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CITY OF NEWBURYPORT WETLANDS ORDINANCE

**Newburyport Conservation Commission
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SECTION I PURPOSE

A. Purpose of the Massachusetts Wetlands Protection Act

The State Wetlands Protect Act, G.L. c. 131, §40, is intended to further the following purposes:

1. protection of groundwater supply;
2. flood control;
3. storm damage prevention;
4. prevention of pollution;
5. protection of land containing shellfish;
6. protection of fisheries; and
7. protection of wildlife habitat.

B. Special Purpose of this Wetlands Ordinance

This Ordinance is intended to further the interests set forth above and to provide enhanced protection to the Plum Island Barrier Beach for the following purposes.

1. To minimize environmental damage, loss of life, and destruction of property inevitably resulting from storms flooding and erosion;
2. To minimize public health threats resulting from storm damage;
3. To prevent loss or diminution of the beneficial functions of storm and flood damage prevention or reduction and pollution prevention provided by wetlands, beaches, dunes, barrier beaches, and coastal banks;
4. To maintain vegetative buffers to wetlands and waterbodies so as to reduce and/or eliminate runoff and other nonpoint discharges of pollutants to protect public health and preserve environmental resources; and
5. To maintain vegetative cover so that the integrity and stability of coastal dunes and banks are maintained and so that the coastal dunes and banks can fulfill their functions and promote the interests identified in Section IA.

SECTION II JURISDICTION

Except as permitted in writing by the Commission or as provided in this Ordinance, no person shall engage in the following activities ("activities"): removal, filling, dredging, discharging into, building upon, or otherwise altering or degrading any barrier beach, as defined in 310 CMR 10.00 *et seq.*, as the same may be amended.

This Ordinance is intended to utilize the City's Home Rule authority to provide additional protection to the barrier beach to further the purposes identified in Section IB above and to provide additional performance standards that are more

specific and more stringent than those set forth in the State Wetlands Protection Act, G.L. c. 131, §40 and the accompanying regulations, 310 CMR 10.00 *et seq.*

Written application shall be filed with the Commission to perform activities on the portion of the barrier beach located within the City of Newburyport and no activities affecting the portion of the Plum Island Barrier Beach located within the City of Newburyport shall commence without the applying for, obtaining and complying with an Order of Conditions or Determination of Applicability in accordance with the performance standards set forth in this Ordinance. Except as expressly permitted pursuant to a Variance granted in accordance with Section IV, the Commission shall issue Orders of Conditions or Determinations of Applicability in accordance with the performance standards set forth in this Ordinance.

SECTION III SPECIFIC PERFORMANCE STANDARDS FOR THE BARRIER BEACH

III-A. No development or redevelopment shall be permitted within a FEMA V-Zone or AO-Zone. Notwithstanding the foregoing, structures damaged or destroyed from fire, storm, or similar disaster may be redeveloped/repared only in accordance with current local, state and federal regulatory standards when damage to or loss of the structure is equal to or greater than 50% of the market value of the building. When damage to or loss of the structure is less than 50% of the market value of the building, redevelopment/repairs may be allowed to return the structure to pre-damaged conditions. In all instances, reconstruction, renovation or repairs to damaged structures may be authorized as stated herein, provided that there is no increase in floor area.

III-B. All new buildings or substantial improvements to existing buildings shall be built on open pilings and comply with FEMA National Flood Insurance Regulations and State Building Code Regulations for elevation and flood proofing. All development and redevelopment shall comply with G.L. c. 131, sec. 40, 310 CMR 10.00 and Section 744 of the Massachusetts State Building Code Design Requirements for Floodplain and Coastal High Hazard Areas.

III-C. For the purposes of this Ordinance, the term “substantial improvement” shall mean an improvement that increases the market value of the building by an amount equal to or greater than 50% or an improvement that increases the square footage by an amount equal to or greater than 25%.

III-D. All new buildings, replacements, substantial improvements or expanded footprints less than 25% in square footage shall have their first floor built at least two feet above base flood elevation or the highest existing ground elevation whichever is higher.

III-E. Electrical, heating, ventilation, plumbing and air conditioning and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

III-F. Development or redevelopment on or within 200 feet landward of the top of a coastal bank or dune shall have no adverse impact on the height, stability or function of the bank or dune to fulfill the purposes set forth in Section IB.

III-G. In areas where there are coastal banks or primary or frontal dunes, all new buildings and structures shall be set back from the beach dune interface at a distance equal to thirty times the average yearly historical erosion as shown by the most current CZM shoreline change map.

III-H. No activity shall increase the elevation or velocity of flows in a floodplain.

III-I. Within the FEMA V Zone, A Zone, or AO Zone or their equivalent, new or reconstructed structures or development on the barrier beach that alters vegetation, interrupts sediment supply and/or changes the form or volume of a dune or beach must comply with the specific performance standards in this Ordinance and in the regulations promulgated pursuant hereto.

III.J. In all other areas of the Plum Island Barrier Beach outside of the V-Zone and AO-Zone, all new Buildings shall be built on open pilings and shall comply with FEMA National Flood Insurance Regulations and State Building Code Regulations for elevation and flood proofing. All existing Buildings with Substantial Improvements, and all horizontal expansions of the existing footprint, shall be built on open pilings and shall comply with FEMA National Flood Insurance Regulations and State Building Code Regulations for elevation and flood proofing. If a Licensed Engineer certifies that an existing portion of the solid foundation will not require modifications to support the proposed building (other than new pilings exterior to the existing footprint), the existing portion of the solid foundation may remain.

Notwithstanding the previous sentence, the existing solid foundation of a *Building* shall be replaced with pilings, if, 50% or more of the exterior walls have been removed, or are proposed to be removed, and a new roof will be construction, or is proposed to be constructed. (rev. of 9/12/05)

SECTION IV VARIANCE

IV-A. The Conservation Commission may grant a variance from these special requirements when it finds after opportunity for public hearing that:

1. there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with this Ordinance; and
2. mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the wetland resource areas located on the barrier beach; and

3. the variance is necessary to accommodate an overriding community public interest or to avoid a decision that so restricts the use of the property as to constitute an unconstitutional taking without compensation.

IV-B. A request for a variance shall be made in writing and shall include, at a minimum the following information:

1. a description of alternatives explored that would allow the project to proceed in compliance with this Ordinance and an explanation of why each is unreasonable; and
2. a description of the mitigating measures to be used to contribute to the protection of the wetland resources located on the barrier beach;
3. evidence that an overriding public interest is associated with the project which justifies waiver of these requirements or evidence that the decision on this permit application so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

SECTION V APPLICATIONS

All applications to perform activities in the City's resource areas shall be either in the form of a Request for Determination, a Notice of Intent, or an Abbreviated Notice of Resource Area Delineation. The Commission in an appropriate case may accept as the application and plans under this Ordinance the application and plans (*i.e.*, Notice of Intent, Request for Determination of Applicability) under the Wetlands Protection Act, G.L. c. 131, § 40. Such applications shall contain data and plans as specified in the Commission's regulations, and shall be submitted in complete written form to the Commission. The Commission or its designee shall be authorized to make determinations of completeness for applications submitted to the Commission and reject those applications that do not meet the minimum submittal requirements of this Ordinance. In order to provide sufficient review time, the Commission may continue a public hearing or public meeting if new information is submitted by the applicant, or applicant's agent, less than seven (7) business days before the scheduled public hearing or public meeting.

The applicable forms must be signed by the applicant or applicant's agent where required. The Commission may require further information by regulation, guideline, or as otherwise deemed necessary for review of the proposed Application by the Commission. In order to comply with the provisions of this Ordinance, each application must be complete as filed, and must comply with the rules set forth herein and Commission's regulations.

SECTION VI HEARINGS

VI-A. Commencement:

The Commission shall commence the public hearing or meeting within 21 days from receipt of a completed application unless the applicant authorizes an extension in writing.

VI-B. Combination with State Law Hearing:

The Commission, in its discretion, may hear any oral presentation under this Ordinance at the same public hearing or public meeting required to be held under the provisions of the Wetlands Protection Act, G.L. c. 131, § 40. Notice of the time and place of such hearing(s) shall be given as required below.

VI-C. Notice:

For a public hearing, written notice of the time and place of the hearing shall be given at the applicant's expense, not less than seven (7) calendar days prior to the public hearing, by publication in a newspaper of general circulation in Newburyport, and by hand delivering or mailing, by certified mail return receipt requested, at the mailing addresses shown on the most recent applicable tax list of the assessors, a copy of such notice to all abutters within one hundred feet of the property line of the land on which the work is proposed, including, but not limited to, owners of land directly opposite said proposed work on any public or private street or way, and in another municipality or across a body of water. Proof of such notification, with a copy of the notice mailed or delivered, shall be filed with the Commission. All publications and notices shall contain the name of the applicant, a description of the area where the activity is proposed by street-address, if any, or other adequate identification of the location of the area or premises which is the subject of the notice, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of the action or relief requested, if any. Public notice requirements for continued public hearings under this Ordinance shall be the same as the notification requirements set forth in 310 CMR 10.05(5)(b)3.

VI-D. Proof:

The applicant shall have the burden of proving by a preponderance of credible evidence that the activity proposed in the Request for Determination of Applicability or the Notice of Intent will not have a significant or cumulatively detrimental effect upon the interests and values protected by this Ordinance. Failure to provide to the Commission adequate evidence for it to determine that the proposed activity will not cause such impacts shall be sufficient cause for the Commission to deny permission or to grant permission with such

conditions as it deems reasonable, necessary, or desirable to carry out the purposes of this Ordinance; or to postpone or continue the hearing or public meeting to another date certain to enable the applicant and others to present additional evidence, upon such terms and conditions as deemed by the Commission to be reasonable.

Due consideration shall be given to possible effects of the proposal on all interests and values protected under this Ordinance.

VI-E. Continuances:

The Commission may continue a public hearing or public meeting in the following situations:

1. With the consent of the applicant, to an agreed-upon date, which shall be announced at the hearing; or
2. Without the consent of the applicant, to a specific date within 21 days for the reasons stated at the hearing, including but not limited to receipt of additional information from the applicant or others.

VI-F. Investigations:

The Commission, its agents, officers, and employees, may enter upon privately owned land for the purpose of carrying out its duties under this Ordinance and may make or cause to be made such examination or survey as deemed necessary, subject to the Constitutions of both the United States and the Commonwealth.

SECTION VII ORDERS AND DECISIONS

VII-A. Orders and Decisions:

If the Commission determines that the proposed activity does not require the imposition of conditions to preserve and protect the interests of this Ordinance, the applicant shall be so notified in writing.

If, after the hearing, the Commission determines that the proposed activity is significant to one or more interests and values of this Ordinance, the Commission shall vote to issue written Orders of Conditions within 21 days of the close of the public hearing. The Order of Conditions may describe such conditions, safeguards, and limitations on time and use upon such activity in the event that the Commission finds that necessary to protect those interests and values. The Commission may require the Applicant to hire an appropriate

technical expert to monitor the project to ensure compliance with the order of Conditions.

The Commission may choose to issue an Order of Conditions denying a project if it finds that the interests and values of this Ordinance cannot be preserved and protected by the imposition of such conditions, safeguards, or limitations. The Commission shall state the reasons for such denial in the Order of Conditions.

VII-B. Security to Assure Performance:

The Commission may, as a part of its Order of Conditions, require that, in addition to any security required by any other City or State Board, Commission, agency, or officer, the performance and observance of the conditions, safeguards, and limitations imposed under this Ordinance on the applicant and owner be secured by one, or both, of the following methods:

1. Deposit:

By the deposit of money, sufficient to complete the work as proposed, to secure performance of the conditions and observance of the safeguards of such Order of Conditions. Such security, if filed or deposited, shall be approved as to form and manner of execution by City Solicitor or the City Treasurer.

2. Land Restrictions(s):

By an executed and properly recorded (or registered, in the case of registered land) conservation restriction, easement, or other covenant running with the land. This method shall be used only with the consent of the applicant.

VII-C. Duration of Orders:

All Orders of Conditions shall expire three (3) years after the date of issuance. The Commission may extend an Order for one (1) or more periods of up to three (3) years each, upon the request of the applicant. The request for an extension of an Order of Conditions shall be made to the Commission at least 30 days prior to expiration of the Order of Conditions. The Commission may grant only two (2) extensions for an individual Order of Conditions.

No activity governed by an Order of Conditions shall be performed unless and until all permits, approvals, and variances required by the Ordinance of the

City shall have been obtained, such Order of Conditions or notification shall have been recorded or registered at the Southern Essex District Registry of Deeds or in the Southern Essex District of the Land Court Department, and all applicable appeal periods have expired. The Commission shall have the right to record or register its Order of Conditions with said Registry or Registry District. In the event that an Order of Conditions issued pursuant to this Ordinance is identical to a final Order of Conditions issued pursuant to the provisions of the Act, only one such order need be recorded or registered.

VII-D. Modifications, Amendments, Revocations:

The Commission shall have the power (on its own motion or upon the petition of the applicant, or any person interested) to modify, amend, or revoke an Order of Conditions. In revoking an Order of Conditions, the Commission shall officially notify the interested parties through certified mail and hold a public hearing within 21 days of the notification date. A modification is a minor or insignificant change that will not result in an adverse impact to wetland resource areas and/or interests protected by this Ordinance. An amendment is a change of significant magnitude that will require the imposition of additional conditions to ensure adequate protection of wetland resource areas and/or interests protected by this Ordinance. In the case of an amendment to an Order of Conditions, the Commission shall have the discretion to decide if a public hearing is warranted. This decision shall be based on the potential impact of the proposed work and its effect on the ability of the identified wetland resource areas to provide those interests as defined under the Act and Ordinance. If the Commission determines that a public hearing is warranted, the Applicant shall comply with the publication and abutter notification requirements as required for new filings. No public hearing is required for a modification to an Order of Conditions. Written notification to the applicant by certified mail is required in all cases where the Commission initiates a modification, amendment, or revocation of an Order of Conditions. The Applicant shall record modified and amended Orders of Conditions prior to the commencement of authorized work under the Order.

SECTION VIII CERTIFICATES OF COMPLIANCE

The Commission or its designee shall, upon receiving a written request, inspect the resource areas where the activity governed by an Order of Conditions was carried out and issue a Certificate of Compliance (or Partial Certificate of Compliance) to the owner of the property, applicant, or applicant's representative, in a form suitable for recording or registering, if it shall determine that all of the activity(ies), or portions thereof, limited thereby have been completed in accord with said Order. If the Order contains conditions that continue past the completion of the work, such

as maintenance or monitoring, the Certificate of Compliance shall specify which of the conditions shall continue. The Applicant shall record Certificates of Compliance.

If the Commission determines that the work was not performed in compliance with the Order, it may refuse to issue a Certificate of Compliance. The written refusal shall be issued within 21 days of the receipt of a request for a Certificate of Compliance and shall specify the reasons for denial.

The Certificate of Compliance shall be recorded or registered at the Southern Essex District Registry of Deeds or in the Southern Essex District of the Land Court Department. Certification of recording shall be sent to the Commission.

SECTION IX RESPONSIBILITY FOR COMPLIANCE

After the recording of a Notice of Violation or Order, any person who purchases, inherits, or otherwise acquires real estate upon which work has been done in violation of the provisions of this Ordinance or in violation of any Order issued under the Ordinance shall forthwith comply with any such Order or restore such land to its condition prior to any such violation; provided, however, that no action, civil or criminal, shall be brought against such person unless such action is commenced within three years following the recording of the deed or the date of the death by which such real estate was acquired by such person.

SECTION X RULES AND REGULATIONS

The Commission shall be empowered to establish Rules and Regulations to govern its affairs, including but not limited to fees, definitions, use of consultants, security to assure performance, performance standards for work proposed on the barrier beach, and such other information the Commission deems necessary to discharge its responsibilities. After due notice and public hearing, the Commission may promulgate such rules and regulations to effectuate the purposes of this Ordinance, by a majority vote of the duly appointed members.

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 Ordinance.

SECTION XI ENFORCEMENT, INVESTIGATIONS, VIOLATIONS

In accord with the provisions of G.L. c. 40, §§ 21D and 31 as well as every other authority and power that may have been or may hereafter be conferred upon it, the City may enforce the provisions of this Ordinance, restrain violations thereof, and seek injunctions and judgments to secure compliance with its Orders of Conditions. Without limiting the generality of the foregoing:

XI-A. Any person who violates any provision of this Ordinance or of any condition or a permit issued pursuant to it 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 may be fined or issued a stop work order or an order to restore for an unauthorized alteration of an area subject to protection under the Ordinance or for failing to restore illegally altered land to its original condition or failing to comply with an order issued pursuant to the Ordinance. Fines may be levied pursuant to G.L. c. 40, § 21. Each day or portion thereof during which a violation continues shall constitute a separate offense; if more than one, each condition violated shall constitute a separate offense. This Ordinance may be enforced pursuant to G.L. c. 40, § 21D, by a City police officer, other persons having police powers, Conservation Commissioners, or the Conservation Administrator. The penalties for violations of this Ordinance or regulations promulgated hereunder may be assessed as follows:

<u>Violation</u>	<u>Penalty/Violation/Day</u>
Alteration of any wetland resource area	Up to \$ 300
Violation of any Order of Conditions	Up to \$ 300

XI-B. In the event of a violation of this Ordinance or of any order issued thereunder, the Commission or its agents may issue a stop work order to the owner, the applicant, or the applicant’s agent by certified mail, return receipt requested, or by posting the same in a conspicuous location on said site. Any person who shall violate the provisions of a stop work order shall be deemed in violation of the Ordinance; but the failure of the Commission to issue a stop work order for any reason shall not prevent the City from pursuing any other legal remedy at law or in equity to restrain violations of this Ordinance or promulgated regulations and to secure compliance with its Orders.

XI-C. The City shall be the beneficiary of all fines imposed on account of the violation of this Ordinance or promulgated regulations in order to defray the expense of enforcing the same.

XI-D. Upon request of the Commission, the Mayor and City Solicitor shall take such legal action as may be necessary to enforce this Ordinance or promulgated regulations and permits issued pursuant to it.

XI-E. Upon recommendation of the Commission, the Mayor may employ Special Counsel to assist the Commission in carrying out the legal aspects, duties, and requirements of this Ordinance and promulgated regulations.

SECTION XII CONSULTANT SERVICES

Upon receipt of an application for a Notice of Intent, Request for Determination of Applicability, Abbreviated Notice of Resource Area Delineation or at any time proceeding the Commission’s issuance of a Certificate of Compliance, 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." 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 analyses and monitoring; and researching environmental or land use law. The Commission may require the payment of the consultant fee at any point in its deliberations prior to a final decision.

If a revolving fund for consultant fees is authorized, the applicant's fee shall be put into such revolving fund and the Commission may draw upon that fund for specific consultant services approved by the Commission.

The exercise of discretion by the Commission in making its determination to require the payment of a consultant fee shall be based upon its reasonable finding that additional information acquirable only through outside consultants would be necessary for the making of an objective decision.

The Commission shall waive the consultant fee for a permit application filed by the City.

SECTION XIII CAPTIONS AND SEVERABILITY

The captions used herein are for convenience only and are expressly intended to have no legal or binding significance. The invalidity of any section or provision of this Ordinance shall not invalidate any other section or provision thereof, nor shall it invalidate any Order of Conditions or decisions that have previously become final.