

## NO. 161

## AN ORDINANCE CREATING A WETLANDS PROTECTION ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GARDNER:

**Section 1. WETLANDS PROTECTION**

This Section shall be known as the "Wetlands Protection Ordinance", and may also hereafter be referred to as "Section 1".

**1.1 - Purpose and Intent**

The Purpose of Section 1 is to preserve and exercise jurisdiction over the Protected Resource Areas, as defined below, and adjoining land areas in the City by means of the regulation and control of activities deemed by the Conservation Commission (the "Commission") as likely to have significant or cumulative adverse effect on any or all Resource Area Values, which include, without limitation: the protection of public water supply, private water supply and groundwater; the prevention and control of flooding, erosion and sedimentation; the prevention of storm damage; the prevention and control of pollution; the protection of water quality, agriculture and aquaculture; the protection of wildlife, wildlife habitat and Rare Species habitat including rare plant species; and the protection and promotion of aesthetic values, recreation values, education values, and similar concerns. Section 1 is intended to use the authority of the City, under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule Statutes, to protect additional resource areas, independent of, and to provide more stringent protection by the Commission than that provided by M.G.L. Chapter 131, Section 40 (the "Wetlands Protection Act") and the regulations issued there under, 310 CMR 10.00 (the "Wetlands Protection Regulations").

**1.2 - Definitions**

The definition of certain words used in the interpretation and implementation of this Section 1 follow. Terms used herein and not defined below, or elsewhere in Section 1, or in the Rules and Regulations adopted by the Commission, shall be defined as provided in the Wetlands Protection Act and the Wetlands Protection Regulations.

**Alter/Alteration.** This term includes, without limitation, the following activities when undertaken to, upon, within or affecting Protected Resource Areas and associated Buffer Zones:

Removal, excavation, or dredging of soil, sand, gravel, or aggregate materials of any kind.

Changing of preexisting drainage characteristics, flushing characteristics, salinity distribution, pollution distribution, sedimentation patterns, flow patterns, or flood retention characteristics.

Drainage, or other disturbance of water level or water table.

Dumping, discharging, or filling with any material that may degrade water quality.

Placing of fill, or removal of material, that would change elevation.

Driving of piles, or placement, erection, or exterior repair of Structures.

Placing of obstructions or objects in water.

Destruction of plant life including cutting of trees.

Changing temperature, biochemical oxygen demand, or other physical, biological, or chemical characteristics of any waters.

Any activities, changes, or work that may cause or tend to contribute to pollution of any body of water or groundwater.

**Bank.** 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 flood level, whichever is higher.

**Buffer Zone.** Lands within 100 feet of any Protected Resource Area except floodplain land and Riverfront Area.

**Floodplain.** The land area that lies between a body of water and the floodline for that particular body of water.

**Floodline.** The limits of flooding from a particular body of water as defined by the National Flood Insurance Program as a Zone A (including Zone A subcategories) and Zone B.

**No Build Zone.** Lands within 30 feet of any No Disturbance Zone. Beginning at the upland edge of the No Disturbance Zone and extending for 30 feet into the upland.

**No Disturbance Zone.** Lands within 30 feet of any Protected Resource Area except floodplain and Riverfront Area.

**Protected Resource Area.** Any freshwater wetland as defined in M.G.L. Chapter 131, Section 40 and as determined by vegetation community, soil composition or hydrologic regime, bank, beach, marsh, wet meadow; bog or swamp lands bordering any creek, river, perennial stream, intermittent stream, reservoir, pond or lake; vernal pool; Riverfront Area; any floodplain; and any lands under or any lands subject to flooding or inundation by groundwater, surface water or storm flow that are determined by the Commission to fall within the Purpose and Intent of this Ordinance.

**Rare Species.** All vertebrate and invertebrate animal and plant species listed as endangered, threatened, or of special concern by the Massachusetts Division of Fisheries and Wildlife, or any successor organization, regardless of whether the site in which they occur has been previously identified by the Massachusetts Division of Fisheries and Wildlife.

**Resource Area Values.** As defined in the Wetlands Protection Act, M.G.L. Chapter 131, Section 40.

**Riverfront Area.** As defined in 310 CMR 10.00, as amended.

**Structure.** A combination of materials assembled at a fixed location to give support or shelter such as a building, house, barn, garage, or shed. The word "Structure" shall be construed, where the context requires, as though followed by the words "or part or parts thereof". However, in reference to the No Build Zone, "Structure" shall not include fences, retaining walls, decks, patios, gazebos, lawn furniture, children's toys such as sandboxes and swing-sets, rip-rapped areas, driveways, parking areas, or the like.

**Vernal Pool.** 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 which, at least in most years, holds water for a minimum of two continuous months during the spring and/or summer, contains at least 100 cubic feet of water at some time during most years, is free of adult predatory fish 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.

### **1.3 - Activities Requiring Approval**

Except as otherwise provided hereunder, no person shall Alter any Protected Resource Area or the Buffer Zone thereof (hereafter, "Regulated Activity"), without first having received and complied with a permit issued pursuant to Section 1. Such permit shall be in the form of an Order of Conditions issued by the Commission in accordance with its Rules and Regulations.

**1.4 - Exceptions**

The application and permit required by Section 1 shall not be required for the following activities, subject to the conditions provided below:

1.4.1 - Emergency Projects. Projects necessary for the protection of the health and safety of the public, provided that:

the work that is to be performed has been ordered to be so performed by an agency of the Commonwealth or a political subdivision thereof;

advance written notice has been given to the Commission prior to the commencement of the work or within 14 hours after commencement in the event of extreme emergency; and

the Commission or its agent certifies the work as an emergency project, or fails to act within 10 business days after receiving written notice thereof.

The work to be performed shall be limited as to the time and place certified by the Commission and for the limited purposes necessary to abate the emergency. Notwithstanding the above exception, within 11 days of commencement of an emergency project a permit application shall be filed with the Commission for review as provided in this Section 1. If any of the conditions specified above are not met, or if any of the conditions contained in any determination of the Commission regarding such project are not fulfilled, the Commission may, after notice and a public hearing, revoke or modify any determination or order it has issued regarding an emergency project, and/or may order restoration and mitigation measures to be performed.

1.4.2 - Public Service Structures and Facilities. Maintenance, repair or replacement, without substantial change or enlargement, of existing and lawfully located structures or facilities used in the service of the public and used to provide electric, gas, water, storm drainage, sewer, telephone or other telecommunication services to the public, provided that written notice has been given to the Commission prior to commencement of work and provided that the work conforms to the Rules and Regulations of the Commission, including any performance standards and design specifications.

1.4.3 - Public Ways. Maintenance and repair of existing public ways, provided that written notice has been given to the Commission prior to commencement of work, and provided that the work conforms to the Rules and Regulations of the Commission, including any applicable performance standards and design specifications.

**1.5 - Procedure and Fees**

1.5.1 - Applications. All applications to perform Regulated Activities shall be in the form of a written Request for Determination of Applicability ("RDA"), a Notice of Intent ("NOI"), or both, as applicable, and shall be filed with the Commission pursuant to its Rules and Regulations. Any person desiring to know whether or not a proposed activity or an area is subject to Section 1 may file a RDA with the Commission, including information and plans as are deemed necessary by the Commission. All permit applications (i.e., "Notices of Intent") shall include such information and plans as are deemed necessary by the Commission to describe the proposed Regulated Activities and their effects on Resource Area Values.

1.5.2 - Coordination with Other Boards. Any person filing a permit application or RDA with the Conservation Commission shall provide a copy thereof at the same time, by certified mail (return receipt requested) or hand delivery, to the mayor, planning board, zoning board of appeals, board of health, city engineer, and building inspector. 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. The applicant shall have the right to receive any comments and recommendations, and to respond to them at a hearing of the Commission, prior to final action.

1.5.3 - Filing Fees. The Rules and Regulations of the Commission adopted hereunder shall require the payment of a fee at the time of filing a RDA, NOI, permit application and Certificate of Compliance. Such fee shall be in addition to that required by the Wetlands Protection Act. The filing fees collected hereunder shall be deposited in a dedicated account, for use only for wetland protection activities, from which the Commission may withdraw funds without further appropriation.

1.5.4 - Consultant Fees. Upon receipt of an 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; and researching environmental or land use law.

If a municipal revolving fund has been established, pursuant to M.G.L. Ch. 44 §53E or a special act, for deposit and Commission use of filing and/or consultant fees described above, then such filing and/or consultant fees 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. (see note 1).

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. 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.

The maximum consultant fee charged to reimburse the Commission for reasonable costs and expenses shall be according to the following schedule:

**Project Cost (\$) - Maximum Fee (\$)**

Up to 100,000	-- 500
100,001 - 500,000	-- 1,500
500,001 - 1,000,000	-- 5,000
1,000,001 - 1,500,000	-- 7,500
1,500,001 - 1,000,000	-- 10,000

Each additional \$500,000 project cost increment (over \$1,000,000) may be charged not more than an additional \$1,500 maximum fee per increment.

The project cost means the estimated, entire cost of the project, including but not limited to, resource area delineation, building design and construction, site preparation, landscaping, and all site improvements. The consultant fee shall be paid pro rata for that portion of the project cost applicable to those activities within resource areas protected by this bylaw. The project shall not be segmented to avoid the consultant fee. The applicant shall submit estimated project costs at the Commission's request, but the lack of such estimated project costs shall not impact payment of the consultant fee.

1.5.5 - Waiver of Fees. The Commission may waive the filing fees, and costs and expenses for a RDA, NOI, or permit application filed by a government agency.

1.5.6 - Notice. The Rules and Regulations of the Commission adopted hereunder shall provide notice requirements for public hearings of the Commission and for applications to perform Regulated Activities, including the timing and contents of such notices.

1.5.7 - Hearing and Burden of Proof. The Commission shall commence the public hearing within 11 days from receipt of a completed RDA or NOI unless the applicant authorizes an extension in writing. In an appropriate case, the Commission may combine its hearing under this Section 1 with the hearing conducted under the Wetlands Protection Act and Wetlands Protection Regulations.

The public hearing may be continued upon the request of the Applicant, or upon vote of the Commission, until such time that the Commission is satisfied that it has received sufficient evidence concerning all issues raised during the hearing to enable it to render a decision upon the application. To receive the approval of the Commission to conduct a Regulated Activity the applicant must establish by a preponderance of the evidence submitted during the hearing that the proposed Regulated Activity and any proposed mitigation will not have a significant or cumulative adverse effect on Resource Area Values.

1.5.8 - Decisions. The Commission shall issue a written decision within 11 days of the close of the public hearing, unless an extension is authorized in writing by the applicant. In rendering its decision the Commission shall take into account the cumulative adverse effects of loss, degradation, isolation, and replication of Protected Resource Areas throughout the City and the watershed, resulting from past activities, permitted and exempt activities, and foreseeable future activities. The Commission may issue a permit to conduct the Regulated Activity with such conditions as it deems are necessary or desirable to insure that the proposed Regulated Activity will not have a significant or cumulative adverse effect on Resource Area Values. Alternatively, the Commission may deny a permit for the proposed Regulated Activity, stating in reasonable detail the reasons for its denial.

1.5.9 - Permits. No work proposed in any Notice of Intent shall be undertaken until the Order of Conditions issued by the Commission with respect to such work has been recorded in the registry of deeds or land court, and until the permit holder submits evidence of such recording to the Commission. A permit shall expire three years from the date of issuance, however, where recurring or continuous maintenance work is required, the Commission may issue a permit expiring five years from the date of issuance. Any permit may be renewed for periods of up to three years, provided that a request for renewal of the permit is received in writing by the Commission at least thirty (30) days prior to its expiration, and further provided that all requirements provided in the Rules and Regulations of the Commission are met. Notwithstanding the foregoing, the 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 including successors. For good cause, the Commission may revoke or modify a permit by following the procedure set forth above in connection of the initial issuance of such permit.

## **1.6 - Policies and Conditions**

1.6.1 - Wetlands Replication. To prevent wetlands loss, the Commission shall require applicants to avoid wetlands Alteration wherever feasible, to minimize wetlands Alteration where the Commission determines that Alteration is necessary; and, where Alteration is unavoidable, the Commission shall require mitigation in the form of replication of not less than the amount of wetlands permitted to be Altered and not more than twice such amount; said amount of replication to be determined by the Commission in accordance with its Rules and Regulations. The construction of replication shall be designed and monitored by a registered engineer or a professional wetlands scientist, and adequate security shall be provided, in accordance with the provisions of Section 1.8, to insure the proper construction of replication.

1.6.2 - No Disturbance and No Build Zones. No Alteration shall occur within a No Disturbance Zone, unless otherwise provided in a permit issued under Section 1. Lands within a No Build Zone may be cleared of vegetation to the extent necessary to construct a permitted Structure located outside of such No Build Zone and the adjacent No Disturbance Zone; provided however that once such Structure is completed, no further Alteration, other than the growing of vegetation, shall occur in the No Build Zone. The Commission may require, as a condition of a permit issued hereunder, that deeds conveying any portion of the previously cleared No Build Zone contain a restriction running in perpetuity preventing any further Alteration in such No Build Zone upon completion of such nearby construction.

1.6.3 - Vernal Pools. No Alteration shall occur within the 100-foot Buffer Zone of a Vernal Pool except as provided in Section 1.13.6. The Commission shall presume that all areas meeting the definition of "vernal pools" under Section 1.1 of this ordinance, including the adjacent area, perform essential habitat functions. This presumption may be overcome only by the presentation of credible evidence which, in the judgment 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.

1.6.4 - Wildlife Habitat. 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. The work shall be performed by an individual who at least meets the qualifications set out in the wildlife habitat section of the Wetlands Protection Act Regulations (310 CMR 10.60).

## **1.7 - Rules and Regulations**

After public notice and public hearing, the Commission shall adopt rules and regulations to carry out the purpose and intent of Section 1 (the "Rules and Regulations"). The Rules and Regulations shall include procedures to conduct hearings, issue, deny, revoke and/or modify permits and to appeal, and shall also provide guidance generally to persons seeking to conduct a Regulated Activity. Such Rules and Regulations may also provide, as the Commission deems necessary, additional definitions and procedures not inconsistent with Section 1 and a schedule of fees to be charged, which may be based on estimated project cost including, but not limited to, building construction, site preparation, landscaping, and all site improvements. Such Rules and Regulations shall become effective when voted by the Commission, approved by the Gardner City Council and filed with the City Clerk. Failure by the Commission to promulgate such Rules and Regulations, or a final decision by a court which cannot be appealed of the invalidity of any part of such Rules and Regulations, shall not act to suspend or invalidate the effect of Section 1 other than in accordance with such decision.

## **1.8 - Security**

The Commission may require, in addition to any security required by any other municipal or state agency, that the performance and observance of the conditions imposed under a permit issued under Section 1, including conditions requiring mitigation work, be secured wholly or in part by one or more of the methods described below, or combinations thereof:

1.8.1 - Surety. By a proper bond or deposit of money or other undertaking of financial responsibility acceptable to the City Treasurer- 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.

1.8.2 - Restrictions. By a conservation restriction, easement, or other covenant executed and duly recorded by the owner of record, running with the land to the benefit of the City whereby the permit conditions shall be performed and observed by all owners, including successors.

**1.9 - Enforcement**

Upon receipt of a RDA or NOI, the Commission or its agents shall have authority to enter upon privately owned land for the purpose of performing their duties under Section 1 and may make or cause to be made such examinations, surveys, or sampling as the Commission deems necessary. The Commission shall have the authority to enforce Section 1 and its Rules and Regulations, and the Commission, any member thereof, or its agent, may issue citations under the non-criminal disposition procedure set forth in M.G. L. Ch. 40 Sect 11D, which has been adopted by the Gardner City Council, and by civil and criminal court actions. Any person who violates provisions of this Wetlands Protection Ordinance 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. Any person who violates provision of Section 1 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.

**1.10 - Appeals**

Any decision of the Commission may be reviewed in the Superior Court in accordance with M.G.L. Ch 149, Sect 4.

**1.11 - Severability**

The invalidity of any section or provision of Section 1 shall not invalidate any other section or provision thereof, nor shall it invalidate a permit or determination, which previously has been issued. In the event any section or provision shall nevertheless remain valid and in effect to the fullest possible extent under the law.

**1.12 - Transition**

The provisions of this Section 1 shall not apply to:

That work for which a Notice of Intent has been filed with, or an Order of Conditions has been obtained from, the Commission at the time of the effective date of this Section 1, but such work has not yet been commenced or completed, so long as such Order of Conditions issued for such work remains valid, unexpired and unmodified; and

The initial Notice of Intent filing or permit application for construction on an individual lot that is part of the development for which an Order of Conditions has been obtained from the Commission at the time of the effective date of this Section 1 but has not yet been commenced or completed, so long as the Order of Conditions remains valid, unexpired and unmodified, and provided further that the proposed work is, in the determination of the Commission, consistent with and not an expansion of the previously approved development.

**1.13 - Nonconforming Uses in the Areas Which May Be Regulated by the Commission Under Section 1.**

1.13.1 - Continuation. The lawful use of any Structure or land in the areas which may be regulated by the Commission under Section 1 existing at the time of the enactment or subsequent amendment of Section 1 may be continued, although such Structure or use did not conform with the provisions of Section 1 as adopted or amended.

1.13.2 - Extension. No increase in the extent of the nonconforming use of a Structure or land in areas which may be regulated by the Commission under Section 1 may be made beyond the limits of the property owned at the time of enactment or subsequent amendment of Section 1, without applying for and receiving an Order of Conditions to permit such increase. Pre-existing, nonconforming Structures or uses in the areas which may be regulated by the Commission under Section 1, may be extended or altered, provided, that no such extension or Alteration shall be permitted unless there is a finding by the Commission that such extension or Alteration is not substantially more detrimental than the existing nonconforming use to Protected Resource Areas.

1.13.3 - Abandonment. A nonconforming use in the areas which may be regulated by the Commission under Section 1 that has been abandoned or not used for a period of two years shall not be re-established and any future use shall conform with Section 1.

1.13.4 - Changes. Once changed to a conforming use in the areas which may be regulated by the Commission under Section 1, no Structure or land shall be permitted to revert to a nonconforming use.

1.13.5 - No Disturbance and No Build Zones. Where a prior existing Structure protrudes into, or a prior existing Alteration exists in, a No Disturbance Zone or No Build Zone, the Commission may permit the extension of such non-conforming Structure into, or further Alteration in, such zones, in accordance with its Rules and Regulations.

1.13.6 - Vernal Pools. Where a prior existing Structure protrudes into, or a prior existing Alteration exists within the 100-foot Buffer Zone of a Vernal Pool, the Commission may permit the extension of such non-conforming Structure into, or further Alteration within the 100-foot Buffer Zone of a Vernal Pool, in accordance with its Rules and Regulations.

#### **1.14 – Variances**

The Commission may, in its discretion, grant variances from the specific requirements of these regulations pursuant to this section. The Commission may grant a variance from these regulations when an overriding public interest is demonstrated or when strict enforcement makes an otherwise buildable lot unbuildable. The intent of this section is to ensure that the Commission may permit activities within the buffer zone when the applicant has demonstrated to the Commission's satisfaction that the proposed work has been designed to minimize impacts to the buffer zone. In all cases, the burden of proof shall be on the applicant to demonstrate maximum feasible compliance with the requirements of this Ordinance and regulations. The Commission may require mitigation to offset adverse impacts to buffer zones and resource areas protected by this Ordinance.

Ordinance No. 1401 passed March 1, 2004