

**AN ORDINANCE TO AMEND CHAPTER 24 OF THE TOWNSEND MUNICIPAL
CODE,
ZONING AND UNIFIED DEVELOPMENT CODE, RELATING TO THE
PROTECTION OF
CRITICAL NATURAL AREAS, FORESTS AND WETLANDS**

Working draft, August 26, 2026. Not reviewed by counsel. Not introduced.

KEY: Underlined text is added. ~~Struck text~~ is deleted. Text shown without either mark is existing code, reproduced for context and unchanged.

Section 1. TMC 24.36.020, Definitions, is amended by amending one definition and adding four definitions in alphabetical order.

24.36.020 Definitions — Environmental Protection Regulations

"Critical natural area (CNA)" means any site listed in the state natural areas inventory, as administered by the State Office of Nature Preserves, Division of Parks and Recreation, or the Delaware Department of Natural Resources and Environmental Control; any site or resource that the Delaware Department of Natural Resources and Environmental Control has determined to constitute or contain a critical natural area; and any such resource identified by a qualified professional retained or accepted by the town.

"De minimis" means, with respect to a disturbance, a disturbance so minor in extent and duration that it does not measurably reduce the extent, function or habitat value of the resource affected. The determination shall be made in writing by the technical review provided for in TMC 24.36.195.

"Exploratory plan" means the initial plan submission for a proposed subdivision or land development, submitted prior to preliminary plan, by which the applicant first identifies site conditions and the general form of the proposed development.

"Project boundary" means the entire area of the parcel, or of contiguous parcels held in common ownership or common control, that is the subject of an application, without regard to the proposed limit of disturbance.

"Qualified professional" means a person holding State certification or registration in the applicable environmental discipline or, where no certification or registration exists in that discipline, a person having not less than three (3) years of substantial practice in the field at issue or a related field.

Section 2. TMC 24.36.050, Wetlands, is amended to read in its entirety as follows.

24.36.050 Wetlands.

~~A. Wetland mitigation shall be that for which a permit has been issued by the United States Army Corps of Engineers. Permits from the state may also be required.~~

~~B. It is permissible to construct utility and access crossings within wetlands where no other recourse is available. The proposed use must be authorized by the town and meet the requirements of this Code, Army Corps of Engineers regulations, and the DNREC. No other forms of construction are permitted in areas designated as wetlands.~~

~~C. Any work in buffer areas shall meet the requirements of this Code, Army Corps of Engineers regulations, and the DNREC.~~

A. Protection Level. All wetlands shall be protected at 100 percent. The entire area of the resource shall be preserved as open space and shall remain undisturbed. This protection level shall be met within any development.

B. Reduction Upon Federal Permit. The protection level established in paragraph A may be reduced only where a permit from the United States Army Corps of Engineers has been issued for filling or disturbance of the wetland. In addition, any mitigation approved by the United States Army Corps of Engineers is also subject to approval by the town before any mitigation may occur. Such approval shall be granted by the town council upon the recommendation of the technical review provided for in TMC 24.36.195. Issuance of a federal permit shall not by itself authorize disturbance under this chapter.

C. Wetlands Not Subject To Federal Jurisdiction. Where the United States Army Corps of Engineers declines jurisdiction over a wetland, determines that a wetland is not a water of the United States, or does not require a permit for its disturbance, the protection level established in paragraph A shall continue to apply as a requirement of this chapter. A determination by any State or federal agency that it lacks jurisdiction over a wetland shall not be treated as a finding that no wetland is present.

D. Man-Made And Isolated Wetlands. Wetlands that are man-made or hydrologically isolated shall be delineated and reported in the same manner as all other wetlands. Where disturbance of such a wetland is proposed and the technical review provided for in TMC 24.36.195 finds the disturbance to be more than de minimis, mitigation shall be required in accordance with TMC 24.36.150.

E. Delineation. All wetlands within a project boundary shall be delineated by a qualified professional and shown on the exploratory plan and on every subsequent plan submission, without regard to whether any wetland is subject to federal or State jurisdiction. An application that states an area of wetlands as undelineated shall not be deemed complete for review. The town may cause the delineation to be verified at the applicant's expense as an application fee established by resolution of the town council.

F. Crossings. Utility and access crossings may be permitted where no other recourse is available, subject to authorization by the town, the regulations of the United States Army Corps of Engineers, and the Delaware Department of Natural Resources and Environmental Control, and only at the minimum width necessary.

G. Construction Otherwise Prohibited. Except for the utility and access crossings permitted by paragraph F, no other forms of construction are permitted in areas designated as wetlands. Nothing in paragraph B shall be construed to authorize any form of construction prohibited by this paragraph.

H. Buffer Areas. Any work in buffer areas shall meet the requirements of this Code, Army Corps of Engineers regulations, and the Delaware Department of Natural Resources and Environmental Control.

Section 3. TMC 24.36.090, Critical Natural Areas, is amended to read in its entirety as follows.

24.36.090 Critical Natural Areas (CNA).

~~The applicant is required to contact the DNREC for the determination of all potential CNA and shall follow the state guidelines for developmental procedures.~~

A. Identification. Where two or more delineations of a critical natural area are before the town, the broadest shall control. The applicant shall contact the Delaware Department of Natural Resources and Environmental Control for a determination of all potential critical natural areas and shall follow the state guidelines for developmental procedures.

B. Delineation And Verification. The applicant shall delineate all Critical Natural Areas on the exploratory plan and on every subsequent plan submission, and shall submit a critical natural areas report meeting the requirements of TMC 24.36.020. The delineation shall be prepared and sealed by a qualified professional. The town may cause the delineation to be verified at the applicant's expense as an application fee established by resolution of the town council, and the verified delineation shall control. The burden of proof shall be on the applicant. No plan shall be deemed complete for review until the delineation required by this paragraph has been submitted.

C. Protection Level. All critical natural areas shall be protected at 100 percent. The entire area of the resource shall be preserved as open space and shall remain undisturbed. This protection level shall be met within any development and shall not be reduced except as provided in paragraph G.

D. Extent Of The Resource. For purposes of calculating the protection level under paragraph C, the extent of the Critical Natural Area shall be the greatest of its extent on the date of the exploratory plan submission, its extent five (5) years prior to that date, or its extent as

depicted in the State natural areas inventory. The applicant shall submit documentation of prior conditions. Disturbance occurring before annexation, before application, or without a required approval shall not reduce the area subject to this section.

E. Aggregation. Contiguous parcels held in common ownership or common control, and successive phases of a single development, shall be treated as one project boundary. No subdivision, conveyance or sequencing of applications shall reduce the area subject to this section.

F. Uses Within A Critical Natural Area. Land preserved under paragraph C shall remain open space, shall remain undisturbed, and shall not be used for any purpose except passive recreation and the crossings permitted by this paragraph. Stormwater management facilities, sediment and erosion control facilities, staging or storage areas, borrow or spoil areas, active recreation facilities, and required landscaping or buffer plantings shall not be located within a Critical Natural Area and shall not be counted toward satisfying any requirement of this chapter. Utility and access crossings may be permitted only at the minimum width necessary and only where the Town Engineer finds in writing that no other recourse is available. Land preserved under paragraph C shall be credited toward the open space dedication required by TMC 24.20.100 as passive open space. Notwithstanding TMC 24.20.100 paragraph A,1,e, such land shall not be counted in determining the required open space that must be suitable for active recreation. Where land is within a Critical Natural Area, this section shall control over the permitted and special exception uses of the district in which the land is located, including TMC 24.12.020.

G. Variance. A variance from the protection level established in paragraph C may be sought only in accordance with TMC 24.36.195. If a variance is granted, mitigation shall be required at a ratio of four to one (4:1) to replace habitat, and the replacement habitat shall be geographically contiguous with the impacted Critical Natural Area. No variance shall be granted with respect to habitat of a species listed as endangered or threatened by the state or the federal government. No variance shall reduce the protection level below 80 percent of the Critical Natural Area within the project boundary.

H. Preapplication Notice. Where a development is proposed in whole or in part within a Critical Natural Area, the town shall notify the applicant at the preapplication conference. The application for an exploratory plan shall include a report indicating how the plan meets the standards of this chapter, together with the comments of the Delaware Department of Natural Resources and Environmental Control on the plan. Where the applicant can preserve greater areas of open space without losing density, the town may require that greater preservation on the advice of that Department.

I. Application Upon Annexation. This section applies to any land annexed to the town upon the effective date of annexation, and to any subsequent development of that land, without

regard to the zoning district assigned at annexation and without regard to any standard applicable to the land before annexation.

J. Effect Of Other Jurisdiction. The protection level established in paragraph C applies whether or not the Critical Natural Area is subject to a State or federal permit, a recorded conservation easement, dedication under 7 Del. C. Chapter 73, or any other State or federal protection. Identification, listing, registration or inventorying of a resource by a State or federal agency does not satisfy this section. Neither the absence of a State or federal permit requirement, nor a determination by a State or federal agency that it lacks jurisdiction over the resource, nor the expiration or denial of any State or federal application, shall reduce the protection level established by this section.

Section 4. TMC 24.36.150, Environmental Impact Assessment Report, is amended by adding the following paragraphs.

24.36.150 Environmental Impact Assessment Report

If a proposed use requires an environmental impact assessment report, the applicant shall have such a report certified by a professional engineer, geologist or other certified professional in the applicable environmental discipline. Mitigation cannot be used where the conflict can be avoided or minimized. The report shall contain the following criteria, given in order of preference:

- A. Site Character.** The report shall identify all potential on-site sensitive environmental concerns.
- B. Avoidance.** Alternative sites or routes shall be identified that would not damage the resource or result in less resource damage. Reasons shall be provided explaining why using these sites is impossible or infeasible versus that proposed.
- C. Minimization.** The applicant shall demonstrate that the plan minimizes the impact of the activity, route, or use on the resource. The applicant shall also demonstrate that the areas impacted shall be lowest quality and result in the least damage to the resource.
- D. Mitigation.** A mitigation plan shall be submitted indicating mitigation activities. On-site replacement is the most acceptable form of mitigation. However, mitigation can include restoration and enhancement after the use is abandoned. Mitigation by replacement on another site shall be at a ratio of 2:1. Mitigation may also include enhancement; this ratio shall be 4:1. Final town approval is required for all other forms of mitigation not consistent with this section.

Paragraphs E through H state additional required contents of the report and are not part of the order of preference established by paragraphs A through D.

E. Resource Mitigation. In addition to the ratios established in paragraph D, mitigation for impacts to a Critical Natural Area shall be at a ratio of four to one (4:1) and shall be

geographically contiguous to the impacted Critical Natural Area. The mitigation plan shall describe the site conditions of the area to be mitigated, the required size of the mitigation area, the mitigation area boundaries, and detailed plans for monitoring and long-term maintenance.

F. Conservation Design. Any use proposed within natural resource area open space shall demonstrate how the principles of conservation design will be implemented and how the proposed use will be addressed in the open space management plan.

G. Endangered Species. The applicant shall prepare an inventory of federal and State threatened and endangered plant and animal species, and candidates for such designation, located on the site and within five hundred (500) feet of the site, a determination of the proposed development's impact, and identification of any mitigation.

H. Cultural And Scenic Resources. The applicant shall prepare an inventory of federal, State or locally identified irreplaceable historical, archaeological, paleontological or scenic resources located on the site and within five hundred (500) feet of the site, a determination of the proposed development's impact, and identification of any mitigation.

Section 5. A new section, TMC 24.36.155, Forest Protection, is added to read as follows.

24.36.155 Forest Protection.

A. Habitat Assessment Required. Where a forest exists within a project boundary that will be disturbed by development or construction activity, a Forest Habitat Value Assessment shall be required. The assessment shall be conducted by a qualified professional landscape architect, forester, arborist, botanist, plant or wildlife ecologist, or other qualified professional, and shall be submitted with the exploratory plan.

B. Priority For Preservation. The forested areas containing the highest habitat value, as determined by the Forest Habitat Value Assessment, shall be given the highest priority for preservation.

C. Protection Level. Not less than 60 percent of the forest within a project boundary shall be preserved as open space and shall remain undisturbed. Forest located within a Critical Natural Area shall be protected at 100 percent in accordance with TMC 24.36.090 and shall not be counted toward satisfying this paragraph.

D. Mitigation. An applicant may be permitted to reduce the protection level established in paragraph C to not less than 50 percent, provided that mitigation is provided at a ratio of two acres planted to one acre disturbed (2:1), and provided that the area to be reforested is located on the same parcel or on an adjoining parcel. Reforestation shall meet the

requirements of TMC 24.36.170. Any reduction under this paragraph shall require the approval of the town council upon the recommendation of the Planning Commission.

E. No Increase In Density. In no case shall a reduction under paragraph D result in an increase in the density otherwise permitted for the site.

F. Prior Clearing. For purposes of calculating the forest protection level under this section, a parcel that has been cleared and is proposed for development shall use the forest cover that existed on the parcel as of the date of the exploratory plan submission or five (5) years prior to that date, whichever is greater. The applicant shall submit documentation of prior forest cover.

Section 6. TMC 24.36.160, Clearing, is amended by adding a new paragraph D.

24.36.160 Clearing

With all natural resources, clearing shall be permitted only under the following conditions:

- A. To prepare land for a use permitted by this chapter;
- B. As a reforestation measure, or to enhance to improve the quality of existing vegetation or as a means to eliminate dead, diseased, or hazardous tree stands;
- C. Where a clearcutting operation is deemed permissible for one of the reasons stated in this paragraph, it shall be consistent with the terms of TMC 24.36.170 and in accordance with the State Department of Agriculture Division of Forest Services.

D. Clearing, including earth moving, logging or burning, shall require a permit issued by the town. Such permit shall be issued only as part of an approved land development plan with an approved resource protection plan, or upon submission of a resource protection plan and analysis demonstrating that the protection levels established by this chapter are met, including a record of the property's original conditions. Agricultural uses are exempt from this paragraph, except that agricultural uses shall submit an approved State Forestry Plan, which shall be used to determine the extent of forest on the site for purposes of TMC 24.36.155.

Section 7. A new section, TMC 24.36.195, Environmental Variance Procedure And Technical Review, is added to read as follows.

24.36.195 Environmental Variance Procedure And Technical Review.

A. Applicability. This section applies to any application for a variance from a resource protection standard established by this chapter, and to any other application on which this chapter requires the technical review provided for in this section. A variance application

shall be filed with the town and shall be heard by the Board of Adjustment at a public hearing noticed in the same manner as required by TMC 24.08.030(C).

B. Environmental Impact Assessment Required. No such variance shall be granted unless the applicant has submitted an Environmental Impact Assessment Report meeting the requirements of TMC 24.36.150.

C. Technical Review Required Before Consideration. The Board of Adjustment shall not consider any application for a variance from a resource protection standard of this chapter until the technical review required by paragraph D has had an opportunity to review the application and issue a written recommendation. Any such application shall be transmitted for technical review upon filing, and the written recommendation shall be issued within forty-five (45) days of the date the application is filed. If no written recommendation is issued within that period, the Board of Adjustment may proceed without it and the record shall so note. The written recommendation shall be entered into the record of the public hearing.

D. Technical Review.

> 1. Retention. The town shall cause each such application to be reviewed by a qualified > professional in the applicable environmental discipline, who shall issue a written > recommendation to the body acting on the application. The professional shall be selected and retained by > the town, and shall report only to the town. The applicant may make recommendations on the > selection, however the town may disregard such recommendations. > > 2. Scope. Before retaining the professional, the town shall prepare a written scope of > the review. The scope shall address only the criteria upon which the Board of Adjustment is > required to base its decision, and shall require that the review be completed within the > period established by paragraph C. > > 3. Cost; Estimate And Ceiling. The cost of the review shall be borne by the applicant. > The town shall obtain a written estimate of the cost of the review before the review begins, > shall provide the estimate to the applicant, and the cost of the review shall not exceed the > estimate without the written approval of the town. > > 4. Escrow And Refund. The estimated cost shall be deposited by the applicant with the > town in an interest bearing escrow account before the review begins, and the town may draw > against the account to pay the professional. Any balance remaining after final action on the > application shall be returned to the applicant, with accrued interest, within thirty (30) > days, notwithstanding TMC 24.32.010(C). > > 5. Appeal Of Selection. The applicant may appeal the selection of the professional to the > town council, which may disqualify the professional only on the grounds that the professional > has a conflict of interest or does not meet the definition of a qualified professional at TMC > 24.36.020. Such an appeal shall be in writing and shall be received by the town council, with > a copy to the Board of Adjustment, within ten (10) days of the date the town provides the > applicant with the written estimate required by paragraph D,3.

An appeal under this paragraph stops the running of the period established by > paragraph C, which resumes on the first business day after the appeal is decided.

E. Findings Required. In addition to the standards of TMC 24.08.020(B)(1)(c), a variance from a resource protection standard shall not be granted unless the Board of Adjustment makes written findings that the applicant has demonstrated avoidance and minimization in accordance with TMC 24.36.150, that the mitigation required by this chapter will be provided, and that the variance is the minimum necessary. The findings shall be entered in the record.

Section 8. Table 11-2.1, Uses in Required Open Space, is amended.

In Table 11-2.1, the entry for **Clearing** in the **Forests** column is amended as follows:

Use	Forests column
Clearing	L <u>N</u>

Section 9. TMC 24.04.080, Preservation of Natural Features, is amended by adding a new paragraph D.

24.04.080 Preservation Of Natural Features

C. Existing natural resources, such as woodlands, individual mature trees, streams and watercourses, drainage channels and important vistas and view-sheds shall be retained. Whenever a development proposal is in conflict with the preservation of such natural features, the Planning Commission may authorize their removal or relocation provided that, in their opinion, there will be no substantial adverse impact upon the overall integrity of the community or property values in the area, and no feasible alternative exists.

D. Paragraph C shall not apply to any Critical Natural Area, forest, or wetland regulated by TMC 24.36. Removal or disturbance of such resources shall be authorized only in accordance with TMC 24.36.050, TMC 24.36.090, TMC 24.36.155 and TMC 24.36.195.

Section 10. Conflict.

Where the provisions of TMC 24.36 conflict with any other provision of this chapter, the more restrictive shall govern.

Section 11. Severability.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held invalid, such decision shall not affect the validity of the remaining portions of this

ordinance, and the town council declares that it would have adopted each section, subsection, sentence, clause and phrase irrespective of the invalidity of any other.

Section 12. Effective date.

This ordinance shall take effect upon adoption as provided by law.