

**JOHNSON &
BORENSTEIN, LLC**
ATTORNEYS AT LAW

12 Chestnut Street
Andover, MA 01810-3706
Tel: 978-475-4488
Fax: 978-475-6703
www.jbllclaw.com
gordon@jbllclaw.com

Mark B. Johnson (MA, NH, DC)
Donald F. Borenstein (MA, ME, NH)

Patrick M. Groulx (MA, NH)
Keri M. Armstrong (MA, NH)
Gordon T. Glass (ME, MA)
Andrew T. Lechner (VT, MA)

Of Counsel
Robert W. Lavoie (MA, NH)

Paralegals
Karen L. Bussell
Lianne Patenaude
Ellen M. Melvin
Tina M. Wilson

March 15, 2023

Via Email ~ sfarrell@hamiltonma.gov & selectmen@hamiltonma.gov

Hamilton Select Board
Town of Hamilton
577 Bay Rd.
South Hamilton, MA 01982

Re: 2023 Annual Town Meeting
Proposed Conservation Bylaw Revisions

Dear Chair Farrell and Select Board Members,

Johnson & Borenstein, LLC represents Country Squire Realty, Inc., a Massachusetts corporation that owns a large undeveloped parcel of land in the Town of Hamilton. The purpose of this letter is to comment on the substantial negative impact that will result from promulgation of certain provisions included in the proposed wholesale Amendment to the Town's Conservation Bylaw, published as Section 2023/4 3-1 and Appendix H of the Warrant for the Annual Town Meeting scheduled for April 1, 2023 ("Article" or "Amendment").

In order that Select Board members and Town Meeting voters be properly informed of the increased restrictions on property owners that will result from the proposed substantial changes to the Town's Conservation Bylaw discussed below, I hereby request that this letter be read at the Select Board's meeting scheduled for March 16, 2023, as well as the Annual Town Meeting. In the alternative, I request that this letter be made available to Town Meeting voters.

As you know, the Conservation Commission is proposing a 15-page Amendment to the Conservation Bylaw for approval at the 2023 Hamilton Annual Town Meeting. This letter constitutes a short summary of the most impactful proposed changes to the Conservation Bylaw, to ensure that residents understand the complexities and negative impacts to all property owners of the Amendment and the substantial, improper expansion of the Commission's authority.

In short, the Amendment proposes to expand the Commission’s authority and jurisdiction beyond areas identified as “wetland resources”, thereby substantially abridging the rights of Hamilton property owners without evidence that such restrictions are necessary to protect wetland resources, control flooding and prevent pollution, protect private and public water supply, and protect wildlife habitat. The Article presents many provisions that should be of concern to Town residents, though the following proposed significant increases in restrictions on Town property owners and dramatic increases to the Conservation Commission’s jurisdiction are highlighted as the most negative and burdensome.

Section 7.A: Project Evaluation (Warrant Appendix H, p. 7)

This section of the Amendment seeks to enable the Commission to expand their scope of review to consider the impacts of past development in the “community”¹ and watershed, as well as to speculate regarding any possible future projects in the community and watershed, regardless of whether such projects are located on or even in close proximity to the particular property that is before the Commission or are in any way connected to the project the Commission is considering. To wit, via the Article, the Conservation Commission proposes a provision requiring the Commission to consider the following when determining whether to issue or deny a permit under the Conservation Bylaw,

“ . . . any loss, degradation, isolation, and replacement or replication of such protected resource areas elsewhere in the community and the watershed, resulting from past activities, whether permitted, unpermitted or exempt, and foreseeable future activities.”

Such a requirement would improperly give the Commission unfettered discretion to deny proposed projects that have absolutely no adverse impacts on the interests that the Commission has been charged with protecting. Allowing the Commission such broad authority to deny development based on factors completely unrelated to the development proposed would be unjust and inequitable. As a result, the Town could conceivably be subjected to an increased number of legal claims concerning projects being denied based on factors and conditions outside of the control of property owners and petitioners.

Section 7.B: Resource Area Alteration and Replication (Warrant Appendix H, p. 7)

The existing Conservation Bylaw and Regulations only require a property owner to provide a “wildlife habitat study” when proposed development is large enough to exceed certain thresholds under the State Wetlands Protection Act Regulations. See Regulations, § 7.B.2. However, the Commission’s proposed Article allows the Commission to require a study at its whim, providing,

*“The Commission may require a wildlife habitat study of the project area, to be paid for by the applicant, **whenever it deems appropriate,***

¹ The term “community” is apparently not defined anywhere in the Amendment.

regardless of type of resource area or the amount or type of alteration proposed.”

Wildlife habitat studies can cost tens of thousands of dollars and take several months or delay an application process for up to a year, to allow study observations during different seasons. This proposed dramatic increase in the Commission’s authority to require costly and lengthy studies, paid for by property owners (regardless of the scope of the proposal), represents a significant, increased burden on Town property owners. As such, this section needs to be amended to provide clear thresholds so that a property owner has a reasonable expectation of what will be required when seeking a permit from the Commission. Failure to provide such objective criteria could result in legal claims that this section is broadly intended to have a chilling effect on development without regard to the specific “wetland resources” the Conservation Commission is charged with protecting.

Section 14: Waiver from Regulations (Warrant Appendix H, p. 13)

Compounding the increased restrictions on Town property owners and expanded Conservation Commission jurisdiction proposed in the Article, the Article also proposes to make it much more difficult for the Commission to grant a waiver from the Bylaw. Specifically, the Article would only allow the Commission to grant a waiver where the landowner can,

*“ . . . demonstrate that a waiver is necessary to accommodate an **overriding public interest** or to avoid a decision that so restricts the use of the property as to **constitute an unconstitutional taking** without compensation.”²*

This is an extremely high burden to meet for the granting of a waiver and is likely unattainable for any homeowner project and in the vast majority of commercial proposals. Again, this section needs to be amended unless the Town seeks to make it practically impossible for the overwhelming majority of residents to obtain any waivers from strict enforcement of the proposed stringent Conservation Bylaw.

Additionally, the above-quoted language is not contained in the current Conservation Bylaw Regulations, yet it is misleadingly color coded on the Conservation Commission’s webpage on the Town’s website as a “Copy Paste from current REGULATIONS”.

Conclusion

The Conservation Commission’s proposed Article will significantly increase substantive restrictions and application costs on property owners and dramatically and arbitrarily expand the Commission’s jurisdiction and discretion. As such, I urge the Select Board to reconsider its support of the remarkable expansion of land use restrictions proposed in the Article.

² See also Section 7.G: Issuance of Conditions (Warrant Appendix H, p. 10) (utilizing the same language quoted above).

Very truly yours,

JOHNSON & BORENSTEIN, LLC

/s/ GORDON T. GLASS

Gordon T. Glass

Cc: Country Squire Realty, Inc.
Brian Colleran *via email*
Patrick Reffett *via email*
Joe Domelowicz *via email*