

March 31, 2020

Via email

Michael Parker
Chair, City of Boston Conservation Commission
City Hall Room 709
Boston, MA 02201
cc@boston.gov

Re: City of Boston Local Wetlands Ordinance Implementation, Initial Regulations

Dear Chair Parker and Commissioners:

We are writing to provide the Commission with comments on the proposed regulations implementing the Ordinance Protecting Local Wetlands and Promoting Climate Change Adaptation in the City of Boston, as well as comments on the process for developing additional regulations. The Conservation Commission is scheduled to discuss the proposed regulations at its meeting on Wednesday, April 1.

These proposed regulations were first posted on March 11, 2020, giving stakeholders only 20 days review and comment at a time when, due to efforts to reduce spread of the Coronavirus, many of us are adjusting our schedules and lives to work remotely, in many cases tending at home to school age children. In allowance for this, we request a minimum 30-day comment period, with a Commission vote on April 15, 2020 at the earliest. We are providing these initial comments for consideration at the April 1 meeting. We will continue to provide further comments and input as the process of developing regulations moves forward.

To advance transparency and shared knowledge, we recommend that all comments submitted be posted on the Commission's website at least 48-hours in advance of Commission consideration. We also ask you to keep in mind that a widely inclusive stakeholder process was key to developing and enacting the ordinance, and stakeholder engagement and participation remains just as important as regulations are drafted and considered.

The undersigned organizations include residents and neighborhood associations from all parts of the City of Boston, together with regional groups with expert knowledge regarding regulatory frameworks for resource protection at local, state, and federal levels. We have long-standing direct experience with the most important ecological areas in Boston, with efforts ranging from organizing community clean-up events to land conservation, participation in project review, and the City's Climate Ready program.

We bring both expertise and unique perspectives to the local wetlands ordinance process and will play an important role in the successful implementation of the ordinance. We look forward to working with the Commission and City staff throughout this rulemaking process to ensure the best possible outcome for the City's residents and environment.

General Comments on the Proposed Regulations

We provide the following general comments on the proposed regulations, with specific comments on the proposed language in the next section.

The proposed provisions should be referred to as interim regulations or guidance until comprehensive regulations are finalized.

It is our understanding that the proposed regulations are intended to function as initial guidelines for applicants while detailed performance standards and other key substantive elements of the regulations are being developed. We appreciate the need to have consistent standards for ongoing review of applications while comprehensive regulations implementing the ordinance are developed. However, a piecemeal approach to drafting regulations results in uncertainty over whether certain parts of the regulations are “final” and whether (and when) they may be subject to further revision. It is likely that earlier-drafted parts of the regulations will have to be revised and adapted to ensure consistency and harmony with later-drafted parts.

To avoid confusion about the legal force and effect of these provisions until a comprehensive set of regulations is finalized, these provisions should be referred to as interim regulations or guidelines or otherwise designated as something other than final regulations. This would also help to clarify the ability to revise earlier-drafted parts of the regulations as additional provisions are developed.

The initial regulations should include consideration of climate change impacts, climate equity, and environmental justice.

Consideration of climate change impacts, climate equity, and environmental justice is fundamental to implementation of the ordinance. For example, with respect to climate change, the ordinance states that

[t]he Conservation Commission shall explicitly consider climate change resilience and impacts in the issuance or denial of any permit through measurement of potential adverse impacts to resource areas for the protection of resource areas both as they currently exist and as are reasonably expected to exist based on the best available data on the projected impacts of climate change.

Interim guidance should therefore be provided requiring project proponents to consider these factors, even as those provisions of the final regulations are being developed.

This can be accomplished in large part by simply ensuring consistency between the interim regulations, the Commission’s Filing Guide, and the Commission’s Filing Checklist. The Filing Guide and Filing Checklist both require applicants to submit “a consideration of the effect that projected sea level rise, changes in storm intensity and frequency, and other consequences of climate change may have on the resource areas and proposed activities,” as well as “narrative on how they plan to integrate climate change and adaptation planning considerations into their project

to promote climate resilience to protect and promote Resource Area Values and functions into the future.” These requirements should be similarly included in the interim regulations.

Further, the interim regulations, as well as the Filing Guide and Filing Checklist, should refer to the City’s Climate Ready Boston maps and direct applicants to indicate whether the subject parcel is within any of the coastal or inland flood risk zones, pending final mapping of Coastal and Inland Flood Resilience Zones by the Commission. The Filing Guide and Filing Checklist currently refer to FEMA maps; however, FEMA maps are retrospective and do not take future climate change projections for sea level rise and inland flooding into account. The Climate Ready Boston maps, on the other hand, contain the best available information on the projected impacts of climate change and should therefore be used to determine flood risk and other climate change implications.

Neither the interim regulations nor the Filing Guide or Filing Checklist reference the ordinance’s climate equity and environmental justice provisions. Similar to the requirements to consider climate change, we urge the Commission to require applicants to provide a narrative discussion of climate equity and environmental justice impacts, pending adoption of specific regulations by the Commission after a community engagement process.

The initial regulations should include or reference the provisions of section ‘g’ of the ordinance.

The initial regulations should either include or at a minimum cite to the relevant provisions of the ordinance at section g) Permits. This section sets forth how the Commission must review activities proposed in several specific resource areas and provides guidance to applicants as well as the Commission.

Specific Comments on the Text of the Proposed Regulations

We recommend the following amendments (in red) to the proposed regulatory language:

Section IV. Promulgation of Regulations

- A. The Commission may adopt such additional definitions, rules, regulations, policies, fees, and performance standards as it may deem necessary to protect the Resource Area Values. Said definitions, rules, regulations, fees, and performance standards shall become effective upon publication following a public hearing for which public notice has been provided. *For all proposed regulations, the Commission shall conduct a public rule-making process, including but not limited to posting of the proposed regulations, written notice of posting to parties requesting such notice, a minimum 30-day comment period, a written “response to comments” posted not less than 7 days before any hearing and a properly noticed public hearing.* Policies may be adopted by a majority vote of the Commission.
- B. The Commission may amend these Regulations after public notice and public hearing. *For all proposed amendments, the Commission shall conduct a public rule-making process, including but not limited to posting of the proposed amendment, written notice of posting to parties requesting such notice, a minimum 30-day comment period, a written “response*

to comments” posted not less than 7 days before any hearing and a properly noticed public hearing.

Section VI. Procedures

H. Denials.

1. Procedural Denials. If the Commission finds that the information submitted by the applicant is not sufficient to describe the site, the work, or the effect of the work on the Resource Area Values, *or if the Commission finds that consideration of a project is premature due to review pending before any other city, state or federal permitting or regulatory body*, it may issue a denial prohibiting the work. ***
2. Substantive Denials. The Commission may deny permission for any activity within areas under its jurisdiction if, in its judgment, such denial is necessary to ~~protect the avoid or prevent significant or cumulative effects upon~~ Resource Area Values, *to prevent significant or cumulative adverse impacts to protected resources within environmental justice communities, or to prevent significant or cumulative adverse impacts to protected resources due to climate change*. Due consideration shall be given to all possible effects of the proposal on all Resource Area Values. Substantive denials are based on a reasoned analysis of the proposed activity and the likely effects of the activity on the Resource Area Values. ~~In most cases, neither the assumption of protection nor the assumption of damage will be able to be proven with certainty.~~ The Commission will base its judgment on the best information available at the time and in all cases will act to protect the Resource Area Values. The written decision will include the reasons for the denial, citing the Resource Area Values protected, and relevant regulations. The written decision will be signed by a majority of the Commission.

Section XII. Appeals

~~Any person with standing to challenge a decision of the Commission may appeal a decision~~ *Decisions* of the Commission under the Ordinance may be challenged in the Superior Court within sixty (60) days following the date of issuance of the decision, in accordance with M.G.L. c. 249 § 4.

Comments on the Work Plan and Process for Developing Additional Regulations

Finally, we provide the following comments on the work plan and rulemaking process going forward. Since the Commission is still in the early stages of drafting regulations and has a proposed work plan for the next year, we urge the Commission to consider these comments as it continues to develop its processes and prioritize activities.

Ongoing stakeholder involvement is crucial to the rulemaking and work plan process.

As noted above, robust stakeholder involvement was key to passage of the ordinance and is just as important in the development of the implementing regulations. There are several RFP and consultant engagement processes envisioned in the current work plan. We urge the Commission to involve stakeholders in those processes by building in opportunities for public outreach and solicitation of public input. These processes must be inclusive and designed to encourage feedback from all City residents, particularly environmental justice communities and those Boston residents and neighborhoods most affected by climate change and development. A primary factor in selecting consultants should be a proven track record of facilitating robust stakeholder engagement. The interconnection of climate change, environmental justice, and public health makes it especially important to include these issues as priorities within the work plan for the first year.

Specifically, we recommend and request that all stakeholders be given an opportunity to comment on draft RFPs by posting the RFP on the Commission website, or, alternatively, by either posting a proposed final work plan which will form the basis of any RFP or by submitting the proposed final work plan to the Commission for its consideration, at which time stakeholders may also comment.

Extended Riverfront Areas should be designated early in the process.

Extended Riverfront Areas (those areas that should receive protection beyond the default 25-foot riverfront area) are critical to successful implementation of the ordinance. However, designation of these areas is not currently included in the Commission's first-year work plan. We recognize that limited resources and capacity require prioritizing some actions over others, but Extended Riverfront Areas should be at or near the top of the priority list. Many of the undersigned organizations and individuals have expertise in this area and are willing to assist the Commission with this process. In the meantime, for any projects undergoing review prior to designation of Extended Riverfront Areas city-wide, decisions should be made on a case-by-case basis as to whether a particular riverfront area should be expanded beyond the 25-foot default.

The Commission should specify how it will review projects within and adjacent to Areas of Critical Environmental Concern, as well as how it will consider designating additional areas of environmental concern.

The ordinance provides heightened protections for state Areas of Critical Environmental Concern (ACECs) and allows the City to separately designate additional areas of environmental concern.

The purpose of the Commonwealth's ACEC program is to preserve, restore, and enhance critical environmental resources and resource areas. ACEC designation creates a framework for local and regional stewardship of critical resources and ecosystems. Within Boston, ACECs have been established for Belle Isle Marsh and Sales Creek (Rumney Marsh), the Neponset River Estuary, and the Fowl Meadow and Sprague Pond areas within the upper Neponset River Watershed. The Commission should specify how it will apply the "highest standards of scrutiny" to the impacts of projects within and bordering these areas.

The work plan and the stakeholder engagement process should also identify the steps and schedule for evaluating and designating additional areas of environmental concern. These tasks should be coordinated with the Conservation Commission's role in land stewardship and the City's Climate Ready program, as well as initiatives to protect remaining natural lands by purchase and conservation restrictions.

The work plan should consider streamlined review, including for beneficial projects.

The work plan should include provision for evaluating and making recommendations for streamlined project review, including fee schedules by project type and "tiering" whereby certain beneficial projects may be exempt from a full Notice of Intent.

Thank you for your leadership on this critical component of the City's overall response to climate change, resource protection, and sustainable, equitable development.

Very Truly,

Charles River Watershed Association
Conservation Law Foundation
Friends of Allandale
Friends of Belle Isle Marsh
Greater Mattapan Neighborhood Council
GreenRoots – Raices Verdes
Maria Lyons, Environmental Chairperson, Port Norfolk Civic Association
Mt. Hope Canterbury Neighborhood Association
Muddy Water Initiative
Mystic River Watershed Association
Neponset River Watershed Association
Roslindale Wetlands Task Force