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July 16, 2010

TO BE HAND DELIVERED

Supervisor Florence Prisco and Members of the  
Town Board of the Town of Washington  
c/o Town Hall  
10 Reservoir Drive-P.O. Box 667  
Millbrook, NY 12545

RE: PROPOSED LOCAL LAW; WETLANDS AND WATERCOURSES

Dear Supervisor Prisco and Members of the Town Board of the Town  
of Washington:

I take this opportunity to provide you with preliminary written  
comments concerning the proposed Wetlands and Watercourses Law of  
the Town of Washington (Wetlands Law).

As a first point, my client, Rob Dyson, has asked me to assure  
you that he shares the objective of protecting the community's  
resources for the future by enhancing the rural quality of the  
community and by protecting environmentally sensitive areas and  
natural resources. He has also asked me to acknowledge his  
support for your efforts at exploring appropriate avenues for  
accomplishing these goals.

I am nonetheless constrained to offer my opinion that the  
proposed Wetlands Law should not be adopted. If, in the  
alternative, you choose to proceed with the Wetlands Law, I urge  
that significant amendments be incorporated into the draft. I  
will amplify the reasons for these suggestions.

THE PROPOSED WETLANDS LAW SHOULD NOT BE ADOPTED

The preferred alternative is that you do not adopt the proposed  
Wetlands Law. In non-technical terms, the reason is that the  
proposed Wetlands Law is simply not needed. All of the  
protections contemplated by the Wetlands Law are already

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available to the Town of Washington including, in particular, the Planning Board through the appropriate use of the New York State Environmental Quality Review Act as set forth in Environmental Conservation Law Article 8 and the accompanying regulations in 6 NYCRR Part 617.

This is a serious subject and I do not mean to be glib. Nonetheless, the Wetlands Law might rather be entitled the "Full Employment Law for Wetlands Scientists, Planners, Engineers and Lawyers." The Law creates a large, expensive, and time consuming procedure which in many, perhaps most, cases is simply not needed.

An application by a property owner or a prospective purchaser that entails disturbance of wetlands and watercourses proposed to be protected under the Wetlands Law, whether in the context of site plan approval, or special permit approval, or subdivision approval, or a variance, triggers the SEQRA process. If the proposed application raises bonafide questions that are relevant to the resources proposed to be protected by the Wetlands Law, the SEQRA process gives broad discretion to require disclosure of the issues, details about the issues and mitigation for the issues. If it turns out that a particular application raises significant issues about the proposed resources, the lead agency has available to it a Positive Declaration and a focused Environmental Impact Statement (EIS) providing an in-depth examination of the resources and the impacts. The end process of an EIS procedure is a Findings Statement that gives the lead agency expansive authority to prohibit disturbances that create significant negative impacts and/or to require modifications or alternatives to eliminate such impacts, including buffer areas, relocation of resources, and the like.

**There is nothing in the Wetlands Law that cannot be achieved by the existing authority under SEQRA.** The SEQRA process, as compared to the proposed Wetlands Law, provides far more flexibility by requiring an examination of the resources in question and the proposed protective measures only when relevant to a particular application and only when there is a basis for questioning whether a proposed activity will cause disturbance to a wetland and harm to a wetland. The proposed Wetlands Law, on the other hand, requires expensive, time consuming and detailed procedures whether or not there is a potential for significant negative impacts. It will create an insurmountable financial burden for landowners of ordinary economic means with no real benefit to the Town.

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### THE TOWN'S ENVIRONMENTAL GOALS CAN BE ACHIEVED BY APPROPRIATE TRAINING OF TOWN OFFICIALS

The Town of Washington is fortunate in having a Planning Board made up of dedicated public servants who devote a large amount of time and bring a great amount of knowledge and skill to their tasks. The solution for achieving the Town's environmental goals is to provide assistance to the Members of the Planning Board and, also, to the Building Inspector and the Zoning Administrator, by providing training by third party wetlands scientists that will enable the Planning Board and other Town officials to take a more active and more knowledgeable role in the process of evaluating wetlands and related resources including impacts by reason of proposed development. Such an alternative course of action is a win/win in that it provides the Planning Board and other relevant Town officials with the tools necessary to achieve the Town's environmental goals without creating an unnecessary, cumbersome, expensive layer of regulation. Again, the SEQRA process combined with wetlands training can fully achieve the Town's goals.

### CONCURRENT JURISDICTION

Section III (D) proposes concurrent jurisdiction with NYSDEC and USACE for regulating wetlands and other protected resources. The operative word is "why"? There is no common sense reason for concurrent jurisdiction. The Town jurisdiction, if there is to be any, should be for resources that are not otherwise regulated by these two other bodies of government.

### OVER-EXPANSIVE PROVISIONS

Many of the provisions in the proposed legislation are over-expansive. As one example, §IV defines the term "alter" as follows,

"To change, move or disturb any vegetation, soil, drainage way or other natural material or system within a wetland, watercourse or controlled area."

This definition includes mowing grass and planting. This is a far too expansive definition.

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Section IV defines the term "Controlled Area". Under the definitions, a wetland that is one-quarter acre in size requires a 50-foot boundary or controlled area. If you have a hypothetical property of approximately 100 feet by 50 feet (approximately one-quarter acre), you would then have controlled areas of 50 feet by 100 feet on two sides, one-half acre, and 50 feet by 50 feet on the other two sides, another quarter acre, so that you would have three-quarters of an acre of controlled area, plus the quarter acre wetland. This limitation on one acre of land in the absence of unusual circumstances is simply overreaching.

Article IV defines the term "dredge" as follows,

"To excavate, move or remove sediment, soil, mud, shells, gravel, or other aggregate either by hand or machine."

In its literal terms, this definition includes a child picking up and throwing away a rock. Again, this is yet another example of an overly broad definition.

The recitation of the requirements and procedures for a Wetlands Law permit in §IX(C) encompasses three and a half pages in small font just to list the requirements.

Worse yet, the standards for permit decisions in §X are onerous and inappropriate. The proper standard, one which is reflected in the SEQRA process, is whether the proposed activity causes harm to a protected resource. If the proposed activity does not cause harm to a protected resource, there is no reason to require a demonstration that there is no reasonable alternative to the proposed regulated activity. If a landowner wants a driveway, or a house, or a barn, or some other improvement in a particular location involving a regulated resource, and if such activity causes no harm to the protected resource, there is no reason to require an alternative.

The examples that I have set forth are simply the tip of the iceberg. I could go on for pages and pages describing the inappropriate content of the proposed law.

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IF THE TOWN BOARD CHOOSES TO PROCEED WITH  
THE WETLANDS LAW, THE LAW SHOULD BE EXTENSIVELY  
AMENDED PRIOR TO ADOPTION

If the Town Board decides to proceed with the Wetlands Law, then, and in such event, the current draft should be extensively amended.

The resources sought to be protected vary greatly in terms of their contribution to protecting the environment. There is a wide spectrum ranging from significant beneficial environmental functions - water recharge, habitat and drainage control, to name a few - through wetlands which demonstrate the absence of any beneficial environmental functions. This is particularly true given your expansive definitions.

In general terms, the current draft is unacceptable because:

- a. it fails to incorporate standards for an initial evaluation of the beneficial environmental functions of potentially protected resources;
  - b. it fails to exclude from the permitting requirements those potentially protected resources which do not have a beneficial environmental function;
  - c. it establishes an expensive and cumbersome procedure that is cost prohibitive for landowners of ordinary economic means;
  - d. the expensive and cumbersome procedures are applicable to both potentially protected resources which have a beneficial environmental function and those which do not;
  - e. it fails to contain a straightforward recitation that an applicant is entitled to a permit if the proposed activity does not negatively impact the functioning of a resource that has a beneficial environmental function;
- and f. it contains overreaching and over-expansive definitions.

In terms of costs and cumbersome procedures, a property owner of a hypothetical 100 acre parcel seeking to create 2, or 3, or 4 lots - perhaps to create a lot for a child or perhaps to sell a lot for funds to help support the owner after retirement - faces, at a minimum, \$25,000 to \$30,000, in expenses, perhaps much more, for extra surveying and extra wetland biology testing in order to satisfy the submission requirements of the Wetlands Law.

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CONTINUATION OF PUBLIC HEARING

It is requested that this public hearing be continued after this evening to allow for further comment in the context of all of the comments anticipated to be received by the Town.

CONCLUSION

For the reasons stated, and based only on these preliminary comments, it is urged that you do not adopt the proposed Wetlands Law. It is urged that you provide technical training to the Planning Board and other Town officials in order to achieve the Town's environmental goals. Finally, if the Town Board is nonetheless intent on adopting the Wetlands Law, the current draft should be extensively amended. If you continue the public hearing, it is my intent to provide you with further comments in far more detail.

Respectfully submitted,



RICHARD I. CANTOR

RIC:ggg

cc: Mr. Robert S. Dyson