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January 17, 2017

Paul Apple, Town Administrator  
Town of North Hampton  
233 Atlantic Ave.  
North Hampton, NH 03862

Re: Petition Warrant Articles Regarding Election of Conservation Commission  
Members and Review Board, Morris Lamprey Conservation Easement

Dear Paul:

We have received the petition warrant articles and provide you with the following opinions as to the legal viability of those articles.

## **To Make the Conservation Commission an Elected Rather than Appointed Body**

Towns are subdivisions of the state and have only those powers granted to them by the legislature and such as are necessarily implied or incidental thereto. *Buxton v. Town of Exeter* 117 NH 27, 29 (1977) (citations omitted.) Therefore, when a statute authorizes a town to take certain action, the town cannot expand nor change the nature of the actions specified by the state's legislature.

RSA 36-A, *et seq.* "Conservation Commissions" authorizes towns to adopt the provisions of this chapter to establish conservation commissions. The statute provides that members of the conservation commission "shall be appointed by the selectmen." RSA 36-A:3. While the state legislature has, in regard to certain local land use boards (planning board and zoning board of adjustment), allowed members to be appointed or elected, it did not see fit to provide towns with the option of electing conservation commission members. There is no provision in this chapter authorizing towns to elect conservation commission members.

It is our opinion that this is not a legal article. If the selectmen speak on this article, they should state that they have been advised by counsel that this article is illegal and will have no legal effect if passed.

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**To Control Development of Conservation Land**

Chapter 36-A, *et seq.* "Conservation Commissions" authorizes the establishment of conservation commissions "for the proper utilization and protection of the natural resources and for the protection of watershed resources of said city or town." RSA 36-A:2. The state statute provides that conservation properties and conservation easements "shall" be managed and controlled by the conservation commission. RSA 36-A:4.

The petition warrant article proposes that "any development of or changes to any conservation land owned or controlled by North Hampton or otherwise designated by North Hampton as conservation land" be subject to "ultimate approval" by a Review Board. There is no statutory authority within Chapter RSA 36-A granting the town the power to establish a review board to oversee the actions of its conservation commission. Were such a review board created, it would usurp the statutory authority of the conservation commission. *see Beck v. Town of Auburn*, 121 NH 996, 998 (1981). Once a town accepts the provisions of the state statute and appoints a conservation commission, the town is bound by the provisions of that legislation and cannot decrease or increase the commission's authority without legislative approval.

It is our opinion that this is not a legal article. If the selectmen speak on this article, they should state that they have been advised by counsel that this article is illegal and will have no legal effect if passed.

**To Restore the Morris Lamprey Conservation Easement**

This proposed article seeks to reverse decisions of the conservation commission and selectmen which permitted the relocation of a barn and certain related work on the Lamprey Conservation Easement. While I am unclear as to what specific action the selectmen took in regard to this matter, the building inspector did issue a permit for the relocation of the barn.

As noted in the discussions regarding the other proposed articles, the conservation commission has the statutory authority to manage and control conservation easements. The conservation commission did "vote" that the relocation of the barn to the Lamprey Conservation Easement did not violate the terms of the conservation easement. The circumstances of the relocation of the barn and the conservation commission's decision were reviewed by the New Hampshire Attorney General's Office, Charitable Trust Unit, and it determined that the conservation commission had acted reasonably in regard to this matter.

The conservation commission's managerial decision in regard to this conservation easement is not subject to reversal by a vote of the town. Pursuant to RSA 36-A *et seq.*, the town has invested the conservation commission with the authority to manage and control conservation easements. The town cannot vote to invalidate actions taken by the conservation commission that are within that commission's statutory authority to do. *See Levasseur v. Board of Selectmen*, 116 NH 340, 342 (1976).

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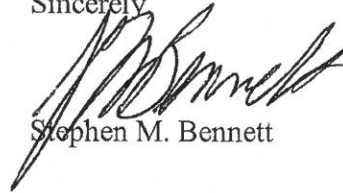
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Nor can the town voters revoke the building permit issued by the town's building inspector, allowing the barn to be relocated to the conservation easement. The building inspector has been authorized by the town to issue building permits. If a person is aggrieved by the issuance of a permit by the building inspector, town ordinances require an appeal to be brought to the zoning board of adjustment. No such appeal was taken within a reasonable amount of time. The town voters cannot circumvent the town's own ordinances and the authority of the zoning board of adjustment and revoke the building permit at issue. *See Cloutier v. Epping Water and Sewer Commission*, 116 NH 276, 280 (1976).

It is our opinion that this is not a legal article. If the selectmen speak on this article, they should state that they have been advised by counsel that this article is illegal and will have no legal effect if passed.

Should you have any questions regarding our opinions regarding these articles or have any additional matters you wish to discuss, please contact us.

Sincerely,



Stephen M. Bennett

SMB/lm

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