

Town of Newbury, NH

Regulations for  
Earth Excavation

Adopted: June 19, 2018

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**All regulations in RSA 155:E not addressed in these regulations are hereby incorporated by reference. The land owner is responsible for being aware of the contents of RSA 155:E. (The unofficial version is online at:**

**<http://www.gencourt.state.nh.us/rsa/html/XII/155-E/155-E-mrg.htm>**)

## **Article 1. Authority**

- 1.1 Chapter 155-E of the New Hampshire Revised Statutes Annotated stipulates that, with some exceptions, all commercial earth excavations in the State are subject to regulation by the town in which the operation occurs. Pursuant to the authority vested in the Planning Board by RSA 155-E:1, III, the Planning Board of Newbury as the regulator adopts the following regulations to govern earth excavation in the Town of Newbury.

## **Article 2. Purpose and Scope**

- 2.1 The purpose of these regulations is to:
- 2.1.1 Provide for reasonable opportunities for excavation sites;
  - 2.1.2 Minimize safety hazards which can be created by open excavations;
  - 2.1.3 Ensure that the public health and welfare will be safeguarded;
  - 2.1.4 Protect natural resources and the environment;
  - 2.1.5 Protect Newbury's aquifers as stipulated in Newbury's Zoning Ordinance Article 20 - Aquifer Protection Overlay District;
  - 2.1.6 Maintain the aesthetic features of Newbury.
  - 2.1.7 Consider and provide for orderly development on the basis of being an integral part of the community, assuring that such an excavation site will mesh effectively with the overall community goals and plans.

For the purpose of achieving these goals, no earth materials in the Town shall be excavated except in conformance with RSA 155:E and these regulations.

- 2.2 The scope of these regulations includes the provisions of RSA 155-E and provides further clarification of the statutory requirements and their application in Newbury. Whenever Newbury's regulations differ from the most recent provisions of RSA 155-E, those which impose a greater restriction or higher standard shall be controlling.

## **Article 3. Definitions**

- 3.1 Abutter: See definition in Newbury Zoning Ordinance
- 3.2 Commercial Excavation: means 250 cubic yards or more of excavation of earth intended for commerce, excluding excavation that is strictly conducted for the purpose of alteration,

renovation, improvement or construction to the property on which the excavation takes place.

- 3.3 Earth: means sand, gravel, rock, soil or construction aggregate produced by quarrying, crushing or any other mining activity or such other naturally-occurring unconsolidated materials that normally mask the bedrock.
- 3.4 Excavation: means a land area which is used, or has been used, for the commercial taking of earth, including all slopes.
- 3.5 Excavation area: means the surface area within an excavation site where excavation has occurred or is eligible to occur under the provisions of RSA 155-E
- 3.6 Excavation site: means any area of contiguous land in common ownership upon which excavation takes place.
- 3.7 Minor Topographical adjustment: means a one-time removal of earth from the site that is exclusively necessary to change the physical configuration of the land for a specified use or situation.
- 3.8 Normal Landscaping: means the on-site alteration and contouring of the land exclusively devoted to improving the functional utility and planting of the grounds.
- 3.9 Phased Excavation: means excavation over a limited part of the permitted area, with reclamation of that area to be inspected before expanding to a new portion of the permitted area.
- 3.10 Reclamation: means the restoration of an excavation area to the standards of RSA 155-E:5 (Minimum and Express Reclamation Standards) and RSA 155-E:5-a (Incremental Reclamation).

#### **Article 4: Excavations Requiring a Permit**

- 4.1 Any commercial excavation of earth unless specifically exempted by either RSA 155-E:2 or in Article 5 of these regulations.
- 4.2 Those that commenced operations since August 24, 1979 without first obtaining a permit unless specifically exempted in Article 5 of these regulations.
- 4.3 Those that have lawfully operated prior to August 24, 1979 and wish to expand the excavation area.
- 4.4 A permit shall be applied for using the procedures in Article 6.

#### **Article 5: Exceptions from an excavation permit**

- 5.1 Specifically exempted by either RSA 155-E:2 or:
  - 5.1.1 Excavation that is exclusively incidental to the lawful construction or alteration of a building or structure, a parking lot or way including a driveway on a portion of the

premises where removal occurs. This excavation cannot be started, however, until any required state and local permits have been issued.

- 5.1.2 Excavation that is incidental to agricultural or silvicultural activities, normal landscaping or minor topographical adjustment. In the event of questions, the Board has final authority for interpretation of the regulations.

## **Article 6. Application Procedures**

### **6.1 Conceptual Consultation:**

- 6.1.1 A conceptual consultation is not required, but is strongly recommended before making application for an excavation permit. This gives the applicant the opportunity to discuss their proposal with the Board. It also provides for a review of applicable Earth Excavation Regulations, application forms, and necessary supporting maps and documents for an excavation permit application. The Board and the applicant may discuss proposals in conceptual form only and in general terms. The consultation and review is not binding in any way on either the applicant or the Board. Conceptual Consultation may occur only at a formal meeting of the Planning Board.
- 6.1.2 There is no application fee for the consultation. To be placed on the Board's meeting agenda, the applicant shall submit an application for Conceptual Consultation at least five (5) business days before the Board's next regular scheduled meeting.

### **6.2 Newbury Zoning Ordinance Provisions:**

Prior to submitting a final application for an earth excavation permit, if the excavation site is in the Residential District, the landowner shall apply to the Zoning Board of Adjustment for a Special Exception as required by Section 5.4.8 of the Newbury Zoning Ordinance. If the excavation site is in the Business District, the landowner shall apply to the Zoning Board of Adjustment for a Special Exception as required by Section 4.3.12 of the Newbury Zoning Ordinance. Excavations are not permitted in the Aquifer Protection Overlay District.

### **6.3 Permit to Excavate:**

- 6.3.1 Any person desiring a permit to excavate shall submit an application, as set forth in Article 8, to the Board at least twenty-one (21) days prior to a regularly scheduled meeting of the Board.
- 6.3.2 The applicant shall send a copy of the application, together with all application requirements, to the Conservation Commission at the same time that the application is submitted to the Planning Board. Any comments by the Conservation Commission are requested to be transmitted to the Board before the hearing.

#### **6.4 Notice of Public Hearing:**

- 6.4.1 The Board shall notify the following persons by certified mail of the hearing at least ten (10) clear days before the hearing:
  - 6.4.1.1 the applicant (owner and agent if applicable)
  - 6.4.1.2 the abutters (as defined in the Zoning Ordinance)
- 6.4.2 The Board shall place a notice in a local newspaper of general circulation timed to ensure that the publication date is 10 or more clear days before the hearing.
- 6.4.3 The Board shall post a copy of the notice, in 3 public places in the town, at least ten (10) clear days before the hearing.
- 6.4.4 In each of the three cases above, the notice shall include the date, time and place of the hearing, a general description of the proposal which is the subject of the application and shall identify the applicant and the location of the property. The Board shall include in the notice that the application will be reviewed for completeness and if it is complete, the public hearing on the earth excavation permit will take place at the same meeting.

#### **6.5 Public Hearing**

- 6.5.1 Prior to the Planning Board approving an application for an excavation permit or an application for an amended excavation permit, a public hearing shall be held within 30 days of the filing of the application with the Planning Board.
- 6.5.2 At the beginning of the hearing, the Board shall determine if the application is complete, and if it is, a public hearing will commence on the merits of the proposal.
- 6.5.3 Prohibited Projects or Activities: In addition to other considerations, the Board shall determine if the following prohibited projects or activities are proposed. Any project or activity so proposed shall be grounds for disapproving the application and denial of a permit. If any of the prohibited projects or activities appear subsequent to the hearing, the permit may be revoked in accordance with RSA 155-E:10, I.
  - 6.5.3.1 Where the excavation would substantially damage a known aquifer, so designated by the United States Geological Survey;
  - 6.5.3.2 Where the excavation area would be located within the Aquifer Protection Overlay District.
  - 6.5.3.3 When the issuance of the permit would be unduly hazardous or injurious to the public welfare;
  - 6.5.3.4 Where excavation would occur within 50 feet of the boundary of a disapproving abutter or within 10 feet of the boundary of an approving abutter unless approval is requested by said abutter;

- 6.5.3.5 Where existing visual barriers in the areas specified in RSA 155-E:3, III would be removed, except to provide access to the excavation;
  - 6.5.3.6 Where the excavation would violate the operational standards of RSA 155-E:4-a;
  - 6.5.3.7 Where the project cannot comply with the reclamation provisions of RSA 155-E:5 and 155-E:5-a.
  - 6.5.3.8 When the excavation requires land use permits from state or federal agencies that are not obtainable. If this issue is not resolved at the time of the hearing, obtaining the permits may be a condition precedent.
- 6.5.4 Within 20 days of the hearing or any continuation thereof, the Board shall render a decision in writing approving or disapproving the application, giving reasons for disapproval.

## **6.6 Issuance of Permit**

- 6.6.1 The permit shall be on a form provided by the Planning Board and it shall specify the date upon which the permit expires. The permit expiration shall be negotiated but expiration shall not exceed five (5) years.
- 6.6.2 If the Board approves the application, it shall grant to the owner a permit to excavate subject to the following conditions:
- 6.6.2.1 The owner shall provide surety in the form of an Irrevocable Letter of Credit in favor of the Town of Newbury, or Cash in an amount determined by the Board to be sufficient to guarantee compliance with the permit including reclamation.
    - 6.6.2.1.1 If an irrevocable letter of credit is chosen, it shall be in a form substantially the same as that supplied by the Planning Board. Any changes shall be approved by Town counsel.
    - 6.6.2.1.2 If cash is chosen, it shall be turned over to the Town Treasurer to be put in an interest bearing savings account.
    - 6.6.2.1.3 The surety shall not lapse until the expiration date of the permit plus one year.
  - 6.6.2.2 An estimate of the cost to return the site to its natural state based on the reclamation plan shall be obtained from an independent landscaper or company experienced in site reclamation improvements. The Board reserves the right to hire its own professional consultant(s) to review the cost estimate provided by the owner with the owner bearing the cost. The Board in its discretion shall determine the amount of surety required.

- 6.6.2.3 Release of Surety: The Planning Board shall release any surety remaining after satisfactory completion of the reclamation and after approval by the Planning Board. The surety may be reduced at the discretion of the Board, subject to appropriate funds being retained to finish the work. Some of the surety may be retained to guarantee the viability of any vegetation for three years from the date of planting.
- 6.6.2.4 A weatherproof copy of the permit shall be prominently posted at the excavation site or the principal access thereto.
- 6.6.2.5 The owner shall comply with any other conditions the Board may require at the conclusion of the hearing.
- 6.6.3 A permit shall not be assignable or transferable without the prior written consent of the Planning Board.
- 6.6.4 No material shall be removed from the property before an executed Irrevocable Letter of Credit in Favor of the Town of Newbury or Cash in an amount approved by the Planning Board has been received by the Planning Board.
- 6.6.5 Excavation work shall meet the Operational Standards of Article 7 of the Newbury Regulations for Earth Excavation and the minimum operational standards of RSA 155-E:4-a.
- 6.6.6 The completed reclamation shall meet or exceed the requirements Article 9 of the Newbury Regulations for Earth Excavation and RSA 155-E:5.
- 6.6.7 At the end of any two-year period during which no earth materials have been removed, this permit shall be void, the excavation shall be deemed abandoned, and it shall be reclaimed in accordance with Article 9 of the Newbury Regulations for Earth Excavation and RSA 155-E:5.
- 6.6.8 Within twelve months of the expiration date of this permit or the completion of any excavation, whichever occurs first, any excavated land shall be reclaimed in accordance with the requirements of Article 9 of the Newbury Regulations for Earth Excavation and RSA 155-E:5.

## **6.7 Application for Amendment:**

When the scope of a project for which an excavation permit has been issued is proposed to be altered so as to affect either the size or location of the excavation, the rate of removal or the plan for reclamation, the owner shall submit an application for amendment of his excavation permit, which application shall be subject to approval in the same manner as provided for an excavation permit.

## **Article 7. Operational Standards**

- 7.1 It shall be a violation of these regulations for any person to excavate, or for any owner to permit excavation on his excavation site, when such excavation is subject to a permit



under these Regulations, without complying with the following minimum standards or when such excavation is not subject to a permit under this regulation pursuant to RSA 155-E:2 without complying with the following express standards:

- 7.1.1 No excavation shall be permitted below road level within 50 feet of the right of way of any public highway as defined in RSA 229:1 unless such excavation is for the purpose of said highway.
- 7.1.2 No excavation shall be permitted within 50 feet of the boundary of a disapproving abutter, within 150 feet of any dwelling which either existed or for which a building permit has been issued at the time the excavation is commenced.
- 7.1.3 No excavation shall be permitted within 150 feet of any lake, pond or stream named in the Shoreland Overlay District of Newbury's Zoning Ordinance or wetland or wetland buffer as designated in the Wetlands Conservation Overlay District of Newbury's Zoning Ordinance.
- 7.1.4 Vegetation shall be maintained or provided within the peripheral areas required by Section 7.1.4.1.
  - 7.1.4.1 Natural vegetation adjacent to neighboring properties shall be maintained for the purposes of erosion control, screening, noise reduction, and property valuation. A vegetative buffer or six (6) foot high topographical berm of a minimum width of fifty feet (50') shall be maintained between surrounding streets, highways commercial and residential land uses and the excavation site. The Planning Board shall direct the applicant as to specific requirements for the proposed excavation site and may in its discretion waive or alter the fifty (50') foot requirement in unusual situations or in the case of an approving abutter, but in no case shall the buffer ever be less than thirty feet (30'). In situations where the natural vegetation has been removed, the Planning Board shall require that a vegetative buffer be planted/restored.
- 7.1.5 Drainage shall be maintained so as to prevent the accumulation of free-standing water for periods longer than thirty (30) days. Excavation practices which result in continued siltation of surface waters or any degradation of water quality of any public or private water supplies are prohibited.
- 7.1.6 No fuels, lubricants, or other toxic or polluting materials shall be stored on-site unless in compliance with state laws or rules pertaining to such materials.
- 7.1.7 Where temporary slopes will exceed a grade of 1:1, (45 degree angle) a fence or other suitable barricade shall be erected on the high-side of the slope to warn of danger or limit access to the site.
- 7.1.8 Prior to the removal of topsoil or other overburden material from any land area that has not yet been excavated, the owner shall provide surety as required by Section 6.6.2.1.
- 7.1.9 Nothing in this chapter shall be deemed to supersede or preempt applicable environmental standards or permit requirements contained in

other state laws, and no exemption under this chapter shall be construed as an exemption from any other state statute.

- 7.1.10 The depth of excavation is limited to two (2) feet above the high annual groundwater table.
- 7.1.11 Excavation site shall be kept free of all discarded waste material; i.e. machine parts, cables, cans, etc. In addition, no solid and/or hazardous waste; septage; dredge spoils; tree stumps; or organic waste and debris shall be disposed of on the excavation site unless specifically authorized and/or permitted by the appropriate federal, state and the Planning Board.
- 7.1.12 Trucks operating on any roads within the Town of Newbury, exclusive of State Highways, shall be limited to Newbury and NHDOT weights limits.
- 7.1.13 Gravel excavation, loading and hauling on Town roads will be limited to the hours between 7:00 a.m. to 5:00 p.m., Monday through Saturday only.
- 7.1.14 Only earth excavation materials that originate from the excavation site are to be commercially sold on-site. No materials that do not originate on the excavation site shall be brought on to the excavation site except those required for reclamation.
- 7.1.15 No mechanical hammering such as, but not limited to, hydraulic hammering equipment shall be allowed at excavation site without prior approval of the Planning Board

## **Article 8: Application Requirements**

- 8.1 Signed and dated application form. Fees paid (See Land Use Application Fee Schedule)
- 8.2 List of all abutters. (See definition in Section 2.1 of Zoning Ordinance)
- 8.3 Copies of any required local, state, or federal permits or approvals.
- 8.4 An Excavation Plan prepared by a NH Licensed Land Surveyor and/or licensed Professional Engineer. The Plan shall be drawn to a scale that fits a full-size (24"x36") sheet of paper. The following information shall be included:
  - 8.4.1 A title block in the lower right-hand corner containing the tax map and lot numbers, the name and address of the owner of record, the name and address of the surveyor or engineer, seal, and signature, date of last revision, and scale.
  - 8.4.2 The Excavation Plan site map shall include a usable graphic scale near the center bottom of the map and a north arrow in a convenient location;
  - 8.4.3 A location map, shown as an inset on the Excavation Plan, which shall show the proposed development in relation to major roads, bodies of water, or other landmarks of the town;

- 8.4.4 A perimeter boundary survey by a licensed land surveyor including metes and bounds, area of lot and area of the excavation site;
- 8.4.5 Show all easements and public streets and excavation site access road(s);
- 8.4.6 Show the name and the tax map and lot number of each abutter (see definition in Section 2.1 of Newbury Zoning Ordinance);
- 8.4.7 Show location, shape and size of existing and/or proposed buildings, structures, septic systems, and wells on the excavation site and within 150' of the excavation;
- 8.4.8 Existing and proposed excavation site grades with topographic contours at intervals not exceeding two (2) feet. Show the breadth, depth and slope of the proposed excavation (and existing excavation where applicable);
- 8.4.9 Show any lake, pond or stream named in the Shoreland Overlay District of Newbury's Zoning Ordinance or wetland and wetland buffers as designated in the Wetlands Conservation Overlay District of Newbury's Zoning Ordinance;
- 8.4.10 Separate Plans at two (2) foot contour intervals of the existing topography, the topography at the completion of the excavation and the topography at the completion of the reclamation;
- 8.4.11 The elevation of the highest annual high groundwater table within or next to the proposed excavation;
- 8.4.12 A plan for the reclamation of the area affected by the excavation at least in compliance with RSA 155-E:5 and RSA 155-E:5-a. Such plan shall address the effects of the proposed excavation on soil, surface water and groundwater, vegetation, overburden, topography, and fill material, and may address future land use consistent with the approved master plan, and shall include a timetable for reclamation of fully depleted areas within the excavation site during said project;
- 8.4.13 Test pit data that extend to either the seasonal high water table, ledge, or a minimum of six feet below the maximum proposed excavation depth, including location and soils data; boring logs may be submitted separately.
- 8.4.14 Proposed fencing, buffers or other visual barriers, including height and material.
- 8.4.15 Plans for stormwater management.
- 8.4.16 Plans for equipment maintenance.
- 8.4.17 All measures to control erosion, sedimentation, water pollution, air pollution, and any hazards to public safety.
- 8.4.18 Methods to prevent materials from the site from being tracked onto public roadways.

- 8.4.19 Show any area included in the Aquifer Protection Overlay District as outlined in Section 20.2 of the Newbury Zoning Ordinance.
- 8.5 Suitable photographs 5x7 in size adequately depicting the existing or proposed excavation site.
- 8.6 Written Summary of Excavation including:
- 8.6.1 days and hours of operation
  - 8.6.2 number of employees
  - 8.6.3 an estimate of the maximum weekly traffic into and out of the excavation site
  - 8.6.4 Estimated time of duration of excavation
  - 8.6.5 Breadth, depth, and slope of the proposed excavation, and estimate of the total volume of earth to be excavated.
  - 8.6.6 Name(s), address(s), and contact information of the person(s) who will actually do the excavating
  - 8.6.7 Specific actions to be taken by the applicant on the excavation site relative to fuel and chemical handling and storage, dust control, traffic, noise control and abatement, and comprehensive site safety of unauthorized persons.

## **Article 9: Reclamation**

- 9.1 Applicant shall comply with the provisions of 155-E:5 (Minimum and Express Reclamation Standards) and 155-E:5-a (Incremental Reclamation):

"Within 12 months after the expiration date in a permit issued under this chapter, or of the completion of any excavation, whichever occurs first, the owner of the excavated land shall have completed the reclamation of the areas affected by the excavation to meet each of the following minimum standards or when such excavation is not subject to a permit under this chapter pursuant to RSA 155-E:2, to meet each of the following express standards:

I. Except for exposed rock ledge, all areas which have been affected by the excavation or otherwise stripped of vegetation shall be spread with topsoil or strippings, if any, but in any case covered by soil capable of sustaining vegetation, and shall be planted with seedlings, saplings and/or grass suitable to prevent erosion. Areas visible from a public way, from which trees have been removed, shall be replanted with tree saplings, set out in accordance with acceptable horticultural practices.

II. Earth and vegetative debris resulting from the excavation shall be removed or otherwise lawfully disposed of.

III. All slopes, except for exposed ledge, shall be graded to natural repose for the type of soil

of which they are composed so as to control erosion or at a ratio of horizontal to vertical proposed by the owner and approved by the regulator. Changes of slope shall not be abrupt, but shall blend with the surrounding terrain.

IV. The elimination of any standing bodies of water created in the excavation project as may constitute a hazard to health and safety.

V. The topography of the land shall be left so that water draining from the site leaves the property at the original, natural drainage points and in the natural proportions of flow. Reclamation design shall comply with the requirements of Zoning Ordinance Article 21, Stormwater Management. For excavation projects which require a permit from the department of environmental services pursuant to RSA 485-A:17, the provisions of that statute, and rules adopted under it, shall supersede this paragraph as to areas of excavation sites covered thereby. The excavator shall file a copy of permits issued under RSA 485-A:17 (Terrain Alteration) with the Planning Board."

## **Article 10. Incremental Reclamation**

10.1 The Applicant is also required to comply with RSA 155-E:5-a (Incremental Reclamation):

"Except for excavation sites of operating stationary manufacturing plants, any excavated area of 5 contiguous acres or more, which is depleted of commercial earth materials, excluding bedrock, or any excavation from which earth materials have not been removed for a 2-year period, shall be reclaimed in accordance with RSA 155-E:5, within 12 months following such depletion or 2-year non-use, regardless of whether other excavation is occurring on adjacent land in contiguous ownership. Each operator, other than the operator of stationary manufacturing plants which are exempt from permit requirements pursuant to RSA 155-E:2, III, shall prepare and submit for the Planning Board's record a reclamation plan for the affected land, including a timetable for reclamation of the depleted areas within the reclamation site."

## **Article 11. Separability**

If any provision in these Regulations shall be held to be invalid for any reason by any court, such holding shall not invalidate in any manner any other provisions contained herein.

## **Article 12. Enforcement, Fines and Penalties, and Injunctive Relief**

The Planning Board may suspend or revoke the permit of any person who has violated any provision of his permit, or this regulation, or made a material misstatement in the application upon which his permit was granted. Such suspension or revocation shall be subject to a motion for rehearing thereon and appeal in accordance with RSA 155-E:9

Enforcement: These regulations shall be enforced by the Select Board as provided in RSA 676:17.

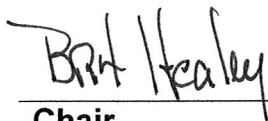
Fines and Penalties and Injunctive Relief: Enforcement of these regulations by the Select Board shall follow the provisions of RSA 676:15 and 676:17.

### Article 13. Appeal.

If the Planning Board disapproves or approves an application for an excavation permit or an application for an amended permit, any interested person affected by such decision may appeal to the Planning Board for a rehearing on such decision or any matter determined thereby. The motion for rehearing shall fully specify every ground upon which it is alleged that the decision or order complained of is unlawful or unreasonable and said appeal shall be filed within 10 days of the date of the decision appealed from. The Planning Board shall either grant or deny the request for rehearing within 10 days, and if the request is granted a rehearing shall be scheduled within 30 days. Any person affected by the Planning Board's decision on a motion for rehearing to the Planning Board may appeal in conformity with the procedures specified in RSA 677:4-15.

### CERTIFICATION

Certified to be a true copy, attest:



Chair

