THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A PUBLIC HEARING ON TUESDAY, MARCH 5, 2019.

Present were Clifford Thier, Chair; Michael Beauchamp, Vice-chair; and Commissioners Bob Breckinridge, Martha Dean, Dean Applefield, Michael Feldman, and Jed Usich. Also present were John McCahill, Planning and Community Development Specialist/Wetlands Agent; Kari Olson of Murtha Cullina, LLP, Town Attorney; and Joseph Szerejko of Murtha Cullina, LLP.

Present on behalf of the application were David Ziaks, PE and President of F. A. Hesketh & Associates, Inc.; Tony Giorgio of The Keystone Companies, LLC; Bill Ferrigno of Sunlight Construction, Inc.; Robert Russo, Certified Soil Scientist of CLA Engineers, Inc.; and Attorneys Thomas Fahey and Carl Landolina, of Fahey & Landolina, Attorneys LLC. Present on behalf of Nod Road Preservation, Inc. was Attorney Brian Smith, of Robinson & Cole.

Chairman Thier called the meeting to order at 7:05 p.m.

PENDING APPLICATION

APPL. #759 – Blue Fox Run Golf Course, LLC; Nod Road Properties, LLC; Cornor Properties, LLC, owners/applicants: Requesting a map amendment to depict accurate information based on detailed field mapping and soil evaluations on subject properties. Locations: 65 Nod Road, Parcel 3290065; 117 Nod Road, Parcel 3290117; and 231 Nod Road, Parcel 3290231.

Chairman Thier indicated that the attorneys would speak on behalf of their parties on the issue of application notice defect.

Attorney Smith, on behalf of the intervenor, stated that the original application calls for amending the map in one manner and mid-way after the January 8, 2019 public hearing, the applicant seeks to change what they are seeking to amend. This is not appropriate and it is a procedural defect in the intervenor's view. The applicant has to demonstrate what it is asking the Commission to do. Courts look at whether any member of the public could determine whether or not the changes would affect or bother that person; however, if the applicant makes changes that the public did not know about, it is inappropriate if the person was unaware of the mid-way change and lost their rights to raise the issue before this Commission. Therefore, when there is an application, it needs to be correct in what the change is in the first instance when advertised. In this case, it was represented to me that at the last public hearing, the Commission asked the applicant which map it was seeking to amend. The applicant's attorney responded, whichever map the Commission thinks is the right one. This is not a good answer and is not a precise answer. It is the applicant's burden to change a map that will perhaps erase up to twenty-two acres of wetlands, however it is unknown if it is eighteen acres. There is a remedy for that; they withdraw the application and resubmit what it is seeking to do. If that is done, then there is an even playing field. Arguments can be made about the science by both parties. Here however, it is unknown where the science is being applied in the course of this lengthy application. Submitted documents to the Commission indicated court cases of procedural defects relevant to wetlands. It is requested of the Commission to consider asking the applicant to withdraw the application without prejudice. The right application needs to be established.

Attorney Landolina, on behalf of the applicant, directed the Commission's attention to his letter drafted February 5, 2019, in response to the notice defect claim. He indicated that Brian Smith was not at the last meeting. However, the issue did arise and it was Town Attorney Olson who indicated that it did not matter which map the applicant was seeking to be amend, but the issue was whether the delineation of the wetlands is accurate and proper. When the question was posed to the applicant of which map it sought to amend, the answer stated, on behalf of the applicant, was the official Town of Avon Inland Wetlands Map. It was never stated that the application was changing mid-way. Attorney Landolina read the application notice which had been published. It is the essence of proper notice. The application has not changed. The cases cited by the intervenor, when there is a notice defect for applications that have changed mid-way, have to do with additional properties added to an application. There was an application in Enfield, CT years ago, and mid-way there was an opportunity to acquire approximately ten feet of additional property in the application. That changed the essential nature of the application. The notice provided prior was defective. There was another case cited in the intervenor's material which had to do with properties in two towns, and it was only noticed with respect to the property in one town. That is a notice defect. The nature of the notice must accurately describe the application so that the public can prepare intelligently for the proceedings. The notice of this application before the Commission does that and the application has not changed. With respect to the comments made before regarding the presentation made at the last hearing about what occurred in 2004, and how the application was different in 2004, and related to the official Town of Avon Inland Wetlands Map, what happened in 2004 and in 1997 does have legal significance. This application has always been about amending the official Town map by correctly identifying and delineating the wetlands on the site as they exist today. Given that a notice problem is a legal issue, the applicant is not willing to withdraw its application, as the applicant believes that the notice is appropriate.

Commissioner Usich inquired if there was a material issue existing if the notice defect is accepted, and the application is withdrawn, would the Commission be back conducting the same business in thirty days.

Attorney Landolina stated it is a legal issue to be decided by a court of law, and if the court finds that the applicant does not have jurisdiction, then the applicant would be back at a later date, presenting the same material.

Commissioner Applefield inquired of Attorney Smith if the Commission decided that the appropriate delineation was not the 2004 application, would the intervenor's issue be mute.

Attorney Smith responded that he did not believe the notice issue would be mute. The application that was before the Commission on December 18, 2019, which is what the legal notice refers to, is not the same application before the Commission now based on the change made at the February 5, 2019, hearing.

Commissioner Applefield inquired further on the nature of the challenge. An application came in, and the only thing that changed was the suggestion that instead of using the Town's map, whichever map that may be, that the introduction of the regulated activities lines as was

approved in the 2004 application, was somehow different than the lines within the original application. It seems that if the Commission decided it was not going to utilize the lines of the 2004 application, and we rejected Attorney Landolina's suggestion that it may modify the map, does that not mute the issue since the Commission would be back to deciding the actual application?

Attorney Smith responded that if the Commission decides this, it needs to state categorically that it is looking at the original application and is rejecting that whole line of testimony regarding the 2004 map.

Commissioner Feldman stated that it is his preference to get to the merits of the case. If it is jurisdictional, then it will have to be addressed. He would rather avoid forcing the applicant to resubmit the application and start over. At the last meeting, Attorney Seeman raised this issue, and the Commission did not decide then, and also asked for a thirty-day continuance. The Commission did not rule on the thirty-day continuance, but effectively the hearing was continued until today. He inquired of Attorney Smith whether that extra thirty days would have cured whatever notice issue the intervenor may have raised; the extra thirty days to figure out what the position would be.

Attorney Smith responded that he did not recall Attorney Seeman telling him that by given an extra thirty days, a notice defect is cured. He believed no party would want to go through another set of hearings. He would ask that the existing records would be incorporated in a new proceeding.

Commissioner Feldman questioned what the point of the issue raised was.

Attorney Smith responded that the point of the law is for representing both sides. It is to protect the public of Avon for what is being considered. If a court agreed there was a notice defect one year from now, and the applicant had to reapply then, it is better to settle this now.

Commissioner Feldman inquired if Attorney Smith could specify how he believed the applicant had deviated from its original application. What is different in the application?

Attorney Smith responded that it is a difference in acreage that is being considered. If the Commission were to accept the 2004 lines that were suggested at the February 5, 2019 hearing, and look at that, then that changes the amount by several acres.

Commissioner Feldman commented that the maps seem to be the same, and the boundaries are the same that the applicant has been talking about throughout.

Attorney Smith responded that the 2004 map versus the Town's official Inland Wetlands Map is really the question, and the amount of acreage that is to be re-delineated if you choose one over the other. That is the concern.

Commissioner Dean thanked Attorney Smith for addressing the issue. She agreed that the Commission should determine the issue of notice defect sooner rather than later so that all parties

would not need to repeat a public hearing. The Commission owes it to the applicant, to the Town and the public that the Commission votes on this now. If the applicant were to withdraw and start over, the material probably could be incorporated to streamline the process, then the Commission should have the applicant withdraw the application. She was concerned with members of the public accessing the map, after seeing the published notice, and questioning which wetlands map to view. There is a difference of approximately eighteen acres, which is substantial. The Commission knows that Nod Road Preservation, Inc. will raise issue, so the Commission should settle this now.

Commissioner Breckinridge stated that he has closely reviewed all of the documents and that there are a few items that stand out in his opinion. There is no doubt that in 2004, the Wetlands Commission at the time modified this site. There was testimony from a Town official who explained the process, as it had been ongoing, that the official Town Inland Wetlands Map had only been updated to 2003. That Town's official Inland Wetlands map has not been updated since 2003.

John McCahill affirmed Commissioner Breckinridge's statement.

Commissioner Breckinridge continued that he had no doubt, after looking through the material, that in 2004 the wetlands lines were redrawn. The reason why it is not on the Town's official Inland Wetlands Map is that the Town is behind in updating it. All of the talk about two different maps does not make sense. It seems obvious that the 2004 map is the correct one to use based on what the Commission did. He did not know if the Commission can change and go back to this, it will be a legal problem for whichever side prefers whichever map we use. The issue is, if the Commission does not approve this application, it will revert to the 2004 map, which is the accepted map. According to Mr. Ziaks, 3.14 acres of wetlands are gained in the 2004 map. If the Commission denies this application, based upon the correct mapping, the property will lose wetlands and not gain them. If one follows the history of this site, it seems there is only one conclusion. The legal issues are appreciated, however when considering the basic facts as they have been presented to the Commission, it seems there is an obvious map of reference.

Attorney Smith appreciated that Commission Breckinridge had reviewed all of the materials in trying to figure out exactly what it is, and felt that this was the point to highlight. It was not the issue of merits, whether the wetland delineation is appropriate or not, it is the official map that Attorney Landolina's client proposes to change.

Attorney Landolina affirmed this statement.

Attorney Smith indicated that the Commission members had stated the 2004 map is really the correct map. That highlights the issue of which map is being considered. It is not a matter or right or wrong, it is a matter of which one is being considered in this application. In the cases cited in the materials submitted by the intervenor for record, those with much more obvious defect, the defense in the Lauver case indicated that there were many members of the public present and questioned the need for starting again. The public had been confused. The maps in this application before the Commission are genuinely confusing.

Attorney Landolina stated that, put into context, at the first hearing in January 2019, there was a discussion that potentially raised this issue and we heard from Town staff that in the minutes of 2004, two hundred applications were approved with regard to regulated activities. In 2003, the firm Fuss & O'Neil had been hired to digitize the maps, and overlay the maps in order to create a Town-wide GIS system; one of the layers was a wetlands layer. It was described in the January 2019, meeting that after the map was amended by this Commission, in 2003 or 2004, it was an ongoing process and these maps were going to be part of the record. Based on that, the applicant showed the difference between the official Town Inland Wetlands Map, from the 1970s, and the applicant's delineated map. In addition, the applicant showed the difference of what was approved in 2004 and the map of the applicant's current findings. After a letter was written and a presentation was made on behalf of the applicant, staff said that there was an application submitted by the Commission to change two hundred parcels in Town to reflect what is on the map. He did not believe it was a notice problem. What happened in 1997 and in 2004 has significance and that was the point of the letter. It was not intended to change the essential nature and scope of the applicant's application. The application has always been to identify wetlands, alluvial soils, and floodplain soils on the site, and present a map to the Commission believed to be accurately and correctly identifying those soils. From here going forward, with respect to this parcel, this is the map. This is what the application has been from the start and has not changed.

Commissioner Beauchamp stated his confusion over the application and requested a timeline from the Town, going back to 2003 and 2004, for the changes on this land concerning wetlands, alluvial soils, and zoning, in order to help clarify the history. It is very important due to the large piece of land by a river, and by the golf course. The emotion needs to be kept out of the application in order to base a decision on facts. The maps need to be straightened out before continuing further.

John McCahill commented that the Commission had received correspondence from Attorney Seeman, dated February 4, 2019, that raised the issue of the notice defect. The correspondence was shown to Town Attorney Olson. At the opening of the February 5, 2019, public hearing, this Commission did state for the record that the Town's legal counsel stated that there was not a notice defect at that point in time, and nothing has changed since.

Chairman Thier requested clarification on Town Attorney Olson's position related to the issue of the notice defect, and asked her to present her opinion.

Town Attorney Olson responded that she provided a memorandum on February 5, 2019, that dealt with the intervenor status. To the extent that she gave an oral opinion on this, the general rule when it comes to notice is that what is published has to adequately identify the property at issue. The cases that involved inappropriate notice, were situations where the address was wrong, the identification of the parcel was wrong, and the size of the parcel was incorrect. She was unclear on the purported changes in the application. However, it was helpful to hear from the attorneys what the basis for the notice claim was. If understood correctly, there have been no changes to the proposed map that was filed with the application. Therefore, the notice was published that there was a proposed amendment to the wetlands map via this parcel. She asked

Attorney Landolina if it was correct that the map that was presented with the application had not changed.

Attorney Landolina responded in the affirmative.

Town Attorney Olson stated that the intervenor is raising a notice issue based on something she believed was not necessary for determining this application. What is the clear scope of what is the baseline for the change? Based on the wetland regulations, there is no requirement that the applicant come up with the exact change from the particular map that was before the Commission, only that a map certified by a soil scientist be provided as part of the proposal to amend the existing wetlands map. Attorney Olson did not see, based on the information provided to her, a change to the application because the map that was proposed has remained unchanged. The only thing that may have been modified in the minds of people at the hearing, is the question of the magnitude or baseline of the change. The cases that she reviewed were superior court cases, on which she was not asked to give a written opinion. The cases have clearly stated that there have been challenges to people applying for regulated activities, having the wetlands delineated. People have challenged the actions saying the applicant needs to get a formal map amendment. The courts have responded in the negative, in order not to elevate form over substance. It would be too much to expect the applicant to file an application for a regulated activity where the wetlands are delineated as a part of the process, there would need to be a formal map amendment.

Commissioner Feldman stated that there is a difference between twenty-two and four acres. That is not form; that is substance. That is substantial acreage.

Commissioner Dean stated that the applicant did not apply for regulated activities. A map amendment was applied for. Attorney Landolina indicated that the application was to delineate the wetlands and show where there are. The applicant is asking for more and the Commission is being asked to change the map, to reclassify wetlands. It is very different than asking for a regulated activity.

Town Attorney Olson continued to state that in the analysis of those cases, it was clearly discussed that the wetlands maps were created generally, and never to be substituted for the field testing process that requires a soil scientist to test for wetlands at a particular site. The ultimate decision is the Commission's, however from a notice standpoint it is not apparent where the application has changed based on what was filed and heard tonight.
Chairman Thier commented that the Commission has heard the Town Attorney's analysis, however it was not appropriate that she testify. He stated that the Commission had asked the Town Attorney if what John McCahill stated was correct or not. That based on something that the Town Attorney had told Chairman Thier and Commissioner Dean, it conflicted with what John McCahill had told the Commissioners, and that John McCahill was incorrect based upon what was said before the meeting. There was a conflict between what was said by the Town Attorney before the meeting and what John McCahill had just read into the record. The Commission had asked whether John McCahill had stated facts correctly or not. It was now beyond that, and the Town Attorney's position at the hearing was to advise the Commission and not testify as a party at the hearing.

Town Attorney Olson stated that she was giving her legal opinion.

Chairman Thier stated that the Commission does not want it in this format. The only party who should be speaking and testifying is either the intervenor or the applicant.

Town Attorney Olson stated for the record that her position at the hearing was not to take sides. She stated that her job was to give a legal opinion based upon her knowledge of the law, and based upon her position as if she were to stand in a court of law. She stated that she does not take sides, she gives legal opinions. It was her understanding that she was asked for her legal opinion by Chairman Thier.

Chairman Thier asked if anyone had a question for the applicant or the intervenor on this issue alone.

Commissioner Applefield commented that he heard what both sides presented with regard to the notice issue. However, his opinion of the map that is proposed to be changed is 180 degrees different. There is no way that the Commission is acting on a map that it has approved as a result of regulated activities. The law is clear that unless a boundary is redefined, through that process which requires a public hearing, the maps approved in the course of approving regulated activities, do not modify the Town's Inland Wetlands Map. It is mentioned in part, due to the uncertainty of how the Commission can proceed over that fundamental disagreement.

Commissioner Breckinridge cannot see the Commission modifying any map other than the 2004 map. How can a change be made to any other map besides the only map of the Commission and Town? In order for those individual decisions to become part of the Town's Inland Wetlands Map, the decisions have to go through a process. Those decisions have not gone through that process for whatever reason. The Town never has to go through that process if that is its decision. It is very important to identify at the outset which map is to be modified and for which reason.

Chairman Thier stated that it is a question of whether the Commission has jurisdiction on the notice of the application. Since this is before the Commission, is there any member who wishes to make a motion before the Commission proceeds?

Commissioner Feldman stated that the intervenor made a motion to essentially move to dismiss. However, the intervenor cannot make a motion.

Chairman Thier asked if the intervenor formally made the motion to dismiss for the record. There was indication from the intervenor in the negative.

Chairman Thier again asked if there was any Commission member who wished to make a motion.

Commissioner Dean made a motion to reject the application for lack of proper notice and asked the applicant to refile the application with whatever permissions can be made legally to

incorporate this record, so that there is not a repeat of what was already done, and proceed forward with a clean application with no potential defect issue for appeal.

Chairman Thier asked for a second on the motion. Commissioner Applefield seconded the motion.

Chairman Thier asked if all were in favor.

Commissioner Feldman sought clarification that a vote in the affirmative was to dismiss the application on grounds of defective notice.

Chairman Thier responded in the affirmative.

Town Attorney Olson suggested that the Commission first close the public hearing before deciding on the application. The Commission would be effectively rendering a decision on the application.

Chairman Thier asked if there was a motion to close the public hearing.

Commissioner Applefield inquired of Town Attorney Olson if the Commission closes the public hearing, and the motion fails, is it possible for the Commission to reopen the hearing?

Town Attorney Olson responded in the negative.

Commissioner Feldman stated that there was a problem and that the Commission cannot vote in Executive Session.

Town Attorney Olson confirmed Commissioner Feldman's statement.

Commissioner Feldman questioned whether the Commission was prepared to vote tonight.

Chairman Thier made a ruling that the Commission should vote on Commissioner Dean's motion. He then sought clarification on the issue of first closing the public hearing.

Town Attorney Olson stated that there is an application pending before the Commission. The applicant has indicated that it will not voluntarily withdraw the application. If the Commission were to vote that notice was defective, it would be effectively denying the application, however the Commission would not have first closed the public hearing.

Chairman Thier sought clarification that the Commission cannot vote prior to closing the public hearing.

Town Attorney Olson confirmed that the Commission cannot render a decision on an application until the public hearing is closed.

Commissioner Feldman thought that the Commission could make a procedural decision without closing the public hearing.

Chairman Thier proposed a solution to vote on the motion, and if the motion is voted down, then the Commission continues. If the motion is approved, then the Commission will vote again to close, and then the Commission will vote again on the motion, knowing what the vote will be. Are all in favor of Commissioner Dean's motion? Those members in favor were: Chairman Thier, Vice-chairman Beauchamp, and Commissioner Dean. Those members not in favor were: Commissioners Applefield, Usich, Feldman, and Breckinridge. The motion was defeated by four of the seven Commission members. The application will proceed.

Chairman Thier asked if the applicants have new information for the Commission. The Commission did not want a repeat of information.

Mr. Ziaks stated that on February 20, 2019, he submitted a letter dated the same to staff and the Commission providing supplemental information to address questions raised at the last meeting. Items included in that transmittal were the following: two reports by different labs; revised Sheets A.1 and 3.6 that take the plans already submitted and include additional testing conducted last month; and Sheets SP1 (soil pit 1) and SP2, dated from October 2018, that contained additional testing on a portion of the property. A portion of the last hearing was spent on whether there was an adequate number of test holes in two areas on the site. One was the *blob* (the area in question), the area directly north of Watercourse B, that has been identified on the existing Town map as having alluvial soils; and the applicant's claim is that there is no alluvial soil on that portion of the property. The soil scientists went into the field and conducted additional soil tests in that area to tighten the test hole pattern in the area, as the Commission had stated that there were too few test holes in that area, and the soil scientists concluded that there were no alluvial soils found in that area.

Chairman Thier requested that Mr. Ziaks identify the scientist who conducted the work.

Mr. Ziaks confirmed that the work was done by Mr. Russo and Mr. Klein together at the field. The other area looked at was the northeast quarter of the site, which is the area currently zoned for residential purposes. It is the area between the 100-floodplain line and the right of way of Nod Road. Mr. Ziaks referenced the materials submitted on February 20, 2019: the CLA Engineers, Inc. report; a Welti Geotechnical, P.C. report; soil testing by Heritage Consultants and a cultural heritage resources report, phase 1, on the property; and deep soil tests that were conducted by F. A. Hesketh & Associates, Inc. in that area last autumn, in order to investigate the appropriate conditions for septic systems. Maps A.1 and 3.6 were revised to illustrate, by a legend, where the various soil investigations were conducted by the soil scientists, the Heritage Consultants, and Dr. Welti. Judging by the aerial maps, there are numerous areas that have been tested, and based on twenty years of experience, this site is the most tested he has seen.

Mr. Russo indicated that based on the Commission inquiries from the February 5, 2019, public hearing, additional soil testing was conducted. The Commission packet contains letters from both Mr. Russo and Mr. Klein summarizing the findings from the additional test holes. Additional hand-dug test holes were done it the area in question with spade and auger, numbered

TH12 through TH18. There was no evidence of alluvial soils or wetland soils found in this area. This supports the previous conclusion that the area in question does not contain floodplain soils and alluvial soils. Additional testing was done in areas on Map A.1, and areas with frontage on Nod Road and along the very northern portion of the site which has frontage on Nod Road, and a couple of additional hand-test pits in the area designated between the 100-year and 500-year floodplains in the middle of the existing golf course. The soil logs and letters of findings were provided. The two soil science finding reports were in agreement, and support the issue that was originally presented. We did not find any evidence of alluvial soils and floodplain soils in those areas, nor any additional poorly drained or very poorly drained soils. In addition to the test pits, data from test holes by other consultants, Heritage Consultants and F. A. Hesketh & Associates, Inc., had been reviewed and provided as well. Upon review of the consultants' data, it was determined that the data was in agreement with the delineation submitted in the application. No alluvial soils or floodplain soils were found above that 100-year flood line. Data from Welti Geotechnical, P.C. was reviewed and there was no evidence of alluvial soils or floodplain soils in or near the areas indicated in the application. The wetland boundary that was originally presented to the Commission is further bolstered by the data presented tonight. It is confirmed that the alluvial soils are all riverward of the line presented. All of the poorly drained and very poorly drained soils are indicated by the blue lines on the map originally presented to you. In summary, based upon the additional test pit and boring data, the original line presented to the Commission is in fact the proper wetland boundary.

Commissioner Applefield inquired if Mr. Russo indicated that there were alluvial soils within the map areas lined in blue, and that if alluvial soils were determined riverward on the map.

Mr. Russo responded that the edge of poorly drained and very poorly drained soils are delineated by the blue lines on the map. There were alluvial soils in that section of the site.

Commissioner Applefield found it disappointing that after the last meeting, when the Commission received a report with the data and a conclusion, that Mr. Russo does not find it necessary now to explain the gap between the data and the conclusion. In this case, the issue is that the soils are not being delineated in the field, but the absence of those soils has been observed, however the area has been disturbed. The question in this case is, what is done with soils that have been disturbed. From the last meeting, it was not easily understood how the soil test conclusions were made. The Commission has received a report that has done the exact same thing again.

Mr. Russo responded that the conclusions were made the same way as in the past. Holes were dug in the ground and a line was drawn between where the holes were upland, and that line was depicted on the plan. That is exactly what is always done.

Commissioner Applefield stated that significant time was spent on how to understand and interpret the data. The question was how to understand the data. In a case like this, it is important to understand how conclusions are reached based on the data.

Mr. Russo stated that it was described in detail how the delineation was made.

Commissioner Applefield stated that the Commission was not contesting the methodology of the testing as inappropriate. An analogy would be if a doctor gave a patient the results of an x-ray, how would the doctor read the x-ray and come to the conclusion?

Commissioner Usich commented that looking at the soil logs, it was interesting to see the differences in testing depths. How does the soil scientist determine how deep to dig?

Mr. Russo responded that there are a number of ways to determine how deep to dig. The first round of test pits conducted were by an excavator and that was very instructive in knowing how far to dig. Having done a number of test pits down to six or seven feet, it was evident that the first two to three feet would be instructive on this site as to the type of soils. Thereafter, for hand-pits, testing was conducted two feet down. Generally, by excavating first, this indicated how far down to dig in order to find characteristic buried soil horizons.

Commissioner Usich inquired about the depth of the deepest hole.

Mr. Russo responded that the excavator pits were approximately six feet down and the hand holes were between two and three-and-a-half feet down.

Commissioner Usich questioned the area on the map west of the blue line, the areas of rectangles down from the blue line. Where were the places that alluvial soils were found?

Mr. Russo confirmed that this was the area on Figure A.1, B.7 and B.6. TH1 and TH2 were the sites where alluvial soils were found. TH3 no longer had alluvial soils.

Commissioner Feldman commented on the assumption that the golf course was subjected to a fair amount of grading and filling with top soil.

Mr. Russo confirmed this notion.

Commissioner Feldman inquired whether the top couple of feet were indicative of disturbed soil rather than natural soils possibly deposited by the river.
Mr. Russo stated again that special care was taken with the site to find places with an undisturbed soil profile in order to make the proper assessment.
Commissioner Feldman stated that the area in question was all golf course and disturbed. In order to find undisturbed soils, should the testing have gone deeper?

Mr. Russo responded that the area was not all disturbed. A number of the undisturbed places were found. Areas of fairways or greens were avoided, and areas that were rough or contained trees were considered undisturbed and tested.

Commissioner Feldman inquired how it was determined whether soils were disturbed or undisturbed.

Mr. Russo reiterated his response from the last meeting that in one test area irrigation pipes were found, as well as buried cables in another area, or buried materials such as asphalt. Those were the indicators of disturbed areas.

Commissioner Feldman stated that his newly received Commission meeting packet contained the Heritage Consultants report, dated December 2018, and the Welti report, dated November 2018. He questioned why these documents were not submitted earlier in the application process, prior to the two lengthy hearings.

Mr. Russo responded that the Commission had since requested additional data. He felt that the team had previously met its burden of proof, based on the standard work by the soil scientists. Since the Commission had requested additional information, the referenced reports were reviewed for submission to the Commission.

Commissioner Feldman stated that prior to the hearings, the applicant's team had in their possession both the Heritage report and the Welti report. It seemed like a selective presentation, where it was decided that certain information was provided to the Commission at specific times.

Mr. Russo responded that the standard type of data accepted by the Commission in the past had been submitted, and due to the Commission requesting additional information, more data was found and provided. There has not been a selective omission or selective inclusion of data. Geotechnical or archeological findings are not usually submitted.

Commissioner Feldman stated that Mr. Russo had acknowledged that there is no law, regulation, or statute that requires the Commission to use the 100-year FEMA flood map. Does it not make sense to err on the side of cautionary approach, suggested by the intervenor, and use the 500-year floodplain?

Mr. Russo responded that there was no reason to use the 500-year floodplain. The test holes in the area of the 100-year floodplain line on the map show non-regulated soils riverward of that line. That 100-year floodplain line is extremely conservative.

Commissioner Dean requested to hear from the intervenor whether the 500-year floodplain line was still being argued for the Commission's consideration. She first inquired further of Mr. Russo regarding the 100-year floodplain line and whether the soils were consistent or sporadic.

Mr. Russo responded that anywhere riverward of the 100-year line is consistently of non-alluvial soils.

Commissioner Dean read from the minutes of the last public hearing regarding Mr. Klein's statement that the scientists were at the hearing to discuss highly technical issues for the public in the absence of countervailing expert testimony, and the only evidence on record would be from those qualified in the field. Basically, the applicant provides the expert testimony, and in the end, the Commission would have to accept this testimony. In speaking with the Town Counsel, this notion is supported by case law, that unless the Commission has its own expert, the existing

expertise must be accepted. Typically the applications before the Wetlands Commission involve an acre or two. What is the total acreage of this site?

Mr. Russo deferred the question to Mr. Ziaks.

Mr. Ziaks indicated the whole area of the application is 224 acres.

Commissioner Dean stated that both the experts involved with the application are esteemed and excellent and the intervenor representation is excellent as well. While hearing expertise from one side, with millions of dollars at stake, people will advocate for their side.

Mr. Russo corrected the notion that he advocates for the applicant's side. He is a technician and conducts the wetlands delineation by the standards of his field.

Commissioner Dean concurred with Mr. Russo's statement. She stated that the Commission may be hearing facts by another expert that the scientists do not feel is their responsibility to present. Regarding the letter from Robinson & Cole, dated February 26, 2019, on pages two to three, the intervenor has asked the Commission to request that a third party conduct soil testing and an independent peer review, and has suggested that the Commission contact Barbary Kelly of the North Central Conservation District. If it is clear that non-wetland soils are evidenced, then perhaps there is nothing to review. However, Mr. Klein has described that the findings and data are highly technical. Since the acres have been changed over time, and the Commission does not have any other expertise as a resource, there needs to be more comfort in making a determination on the application. Commissioner Dean commented that she would feel more comfortable with another party looking at the data.

Commissioner Breckinridge inquired whether any wetlands commission in the state has used the 500-year boundary line.

Mr. Russo responded in the negative.
Commissioner Breckinridge inquired of Attorney Smith whether he knew of such a commission-not considering a commission along the coast.
Attorney Smith responded that he was unaware, however possibly one existed among the one hundred and sixty-nine Connecticut towns.

Commissioner Breckinridge inquired if Attorney Smith could specifically back up the expert testimony made on behalf of the intervenor. Commissioner Breckinridge stated that, depending upon the Commission's determination, the real battle would come in the next phase of the application. This was only a small part of the battle. He suggested that the intervenor be prepared to support the need for utilizing the 500-year boundary, if the Town of Avon were the first one to implement that line when there was no prior precedent.

Attorney Smith responded that the expert testimony had been presented by Dr. Michael Klemmens, the Chairman of the Salisbury, Connecticut Planning and Zoning Commission, and he believed that the chairman's statements would not have been made arbitrarily.

Commission Breckinridge stated that he had reviewed all of Dr. Klemmens' documents and he did not provide an example either. A blanket statement should be backed by fact. He felt that the issue is emotional, however he must rule based on the given facts.

Attorney Smith stated that he was not present at that meeting, however understood that the facts presented to the Commission by Dr. Klemmens were more of the nature of resiliency, and that the 100-year and 500-year flood lines are no longer accurate based upon three or four 100-year floods in the last decade, or 500-year floods occurring in a century.

Commissioner Breckinridge noted that idea has become prevalent based upon what had happened in Huston, however this was not Huston. He believed that the idea did have merit, however thought that it would not be right for the Commission to set a precedent at this point. It would be helpful to have examples within the State of Connecticut provided to the Commission.

Attorney Smith responded that, aside from the exception of Simsbury, Connecticut, he had not seen other Commissions use the 100-year boundary line either. He has presented before approximately forty wetland commissions within the state. The applicant has suggested it, rather than identifying with specificity, the wetlands. There may be striations of wetlands in areas. If a surrogate were to be used, the more conservative line would be the 500-year boundary or something in between. Dr. Klemmens had indicated that the climate in Connecticut has changed since 2004, and it the reason for the suggestion to take the more conservative approach.

Commissioner Breckinridge accepted the answer. However, he stated it would help if that information would be provided in the future.

Attorney Smith would relay the Commissioner's suggestions to Dr. Klemmens.

Attorney Landolina stated that in his experience, he had never seen the 500-year line as the designation for alluvial soils. There is a difference between the presence of alluvial soils and the flood line when it relates to project design criteria. There is regulation in the Town's planning and zoning that requires an applicant, during the design phase of a project, to design with respect to the 500-year line. Planning and zoning regulations are concerned with flood issues. The question here is the presence of floodplain soils and alluvial soils as it relates to flooding, however it is an issue of the location of designated soils. The design will relate to the 500-year line, where flood issues are of concern, if and when an application is brought to the Avon Planning and Zoning Commission.

Vice-chairman Beauchamp questioned the amount of holes dug by the scientists. Are there one hundred holes?

Mr. Russo responded that eighty-one holes were dug.

Vice-chairman Beauchamp stated that he was satisfied with the soil analysis conducted. He acknowledged the scientists as experts, and commented that the scientists would have no reason to tell untruths. He was concerned with the lawyers and the map situation, and that before he could move forward, clarification was necessary.

Commissioner Usich inquired if the applicant was seeking remapping of the flood zones from FEMA at any foreseeable time. He inquired about the baseline elevation in the western zone.

Mr. Russo responded that there had not been any mention of that or attempts to do so. Those flood zones were remapped recently, within the past decade. He deferred the answer to Mr. Ziaks.

Mr. Ziaks stated that the 100-year flood line elevation on the property is 162.5 feet.

Commissioner Applefield inquired of any of the presenters whether or not the property's wild and scenic river designation would have any impact on the application before the Commission.

Mr. Russo stated he was unacquainted with any restrictions that a designation of wild and scenic would bear on the application.

Attorney Landolina stated that if it had impact in the design phase, it would be considered then. He did not believe it had any impact at the current phase.

Commissioner Applefield was referring to the proposed construction that would follow. He believed that the area had been designated.

Commission Breckinridge stated that there was a number of commissioners who were still concerned with an accurate map upon which to base their decisions. He questioned if it was in the Commission's jurisdiction to make a ruling on that, or whether the Town Attorney could help the Commission with that determination. He did not see how a decision could be made when dealing with two different maps.

Mr. Russo commented that from his experience as a soil scientist, past map amendments in which he has participated in have not focused on what the town map was, but instead on the proposed map amendment. In other towns, the commissions have been concerned with the maps proposed by soil scientists for amendments.

Commissioner Breckinridge continued with his earlier concern that if the application were denied by the Commission and the attorneys were to file a motion that the 2004 map is the correct wetlands map, then the development will be based on the 2004 map and not the official Town of Avon Inland Wetlands Map noted in the room.

Attorney Landolina stated that the 2004 map has legal significance. It would be up to the Commission and its legal counsel. The application is to amend the official Town of Avon Inland Wetlands Map to the map that has been presented by the applicant. It would be possible, that in a future legal matter, a court would be asked to consider the 2004 map as the official one as it relates to this property.

Commissioner Breckinridge stated that was his concern.

Chairman Thier asked if the maps could be reviewed, and why the Commission had been looking at Map A and then Map B.

Mr. Russo stated that the map before the Commission this evening, Map A.1 Site Aerial Blue Fox Run Residences, Nod Road, Avon, Connecticut, depicts the wetland mapping that was submitted to the Commission originally as part of this application. It has not changed through the course of the application. Additional data were collected on the site.

Chairman Thier inquired on the origin of the map that was being used for the application.

Mr. Russo responded that it was the map prepared by F.A. Hesketh & Associates, Inc. that depicts the boundaries of the wetlands as defined in the field by himself and Mr. Klein.

Chairman Thier sought clarity that the map before Mr. Russo was not the official Town map.

Mr. Russo responded that it was the map that was submitted to the Commission as part of the public record. He confirmed that the map before him was not the Town of Avon Inland Wetlands Map.

Chairman Thier inquired which map was submitted as part of the original application, and had he submitted the official Town of Avon Inland Wetlands Map.

Mr. Russo responded that he was confused by the question. He indicated that the maps submitted to the Commission, as part of the public record, were prepared by F. A. Hesketh & Associates, Inc., and that they reflect the applicant's proposal to the Town of Avon of the correctly delineated wetlands on the site.

Mr. Ziaks stated that the application is based on the F. A. Hesketh & Associates, Inc., prepared map.
Chairman Thier asked if the original application was based upon a different map.

Mr. Ziaks responded in the negative.

Chairman Thier sought clarification that the application was based on the F. A. Hesketh & Associates, Inc., map from the beginning of the application process.

Mr. Ziaks responded in the affirmative. He stated that the official Town of Avon Inland Wetlands Map was not being disputed. There are errors in that map, as it is outdated. The Commission revised this map in 2003 and prior. It needs to be revised; it is incorrect. The Commission made a decision based upon an application fifteen years ago, and that is the 2004 map. It was proven to the Commission that the map needs to be updated. After the golf course added nine holes to the property, over three acres of wetlands were created in the way of ponds and watercourses. The Commission needs to take portions of the 2004 map and portions of the Town map and revise it to be the map that is presented in the application. The soil scientists conducted much testing on the site by flagging the traditional watercourses and wetlands. Due to the presence of the Farmington River, it was determined where the floodplain soils and alluvial

soils were located. The data was provided to show the six tablespoons of alluvial soil which is located along the river. The rest of the site does not contain alluvial soils. It has been tested repeatedly. The proposed map needs to be adopted by the Commission.

Commissioner Dean inquired of Attorney Smith if the Commission were to have the review of an independent third party soils scientist, what he thought the review would reveal that the Commission had not already considered.

Attorney Smith stated that the intervenor tried diligently to hire independent soils scientists over the last three months, however every one that was contacted either had conflict of interest or had been contacted by the applicant. He had advised the intervenor that the independent soil scientist could very well agree with the findings already presented. The missing factor is the independent review of the methodology used by the scientists and whether that was correctly applied to the soil findings.

Commissioner Dean inquired whether it was Attorney Smith's understanding that the applicant interviewed all of the other scientists in relation to this application and that they were conflicted.

Attorney Smith responded that he did not know. He stated that the scientists did not state this specifically. He asked that the Commission look at a third party review of human-altered soils and also the issue of the 100-year or 500-year floodplain line utilization; whether or not the 100-year floodplain line was appropriate. If there is a development in the future, anticipated by the applicant, and upon reaching the development stage, the applicant would not have to consider wetlands at all, even though there may still be a portion of this property that contains wetlands. The Commission is asked to strongly consider the methodology in its determination.

Commissioner Dean did not hear how the Commission could take into consideration the opinion of one who was not a soil scientist. It was not a flood issue, but an issue of soils. The applicant has made that clear and that appears correct. She inquired whether Attorney Smith believed that Barbara Kelly could stand in for a soil scientist.

Attorney Smith responded he did not know if Barbara Kelly was a soil scientist, however scientists were part of the staff.

Commissioner Dean asked if it was Attorney Smith's understanding that Barbara Kelly could not conduct the review for the intervenor, however could do so for the applicant. Could this be done fairly soon?

Attorney Smith responded in the affirmative as to his understanding. He indicated that he had not spoken to Barbara Kelly.

Commissioner Dean commented that the intervenor might not appeal, due to the expense, if a third party were to review the applicant's findings. She felt this was the approach for the Commission to take.

Chairman Thier noted that if the application is not decided this evening, the applicant would have to agree to an extension to conduct a third party review. At this moment, the Commission will vote on the application this evening.

Town Attorney Olson stated that a vote would not have to be made this evening. The Commission will have sixty-five days from the date of the close of the public hearing to render a decision on the application.

Commissioner Applefield stated that the Commission could not close the public hearing and then reopen it.

Town Attorney Olson stated that the Commission needs to decide whether to leave the hearing open with consent. If the Commission does not have consent, the hearing will have to be closed. She stated that the Commission can only entertain information from staff or legal counsel based upon information that is already in the record.

Chairman Thier inquired how it would work in the process if the Commission asked counsel to retain an outside expert.

Town Attorney Olson did not believe the Commission could hire a third party consultant, at this time, and after the close of the public hearing.

Commissioner Feldman inquired of Attorney Smith if the Commission were to enlist Barbara Kelly for a peer review, and she agreed with Mr. Russo and Mr. Klein, would the intervenor rest its position, and the map amendment would proceed.

Attorney Smith responded that an outside party would provide information to the Commission. He believed that the information would be significant to the Commission.
Attorney Landolina stated that it was the third time the issue had come up in the course of the application. The intervenor had asked the Commission to hire a soil scientist in January 2019. It was not done. Again, the Commission was asked in February. There is no ordinance where the applicant would be required to pay for the review. The Commission did not take action. The process is already beyond thirty-five days of the continuance period. The intervenor is aware that the Commission will not pay for a soil scientist, and is now asking for the service and requesting a peer review. The intervenor could have asked for this in January or February 2019. The intervenor is asking the Commission to do the work for the intervenor. Unless the applicant changes its mind, there has been ninety days to conduct a third party peer review; for the third-party to review the data without going to the site, that has not been done. It is suggested that the applicant agree to a continuance for that purpose. The intervenor has had ninety days to do something. The idea that the applicant's party interviewed every soil scientist within the State of Connecticut is ridiculous. There are hundreds, if not thousands of soil scientists, within the State of Connecticut. It is hard to imagine that every soil scientist had a conflict, could not look at the data, and present to the Commission. Rather than do that, Dr. Klemmens presented, however he is not a soil scientist.

Commissioner Feldman indicated that to be fair, the new information on soil testing that has been submitted at each hearing, has been a moving target. In fairness, he did not suggest continuing the hearing at this point. The applicant's side has been able to supplement the record and it would be fair for the other side to do so as well.

Attorney Landolina responded that he would agree with Commissioner Feldman if the intervenor had brought a soil scientist in the beginning. However, there have already been three meetings. Commissioner Feldman's point was understood.

Commissioner Dean stated that she did not feel the sense of urgency; it has been fifteen years since the last application was presented on this property. It will be a long and slow process. It would be a nice courtesy for the applicant to give the Commission an additional thirty days. There is a slim chance that the third party would disagree with the applicant, however an appeal might be avoided. The odds and costs should be weighed. It would also be helpful to the applicant to have a thirty-day delay for the third party review. The Town would likely avoid the cost of an appeal, the public would have another level of comfort. It would be a great service to the Town provided by the intervenor.

Attorney Landolina responded that the public hearing can only be continued for so long. There is nothing to indicate that the third party review could be done in the required time frame. The applicant is not agreeable to extending the public hearing. Attorney Landolina requested that Mr. Russo explain a Connecticut Department of Energy and Environmental Protection (CT DEEP) document of May 2015 that had been submitted for the record.

Mr. Russo noted the document was titled, *Clarification of Wetland Soil Criteria for Human-Altered or Human-Transported Soils in Connecticut*, published by the CT DEEP, dated May 2015. This document was issued by the CT DEEP to offer clarification on how to conduct wetland delineation where there have been altered soils. He indicated that he had followed the guidelines of the document for the delineation of the soils in the application before the Commission.

Commissioner Applefield inquired if the referenced document mentioned the use of the 100-year flood line.

Mr. Russo responded that it did not.

Chairman Thier stated that the Commission would hear comments from the public.

John McCahill requested that a list of public correspondence received to date be read so that information would not be repeated and it would be known for the record.

Chairman Thier stated that the Commission was comfortable in the knowledge of the receipt of the correspondence.

Lynne Pollack, of 7 Saddle Crossing in Avon, is a resident of thirty-six years. She was disturbed that it appears to be a one-sided battle, where one side was bullied. The Commission would be making a decision with information from one side. It was offensive to her.

Scott Sharlow, of 14 Saddle Ridge in West Hartford, is a geographer. He stated that the information presented tonight was new to him. He submitted for the record the *Soil Survey Hartford County, Connecticut* by the United States Department of Agriculture Soil Conservation Service in Cooperation with Connecticut Agricultural Experiment Station and Storrs Agricultural Experiment Station, February 1962. Areas of wetland and watercourses indicated in this report should be included, for the entire property and not just the area in question, in the Town's existing mapping. He submitted his own maps created with overlay to indicate the blended information. The areas delineated in red were from 1962 based upon the report submitted. The colored area is the Town's mapping, taken from the Town's website.

Harry Werner, of 20 Goddard Road in North Granby, had served terms in various Granby planning commissions, including one that heard an application on Holcolm Farm, West Granby, CT. He was a large animal veterinarian and has traveled Nod Road since 1974. He had walked the property when it was farmland. He believed there was a conflict of interest which may be perceived. It is fine that the soil scientists have been hired by the applicant. He was encouraged that Commissioner Dean had interest in a third party review. In his opinion, it was essential. There have been many science questions and technical answers. He indicated concern for plants living on the site and animals which frequent the site. It would be valuable to hear from a biologist. At the meetings, there has been discussion regarding the term *flooding*, and that it was applicable. He referenced the FEMA website, and in relation to its national insurance program, flooding was considered a temporary situation of complete or partial inundation of normally dry areas, from the overflowing of tidal waters, and the unusual and rapid accumulation of runoff of surface waters from any source. Anyone familiar with Nod Road will appreciate the FEMA verbiage. It would be important to have the objective third party review to negate any perception of the conflict of interest and provide confidence to the residents of Avon.
Polly Carville, of 215 Nod Road in Avon, read the letter she submitted to the Commission for the record.

Laura Young, of 57 Hitchcock Lane in Avon, has lived in Avon for twelve years. She indicated that the Commission had enormous power to protect the land around the river. It was land to protect the residents from flooding. It was irrelevant whether the 100-year or 500-year floodplain line was to be used. She had seen the river overflow to the extent that the sewer system in her neighborhood could not handle the influx of water. She indicated the flooding of Fisher Meadows in Avon. It was the new normal for flooding in this area. She noted that a wider study should be done. There was a huge conflict of interest, and many of the other available scientists would not present to the Commission. She was grateful to hear that an independent study might be in consideration by the Commission. It was the only way to avoid a conflict of interest. The decision is not to be taken lightly. She wondered how many applications along a river had been considered in the State of Connecticut.

Cheryl Jackson, of 232 Nod Road in Avon, referenced Commission minutes from 1997 regarding this property. The methodology was never questioned, nor the impact of the proposed

changes to the wetlands on the property. There were no discussions about the Town, State, and Federal maps regarding the removal of wetlands. The soil scientist kept no records of his initial tests; this does not appear scientific. She inquired why the Town had not hired a soil scientist to develop the methodology for findings. She questioned whether the Commission was comfortable with the methodology used by the soil scientist in relation to the number, spacing, and location of sample test holes. Wetlands are on the front lines as pressure increases to develop property, and they are vulnerable to exploitation. She requested that the Commission makes the right decision for the Town by saving the wetlands.

Mary Jane Gately, of 15 Thistle Hollow in Avon, was concerned with the soil sampling. The CT DEEP soil testing guidance indicates that testing soils in winter, when it is dry and without vegetation, can result in misclassification of the soils as not being wetlands.

Chrissy D'Esopo, of 289 West Avon Road in Avon, indicated that there was an interactive mapping resource available online, strongly promoted by the CT DEEP/USDA/National Conservation Resources Service. On February 5, 2019, Mr. Klein was dismissive of this mapping tool and the people who conducted the soil assessments. Several residents had spoken with the USDA and DEEP, and those offices were not critical of this tool. It is an important tool in various types of planning. According to the web soil survey, 92% of the area in question is Winooski soil, which Connecticut recognizes as functioning wetlands. During the February 5, 2019 meeting, Mr. Klein elaborated on his belief that the soil of the golf course was extremely sandy and had excellent drainage, and would readily drain during the growing season and harvesting time of the year. She requested that common sense and experience prevail. Last summer much of the golf course was under water due to excessive rains; half of the golf course was closed due to flooding. It could be called ponding or flooding. It is all of the same problem when the soil cannot absorb the water. What will happen when one hundred houses are built along with a long driveway with cul-de-sacs and an extensive road system? Where will all of the water go? It will flood onto Nod Road, the existing homes, and surrounding area. On February 5, 2019, Town Attorney Olson stated that the Commission should not research matters or materials outside of this hearing, and only consider materials presented by the applicant. The job of the Commission is to look at all aspects endangering the wetlands in Avon. It sounded like Attorney Olson was representing the applicant and not the Town of Avon. She thanked the Town of Avon Inland Wetlands Commission.

Carrie Firestone, of 36 Cambridge Crossing in Avon, stated she has had many conversations with people about wetlands and floodplains over the last few months. The idea that is making people most uncomfortable is that the applicant wants to change a map that the Town has deemed a floodplain designation. It feels shady and that is the perception. Why is the applicant allowed to change the map to suit its own needs? One Commission member indicated that once wetlands are removed, they are removed forever. That is why the public is here. She thanked the Commission.

Ronaldo Tedeschi, of 100 Woodford Hills Drive in Avon, is an engineer by trade and owner of a company in East Granby, CT. He was concerned that the Town Attorney was advising the Commission to make a decision based solely on the findings of the soil scientists. These scientists were hired by the applicant, whose intention for the property is to build one hundred

homes, as referenced in Map 3.3. The scientists' findings that the soils of the area in question have been disturbed over the last fifty years resulted in conventional test methods are lacking in accuracy. They were forced to rely on the 100-year floodplain line for their conclusions. The key word is accuracy. He believed that a more conservative approach, also referenced by Dr. Klemmens, is the 500-year floodplain boundary. If there is not a definite means of accuracy, then the lines should be delineated erring with caution. He referenced the Town of Avon 2016 Plan of Conservation and Development, whereby the regulations restrict development in flood-prone areas within limits of wetlands and watercourses. This is a flood-prone area. Avon's regulations are more restrictive than FEMA's with regard to using the 500-year floodplain level. Over the last ten years, only four acres of land have been decided by the Commission, from over one hundred applications. The current application requires consideration of over ten acres. Vegetation will be replaced with over 800,000 square feet of concrete or tar. It will be able to absorb the water. The Commission will be voting on making it easier for the applicant to develop the land. It has been written that development of the property would be unlikely due to the flooding of the golf course. He agreed with Dr. Klemmens in his presentation to the Commission, regarding use of the 500-year boundary, and that he was unbiased. If the science is not accurate, then the 500-year floodplain line should be used, especially since the area had been disturbed. This is not accurate data.

Doris Cinti, of 4 Whitfield Heights in Avon, encouraged the Commission to hire an independent soil consultant, as so many have suggested. To think that the property will be handed over for development based upon the applicant's hired findings, does not feel right. It will feel like the Town did something wrong in its approval. She mentioned enlightened planning in relation to other towns and the use of either 100-year or 500-year floodplain line. There is nothing wrong with the Town of Avon being first in setting an example. She quoted from the fourth national climate assessment released by the National Oceanic and Atmospheric Association this past November, regarding the excessive rain experienced by the northeast and risk for future floods related to land use. She requested that the Town of Avon be proactive and build in a resistance to climate change. She thanked the Commission.

Leslie Sinclair, of 191 Nod Road in Avon, stated that it was hard to avoid emotion on this issue. The importance of the wetlands is critical since we see the flooding of the area. There is a watercourse that runs through her property. When there is excessive rain and the water runs down from the mountain, she can hear the brook roaring. It will be a matter of time before there is extreme flooding. Her house is from 1886 and she would like to ensure it exists in the future. She did not see the need for the development of this property and would like to see it remain open.

Kirsten Ek, of 12 Henderson Drive, inquired how the Colebrook Dam is factored into the issue. She did not understand the Town of Avon's relationship to the dam, and wondered what happens when the dam is utilized to release water in times of extreme flooding.

Gail Blackwell, of Plainville, CT, commented that the Commission should acquire a second opinion. She mentioned her concern for the use of pesticides and fertilizer, and the breakdown of materials in chemicals, that end up in the river.

Chairman Thier inquired if there were any closing comments from the applicant and intervenor.

Mr. Russo responded to some of the public commentary. With regard to the map based upon the 1962 soil survey, referenced by Mr. Sharlow and presented to the Commission this evening, the survey and the online soil survey application were materials which he and Mr. Klein referenced in their initial studies. He stressed the importance of noting that they were planning-level documents. Commissions do not use those as final maps, and instead use the on-site delineations by soil scientists as a standard for map amendments and map revisions. The on-site testing is considered much more accurate than the online databases. Ms. Gately stated that wintertime, with a lack of vegetation, it is not the proper time to do a delineation. He pointed out that in Connecticut, vegetation-based delineations are not done. The statutes require that delineations be based upon soils. With regard to commentary by Ms. De'Esopo, he stated that neither he nor Mr. Klein made derogatory remarks about the CT DEEP/USDA/National Conservation Resources Service database. He stressed again that it was planning-level data and not site-specific. The standard is to have an on-site delineation performed by a soil scientist, which is before the Commission. Mr. Tedeschi complained about the lack of accuracy and questioned the lack of conservatism. All of the test pit data on this map reflect soils that were collected on the site to establish the line for wetland boundaries, as determined by soils on the field. As both he and Mr. Klein have indicated that the delineation shown is upland from soil pits of non-floodplain soils and non-alluvial soils. An extremely conservative factor in the delineation has been built in.

Attorney Smith responded with closing remarks. The intervenor has done part of its job, since before intervening and members of the public became aware, the Commission had a much less complete application than it does today. The applicant and its consultants seem put upon to deliver more information. It is a large proposal before the Commission. A couple of components are missing. A peer review is suggested at this point. Attorney Landolina has indicated to the Commission that the applicant will not extend the hearing, and the hearing will have to be closed and decide upon the information presented thus far. That is the choice of the applicant. The Commission has a choice as well, which the application does not have to be voted through because the application is forced closed, and the Commission needs more information. The Commission does not need to accept the work of any expert. The case law says that if there is no contravening expertise, and the Commission finds the testimony credible and no further information is needed, then the Commission should accept an expert. However, if the Commission feels that information is missing, or the Commission needs confirmation, it can be turned down. It would be up to the applicant to come back to the Commission with whatever it plans to do, or the Commission could then hire its own consultant. The Commission does not have to approve the application if the applicant closes the hearing. The Commission is implored to suggest to Attorney Landolina that the application should be extended an additional thirty days, even though from the risk of an attorney if it would possibly allow a witness to destroy the case, the attorney is there to protect the wetlands and ensure there is an appropriate decision. It would be to the Commission's benefit. The Commission is requested to ask the applicant to allow it get the information from its own expert. If the applicant refuses, it is respectfully requested that the Commission turn down the application and the applicant can return with a properly noticed application. The process should be complete for the Commission to make a proper and informed decision. He thanked the Commission.

Attorney Landolina thanked the Commission for the last opportunity to speak. A number of prepared remarks had already been discussed tonight. Over the three months, based upon the highly technical questions that many of the Commission members asked, the Commission understands the scope of the application. It is a highly technical and complex issue which is left to the soil scientists. This is stated in the Town of Avon Inland Wetlands Regulations. In the planning stage for this application, the applicant hired Mr. Russo as the soil scientist. He completed his work. It was suggested by one of the team members that perhaps a second soil scientist should be acquired to check Mr. Russo's work. We looked into the field and questioned who was highly respected, not only in the field, but in the area of this community. There was one name which repeatedly came up, and that was Mr. Klein. We had already conducted a peer review. The 2004 applications' impact has already been discussed and it will not be left to the Commission to determine its legal significance with respect to this application. With regard to Town Attorney Olson's legal opinions from the last hearing, the Commission should be clear on its obligations. Regarding Attorney Smith's letter dated February 26, 2019, a statement in the first paragraph, noted in bold italics, "The Commission has already determined that this proceeding involves 'conduct' under § 22a-19 that could unreasonably pollute, impair or destroy wetlands when it approved NRP's verified Petition for Intervention and formally recognized NRP as an intervenor in this proceeding." He disagreed entirely with this statement. All that the Commission has done by granting the intervenor status is to acknowledge, in the Commission's view, that this application involves conduct, and nothing else. The implication in this statement runs through the rest of Attorney Smith's letter, and implies that the applicant has the burden of proving no impairment to the wetlands. The applicant does in one sense to articulate through the mapping, and through the soil science with the best methodology possible, where the wetlands are accurately located on this site. That has been done. However, once completed, the intervenor has the burden of proving that the applicant is impairing the wetlands. The applicant is not destroying any wetlands in existence. What is not there, cannot be destroyed. No substantial evidence from the intervenor has been presented in proving the requirements under the statute. Attorney Landolina read a quote of the Connecticut statute which describes the issue of *conduct* with regard to the impairment of wetlands and resources. It is the intervenor's burden. The only issue that the intervenor takes, aside from the procedural issues of notice and whether to hire a third party consultant, is the designation of the 100-year line for the limits of alluvial soils on the site. The reason why it was agreed with the Commission in 1997 and 2004, that the 100-year boundary line was appropriate, was because there are alluvial soils riverward of that line. Most of the soils in that area are not of alluvial soils or floodplain soils, but are upland soils. It is already a conservative line. There is no evidence, after exhaustive testing or evidence introduced by the intervenor, that there are alluvial soils or floodplain soils located between the 100-year and 500-year floodplain boundary lines. At the very least, in order to move that line away from the river to the 500-year boundary line would require some evidence that there are alluvial soils and floodplain soils in that area. Absent that, there is no basis to move the 100-year line to the 500-year line, as a matter of regulatory practice. What the intervenor is asking the Commission to do is to establish the 500-year boundary line throughout the Farmington Valley. The Commission could not do that without changing the Town's regulations. The applicant has carried its burden of establishing the accurate delineation of wetlands, and alluvial soils and floodplain soils on the site. The applicant respectfully asks the Commission to close the public

hearing this evening and vote, at some point either tonight or in the future, to accept the delineations. He thanked the Commission.

Town Attorney Olson stated that a Commission member should move to close the public hearing.

Commissioner Applefield inquired of the applicant if it was still its position to close the hearing after the public testimony regarding a plea from the public.

Attorney Landolina responded in the affirmative.

Commissioner Dean inquired if the Commission were to vote on whether to seek an independent soil science consultant, in what context would that be done. Would the public hearing still be open or be closed?

Chairman Thier and Town Attorney Olson concurred that the hearing would have to be closed without the applicant's agreement to extend the continuance, and that it was too late.

Commissioner Dean indicated that if the Commission were to hire an independent consultant, it would have to deny the application.

Chairman Thier indicated that would be the likely course of action. He stated that the Commission would have to vote after the close of the hearing. There is no choice in the matter.

Town Attorney Olson stated that the Commission would not be allowed to accept any new information after the close of the public hearing, except from staff or the Town Counsel if it is related to information already submitted.

Commission members and the Town Attorney concurred there would be sixty-five days to vote on the application's approval or disapproval.

Chairman Thier made a motion to close the public hearing. Commissioner Dean seconded the motion. All were in favor.

Chairman Thier noted that the Commission could have the time to review all materials again. The Commission could decide to continue its discussion tonight or vote tonight. There will be two Commission meetings within the sixty-five day deadline to vote; the April and May 2019 meetings. If the Commission had questions for staff and the Town Attorney, they would be settled in this time period. A special meeting could also be scheduled in order to vote on the application. He asked the Commissioners if they wanted to discuss issues this evening, vote, or postpone the vote on the application.

The next Inland Wetlands Commission regularly scheduled meeting will be on April 2, 2019.

The majority of Commissioners requested more review time in order to vote.

Commissioner Feldman commented that enough information was heard and he did not see the point in delaying a vote.

Chairman Thier indicated that the applicant did not have to attend the next Inland Wetlands Commission meeting. The materials will be discussed among the Commissioners at the next meeting, plus any other agenda items. The Commissioners can vote at that meeting, if satisfied with their decisions, or request more time for review. Sixty-five days from today, a vote must be held by the Commission.

The approval of the prior minutes was postponed upon the request of Commissioner Applefield in order to conduct a full review. Chairman Thier granted that request and asked for a motion to adjourn the meeting.

Commissioner Feldman made a motion to adjourn the meeting. Commissioner Usich seconded the motion. All were in favor.

NEXT MEETING

The next regularly scheduled meeting is Tuesday, April 2, 2019.

There being no further business, the meeting adjourned at 10:03 p.m.

Susan Guimaraes, Clerk
Inland Wetlands Commission
Planning and Community Development