

ARTICLE XX.
STREAM SETBACKS [DRAFT]

SECTION 1. INTENT

This Article establishes overlay zoning districts for stream setbacks as defined here in.

SECTION 2. PURPOSE

It is the intent of this Article to reasonably regulate Development, uses and activities within identified Steam Corridors and to thereby preserve, conserve, manage disturbance, and attempt to restore _____'s natural stream corridors, pursuant to _____'s Home Rule authority, Article 12, § 5 of the Kansas Constitution, and in accordance with state and federal statutes, so that the following objectives may be achieved:

- A. Regulate the land use, location, and engineering of all development within the Stream Corridor to ensure consistency with the intent and objectives of accepted conservation and Best Management Practices, and to work within the carrying capacity of existing natural resources;
- B. Assist in the implementation of pertinent federal, state, and local laws concerning clean water, pollutant discharges, storm and surface water management, erosion and sediment control and flood control;
- C. Improve surface and ground water quality by reducing the amount of nutrients, sediment, organic matter, pesticides, and other harmful substances that reach watercourses, wetlands and subsurface and surface water bodies by using scientifically-proven processes including filtration, deposition, absorption, adsorption, plant uptake, and denitrification, and by improving infiltration, encouraging sheet flow and stabilizing concentrated flows;
- D. Improve and maintain the safety, reliability, and adequacy of the water supply for domestic, agricultural, and other uses, in addition to supporting recreational uses and sustaining diverse populations of aquatic flora and fauna;
- E. Preserve and protect areas that intercept storm and surface water runoff, wastewater, subsurface flow and/or deep groundwater flows from upland sources and reduce, to the maximum extent practicable, the effects of the entry of associated nutrients, sediment, organic matter, pesticides, or other pollutants into surface waters, as well as provide wildlife habitat, moderate water temperature in surface waters, attenuate flood flow, and, where appropriate and feasible, provide opportunities for recreational activities;
- F. Manage Development within floodplains, on land adjacent to stream segments with greater than _____% slopes, and other environmentally sensitive areas to minimize hazards to life, property, and stream features;

- G. Recognize that natural features contribute to the welfare and quality of life of _____'s residents;
- H. Provide natural, scenic, and recreation areas within and adjacent to Stream Corridors for the community's benefit; and
- I. Create added value to lands adjacent to Stream Corridors.

SECTION 3. DEFINITIONS

In this Article, these words and phrases have the following meaning:

- A. "Best Management Practices or BMPs": The utilization of methods, techniques or products that have been demonstrated to be the most effective and reliable in minimizing adverse impacts on water bodies and their adjacent Stream Corridors.
- B. "Clearing": Any act by which vegetative cover, structures or surface material is removed, including, but not limited to, surface layer, root mat or topsoil removal.
- C. "Development": Any human-made change to improved or unimproved real estate including, but not limited to buildings or other structures, mining, dredging, filling, grading, site clearance, paving, excavation, drilling operations and storage of equipment and materials.
- D. "Development Application or Application": All applications required by _____'s Zoning and Subdivision Regulations as a prerequisite to initiation of development, including, but not limited to, a building permit application.
- E. "Edge of Stream Bank": A line formed by the outer boundary of the stream as delineated by the bankful or channel-forming flow caused by approximately the two-year rainfall event.
- F. "Ephemeral Stream": A stream that has flows only in direct response to effective precipitation, i.e. during and immediately following a major storm. Ephemeral streams do not intercept groundwater flow and therefore have no base flow. Instead, ephemeral streams usually contribute to groundwater seepage through their porous channel beds.
- G. "Enhancement": In the context of this Article, a process undertaken to rehabilitate or improve an existing degraded Stream Segment by increasing native plant diversity or removing exotic plant species and increasing water quality, wildlife habitat or erosion controls.
- H. "Erosion": The process by which the ground surface is worn away by the action of the wind, water, ice, gravity, or artificial means, and/or land disturbance.

- I. "Filling": Any act by which soil, rock, organic material or any other material is deposited, placed, pushed, pulled or transported and includes the conditions that result from that act.
- J. "Floodplain": The floodway and floodway fringe as identified by the Federal Insurance Administration, or such other designation of the floodplain as is subsequently adopted by _____, and representing the regulated 100-year water surface and corresponding elevations.
- K. "Intermittent Stream": A stream of mixed character, behaving as a perennial stream at certain times of the year and an ephemeral stream at other times. Depending on seasonal conditions these streams may feed to and from the groundwater.
- L. "Grading": Any act by which soil is cleared, stripped, moved, leveled, stockpiled, or any combination thereof, and includes the conditions that result from that act.
- M. "Mitigation": A negotiated action involving the avoidance, minimization or compensation for possible adverse impacts.
- N. "Native Vegetation": Vegetation comprised of plant species that are indigenous to the area in question.
- O. "Public Works Director": The individual appointed by _____ as the Public Works Director or his/her duly authorized designee.
- P. "Restoration": The act of improving, enhancing, and reestablishing a once viable and now degraded Stream Segment to a state in which its stability, functions, and values approach its unaltered state.
- Q. "Routine Repair and Maintenance": Any activities directed at preserving an existing allowed use or facility, without expanding the development footprint or site use.
- R. "Slopes": The inclined surface of a fill, excavation or natural terrain expressed as a ratio of horizontal distance to vertical distance over a measured inclined surface.
- S. "Stream": A body of running water moving over the earth's surface in a channel or bed, such as a creek, rivulet or river that flows at least part of the year, including perennial and intermittent streams. Streams are dynamic in nature and their structure is maintained through build-up and loss of sediment.
- T. "Stream Corridor or Corridor": An area established by this Article surrounding an identified Stream Segment, including adjacent floodplains and lands with slope greater than ____%. The Stream Corridor is a protective zone for the adjacent Stream Segment. _____ zones are located on each side of the Stream Segment. Together, these zones and the Stream Segment compose the Stream Corridor.

- U. "Stream Segment or Segment": Any stream segment identified by _____.
- V. "Structure": Anything constructed or erected that requires location on the ground or attachment to something having a location on the ground, including, but not limited to signs, conventional television or satellite antennas and excepting customary utility poles, retaining walls and boundary fences.
- W. "Utility": Buildings, structures or any constructed portion of a system that provides for the production, transmission, conveyance, delivery or furnishing of services including, but not limited to, heat, light, water, power, natural gas, sanitary sewer, storm water, telephone and cable television.
- X. "Variance": A variation from a specific requirement in this Title, as applied to a specific piece of property pursuant to Section _____ of this Title.

SECTION 4: APPLICABILITY.

- A. This Stream Setback Ordinance shall apply to all land or new development within the Stream Corridor, as defined by this Article and applied to designated Stream Segments identified on the most current map adopted by _____ and as Exhibit A. No development shall occur on a parcel of land that is within or partially within the defined Stream Corridor, except in accordance with this Article; provided, however, that this Article shall not apply to land or to development, which:
 - 1. is on land covered by an approved, unexpired preliminary plat or preliminary plan, where such approval was given prior to the effective date of this Article; or
 - 2. if platting is not required prior to issuance of a building permit, is covered by a unexpired building permit issued prior to the effective date of this Article, in accordance with _____.
- B. No Development Application shall be approved that proposes development on any parcel of land wholly or partially within the defined Stream Corridor unless the proposed development is in compliance with the applicable provisions of this Article.

SECTION 5: STREAM CORRIDOR.

Stream Corridor widths have been determined by drainage area to the stream. The location of designated Stream Segments shall be as delineated on Exhibit A. At all designated Stream Segment locations, the Stream Corridor shall consist of _____ zones. The width of each zone within the Stream Corridor is defined below. See Exhibit B for an illustration of the Stream Corridor, as defined.

Table 1. Minimum Stream Corridor Width

Drainage Area (acres)	Minimum Buffer Width, from Edge of Stream Bank Outwards, Measured Separately in Each Direction (feet)
Less than 20	40
20 to 160	60
160 to 5,000	100
Greater than 5,000	120

The general guidelines used to determine the width of each zone are as follows:

- A. Inner Zone = 25' from the Edge of the Stream, and measured horizontally from the edge.
- B. Outer Zone = Variable width zone determined by _____, and measured horizontally from the outer boundary of the Inner Zone to _____. The Outer Zone includes a distance that comprises all lands with slope greater than _____% and Floodplains; *provided that*, these features occur, in part, within the Inner or Outer Zone.

Note: Where manmade ponds interrupt streams, the Stream Corridor as herein defined shall stop at the pond and resume on the other side thereof. Where ponds are removed or filled in as part of development, the stream shall be restored through that area and the Stream Corridor buffer shall be created using the typology for adjacent stream sections.

SECTION 6. PROHIBITIONS

Any use or activity not identified as permitted by this Article within any Stream Corridor zone is prohibited in all identified Stream Corridors. Mowing or clearing of the Inner Zone shall be specifically prohibited.

SECTION 7. REGULATED USES, STRUCTURES AND ACTIVITIES.

- A. General Applicability to Stream Corridor. No development shall be undertaken on land in a Stream Corridor unless a Development Application has been approved authorizing the applicant to perform the development proposed therein; provided that, no Development Application shall be approved unless the development proposed therein is, in all respects, in conformity with the requirements of this Article.
- B. Uses and activities permitted in the Inner Zone.
 - 1. Conservation uses, wildlife sanctuaries, nature preserves, forest preserves, fishing areas, and passive areas of parklands.
 - 2. Unpaved recreational trails and greenways.

3. Education/scientific research.
4. Stream bank stabilization and other storm water BMPs
5. Activities associated with the Restoration and Enhancement of Stream Corridors.
6. Excavation and fill required to plant any new trees or vegetation.
7. Installation of water and wastewater facilities, provided that, the owner of the facilities provides information to _____ that is sufficient to allow the Public Works Director to determine that the installation of the facilities in Outer Zone is unfeasible. Feasibility will be determined through consideration of factors, such as geology, topography and the presence of unique habitat in the Stream Corridor. Water and wastewater facilities will be permitted to cross the Inner Zone and Stream as necessary, provided that, the number of crossings is minimized to the greatest extent possible.
8. Public infrastructure.

C. Uses and Activities Permitted in the Outer Zone.

1. All uses and activities permitted in the Streamside Zone.
2. Paved recreational trails.
3. Fences; provided however, that such fences must be constructed so as not to impede floodwaters.
4. Installation of utilities, including water and wastewater facilities.

D. Additional Uses and Activities Permitted in the Outer Zone, with Public Works Director Approval.

1. Passive uses, such as camps, campgrounds, picnic areas and golf courses.
2. Minor recreational structures and surfaces that are ancillary to passive recreational uses as set forth in subparagraph 2 above; provided that, the total impervious area created by such structure(s) in residential areas shall not exceed two hundred (200) square feet per single family residential lot. Examples of such permitted structures include, but are not limited to, decks, gazebos, picnic tables, playground equipment and small concrete slabs built to accommodate such permitted structures.

E. Single Family Residential – Rear Yard Allowance

The rear yard of a single-family residential use may extend into the the Outer Zone; provided, however, that the rear of the actual residential structure may not be located

nearer than 20' from the outer edge of the Outer Zone and no ancillary structure may be located in the Outer Zone (only those ancillary structures otherwise permitted by this Title may be located in the Outer zone), and further that any development satisfies the open space and setback requirements of this Article.

F. Uses Subject to Federal and/or State Approval.

The following in-stream activities are regulated and require approval from United States Corp of Engineers or Environmental Protection Agency, the Kansas Department of Health and Environment or other appropriate federal and state agencies:

1. dredging,
2. filling,
3. excavation,
4. draining, and
5. clearing;

provided that, the requisite state and/or federal approvals are provided to _____.

SECTION 8. ACTIVITIES PERMITTED IN ALL STREAM CORRIDOR ZONES.

The following activities are allowed within all zones of the Stream Corridor:

- A. Existing and ongoing agricultural activities. The activities cease to be existing when the area on which they were conducted has been converted to a nonagricultural use or has lain idle for more than five years or so long that modifications to the hydrological regime are necessary to resume agricultural activities, unless the idle land is registered in a federal or state soils conservation program.
- B. Maintenance/repair of public right-of-way, streets, public structures.
- C. Site investigation work necessary for initial land use applications, such as surveys, soil logs and percolation tests, and special studies as required by this Title; provided, however, that the land must be restored to its pre-investigation condition.
- D. Reconstruction, remodeling or maintenance of existing structures, provided that the activity does not expand the existing use beyond the previously approved use so as to physically extend into or adversely affect the Stream Corridor.
- E. Routine maintenance of existing landscaping within a lot's boundaries, including pruning, removal of diseased trees or other diseased vegetation and replacement of individual plants when necessary to maintain a unified landscape theme.

- F. Control of vegetation defined as state noxious weeds by K.S.A. 2-1314 et seq., by the recommended methods or alternative methods established by the State Board of Agriculture, Noxious Weed Division.
- G. Emergency action necessary to prevent imminent threat or danger to public health or safety, or to public or private property, or serious environmental degradation may be taken at any time without advance notice to the Public Works Director; provided that, the notice, as herein above required, shall be given at the earliest opportunity thereafter.

SECTION 9. STREAM CORRIDOR DEVELOPMENT APPLICATION REQUIREMENTS.

- A. All persons required to submit a Development Application, pursuant to any section of the _____ Zoning and Subdivision Regulations, shall, on the otherwise required submittals for that particular type of Development Application, show the exact location of the Stream Corridor and its _____ zones. Stream Corridor and zone location information must be accurately delineated on a legal property survey. If the proposed use within a Stream Corridor is agriculture-related, an Agriculture Resource Management Plan, including BMPs for erosion, nutrient, fertilizer, herbicide and pesticide control, consistent with the requirements of Kansas Department of Agriculture, also shall be submitted for review.
- B. _____ will review the location of the Stream Corridor, as shown in the Development Application, to determine whether it is consistent with the defined Stream Corridor for the designated segment. If a discrepancy arises, the applicant may request that a _____ representative perform a site visit to view conditions on site with applicant to assist in making this determination. This determination shall be reported to the relevant decision maker as a part of _____ staff's comments on the subject Development Application and shall also be reported to the applicant.
- C. If _____ determines that the locations shown in the Development Application are not consistent with the defined Stream Corridor for the designated segment, as defined and incorporated by this Article, the applicant shall be provided written notice of the inconsistency. The Public Works Director will be responsible for the final determination in cases of disagreement.
- D. Any applicant who believes that the Public Works Director has incorrectly determined that the Development Application is inconsistent with the defined Stream Corridor for the designated segment, as defined by this Article, may appeal the decision of the Public Works Director using the procedure set forth in Section ____ here in.

SECTION 10. APPROVAL PROCESS.

All Development Applications covering land partially or wholly included within the Stream Corridor shall be processed, considered and acted upon in accordance with the procedures established in this Title for the type of Development Application submitted.

SECTION 11. CONDITIONS OF APPROVAL.

_____ shall have the authority to attach conditions to the approval of any Development Application as deemed necessary to alleviate adverse impacts on Stream Corridors and to carry out the provisions of this Article.

SECTION 12. DEVIATIONS FROM REQUIREMENT APPLICABLE TO LANDS WITHIN STREAM CORRIDORS.

- A. When considering any Development Application, _____ may:
 - 1. approve a reduction in the yard and setback requirements established by the underlying zoning district, of up to 25%, to maintain the width of Stream Corridor; and
 - 2. alter the outer boundary of the Outer Zone of the mapped Stream Corridor allowing the width of the Outer Zone to become narrower than as mapped at some points within the property, that is included in the subject Development Application, to allow for the presence of an existing structure, as long as the Inner Zone is not altered by the narrowing, and no new structures are built within the Floodplain.

- B. The decision to approve or deny a request for a deviation from requirements applicable to lands within Stream Corridor shall be based on the following considerations:
 - 1. sensitivity of the Stream Segment and affected critical habitats;
 - 2. intensity of land use adjacent to the Stream Segment proposed for reduced Stream Corridor width; and
 - 3. impact on Floodplain and stream functions.

- C. A Stream Corridor deviation shall not be approved when the reduction would result in the Stream Corridor being narrower than the Floodplain or a width that does not include adjacent land with a slope of greater than ____%.

SECTION 13. VARIANCE.

If an applicant believes that the requirements of this Article will result in an unnecessary hardship, the applicant may seek a variance through the procedures provided in _____.

SECTION 14. APPEALS.

A. The Board of Zoning Appeals (BZA) shall hear and decide appeals of final decisions made by the Zoning Administrator, and also requests for variances from the requirements of this Article.

1. An appeal to the BZA may be taken by any applicant aggrieved by any decision of _____ requiring the applicant to conform to a Development Application covering land included within a Stream Corridor to the requirements of this Article and who alleges that the final decision of _____ constitutes a "taking" without just compensation under the 5th Amendment to the United States Constitution or under the Kansas Constitution. On appeal, the burden will be on the appellant to establish, by the preponderance of the evidence:

a. with respect to a requirement, which is imposed as a condition of approval of the Development Application, that the applicant convey to _____ an interest in land:

- (1) that there is not an essential nexus between the challenged requirement and the public purposes sought to be achieved by the challenged requirement, or
- (2) that, through an individualized determination, the challenged condition is not roughly proportionate both in nature and extent to the impact of the Development proposed in the Development Application; and

b. with respect to other requirements imposed by this Article, that:

- (1) the requirements result in a denial of all beneficial economic or productive use of the property; or
- (2) the requirements constitute a permanent physical occupation or invasion of the applicants property; or
- (3) the requirement does not substantially advance a legitimate state interest; or
- (4) the burden that the requirement places on the applicant is greater than the benefit that the requirement confers on the general public, considering all of the following and any other relevant factor: (a) the temporal relationship between the effective date of the ordinance and the date the applicant (or if the applicant is not the landowner, the date the landowner) acquired the property that is the subject of the Development Application; (b) the degree of interference created by the challenged requirements with the applicant's reasonable investment-backed expectations that the property could be developed free of the impacts of the challenged

requirements; (c) whether, and if so the extent to which, the development proposed by the applicant is prejudicial to the health, safety or general welfare of others or constitutes a nuisance or nuisance-like activity; (d) the extent to which the challenged requirements achieve important public purposes; (e) the economic impact of the challenged requirements on the applicant's (or if the applicant is not the landowner, the landowner's) entire parcel and contiguous parcels commonly owned, as determined through a comparison of the value of this ownership without application of the challenged requirements with its value with application of the challenged requirements; and (f) that applicant is not necessarily entitled to the most profitable use of the property.

- B. Appeals to the BZA may be taken, pursuant to the procedures and provisions set forth in Article 3 of these regulations, by any person aggrieved, or by any officer, department head or bureau of _____ or any government agency or body affected by any decision of the Zoning Administrator, who alleges there is an error in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement or administration of this Article, including but not limited to, all application request for a Development Permit.
- C. The BZA may authorize in specific cases, pursuant to the procedures and provisions set forth in Article 3 of these regulations, a variance from the specific terms of this Article. In addition to the criteria set forth in Article 3, Section 5(F)(2)(a) through (e) of these regulations, the BZA and the Board, in determining whether the requested variance will not be contrary to the public interest, that the spirit of this Article shall be observed, that public safety and welfare secured, and substantial justice done, shall give consideration which shall include, but not limited to, all technical evaluations, all relevant factors and standards specified in other provisions of these regulations, and the following additional criteria:
1. The appeal shall be in writing and a copy shall be simultaneously provided to the Public Works Director. The written appeal shall identify the specific grounds for the appeal, including the exact locations of the Stream Corridor that the applicant disputes. The notice shall also be accompanied by a Stream Corridor Delineation Report. The Report shall include:
 - a. a surveyed site plan covering all property that is the subject of the Development Application, which shows the property's topography;
 - b. drainage flow on the property;
 - c. the location of streams;
 - d. the edge of bank of the streams;

- e. the _____ zones of the Stream Corridor as defined in Section 4 of this Article;
 - f. a tree and native vegetation inventory;
 - g. a delineation of areas with slope greater than _____% (with the percentage slope shown);
 - h. critical habitat contiguous to the streams;
 - i. drinking water sources on the property;
 - j. related water right information for each stream;
 - k. designation of the Floodplain; and
 - l. all other information required by the BZA to be submitted for its consideration.
- D. On appeal, the burden will be on the appellant to establish, by clear and convincing evidence, that the Development Application is consistent with the defined Stream Corridor for that designated Stream Segment, as defined by this Article.
- E. The BZA, after considering all evidence presented by the applicant in support of the appeal and any evidence presented by _____ in rebuttal or otherwise presented in relation to the appeal, shall render a written decision. If the BZA determines that applicant has not met the requisite burden of proof, it shall affirm, wholly or partly, the decision of the Public Works Director. If the BZA determines that the applicant has met the requisite burden of proof, it may reverse or modify the decision of the Public Works Director and make a decision respecting Development Application as it determines is appropriate. In making this new decision, the BZA may attach any condition it deems necessary to further the purposes of this Article.

SECTION 15. APPEAL TO DISTRICT COURT.

Any person or persons jointly or severally aggrieved by any final decision on appeal may present to the District Court of _____ County, Kansas, a petition duly verified appealing the decision. The petition shall set forth that the decision is illegal, in whole or in part, and specify the ground of its illegality. The petition shall be presented to the court within thirty (30) days after the decision is issued or it shall be barred.

SECTION 16. NOTIFICATION; RECORDATION.

The following title and plat notification requirements concerning stream corridors and associated development and use restrictions shall be required.

- A. *Notice on Title.* The owner of any property within a Stream Corridor, upon the approval of a Development Application covering property containing a Stream Corridor (which does not involve the approval of a final plat) shall record a notice of presence for each Stream Corridor with the _____ County Register of Deeds. This recording shall contain notice of the Stream Corridor, the application of this Article to the property, and the limitations on actions in or affecting such Stream Corridor. The applicant must submit proof that the notice has been legally recorded before the final approval for development is issued. The notice shall run with the land and failure to provide this notice to any purchaser prior to transferring any interest in the property shall be in violation of this Article. The notice shall be substantially as set forth below:

STREAM CORRIDOR NOTICE

Legal Description:

Present Owner:

Notice: This property is located within or contains the following Stream Corridor, as defined and regulated in _____ Zoning and Subdivision Regulations Article ____:

Restrictions on the use or alteration of land within the Stream Corridor may apply.

Application #___ filed on (Date).

Signature of owner(s).

Notarization:

State of Kansas }
_____ County }

On this day personally appeared before me to me known to be the individual(s) described in and who executed the within and foregoing instrument and acknowledged that they freely and voluntarily signed the same for the uses and purposes therein stated.

Given under my hand and official seal this _____ day of _____.

Notary Public in and for the state of Kansas, residing at _____.

- B. *Notice on Plat.* For all subdivision proposals within the Stream Corridor, the applicant shall include a notice on the face of the plat. The notice shall be substantially as set forth below:

Notice: This site lies within a protected Stream Corridor, as defined and regulated in _____ Zoning and Subdivision Regulations Article

_____. *Restrictions on the use or alteration of the Stream Corridor may apply.*

SECTION 17. ENFORCEMENT.

The Public Works Director is authorized and empowered to enforce the requirements of this Article in accordance with the procedures set forth in these regulations. In doing so, the Public Works Director shall have all the enforcement powers and may employ all or any of the remedies set forth in Sections _____ and _____ of this Chapter.

SECTION 18. ABROGATION AND GREATER RESTRICTIONS.

It is not intended that this Article repeal, abrogate, or impair any existing regulations, easements, covenants of deed restrictions. However, where this Article imposes greater restrictions, the provisions of this Article shall prevail.