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Ms. Florence Prisco, Town Supervisor
Town of Washington Town Hall
10 Reservoir Drive
Millbrook, NY 12545

Re: Wetlands and Watercourses Law
Technical Review Comments

Dear Supervisor Prisco and Members of the Town Board:

Our office has been requested by several interested Town residents to review the pending amendment to add a new Section 396, entitled "Wetlands and Watercourses Law" to the Town Zoning Code. This zoning code amendment will replace the existing Section 328 of the Zoning Code regarding the regulation of wetlands and watercourses.

The current Wetlands Law in Section 328 of the Zoning Code was enacted without the ability to apply it, because the requisite mapping was never adopted. While it is encouraging that the Town Board is taking steps to remedy this, it is incumbent on the Town Board to make sure that this new law is well crafted, has an administration procedure that will be fair and efficient, and its application will be comprehensive in affording protection to the Town's wetland and watercourse resources.

Enactment of a local wetland and watercourse law will end the community's reliance the protection of these valuable natural resources by understaffed State and Federal regulators. Enactment of a local wetland and watercourse law also makes a clear statement that the Town recognizes the benefits that wetlands and watercourses provide to water resources and wildlife, and the need for their protection that does not depend solely on the (often changing) State and Federal regulations. Regulation of wetland areas of one quarter acre or greater and their associated upland buffer areas will afford protection to a majority of the Town's wetlands. The proposed zoning amendment defines wetlands by those shown on the (soon to be adopted) Town *Wetlands and Watercourses Maps* and by their physical and vegetative characteristics, which provides a method of wetland identification and regulation that is not subject to State and Federal law. Regulation of the Town's watercourses and their adjacent "controlled areas" should will go far in maintaining their functional integrity and the myriad essential purposes of watercourses in the overall ecological system.

The following provides detailed comments of the results of our review and are offered in the spirit of trying to improve the proposed law prior to the law's adoption and implementation. We hope that these recommendations are considered as a means to further ensure the Town's protective measures for these valuable community assets.

As a result of our review of the law being proposed, we found several significant defects in its present form that should be corrected before the Town Board considers its adoption. The primary issues that should be addressed before the law is adopted include:

- A close reading of the proposed law, as it is now written, indicates several conflicts within the language of the proposed law and also conflicts with the requirements of other sections of the zoning code. These must be corrected to eliminate ambiguities that lead to misunderstanding and/or misapplication of the proposed law.
- The administrative procedure and power to determine whether a permit is necessary must be reconsidered. Amendment of the areas being regulated should not be subject to the majority vote of the Town Board – amendments must be based on the collection of scientific data that gets reviewed by persons that are qualified to make such decisions. Further, the power to decide whether any activity might detrimentally impact a protected wetland or watercourse area function must be granted to someone with the required experience and qualifications to assess the resource and what might impact it.

These serious defects should be changed to prevent a situation where the law could become a “paper tiger”, without any real force and effect.

- Numerous corrections, additions and clarifications to the law as it is presently written would markedly improve the implementation of its purpose and enforceability. The Board should also reconsider the time necessary for a decision appeal process and whether the penalties imposed reflect the damage that could occur to the community’s valuable resources --- unlike most zoning matters, it is practically impossible to recover from the damage to these valuable resources and therefore the penalties should be consistent with the loss.

Comments resulting from our review of the presently crafted local law are provided in more detail for the Board’s consideration and for referral to its consultants as follows:

I. Procedural Issues - The following cited procedural issues must be resolved prior to proceeding with the adoption of the proposed zoning law amendment to eliminate ambiguities:

A. Conflicts with other parts of the Zoning Code -

1. Delete the present Section 328 "Wetland and Watercourses", from the current Zoning Code. This deletion should be made as part of the zoning amendment adoption to eliminate a conflict between the old and new regulations.
2. Amend Section 430 "Planning Board", to reflect that the Zoning Administrator is also empowered to issue a wetland permit (i.e., short form letter of permission permit) per Section X. of the proposed law.

B. Conflicts within the proposed zoning code amendment -

1. Revise Section V. "Regulated Action Required", which states that a written permit will be issued by the Planning Board, while Section X. "Permit Application Procedures" allows a short form letter of permission permit determination to be made and issued by the Zoning Administrator.
 2. Section III. "Intent", (D.) states that the intent of the law is to "exercise concurrent jurisdiction with the NYSDEC and the USACE", but Section XII. "Definitions", *Wetlands*: appears to exclude wetlands regulated by the NYSDEC. This issue needs to be clarified because apparently NYSDEC regulated wetlands are incorporated in the new Town Wetlands & Watercourses Maps that are to be adopted when this new law is adopted.
- C. Conflicts with the State Environmental Quality Review Act (SEQRA) -
1. Authority is given to the Zoning Administrator in Sections X "Permit Application Procedures" (A) (1) to determine that "a proposed activity would not have a significant adverse effects or environmental impact on a regulated area" and issue a "letter of permission", which would be considered a permit approval. As the Board is aware, a SEQRA review process is required anytime a discretionary permit approval is granted in compliance with 6 NYCRR Part 617, 617.3(a). The proposed zoning code amendment should be revised to incorporate the SEQRA process requirements within the permitting process.

II. Issues regarding Administration of the Proposed Zoning Amendment - The

following issues should be carefully considered by the Town Board prior to adopting this law to prevent the possibility of future adverse decisions that could substantially weaken the purposes and objectives of the new Wetlands and Watercourses Law.

- A. Section IV "Wetlands and Watercourses Map(s)" allows the Town Board the authority to "correct or clarify the locations of wetlands for watercourses", to "eliminate from the jurisdiction of this Local Law particular wetlands and watercourses deemed to be insignificant for the purposes of this Local Law", and to "incorporate supplementary maps that correct, clarify, or affirm in detail the area of jurisdiction of this Local Law." This authority poses an unwieldy ability by a future Town Board to remove any or all regulated wetlands for watercourses from the Town Wetlands and Watercourses Map -- without input from the Wetlands Administrator, the Zoning Administrator, the Planning Board or members of the community.

We suggest as an alternate method that the Wetland Administrator and Planning Board provide an annual report of any suggested map modifications to the Town Board, and that accepted modifications be adopted using a zoning amendment process which requires a public hearing, County Planning Department input and a SEQRA determination. This method would add a means of checks and balances to the process and eliminate the possibility that a key wetland area could be removed from the mapping on a simple resolution made by a future Town Board.

- B. Section X. "Permit Application Procedures" prescribes that a permit application would be made to the Planning Board, who would refer the application to the

Zoning Administrator, the Wetlands Administrator and the CAC. A close reading of that section of the proposed law, however, indicates that early in the process, it is the Zoning Administrator that determines whether the application's activities requires a permit. This also could be an unwieldy delegation of power to the Zoning Administrator. The Zoning Administrator is given the ability (i.e., but not the mandate) in the proposed law to consult with the Wetland Administrator and the CAC. However, it is the Zoning Administrator that determines whether the proposed activity would have a significant adverse effects or environmental impact on a regulated area, and whether the permit process should be continued or concluded.

We suggest that some form of checks and balances be incorporated in this process, whether the Wetlands Administrator (who is by definition a qualified expert in wetlands and capable of determining appropriate actions with regards to wetland applications) should concur with the Zoning Administrator's opinion. Perhaps the Planning Board should also formally review that opinion (and also be the administrator of the necessary SEQRA process). The present law requires that the Zoning Administrator file the letter of permission with the Planning Board, the Building Inspector, the CAC, and the Town Clerk, but does not require this filing until he could have independently made and issued his decision that could have been contrary to the Wetlands Administrator and the Planning Board opinions. We consider this a serious flaw in the law's process that should be corrected prior to its adoption.

We suggest that anytime a regulated activity occurs within a regulated area that the Wetland Administrator, who will be most knowledgeable in the matter, should be the primary person in this review process.

III. Additional Issues to be Considered - The following items merit consideration by the Town Board prior to adopting the zoning amendment in its present form.

- A. Quality Vernal Pool Regulation. Areas of quality vernal pools are not regulated as this zoning amendment is presently written. Vernal pools are generally seasonally flooded, isolated pools of standing water without a flowing outlet. These pools do not support fish habitat and persist in a year of average precipitation for at least two months and are usually dry during much of the year. Quality vernal pools are those vernal pools that provide essential breeding habitat for pool-breeding amphibians. These areas are critical breeding habitat for several species of salamanders and frogs, and without these quality vernal pools, these important species to our ecological system cannot survive.

As the Board will note, the proposed law's Section II."Findings" (6) recognizes the importance of breeding and spawning grounds, without specifically identifying vernal pools. Accordingly, we suggest that quality vernal pools be acknowledged explicitly in the proposed law and that these areas be afforded reasonable adjacent upland buffer areas based on the particular species that are known to use these areas for breeding.

- B. Regulation of Mining Activities. Section III." Intent" (F.) indicates an objective to regulate "natural resource extraction" in a manner that avoids the loss or

impairment of the natural functions and values of the regulated areas. However, no further language is evident in the proposed law with regard to any means that might regulate gravel mining activities. This issue should be investigated in light of the Town's granted authority to regulate this type of land use and applicable provisions should be included in this law as a means to protect the community's natural resources.

- C. Watercourse Buffer. Section IV. "Regulated Activities" provide the minimum buffer for wetland resources, but omits the riparian buffer required for watercourses. For clarity, the "controlled area" definition in Section XII for watercourses should be repeated in Section IV (first paragraph). It is unclear where the 100 feet "controlled area" of the watercourse is measured from in the Section XII. definition, and that should also be clarified.
- D. Stormwater Discharge Regulation. Section IV. "Regulated Activities", should include the discharge of stormwater into wetlands and watercourses. It should be made very clear in the law that wetlands and watercourses cannot be the repository of untreated (i.e., both quantity and quality treatment) stormwater discharges. Further, the NYSDEC Stormwater Design Manual (Chapter 6) specifically prohibits stormwater ponds and created stormwater wetlands from being located in wetland areas and this should be emphasized in the wetlands law to ensure compliance with this prohibition.
- E. Elimination of Vague Terms. Section VIII. "Activities Allowed Without Permit" contains vague terms that should be removed to avoid potential ambiguities and misunderstandings. These include "reasonable use of water resources" and paragraph B., "substantial restoration, reconstruction, rehabilitation, or modifications" in paragraph F., and "incidental removal of trees and brush" in paragraph G..
- F. Additional Exempt Activities. The Town may wish to consider adding activities in regulated areas that would be allowed without a permit in Section VIII. Of the proposed law. These activities would include recreational activities (i.e., boating, hiking, swimming, camping, picnicking, and similar activities that do not involve intense, organized use or those that use motorized vehicles), establishing scenic, historic, wildlife and scientific preserves, and conducting educational and scientific research activities.
- G. Addition of "Watercourse Permit." Section IX. "Permit Requirement" should include "or watercourse permit" as this now reads that a regulated activity in the watercourse must obtain a wetland permit.
- H. Permit Application Requirements. Section X. "Permit Application Procedures" (B) (9) indicates that the Planning Board "may" require the listed information in that portion of the law that is necessary to determine the impact of the regulated activity. As an example, how could the Planning Board make a decision on an application without knowing the location of the construction area in the area to be disturbed (refer to d.), or the location of any proposed draining filling grading dredging and clearing vegetation (refer to e.)? We suggest that all of these items be required unless they are waived in writing by the Planning Board, based on site-specific and application specific reasons.

- I. Pollutant Information Requirement. Section X. "Permit Application Procedures" (B) (9) should include a pollutant loading analysis. The results of this analysis would indicate the potential for water resource contamination by a proposed use. The results of this analysis would also provide information to evaluate the impact consideration that is specified in (3) (k) of this section of the law.
- J. Approval of State and Federal Permits. Section X. "Permit Application Procedures" (C) does not seem to fit into this section of the law. This paragraph provides for the ability of the Planning Board to review and consider state and federal applications for activities in the regulated wetland (but does not consider activities in regulated watercourses?). It is interesting to note that the Planning Board may concur with the state or federal permit mitigation as long as the mitigation satisfies this local law, but there does not appear to be a mechanism to deny the issuance of a Town wetland permit if the mitigation is not deemed suitable by the Planning Board. This discrepancy should be addressed.
- K. Enforceability. There does not appear to be specifics regarding the law's enforceability. How will the Zoning Administrator be aware of regulated activities in regulated areas unless they are associated with a Planning Board action or a Building Permit? Will notice of other activities depend on neighbors filing a complaint?
- L. Penalties. The penalties for offenses are not mentioned in the proposed law, and therefore, by default, will be the penalties imposed for other zoning violations. We suggest that a penalties section be added to this Section of the Zoning Code that might be tailored to the potential damage to the community's resources if a violation occurred.
- M. Appeals Process Potential Timeframe. The appeal mechanism for a decision on a permit does not match the damage that could occur to a wetland or watercourse before the available appeal process is complete. As an example, the Zoning Administrator's letter of permission decision or the Planning Board's permit decision would apparently stand until such time as an appeal is made to the Zoning Board of Appeals and up to an additional 60 days after the close of the public hearing on the appeal. This is an undue time period for action to potentially prevent the destruction of the natural resource, and a more timely mechanism should be prescribed in the law.

As noted above, several of these issues will require revisions to the proposed zoning amendment before it can be adopted by the Town Board. We hope that during the time that the necessary revisions to the law are being made that all of the above will be considered.

As the Board is aware, substantive changes to the proposed zoning amendment require re-noticing a public hearing on the matter and referring the revised zoning amendment to the Dutchess County Planning Department to satisfy GML 239-m review requirements. These required procedures will afford ample time to carefully consider these comments.

We appreciate the opportunity to provide input in this important process that will afford the deserved protection of the community's natural assets. Please feel free to contact our office with any questions or if a meeting to discuss this matter in further detail would be beneficial.



Sincerely,
David Clouser & Associates

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