

Article XXXII Tyngsborough Wetlands Protection Bylaw

Section 1. Purpose

1.1 The purpose of this bylaw is to protect the wetlands, water resources, and adjoining land areas in the Town of Tyngsborough by controlling activities deemed by the Conservation Commission (the Commission) likely to have a significant or cumulative effect upon resource area values. These resource area values include but are not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention including coastal storm flowage, water quality, water pollution control, fisheries, shellfish, wildlife habitat, rare species habitat including rare plant species, agriculture, aquaculture, and recreation values deemed important to the community (collectively, the "resource area values protected by this bylaw"). This bylaw is intended to utilize the Home Rule authority of this municipality to protect additional resource areas, for additional values, with additional standards and procedures stricter than those of the Wetlands Protection Act (G.L. Ch. 131 s.40) and Regulations thereunder (310 CMR 10.00), subject however to the rights and benefits accorded to agricultural uses and structures of all kinds under the laws of the Commonwealth.

Section 2. Jurisdiction

2.1 Except as permitted by the Commission or as provided in this bylaw, no person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter the following resource areas: any freshwater wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds of any size; rivers; streams; creeks; beaches; lands under water bodies; lands subject to flooding or inundation by groundwater or surface water; or flooding, and lands abutting, any of the aforesaid resource areas as set out in Section 7 (collectively the "resource areas protected by this bylaw"). Said resource areas shall be protected whether or not they border surface waters.

Section 3. Conditional Exceptions

3.1 The application and permit required by this bylaw shall not be required for maintaining, repairing, or replacing, but not substantially changing, or enlarging, an existing and lawfully located structure or facility used in the service of the public to provide electric, gas, water, telephone, telegraph, or other telecommunication services, provided that written notice 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.

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

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

3.4 Other than stated in this section, the exceptions provided in the Wetlands Protection Act (G.L. Ch. 131 s.40) and Regulations (310 CMR 10.00) shall not apply under this bylaw.

Section 4. Applications for Permits and Requests for Determination

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

4.2 The Commission in an appropriate case may accept as the permit application and plans under this bylaw the Notice of Intent and plans filed under the Wetlands Protection Act (G.L. Ch. 131 s.40) and Regulations (310 CMR 10.00).

4.3 Any person desiring to know whether or not a proposed activity or an area is subject to this bylaw may in writing request a determination from the Commission. Such a Request for Determination (RDA) shall include information and plans as are deemed necessary by the Commission.

4.4 At the time of an application, the applicant shall pay a filing fee specified in Regulations of the Commission. The fee is in addition to that required by the Wetlands Protection Act (G.L. Ch. 131 s.40) and Regulations (310 CMR 10.00).

4.5 Upon receipt of a permit application, or at any point during the hearing process, the 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 application. 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, hydrogeologic and drainage analysis; soils analysis, and researching environmental or land use law.

4.5.1 The applicant may seek an administrative appeal from the selection of the outside consultant to the Tyngsborough Board of Selectmen. The grounds for such an appeal shall be limited to claims that the consultant chosen by the Conservation Commission has a conflict of interest or does not possess the minimum required qualifications. The minimum qualification shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field. The required time limits for action upon an application by the Conservation Commission shall be extended by the duration of the administrative appeal. In the event that no decision is made by the Board of Selectmen within one month following the filing of the appeal, the selection of the Conservation Commission shall stand. Such an administrative appeal shall not preclude further judicial review, if otherwise permitted by law, on the grounds provided for in these rules.

4.5.2 Any such account shall be established by the Town Treasurer in the town treasury and shall be kept separate and apart from other monies. The special account, including accrued interest, if any, shall be expended at the direction of the Conservation Commission without further appropriation, provided, however, that such funds are to be expended by the Commission only in connection with carrying out its responsibilities under the law. Any excess amount in the account attributable to a specific project, including any accrued interest, at the completion of said project shall be repaid to the applicant or to the applicant's successor in interest. The Commission may require the applicant or the applicant's assigns or successors to replenish the account if such account is drawn down to less than 25% of its original amount if further costs are anticipated for consultant review.

4.5.3 The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision. If a municipal revolving fund has been established, pursuant to G. L. Ch. 44 s.53E1/2 or a special act, for deposit and Commission use of filing or consultant fees, or both, described above, then such filing or consultant fees, or both, shall be deposited therein, for uses set out in the vote establishing the fund. This account shall be kept separate from the account established for filing fees paid under the state Wetlands Protection Act.

4.5.4 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. The Commission may waive the filing fee, consultant fee, and costs and expenses for a permit application or RDA filed by a government agency.

Section 5. Notice and Hearings

5.1 Any person filing a permit application or a RDA with the Commission at the same time shall give written notice thereof, by certified mail (return receipt requested) or hand delivered, to all abutters at their mailing addresses shown on the most recent applicable tax list of the assessors, including owners of land directly opposite on any public or private street or way, and abutters to the abutters within 300 feet of the property line of the applicant, including any in another municipality or across a body of water. The notice to abutters shall have enclosed a copy of the application notification form that shall state the date, time, and place of the hearing and where copies may be examined or obtained by abutters. An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. When a person requesting a determination is other than the owner, the request, the notice of the hearing, and the determination itself shall be sent by the Commission to the owner as well as to the person making the request. When the applicant is anyone other than the owner of the property, the applicant shall furnish written permission for the application signed by the owner. The Commission shall conduct a public hearing on any permit application or RDA, with written notice given at the expense of the applicant, five days prior to the hearing, in a newspaper of general circulation in the municipality.

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

5.3 The Commission shall have authority to continue the hearing to a certain date, time and place announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information from the applicant or others deemed necessary by the Commission in its discretion, or comments or recommendations of the boards and officials listed in section 6.

Section 6. Coordination with Other Boards

6.1 The Commission shall provide written notice of such applications to the Board of Selectmen, Planning Board, Board of Appeals, Board of Health, Building Commissioner, and other Boards or Departments as the Commission deems appropriate. A copy shall be provided in the same manner to the Conservation Commission of the adjoining municipality, if the application or RDA pertains to property within 300 feet of that municipality. An affidavit of the person providing notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. The Commission shall not take final action until the boards and officials have had 14 days from receipt of notice 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. Upon written request the applicant shall receive forthwith any comments and recommendations by the above boards or officials and may respond to the Commission in writing or at the hearing.

Section 7. Permits and Conditions

7.1 If the Commission, after a public hearing, determines that the activities which are subject to the permit application or the land or water uses which will result there from are likely to have a significant individual or cumulative effect upon the resource area values protected by this bylaw, the Commission, within 21 days of the close of the hearing, shall issue or deny a permit for the activities requested. If it issues a permit, the Commission shall impose conditions that the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions. The Commission shall take into account the cumulative adverse effects of loss, degradation, isolation, and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities.

7.2 The Commission may deny a permit 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; or where no conditions are adequate to protect those values. The Commission may consider any demonstrated hardship on the applicant caused by reason of denial.

7.3 Lands within 200 feet of rivers, and lands within 100 feet of other resource areas, are presumed important to the protection of these resources because activities undertaken in close proximity to resource areas have a high likelihood of adverse impact upon the wetland or 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, degraded water quality, and loss or degradation of wildlife habitat. The Commission therefore may require in its regulations that the applicant maintain a strip of continuous, undisturbed vegetative cover and a strip of continuous area where no permanent structures or impervious surfaces exist within the 200-foot or 100-foot area, unless the applicant presents credible evidence which in the judgement of the Commission the area or part of it may be disturbed without harm to the values protected by this bylaw.

7.4 In the review of areas within 200 feet of rivers and streams and areas within 100 feet of other resources, no permit issued hereunder shall permit any activities unless the applicant, in addition to meeting the applicable requirements of this bylaw, has proved by a preponderance of evidence that (1) there is no practicable alternative to the proposed project with less adverse effects, and that (2) such activities, including proposed mitigation measures, will have no significant adverse impact on the areas or values protected by this bylaw. The Commission shall regard as practicable an alternative which is reasonably available and capable of being done after taking into consideration the proposed property use, overall project purpose (e.g., residential, institutional,

commercial, or industrial purpose), logistics, existing technology, costs of the alternatives, and overall project costs. To prevent wetlands loss, the Commission shall first require applicants to avoid wetlands alteration wherever feasible; shall minimize wetlands alteration; and, where alteration is unavoidable, shall require full mitigation. The Commission may authorize or require replication of wetlands as a form of mitigation, but only with adequate security, professional design, and monitoring to assure success, because of the high likelihood of failure of replication.

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

7.6 The Commission shall presume that all areas meeting the definition of "vernal pools" in section 9 of this bylaw, including the adjacent area, perform essential habitat functions. The presumption may be overcome only by the presentation of credible evidence which in the judgement of the Commission demonstrates that the basin or depression does not provide essential habitat functions. Any formal evaluation should be performed by an individual meeting the qualifications under the wildlife habitat section of the Wetlands Protection Act Regulations (310 CMR 10.60).

7.7 A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that annual notification of time and location of work is given to the Commission. Any permit may be renewed once for up to an additional three year period, provided that a request for a renewal is received in writing by the Commission prior to expiration. Notwithstanding the above, a permit may contain requirements which shall be enforceable for a stated number of years, indefinitely, or until permanent protection is in place, and shall apply to all owners of the land, their successors or assigns.

7.8 For good cause the Commission may revoke or modify a permit or determination issued under this bylaw after notice to the holder or the holders successors or assigns of the permit or determination, notice to the public, abutters, and town boards, pursuant to sections 5 and 6, and a public hearing. The Commission in an appropriate case may combine the permit or determination issued under this bylaw with the Order of Conditions or Determination of Applicability issued under the Wetlands Protection Act (G.L. Ch. 131 s.40) and Regulations (310 CMR 10.00).

7.9 The Commission in an appropriate case may combine the decision issued under this bylaw with the Order of Conditions, Order of Resource Area Delineation (ORAD),

Determination of Applicability or Certificate of Compliance issued under the Wetlands Protection Act and Regulations (310 CMR 10.00)..

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

Section 8. Regulations

8.1 After public notice and public hearing, the Commission shall promulgate rules and regulations to effectuate the purposes of this bylaw effective when voted and filed with the town clerk. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their invalidity by a court of law shall not act to suspend or invalidate the effect of this bylaw. At a minimum these regulations shall define key terms in this bylaw not inconsistent with the bylaw and procedures governing the amount and filing of fees.

Section 9. Definitions

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

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

- (a) Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind;
- (b) Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics;
- (c) Drainage or other disturbance of water level or water table;
- (d) Dumping, discharging, or filling with any material which may degrade water quality;
- (e) Placing of fill, or removal of material, which would alter elevation;
- (f) Driving of piles, erection, or repair of buildings, or structures of any kind;
- (g) Placing of obstructions or objects in water;
- (h) Destruction of plant life including cutting of trees;
- (i) Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters;
- (j) Any activities, changes, or work which may cause or tend to contribute to pollution of any body of water or groundwater; and
- (k) Incremental activities that have, or may have, a cumulative adverse impact on the resource areas protected by this bylaw.

9.1.2 The term "bank" shall include the land area that normally abuts and confines a water body; the lower boundary being the mean annual low flow level, and the upper

boundary being the first observable break in the slope or the mean annual flood level, whichever is higher.

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

9.1.4 The term "pond" shall have the same meaning as the definition in 310 CMR 10.04 except that the size threshold of 10,000 square feet shall not apply.

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

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

9.1.7 The term "water quality" shall include but not be limited to aspects of flow, volume, dissolved oxygen, temperature, and clarity.

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

Section 10. Security

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

(a) 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 permit.

(b) By accepting a conservation restriction, easement, or other covenant enforceable in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of this municipality whereby the conditions imposed shall be performed and observed before any lot may be conveyed other than by mortgage deed.

Section 11. Enforcement

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

11.2 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.

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

11.4 Upon request of the Commission, the Board of Selectmen and the Town Counsel shall take legal action for enforcement under civil law. Upon request of the Commission, the chief of police shall take legal action for enforcement under criminal law. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in the enforcement of this bylaw.

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

11.6 As an alternative to criminal prosecution in a specific case, the Commission may issue citations under the noncriminal disposition procedure set forth in G.L. Ch. 40 s.21D, which has been adopted by the Town in Article V Section 1 of the general bylaws.

Section 12. Burden of Proof

12.1 The applicant for a permit shall have the burden of proving by a preponderance of credible evidence that the work proposed in the permit application 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 deny a permit or grant a permit with conditions.

Section 13. Appeals

13.1 A decision of the Commission shall be reviewable in the Superior Court in accordance with G.L. Ch. 249 s.4.

Section 14. Relation to the Wetlands Protection Act

14.1 This bylaw is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act (G.L. Ch. 131 s.40) and Regulations (310 CMR 10.00) thereunder.

Section 15. Severability

15.1 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 that previously has been issued.