



TOWN OF FAIRHAVEN, MASSACHUSETTS

CONSERVATION COMMISSION

Town Hall · 40 Center Street · Fairhaven, MA 02719

Buffer Zone Regulation

This regulation is promulgated by the Fairhaven Conservation Commission pursuant to Chapter 192, §7 of the code of the Town of Fairhaven.

1.0 Preamble

- 1.1 The purpose of this regulation is to establish performance standards applicable to the buffer zone adjoining wetland resource areas specific to the Fairhaven Wetlands Bylaw (Chapter 192 of the Code of the Town of Fairhaven), and which are not provided for by state regulation.
- 1.2 The Town of Fairhaven considers the area within 100 feet of a resource area (commonly, and in this regulations, called “the buffer zone”) to be an additional protected resource. Floodplains and lands within 100 feet of other resource areas are presumed significant to the protection of functions and characteristics of the resource areas subject to the town bylaw because activities undertaken in close proximity have a high likelihood of adverse impact upon them, 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, damage to or reduced water quality, and damage or loss of wildlife habitat. A growing body of research evidence suggests that even “no disturbance” areas reaching beyond 25 feet from resource areas may be insufficient to protect many important characteristics and values. Problems of nutrient runoff, water pollution, siltation, erosion, vegetation change, and habitat destruction are greatly exacerbated by activities within 100 feet of resource areas. Thus, work and activity within the 100-foot buffer zone shall be avoided and discouraged and reasonable alternatives pursued. The applicant may site all construction activities, including grading, beyond the 100-foot buffer zone resource area and avoid a public hearing and the permitting process through the Commission.
- 1.3 Currently as established by precedent, the Commission has instituted a no disturb buffer zone that extends 25 feet from the defined/delineated edge of the resource area. This regulation will codify this requirement. Extensive work in this zone, particularly clearing of natural vegetation and soil disturbance, is likely to alter the physical characteristics of resource areas by changing their soil composition, topography, hydrology, temperature, and the amount of light received. Soil and water chemistry within resource areas may be adversely affected by work in the buffer zone. As a result of buffer zone alterations, biological conditions in adjacent resource areas may include changes in plant community composition and structure, invertebrate and vertebrate biomass and species composition, and nutrient cycling. The effects from work in the buffer zone will most likely result in the disruption and

erosion of soil, loss of shading, reduction in nutrient inputs, and changes in litter and soil composition that filters runoff and serves to attenuate pollutants and sustain wildlife habitat within resource areas. For these stated reasons, the Commission is codifying the requirement not to disturb the 0-25 foot buffer zone around the defined/delineated resource area.

- 1.4 This regulation will also characterize and provide guidance as to the type of projects that may be allowed in the zone that extends 25-50 feet from the defined/delineated resource area (“25-50 foot buffer zone”), as well as in the zone that extends 50-100 feet from the defined/delineated resource area (“50-100 foot buffer zone”).
- 1.5 The science supporting the protection of buffer zones is documented in the Massachusetts Association of Conservation Commissions Buffer Zone Guidebook. The Commission and applicants shall utilize this guidebook in evaluating buffer zone projects.

2.0 Application

- 2.1 Any person in Fairhaven who proposes an activity that may alter the area within the 100-foot buffer zone is required to submit a Notice of Intent or other applicable application such as a Request for Determination of Applicability to the Fairhaven Conservation Commission (the Commission).

3.0 Allowed Activities

- 3.1 Minor Buffer Zone Activities (hereinafter “MBZA”) shall generally be allowed in the buffer zone, subject to the provisions of sections 4.0 through 6.0 of this regulation, and provided the following:
 - 3.1.1 The activity will occur exclusively within a previously disturbed or clearly delineated buffer zone; and
 - 3.1.2 The alteration is less than 1,000 square feet or 5% of the buffer zone on the lot, whichever is less; and
 - 3.1.3 At a minimum, a 25-foot-wide area is preserved between the activity and the resource area boundary; and
 - 3.1.4 The buffer zone does not contain estimated wildlife habitat which is indicated on the most recent Estimated Habitat Map of State Listed Rare and Endangered Species; and
 - 3.1.5 Erosion and sedimentation controls, if required, are provided at the limit of work to protect the resource areas; and
 - 3.1.6 Shall constitute activities within the buffer zone that would be eligible for a Negative Determination of Applicability with conditions.
- 3.2 The Commission may determine that MBZA will not be allowed due to unusual circumstances such as steep slopes, the potential for negative impacts over time, or because the proposed project would require oversight through continuing conditions. The Commission may waive any or all of the above requirements if they find that there is an emergency situation. In order for the site to be declared an emergency, a vote of the Commission shall be required.

4.0 0 to 25 Foot Buffer Zone Resource Area

- 4.1 An applicant shall demonstrate that no alteration is proposed within the 0-25 foot buffer zone resource area.
- 4.2 The Commission may, in its discretion, permit a MBZA in a location closer than 25 feet to the resource area if, and only if, the proposed activity occurs exclusively within a previously disturbed area and is located no closer to the resource area than existing structures, activities, or disturbances. However, it is encouraged to increase the width of the buffer zone where possible.

5.0 25 to 50 Foot Buffer Zone Resource Area

- 5.1 Any applicant proposing a project within the 25-50 foot buffer zone resource area shall indicate that there are no structures including, but not limited to, concrete, stone, or other impervious foundations and/or slabs for construction purposes that would significantly increase runoff.
- 5.2 Alteration of the 25-50 foot buffer zone resource area is limited to grading, tree clearing, stormwater management system components, lawns, gardens, and other low-impact uses as determined by the Commission or otherwise approved by the Commission by the variance procedures set forth in Section 8.0 of this regulation. Footings for building structures, such as a deck, as opposed to slabs or foundations, shall be used when technically feasible.
- 5.3 The Commission may condition the applicant to use Best Management Practices (BMPs) for stormwater management consistent with the best available data, most up-to-date local and state stormwater regulations, and taking into account impacts from climate change. Stormwater management systems or individual components, including drainage piping and construction of detention/retention ponds, shall be allowed by the Commission based on an alternative analysis and review of design and space limitations as indicated in the final approved plans.
- 5.4 Previously disturbed areas: When there is a pre-existing disturbance (disturbed as part of a previously recorded Certificate of Compliance or Determination of Applicability or disturbed prior to the enactment of the Massachusetts Wetlands Protection Act (MGL Ch. 131 §40) and the Fairhaven Wetlands Bylaw (Chapter 192)), and the work proposed is entirely within this previously disturbed area, an applicant may propose impervious surfaces or other uses, such as pools, buildings, porches, and sheds within the 25-50 foot buffer zone resource area. The Commission shall evaluate the proposed uses based on the demonstration by the applicant that the functions, characteristics, and values of the resource area will not be adversely impacted.

6.0 50 to 100 Foot Buffer Zone Resource Area

- 6.1 Alterations including structures are allowed in the 50-100 foot buffer zone resource area. The Commission may require additional mitigation offsets when the slope within the buffer zone is steeper than 10%. Additionally, mitigation offsets may be required by the Commission when the applicant proposes that more than 30% of the 50-100 foot buffer zone resource area is proposed to be impervious surface.

- 6.2 Mitigation offsets may include, but are not limited to, plantings, conversion of impervious surfaces to pervious surfaces, and other practices consistent with best available data.

7.0 Vernal Pool and Its Associated 100-Foot Buffer Zone Resource Area

7.1 Findings

- 7.1.1 Vernal pools and their associated 100-foot no-disturbance zones are likely to be significant to the protection of wildlife habitat and rare plant and animal habitat. Vernal pools constitute a unique and increasingly rare type of wetland that is inhabited by many species of wildlife, some of which are completely dependent on vernal pools and their associated habitat for survival. Areas in the immediate vicinity of vernal pools (i.e., the 100-foot buffer zone) provide these species with important non-breeding habitat functions, such as migratory pathways, feeding, shelter, and over-wintering sites. Many other species utilize vernal pools and their associated 100-foot buffer zone resource area for breeding and non-breeding functions, although such species are not limited to this type of wetland. The protection of vernal pools and their associated 100-foot buffer zone resource area is essential for the survival of wildlife species that depend on these unique and threatened resource areas. Vernal pools need not be state-certified in order to be protected under the Fairhaven Wetlands Bylaw (Chapter 192) or this regulation.
- 7.1.2 The extreme edges of vernal pool habitat represent one of the most ecologically valuable portions of these habitats. Shallow water at the edges of a pool generally are the first to thaw in the spring. This provides early access to the pool for the earliest breeding species. The shallow water zones also tend to be significantly warmer than the deeper portions of a vernal pool throughout the spring. Egg masses of early breeding amphibians benefit from the warmer water temperatures at the pool edges that promote rapid egg development.

7.2 Definition, Critical Characteristics, and Boundary

- 7.2.1 Vernal pools exhibit a tremendous variation in physical, geographic, hydrologic and vegetative conditions, and therefore, for the purposes of these Regulations, these conditions are not considered reliable criteria for their identification. A vernal pool is a temporary freshwater body, which, in most years holds water for a minimum of two (2) months and is free of established, reproducing fish populations, and is protected by this regulation if it meets any of the following criteria:
 - 7.2.1.1 The vernal pool contains evidence of the presence of any one (1) of the following obligate indicator species: Spotted Salamander, Blue-Spotted Salamander, Jefferson Salamander, Marbled Salamander, Wood Frog or Fairy Shrimp, or;
 - 7.2.1.2 In the absence of any obligate indicator species, the Vernal Pool contains evidence of two (2) of any of the following facultative indicator species: Spring Peeper, American Toad, Green Frog,

Pickerel Frog, Gray Tree Frog, Four-Toed Salamander, Spotted Turtle, Caddisfly larvae or cases of Caddisfly larvae, Dragonfly or Damselfly larvae or shed skins (exuvia) of Dragonfly or Damselfly larvae, adults, juveniles or shells of either Fingernail Clams or Amphibious, air-breathing Snails.

7.2.2 The boundary of vernal pool is the lower of:

7.2.2.1 the maximum elevation of a topographic depression that holds water for a minimum of two (2) continuous months each year; or

7.2.2.2 the maximum observed or recorded water level in a topographic depression.

7.2.3 For the purpose of this regulation, the boundary of a vernal pool as determined by the Commission may differ from the boundary as determined for the purpose of state or federal protection, and may differ from the boundary as established when a vernal pool certification number is issued by the Commonwealth.

7.3 Timing of Evidence Collection: Many of the indicators of Vernal Pool habitat are seasonal. For example, certain salamander egg clusters are found only between late March and late May; Wood Frog chorusing occurs only between late March and late May, and then only at night.

Consequently, failure to find evidence of breeding must be tied explicitly to those periods during which the evidence is most likely to be available. Accordingly, in the case of challenges to the presumption of Vernal Pool habitat, the Commission may require that the determination be postponed until the appropriate time period consistent with the evidence being presented. The Commission may also require its own site visit(s) as necessary to confirm the evidence.

7.4 Presumptions of Significance for 100-foot Buffer Zone to a Vernal Pool: Where a proposed activity involves the removing, filling, dredging, or altering of a Vernal Pool or its 100-foot buffer zone resource area, the Commission shall presume that the Vernal Pool and its 100-foot buffer zone resource area are significant to the protection of wildlife habitat and rare plant and animal habitat.

7.5 Performance Standards for 100-foot Buffer Zone Resource area: Unless the presumption set forth in Section 7.4 of this regulation is overcome, the following standards shall apply to Vernal Pools and their 100-foot buffer zone resource area:

7.5.1 100-foot Buffer Zone Resource Area: No activity shall be permitted within 100 feet of the delineated edge of a Vernal Pool, or in the case of a wetland resource area that encompasses the pool, within 100 feet of the delineated edge of said wetland resource area. Prohibited activities include, but are not limited to, grading, landscaping, vegetation control, pruning, cutting, filling, excavation, roadway construction and/or driveway construction.

7.5.2 100-foot Buffer Zone to Vernal Pool Demarcation: To maintain the perpetual integrity of the 100-foot Buffer Zone Resource Area and to ensure that there will be no encroachments into this Area by the applicant or future owners of the subject property, the Commission may require the 100-foot

Buffer Zone Resource Area to be marked on the ground, at the applicant's expense, with permanent markers. These markers shall be made of weather resistant material (e.g. granite, concrete, other), and the Commission shall determine their number, location and size. The Commission may require the maintenance of such markers in any certificate of compliance issued for the project.

8.0 Variance Procedure

- 8.1 The Commission may grant a variance from this regulation upon a showing by the applicant that any proposed activity, or its natural and consequential impacts and effects, will not have any adverse effect upon any of the interests protected in Chapter 192 of the Code of the Town of Fairhaven (Wetlands). It shall be the responsibility of the applicant to provide the Commission, in writing, with any and all information, which the Commission may request, in order to enable the Commission to ascertain such adverse effects. The failure of the applicant to furnish any information, which has been requested, shall result in the denial of a request for a variance pursuant to the applicable subsection of this regulation.
- 8.2 The Commission may grant a variance from this regulation when it is necessary to avoid so restricting the use of the property as to constitute an unconstitutional taking without compensation. If the Commission receives an application for a variance pursuant to an applicable subsection of this regulation, the Commission may request an opinion from Town Counsel as to whether the application of this regulation to a particular project will result in such a taking without compensation.
- 8.3 Variance process: To request a variance, the applicant shall submit a variance request in writing at the time of the application for the Notice of Intent or Request for Determination of Applicability. The request shall explain why the variance is needed and shall describe in detail how the project can be completed without significant adverse impacts on the functions, characteristics, and values of the resource areas. Such detail must include, but is not limited to, an alternatives analysis.