

November 23, 2020

Clifford S. Thier, Chair  
Inland Wetlands Commission of the Town of Avon  
Town Hall, 60 West Main Street  
Avon, CT 06001

Re: **Application # 768 – Nod Road Preservation, Inc.’s Verified Petition for Intervention**

Dear Chairman Thier and Members of the Commission:

This letter is written on behalf of Nod Road Preservation, Inc. (“NRP”). It addresses two issues regarding NRP’s Verified Petition for Intervention. First, this letter explains why Application #768 (“Application”) involves conduct under Connecticut General Statutes § 22a-19. Second, it explains why – after recognizing NRP as an intervenor – the Commission should find that the conduct proposed in the Application will pollute, impair and destroy the public trust in the water and other natural resources of the state. Much of the information in this letter has already been submitted into the record, but we are providing it again now as our final position. NRP requests that the Commission decide whether to recognize NRP as an intervenor at the beginning of the December 1, 2020 public hearing so that everyone – including members of the public – can comment on an alternatives analysis under § 22a-19 if intervention is granted.

Preliminarily, it is important to note that NRP does not have to establish the allegations in its intervention petition to be recognized as an intervenor. Section 22a-19 provides that intervenor status is recognized upon the filing of a verified petition “*asserting*” pollution, impairment, and destruction of natural resources. Once intervenor status is recognized, the Commission must *then* consider the substantive assertions in NRP’s petition. As such, this letter also describes why the Commission should deny the Application under both the Town of Avon’s Inland Wetland and Watercourses Regulations (“Regulations”) as well as § 22a-19. Specifically, the Commission should deny the Application because the Applicants seek to eliminate regulated wetlands from existence using a methodology that is not permitted under the Regulations (i.e., use of the FEMA 100-year floodline to delineate wetlands, although they are now trying to mask this methodology by calling it “elevation”).

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**I. The Application Involves “Conduct” Under Section 22a-19 of the General Statutes.**

**A. Using Improper Methodology to Remove Currently Regulated Wetlands from the Town’s Wetlands Map Erases them from Existence.**

NRP should be permitted to intervene because its petition asserts that this proceeding involves conduct that is reasonably likely to have the effect of unreasonably polluting, impairing and destroying the public trust in the natural resources of the state. Unlike an application to rezone land, an application to modify the Town of Avon’s official wetlands map is based on science and must comply with the requirements of the Town’s Regulations regarding the re-mapping of wetlands. Using the wrong science or improper methods that are not permitted by the Regulations to remove currently regulated wetlands from regulation is conduct under § 22a-19. Section 22a-19 permits intervention upon alleging facts asserting that it is reasonably likely that natural resources of the state will be either impaired, destroyed, or polluted. Erasing large swaths of currently regulated wetlands from the Town’s official map, as the Applicants propose doing here, will remove those wetlands from existence. Eradicating wetlands in this way will result in their impairment and destruction.

Dr. Michael Klemens explained that the Application involves much more than drawing a line on a piece of paper, as was suggested by the Applicants’ lawyer. Dr. Klemens testified that “[w]hen you put a line on a piece of paper and designate something as a protected or regulated area you place it [on a] level of performance protection.” (*See* Transcript, November 5, 2020 at Paragraph 724). Removing that line removes that level of protection. (*Id.* at 728-729). It also erases them from the Town’s map and means that their existence is no longer recognized by the Town.

In 2019, the Commission agreed that an application to amend the Town’s wetlands map is conduct under § 22a-19. That application was submitted by the same Applicants, proposed removing the same wetlands from the same property, and proposed doing so using the same improper methodology (the FEMA 100-year Floodline). In that earlier proceeding, the Town Attorney provided a legal opinion, dated January 25, 2019, in which she recommended that the Commission recognize NRP as an intervenor because the law was “unsettled.”<sup>1</sup> The Commission permitted NRP to intervene in that proceeding and should do so again.

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<sup>1</sup> The Town Attorney’s January 25, 2019 legal opinion is part of the record in this proceeding.

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B. The Superior Court Agreed with the Commission and Concluded that a Proposed Wetlands Map Amendment is “Conduct” Under § 22a-19.

The Superior Court agreed with the Commission that a wetlands map amendment is conduct under § 22a-19, and that NRP could properly intervene under the statute. *See Blue Fox Run Golf Course, LLC v. Inland Wetlands Commission of the Town of Avon*, Docket No. HHD-CV19-6110376 (2019). In reaching this decision, the Judge Berger stated the following:

I think an argument that suggests that mapping a property as to where the wetlands are is not conduct totally misunderstands the whole Inland Wetlands Act.... I believe it is conduct.

(*See* Exhibit D to NRP’s Verified Petition for Intervention (Sept. 29, 2020) at p. 23-24). The Superior Court distinguished *Pond View, LLC v. Planning & Zoning Commission*, 288 Conn. 143 (2008), which the applicants rely on here, because *Pond View* involved an application to rezone property rather than re-mapping wetlands. The court in *Blue Fox Run Golf Course, LLC v. Inland Wetlands Commission of the Town of Avon* determined that re-mapping of wetlands is conduct because “[i]t is a much more important function because it goes to the protection of wetlands.” *See* Exhibit D to NRP’s Verified Petition for Intervention (Sept. 29, 2020), at p. 24.<sup>2</sup> Dr. Klemens made this very point in his testimony to the Commission on November 5.

The Application currently pending before the Commission is the same as the one which was denied in 2019. The Applicants seek to mask it by claiming that they are now using “elevation” to re-map wetlands. But the “elevation” to which the Applicants refer is the 100-year FEMA floodline. The Applicants can call it whatever they want; the critical point for the Commission’s review, however, is that it is no different than the application denied in 2019.

C. Feasible and Prudent Alternatives are Not Limited to Development Activity.

At the November 5, 2020 hearing, the Applicants’ lawyer misstated the law and confused the Commission about what is conduct under § 22a-19. The Applicants’ lawyer did correctly note

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<sup>2</sup> Judge Berger’s decision should have settled the “unsettled” law upon which the Town Attorney based her 2019 legal opinion. One would have expected the Town Attorney to again recommend that the Commission recognize NRP as an intervenor if prior to Judge Berger’s decision she gave such a recommendation. However, the Town Attorney’s 2020 legal opinion does not do so. The Town Attorney did state at the November 5 hearing that she could imagine a situation where a wetland map amendment could be considered conduct, but stated she did not believe this Application involved conduct.

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that if the Commission makes a finding of unreasonable impairment, destruction, or pollution under § 22a-19, it must engage in a feasible and prudent alternatives analysis. The Applicants' lawyer then incorrectly stated a wetlands map amendment is not conduct because any "feasible and prudent alternative" would have to be tied to actual development activity. First, this is not what the statute says. Section 22a-19 does not state that a feasible and prudent alternative is limited to the type of development activity that is proposed. The Commission should reject the Applicants' attempt to read words into a statute which do not exist. Second, NRP's petition for intervention notes feasible and prudent alternatives that are not related to development activity in any way. For example, one possible alternative would be for the Commission to utilize FEMA's 500-Year Floodline rather than the 100-Year Floodline to re-map wetlands on the Applicants' site. Clearly, using one floodline to re-map wetlands over another floodline does not involve any type of development activity.<sup>3</sup>

## **II. The Application will Impair and Destroy Wetlands by Using an Illegal Methodology to Re-Map Wetlands which the Regulations do not permit.**

### **A. The Regulations Do Not Permit the Use of FEMA Floodlines to Re-Map Wetlands.**

Section 3.1 of the Regulations requires that the "precise location" of wetlands be determined in order for the Commission to amend the Town's official wetlands map. Presenting a general or approximate location of wetlands is not sufficient. Unless an applicant provides clear evidence to the Commission showing the precise location of wetlands, the Commission must deny an application. Section 3.1 provides that:

*In all cases, the precise location of wetlands and watercourses shall be determined by the actual character of the land, the distribution of wetland soil type and location of watercourses. (emphasis added).*

Section 15.5.c of the Regulations echoes the need for precision with respect to "the distribution of wetland soils" and requires "defining the boundaries of wetland soil types." Members of the Commission relied on these provisions when denying the first application in 2019. (*See* April 2, 2019 Minutes of the Town of Avon Inland Wetlands Commission).

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<sup>3</sup> As explained below, the Town's Regulations do not permit the use of FEMA floodlines to map wetlands. NRP contends that if the Commission intends to re-map wetlands using the FEMA floodlines as a surrogate, then it should use the 500-Year Floodline boundary.

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The Commission should deny this Application because – by the Applicants’ own admission – the Applicants are unable to determine the “precise location” of alluvial soils. In the first application, the Applicants stated that the “*precise extent of the moderately well to excessively drained alluvial soils cannot be determined* due to the alterations of the soil profile [that] have occurred in the past.” (See Report of Michael Klein, November 16, 2018, at 2, attached as Exhibit C to NRP’s Verified Petition for Intervention) (emphasis added). The same is true with the pending Application. The Applicants again note that “determining the extent of ... floodplain and alluvial soils” is difficult “due to the degree of disturbance at the site.” (See Report of Michael Klein, August 7, 2020 at 2). The Applicants must resort to using a surrogate to identify wetlands (in this case, the FEMA 100-Year Floodline) because they do not know the precise location of the wetlands.

As NRP’s soil scientist, Timothy Welling of Welling Geoservices, Inc. writes in his November 23, 2020 report (attached as **Exhibit A**), even the Town’s peer review consultants, North Central Conservation District, Inc. (“NCCD”) agree that the Applicants have not precisely defined the wetlands boundary. NCCD’s September 22, 2020 report states the need for more test holes and laboratory confirmation of specific soil properties “would be required to *more precisely define a boundary*.” (See NCCD Report, September 22, 2020, at 2 (emphasis added)).

The Regulations do not permit the Applicants to amend the Town’s official wetlands map with an imprecise wetlands boundary. Doing so will lead to the impairment and destruction and destruction of wetlands. See *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 688-89 (2014) (“A claim that the defendant has violated the substantive provision of such a statute, however, may give rise to an inference that the conduct causes unreasonable pollution.”) (citation omitted).

**B. NRP’s Soil Scientist Timothy Welling Testified that Floodline Elevation Cannot be Used to Map Wetlands.**

Mr. Welling has opined that the use of elevation or FEMA floodlines cannot be used to delineate wetlands because the “100 year flood elevation ... is not a soil criteria.” (See Transcript, November 5, 2020 at Paragraph 695). At the November 5, 2020 hearing, Mr. Welling testified that wetlands are based on soil type and “not what a secondary criteria suggest it could be,” because the “100 year flood elevation ... is not a soil criteria.” (See *id.* at 676). In his report submitted on October 28, 2020, Mr. Welling states the following:

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It is my opinion that the use of the 100-year FEMA floodplain mapping is not a reasonable way to define a wetlands/floodplain alluvial soil boundary.... Soils data can be used in part in developing the 100-year flood elevation, however, the opposite is not true. The FEMA 100-year flood elevation cannot be used to map the precise location of wetlands. (See Report of Timothy Welling, October 28, 2020, at 1).

As Mr. Welling explains in his most recent report attached as **Exhibit A**, FEMA mapping was not developed to define wetlands boundaries, let alone the “precise location of wetlands.” Mr. Welling notes that even in those places that do not exactly match the FEMA 100-Year Floodlines, the use of elevations is still not appropriate because it cannot precisely locate wetlands boundaries. According to Mr. Welling, using flood elevations, such as FEMA mapping, is not “standard practice” to define wetlands boundaries. Even if it were, such a practice violates § 3.1 of the Town’s Regulations. (See Report of Timothy Welling, November 23, 2020).

C. The Applicants Agree that the Regulations Do Not Permit the Use of Floodline Elevations to Re-Map Wetlands but Propose doing so anyway.

The Applicants agree that the Regulations do not permit the Commission to utilize FEMA floodline elevations to delineate wetlands. When responding to NRP’s suggestion to use the 500-Year FEMA Floodline elevation instead of the 100-Year Floodline elevation, the Applicants state the following:

Dr. Klemens is not a certified soil scientist who may properly delineate wetlands in the state of Connecticut. He has urged the Commission to use the 500 year flood elevation to determine wetlands boundaries at this site. ***The Inland Wetlands and Watercourses Act (Act) does not currently incorporate such a regulatory scheme. Dr. Klemens is entitled to make those policy arguments to the General Assembly in pursuit of an amendment to the Act.*** (See Letter of Attorney Janet Brooks, October 28, 2020, at 2).

NRP agrees with the Applicants. The Regulations do not allow the use of any type of floodline elevations to identify the location of wetlands. If the Applicants wish to use the 100-Year FEMA Floodline to amend the Town of Avon’s official wetlands map, they should pursue an amendment of the Regulations to do so. Until then, the Commission cannot approve any application that seeks to establish wetlands boundaries by using FEMA floodlines.

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### **III. Conclusion**

The Commission should follow its 2019 decision granting NRP intervenor status and then deny the Application.

Sincerely,



Brian R. Smith



Evan J. Seeman

Copy to: Nod Road Preservation, Inc.  
Janet Brooks, Esq.  
Kari Olson, Esq.  
John McCahill

## **EXHIBIT A**



# WELLING GEOSERVICES INC.

November 23, 2020

Re: Application #768; Blue Fox Run Golf Course  
Whether the use of elevation should be used to delineate wetlands

Dear Members of the Commission,

At the request of Nod Road Preservation Inc., I have prepared the following letter to be submitted to the Town of Avon Inland Wetlands Commission.

As I have stated in my report submitted on October 28, 2020 and testimony at the November 5 public hearing, soils data can be used in part in developing the 100-year flood elevation, however, the opposite is not true. The Applicants have used an elevation which is very similar to the 100-year flood elevation to map the precise location of wetlands. Whether the Applicants call it "elevation" or the 100-year flood elevation, in my professional opinion, using secondary criteria such as elevation which is based on floodplain data to construct a wetland/alluvial floodplain boundary is unrealistic and should not be used. Further, in my professional opinion, the Applicants have failed to provide enough information to change the current Town of Avon Wetlands map.

I have reviewed the report prepared by the Town's peer review consultant, North Central Conservation District, Inc. ("NCCD"). I do not agree with NCCD's statement that it is "standard practice" to use flood elevations to map wetlands. Even if this were true, Avon's Inland Wetlands and Watercourses Regulations ("Regulations") do not allow the use of floodline elevation to map wetland boundaries. The Regulations require that soil data be used to map wetlands. Section 3.1 of the Regulations states that "in all cases, the precise location of wetlands and watercourses shall be determined by the actual character of the land, the distribution of wetland soil types and location of watercourses". FEMA mapping was not developed to define wetland boundaries. By its very nature, floodline elevation such as FEMA mapping is not a soil criteria and cannot be used to identify the precise location of wetlands.

Even NCCD says that the Applicants have not precisely defined a wetland boundary. NCCD's report states that more test holes and laboratory confirmation of specific soil properties "would be required to **more precisely define a boundary**." NCCD Report, September 22, 2020, at 2. This is what your Regulations require, but the Applicants have not provided sufficient data to delineate the precise wetlands boundary.

If you have any questions or require any additional information I would be pleased to provide it.

Very truly yours,

*~ Timothy Welling ~*

Timothy G. Welling  
Certified Soil Scientist, CT, MA and RI  
Society of Soil Scientists of Southern New England