

**PLANNING BOARD OF THE TOWN OF LEWISBORO
PRELIMINARY REPORT AND RECOMMENDATION
TO THE LEWISBORO TOWN BOARD ON PROPOSED LOCAL LAW
AMENDING CHAPTER 217, WETLANDS AND WATERCOURSES, OF THE
LEWISBORO TOWN CODE**

INTRODUCTION

The Town Board of the Town of Lewisboro (the “Town Board”) has referred a proposed Local Law to the Planning Board for a report and recommendation. The proposed Local Law contains numerous amendments to Chapter 217, Wetlands and Watercourses, of the Town Code of the Town of Lewisboro (the “Wetlands Code”). These amendments, in many instances, provide for significant changes to the substantive and procedural provisions of the Wetlands Code.

The Wetlands Code was enacted by the Town Board on February 23, 2004 by Local Law No. 1 of 2004. This local law amended wetland and watercourse regulations that had then been in effect since 1995. The Wetlands Code, as enacted in 2004, opens with a statement of legislative findings of fact and a pronouncement of the intent underlying its provisions. This prefatory portion of the Wetlands Code recites the ecological benefits provided by wetlands and watercourses, acknowledges that the “integrity and realization of the full potential of wetland and watercourse function and benefits is inextricably linked to the presence of intact, undisturbed natural communities or surrounding buffer areas surrounding wetlands and watercourses,” and expresses an intent that “activities in and around wetlands, watercourses and associated buffer areas be conducted . . . in a manner that promotes the preservation of wetlands, watercourses and associated buffer areas . . .” Wetlands Code, § 217-1. These findings of fact and statement of intent remain unchanged in the proposed Local Law.

The proposed Local Law contains amendments to the Wetlands Code that impact both the scope of its protection and the manner in which its terms are administered and enforced. Yet, despite the extent of the proposed amendments, no explanation of the rationale for these regulatory changes has been provided to the Planning Board. Nor are the amendments accompanied by a statement of justification for their implementation, or an accounting as to how they will fulfill the findings of fact and intention clearly expressed at the outset of the Wetlands Code. Thus, the Planning Board requests that the Town Board

articulate the reasons for the amendments, so that they can be analyzed in an informed context.

Although this explanation is absent, the Planning Board has reviewed the proposed amendments. In doing so, it has considered written comments submitted by various organizations and individuals. These include the correspondence and comment letters assembled and itemized by Ms. Janet Anderson, a copy of which is attached and fully incorporated herein for reference purposes as Exhibit "A."

The Planning Board's consideration of the proposed Local Law, and its study of issues associated with the Wetland Code and the proposed amendments, are still underway and includes obtaining data relating to past Wetlands Code administration and enforcement that may assist in the evaluation of changes to its provisions. However, in order to facilitate consideration of this local legislation, the Planning Board submits this preliminary report to the Town Board, and advises that a supplemental report may be forthcoming as its review of the proposed amendments to the Wetlands Code continues.

As set forth below, the Planning Board does not endorse the enactment of the proposed Local Law in its current form. Instead, the Planning Board recommends the formation of a working committee comprised of a Town Board member(s), Planning Board member(s) and the Town's professional consultants to examine the Wetlands Code, secure an understanding of issues that may warrant changes to its substantive provisions, identify areas in which its administration may be improved and to formulate and present recommended revisions to the Town Board for consideration. As part of this process, the input of the Town Building Inspector, the Town Justices and the Town Prosecutor concerning proposed revisions to administration and enforcement provisions of the Wetland Code should be solicited.

PLANNING BOARD COMMENTS

The Planning Board reviewed the proposed amendments to the Wetlands Code at its January 17, 2017, February 28, 2017 and March 21, 2017 meetings.

The Planning Board's comments address amendments affecting both substantive and procedural provisions of the Wetlands Code. The Planning Board therefore divides its comments to the proposed amendments on this basis, and first offers the following with regard to *substantive changes* to the Wetlands Code:

- Under the proposed Local Law, wetlands of less than 2,500 square feet will be deprived of buffer protection. There is no justification for this revised dimensional standard, or an explanation as to how a wetland of this size is less deserving of protection. Moreover, a wetland of this

size may be functionally connected to a lake, stream or larger hydrological complex. Under these circumstances, an interconnected wetland or watercourse system may be compromised due to the loss of buffer protection around a 2,500 square foot wetland segment. This unexplained change is inconsistent with the stated findings and intent recited in the Wetlands Code.

- Under the proposed Local Law, aboveground and underground chemical storage facilities or bulk petroleum storage tanks may be placed in a buffer area. Again, there is no justification for the removal of the prohibition restricting placement of these types of facilities and tanks in a wetland buffer, and both – particularly those that are underground – can create significant wetland disruption if breached.
- Similarly, under the proposed Local Law, animal feed lots, pens and manure storage areas are no longer prohibited in a buffer area and may be sited in close environs to a wetland or watercourse through an administrative permit. The removal of this prohibition is also unexplained. Animal lots and pens produce mud and manure and, obviously, a manure storage area allows for the accumulation of concentrated animal waste in a confined location. Nutrients drawn from animal waste, including nitrogen and phosphorus, cause algae blooms and other deleterious conditions affecting the integrity of wetlands and watercourses. This is of particular concern in the Town of Lewisboro because of the number of lakes within the community. For this reason, the Wetlands Code’s buffer area prohibition for animal lots, pens and manure storage areas – which recognizes the potential damage mud and animal waste can cause – should remain in effect.
- Under the proposed Local Law, “normal ground maintenance,” including mowing within a buffer area, is permitted as-of-right. This term, however, is imprecise and can entail the application of nutrient-rich fertilizers or toxic insecticides and pesticides within a buffer area. The introduction of such substances in a buffer area can threaten an adjoining wetland or watercourse. The degree of allowable yard and ground maintenance activities within a buffer area should therefore be examined and tightened.
- Under the proposed Local Law, maintenance of swimming pools within a buffer area may occur on an as-of-right basis. However, no provision is made with regard to season-end “draw downs” or other maintenance or repair activity that may lead to the discharge of chlorinated or salt water into a buffer and, in turn, an adjoining wetland

or watercourse. Swimming pool water may also contain untreated, unhealthy organic matter and be corrosive to wetlands due to low pH levels. The prospect of such a discharge should be addressed in the event standards related to swimming pool maintenance in a buffer area are revised.

- Under the proposed Local Law, regulated activity or uses associated with an existing residence may be undertaken within 25 feet of such an existing residence, accessory building or structure. No explanation has been provided concerning this dimensional standard. This provision invites a potential “hop scotch” effect, whereby successive incremental increases of 25 feet to an existing residence, accessory building or structure, each a stand-alone authorized activity, will unduly increase these structures over time.
- Similarly, the proposed Local Law renders additions or alterations to residential buildings and related accessory buildings or structures in a buffer area subject to administrative permitting processes alone (unless such activity involves a new residence or a new or expanded septic system). This, too, creates the potential for a “hop scotch” effect by which successive additions or alterations expand a residence or accessory structure over time. The relegation of this type of activity solely to administrative permit procedures also eliminates the prospect of input from neighboring property owners concerning the impact of such activity. This type of input is obtained when an application is presented to, and publicly vetted by, the Planning Board (which can then determine whether to cede permit approval authority to the Town Wetland Consultant).
- The proposed Local Law also places “miscellaneous activities” involving less than 5,000 square feet of land disturbance, and outside the purview of Planning Board review through a subdivision, site plan or special use permit application, exclusively within the realm of administrative permitting. The term “miscellaneous activities” is too open-ended, and should be eliminated and replaced with an express identification of activities that fall within the intended embrace of this provision. Furthermore, no justification for this 5,000 square foot dimensional threshold has been provided, or an explanation as to how land disturbance within this parameter is deserving of administrative review alone. Again, the presentation of applications for such activities to the Planning Board allows for public participation, which may further inform whether, and under what conditions, “miscellaneous” wetland buffer activity may take place.

- The proposed Local Law shifts enforcement of the Wetlands Code from the Town Wetland Consultant to the Building Inspector. As aptly pointed out by the Lewisboro Conservation Advisory Council in its January 10, 2017 written comments, the Building Inspector was formerly charged with enforcement of the Wetlands Code, but this responsibility was subsequently transferred to the Town Wetland Consultant. The Planning Board submits this prior legislative change recognizes that the Building Inspector position is not one ordinarily devoted to enforcement of measures beyond zoning, building and fire code regulations. The proper oversight of wetlands involves specialized training and, in this regard, is particularly suited for a trained wetland specialist. Thus, the Planning Board concludes that enforcement should remain in the hands of the Town Wetland Consultant. In the alternative, if enforcement becomes the responsibility of the Building Inspector, the Wetlands Code should impose wetland training requirements upon this position, or the Wetlands Code should further detail the manner in which the Town Wetland Consultant will facilitate the Building Inspector's enforcement functions.
- The proposed Local Law transfers the adjudication of wetland violations exclusively to the Town Justice Court. Notably, under its existing provisions, violations of the Wetlands Code may be presented to either the Planning Board *or* Town Justice Court. Although there may be benefits to placing violations before a single forum, there are also benefits to the current dual approach, as well as authorizing the Planning Board to hear and act upon wetland violations. Typically, the issuance of a wetlands violation leads, first, to steps to actually remediate and mitigate the effects of the offending activity and, thereafter, to the assessment and levy of a fine. When the Planning Board is presented with a violation, there is greater continuity in this process because it can permit remediation and mitigation activity (or transfer such permitting to the Town Wetland Consultant), monitor remediation and mitigation measures and then proceed to assess a fine with an understanding of the costs incurred in rectifying the violation. In contrast, this process will be bifurcated and potentially less streamlined when the Town Justice Court and Planning Board are both involved in response to a violation. While there may be criticisms regarding the manner in which violations are heard and processed under the Wetlands Code, a “devil you know” scenario may be present and exclusive jurisdiction by the Town Justice Court may upset and hinder response to wetland violations. For this reason, the Planning Board continues to examine the potential impact of this change,

including the gathering of data relating to past practices and the practicality and effectiveness of a single enforcement forum. As set forth in the introduction above, the Planning Board suggests that the Town Justices and Town Prosecutor be consulted concerning this proposed change.

The Planning Board offers the following with regard to *procedural changes* to the Wetlands Code:

- The proposed Local Law eliminates the use of a “Clearance Form,” which is issued by the Town Wetland Consultant to confirm that activity may be taken without a wetland permit, and instead folds the operative effect of this document into an “Environmental Questionnaire Form.” The “Clearance Form” should remain in use because this document, in both name and effect, certifies that no permit is required for proposed activity. The term “Environmental Questionnaire Form” is confusing because it would be employed as the document confirming that activity may proceed without a permit. This term should be revised so that it reads as “Environmental Questionnaire” to clarify that it is an information-gathering document, whereas the “Clearance Form” should remain in use as the document confirming no permit under the Wetland Code is required.
- Consistent with the comment provided above, the amendments should provide that an Environmental Questionnaire Form is filed with the Town Wetland Consultant, who shall use its content (with other pertinent materials), to determine whether no permit is required for proposed activity or if an administrative or Planning Board permit is necessary. The Town Wetland Consultant shall formalize this determination through the issuance of a Clearance Form or written determination directing the applicant to file for an administrative or Planning Board permit.
- The Planning Board questions whether the definitions of “Hydrophytic Vegetation” and “Obligate Wetland Species,” as set forth in the proposed Local Law, recite the most recently accepted definitions for these terms.
- The “Grandfathered Projects” provision of the proposed amendments does not address wetland violations that may be pending before the Planning Board for disposition at the time of the Local Law’s enactment. This provision must include language clarifying that pending violations (those violations before the Planning Board at the

time of enactment) are governed by the laws of the Town of Lewisboro in effect at the time the violation was issued.

- The proposed Local Law eliminates the requirement that the Town Wetland Consultant report annually on the status of administrative permits, and that these permit denials and approvals be filed with the Planning Board. The deletion of these requirements will impair recordkeeping and an accounting of wetland activity within the Town of Lewisboro, and should be kept in place.
- In this regard, amendments to the Wetland Code should also implement a designated system, including an assignment of responsibility, for the monitoring of compliance with conditions of Planning Board and administrative wetland permit conditions, including, in particular, those requiring periodic septic inspection and pumping.
- The proposed Local Law recites standards relating to permits issued by the Planning Board, but does not set forth standards governing permits to be issued on an administrative basis. Such standards should likewise be itemized for permits issued on an administrative level.
- Application standards should place a continuing obligation upon an applicant to provide new or additional materials relevant to a permit application that are prepared or disclosed while an application is under review.
- The proposed Local Law amends the Wetlands Code's provisions pertaining to performance security with the use of the term "bond," rather than "security." The use of the term "bond" limits the form of security to a specific type, when other means may be employed at the time of permit approval. This provision should be revised to provide flexibility in determining the appropriate mechanism for such security (e.g., cash deposit, surety bond or other form).
- The proposed Local Law keeps in place a period of 180 days following the date on which a Planning Board permit is approved in which activity plans may be submitted to the Planning Board Chairman for endorsement. This period of essentially six months should be shortened for administrative purposes.
- The "Sanctions" provisions of the proposed amendments recite the imposition of a "fine." Due to the nature of wetland violations, this

should be changed to “civil penalty.” The amendments also limit this penalty to no more than \$250 for a first offense. This restriction unduly strips the Wetlands Code of an appropriate remedy because it limits the monetary penalty associated with a first offense without regard to its degree. The discretion afforded under existing Wetlands Code provisions should remain.

- In this regard, the Planning Board further requests that the Town Board analyze the methods by which penalties imposed under the Wetlands Code may be collected, including whether a mechanism exists to record unpaid penalties as a lien against the property on which the activity giving rise to a violation occurred.

The Planning Board appends to this Preliminary Report and Recommendation, as Exhibit “B,” a “mark-up” of the proposed Local Law with additional editorial comments and revisions reflective of the points set forth above.

PLANNING BOARD PRELIMINARY RECOMMENDATION

Based on the above, the Planning Board does not support the proposed Local Law, as drafted, and urges thorough consideration of its comments and those presented in the written submissions appended hereto as Exhibit “A” with respect to any amendments to the Wetlands Code. Further, the Planning Board may supplement this preliminary report and recommendation as its examination of the proposed Local Law and the Wetlands Code continues. Finally, it suggests that a coordinated approach to Wetlands Code revisions – one that proceeds with input from the Town Board, the Planning Board, the Town Justices, the Building Inspector, the Town’s Wetlands Consultant and interested parties – be undertaken should amendments to existing regulations be pursued.

Dated: Lewisboro, New York
March ____, 2017

LEWISBORO PLANNING BOARD

By: _____
Honorable Jerome Kerner, Chairman