

## **Guidance for implementing the terms “like...activities” and “like...structures” in the Acton Wetland Bylaw**

Approved by the Conservation Commission: June 20, 2018; Amended on March 31, 2021.

### **INTRODUCTION**

Section F8.3 of the Acton Wetlands Bylaw sets forth minimum distances (setbacks) from the edge of wetlands or vernal pools for activities regulated by the By-law. This section also includes an exception to the minimum setbacks:

“Pre-existing activities or structures not meeting the setbacks set forth above need not be discontinued or removed [but shall be deemed to be non-conforming]. No new activity shall be commenced and no new structure shall be located closer to the edge of wetlands or vernal pools than existing non-conforming LIKE ACTIVITIES OR STRUCTURES, but the Commission may permit new activity or structures as close to the edge of wetlands or vernal pools if it finds that such activity or structure <sup>1</sup>will not affect the interests protected by the Bylaw more adversely than the exiting activity or structure.” (Emphasis added.)

The Bylaw does not include definitions of “like activities” or “like structures.” However, the Rules and Regulations issued by the Commission under the Bylaw contain the following definitions and section:

“LIKE ACTIVITY shall mean any activity similar in nature, purpose and extent as that activity currently occurring on the site of the proposed work”.

“LIKE STRUCTURE shall mean any structure similar in design OR use currently located on the site of the proposed work”. (emphasis added)

### **SECTION 3.3 WETLAND SETBACKS FOR EXISTING STRUCTURES**

Work associated with pre-existing structures or activities not presently in compliance with Section 3.2 [the setback requirements] may not increase the degree of “non-conformance” of those structures or activities. No new activity shall be commenced and no new structure shall be located closer to the edge of a Wetlands Resource Area than existing non-conforming like Activities or structures, but the Commission may permit new like Activity or structures as close to the Wetland Resource Area as the existing like activity or structure if it finds such activity or structure will not affect the interests provided for in the Bylaw more adversely than the existing activity or structure.

The Commission has interpreted these provisions to mean that when there are existing non-conforming activities or structures within the minimum setbacks, expansion or replacement of such activities and structures will not be permitted unless such expansion or replacement is no closer to the wetland or vernal pool AND does not increase any existing adverse effects on the wetland or vernal pool.

There has been confusion as to how the terms “like activities” and “like structure” are implemented by the Commission. The purpose of this document is to provide guidance to potential applicants under the Wetlands Bylaw as to how the Commission interprets these terms.

## **GUIDANCE**

In implementing these provisions, the Commission will be guided by the following general statements:

- The exception to setbacks for pre-existing activities and structures is a modest one and meant to be used sparingly. It is intended to allow limited expansion or replacement of existing non-conforming structures and activities in very limited circumstances when there is no feasible<sup>2</sup> alternative
- In examining any particular proposal that involves expanding or replacing a structure and/or an activity, the Commission will give greater weight to the structure or activity that has, or has the potential to have, greater impact to the resource area
- A determination by the Commission that a proposed structure or activity meets the definition of “like activity” or “like structure” is not sufficient for the Commission to approve such proposal; the Commission must also find that the like activity or like structure will not affect a resource area more adversely than the existing activity or structure.

The following illustrate the Commission’s interpretation of “like structure” and “like activities”:

1. There is a pre-existing<sup>3</sup> house within the 75’ setback. The Commission will not permit an expansion to that house unless the Commission finds that the addition is no closer to the wetland or vernal pool than the pre-existing house, and provided that there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing house, and there is no feasible alternative.
2. There is a pre-existing driveway within the 75’ setback. The Commission will not permit an expansion of the driveway unless the extension is no closer to the wetland or vernal pool, there is no increase in any existing adverse impact on the resource area due to the pre-existing driveway, and there is no feasible alternative.
3. There are a pre-existing office building and parking lot within the 75’ setback. The office building is 55 feet from the wetland resource area and the parking lot is 40 feet from the resource area. The Commission will not permit an expansion<sup>4</sup> of the building unless the expansion is no closer to the wetland or vernal pool than the pre-existing building and will not permit an expansion of the pre-existing parking lot unless the expansion is no closer to the wetland or vernal pool than the pre-existing parking area, there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing building and parking lot, and there is no feasible alternative. Note that the existing building and parking lot are treated independently as separate structures; therefore, their respective setbacks are independent.

4. There are two pre-existing buildings on one lot: Building A is 60' from a resource area; Building B is 40'. Even though Building B is closer to the resource area than Building A, the Commission will not permit an expansion to Building A that is closer than 60' from the resource area unless there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing Building A and there is no feasible alternative.
5. There are a pre-existing house and detached garage similar in structure to the house on a property. The pre-existing house is 40' from a wetland; the garage is 30'. Because the house and garage are considered to be similar in structure, the Commission will not permit an expansion of the house closer to the wetland than the current garage (30'), unless there is no increase in any adverse impact on the resource area than may already exist due to the pre-existing house and garage and there is no feasible alternative.
6. There is a pre-existing driveway within the 75' setback. The Commission will not permit a garage where the driveway is because a garage is not similar in design or use to a driveway.
7. There is a house with a pre-existing deck or terrace within the 75 foot setback. The Commission will not permit an addition to the house where the deck or terrace is located because they are not similar in design or use to a living area.
8. On a case-by-case basis, when a residential structure (dwelling) is determined to be non-conforming pursuant to Section F8.3, conversion of an already disturbed area (such as an existing lawn, blacktop, or garden) to an outdoor recreational accessory use such as a deck, patio, non-portable barbecue, or non-portable fire pit, or other such uses, may be permitted, provided the outdoor recreational accessory use is no closer to the wetland or vernal pool than the existing residential structure, there is no viable alternative location on the property, and the outdoor recreational accessory use is as far away from the wetland or vernal pool as possible, if the Commission finds that such accessory use will have no greater adverse impacts to the interests provided for in the Bylaw than the existing residential structure. Mitigation, such as naturalizing an area of lawn next to the wetland resource with native vegetation, removal of invasive vegetation, or control of stormwater runoff, or other mitigation measures, may be required. For example, a non-portable barbecue, a patio, or a deck, or other such outdoor recreational uses, may be permitted on existing lawn and adjacent to an existing non-conforming residential structure. A non-conforming shed, detached garage, or other non-residential structure would not trigger this provision because they are not residential dwellings.

Paragraph 8 approved by the Commission on March 31, 2021

**Footnotes:**

- (1) The By-law says in Section F 8.3 that the Commission may “permit new activity or structures” and the regulations say in Section 3.3 that the Commission may “permit new like activity or structures”. The context of the By-law clearly indicates that it is referring to like activity and structures and that the regulation merely provides clarity.
- (2) For the purposes of this guidance, “feasible” means physically and financially possible.
- (3) For the purpose of this guidance, “pre-existing” means currently serving its intended use and in existence or having a valid Order of Conditions as of April, 2003, the date the current by-law was enacted.
- (4) For the purpose of this guidance, a new like structure or a new like activity will be treated the same as an expansion.

*This Guidance Document is not intended to and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in any litigation with the Acton Conservation Commission. Nothing in this Guidance Document limits the Commission’s authority in approving or disapproving any Request for Determination of Applicability or Notice of Intent submitted pursuant to the Acton Wetland Bylaw or in determining compliance with the Bylaw. The Commission reserves the right to act at variance with this Guidance Document and to change it at any time without public notice.*