

Town of Falmouth, MA
Friday, July 2, 2021

Chapter 235. Wetlands Protection

[HISTORY: Adopted by the Town of Falmouth Annual Town Meeting 4-2-1979, Art. 32; amended in its entirety by Annual Town Meeting 4-5-1993, Art. 41, approved 7-16-1993. Subsequent amendments noted where applicable.]

GENERAL REFERENCES

Conservation Commission — See Charter, § **C7-6**.

Watershed protection — See Ch. **227**.

Wetlands regulations — See Division 4.

Zoning — See Ch. **240**.

§ 235-1. Purpose.

[Amended AFTM 11-18-1996, Art. 61, approved 4-30-1997]

- A. The purpose of this bylaw is to protect the wetlands, related water resources and adjoining land areas in Falmouth by controlling activities deemed by the Conservation Commission as likely to have a significant or cumulative effect upon resource area values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, water pollution control, fisheries, shellfish, wildlife and plant species and habitats, agriculture, aesthetics, recreation and aquaculture values. These values, collectively, are the resource area values protected by this bylaw.
- B. In the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern, the following resource area values are expressly protected: prevention of flood damage by limiting of development in flood hazard zones, prevention of damage to structures and natural resources as a result of erosion, improvement of water quality, protection and enhancement of existing vegetative cover in order to maintain water quality and wildlife habitat, protection of wildlife, waterfowl and plant habitat and the maintenance of existing populations and species diversity, prevention of loss or degradation of critical wildlife and plant habitat, prevention of new stormwater runoff discharges and the improvement of existing stormwater runoff discharges, protection of coastal ecosystems which support the continued viability of harvestable shellfish and finfish habitat, public access to water and land, improvement of groundwater recharge, and the minimization of the impact of new development, reconstruction and/or expansion on the resource area values protected by this bylaw.

§ 235-2. Jurisdiction.

[Amended AFTM 11-18-1996, Art. 61, approved 4-30-1997]

Except as permitted by the Conservation Commission or as provided in this bylaw, no person shall remove, fill, dredge, build upon, degrade or otherwise alter the following resource areas: any freshwater or coastal wetland; marshes; wet meadows; bogs; swamps; vernal pools; banks; reservoirs; lakes; ponds; streams; creeks; beaches; dunes; estuaries; oceans; lands under water bodies; lands subject to flooding or inundation by groundwater or surface water; lands subject to tidal action, coastal storm flowage or flooding; lands within one hundred (100) feet of any of the

aforesaid resource areas; the lands and waters within the entire Black Beach/Great Sippewissett Marsh District of Critical Planning Concern; and the lands and waters within the entire Massachusetts Executive Office of Environmental Affairs-designated Waquoit Bay Area of Critical Environmental Concern (ACEC). These resource areas are, collectively, the resource areas protected by this bylaw.

§ 235-3. Exceptions.

- A. The application and permit 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 written notice has been given to the Commission ten (10) days prior to commencement of work, and provided that the work conforms to performance standards and design specifications in regulations adopted by the Commission.
- B. The application and permit required by this chapter shall not be required for work performed for normal maintenance of land actively in agricultural use, provided that written notice has been given to the Commission ten (10) days prior to commencement of work, and provided that the work conforms to performance standards and design specifications in regulations adopted by the Commission.
- C. The application and permit required by this chapter shall not apply to emergency projects necessary for the protection of the health and safety of the public, provided that the work is to be performed by or has been ordered to be performed by an agency of the commonwealth or a political subdivision thereof; provided that advance notice, oral or written, has been given to the Commission prior to the commencement of work; provided that the Commission or its agent certifies the work as an emergency project; provided that the work is performed only for the time and place certified by the Commission for the limited purposes necessary to abate the emergency; and provided that within twenty-one (21) days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided by this chapter. Upon failure to meet these and other requirements of the Commission, the Commission may, after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.
- D. Other than stated in this section, the exceptions provided in the Wetlands Protection Act, MGL C. 131, § 40, and Regulations, 310 CMR 10.00, shall not apply under this chapter.

§ 235-4. Applications for permits and requests for determination.

- A. Written application shall be filed with the Commission to perform activities affecting resource areas protected by this chapter. 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 chapter. No activities shall commence without receiving and complying with a permit issued pursuant to this chapter.
- B. The Commission, in an appropriate case, may accept as the permit application and plans under this chapter the Notice of Intent and plans filed under the Wetlands Protection Act, MGL C. 131, § 40, and Regulations 310 CMR 10.00.
- C. Any person desiring to know whether or not a proposed activity or an area is subject to this bylaw, including expansion exemptions requested in accordance with Section 22(c) of the Cape

Cod Commission Act, may in writing request a determination from the Conservation Commission. Such a request for determination shall include information and plans as are deemed necessary by the Commission.

[Amended AFTM 11-18-1996, Art. 61, approved 4-30-1997]

- D. At the time of a permit application or request for determination, the applicant shall pay a filing fee specified in the regulations of the Commission. The fee is in addition to that required by the Wetlands Protection Act, MGL C. 131, § 40, and Regulations, 310 CMR 10.00. The Commission may waive the filing fee, consultant fee and costs and expenses for a permit application or request for determination filed by a government agency and shall waive them for a request for determination filed by a person having no financial connection with the property or project which is the subject of the request. The required advertising fees for public notification of the project cannot be waived.
- E. Upon receipt of a permit application or request for determination, 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 the resource area survey and delineation, analysis of resource area values, including wildlife habitat evaluations, hydrogeologic and drainage analysis and environmental or land use law.
- F. The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision. The applicant shall pay the fee to the Town to be put into a consultant services account of the Commission which may be drawn upon by the Commission for specific consultant services approved by the Commission at one of its public meetings.
- G. The exercise of discretion by the Commission in making its determination to require the payment of a 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.
- H. The Commission shall return any unused portion of the consultant fee to the applicant unless the Commission decides at a public meeting that other action is necessary. Any applicant aggrieved by the imposition of, or size of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.
- I. The maximum consultant fee charged to reimburse the Commission for reasonable costs and expenses shall be according to the schedule established by local regulation.
- J. The Town hereby accepts MGL C. 131, §§ 40 and 53E, for purposes of administering jointly the filing fee and professional service conservation account provisions of this chapter.

§ 235-5. Notice and hearings.

- A. Any person filing a permit application 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 one hundred (100) feet of the property line of the applicant, including any in another municipality. The notice to abutters shall enclose a copy of the permit application or request, with plans, or shall state where copies may be examined and 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.

- B. The Commission shall conduct a public hearing on any permit application or request for determination, with written notice given at the expense of the applicant, five (5) business days prior to the hearing, in a newspaper of general circulation in the municipality.
- C. The Commission shall commence the public hearing within twenty-one (21) days from receipt of a completed permit application or request for determination unless an extension is authorized in writing by the applicant.
- D. The Commission shall issue its permit or determination 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.
- E. The Commission, in an appropriate case, may combine its hearing under this chapter with the hearing conducted under the Wetlands Protection Act, MGL C. 131, § 40, and Regulations 310 CMR 10.00.
- F. The Commission shall have the authority to continue the hearing to a date certain announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information offered by the applicant deemed necessary by the Commission in its discretion, or comments and recommendations of other Town boards and officials, as appropriate. In the event the applicant objects to a continuance or postponement, the hearing shall be closed and the Commission shall take action on such information as is available.

§ 235-6. Coordination with other boards.

A copy of the public hearing notices shall be circulated to other Town boards and departments, as appropriate.

§ 235-7. Permits and conditions.

- A. If the Commission, after a public hearing, determines that the activities which are subject to the permit application are likely to have a significant or cumulative effect upon the resource area values protected by this chapter, the Commission, within twenty-one (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 which the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions.
- B. The Commission is empowered to deny a permit for failure to meet the requirements of this chapter; for failure to submit the 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 chapter; and where no conditions are adequate to protect those values. Due consideration shall be given to any demonstrated hardship on the applicant by reason of denial, as presented at the public hearing.
- C. A permit shall expire three (3) years from the date of issuance. Notwithstanding the above, the Commission, in its discretion, may issue a permit expiring five (5) 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 for an additional one-year period, provided that a request for renewal is received in writing by the Commission thirty (30) days prior to expiration.

- D. For good cause, the Commission may revoke or modify a permit or determination issued under this chapter after notice to the holder of the permit or determination, notice to the public, abutters and Town boards, pursuant to §§ **235-5** and **235-6**, and a public hearing.
- E. The Commission, in an appropriate case, may combine the permit or determination issued under this chapter with the Order of Conditions or Determination of Applicability issued under the Wetlands Protection Act, MGL C. 131, § 40, and Regulations, 310 CMR 10.00.
- F. 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 effected 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.

§ 235-8. Regulations.

- A. After public notice and public hearing, the Commission shall promulgate rules and regulations to effectuate the purposes of this chapter. Notice shall be given at least one (1) week prior to the public hearing by publication in a newspaper of general circulation in the Town and by posting 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 chapter.
- B. At a minimum, these regulations shall define key terms in this chapter not inconsistent with the bylaw and procedures governing the amount and filing of fees.
- C. After due notice and public hearing, the Conservation Commission may promulgate policy guidelines in the form of additional rules, regulations and definitions consistent with the provisions and objectives of this chapter and designed to clarify and implement its purpose. Notice shall be given at least two (2) weeks prior to such hearing by publication in a newspaper of general circulation in the Town and by posting with the Town Clerk. The Conservation Commission, by regulation duly advertised and heard, may set fees for services performed, subject to written approval of the Board of Selectmen. No fees shall be in excess of demonstrated true costs to the Town of the services performed by the Commission.
- D. Pursuant to the requirements of this section, the Conservation Commission shall adopt Implementing Regulations for the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern (DCPC) which, with regard to this resource area, shall contain performance standards to protect the interests of the district.
[Added AFTM 11-18-1996, Art. 61, approved 4-30-1997]

§ 235-9. Definitions.

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

ALTER

Includes, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected under 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 the water.
- (8) Destruction of plant life, including cutting of trees.
- (9) Changing temperature, biochemical oxygen demand or other physical, biological or chemical characteristics of any waters.
- (10) Any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater.
- (11) Application of pesticides or herbicides.

PERSON

Includes 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.

- B. Except as otherwise provided in this chapter or in regulations of the Commission, the definitions of terms in this chapter shall be as set forth in the Wetlands Protection Act, MGL C. 131, § 40, and Regulations, 310 CMR 10.00.

§ 235-10. Security.

As part of a permit issued under this chapter, 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 hereunder be secured wholly 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 the issuance of a certificate of compliance for work performed pursuant to the permit.
- B. By a conservation restriction, easement or other covenant enforceable in a court of law, executed and duly recorded by the owner of record, running with the land to the benefit of this municipality whereby the permit conditions shall be performed and observed before any lot may be conveyed other than by mortgage deed.

§ 235-11. Enforcement.

- A. No person shall remove, fill, dredge, build upon, degrade or otherwise alter resource areas protected by this chapter, or cause, suffer or allow such activity to continue or allow such fill or other alteration to be left in place, without the required authorization pursuant to this chapter.
- B. The Commission, its agents, officers and employees shall have authority, with prior approval from the property owner, to enter upon privately owned land for the purpose of performing their

duties under this chapter and may make or cause to be made such examinations, surveys or sampling as the Commission deems necessary.

- C. The Commission shall have the authority to enforce this chapter, its regulations and permits issued thereunder by violation notices, administrative orders and civil and criminal court actions. Any person who violates provisions of this chapter may be ordered to restore the property to its original condition and take any other action deemed necessary to remedy such violations.
- D. Upon request of the Commission, the Board of Selectmen and 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.
- E. Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement.
- F. Any person who violates any provision of this chapter, or regulations, permits or administrative orders issued thereunder, shall be punished by a fine of not more than three hundred dollars (\$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.
- G. As an alternative to criminal prosecution in a specific case, the Commission may issue citations under the noncriminal disposition procedure set forth in MGL C. 40, § 21D, and adopted by the Town as a general bylaw.

§ 235-12. Burden of proof.

The applicant for a permit shall have the burden of proving by a preponderance of the 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 chapter. 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.

§ 235-13. Appeals.

- A. A decision of the Commission shall be reviewable in the Superior Court in an action filed within sixty (60) days thereof, in accordance with MGL C. 249, § 4.
- B. Any applicant, owner, abutter or other party in interest aggrieved by an order of the Conservation Commission may, within ten (10) days of the issuance of said order, request that the matter be settled through a mediation process conducted by a professional environmental service. Any party may refuse to participate in or may withdraw from the mediation proceeding at any time, and no settlement agreement shall be effective unless signed by all parties whose cooperation is necessary to its implementation. If no agreement to mediate is recorded within the said ten (10) days, or for any reason mediation is abandoned before consummation, then the applicant, owner, abutter or party in interest may appeal to the Superior Court in the usual course as defined below.^[1]

[1] *Editor's Note: Former Subsection C, dealing with appeals, which immediately followed this subsection, was repealed AFTM 11-15-1994, Art. 34.*

§ 235-14. Relation to the Wetlands Protection Act.

[Amended AFTM 11-18-1996, Art. 61, approved 4-30-1997]

This chapter is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act, MGL C. 131, § 40, and Regulations, 310 CMR 10.00. With respect to the Black Beach/Great Sippewissett Marsh District of Critical Planning Concern, this bylaw is adopted under the Home Rule Amendment to the Massachusetts Constitution and the Home Rule statutes, as well as c. 716 of the Acts and Resolves of 1989, as amended, and Barnstable County Ordinance 96-1.