

AN ORDINANCE ADDING SECTION 5.18 TO THE CHAPEL HILL LAND USE  
MANAGEMENT ORDINANCE REGARDING RIPARIAN BUFFER PROTECTION  
(2010-12-06/O- )

WHEREAS, the Council of the Town of Chapel Hill has considered the proposed text amendments to the Land Use Management Ordinance regarding riparian buffer protection and finds that the amendments are warranted in order to achieve the purposes of the Comprehensive Plan and are necessary to meet the newly mandated requirements for the protection of the Jordan Lake watershed established by the North Carolina Environmental Management Commission;

NOW, THEREFORE, BE IT ORDAINED by the Council of the Town of Chapel Hill as follows:

**Section 1.** Article 5 of the Chapel Hill Land Use Management Ordinance, Design and Development Standards, is hereby revised to add a new section, Section 5.18, to read as follows:

**“5.18 Jordan Watershed Riparian Buffer Protection**

***5.18.1 Authority***

This Section is adopted pursuant to the authority vested in the Town of Chapel Hill by the Session Laws and the General Statutes of North Carolina, particularly Session Law 2009-216 (House Bill 239), Session Law 2009-484 (Senate Bill 838), and the authority referenced in Section 1.2 of this Ordinance.

***5.18.2 Purpose and Intent***

The purpose of this Section is to protect and preserve existing riparian buffers throughout the Jordan Watershed as generally described in 15A North Carolina Administrative Code 2B.0262 in order to maintain their nutrient removal and stream protection functions. Additionally this Section will help protect the water supply uses of Jordan Reservoir.

Buffers adjacent to streams provide multiple environmental protection and resource management benefits. Forested buffers enhance and protect the natural ecology of stream systems, as well as water quality through bank stabilization, shading, and nutrient removal. They also help to minimize flood damage in flood prone areas. Well-vegetated streamside riparian areas help to remove nitrogen and prevent sediment and sediment-bound pollutants such as phosphorous from reaching the streams.

***5.18.3 Definitions***

The definitions in Appendix A of this Ordinance shall apply to this Section except as modified herein:

- (a) ‘Access Trails’ means pedestrian trails constructed of pervious or impervious surfaces and related structures to access a surface water, including boardwalks, steps, rails, and signage.
- (b) ‘Airport Facilities’ means all properties, facilities, buildings, structures, and activities that satisfy or otherwise fall within the scope of one or more of the definitions or uses of the

- (c) words or phrases ‘air navigation facility’, ‘airport’, or ‘airport protection privileges’ under G.S. 63-1; the definition of ‘aeronautical facilities’ in G.S. 63-79(1); the phrase ‘airport facilities’ as used in G.S. 159-48(b)(1); the phrase ‘aeronautical facilities’ as defined in G.S. 159-81 and G.S. 159-97; and the phrase ‘airport facilities and improvements’ as used in Article V, Section 13, of the North Carolina Constitution, which shall include, without limitation, any and all of the following: airports, airport maintenance facilities, clear zones, drainage ditches, fields, hangars, landing lighting, airport and airport-related offices, parking facilities, related navigational and signal systems, runways, stormwater outfalls, terminals, terminal shops, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant rights-of-way; restricted landing areas; any structures, mechanisms, lights, beacons, marks, communicating systems, or other instrumentalities or devices used or useful as an aid, or constituting an advantage or convenience to the safe taking off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport or restricted landing area; easements through, or interests in, air space over land or water, interests in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to ensure safe approaches to the landing areas of airports and restricted landing areas, and the safe and efficient operation thereof and any combination of any or all of such facilities. Notwithstanding the foregoing, the following shall not be included in the definition of ‘airport facilities’:
- (1) Satellite parking facilities;
  - (2) Retail and commercial development outside of the terminal area, such as rental car facilities; and
  - (3) Other secondary development, such as hotels, industrial facilities, free-standing offices and other similar buildings, so long as these facilities are not directly associated with the operation of the airport, and are not operated by a unit of government or special governmental entity such as an airport authority, in which case they are included in the definition of ‘airport facilities’.
- (d) ‘Channel’ means a natural water-carrying trough cut vertically into low areas of the land surface by erosive action of concentrated flowing water or a ditch or canal excavated for the flow of water.
- (e) ‘Commission’ means the North Carolina Environmental Management Commission.
- (f) ‘Diameter at breast height’ (DBH) means the diameter of a tree measured at 4.5 feet above the ground surface level.
- (g) ‘Development’ means any land disturbing activity which adds to or changes the amount of impervious or partially impervious cover on a land area or which otherwise decreases the infiltration of precipitation into the soil.
- (h) ‘Director’ means the Director of the North Carolina Department of Environment and Natural Resources’ Division of Water Quality.

- (i) 'Ditch or canal' means a man-made channel other than a modified natural stream constructed for drainage purposes that is typically dug through inter-stream divide areas. A ditch or canal may have flows that are perennial, intermittent, or ephemeral and may exhibit hydrological and biological characteristics similar to perennial or intermittent streams.
- (j) 'Division' means the North Carolina Department of Environment and Natural Resources' Division of Water Quality or its successor.
- (k) 'Ephemeral stream' means a feature that carries only stormwater in direct response to precipitation with water flowing only during and shortly after large precipitation events. An ephemeral stream may or may not have a well-defined channel, the aquatic bed is always above the water table, and stormwater runoff is the primary source of water. An ephemeral stream typically lacks the biological, hydrological, and physical characteristics commonly associated with the continuous or intermittent conveyance of water.
- (l) 'Existing development' means development, other than that associated with agricultural or forest management activities, that meets one of the following criteria:
  - (1) It either is built or has established a vested right based on statutory or common law as interpreted by the courts, for projects that do not require a state permit, as of the effective date of either local new development stormwater programs implemented under 15A NCAC 2B.0265 or, for projects requiring a state permit, as of the applicable compliance date established in 15A NCAC 2B.0271 (5) and (6); or
  - (2) It occurs after the compliance date set out in Sub-Item (4)(d) of 15A NCAC 2B.0265 but does not result in a net increase in built-upon area.
- (m) 'Greenway/Hiking Trails' means pedestrian trails constructed of pervious or impervious surfaces and related structures including but not limited to boardwalks, steps, rails, and signage, and that generally run parallel to the shoreline.
- (n) 'High Value Tree' means a tree that meets or exceeds the following standards: for pine species, 14-inch DBH or greater or 18-inch or greater stump diameter; or for hardwoods and wetland species, 16-inch DBH or greater or 24-inch or greater stump diameter.
- (o) 'Intermittent stream' means a well-defined channel that contains water for only part of the year, typically during winter and spring when the aquatic bed is below the water table. The flow may be heavily supplemented by stormwater runoff. An intermittent stream often lacks the biological and hydrological characteristics commonly associated with the continuous conveyance of water.
- (p) 'Jordan Nutrient Strategy' or 'Jordan Water Supply Nutrient Strategy' means the set of rules in 15A NCAC 2B.0262 through .0273 and .0311(p).
- (q) 'Jordan Reservoir' means the surface water impoundment operated by the US Army Corps of Engineers and named B. Everett Jordan Reservoir, as further delineated for purposes of the Jordan nutrient strategy in 15A NCAC 2B.0262(4).

- (r) 'Jordan watershed' means all lands and waters draining to B. Everett Jordan Reservoir.
- (s) 'New Development' means any development project that does not meet the definition of existing development set out in this Section.
- (t) 'Perennial stream' means a well-defined channel that contains water year round during a year of normal rainfall with the aquatic bed located below the water table for most of the year. Groundwater is the primary source of water for a perennial stream, but it also carries stormwater runoff. A perennial stream exhibits the typical biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water.
- (u) 'Perennial waterbody' means a natural or man-made basin, including lakes, ponds, and reservoirs, that stores surface water permanently at depths sufficient to preclude growth of rooted plants. The waterbody must be part of a natural drainage way. A waterbody is part of a natural drainage way when it is fed by an intermittent or perennial stream or when it has a direct discharge point to an intermittent or perennial stream.
- (v) 'Shoreline stabilization' is the in-place stabilization of an eroding shoreline. Stabilization techniques which include "soft" methods or natural materials (such as root wads, or rock vanes) may be considered as part of a restoration design. However, stabilization techniques that consist primarily of "hard" engineering, such as concrete lined channels, riprap, or gabions, while providing bank stabilization, shall not be considered stream restoration.
- (w) 'Stream restoration' is defined as the process of converting an unstable, altered or degraded stream corridor, including adjacent riparian zone and flood-prone areas to its natural or referenced, stable conditions considering recent and future watershed conditions. This process also includes restoring the geomorphic dimension, pattern, and profile as well as biological and chemical integrity, including transport of water and sediment produced by the stream's watershed in order to achieve dynamic equilibrium. 'Referenced' or 'referenced reach' means a stable stream that is in dynamic equilibrium with its valley and contributing watershed. A reference reach can be used to develop natural channel design criteria for stream restoration projects.
- (x) 'Stream' means a body of concentrated flowing water in a natural low area or natural channel on the land surface.
- (y) 'Stump diameter' means the diameter of a tree measured at six inches above the ground surface level.
- (z) 'Surface waters' means all waters of the state as defined in G.S. 143-212 except underground waters
- (aa) 'Tree' means a woody plant with a DBH equal to or exceeding five inches or a stump diameter exceeding six inches.

- (bb) ‘Temporary road’ means a road constructed temporarily for equipment access to build or replace hydraulic conveyance structures such as bridges, culverts, pipes or water dependent structures, or to maintain public traffic during construction.

#### **5.18.4 Applicability**

This Section applies to all landowners and other persons conducting activities in the area described in Section 1.4. The NC Division of Water Quality shall administer the requirements of 15A NCAC 02B.0267 and .0268 for activities conducted by the entities not subject to this Section.

#### **5.18.5 Relation to Other Ordinances**

The requirements of this Section shall supersede requirements of Subsection 3.6.4(f). If the provisions of this Section otherwise conflict with other provisions of this Ordinance, the most stringent provisions shall control. This Section is not intended to interfere with, abrogate, or annul any other ordinance, rule, regulation, or other provision of law.

Parties subject to this Section shall abide by all State rules and laws regarding waters of the state including, but not limited to, 15A NCAC 2B.0230 and .0231, 15A NCAC 2H.0500, 15A NCAC 2H.1300, and Sections 401 and 404 of the Federal Water Pollution Control Act.

#### **5.18.6 Riparian Area Protection**

##### **(a) Riparian Buffer Zones**

The protected riparian buffer shall have two zones as follows:

- (1) Zone One shall consist of a vegetated area that is undisturbed except for uses and activities provided for in Subsection 5.18.7(b). The location of Zone One shall be as follows:
  - A. For intermittent and perennial streams, Zone One shall begin at the top of the bank and extend landward a distance of thirty (30) feet on all sides of the surface water, measured horizontally on a line perpendicular to a vertical line marking the top of the bank.
  - B. For perennial waterbodies located within a natural drainage way, Zone One shall begin at the normal pool elevation and extend landward a distance of thirty (30) feet, measured horizontally on a line perpendicular to a vertical line marking the normal pool elevation.
- (2) Zone Two shall consist of a stable, vegetated area that is undisturbed except for uses and activities provided for in Subsection 5.18.7(b). Grading and revegetating in Zone Two is allowed provided that the health of the vegetation in Zone One is not compromised. Zone Two shall begin at the outer edge of Zone One and extend landward twenty (20) feet as measured horizontally on a line perpendicular to the surface water. The combined width of Zones One and Two shall be fifty (50) feet on all sides of the surface water.

- (b) The following minimum criteria shall be used for identifying protected riparian areas:
- (1) This Section shall apply to uses in or activities conducted within, or outside of with hydrological impacts in violation of the diffuse flow requirements set out in Subsection 5.18.6(c) upon, fifty (50) foot wide riparian buffers directly adjacent to intermittent streams, perennial streams and perennial waterbodies, excluding wetlands.
  - (2) Wetlands adjacent to, or within fifty (50) feet of, intermittent streams, perennial streams and perennial waterbodies shall be considered as part of the riparian buffer but are regulated pursuant to 15A NCAC 2B.0230 and .0231, 15A NCAC 2H.0500, 15A NCAC 2H.1300, and Sections 401 and 404 of the Federal Water Pollution Control Act.
  - (3) An intermittent stream, perennial stream or perennial waterbody shall be subject to these requirements if it is approximately shown on one of the following maps:
    - A. The most recent hard copy paperbound version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture.
    - B. The most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS).
    - C. A map approved by the Geographic Information Coordinating Council and by the NC Environmental Management Commission. Prior to approving a map, the Commission is required to provide a 30-day public notice and opportunity for comment.
  - (4) Waterbodies subject to this Section shall be subject to field verification by the Town Manager. Where it is believed the map has inaccurately depicted surface waters or the origination point of a stream is in question, the Town Manager shall make an onsite determination upon written request by the landowner, the Division, or other affected party. A Town representative who has successfully completed the Division's *Surface Water Identification Training Certification* course, its successor, or other equivalent training curriculum approved by the Division, shall verify the location of the waterbody or origination point using the latest version of the Division publication, *Identification Methods for the Origins of Intermittent and Perennial Streams*. Any disputes about onsite determinations made according to this Subsection shall be referred to the Director of the Division, in writing.

Surface waters that appear on the maps shall not be subject to these buffer requirements if an onsite determination reveals any of the following cases:

- A. Manmade ponds and lakes that are not part of a natural drainage way that is classified in accordance with 15A NCAC 2B.0100, including ponds and lakes created for animal watering, irrigation, or other agricultural uses.
- B. Ephemeral streams.

- C. The absence on the ground of a corresponding intermittent or perennial stream, or perennial waterbody.
- D. Ditches or other manmade water conveyances, other than modified natural streams.

(c) *Diffuse Flow Requirements*

- (1) Diffuse flow of runoff shall be maintained in the riparian buffer by dispersing concentrated flow prior to its entry into the buffer and reestablishing vegetation.
- (2) Concentrated runoff from new ditches or manmade conveyances shall be converted to diffuse flow at non-erosive velocities before the runoff enters Zone Two of the riparian buffer.
- (3) Periodic corrective action to restore diffuse flow shall be taken as necessary and shall be designed to impede the formation of erosion gullies.
- (4) No new stormwater conveyances are allowed through the buffer except for those specified Subsection 5.18.7(b), Table of Uses, addressing stormwater management ponds, drainage ditches, roadside ditches, and stormwater conveyances.

(d) *Exemptions for Existing and Ongoing Uses and Activities*

This Section shall not apply to uses and activities that are existing and ongoing; however, this Section shall apply at the time an existing and ongoing use or activity is changed. A change of use or activity shall involve the initiation of any use or activity that does not meet either of the following criteria:

- (1) It was an existing and ongoing use or activity within the riparian buffer as of the effective date of this Section and has continued since that time. Such uses shall include, but may not be limited to, agriculture, buildings, industrial facilities, commercial areas, transportation facilities, maintained lawns, utility lines and on-site sanitary sewage systems, any of which involve either specific, periodic management of vegetation or displacement of vegetation by structures or regular activity. Only the portion of the riparian buffer occupied by the footprint of the existing use is exempt from this Section. Change of ownership through purchase or inheritance is not a change of use. Activities necessary to maintain uses are allowed provided that the site remains similarly vegetated, no impervious surface is added within 50 feet of the surface water where it did not previously exist as of the effective date of this Section, and existing diffuse flow is maintained.
- (2) Project or proposed development that is determined by the Town Manager to meet at least one of the following criteria:
  - A. Project or proposed development requires a State 401 Certification and Federal 404 Permit and the Certification and Permit were issued prior to the effective date this Section;

- B. Project or proposed development, such as landfills, NPDES wastewater discharges, land application of residuals and road construction activities, requires a state permit, has begun construction or is under contract to begin construction and has received all required state permits and certifications prior to the effective date of this Section;
- C. Project or proposed development is being reviewed through the Clean Water Act Section 404/National Environmental Policy Act Merger 01 Process (published by the US Army Corps of Engineers and Federal Highway Administration, 2003) or its immediate successor and the applicant has reached agreement with the Department of Environment Natural Resources on avoidance and minimization by the effective date of this Section; or
- D. Project or proposed development is not required to be reviewed by the Clean Water Act Section 404/National Environmental Policy Act Merger 01 Process (published by the US Army Corps of Engineers and Federal Highway Administration, 2003) or its immediate successor if a Finding of No Significant Impact has been issued for the project and the project has the written approval of the Town Manager prior to the effective date of this Section.

#### ***5.18.7 Requirements for Uses and Activities***

(a) Uses and activities designated in Subsection 5.18.7(b) as exempt, allowable, and allowable with mitigation within a riparian buffer shall have the following requirements:

- (1) Exempt.

Uses and activities designated as exempt are permissible without authorization by the Town provided that they adhere to the limitations of the use or activity as defined in Subsection 5.18.7(b), and a Notice of Exemption has been submitted to the Town prior to beginning the activity. In addition, exempt uses shall be designed, constructed and maintained to minimize soil disturbance and to provide the maximum water quality protection practicable, including construction, monitoring, and maintenance activities.

- (2) Allowable.

Uses and activities designated as allowable may proceed provided that there are no practical alternatives to the requested use pursuant to in Subsection 5.18.8(c). This includes construction, monitoring, and maintenance activities. These uses and activities require written authorization from the Town Manager.

- (3) Allowable with Mitigation.

Uses and activities designated as allowable with mitigation may proceed provided that there are no practical alternatives to the requested use pursuant to in Subsection 5.18.8(c) and an appropriate mitigation strategy has been approved pursuant to in Subsection 5.18.8(e). These uses and activities require written authorization from the Town Manager.

- (b) The following table sets out uses and activities within, or outside with impacts upon, the buffer and categorizes them as exempt, allowable, or allowable with mitigation. All uses and activities not categorized as exempt, allowable, or allowable with mitigation are prohibited and may not proceed within the riparian buffer or outside the buffer if the use would impact the buffer, unless a variance is granted pursuant to Subsection 5.18.8(d).

Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
<p>Access trails: Pedestrian access trails leading to the surface water, docks, fishing piers, boat ramps and other water dependent activities:</p> <ul style="list-style-type: none"> <li>• Pedestrian access trails that are restricted to the minimum width practicable and do not exceed 4 feet in width of buffer disturbance, and provided that installation and use does not result in removal of trees as defined in this Section and no impervious surface is added to the riparian buffer</li> <li>• Pedestrian access trails that exceed 4 feet in width of buffer disturbance, the installation or use results in removal of trees as defined in this Section or impervious surface is added to the riparian buffer</li> </ul>	X	X	
<p>Airport facilities:</p> <ul style="list-style-type: none"> <li>• Airport facilities that impact equal to or less than 150 linear feet or one-third of an acre of riparian buffer</li> <li>• Airport facilities that impact greater than 150 linear feet or one-third of an acre of riparian buffer</li> <li>• Activities necessary to comply with FAA requirements (e.g. radar uses or landing strips)<sup>1</sup></li> </ul>		X  X	X
Archaeological activities	X		
Bridges		X	
Canoe Access provided that installation and use does not result in removal of trees as defined in this Section and no impervious surface is added to the buffer.	X		
<p>Dam maintenance activities:</p> <ul style="list-style-type: none"> <li>• Dam maintenance activities that do not cause additional buffer disturbance beyond the footprint of the existing dam or those covered under the U.S. Army Corps of Engineers Nationwide Permit No. 3</li> <li>• Dam maintenance activities that do cause additional buffer disturbance beyond the footprint of the existing dam or those not covered under the U.S. Army Corps of Engineers Nationwide Permit No.3</li> </ul>	X	X	

\* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).



Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
Fences: <ul style="list-style-type: none"> <li>• Fences provided that disturbance is minimized and installation does not result in removal of trees as defined in this Section</li> <li>• Fences provided that disturbance is minimized and installation results in removal of trees as defined in this Section</li> </ul>	X	X	
Fertilizer application: one-time application to establish vegetation	X		
Grading and revegetation in Zone Two provided that diffuse flow and the health of existing vegetation in Zone One is not compromised and disturbed areas are stabilized until they are revegetated.	X		
Greenways and hiking trails designed, constructed and maintained to maximize nutrient removal and erosion protection, minimize adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practical.		X	
Historic preservation	X		
Maintenance access on modified natural streams: a grassed travel way on one side of the water body when less impacting alternatives are not practical. The width and specifications of the travel way shall be only that needed for equipment access and operation. The travel way shall be located to maximize stream shading.		X	
Mining activities: <ul style="list-style-type: none"> <li>• Mining activities that are covered by the Mining Act provided that new riparian buffers that meet the requirements of Subsections 5.18.6(a) and 5.18.6(c) are established adjacent to the relocated channels</li> <li>• Mining activities that are not covered by the Mining Act OR where new riparian buffers that meet the requirements of Subsections 5.18.6(a) and 5.18.6(c) are not established adjacent to the relocated channels</li> <li>• Wastewater or mining dewatering wells with approved NPDES permit</li> </ul>	X	X	X

\* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).

Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
Playground equipment: <ul style="list-style-type: none"> <li>• Playground equipment on single family lots provided that installation and use does not result in removal of vegetation</li> <li>• Playground equipment installed on lands other than single-family lots or that requires removal of vegetation</li> </ul>	X	X	
Ponds created by impounding streams and not used as stormwater BMPs: <ul style="list-style-type: none"> <li>• New ponds provided that a riparian buffer that meets the requirements of Subsections 5.18.6(a) and 5.18.6(c) is established adjacent to the pond</li> <li>• New ponds where a riparian buffer that meets the requirements of Subsections 5.18.6(a) and 5.18.6(c) is NOT established adjacent to the pond</li> </ul>		X	X
Protection of existing structures, facilities and stream banks when this requires additional disturbance of the riparian buffer or the stream channel		X	
Railroad impacts other than crossings of streams and other surface waters subject to this Section.			X
Railroad crossings of streams and other surface waters subject to this Section: <ul style="list-style-type: none"> <li>• Railroad crossings that impact equal to or less than 40 linear feet of riparian buffer</li> <li>• Railroad crossings that impact greater than 40 linear feet but equal to or less than 150 linear feet or one-third of an acre of riparian buffer</li> <li>• Railroad crossings that impact greater than 150 linear feet or one-third of an acre of riparian buffer</li> </ul>	X	X	X

\* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).



Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
<p>Stormwater BMPs:</p> <ul style="list-style-type: none"> <li>• Wet detention, bioretention, and constructed wetlands in Zone Two if diffuse flow of discharge is provided into Zone One</li> <li>• Wet detention, bioretention, and constructed wetlands in Zone One</li> </ul>		X	X
Scientific studies and stream gauging	X		
Streambank or shoreline stabilization		X	
<p>Temporary roads, provided that the disturbed area is restored to pre-construction topographic and hydrologic conditions immediately after construction is complete and replanted immediately with comparable vegetation, except that tree planting may occur during the dormant season. A one-time application of fertilizer may be used to establish vegetation: At the end of 5 years the restored buffer shall comply with the restoration criteria in Subsection 5.18.8(e)(7):</p> <ul style="list-style-type: none"> <li>• Less than or equal to 2,500 square feet of buffer disturbance</li> <li>• Greater than 2,500 square feet of buffer disturbance</li> <li>• Associated with culvert installation or bridge construction or replacement.</li> </ul>	X	X  X	
<p>* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).</p>			

Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
<p>Temporary sediment and erosion control devices, provided that the disturbed area is restored to pre-construction topographic and hydrologic conditions immediately after construction is complete and replanted immediately with comparable vegetation, except that tree planting may occur during the dormant season. A one-time application of fertilizer may be used to establish vegetation. At the end of five years the restored buffer shall comply with the restoration criteria in Subsection 5.18.8(e)(7):</p> <ul style="list-style-type: none"> <li>• In Zone Two provided ground cover is established within timeframes required by the Sedimentation and Erosion Control Act, vegetation in Zone One is not compromised, and runoff is released as diffuse flow in accordance with Subsection 5.18.6(c).</li> <li>• In Zones One and Two to control impacts associated with uses and activities approved by the Town or that have received a variance, provided that sediment and erosion control for upland areas is addressed, to the maximum extent practical, outside the buffer.</li> <li>• In-stream temporary erosion and sediment control measures for work within a stream channel that is authorized under Sections 401 and 404 of the Federal Water Pollution Control Act.</li> <li>• In-stream temporary erosion and sediment control measures for work within a stream channel.</li> </ul>	<p style="text-align: center;">X</p> <p style="text-align: center;">X</p>	<p style="text-align: center;">X</p> <p style="text-align: center;">X</p>	
<p>Utility, electric, aerial, perpendicular crossings of streams and other surface waters subject to this Section<sup>2,3,5</sup>:</p> <ul style="list-style-type: none"> <li>• Disturb equal to or less than 150 linear feet of riparian buffer</li> <li>• Disturb greater than 150 linear feet of riparian buffer</li> </ul>	<p style="text-align: center;">X</p>	<p style="text-align: center;">X</p>	
<p>Utility, electric, aerial, other than perpendicular crossings<sup>5</sup>:</p> <ul style="list-style-type: none"> <li>• Impacts in Zone Two</li> <li>• Impacts in Zone One<sup>2,3</sup></li> </ul>		<p style="text-align: center;">X</p>	<p style="text-align: center;">X</p>

\* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).

Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
Utility, electric, underground, perpendicular crossings <sup>3,4,5</sup> : <ul style="list-style-type: none"> <li>• Disturb less than or equal to 40 linear feet of riparian buffer</li> <li>• Disturb greater than 40 linear feet of riparian buffer</li> </ul>	X	X	
Utility, electric, underground, other than perpendicular crossings <sup>4</sup> : <ul style="list-style-type: none"> <li>• Impacts in Zone Two</li> <li>• Impacts in Zone One<sup>1</sup></li> </ul>	X X		
Utility, non-electric, perpendicular crossings of streams and other surface waters subject to this Section <sup>3,5</sup> : <ul style="list-style-type: none"> <li>• Disturb equal to or less than 40 linear feet of riparian buffer with a maintenance corridor equal to or less than 10 feet in width</li> <li>• Disturb equal to or less than 40 linear feet of riparian buffer with a maintenance corridor greater than 10 feet in width</li> <li>• Disturb greater than 40 linear feet but equal to or less than 150 linear feet of riparian buffer with a maintenance corridor equal to or less than 10 feet in width</li> <li>• Disturb greater than 40 linear feet but equal to or less than 150 linear feet of riparian buffer with a maintenance corridor greater than 10 feet in width</li> <li>• Disturb greater than 150 linear feet of riparian buffer</li> </ul>	X	X  X	X  X
Utility, non-electric, other than perpendicular crossings <sup>4,5</sup> : <ul style="list-style-type: none"> <li>• Impacts in Zone Two</li> <li>• Impacts in Zone One<sup>1</sup></li> </ul>		X	X

\* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).



Use or Activity	Exempt*	Allowable*	Allowable with Mitigation*
Wetland, stream and buffer restoration that results in impacts to the riparian buffers: <ul style="list-style-type: none"> <li>• Wetland, stream and buffer restoration that requires NC Division of Water Quality approval for the use of a 401 Water Quality Certification</li> <li>• Wetland, stream and buffer restoration that does not require Division of Water Quality approval for the use of a 401 Water Quality Certification</li> </ul>	X	X	
Wildlife passage structures		X	

\* To qualify for the designation indicated in the column header, a use or activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Subsection 5.18.7(a).

<sup>1</sup> Provided that:

- No heavy equipment is used in Zone One.
- Vegetation in undisturbed portions of the buffer is not compromised.
- Felled trees are removed by chain.
- No permanent felling of trees occurs in protected buffers or streams.
- Stumps are removed only by grinding.
- At the completion of the project the disturbed area is stabilized with native vegetation.
- Zones One and Two meet the requirements of Subsections 5.18.6(a) and 5.18.6(c).

<sup>2</sup> Provided that, in Zone One, all of the following BMPs for overhead utility lines are used. If all of these BMPs are not used, then the overhead utility lines shall require a no practical alternative evaluation by the Town, as defined in Subsection 5.18.8(c).

- A minimum zone of ten (10) feet wide immediately adjacent to the water body shall be managed such that only vegetation that poses a hazard or has the potential to grow tall enough to interfere with the line is removed.
- Woody vegetation shall be cleared by hand. No land grubbing or grading is allowed.
- Vegetative root systems shall be left intact to maintain the integrity of the soil. Stumps shall remain where trees are cut.
- Riprap shall not be used unless it is necessary to stabilize a tower.
- No fertilizer shall be used other than a one-time application to re-establish vegetation.
- Construction activities shall minimize the removal of woody vegetation, the extent of the disturbed area, and the time in which areas remain in a disturbed state.

- Active measures shall be taken after construction and during routine maintenance to ensure diffuse flow of stormwater through the buffer.
- In wetlands, mats shall be utilized to minimize soil disturbance.

<sup>3</sup> Provided that poles or aerial infrastructure shall not be installed within ten (10) feet of a water body unless the Town completes a no practical alternative evaluation as defined in Subsection 5.18.8(c).

<sup>4</sup> Provided that, in Zone One, all of the following BMPs for underground utility lines are used. If all of these BMPs are not used, then the underground utility line shall require a no practical alternative evaluation by the Town, as defined in Subsection 5.18.8(c).

- Woody vegetation shall be cleared by hand. No land grubbing or grading is allowed.
- Vegetative root systems shall be left intact to maintain the integrity of the soil. Stumps shall remain, except in the trench where trees are cut.
- Underground cables shall be installed by vibratory plow or trenching.
- The trench shall be backfilled with the excavated soil material immediately following cable installation.
- No fertilizer shall be used other than a one-time application to re-establish vegetation.
- Construction activities shall minimize the removal of woody vegetation, the extent of the disturbed area, and the time in which areas remain in a disturbed state.
- Measures shall be taken upon completion of construction and during routine maintenance to ensure diffuse flow of stormwater through the buffer.
- In wetlands, mats shall be utilized to minimize soil disturbance.

<sup>5</sup> Perpendicular crossings are those that intersect the surface water at an angle between 75 degrees and one hundred five (105) degrees.

#### ***5.18.8 Procedures, Requirements, and Approvals***

(a) No new clearing, grading, or development shall take place nor shall any new building permits be issued in violation of this Section.

(b) *Approval for New Development*

The Town Manager shall issue an approval for new development only if the development application contains measures to avoid impacts to riparian buffers defined in Subsection 5.18.6(b), or where the application indicates an impact to riparian buffers, it demonstrates that the applicant has done the following, as applicable:

- (1) Determined the activity is exempt from requirements of this Section and a Notice of Exemption has been submitted to the Town Manager;
- (2) Received an Authorization Certificate from the Town Manager pursuant to Subsection 5.18.8(c);

- (3) Received an approval from the Town Manager for a mitigation plan pursuant to Subsection 5.18.8(e); and
- (4) Received a variance pursuant to Subsection 5.18.8(d).

(c) *Authorization Certificate and Determination of No Practical Alternatives*

- (1) Except as otherwise specifically provided in this Section, it shall be unlawful to undertake uses and activities designated as allowable or allowable with mitigation until the Town Manager has issued an Authorization Certificate for such uses and activities. Persons who wish to undertake uses and activities designated as allowable or allowable with mitigation shall submit a request for a “no practical alternatives” determination to the Town Manager. The applicant shall certify that the project meets all the following criteria for a determination of “no practical alternatives:”
  - A. The basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality;
  - B. The use or activity cannot practically be reduced in size or density, reconfigured, modified or redesigned to better minimize disturbance, preserve aquatic life and habitat, and protect water quality; and
  - C. Best management practices shall be used as necessary to minimize disturbance, preserve aquatic life and habitat, and protect water quality.
- (2) The applicant shall also submit at least the following information in support of his or her assertion of “no practical alternatives:”
  - A. The name, address and phone number of the applicant;
  - B. The nature of the use or activity to be conducted by the applicant;
  - C. The location of the use or activity;
  - D. A map of sufficient detail to accurately delineate the boundaries of the use or the land to be utilized in carrying out the activity, the location and dimensions of any disturbance in riparian buffers associated with the use or activity, and the extent of riparian buffers on the land;
  - E. An explanation of why this plan for the use or activity cannot be practically accomplished, reduced or reconfigured to better minimize disturbance to the riparian buffer, preserve aquatic life and habitat and protect water quality; and
  - F. Plans for any best management practices proposed to be used to control the impacts associated with the activity.
- (3) Within sixty (60) days of a submission that complies with Subsection 5.18.8(c)(2), the Town Manager shall review the entire project and make a finding of fact as to whether the criteria in Subsection 5.18.8(c)(1) have been met. A determination of “no practical alternatives” shall result in issuance of an Authorization Certificate. The Town Manager’s failure to act within sixty (60) days shall be construed as a determination of “no practical alternatives” and an

Authorization Certificate shall be issued to the applicant unless one of the following occurs:

- A. The applicant agrees, in writing, to a longer review period;
  - B. The Town Manager determines that the applicant has failed to furnish requested information necessary for the Town to render a decision;
  - C. The final decision is to be made pursuant to a public hearing; or
  - D. The applicant refuses access to his/her records or premises for the purpose of gathering information necessary for the Town Manager to render a decision.
- (4) The Town Manager may attach conditions to the Authorization Certificate that support the purpose, spirit and intent of this Section.
- (5) Any appeals of determinations regarding Authorization Certificates shall be referred to the Director of the Division.

(d) *Variances*

- (1) Requirements for Variances.

Persons who wish to undertake uses and activities prohibited by this Section may pursue a variance. The procedures for requesting a variance from the requirements of this Section shall be as follows:

- A. For any variance request, the Town Board of Adjustment shall make a finding of fact as to whether there are practical difficulties or unnecessary hardships that prevent compliance with the riparian buffer protection requirements. A finding of practical difficulties or unnecessary hardships shall require that the following conditions are met:
  - 1. If the applicant complies with the provisions of this Section, he or she can secure no reasonable return from, nor make reasonable use of, his or her property. Merely proving that the variance would permit a greater profit from the property shall not be considered adequate justification for a variance. Moreover, the Town Board of Adjustment shall consider whether the variance is the minimum possible deviation from the terms of this Section that shall make reasonable use of the property possible;
  - 2. The hardship results from application of this Section to the property rather than from other factors such as deed restrictions or other hardship;
  - 3. The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, such that compliance with provisions of this Section would not allow reasonable use of the property;
  - 4. The applicant did not cause the hardship by knowingly or unknowingly violating this Section;

5. The applicant did not purchase the property after the effective date of this Section, and then request a variance; and
  6. The hardship is rare or unique to the applicant's property.
- B. The variance is in harmony with the general purpose and intent of the State's riparian buffer protection requirements and this Section and preserves its spirit; and
  - C. In granting the variance, the public safety and welfare have been assured, water quality has been protected, and substantial justice has been done.

(2) **Minor Variances**

A minor variance request pertains to uses and activities that will impact only Zone Two of the riparian buffer. Minor variance requests shall be reviewed and approved by the Town Board of Adjustment based on the criteria in Subsections 5.18.8(d)(1)A through 5.18.8(d)(1)C and in accordance with Section 4.12 and as provided by North Carolina General Statute Chapter 160A, Article 19. The Board may attach conditions to the variance approval that support the purpose, spirit and intent of the riparian buffer protection program. Request for appeals to decisions made by the Town Board of Adjustment shall be made in writing to the Director of the Division. Appeals from a decision by the Director on a minor variance request are subject to review as provided in North Carolina General Statute Chapter 150B, Articles, 3 and 4.

(3) **Major Variances**

A major variance request pertains to uses and activities that will impact any portion of Zone One or any portion of both Zones One and Two of the riparian buffer. If the Town Board of Adjustment has determined that a major variance request meets the requirements in Subsections 5.18.8(d)(1)A through 5.18.8(d)(1)C and as provided by North Carolina General Statute Chapter 160A, Article 19, then it shall prepare a preliminary finding and submit it to the North Carolina Environmental Management Commission in care of the Director of the Division. Within ninety (90) days after receipt, the Environmental Management Commission is required to review preliminary findings on major variance requests and take one of the following actions: approve, approve with conditions and stipulations, or deny the request. Appeals from a Commission decision on a major variance request are subject to review as provided in North Carolina General Statute Chapter 150B, Articles 3 and 4.

(e) *Mitigation*

- (1) This Subsection shall apply to persons who wish to impact a riparian buffer in the Jordan watershed when one of the following applies:

- A. A person has received an Authorization Certificate pursuant to Subsection 5.18.8(c) for a proposed use or activity that is designated as “allowable with mitigation;” or
- B. A person has received a variance pursuant to Subsection 5.18.8(d) and is required to perform mitigation as a condition of a variance approval.

(2) Issuance of the Mitigation Approval

The Town Manager shall issue a mitigation approval upon determining that a proposal meets the requirements set out in this Section. The approval shall identify at a minimum the option chosen, the required and proposed areas, and either the mitigation location or the offset payment amount as applicable.

(3) Options for Meeting the Mitigation Requirement

The mitigation requirement may be met through one of the following options:

- A. Payment of a compensatory mitigation fee to the Riparian Buffer Restoration Fund pursuant to 15A NCAC 02B.0269 and contingent upon acceptance of payments by the NC Ecosystem Enhancement Program, or to a private mitigation bank that complies with banking requirements of the US Army Corps of Engineers and the applicable trading criteria in 15A NCAC 02B.0273;
- B. Donation of real property or of an interest in real property pursuant to Section Subsection 5.18.8(e)(6); or
- C. Restoration or enhancement of a non-forested riparian buffer pursuant to the requirements of Subsection 5.18.8(e)(7).

(4) The Area of Mitigation

The Town Manager shall determine the required amount of mitigation area, which shall apply to all mitigation options identified in Subsection 5.18.8(e)(3) and as further specified in the requirements for each option set out in this Subsection, according to the following:

- A. The impacts in square feet to each zone of the riparian buffer shall be determined by the Town Manager by adding the following:
  - 1. The area of the footprint of the use causing the impact to the riparian buffer;
  - 2. The area of the boundary of any clearing and grading activities within the riparian buffer necessary to accommodate the use; and
  - 3. The area of any ongoing maintenance corridors within the riparian buffer associated with the use.
- B. The required amount of mitigation area shall be determined by applying the following multipliers to the impacts determined in Subsection 5.18.8(e)(4)A to each zone of the riparian buffer:
  - 1. Impacts to Zone One of the riparian buffer shall be multiplied by three;

2. Impacts to Zone Two of the riparian buffer shall be multiplied by one and one-half; and
3. Impacts to wetlands within Zones One and Two of the riparian buffer that are subject to mitigation under 15A NCAC 2H.0506 shall comply with the mitigation ratios in 15A NCAC 2H.0506.

(5) The Location of Mitigation

For any option chosen, the mitigation effort shall be located within the same subwatershed of the Jordan watershed, as defined in 15A NCAC 02B.0262, and the same distance from the Jordan Reservoir as the proposed impact, or closer to the Reservoir than the impact, and as close to the location of the impact as feasible. Alternatively, the applicant may propose mitigation anywhere within the same subwatershed of the Jordan watershed, as defined in 15A NCAC 02B.0262, provided that the mitigation proposal accounts for differences in delivery of nutrients to the affected arm of Jordan Reservoir resulting from differences between the locations of the buffer impact and mitigation. Additional location requirements for the property donation option are enumerated in Subsection 5.18.8(e)(6)C.1.

(6) Donation of Property

Any donation of real property or an interest in real property shall be subject to acceptance by the Town. Further, the donee organization and the donated real property or interest in real property shall be approved by the North Carolina Department of Environment and Natural Resources. Persons who choose to satisfy their mitigation determination by donating real property or an interest in real property shall meet the following requirements:

- A. The donation of real property interests may be used to either partially or fully satisfy the payment of a compensatory mitigation fee to the Riparian Buffer Restoration Fund pursuant to 15A NCAC 02B.0273. The value of the property interest shall be determined by an appraisal performed in accordance with Subsection 5.18.8(e)(6)D.4. The donation shall satisfy the mitigation determination if the appraised value of the donated property interest is equal to or greater than the required fee. If the appraised value of the donated property interest is less than the required fee calculated pursuant to 15A NCAC 02B.0273, the applicant shall pay the remaining balance due.
- B. The donation of conservation easements to satisfy compensatory mitigation requirements shall be accepted only if the conservation easement is granted in perpetuity.
- C. Donation of real property interests to satisfy the mitigation determination shall be accepted only if such property meets all of the following requirements:
  1. In addition to the location requirements of Subsection 5.18.8(e)(5), the property shall be located within an area that is identified as a priority for restoration in, or is otherwise consistent with the goals of, the *Basinwide Wetlands and Riparian Restoration Plan for the*

*Cape Fear River Basin* developed by NC Division of Water Quality pursuant to G.S. 143-214.10;

2. The property shall contain riparian buffers not currently protected by the State's riparian buffer protection program that are in need of restoration as defined in Subsection 5.18.8(e)(7)D.;
  3. The restorable riparian buffer on the property shall have a minimum length of one thousand (1000) linear feet along a surface water and a minimum width of fifty (50) feet as measured horizontally on a line perpendicular to the surface water;
  4. The size of the restorable riparian buffer on the property to be donated shall equal or exceed the amount of mitigation area responsibility determined pursuant to Subsection 5.18.8(e)(4);
  5. Restoration shall not require removal of man-made structures or infrastructure;
  6. The property shall be suitable to be successfully restored, based on existing hydrology, soils, and vegetation;
  7. The estimated cost of restoring and maintaining the property shall not exceed the value of the property minus site identification and transaction costs;
  8. The property shall not contain any building, structure, object, site, or district that is listed in the National Register of Historic Places established pursuant to Public Law 89-665, 16 U.S.C. 470 as amended;
  9. The property shall not contain any hazardous substance or solid waste;
  10. The property shall not contain structures or materials that present health or safety problems to the general public. If wells, septic, water or sewer connections exist, they shall be filled, remediated or closed at owner's expense in accordance with state and local health and safety regulations;
  11. The property and adjacent properties shall not have prior, current, and known future land use that would inhibit the function of the restoration effort; and
  12. The property shall not have any encumbrances or conditions on the transfer of the property interests.
- D. At the expense of the applicant or donor, the following information shall be submitted to the Town with any proposal for donations or dedications of interest in real property:
1. Documentation that the property meets the requirements laid out in Subsection 5.18(e)(6)C.;
  2. US Geological Survey 1:24,000 (7.5 minute) scale topographic map, county tax map, USDA Natural Resource Conservation Service County Soil Survey Map, and county road map showing the location of the property to be donated along with information

on existing site conditions, vegetation types, presence of existing structures and easements;

3. A current property survey performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the State Board of Registration for Professional Engineers and Land Surveyors in "Standards of Practice for Land Surveying in North Carolina.";
4. A current appraisal of the value of the property performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the Appraisal Board in the "Uniform Standards of Professional North Carolina Appraisal Practice;" and
5. A title certificate.

(7) Riparian Buffer Restoration or Enhancement

Persons who choose to meet their mitigation requirement through riparian buffer restoration or enhancement shall meet the following requirements:

- A. The applicant may restore or enhance a non-forested riparian buffer if either of the following applies:
  1. The area of riparian buffer restoration is equal to the required amount of mitigation area determined pursuant to Subsection 5.18.8(c)(4); or
  2. The area of riparian buffer enhancement is three times larger than the required amount of mitigation area determined pursuant to Subsection 5.18.8(c)(4);
- B. The location of the riparian buffer restoration or enhancement shall comply with the requirements in Subsection 5.18.8(e)(5);
- C. The riparian buffer restoration or enhancement site shall have a minimum width of fifty (50) feet as measured horizontally on a line perpendicular to the surface water;
- D. Enhancement and restoration shall both have the objective of establishing a forested riparian buffer according to the requirements of this Subsection. Enhancement shall be distinguished from restoration based on existing buffer conditions. Where existing trees are sparse, that is greater than or equal to one hundred (100) trees per acre but less than two hundred (200) trees per acre, a buffer may be enhanced. Where existing woody vegetation is absent, that is less than one hundred (100) trees per acre, a buffer may be restored;

- E. The applicant shall first receive an Authorization Certificate for the proposed use according to the requirements of Subsection 5.18.8(a). After receiving this determination, the applicant shall submit a restoration or enhancement plan for review and approval by the Town. The restoration or enhancement plan shall contain the following:
  - 1. A map of the proposed restoration or enhancement site;
  - 2. A vegetation plan. The vegetation plan shall include a minimum of at least two native hardwood tree species planted at a density sufficient to provide three hundred twenty (320) trees per acre at maturity;
  - 3. A grading plan. The site shall be graded in a manner to ensure diffuse flow through the riparian buffer;
  - 4. A fertilization plan; and
  - 5. A schedule for implementation;
- F. Within one (1) year after the Town Manager has approved the restoration or enhancement plan, the applicant shall present proof to the Town Manager that the riparian buffer has been restored or enhanced. If proof is not presented within this timeframe, then the person shall be in violation of both the State's and the Town's riparian buffer protection program;
- G. The mitigation area shall be placed under a perpetual conservation easement that will provide for protection of the property's nutrient removal functions; and
- H. The applicant shall submit annual reports for a period of five (5) years after the restoration or enhancement showing that the trees planted have survived and that diffuse flow through the riparian buffer has been maintained. The applicant shall replace trees that do not survive and restore diffuse flow if needed during that five-year period.

### ***5.18.9 Compliance and Enforcement***

#### ***(a) Site Inspections***

- (1) Agents, officials, or other qualified persons authorized by the Town Manager may periodically inspect riparian buffers to ensure compliance with this Section.
- (2) Notice of the right to inspect shall be included in the letter of approval of each variance and buffer authorization.
- (3) Authorized agents, officials or other qualified persons shall have the authority, upon presentation of proper credentials, to enter and inspect at reasonable times any property, public or private, for the purpose of investigating and inspecting the site of any riparian buffer. No person shall willfully resist, delay, or obstruct an authorized representative, employee, or agent of the Town, while that person is inspecting, or attempting to inspect, a riparian buffer nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out their official duties. The Town shall have the power to conduct such investigations as deemed reasonably necessary to carry out the duties as prescribed in this Section.

(4) Notice of Violation

- A. If it is determined that a person has failed to comply with the requirements of this Section, or rules, or orders adopted or issued pursuant to this Section, a notice of violation shall be served upon that person. The notice may be served by personal service or by certified mail, return receipt requested.
- B. The notice shall specify the violation and inform the person of the actions that need to be taken to comply with this Section, or rules or orders adopted pursuant to this Section. The notice shall direct the person to correct the violation within a specified reasonable time. The notice shall inform the person that any person who violates or fails to act in accordance with any of the provisions of this Section or rules or orders adopted or issued pursuant to this Section is subject to the civil and criminal penalties and other enforcement actions as provided in this Section.

(5) Power to Require Statements

The Town shall also have the power to require written statements, or the filing of reports under oath, with respect to pertinent questions relating to land-disturbing activities.

(b) *Civil Penalties*

(1) Assessment of Penalties

Any person who violates or fails to act in accordance with any of the provisions of this Section or rules or orders adopted or issued pursuant to this Section shall be subject to a civil penalty. A civil penalty for a violation may be assessed in an amount not to exceed ten thousand dollars (\$10,000) per day. If any violation for which a penalty may be assessed is continuous, a civil penalty may be assessed for each day of the violation in an amount not to exceed twenty-five thousand dollars (\$25,000) per day for as long as the violation occurs. Each day of a continuing violation shall constitute a separate violation under Subsection 5.18.9(b)(1).

(2) Notice of Civil Penalty Assessment

The Town Manager shall provide written notice of the civil penalty amount and the basis for the assessment to the person assessed. The notice of civil penalty assessment shall be served by any means authorized under G.S. 1A-1, Rule 4 including personal service or by certified mail, return receipt requested, and shall direct the violator to either pay the assessment or contest the assessment, within thirty (30) days after receipt of the notice of assessment by written demand for a hearing.

(3) Hearing

Any decision imposing a civil penalty may be appealed to the Town Board of Adjustment. The Board shall hold a hearing in accordance with Sections 4.10 through 4.13.

(4) Appeal of Final Decision.

Appeal of the final decision of the Town Board of Adjustment shall be to the Superior Court of Orange County. Such appeal shall be in the nature of a certiorati and must be filed with thirty (30) days of receipt of the final decision. A copy of the appeal must be served on the Town Manager by any means authorized under G.S. 1A-1, Rule 4.

(5) Demand for Payment of Penalty

An assessment that is not contested is due when the violator is served with a notice of assessment. The civil penalty must be paid within thirty (30) days of the assessment, if not appealed, or within thirty (30) days after the conclusion of the administrative or judicial review of the assessment. If payment is not received within thirty (30) days after demand for payment is made, the Town may institute a civil action to recover the amount of the assessment. The civil action may be brought in the Orange County Superior Court or in the Judicial District where the violator's residence or principal place of business is located. Such civil actions must be filed within three (3) years of the date the assessment was due.

(c) *Criminal Penalties*

Any violation of any provision of this Section shall constitute a misdemeanor and shall subject the violator to a penalty of five hundred dollars (\$500.00) or imprisonment for not more than thirty (30) days. Each day of a continuing violation shall constitute a separate violation under Subsection 5.18.9(c)(1). (Failure to comply with the requirements of 15A NCAC 02B.0267, as amended by SL 2009-484, may result in imposition of enforcement measures as authorized by G.S. 143-215.6B.)

(d) *Injunctive Relief*

(1) Civil Action in Superior Court

Whenever the Town Manager has reasonable cause to believe that any person is violating or threatening to violate this Section or any rule or order adopted or issued pursuant to this Section, the Town Manager may, either before or after the institution of any other action or proceeding authorized by this Section, institute a civil action in the name of the Town for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the Superior Court of Orange County.

(2) Order to Cease Violation

Upon determination by a court that an alleged violation is occurring or is threatened, the court shall enter any order or judgment that is necessary to abate the violation, to ensure that restoration is performed, or to prevent the threatened violation. The institution of an action for injunctive relief under this Section shall

not relieve any party to the proceedings from any civil or criminal penalty prescribed for violations of this Section.

(e) *Compliance with Requirements*

Any person engaged in new uses or activities as defined by this Section who fails to meet the requirements of this Section shall be deemed in violation of this Section.”

**Section 2.** If any one or more Sections or portions thereof of this Section are held to be invalid or unenforceable, all other Sections and portions thereof shall nevertheless continue in full force and effect.

**Section 3.** That this Ordinance shall become effective following approval by the NC Environmental Management Commission and upon enactment by the Town Council.

This the 6<sup>th</sup> day of December, 2010.