

Memo

To: Rob Desmarais
From: M.P. Hartford *MPH*
Date: April 6, 2020
Re: Land Use Regulation Alignment – Wetlands Ordinance

Following is a summary of the review conducted on the City of Amesbury's Wetlands Protection Ordinance and corresponding regulations. The purpose of this review was to determine whether the existing regulations, which expand upon the requirements of the Wetlands Protection Act, are necessary to the extent that they exceed the restrictions of state and federal wetlands laws. As part of this effort, the wetlands ordinances for the 15 Merrimack Valley Planning Commission (MVPC) communities were compared utilizing a variety of criteria. Online data from MassDEP's website on the filing of Notices of Intent were also obtained for comparison purposes. Finally, interviews were conducted with various stakeholders to obtain feedback on their experience with the wetlands permitting process in Amesbury.

Wetlands Protection Act

The Wetlands Protection Act (WPA) is the State law that regulates activities in or near wetlands by requiring a public review of projects that may alter wetlands. This review is accomplished in each city or town by a local volunteer board known as the Conservation Commission. Many communities in Massachusetts, including Amesbury, have taken the WPA one step further by adopting their own wetlands bylaw via Home Rule Petition. For comparison purposes, the local wetlands bylaws for each of the 15 MVPC member communities were reviewed to see how they differed utilizing a variety of criteria as presented in Table 1 attached.

Local Wetlands Bylaw. As indicated in Table 1, 13 of the 15 member communities have adopted their own wetlands bylaw. The Town of Salisbury previous had its own bylaw but a group of citizens filed a petition to repeal the bylaw that passed at Town Meeting in 2008. Based on discussions with Ms. Michelle Rowden who was the Conservation Agent at the time, the petition was filed by a group of disgruntled residents who were upset because they could not pave their driveways. According to Ms. Rowden, there was a lot of misinformation at the time of the vote, and most importantly, the residents did not realize that repealing the wetlands bylaw would not change the enforcement provisions of the WPA being administered by the Salisbury Conservation Commission.

Since repealing the bylaw, the Town has been working on a new bylaw to include protections for resource areas such as mandatory no-disturb/no-build areas for buffer zones, isolated vegetated wetlands, oceanfront properties in high velocity zones, large-scale clear cutting, and steep slopes. Interestingly, Ms. Rowden also noted that the Town Manager requires all Board members to attend training. Otherwise, they would not be able to perform their duties.

West Newbury is the only other member community that has not adopted its own bylaw; electing to adopt only the provisions established by the WPA.

Jurisdictional Areas. Most of the communities that adopted local bylaws included additional protections for isolated vegetated wetlands and vernal pools. The WPA only mentions isolated vegetated wetlands once under the definition for dredge wherein it states *“the term dredge shall not include activities in Bordering or isolated vegetate wetlands”*. However, these resource areas appear to warrant additional protections based on the number of communities with bylaws that have included them under their jurisdictional areas.

Although the WPA does provide some level of protection for vernal pool areas, it appears to be limited to the habitat area as certified by the Division of Fisheries and Wildlife (MassWildlife). The local bylaws protect all areas that meet the definition of a vernal pool regardless of whether certified by MassWildlife.

Performance Standards for Resource Areas. Roughly half of the MVPC member communities have adopted performance standards for resource areas above and beyond those outlined in the WPA. In some cases, the regulations seek to protect a specific resource. For example, both the City of Newburyport and the Town of Newbury have adopted performance standards to protect the Plum Island Barrier Beach. Similarly, the City of Lawrence and Town of North Andover have defined riverfront areas for their rivers. While North Andover established a 200-foot riverfront area for all eight of its rivers/brooks, Lawrence has assigned four different types of riverfront area (25-, 50-, 100-, and 200-foot) on a section-by-section basin for the three rivers in the City.

The Amesbury Wetlands Regulations (AWR) include performance standards for the following resource areas:

- Land Under Water Bodies;
- Land Subject to Flooding or Inundation by Groundwater or Surface Water;
- Rivers; and
- Buffer Zone.

The AWR also includes project-specific performance standards for septic systems, pools and tennis courts, landscaping, piers, underground storage tanks, filling, and structures.

Based on comparison with other local bylaws, the AWR is by far the most complex. Further, the preamble discussion for each resource area is largely unnecessary given the description provided in the WPA already. The regulations could be made clearer by simply noting the significance of the resource area, adopting the minimum provisions included in the WPA, and then outlining any differences or more stringent regulations.

For example, under Section 17.0 of the regulations pertaining to Land Under Water Bodies, the preamble focuses on the importance of ponds. This may have been done to serve as the basis for incorporating a more stringent definition for a pond; changing it from *“any open body of fresh water with a surface area...of at least 10,000 square feet”* under the WPA to 5,000 square feet under the AWR. However, the first two paragraphs of the preamble are largely taken verbatim from the WPA, and the latter section of the preamble on ponds, while factual and informative, is not necessary since ponds are a resource area protected by the WPA.

The performance standard itself also appears to be duplicative since it establishes the “land within a minimum distance of 100 feet” as subject to the regulations. However, this area is already defined as

the buffer zone area under the WPA. A more straightforward approach would be to specify the buffer zone for each resource area. This approach was implemented in the North Andover bylaws wherein a 100-foot buffer zone was established for five different resource areas such as isolated vegetated wetlands, ephemeral pools, etc. A graphic figure illustrating the various wetland resource areas and/or buffer zones would also be helpful to applicants (see example brochure attached from Town of West Newbury).

No-Disturb/No-Build Zones. Most of the MVPC member communities have established no-disturb and/or no-build zones within the 100-foot buffer zone of resource areas. The no-disturb and no-build zones typically extend horizontally from the edge of wetland resource area a minimum distance of 25-feet and 50-feet, respectively. However, as indicated, the Town of Georgetown and the City of Methuen have no-disturb zones that extend to 50-feet. Similarly, there are two communities (Merrimac and North Andover) that have established separate no-disturb and no-build zones for vernal pools of 50-feet and 75-feet respectively.

As noted previously, the AWR includes seven project specific performance standards that allow certain activities to occur within 25 to 100 feet of the resource area. Based on review of these standards, the Conservation Commission should consider establishing a minimum acceptable distance for each activity to eliminate any uncertainty before an applicant files for a permit. For example, under Section 21.3 pertaining to Landscaping, it is plainly stated that *“no lawns or driveways may be constructed within 25 feet of any Resource Area”*. However, in other sections, the wording is not as clear, stating instead that *“the Commission may at its discretion allow . . .”* an activity within a certain distance of a resource area.

Meeting Schedule. The WPA requires that a public hearing be conducted within 21 days of receipt of a fully completed Notice-of-Intent (NOI) application. As indicated in Table 1, there are six MVPC member communities, including the City of Amesbury, with Conservation Commissions that only meet monthly which does not comply with the WPA. Therefore, the City of Amesbury should consider meeting at a minimum every three weeks to satisfy this requirement.

Further, it should be noted that this issue was raised as a concern by several of the stakeholders that were interviewed by the writer.

Outside Consultant Fees. Although most of the MVPC member communities employ the use of outside consultants to provide peer review services, the process followed in Amesbury appears to be a major source of frustration for the stakeholders that were interviewed. While peer reviews can be a valuable tool to a permitting authority, it may be worthwhile for the ACC to establish minimum criteria for triggering when a peer review is required. For consistency, the ACC should also consider selecting a single firm to conduct peer reviews instead of the pool of five firms that are currently utilized.

Abutter Notification. The WPA requires notification of abutters within 100 feet of a proposed project. As indicated in Table 1, roughly half of the MVPC member communities, including the City of Amesbury, have increased the distance from 100 to either 250 or 300 feet. Lacking any anecdotal data, it is difficult to ascertain whether the additional notification requirement has increased abutter participation in the process. However, the ACC should evaluate reducing the requirement based on its experience in the last ten plus years since the 300-foot requirement went into effect.

Post Legal Ad. The WPA requires the posting of a legal ad at the expense of the applicant. As indicated in Table 1, many of the MVPC member communities facilitate this effort by placing the ad for the applicant upon submittal and payment of the permit application and fees. The ACC should

consider having its Agent place the ads since the City routinely places legal notices with the local newspaper.

Permit Application Copies. The WPA requires the submittal of two copies of the completed NOI with supporting plans and documents to the local conservation commission. Although most of the MVPC member communities currently require the submittal of additional hard copies, it is anticipated that electronic copies will be accepted shortly. The ACC should follow suit if it has not done so already.

Wetlands Replication. While wetlands replication is allowed for mitigation purposes under the WPA, recent studies have found that it is often difficult to successfully replicate wetlands for a variety of reasons. Therefore, the ACC should consider eliminating the 2:1 ratio for wetlands replication since it does not appear to be a viable alternative for mitigation purposes.

Duration of Orders. An Order of Conditions is valid for a period of three years from the date of issuance under the WPA, and where special circumstances warrant, an order may be issued for up to five years. As indicated in Table 1, most of the MVPC member communities, including the City of Amesbury, have adopted a provision to extend the permit duration in one form or another.

Appeals. The WPA includes an appeals process involving the MassDEP, but if the Order of Conditions issued by a conservation commission is based on a local ordinance or bylaw, then they may not have appellate jurisdiction. As a result, roughly half the MVPC member communities, including the City of Amesbury, have enacted an appeals process involving Superior Court. This provision has worked against the City in the past when it was necessary for the Department of Public Works to file suit against the ACC to resolve a dispute.

NOI Data

MassDEP's website provides access to filing information for Notices of Intent submitted throughout the State of Massachusetts by city/town. This information was downloaded for each of the MVPC member communities during the last three calendar years to review the average time required for issuance of an Order of Conditions. Obviously, there are many factors that may impact the approval process once an NOI is submitted for review by a conservation commission. So, it is not appropriate to look solely at the submittal and issuance dates and then draw conclusions about the overall process for a given community. But, it is a worthwhile exercise for comparison purposes.

Table 2 attached presents the NOI filing data obtained from MassDEP's website. As indicated, the City of Amesbury is one of the most active communities with 83 NOIs filed within the last three calendar years. Amesbury is also one of the communities with the highest average number of days for approval. As expected, the commissions that meet more frequently generally have a lower average than those that meet less frequently, but at the same time, there are outliers. For example, the Town of Newbury's conservation commission meets monthly and has one of the highest number of NOI submittals and the lowest average for approval time among the MVPC member communities.

Stakeholder Interviews

A series of phone interviews were conducted with a variety of stakeholders familiar with the wetlands permitting process in Amesbury. As previously noted, the peer review process was a major source of frustration due to the associated cost and schedule impacts, the role of the peer reviewer (i.e., drafting OOCs), and the difficulty with contracting. Most stakeholders expressed frustration with the lack of concern for the cost and schedule impacts associated with repeated requests for changes and/or

hearing continuances. Some questioned whether the materials submitted in support of permit applications were fully reviewed prior to the public hearing. Others voiced concerns that there is a tendency to ask for more than the WPA or wetlands ordinance allows. Duplication of effort with respect to stormwater peer reviews for the ACC vs. the Amesbury Planning Board was also noted. Overall, when asked if changes to the regulations could help streamline the process, the overwhelming response was that the regulations were not the problem, but rather the people involved throughout the process.

Following the phone interviews, a meeting was scheduled on October 1, 2019 with the Chair of the ACC, Mr. Kinsey Boehl, and the Conservation Agent, Mr. John Lopez, to review the feedback from stakeholders and to obtain suggestions for improving the wetlands permitting process. Both acknowledged that the peer review process has been problematic, in part due to the contracting process that the City implemented in late 2018. However, they have also struggled with the quality of developer proposed projects, and it was suggested that it may be helpful to require a pre-NOI meeting with applicants to review the submittal requirements and to identify the need for a peer review earlier in the process. Additional support from the City would also be helpful such as providing budget for training of board members and re-organizing the departments to return the Conservation Agent to the Office of Planning & Economic Development (OCED). The latter suggestion was also made by the former Director of the OCED, Mr. Bill Scott, and the Planning Director, Mr. Nipun Jain.

Overall, it was noted that the ACC has made significant improvements over the years; going from one of the communities with the most frequent appeals to DEP to one of the fewest.

Personal Experience

During this study, the writer had two different face-to-face interactions with the Amesbury Conservation Commission. The first interaction occurred at the ACC's meeting on April 1, 2019 when the writer was invited to provide an overview of the study so that the board could select two members for stakeholder interviews. Prior to the meeting, a posted copy of the meeting agenda was reviewed, and it was observed that the study presentation was the first item on the agenda. However, at the start of the meeting, the ACC made a motion to skip the administrative items until the end of the meeting due to the number of projects under continued business, including the Atlantic Sports Complex. The motion passed without any discussion or public input, and thus, marked the beginning of a three hour wait for the writer as well as the DPW Director who was in attendance to discuss proposed BMPs at Battis Farm after the study presentation.

There are several reasons for including the above interaction. First, people rely on the post meeting agenda for scheduling purposes, and if this had happened to a resident instead, then it may impact public participation in the future. Second, there is a cost associated with having a consultant wait for three additional hours, and in this case, the cost is to the taxpayers. Finally, there is the impact to City staff who are not paid to attend meetings after regular business hours but are expected to as part of their job responsibility.

The second interaction occurred at the ACC's meeting on June 3, 2019 when the writer attended the public hearing for the NOI on the Goodwin Creek water main crossing project. At first, it appeared that the commission was going to approve the project as originally submitted, but then a concern was raised in regards to the waiver request. In their opinion, the waiver request exempted the project from entire sections of the ordinance as opposed to project specific standards. The Conservation Agent then suggested that the commission approve the project conditionally subject to the applicant's submittal of a revised waiver request citing Section 21.3 (Landscaping) and 21.7 (Structures) of the regulations.

While this appeared to be a reasonable solution, the commission opted to continue the public hearing and require the submittal of a revised waiver request that is correct.

There are several reasons for including the above interaction as well. First, it was noted in the meeting that the commission is not supposed to take cost into consideration during their deliberations. This may be true based on the letter of the law, but most would agree that time is money. Therefore, it may be necessary to take the expedient course of action in certain circumstances, especially in this case, where the resolution to the concern raised by the commission boiled down to a paper exercise.

Similar to the first interaction with the ACC, the project being presented at the meeting was a taxpayer funded project. When this fact was mentioned at the meeting, the commission's response was that the standards for City projects should be higher than those for regular applicants. Obviously, the City does not expect to receive preferential treatment but some consideration should be given to the impacts on its residents. In this case, the proposed project involves replacing an existing water main installed under Goodwin Creek that is currently shut-off because of repeated breaks. This condition has contributed to low water pressure for the homes located along Pleasant Valley Road which is concern for fighting fires. To minimize impacts to the creek, a new water main will be constructed on the roof of the concrete culvert and insulated instead of replacing the existing main that runs below Goodwin Creek. At one point, there were discussions about whether the City needed to file an NOI since the argument could be made that the proposed project was exempt from the ordinance. However, based on past experience with the ACC, and due to the proximity of the project to the Merrimack River, it was determined that an NOI should be filed as a courtesy.

Finally, and in hindsight, this project may have benefitted by having the ACC conduct a site walk prior to the public hearing. In doing so, the commission would have observed the existing conditions at the site and realized that the project specific standards cited in the revised waiver request were not necessarily applicable. For example, Section 21.3 specifies that "no lawns or driveways may be constructed within 25 feet of any Resource Area", and this project does not propose to construct either. The new water main will be constructed up and over the existing concrete culvert within the right-of-way and connect to the existing water main located in the road on opposite sides of the culvert. A similar argument could be made regarding Section 21.7 since the proposed project does not involve the construction of a structure, but rather, a water pipeline buried a minimum of five feet deep except for the culvert crossing.

Recommendations

Based on review of the existing wetlands ordinance and discussions with stakeholders, the following recommendations are made to facilitate the wetlands permitting process in Amesbury:

- Revise the meeting schedule for the Amesbury Conservation Commission from once a month to a minimum of once every three weeks to comply with the public hearing requirements of the Wetlands Protection Act;
- Develop checklists for each type of wetlands permit application and post on the City's website for applicants to download and complete. Reject incomplete applications;
- Consider requiring applicants to schedule a pre-NOI filing meeting to review all the submittal requirements, provide the opportunity for Q&A, and identify the need and scope for a peer review;

- Provide in-house staff with the opportunity (time and budget) to pursue additional training, professional development, certifications, etc. that may reduce the reliance on outside consultants to review and interpret the wetlands regulations;
- Re-organize the City Departments to have the Conservation Agent report to the Director of Community & Economic Development to promote interaction between the Agent and the Planning Director similar to years past;
- Provide commission members with the opportunity (budget) to attend training courses offered through the Massachusetts Association of Conservation Commissions;
- Conduct site walks for proposed projects and determine whether a peer review is required based on an established set of minimum criteria prior to conducting public hearings;
- Tailor wetlands regulations to Resource Area seeking to protect. For example, how is the Merrimack River protected in Amesbury, Merrimac, and Salisbury as compared to Newburyport and West Newbury. Similarly, how is Lake Attitash protected in Amesbury as compared to Merrimac;
- Require the submittal of a comprehensive package for stormwater that addresses both the conservation commission (quality) and planning board (quantity) concerns in accordance with the MS4 regulations promulgated by EPA and MassDEP;
- Select a single firm to provide peer review services on a task order basis and then issue separate purchase order for each project upon receipt of the applicant's payment;
- Consider hiring an Environmental Monitor to conduct routine inspections of active projects to eliminate financial burden placed on small projects such as the construction of single family homes and/or additions;
- Provide applicants with the opportunity to review the draft Order of Conditions to eliminate the potential for including conditions that do not apply and/or may be cost prohibitive. Alternatively, prepare a checklist with boilerplate conditions and check-off accordingly for each applicant's project; and
- Refrain from re-arranging the meeting agenda once it is posted.

TABLE 1. COMPARISON OF WETLAND PROTECTION BYLAWS AMONG MVPC MEMBER COMMUNITIES

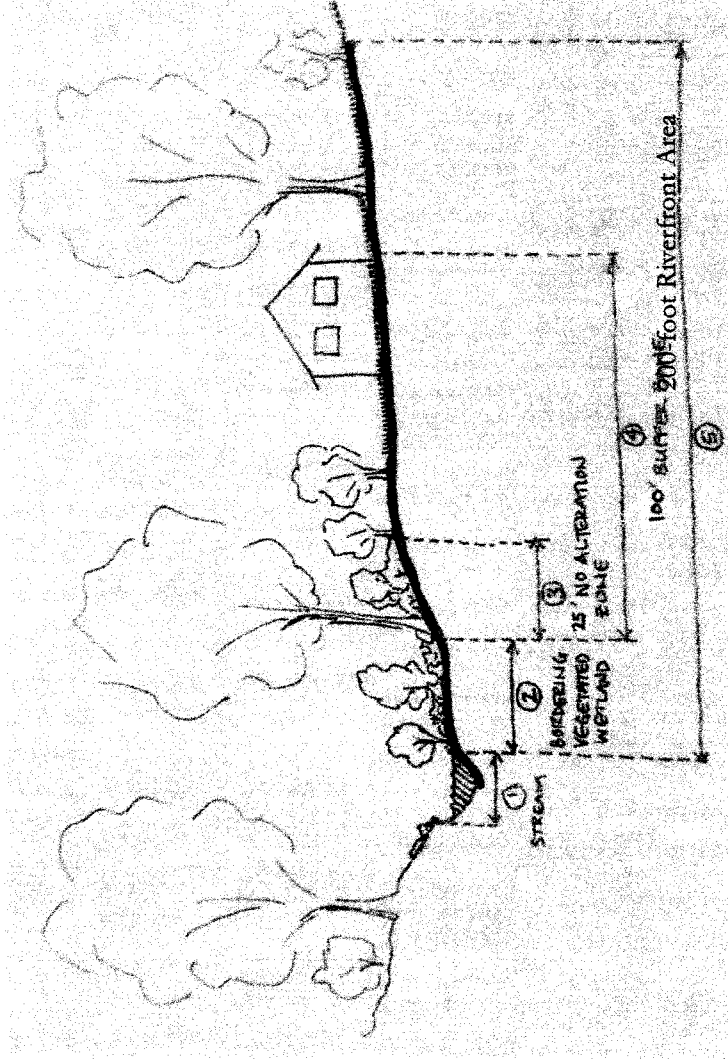
City/Town	Adopted Bylaw by H.R. Petition	Jurisdictional Areas		Performance Standards for Resource Areas	No-Disturb / No-Build Zones	Meeting Schedule	Outside Consultant Fees	Abutter Notification	Post Legal Ad	Permit Application Copies	Wetlands Replication	Duration of Orders	Appeals
		Isolated Vegetated Wetlands	Vernal Pools										
Amesbury	Yes	Yes	Yes	LUWB; LSTF; rivers; and BZ	Yes - varies	Monthly	Yes	300 feet	By applicant	7	2:1 ratio	3 years but may include retracts ⁽¹⁾	Superior Court
Andover	Yes	Yes	Yes	BVM; IVW; vernal pools; and BZ	Yes - varies	Semi-monthly	Yes	100 feet	By Agent at applicant expense	9	No mention	3 years but may include retracts ⁽¹⁾	No mention
Boxford	Yes	Yes	Yes	None	No	Semi-monthly	Yes	250 feet	By Agent at applicant expense	8	No mention	3 years with option for 5 years ⁽¹⁾	No mention
Georgetown	Yes	Yes	Yes	Adjacent upland resources	50' / 50'	Monthly	Yes	300 feet	By Agent at applicant expense	9	2:1 ratio	3 years with option for 5 years ⁽¹⁾	No mention
Groveland	Yes	No	Per WPA	Wetlands; LUWB; LSTF; RVES; and BZ	Yes - varies	Monthly	Yes	300 feet	By applicant	2	Ratio not specified	2 years with option for 5 years ⁽¹⁾	Superior Court
Haverhill	Yes	> 5,000 sf	Per WPA	None	25' / 50'	Every 3 weeks	Yes	300 feet	By Agent at applicant expense	10	1:1 ratio	3 years	DEP and/or Superior Court
Lawrence	Yes	> 1,000 sf	Yes	Riverfront areas	25' / 50'	Monthly	Yes	300 feet	By Agent at applicant expense	8	Ratio not specified	3 years with option for 5 years	Superior Court
Merrimac	Yes	Yes	Yes	None	25' / 50'	Monthly	Yes	100 feet	By Agent at applicant expense	7	2:1 ratio	3 years and extension up to 2 years	Superior Court
Methuen	Yes	Yes	No	None	50' / 50'	Semi-monthly	No mention	100 feet	By applicant	9	2:1 ratio	No mention	Superior Court
Newbury ⁽²⁾	Yes	No	No	Barrier beach	No	Monthly	Yes	100 feet	By applicant	2	No mention	3 years and extension for 3 years	No mention
Newburyport	Yes	Yes	Yes	Barrier beach	25'	Semi-monthly	Yes	100 feet	By Agent at applicant expense	10	Ratio not specified	3 years with option for 5 years	Superior Court
North Andover	Yes	Yes	Yes	Vernal pools; IVW; riverfront areas; and BZ	25' / 50'	Roughly every 2 weeks	No mention	300 feet	By Agent at applicant expense	2	2:1 ratio	3 years and extension up to 2 years	No mention
Rowley	Yes	Yes	Yes	No	25' to 50' as determined by RCC	Every 3 weeks	Yes	100 feet	By Agent at applicant expense	8	No mention	3 years with 1 year extension	Superior Court
Salisbury	Repealed 2008	No	Per WPA	No	No	Semi-monthly	No	100 feet	By Agent at applicant expense	8	1:1 ratio	3 years	DEP
West Newbury	Adopted MGL	No	Per WPA	No	25'	Semi-monthly	No	100 feet	By Agent at applicant expense	3	1:1 ratio	3 years	DEP

Notes:

(1) For recurring or continuous maintenance work; extending for stated number of years, indefinitely, or until permanent protection is in place.

(2) Adopted ordinance to provide enhanced protection to Plum Island Barrier Beach.

Wetland Resource Areas and Buffer Zones



LIVING WITH WETLANDS

A Guide to
Wetland Protection Laws
in West Newbury

Read this before you
dump, cut, or build
near water or wetlands.
You may need a permit.

WEST NEWBURY CONSERVATION
COMMISSION

DAWNE FUSCO
JUDITH MIZNER
WENDY REED
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DID YOU KNOW?

- Wetlands on both public and private property are regulated by law.
- You are responsible for activity that occurs on your property. Before you hire a tree company, landscaper, or contractor call the Conservation office to determine if you need a permit.
- Wetlands can be wooded or meadow-like; wetlands often appear dry in the summer.
- The Conservation Commission takes enforcement action and can issue fines for work done without a permit.

TABLE 2. NOI PROJECT REVIEWS BY MVPC MEMBER COMMUNITIES⁽¹⁾

City/Town	1/1/17 Through 12/31/19			Average # of Days for Approval
	NOIs Submitted	OOCs Issued	Pending	
Amesbury	83	67	16	90
Andover	59	49	10	90
Boxford	49	46	3	62
Georgetown	57	45	12	88
Groveland	19	13	6	91
Haverhill	59	47	12	67
Lawrence	11	7 ⁽²⁾	4	455
Merrimac	18	13	5	47
Methuen	55	37	18	62
Newbury	93	83	10	54
Newburyport	58	46	12	70
North Andover	83	73	10	60
Rowley	41	35	6	81
Salisbury	112	102	10	64
West Newbury	40	37	3	69

Notes:

(1) Source: MassDEP website.

(2) All seven Order of Conditions issued on the same date (7/23/19).