

ARTICLE XXII – BILLERICA WETLANDS PROTECTION BY-LAW
(By-Law Added 10/2002)

1. PURPOSE AND AUTHORITY

1.1 Purpose. The purpose of this by-law is to protect the wetlands, water resources, and adjoining land areas, including floodplains, in the town of Billerica by controlling activities deemed by the Billerica Conservation Commission (hereinafter “Commission”) likely to have a significant or cumulative effect upon wetlands resource area values.

1.2 Authority. The Home Rule authority of Billerica and the authority granted to the Town by the Wetlands Protection Act, Mass. Gen. Laws, Ch. 131 ss 40, entitles the Town to protect additional wetlands resource areas and resource area values with standards and procedures stricter than those of said Wetlands Protection Act and the regulations promulgated thereunder by the Massachusetts Department of environmental Protection at 310 CMR 10.00 (hereinafter “Act”).

2. JURISDICTION

2.1 Regulation:

A. The Billerica Conservation Commission shall have jurisdiction to regulate all proposed activities and alterations within a wetlands resources area protected by this by-law and within 100 feet from all such resources area, provided, however, that there shall be no 100-foot buffer zone to a riverfront area wetlands resource area. In addition, the Commission shall have jurisdiction to regulate those activities and alterations outside the 100-foot buffer zone if such activities have altered a wetland resource area or the area within the 100-foot buffer zone from a wetlands resource area. The Commission shall regulate such activities so as to protect the wetlands resource area values.

(1) A “wetlands resource area protected by this by-law” is: any freshwater wetlands; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds; rivers; streams; creeks; beaches; lands under water bodies; and lands subject to flooding or inundation by groundwater or surface water. Said wetlands resource areas are defined in Section 5 and shall be protected whether or not the wetlands resource areas border surface waters.

(2) The “resource area values protected by this by-law” shall include, without limitation, the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water quality, water pollution control, fisheries, wildlife, wildlife

habitat, rare species habitat including rare plant species, agriculture, aquaculture and recreation values deemed important to the community.

- B. No person shall commence to remove, fill, dredge, build upon, degrade, discharge into, or otherwise alter, as that term is defined in Section 4 of this by-law, a wetlands resource area protected by this by-law or an area within 100 feet from such resource area without receiving and complying with a by-law wetlands permit issued by the Commission; provided, further, that all appeal periods have elapsed.
- C. Any person desiring to know whether a proposed activity or an area is subject to this by-law may request a determination of applicability or a resource delineation confirmation from the Commission in writing.

2.2 Enforcement

- A. No person shall alter or cause, suffer, or allow any activity or alteration of any wetlands resource area or its buffer zone protected by this by-law; or leave in place unauthorized fill in a wetlands resource area or its buffer zone protected by this by-law; or otherwise fail to restore to its original condition an illegally altered wetlands resource area or its buffer zone protected by this by-law.
- B. No person shall fail to comply with a wetlands permit or an enforcement order issued by the Commission pursuant to this by-law.
- C. The Commission shall have authority to enforce this by-law, the regulations authorized by the by-law, and by-law permits by violation notices, enforcement orders, and civil and criminal court actions, as appropriate. Members of the Commission and the Agent of the Commission are empowered to act as “enforcing persons” under these provisions.
- D. The Commission may order any person who alters a wetland resource area or buffer zone in violation of the provisions of this by-law and the regulations promulgated thereunder to restore the land and wetlands resource area to its original condition and take other action deemed necessary to remedy such violations.
- E. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement and as further provided in Article VI, Section 6, of the General By-Laws.

3. **EXEMPTION AND EXCEPTIONS**

- 3.1 Normal Maintenance or Improvement of Land in Agricultural Use. The application and permit required by this by-law shall not be required for work performed for normal maintenance or improvement of land in agricultural use as defined by the Act. Provided, however, nothing contained within this

provision shall prohibit the Commission from exercising its full enforcement powers under this by-law should it determine the activity is not “normal maintenance or improvement of land in agricultural use.”

- 3.2 Public Utilities. The application for and issuance of a by-law wetlands permit 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 public services, provided that written notice has been given to the Commission before commencement of work, and provided that the work conforms to any performance standards and design specifications in regulations adopted by the Commission.
- 3.3 Emergency Projects. The application for and issuance of a by-law wetlands permit shall not be required for emergency projects necessary for the protection of the health and safety of the public.
- A. The project shall only be considered an emergency project under this by-law if: (i) the work to be performed by or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof; and (ii) advanced notice, oral or written, has been given to the Commission before commencement of work or within twenty-four (24) hours after commencement; and (iii) the Commission or its designee certifies the work as an emergency project.
 - B. To further qualify as an emergency project, the work must: (i) be performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency; and (ii) the project proponent must file, within twenty-one (21) days of commencement of an emergency project, a by-law wetlands permit application with the Commission for review as provided by this by-law.
 - C. Upon failure to meet the above 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 Mosquito Control Work. The provisions of this by-law shall not apply to any mosquito control work done under the provisions of Mass. Gen. Laws, ch. 40A, § 5, clause (36) or c. 252,
- 3.5 No other Exceptions to By-Law. Other than as stated in this section, the exceptions provided in the Act shall not apply under this by-law.

4. DEFINITIONS

The following definitions shall apply in the interpretation and implementation of this by-law. Except as otherwise provided in this by-law or in regulations of the commission, the definitions of terms in this by-law shall be set forth in the Wetlands Protection Act (Mass. Gen. Laws, ch.131, ss40) and regulations (310 CMR 10.00)

4.1 Act. The term “Act” means the state Wetlands Protection Act (Mass. Gen. Laws, ch.131, ss 40) and regulations (310 CMR 10.00)

4.2 Alter. The term “alter” shall include, without limitation, the following temporary or permanent activities when undertaken to, upon, within, or affecting wetland resource areas and buffer zones protected by this by-law; provided, however, that the term “alter” shall not apply to maintaining or replacing within the existing foot print, without enlargement of that footprint, structures and vegetation that legally exist at the time of the adoption of this by-law:

- Removing, excavating, or dredging of soil, sand, gravel or aggregate materials of any kind;
- Changing the preexisting drainage and runoff characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics;
- Draining or otherwise disturbing surface water levels or the water table;
- Dumping, discharging, or filling with any material that would degrade water quality;
- Placing fill or removing material that would alter elevation;
- Driving piles and erecting or expanding buildings or structures of any kind;
- Placing obstructions or object in water;
- Destroying, including cutting, any vegetation within a wetlands resource area;
- Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters;
- Conducting any activities, making changes, or performing work that may cause or tend to contribute to pollution of any body of water or groundwater;
- Conducting incremental activities that have, or may have, a cumulative adverse impact on the resource areas protected by this by-law.

4.3 Commission. The term “Commission” shall mean the Conservation Commission of the Town of Billerica, established under the authority of Mass. Gen. Laws, ch 40, ss 8C, the members of which are appointed by the Board of Selectmen for terms of three years.

4.4 Person. 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 such

is subject to the Town By-Laws, administrative agency, public or quasi-public corporation or body, the town of Billerica, and any other legal entity. The term “person” shall also include the legal representatives, agents, or assigns of the above named entities and other legal entities.

- 4.5 **Rare Species.** The term “rare species” shall include, without limitation, all vertebrate and invertebrate animal and all 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 as a habitat by the Division.

5. BY-LAW RESOURCE AREAS AND PRESUMPTIONS

The provisions of this by-law apply to the following wetlands resource areas and presumptions. Except as otherwise provided in this by-law, the wetlands resource areas shall be as set forth in the Act.

- 5.1 **Bank.** A “bank” shall mean the land area which 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 high water line, whichever is higher.
- 5.2 **Buffer Zone.** A “buffer zone” shall mean that area of land extending 100 feet horizontally outward from the boundary of any wetlands resource area subject to protection under this by-law or the Act, provided, however, that there shall not be a 100-foot buffer zone to the wetland resource area known as the “riverfront area.” By regulation, the Commission may require within a buffer zone certain setbacks and/or an area of natural vegetation of sufficient width and vegetative community type to assure protection of the wetlands resource area and mitigation of proposed activities. Nothing herein shall preclude the Commission from establishing a no-alteration zone on a case-by-case basis.
- 5.3 **Freshwater Vegetated Wetlands.** A “vegetated wetlands” shall mean a freshwater wetlands that may either border on another water body or wetlands resource area or not be connected by surface water to any other water body or wetlands. A vegetated wetland is an area where the soils and vegetation meet the criteria of the Act. The types of freshwater vegetated wetlands are bogs, marshes, wet meadows, and swamps as those are defined in the Act.
- 5.4 **Riverfront Area.** A “riverfront area” shall mean that area of land situated between the mean annual high-water line of a river and a horizontal parallel line located two hundred feet from said mean annual high-water line. The 100-foot buffer zone is not applicable to the riverfront area; provided, however, that by regulation the Commission may require with the out riparian area a zone of natural vegetation of sufficient width and vegetative community type and/or setbacks to assure protection of the riverfront area

and mitigation of proposed activities. Nothing herein shall preclude the Commission from establishing a no-alteration zone on a case-by-case basis.

- A. The riverfront area is presumed important to the protection of rivers, ponds, and lakes because activities undertaken in close proximity to these resources, 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 include, without limitation, erosion, siltation, loss of groundwater recharge, poor water quality, and loss of wildlife habitat.
- B. The Commission may therefore establish, by regulations, performance standards for protection of such lands including without limitation strips of continuous, undisturbed vegetative cover within the two hundred-foot area or other form of work-limit or setback to buildings, roads, landscaping and other features.
- C. In the review of riverfront areas, the Commission shall not issue any by-law wetlands permit allowing any activity unless the applicant, in addition to meeting the otherwise applicable requirements of this by-law, has proved by a preponderance of the evidence that (i) there is not practicable alternative to the proposed project with less adverse effects and (ii) that such activities, including proposed mitigation measures, will have no significant adverse impact on the riverfront area or values protected by this by-law. The Commission shall regard as practicable an alternative that is reasonably available and capable of being done after taking into consideration the proposed property use, overall project costs, but the Commission shall not use such consideration as an overriding factor in making its decision.

5.5 Stream. A “stream” shall mean a body of running water, including brooks and creeks, that moves in a definite channel in the ground due to hydraulic gradient. A portion of a stream may flow through a culvert or beneath a bridge. Streams may be intermittent or perennial.

- A. An “intermittent stream” shall mean a body of running water that does not flow throughout the entire year.
- B. A “perennial stream” shall mean a body of running water that flows throughout the year, except in periods of extended drought as such may be defined by the regulations of the Commission. A perennial stream is a river.

6. REQUEST FOR BY-LAW DETERMINATION OF APPLICABILITY AND RESOURCE DELINEATION CONFIRMATION; APPLICATION FOR BY-LAW WETLANDS PERMIT; FEES; CONSULTANTS

6.1 Request for By-Law Determination of Applicability. Any person desiring to know whether a proposed activity or an area is subject to this by-law may in writing request a determination from the Commission.

- 6.2 Request for Resource Delineation Confirmation. Any person desiring to know whether a delineation of a wetland resource area protected under this by-law and, if appropriate, the extent of the buffer zone to that wetlands resource area protected under this by-law may in writing request a confirmation from the Commission. Such a request for by-law confirmation shall include information and plans as are deemed necessary by the Commission.
- 6.3 Application for By-Law Wetlands Permit. Written application for a by-law wetlands permit shall be filed with the Commission to perform activities affecting resource areas protected by this by-law.
- A. The application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on the wetlands resource areas and buffer zones protected by this by-law. The Commission in an appropriate case may accept as the application and plans under this by-law any application and plans filed under the Act.
 - B. No activities shall commence without receiving and complying with wetlands permit issued pursuant to this by-law.
- 6.4 Filing fee. At the time of a request for a by-law determination, request for a confirmation, or an application for a by-law wetlands permit, the applicant shall pay a filing fee as specified in regulations of the Commission. The regulations of the Commission need not set a by-law filing fee for every type of request or application and the regulations may provide for a waiver of the by-law filing fee so set. Town projects are exempt from filing fees under this Section. The by-law filing fee is in addition to that required by the Act and the filing fee shall be deposited in a revolving fund, separate from the account established for filing fees paid under the Act, as such revolving fund may be established by Town Meeting vote.
- 6.5 Consultant Fee. Upon receipt of a request for a by-law determination or confirmation or an application for a by-law permit, 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 request or application. The consultant shall be a qualified individual selected and approved by the Commission by Article XI of the General By-Laws of Billerica.
- A. 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 available only through outside consultants is necessary for the making of an objective decision.
 - B. The specific consultant services may include, but are not limited to performing or verifying the accuracy of resource area surveyed

delineation; analyzing resource area functions and values, including wildlife habitat evaluations; performing hydro geologic and drainage analysis; and researching environmental or land use law.

- C. The Commission may require a wildlife habitat study of the project area, to be paid for by the applicant, whenever it deems 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.
- D. The consulting expert shall submit his or her bill for services rendered directly to the applicant and the applicant shall be responsible for making full payment of such bill directly to the consultant. Problems or disputes over payment arrangements between the consultant and the applicant shall be settled at a regularly scheduled meeting of the Commission by a majority vote of the Commission.

7. ADMINISTRATIVE HEARING PROCESS

7.1 Notice of Filing

- A. Abutters. A person filing an application for a determination, resource delineation, or wetlands permit under this by-law shall, at the same time, 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.
 - (1) The notice to abutters shall have enclosed a copy of the application, with plans, or shall state where copies may be examined and obtained by abutters.
 - (2) When a person requesting a determination is other than the owner, the applicant shall send a copy of the request and plans to the owner.
 - (3) An affidavit of the person providing such notice, with a copy of the notice mailed or delivered, shall be filed with the Commission. The Commission shall not open a public hearing until such proof of notice is received by the Commission.
- B. Other Municipal Boards and Commissions. Any person filing an application for determination, confirmation of resource delineation, or wetlands permit pursuant to this by-law, shall provide a copy thereof at the same time, by certified mail (return receipt requested) or hand delivery, to those town departments specified by the Commission as requiring notice. A copy shall be provided in the same manner to the

conservation commission of the adjoining municipality, if the request or application pertains to property within 300 feet of that municipality.

- (1) An Affidavit of the person providing notice, with a copy of the notice mailed or delivered, shall be filed with the Commission.
- (2) The Commission shall not take final action until the boards and officials have had fourteen (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. The applicant shall have the right to receive any comments and recommendations, and to respond to them at a hearing of the Commission, before final action.

7.2 Notice of Hearing. The Commission shall conduct a public hearing on any application for a determination, resource area delineation, or wetlands permit under this by-law. The Commission shall give written notice, at the expense of the applicant, at least five business days prior to the hearing, in a newspaper of general circulation in the Town of Billerica.

7.3 Hearing Process. The Commission in an appropriate case may combine its hearing under this by-law with the hearing conducted under the Wetlands Protection Act.

- A. Commencement of Hearing. The Commission shall commence the public hearing within twenty-one (21) days from receipt of a completed application, unless an extension is authorized in writing by the applicant.
- B. Continuance of Hearing. The Commission shall have authority to continue the hearing to a specific date announced at the hearing, for reasons stated at the hearing, which may include the need for additional information from the applicant or others deemed necessary by the Commission in its discretion, based on comments and recommendations of the boards and officials noted in Section 7.1.B of this by-law.

7.4 Issuance of Decision. The Commission in an appropriate case may combine the decision issued under this by-law with the Order of Conditions, Order of Resource Area Delineation, or Determination of Applicability issued under the Act. In all permit decisions, the Commission shall make written findings and reasons as provided in Section 7.4.B of this by-law.

- A. Determination of Applicability or Resource Area Delineation. The Commission shall issue its determination of applicability or resource delineation decision in writing within twenty-one (21) days of the close of the public hearing thereon unless an extension is authorized in writing by the applicant.

B. By-Law Wetlands Permit. The applicant for a by-law wetlands permit shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the by-law permit application will not have significant or cumulative effects upon the resource area values protected by this by-law. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit. If the Commission, after a public hearing, determines that the activities that are subject to the by-law wetlands permit application or the land and water uses, which will result therefrom, are likely to have significant or cumulative effects upon the wetland resource area values protected by this by-law, the Commission shall deny a by-law wetlands permit for the activities requested or issue a by-law wetlands permit that protects the wetland resource area values enumerated in this by-law and those that may be found by the Commission.

(1) Where no conditions are adequate to protect those wetland resource values, the Commission shall deny a permit for failure to meet the requirements of this by-law. The Commission may also deny a permit 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 the regulations of the Commission; or for failure to avoid or prevent significant or cumulative effects upon the resource area values protected by this by-law.

(2) If it issues a by-law wetlands 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.

(a) In establishing those conditions, the commission shall take into account the cumulative adverse effects of loss, degradation, isolation, and replication of protected wetland resource areas and their buffer zones throughout the relevant watershed area, resulting from past activities, permitted and exempt, and foreseeable future activities.

(b) To prevent wetlands loss, the Commission shall 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.

8. POST DECISION PROCESS

8.1 Recording in Registry of Deeds. No work proposed in any request or application shall be undertaken until the determination, confirmation of by-law wetland resource area boundary, or by-law wetlands 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 document has been recorded.

8.2 Amendment, Revocation or Expiration of a Determination, Confirmation or Permit under the By-Law

- A. An amendment to a determination, confirmation or permit issued under this by-law shall be in accordance with the Act.
- B. A by-law determination or by-law wetland resource area boundary confirmation shall expire three (3) years from the date of issuance.
- C. A by-law wetlands 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.
 - (1) Any by-law wetlands permit may be renewed once for an additional one-year period, provided that a request for a renewal is received in writing by the Commission before expiration.
 - (2) Notwithstanding the above, a by-law wetlands permit may identify requirements that 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.
- D. For good cause the Commission may revoke any by-law determination, confirmation of by-law wetland resource area boundary, by-law wetlands permit, or other permit, order, determination, or other decision issued under this by-law after notice to the holder of the issued document, the public, abutters and certain town boards and a public hearing.

8.3 Certificate of Compliance. Upon request by the landowner or holder of a by-law wetlands permit, the Commission may issue a certificate of compliance. The Commission shall record on the certificate all conditions that shall remain in effect. Said certificate shall be 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.

9. APPEAL FROM DECISION OF CONSERVATION COMMISSION

A decision of the Commission may be appealed to the superior court in accordance with applicable law.

10. REGULATIONS PROMULGATION BY CONSERVATION COMMISSION

After public notice and public hearing, the Commission shall promulgate rules and regulations to effectuate the purposes of this by-law, effective when voted by the Commission 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 by-law. At a minimum, these regulations shall define essential terms in this by-law not inconsistent with the by-law, and procedures governing the amount and filing of fees and the deposit of such fees in a revolving fund as may be established by Town Meeting vote.

11. SECURITY

As part of a permit issued under this by-law, 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 more of the methods described below;

11.1 Financial Assurance Mechanisms. 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.

11.2 Restrictions on Property. 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 the Town of Billerica 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.