be amended, and lands subject to tidal action and coastal storm flowage or flooding.

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This Bylaw is intended to utilize the Town's Home Rule authority to provide additional protection to the barrier beach and to land subject to coastal storm flowage to further the purposes identified in § 95A-1B above and to provide additional performance standards that are more specific and more stringent than those set forth in the State Wetlands Protection Act, G.L. c. 131, § 40 and the accompanying regulations, 310 CMR 10.00 et seq.

Written application shall be filed with the Commission to perform activities on the portion of the Plum Island Barrier Beach located within the Town of Newbury and no activities affecting the portion of the Plum Island Barrier Beach located within the Town of Newbury shall commence without the applying for, obtaining and complying with an Order of Conditions or Determination of Applicability in accordance with the performance standards set forth in this Bylaw. Except as expressly permitted pursuant to a Variance granted in accordance with § 95A-5, the Commission shall issue Orders of Conditions or Determinations of Applicability in accordance with the performance standards set forth in this Bylaw.

## § 95A-3 Definitions.

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

- A. **Building shall** mean a combination of any materials, whether portable or fixed, having a roof enclosed within exterior walls or firewalls built to form a structure for the shelter of persons, animals or property. Roof shall include an awning or any similar covering, whether or not permanent in nature. The term Building includes bathhouses, sheds and garages.
- B. **Development** shall include the following activities:
- (1) Construction of a *New Building or Structure* on a vacant lot including without limitation a shed, garage, coastal engineering structure, shear wall, vertical wall or solid fence;
  - (2) Construction of a new septic system or the addition of flow to an existing or upgraded septic system;
  - (3) Clearing of land, mining, extraction, beach scraping, dredging, filling, excavation or drilling;
  - (4) Construction of new or proposed expansions of roads, driveways or parking lots, and/or paving of unpaved roads, driveways or parking lots; and
  - (5) Conversion of pervious surfaces to impermeable surfaces and/or paving of existing unpaved roads, driveways or parking lots.
- C. **Redevelopment** shall include the following activities:
- (1) Increase in the footprint of a Building or Structure, including without limitation, a coastal engineering structure, a shear wall, vertical wall, a shed, a garage, and/or a solid fence, that would result in the sum of the footprints of all Buildings or Structures on the lot exceeding 20% of the area of the lot;
  - (2) Conversion of Porches, Carports and Decks to Usable Interior Space below the first dwelling floor;
- D. **Development and Redevelopment** shall not include the following activities:
- (1) Bringing the electrical and/or plumbing system into compliance with current regulatory requirements;
  - (2) Construction, repair, or replacement of unpaved elevated pedestrian walkways supported on open pilings and designed to minimize the disturbance to the vegetative cover and traditional bird-nesting habitat and the form and volume of the coastal dune, coastal beach, or coastal bank;
  - (3) Construction, repair or replacement of sand fencing, designed to increase dune development, provided the fencing does not constitute a barrier to wildlife movement or the lateral movement of a coastal dune or coastal beach;
  - (4) Repair or replacement of open pilings for an existing Building;
  - (5) Modification, maintenance, or repair of existing Buildings or Structures within the limits of existing foundations, which do not result in any addition to, or modification of the foundation itself, or the footprint of Buildings or Structures, additionally, additions or enclosures added above the first

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dwelling floor shall be allowed pursuant to FEMA guidelines.

- (6) Construction, repair, or replacement of decks on open pilings, with at least two feet above grade to allow sand transport by wind or water;
- (7) Planting of native species that are indigenous to Plum Island and that are compatible with the natural vegetative cover excluding turf lawns;
- (8) Conversion of impervious to vegetated surfaces, provided that erosion and sedimentation controls are implemented, and that the impervious surface removed is disposed of off-site in accordance with all applicable federal, state, and local statutes, bylaws and regulations;
- (9) Relocating electrical, heating, ventilation, plumbing, air conditioning and other service facilities for an existing Building to prevent water from entering or accumulating during conditions of flooding;
- (10) Construction, reconstruction, operation and maintenance of underground and overhead utilities, such as electrical distribution lines, transmission lines, communication lines, sewer pipes, water lines, and gas lines, including all structures and interconnections necessary to construct, reconstruct, operate, provide, and maintain electrical, communication, water, sewer, and gas service;
- (11) Assessment activities that are temporary in nature, have negligible impacts and are necessary for the planning and design of otherwise permissible projects, such as the installation of monitoring wells, exploratory borings, and natural gas service;
- (12) Temporary storage for not more than thirty days of construction and/or demolition materials on non-vegetated portions of the barrier beach, provided that best management practices are used to minimize the adverse impacts of such storage and to protect the interests identified in this Bylaw;
- (13) Placing an existing Building on open pilings; repairing and/or replacing open pilings for an existing Building;
- (14) Elevating above flood elevation an existing Building with a structurally sound foundation. In applying this subparagraph, the Commission may require a certification from a professional engineer or architect stating that the foundation is structurally sound;
- (15) Replacement of an existing Building with a New Building that is placed on open pilings and that is located as far landward of the existing Building as possible given the requirements of the Plum Island Overlay District, provided that: (a) the sum of the footprints of all Buildings or Structures on the lot not exceed 20% of the area of the lot; (b) the New Building complies with all applicable federal, state, and local regulations, including without limitation, the Plum Island Overlay District and the Performance Standards set forth in the Commission's Regulations;
- (16) For only those properties that do not have an existing parking area or parking area of lesser size, construction of two parking spaces that are no more than 9 feet by 18 feet per space provided that there is no other area for parking on the property, and provided further that the surface of the parking area is pervious and that the construction complies with all the Performance Standards set forth in the Commission's Regulations and 310 CMR 10.00;
- (17) Removal of stone groins, bulkheads, or other coastal engineering structures;
- (18) Repair, restoration, modification or relocation of existing stone groins or jetties.

E. The Flood Zone boundaries delineated on the Newbury Flood Insurance Rate Map, Community Panel Number 250096 0005 C, Panels of 10, and 9 of 10, revised July 2, 1992 shall apply.

Whenever FEMA delineates new boundaries, those flood boundaries shall be presumed to depict accurately the boundaries of the FEMA V Zone, the FEMA AO Zone, and the FEMA AH Zone within the Land Subject to Coastal Storm Flowage. This presumption may be overcome only by credible evidence such as engineering calculations consistent with the best available FEMA guidance performed by a registered engineer or other qualified professional expert in coastal wetlands delineation.

**Subject to and consistent with the preceding paragraphs, for purposes of this Ordinance/Bylaw:**

- (1) ***FEMA V -Zone*** shall mean those portions of Land Subject to Coastal Storm Flowage that are coastal high hazard areas or areas of special flood hazard within the 100-year floodplain

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- (2) **FEMA AO Zone** shall mean those portions of land Subject to Coastal Storm Flowage that are subject to inundation by moving water (usually sheet flow on sloping terrain) where average depths are between one and three feet in height. AO Zones are commonly associated with over wash and generally border on the landward side of the V-Zone.
- (3) **FEMA AH Zone** shall mean those portions of Land Subject to Coastal Storm Flowage that are subject to shallow ponding where average water depths are between one and three feet.
- (4) **New Development** shall mean the construction of a new Structure or Building on a vacant lot.
- (5) **Structure** shall mean a combination of materials to form a configuration and includes, but is not limited to buildings, platforms, radio towers, storage bins, signs, swimming pools, septic systems, coastal engineering structures, and fences.
- (6) **Substantial Improvement** shall mean any reconstruction, rehabilitation, addition, or other improvement of a Structure or Building, the cost of which equals or exceeds 50 percent of the value of the Structure or Building before the "start of construction" of the improvement. This term includes Structures or Buildings which have incurred "substantial damage", regardless of the actual repair work performed. The term does not, however, include either:
  - a.) Any project for improvement of a structure to correct existing violations of state or local health, sanitary, building or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions, or shall mean the total square feet within the outermost dimensions of a building including decks, porches and staircases without deduction for hallways, stairs, closets, thickness of walls, columns, or other features.
  - b.) Any alteration of a "historic structure" provided that the alteration will not preclude the structure's continued designation as a "historic structure".
- (7) **Footprint** shall mean the total square feet within the outermost dimensions of a building including decks, porches and staircases without deduction for hallways, stairs, closets, thickness of walls, columns, or other features.

## § 95A-4 Specific performance standards for the Barrier Beach.

- A. No new Development shall be permitted within a FEMA V-Zone or AO-Zone.
- B. No redevelopment shall be permitted within a FEMA V-Zone or AO-Zone except that Structures or Buildings may be redeveloped/repared only in accordance with current local, state and federal regulatory standards. In all instances, reconstruction, renovation or repairs to Structures or Buildings shall be authorized as stated herein, provided that the sum of the footprint of all structures or buildings would not exceed 20% of the area of the lot;
- C. In all other areas of the Plum Island Barrier Beach outside of the V-Zone and AO-Zone, all new Buildings and shall comply with State Building Code Regulations for elevation and flood proofing. All existing Buildings with Substantial Improvements, and all horizontal expansions of the existing footprint, shall comply with State Building Code Regulations for elevation and flood proofing.
- D. In all areas of the Plum Island Barrier Beach, electrical, heating, ventilation, plumbing and air conditioning and other service facilities shall be designed to avoid or minimize impacts to coastal beaches and coastal dunes.
- E. In all areas of the Plum Island Barrier Beach, Development or Redevelopment on or within 200 feet landward of the top of a coastal bank or dune shall have no adverse impact on the height, stability or function of the bank or dune to fulfill the purposes set forth in § 95A-1B.

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- F. In all areas of the Plum Island Barrier Beach, in areas where there are coastal banks or primary or frontal dunes, all new Buildings and Structures, excluding replacement of existing Building and Structures, shall be set back from the beach dune interface at a distance equal to thirty times the average yearly historical erosion as shown by the most current CZM shoreline change map.
- G. In all areas of the Plum Island Barrier Beach, no activity shall increase the elevation or velocity of flows in a floodplain.
- H. Within the FEMA V Zone, A Zone, or AO Zone, as defined in § 95A-3 above, new or reconstructed Structures or Development that alters vegetation, interrupts sediment supply and/or changes the form or volume of a dune or beach, shall comply with the specific performance standards in this Bylaw and in the regulations promulgated pursuant hereto.

## § 95A-5 Variance.

- A. The Conservation Commission may grant a variance from the Performance Standards provided in this Bylaw and in any Regulations promulgated by the Commission to implement this Bylaw only where the Commission finds after conducting a public hearing that:
  - 1. there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with this Bylaw; and
  - 2. mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the wetland resource areas located on the barrier beach; and
  - 3. the variance 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.

This variance procedure does not authorize the Commission to waive any requirement of the State Wetlands Protection Act, but is intended only to authorize the Commission to waive, under unusual circumstances, the additional requirements imposed by this Bylaw.

- B. A request for a variance shall be made in writing and shall include, at a minimum the following information:
  - 1. a description of alternatives explored that would allow the project to proceed in compliance with this Bylaw and an explanation of why each is unreasonable;
  - 2. a description of the mitigating measures to be used to contribute to the protection of the wetland resources located on the barrier beach; and
  - 3. evidence that an overriding public interest is associated with the project which justifies waiver of these requirements or evidence that the decision on this permit application so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

## § 95A-6 Applications.

- A. All applications to perform activities in the Town's resource areas on the Plum Island Barrier Beach shall be either in the form of a Request for Determination, a Notice of Intent, or an Abbreviated Notice of Resource Area Delineation. The Commission in an appropriate case may accept as the application and plans under this Bylaw the application and plans (i.e., Notice of Intent, Request for Determination of Applicability) under the State Wetlands Protection Act. Such applications shall contain data and plans as specified in the Commission's regulations, and shall be submitted in complete written form to the Commission. The Commission or its designee shall be authorized to make determinations of completeness for applications submitted to the Commission and reject those applications that do not meet the minimum submittal requirements of this Bylaw.

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In order to provide sufficient review time, the Commission may continue a public hearing or public meeting if new information is submitted by the applicant, or applicant's agent, less than seven (7) business days before the scheduled public hearing or public meeting.

The applicable forms must be signed by the applicant or applicant's agent where required. The Commission may require further information by regulation, guideline, or as otherwise deemed necessary for review of the proposed Application by the Commission. In order to comply with the provisions of this Bylaw, each application must be complete as filed, and must comply with the rules set forth herein and Commission's regulations.

## § 95A-7 Hearings.

- A. **Commencement.** The Commission shall commence the public hearing or meeting within 21 days from receipt of a completed application unless the applicant authorizes an extension in writing.
- B. **Combination with State Law Hearing.** The Commission, in its discretion, may hear any oral presentation under this Bylaw at the same public hearing or public meeting required to be held under the provisions of the Wetlands Protection Act, G.L. c. 131, § 40. Notice of the time and place of such hearing(s) shall be given as required below.
- C. **Notice.** For a public hearing, written notice of the time and place of the hearing shall be given at the applicant's expense, not less than seven (7) calendar days prior to the public hearing, by publication in a newspaper of general circulation in Newbury, and by hand delivering or mailing, by certified mail return receipt requested, at the mailing addresses shown on the most recent applicable tax list of the assessors, a copy of such notice to all abutters within one hundred feet of the property line of the land on which the work is proposed, including, but not limited to, owners of land directly opposite said proposed work on any public or private street or way, and in another municipality or across a body of water. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the Commission. All publications and notices shall contain the name of the applicant, a description of the area where the activity is proposed by street-address, if any, or other adequate identification of the location of the area or premises which is the subject of the notice, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of the action or relief requested, if any. Public notice requirements for continued public hearings under this Bylaw shall be the same as the notification requirements set forth in 310 CMR 10.05(5)(b)3.

### D. **Proof.**

The applicant shall have the burden of proving by a preponderance of credible evidence that the activity proposed in the Request for Determination of Applicability or the Notice of Intent will not have a significant or cumulatively detrimental effect upon the interests and values protected by this Bylaw. Failure to provide to the Commission adequate evidence for it to determine that the proposed activity will not cause such impacts shall be sufficient cause for the Commission to deny permission or to grant permission with such conditions as it deems reasonable, necessary, or desirable to carry out the purposes of this Bylaw; or to postpone or continue the hearing or public meeting to another date certain to enable the applicant and others to present additional evidence, upon such terms and conditions as deemed by the Commission to be reasonable.

Due consideration shall be given to possible effects of the proposal on all interests and values protected under this Bylaw.

- E. **Continuances.** The Commission may continue a public hearing or public meeting in the following situations:
  - 1. With the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or

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2. Without the consent of the applicant, to a specific date within 21 days of the hearing/meeting at which the continuance was made for the reasons stated at the hearing/meeting, including but not limited to receipt of additional information from the applicant or others.

F. **Investigations.** The Commission, its agents, officers, and employees, may enter upon privately owned land for the purpose of carrying out its duties under this Bylaw and may make or cause to be made such examination or survey as deemed necessary, subject to the Constitutions of both the United States and the Commonwealth.

## § 95A-8 Orders and decisions.

### A. **Orders and Decisions.**

If the Commission determines that the proposed activity does not require the imposition of conditions to preserve and protect the interests of this Bylaw, the applicant shall be so notified in writing.

If, after the hearing, the Commission determines that the proposed activity is significant to one or more interests and values of this Bylaw, the Commission shall vote to issue written Orders of Conditions within 21 days of the close of the public hearing. The Order of Conditions may describe such conditions, safeguards, and limitations on time and use upon such activity in the event that the Commission finds that necessary to protect those interests and values. The Commission may require the Applicant to hire an appropriate technical expert to monitor the project to ensure compliance with the order of Conditions.

The Commission may choose to issue an Order of Conditions denying a project if it finds that the interests and values of this Bylaw cannot be preserved and protected by the imposition of such conditions, safeguards, or limitations. The Commission shall state the reasons for such denial in the Order of Conditions.

B. **Security to Assure Performance.** The Commission may, as a part of its Order of Conditions, require that, in addition to any security required by any other Town or State Board, Commission, agency, or officer, the performance and observance of the conditions, safeguards, and limitations imposed under this Bylaw on the applicant and owner be secured by one, or both, of the following methods:

- (1) **Deposit.** By the deposit of money, sufficient to complete the work as proposed, to secure performance of the conditions and observance of the safeguards of such Order of Conditions. Such security, if filed or deposited, shall be approved as to form and manner of execution by Town Counsel or the Town Treasurer.
- (2) **Land Restrictions(s).** By an executed and properly recorded (or registered, in the case of registered land) conservation restriction, easement, or other covenant running with the land. This method shall be used only with the consent of the applicant.

### C. **Duration of Orders.**

All Orders of Conditions shall expire three (3) years after the date of issuance. The Commission shall extend an Order for one (1) period of three (3) years, upon the request of the applicant. The request for an extension of an Order of Conditions shall be made to the Commission at least 30 days prior to expiration of the Order of Conditions. The Commission may grant only two (2) extensions for an individual Order of Conditions.

No activity governed by an Order of Conditions shall be performed unless and until all permits,

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approvals, and variances required by the Bylaw of the Town shall have been obtained, such Order of Conditions or notification shall have been recorded or registered at the Southern Essex District Registry of Deeds or in the Southern Essex District of the Land Court Department, and all applicable appeal periods have expired. The Commission shall have the right to record or register its Order of Conditions with said Registry or Registry District. In the event that an Order of Conditions issued pursuant to this Bylaw is identical to a final Order of Conditions issued pursuant to the provisions of the Act, only one such order need be recorded or registered.

- D. **Modifications, Amendments, Revocations.** The Commission shall have the power (on its own motion or upon the petition of the applicant, or any person interested) to modify, amend, or revoke an Order of Conditions. In revoking an Order of Conditions, the Commission shall officially notify the interested parties through certified mail and hold a public hearing within 21 days of the notification date. A modification is a minor or insignificant change that will not result in an adverse impact to wetland resource areas and/or interests protected by this Bylaw. An amendment is a change of significant magnitude that will require the imposition of additional conditions to ensure adequate protection of wetland resource areas and/or interests protected by this Bylaw. In the case of an amendment to an Order of Conditions, the Commission shall have the discretion to decide if a public hearing is warranted. This decision shall be based on the potential impact of the proposed work and its effect on the ability of the identified wetland resource areas to provide those interests as defined under the Act and Bylaw. If the Commission determines that a public hearing is warranted, the Applicant shall comply with the publication and abutter notification requirements as required for new filings. No public hearing is required for a modification to an Order of Conditions. Written notification to the applicant by certified mail is required in all cases where the Commission initiates a modification, amendment, or revocation of an Order of Conditions. The Applicant shall record modified and amended Orders of Conditions prior to the commencement of authorized work under the Order.

## § 95A-9 Certificates of compliance.

The Commission or its designee shall, upon receiving a written request, inspect the resource areas where the activity governed by an Order of Conditions was carried out and issue a Certificate of Compliance (or Partial Certificate of Compliance) to the owner of the property, applicant, or applicant's representative, in a form suitable for recording or registering, if it shall determine that all of the activity(ies), or portions thereof, limited thereby have been completed in accord with said Order. If the Order contains conditions that continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which of the conditions shall continue. The Applicant shall record Certificates of Compliance.

If the Commission determines that the work was not performed in compliance with the Order, it may refuse to issue a Certificate of Compliance. The written refusal shall be issued within 21 days of the receipt of a request for a Certificate of Compliance and shall specify the reasons for denial.

The Certificate of Compliance shall be recorded or registered at the Southern Essex District Registry of Deeds or in the Southern Essex District of the Land Court Department. Certification of recording shall be sent to the Commission.

## § 95A-10 Responsibility for compliance.

After the recording of a Notice of Violation or Order, any person who purchases, inherits, or otherwise acquires real estate upon which work has been done in violation of the provisions of this Bylaw or in violation of any Order issued under the Bylaw 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.



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## § 95A-11 Rules and regulations. [Amended 11-12-2019STM, Art. 13]

After public notice and public hearing, the Commission may promulgate rules and regulations to administer and enforce the Bylaw. 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.

## § 95A-12 Enforcement, investigations, violations.

In accord with the provisions of G.L. c. 40, §§ 21D and 31 as well as every other authority and power that may have been or may hereafter be conferred upon it, the Town may enforce the provisions of this Bylaw, restrain violations thereof, and seek injunctions and judgments to secure compliance with its Orders of Conditions. Without limiting the generality of the foregoing:

- A. Any person who violates any provision of this Bylaw or of any condition or a permit issued pursuant to it may be ordered to restore the property to its original condition after holding a hearing, and take other action deemed necessary to remedy such violations, or may be fined, or both. Any person may be fined or issued a stop work order or an order to restore for an unauthorized alteration of an area subject to protection under the Bylaw or for failing to restore illegally altered land to its original condition or failing to comply with an order issued pursuant to the Bylaw. Fines may be levied pursuant to G.L. c. 40, § 21. Each day or portion thereof during which a violation continues shall constitute a separate offense; if more than one, each condition violated shall constitute a separate offense. This Bylaw may be enforced pursuant to G.L. c. 40, § 21D, by a Town police officer, other persons having police powers, Conservation Commissioners, or the Conservation Administrator. The penalties for violations of this Bylaw or regulations promulgated hereunder may be assessed as follows:

### Violation Penalty/ Violation/Day

Alteration of any wetland resource area Up to \$100

Violation of any Order of Conditions Up to \$100

- B. In the event of a violation of this Bylaw or of any order issued there under, the Commission or its agents may issue a stop work order to the owner, the applicant, or the applicant's agent by certified mail, return receipt requested, or by posting the same in a conspicuous location on said site. Any person who shall violate the provisions of a stop work order shall be deemed in violation of the Bylaw; but the failure of the Commission to issue a stop work order for any reason shall not prevent the Town from pursuing any other legal remedy at law or in equity to restrain violations of this Bylaw or promulgated regulations and to secure compliance with its Orders.
- C. The Town shall be the beneficiary of all fines imposed on account of the violation of this Bylaw or promulgated regulations in order to defray the expense of enforcing the same.
- D. Upon request of the Commission, the Selectmen and Town Counsel may take such legal action as may be necessary to enforce this Bylaw or promulgated regulations and permits issued pursuant to it.
- E. Upon recommendation of the Commission, the Selectmen may employ Special Counsel to assist the Commission in carrying out the legal aspects, duties, and requirements of this Bylaw and promulgated regulations.

## § 95A-13 Consultant services.

- A. Upon receipt of an application for a Notice of Intent, Request for Determination of Applicability, Abbreviated Notice of Resource Area Delineation or at any time preceding the Commission's issuance of a Certificate of Compliance, the Commission is authorized to require an applicant to pay

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a fee for the reasonable costs and expenses borne by the Commission for specified expert engineering and other consultant services deemed necessary by the Commission to come to a final decision on the application. [Amended 11-12-2019STM, Art. 13]

- (1) If a revolving fund for consultant fees is authorized, the applicant's fee shall be put into such revolving fund and the Commission may draw upon that fund for specific consultant services approved by the Commission.
- (2) The exercise of discretion by the Commission in 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.
- (3) The Commission shall waive the consultant fee for a permit application filed by the Town.

## § 95A-14 Captions and severability.

The captions used herein are for convenience only and are expressly intended to have no legal or binding significance. The invalidity of any section or provision of this Bylaw shall not invalidate any other section or provision thereof, nor shall it invalidate any Order of Conditions or decisions that have previously become final.

## **Chapter 95B. Inland Wetlands**

[HISTORY: Adopted by the Town Meeting of the Town of Newbury ##-##-#### by Art. #.]

### § 95B-1. Purpose.

- A. **Purpose of the Massachusetts Wetlands Protection Act.** The State Wetlands Protect Act, G.L. c. 131, § 40, is intended to further the following purposes:
  1. protection of groundwater supply;
  2. protection of public and private water supply;
  3. flood control;
  4. storm damage prevention
  5. prevention of pollution;
  6. protection of land containing shellfish;
  7. protection of fisheries; and
  8. protection of wildlife habitat.
- B. **Additional purpose of the Town of Newbury Wetlands Bylaw.** This local Wetlands Bylaw, Chapter 95B, is intended to further the following purposes:
  1. erosion and sedimentation control
  2. protection of ecological functions of wetland resources
  3. protection of the ability of wetlands to mitigate effects of climate change and increase community resiliency
- C. **Special Purpose of this Wetlands Bylaw.** This Bylaw is intended to utilize the Town of Newbury's Home Rule authority to protect additional resource areas, for additional values, with additional standards and procedures stricter than those set forth in the State Wetlands Protection Act, G.L. c. 131, § 40 and, specifically, to provide enhanced protection to inland area wetlands for the following purposes.
  1. To prevent storm damage including coastal storm flowage and to minimize environmental damage, loss of life, resulting from storms' flooding and erosion;
  2. To minimize public health threats resulting from storm damage, including prevention of water pollution and protection of water quality;

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3. To prevent loss or diminution of the beneficial functions of the values of storm and flood damage prevention or reduction and pollution prevention provided by wetlands;
4. To maintain vegetative buffers to wetlands and water bodies so as to reduce and/or eliminate runoff and other non-point discharges of pollutants to protect public health and preserve environmental resources; and
5. To provide protection to the Great Marsh Area of Critical Environmental Concern; and
6. To protect and promote community resiliency against sea-level rise and climate change, including protection of the ability of wetlands to mitigate the effects of climate change and increase community resiliency; and
7. To protect and preserve the ecological function of all wetland resources; and
8. To protect all the purposes of the Massachusetts Wetlands Protection Act as described in § 9#-1A and § 9#-1B above; and
9. To protect rare plant and animal species and habitat, including those not yet mapped by the Natural Heritage Endangered Species Program (NHESP); and
10. To protect vernal pool habitat, including those not yet mapped by NHESP; and
11. To protect and preserve the ecological function of all wetland resources.

## § 95B-2. Jurisdiction.

Except as permitted by the Conservation Commission or as provided in this chapter, no person shall remove, fill, dredge, build upon or alter the following resource areas or their listed Buffer Zones in Inland Areas: within 100 feet of any freshwater wetland, marsh, wet meadow, bog or swamp; within 100 feet of any bank or flat; any lake, river, pond, stream, or estuary; any land under said waters; within 100 feet of any land subject to flooding or inundation by groundwater or surface water; within 100 feet of any Vernal Pool habitat, regardless of size, location, or certification status; within the Great Marsh Area of Critical Environmental Concern; and within 200 feet of any river, perennial stream, brook or creek.

## § 95B-3. Definitions.

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

- A. "Inland Areas" shall be all land west of Plum Island, and shall not include any lands making up a part of the barrier beach.
- 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, this municipality and any assigns.
- C. The term "alter" shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this chapter:
  1. Removal, excavation or dredging of soil, sand, gravel or aggregate materials of any kind.
  2. Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, 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 of trees.
  9. Changing water temperature, biochemical oxygen demand or other physical or chemical characteristics of water.
  10. Any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater.

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## § 95B-4. Performance Standards.

Specific performance standards for work or activities within the wetland resource areas described § 95B-1A and § 95B-1B above may be provided in Regulations adopted by the Newbury Conservation Commission.

## § 95B-5. Variances and Exceptions.

- A. The Conservation Commission may grant a variance from the Performance Standards provided in this Bylaw and in any Regulations promulgated by the Commission to implement this Bylaw only where the Commission finds after conducting a public hearing that:
1. there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with this Bylaw; and
  2. mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the wetland resource areas; and
  3. the variance 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.

This variance procedure does not authorize the Commission to waive any requirement of the State Wetlands Protection Act, but is intended only to authorize the Commission to waive, under unusual circumstances, the additional requirements imposed by this Bylaw.

- B. A request for a variance shall be made in writing and shall include, at a minimum the following information:
1. a description of alternatives explored that would allow the project to proceed in compliance with this Bylaw and an explanation of why each is unreasonable;
  2. a description of the mitigating measures to be used to contribute to the protection of the wetland resources; and
  3. evidence that an overriding public interest is associated with the project which justifies waiver of these requirements or evidence that the decision on this permit application so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

### C. Exceptions

1. The permit and application required by this chapter 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 the structure or facility is not substantially changed or enlarged, provided that written notice has been given to the Commission prior to commencement of work, and provided that the work conforms to performance standards and design specifications in regulations adopted by the Commission.
2. For emergency projects, the permit and application required by this chapter shall not apply to emergency projects necessary for the protection of the health or safety of the public, provided that:
  - i. 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.
  - ii. Advance notice, oral or written, has been given to the Commission prior to commencement of work or within 24 hours after commencement.
  - iii. The Conservation Commission or its agent certifies the work as an emergency project.
  - iv. The work is performed only for the time and place certified by the

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- Conservation Commission for the limited purposes to abate the emergency.
- v. Within 21 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided in this chapter.
  - vi. 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.

## § 95B-6. Applications.

A. All applications to perform activities in the Town's wetland resource areas, as described in § 95B-2 and above, shall be either in the form of a Request for Determination, a Notice of Intent, or an Abbreviated Notice of Resource Area Delineation. The Commission in an appropriate case may accept as the application and plans under this Bylaw the application and plans (i.e., Notice of Intent, Request for Determination of Applicability) under the State Wetlands Protection Act. Such applications shall contain data and plans as specified in the Commission's regulations, and shall be submitted in complete written form to the Commission. The Commission or its designee shall be authorized to make determinations of completeness for applications submitted to the Commission and reject those applications that do not meet the minimum submittal requirements of this Bylaw.

In order to provide sufficient review time, the Commission may continue a public hearing or public meeting if new information is submitted by the applicant, or applicant's agent, less than seven (7) business days before the scheduled public hearing or public meeting.

The applicable forms must be signed by the applicant or applicant's agent where required. The Commission may require further information by regulation, guideline, or as otherwise deemed necessary for review of the proposed Application by the Commission. In order to comply with the provisions of this Bylaw, each application must be complete as filed, and must comply with the rules set forth herein and Commission's regulations.

## § 95B-7. Hearings.

- A. **Commencement.** The Commission shall commence the public hearing or meeting within 21 days from receipt of a completed application unless the applicant authorizes an extension in writing.
- B. **Combination with State Law Hearing.** The Commission, in its discretion, may hear any oral presentation under this Bylaw at the same public hearing or public meeting required to be held under the provisions of the Wetlands Protection Act, G.L. c. 131, § 40. Notice of the time and place of such hearing(s) shall be given as required below.
- C. **Notice.** For a public hearing, written notice of the time and place of the hearing shall be given at the applicant's expense, not less than seven (7) calendar days prior to the public hearing, by publication in a newspaper of general circulation in Newbury, and by hand delivering or mailing, by certified mail return receipt requested, at the mailing addresses shown on the most recent applicable tax list of the assessors, a copy of such notice to all abutters within one hundred feet of the property line of the land on which the work is proposed, including, but not limited to, owners of land directly opposite said proposed work on any public or private street or way, and in another municipality or across a body of water. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the Commission. All publications and notices shall contain the name of the applicant, a description of the area where the activity is proposed by street-address, if any, or other adequate identification of the location of the area or premises which is the subject of the notice, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of the action or relief requested, if any. Public notice requirements for continued public hearings under this Bylaw shall be the same as the notification requirements set forth in 310 CMR 10.05(5)(b)3.

### D. **Proof.**

The applicant shall have the burden of proving by a preponderance of credible evidence that the activity proposed in the Request for Determination of Applicability or the Notice of Intent will not have a

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significant or cumulatively detrimental effect upon the interests and values protected by this Bylaw. Failure to provide to the Commission adequate evidence for it to determine that the proposed activity will not cause such impacts shall be sufficient cause for the Commission to deny permission or to grant permission with such conditions as it deems reasonable, necessary, or desirable to carry out the purposes of this Bylaw; or to postpone or continue the hearing or public meeting to another date certain to enable the applicant and others to present additional evidence, upon such terms and conditions as deemed by the Commission to be reasonable.

Due consideration shall be given to possible effects of the proposal on all interests and values protected under this Bylaw.

- E. **Continuances.** The Commission may continue a public hearing or public meeting in the following situations:
1. With the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
  2. Without the consent of the applicant, to a specific date within 21 days of the hearing/meeting at which the continuance was made for the reasons stated at the hearing/meeting, including but not limited to receipt of additional information from the applicant or others.
- F. **Investigations.** The Commission, its agents, officers, and employees, may enter upon privately owned land for the purpose of carrying out its duties under this Bylaw and may make or cause to be made such examination or survey as deemed necessary, subject to the Constitutions of both the United States and the Commonwealth.

§ 95B-8. Orders and decisions.

A. **Orders and Decisions.**

If the Commission determines that the proposed activity does not require the imposition of conditions to preserve and protect the interests of this Bylaw, the applicant shall be so notified in writing.

If, after the hearing, the Commission determines that the proposed activity is significant to one or more interests and values of this Bylaw, the Commission shall vote to issue written Orders of Conditions within 21 days of the close of the public hearing. The Order of Conditions may describe such conditions, safeguards, and limitations on time and use upon such activity in the event that the Commission finds that necessary to protect those interests and values. The Commission may require the Applicant to hire an appropriate technical expert to monitor the project to ensure compliance with the order of Conditions.

The Commission may choose to issue an Order of Conditions denying a project if it finds that the interests and values of this Bylaw cannot be preserved and protected by the imposition of such conditions, safeguards, or limitations. The Commission shall state the reasons for such denial in the Order of Conditions.

- B. **Security to Assure Performance.** The Commission may, as a part of its Order of Conditions, require that, in addition to any security required by any other Town or State Board, Commission, agency, or officer, the performance and observance of the conditions, safeguards, and limitations imposed under this Bylaw on the applicant and owner be secured by one, or both, of the following methods:
- (1) **Deposit.** By the deposit of money, sufficient to complete the work as proposed, to secure performance of the conditions and observance of the safeguards of such Order of Conditions. Such security, if filed or deposited, shall be approved as to form and manner of execution by Town Counsel or the Town Treasurer.
  - (2) **Land Restrictions(s).** By an executed and properly recorded (or registered, in the case of registered land) conservation restriction, easement, or other covenant running with the land.

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This method shall be used only with the consent of the applicant.

## C. Duration of Orders.

All Orders of Conditions shall expire three (3) years after the date of issuance. The Commission shall extend an Order for one (1) period of three (3) years, upon the request of the applicant. The request for an extension of an Order of Conditions shall be made to the Commission at least 30 days prior to expiration of the Order of Conditions. The Commission may grant only two (2) extensions for an individual Order of Conditions.

No activity governed by an Order of Conditions shall be performed unless and until all permits, approvals, and variances required by the Bylaw of the Town shall have been obtained, such Order of Conditions or notification shall have been recorded or registered at the Southern Essex District Registry of Deeds or in the Southern Essex District of the Land Court Department, and all applicable appeal periods have expired. The Commission shall have the right to record or register its Order of Conditions with said Registry or Registry District. In the event that an Order of Conditions issued pursuant to this Bylaw is identical to a final Order of Conditions issued pursuant to the provisions of the Act, only one such order need be recorded or registered.

- D. **Modifications, Amendments, Revocations.** The Commission shall have the power (on its own motion or upon the petition of the applicant, or any person interested) to modify, amend, or revoke an Order of Conditions. In revoking an Order of Conditions, the Commission shall officially notify the interested parties through certified mail and hold a public hearing within 21 days of the notification date. A modification is a minor or insignificant change that will not result in an adverse impact to wetland resource areas and/or interests protected by this Bylaw. An amendment is a change of significant magnitude that will require the imposition of additional conditions to ensure adequate protection of wetland resource areas and/or interests protected by this Bylaw. In the case of an amendment to an Order of Conditions, the Commission shall have the discretion to decide if a public hearing is warranted. This decision shall be based on the potential impact of the proposed work and its effect on the ability of the identified wetland resource areas to provide those interests as defined under the Act and Bylaw. If the Commission determines that a public hearing is warranted, the Applicant shall comply with the publication and abutter notification requirements as required for new filings. No public hearing is required for a modification to an Order of Conditions. Written notification to the applicant by certified mail is required in all cases where the Commission initiates a modification, amendment, or revocation of an Order of Conditions. The Applicant shall record modified and amended Orders of Conditions prior to the commencement of authorized work under the Order.

## § 95B-9. Certificates of compliance.

The Commission or its designee shall, upon receiving a written request, inspect the resource areas where the activity governed by an Order of Conditions was carried out and issue a Certificate of Compliance (or Partial Certificate of Compliance) to the owner of the property, applicant, or applicant's representative, in a form suitable for recording or registering, if it shall determine that all of the activity(ies), or portions thereof, limited thereby have been completed in accord with said Order. If the Order contains conditions that continue past the completion of the work, such as maintenance or monitoring, the Certificate of Compliance shall specify which of the conditions shall continue. The Applicant shall record Certificates of Compliance.

If the Commission determines that the work was not performed in compliance with the Order, it may refuse to issue a Certificate of Compliance. The written refusal shall be issued within 21 days of the receipt of a request for a Certificate of Compliance and shall specify the reasons for denial.

The Certificate of Compliance shall be recorded or registered at the Southern Essex District Registry of Deeds or in the Southern Essex District of the Land Court Department. Certification of recording shall be sent to the Commission.

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## § 95B-10. Responsibility for compliance.

After the recording of a Notice of Violation or Order, any person who purchases, inherits, or otherwise acquires real estate upon which work has been done in violation of the provisions of this Bylaw or in violation of any Order issued under the Bylaw 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.

## § 95B-11. Rules and regulations.

After public notice and public hearing, the Commission may promulgate rules and regulations to administer and enforce the Bylaw. 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.

## § 95B-12. Enforcement, investigations, violations.

In accord with the provisions of G.L. c. 40, §§ 21D and 31 as well as every other authority and power that may have been or may hereafter be conferred upon it, the Town may enforce the provisions of this Bylaw, restrain violations thereof, and seek injunctions and judgments to secure compliance with its Orders of Conditions. Without limiting the generality of the foregoing:

- A. Any person who violates any provision of this Bylaw or of any condition or a permit issued pursuant to it may be ordered to restore the property to its original condition after holding a hearing, and take other action deemed necessary to remedy such violations, or may be fined, or both. Any person may be fined or issued a stop work order or an order to restore for an unauthorized alteration of an area subject to protection under the Bylaw or for failing to restore illegally altered land to its original condition or failing to comply with an order issued pursuant to the Bylaw. Fines may be levied pursuant to G.L. c. 40, § 21. Each day or portion thereof during which a violation continues shall constitute a separate offense; if more than one, each condition violated shall constitute a separate offense. This Bylaw may be enforced pursuant to G.L. c. 40, § 21D, by a Town police officer, other persons having police powers, Conservation Commissioners, or the Conservation Administrator or Agent. The penalties for violations of this Bylaw or regulations promulgated hereunder may be assessed as outlined in the Regulations promulgated by this Commission.
- B. In the event of a violation of this Bylaw or of any order issued there under, the Commission or its agents may issue a stop work order to the owner, the applicant, or the applicant's agent by certified mail, return receipt requested, or by posting the same in a conspicuous location on said site. Any person who shall violate the provisions of a stop work order shall be deemed in violation of the Bylaw; but the failure of the Commission to issue a stop work order for any reason shall not prevent the Town from pursuing any other legal remedy at law or in equity to restrain violations of this Bylaw or promulgated regulations and to secure compliance with its Orders.
- C. The Town shall be the beneficiary of all fines imposed on account of the violation of this Bylaw or promulgated regulations in order to defray the expense of enforcing the same.
- D. Upon request of the Commission, the Selectmen and Town Counsel may take such legal action as may be necessary to enforce this Bylaw or promulgated regulations and permits issued pursuant to it.
- E. Upon recommendation of the Commission, the Selectmen may employ Special Counsel to assist the Commission in carrying out the legal aspects, duties, and requirements of this Bylaw and promulgated regulations.



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## § 95B-13. Consultant services.

- A. Upon receipt of an application for a Notice of Intent, Request for Determination of Applicability, Abbreviated Notice of Resource Area Delineation or at any time preceding the Commission's issuance of a Certificate of Compliance, the Commission is authorized to require an applicant to pay a fee for the reasonable costs and expenses borne by the Commission for specified expert engineering and other consultant services deemed necessary by the Commission to come to a final decision on the application.
- (1) If a revolving fund for consultant fees is authorized, the applicant's fee shall be put into such revolving fund and the Commission may draw upon that fund for specific consultant services approved by the Commission.
  - (2) The exercise of discretion by the Commission in 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.
  - (3) The Commission shall waive the consultant fee for a permit application filed by the Town.

## § 95B-14. Captions and severability.

The captions used herein are for convenience only and are expressly intended to have no legal or binding significance. The invalidity of any section or provision of this Bylaw shall not invalidate any other section or provision thereof, nor shall it invalidate any Order of Conditions or decisions that have previously become final.