

THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A SPECIAL MEETING FOR A PUBLIC HEARING ON WEDNESDAY, JULY 17, 2019, IN THE FIREHOUSE COMPANY 1.

Present were Clifford Thier, Chair, and Michael Beauchamp, Vice-chair; and Commissioners Bob Breckinridge, Jed Usich, Martha Dean, and Dean Applefield. Absent was Commissioner Michael Feldman. Also present was John McCahill, Planning and Community Development Specialist/Wetlands Agent.

Chairman Thier called the meeting to order at 7:00 p.m.

John McCahill stated that Town staff had notified the CT Department of Energy and Environmental Protection (CT DEEP) with regard to the application for the proposed Inland Wetlands and Watercourses Regulations amendment 35 days in advance of this hearing, in accordance with the state statutes. A full copy of Appl. #761 has been filed with the Office of the Town Clerk for at least 10 days in advance of this hearing. Legal notices for the hearing were published on two occasions within the deadlines, as specified in the Town of Avon Inland Wetlands and Watercourses Regulations.

PUBLIC HEARING:

APPL. #761 – Nod Road Preservation, Inc., c/o Robinson & Cole, LLP applicant: Requests proposed regulation text amendment of the Town of Avon Inland Wetlands and Watercourses Regulations: The proposed amendment expands the upland review area for applications proximate to Avon's watercourses from 100 feet to 200 feet measured horizontally from any watercourse boundary.

Present on behalf of the applicant, Nod Road Preservation, Inc., was Attorney Brian R. Smith, of Robinson & Cole LLP.

Attorney Smith introduced the applicant's proposal for a regulation amendment of the Town of Avon Inland Wetlands and Watercourses Regulations. He referenced the importance of the comparison of upland review area regulations of Avon's neighboring towns that was provided with the application. With the exception of Simsbury and Canton, the other towns have greater review areas for watercourses than the Town of Avon. The proposed increase in upland review area would provide a greater tool for the Commission to regulate land development within those boundaries. He submitted a copy of a reduced image of the existing map of the Town of Avon Inland Wetlands and Watercourses to the Commission, for later reference. He read aloud the supporting letter of Michael W. Klemens, PhD, which was submitted for the record. Attorney Smith noted the larger upland review areas of some of the surrounding towns. He indicated the appropriate nature of the application in relation to the importance of the Farmington River and Avon's many watercourses of value, especially those that are steeply graded. He referenced the Connecticut Association of Conservation & Inland Wetlands Commissions (CACIWC) which recommends, at a minimum, the 100' upland review area. He reiterated Dr. Klemens' position that the upland review area is not to indicate a prohibition of development. He requested that the Commission approve the amendment which would allow for an increased upland review area.

Susan Barney, a Bloomfield resident and board member of the Farmington River Watershed Association (FRWA), read aloud a letter dated July 17, 2019, from the association's Executive Director Bill Dornbos, as submitted for the record.

Attorney Carl Landolina, of Fahey and Landolina, Attorneys, LLC, spoke on behalf of the owners of properties in town, which include the Blue Fox Run Golf Course, located on Nod Road. The property on Nod Road is bisected by the Farmington River and it has natural and man-made intermittent watercourses. These properties will be negatively impacted by this application, if approved. He was against the approval of the application. He submitted copies of a CT DEEP published document titled, *Guidelines Upland Review Area Regulations Connecticut's Inland Wetlands & Watercourses Act*, dated June, 1997, to the Commission for its review. He raised the technical and procedural issue of legal standing. Typically, in order to present an application before a land use board, an applicant must have legal standing, as a requirement of the law; where there is a direct connection between the applicant and an area of land. In this case, the applicant is a corporation that does not own any land, and there is no connection to any land. He requested that the Commission seek advice from the Town Attorney on the issue of the applicant's legal standing. There is the concept of representational standing, and that typically would apply in the case of aggrieved parties, in which they get to intervene in proceedings. Nod Road Preservation, Inc., is incorporated and without members. He did not believe that the Town of Avon's regulations were clear on the issue.

Chairman Thier inquired whether or not Attorney Landolina had any evidence of case law to support his argument on legal standing.

Attorney Landolina did not have case law examples with him that evening.

Commissioner Applefield inquired of Attorney Landolina whether he felt the issue of legal standing was a legislative task for the Commission. He asked Attorney Landolina if he believed the application request could only come from a land owner.

Attorney Landolina concurred that the issue of legal standing is a legislative task. He thought that it was debatable whether or not a request such as the one in this application should come from a land owner. He then presented a document to the Commission titled, "Upland Review Analysis by Town." He stated one of the applicant's arguments was that other towns had regulated upland review areas of greater distances than that of the Town of Avon. His office obtained the information on 163 out of 169 Connecticut towns. In 140 of the 163 towns, the upland review area of watercourses is 100 feet. The upland review areas of the remaining 23 towns are between 100 feet and 200 feet. Within the upland review areas of the remaining 23 towns, there are some areas of special concern; and those upland review areas may be greater than 200 feet. A copy of the printed website link for the most recently updated, *CT DEEP's Inland Wetlands and Watercourses Model Municipal Regulations*, dated May 1, 2006, was submitted for the record. In the model regulations, *Appendix C, "Guidelines, Upland Review Area Regulations Connecticut's Inland Wetlands & Watercourses Act,"* the last sentence on page number 4 states: "The DEP believes that a 100 foot-wide upland review area is sufficient for reviewing construction activities in areas surrounding wetlands or watercourses because most of the activities which are likely to impact or affect these resources will be located in that area."

However, based on the special factors of concern to a wetlands agency, e.g., wetland and watercourse values, slope, soils, existing development, etc., a greater or lesser distance may be appropriate for a particular municipality. However, beyond 100 feet it is neither practical nor desirable, from a wetlands and watercourses management perspective, to automatically require an inland wetlands permit for *all* construction activities. It must be emphasized that other municipal authorities and mechanisms involving planning, zoning and subdivision decisions and plans of conservation and development, play a role in addressing the broader watershed issues." He stated that it is unusual to see an application of this magnitude before a commission. The application has an impact beyond the boundaries of the properties owned by his clients. The application proposes a regulatory change that treats all watercourses the same; whether they be the Farmington River or intermittent streams that transport water for only a small percentage of the year. It would be unusual to see this type of application brought before a commission by a third party. Exceptions to the regulatory distances were likely created after a deliberative period of analysis, including the nature of the impact, and how many properties would be affected, etc. That process would take place over several months. Considering the state's regulatory deadlines for holding and deciding the outcome of a public hearing, for an application of this magnitude, there is not adequate time for the Commission to engage in a deliberative process, as should be required for this proposed amendment. All regulations that affect the use of property are in derogation of the common law property rights. This would be a regulatory land-taking; however, not unconstitutional. The applicant's understated goal of this application is to stop development along Nod Road. Every resident who owns property with an intermittent watercourse would be affected by this amendment, including those who own one acre of land. Increasing the regulatory area by 100 feet, will impact properties by a measure of two acres of land. He urged the Commission to deny the application, citing that its approval should only be made on a rational basis.

Harry Werner, of 20 Goddard Road in North Granby, began with statements regarding the nature of the community in the Farmington Valley in relation to the goals of Nod Road Preservation, Inc.

Chairman Thier requested that all speakers this evening comment only on the application before the Commission and not on issues related to other applications that have been heard by the Commission. A particular parcel of land, including that of the Blue Fox Run Golf Course, is not of concern to the Commission this evening.

Mr. Werner raised the issue of the Farmington River's recent federal wild and scenic river designation. Out of 6,000 miles of river in Connecticut, this designation represents two percent of those miles. He read the following statement from the National Parks Service website: "For federally administered rivers, the designated boundaries generally average .25 of a mile on either bank in the lower 48 states." Instead of 100-200 feet, the recommendation for regulated distance for federally designated wild and scenic rivers is actually 1,350 feet on either bank.

Robert Parker, an Avon land owner, stated that he has presented applications before the Commission over the last two decades, as he has sought approval for subdivisions in town. In 2005, he received approval from the Commission before he could proceed to build a house on Hollister Drive. In 2006, the upland review area had been amended from a 40-foot review area for wetlands to a 100-foot upland review area. He had incurred additional expenses on this

project, including engineering, etc., since he did not build the house prior to the regulation amendment; in revisiting the project, he had to present to the Commission again in 2013, for its approval due to the amended regulation. He raised another issue of concern. Due to his business ventures, he had spent time in Tallahassee, Florida, in the spring of 2019, presenting his statements to committee hearings of state boards, after a well-organized and well-funded special interest group proposed legislation to change state regulations in Florida. The regulations in that state were fair and reasonable, and there was no reason to change them. The special interest group was looking to weaponized the regulations and serve its own interests. In some way, and not to that degree, tonight's application is attempting to customize the Town's regulations for the applicant's benefit. Here, the special interest group is looking to change the regulations to create roadblocks for a particular property owner in town, and any subsequent owner or developer of this land. Just like the regulations in Florida, the Town's Inland Wetlands and Watercourses Regulations are fair and reasonable, and there is no reason to change them. After decades of seeing what works and what does not, this Commission and its previous members have carefully crafted these regulations. This process works. He requested that the Commission deny this application and not amend the regulations; and utilize the regulations, as they are, to judge all future applications in the Town of Avon.

Commissioner Usich questioned whether the application before the Commission met the standards for inland wetlands applications.

Commissioner Thier indicated that if it does not, the Commission would not vote on the application this evening. Tonight's meeting is an opportunity to gather information.

Commissioner Usich inquired whether or not any research or evaluation had been conducted to investigate the potential impact of the proposed upland review increase for watercourses; i.e., the impact of the proposed total 400 feet of review area, or the equivalent of two acres of land, as noted by Attorney Landolina. What would be the impact for existing property owners if the regulations were to be amended as proposed?

Attorney Smith stated that the evaluation is based upon trying to balance the regulations. The evaluation was based upon Dr. Klemens' work and the protection of watercourses. In Dr. Klemens' opinion, the Farmington River should require an even wider regulatory review area; in his view, it would be an area of 750 feet from the river. At a minimum, Dr. Klemens would recommend a 150-foot natural buffer for watercourses with steep slopes, and also for vernal pools. The properties of the individual homeowners were not evaluated.

Commissioner Usich raised the example that if a homeowner on Scoville Road presented an application to this Commission, he or she would then need to involve the neighboring properties due to the increased review area distance. It may be that actions taken with the best of intentions have, in the end, many unforeseen consequences. The impacts of the proposed amendment would need to be looked at in greater depth.

Commissioner Dean stated that what other towns do may be interesting; however, the decisions of the Commission and the outcomes for the Town of Avon and its residents are what matters. As a Commission, its decisions will be based upon what is best for the Town of Avon. It seems

that the basis for the application is the concern for the Farmington River. Commissioner Usich mentioned concern about the evaluation of all watercourses in Avon. The amount of rivulets and intermittent watercourses throughout Avon would require a vast amount of properties to be evaluated before the Commission. The Farmington River might require an increased regulatory review area. The concern is that the Farmington River should be a separate issue than the other watercourses of the town. She questioned why the approach of an application to solely consider a change to the upland review area of the Farmington River was not taken.

Attorney Smith stated that the issue of the application focusing solely on the Farmington River was not discussed. The focus was on the uniformity of balance between a wide distance of upland review area for something like the Farmington River and other watercourses. He suggested that the Commission enact the amendment as-is. He acknowledged that the Commission might have a much larger quantity of applications to be reviewed by Town staff and the Inland Wetlands Commission; however, he did not believe that the scenario of a drastically increased quantity of applications would actually happen. If that did occur, the wetlands agent could determine if there were a level of significant activity in a potential application prior to the presentation process before the Commission. That system might safeguard the unsuspecting homeowner from being involved in another owner's application.

Commissioner Dean inquired of Attorney Smith where he felt all of the problem areas in Avon were located. She could envision enlarging the upland review area distance for the Farmington River due to its significance. She did not see a problem with the manner in which upland review areas have been regulated in Avon in the past. She inquired if he could point to problems associated with any smaller streams in Avon.

Attorney Smith responded that watercourses with steep sandy soils were of concern. If a location has steep sandy soils, then a 150-foot natural buffer would be needed, at a minimum. He did not have a specific example of a problematic location.

Commissioner Dean inquired if Attorney Smith knew of an area in Avon with steep sandy soils, where erosion has occurred due to development, but should not have been a result. Would Dr. Klemens have added that information to his letter, if he had specific examples? She again sought clarification on where there were problem areas in the Town of Avon.

Attorney Smith did not have an example of such an area.

Commissioner Applefield inquired about the letter from Robinson & Cole LLP, dated May 16, 2019, on record. He read from the fourth paragraph, "The critical issues affecting watercourses justifies a wider and increased scrutiny due to the history of flooding in Avon." How would the proposed change address that issue?

Attorney Smith responded that where flooding occurs around watercourses, there would be a wider area to protect flora and fauna. Dr. Klemens and others have said that the areas defined as regulated have to be examined. Where there are issues of flooding, a 200-foot upland review area will better capture the affects than a 100-foot upland review area.

Commissioner Applefield did not understand the logic. He contended that it was a leap to say that flooding would be better regulated if the upland review area were wider and the Commission's regulatory scope expanded.

Attorney Smith responded that activities would be better regulated in a wider upland review area prone to flooding, and not that the flooding itself would be better regulated.

Commissioner Applefield mentioned the earlier reference of the lower portion of the Farmington River designated as wild and scenic, for which Attorney Smith highlighted the necessity for the Commission to increase the upland review area. What, if anything, as a result of that designation, changed relative to the protection of the river and the Commission's role in the protection of the river?

Attorney Smith responded that it was related to Commissioner Dean's point about the Farmington River being an important resource.

Commissioner Applefield inquired about the legal significance of the Farmington River's designation as a wild and scenic river. What has changed in the role of the Commission in relation to the Farmington River's federal designation? He acknowledged that the designation is important.

Attorney Smith responded that there is no legal significance related to the designation in the sense that it would require any particular action from the Commission. This is a legislative issue that would suggest an examination of policy, which the Commission typically does not review. Expanding the Commission's jurisdiction to examine the significance of the Farmington River related to the designation seems necessary from a policy viewpoint.

Commissioner Applefield stated that one of the handouts from Attorney Landolina, *Guidelines Upland Review Area Regulations Connecticut's Inland Wetlands & Watercourses Act*, dated 1997, is older information. However, the guidelines identify a number of different environmental considerations that are recommended for Commission review. Unfortunately, Dr. Klemens' letter does not address most of those considerations. Dr. Klemens' letter includes a recommendation; however, the basis for it is difficult to discern other than that it is his opinion. The handout identifies items such as controlling non-point source pollution, protecting aquatic habitat, controlling temperature, insulating fish and wildlife from human activities, and providing a corridor linking wetlands and watercourses. How would the Commission make a decision on those considerations in the absence of any meaningful data showing that increasing the distance from watercourses, from 100 feet to 200 feet, would have any impact on any of those criteria?

Attorney Smith responded again with his regret that Dr. Klemens was not present this evening. Dr. Klemens would be able to answer Commissioner Applefield's question.

Commissioner Applefield stated that documentation and evidence would be necessary in order to consider the proposed amendment. The theory which the Commission is asked to pursue is based on the decisions of other towns, and not based upon any information relevant to the Town of Avon. A good decision should be made on the basis of scientific information in order to

determine the proper number for an increased distance, if an amendment were to be approved. The purpose of the rule-making process is to protect the natural resources; however, not by picking an assumed number for the distance. The determination that the Town of Avon's watercourses are inadequately protected has not been discussed or established. Among other considerations, the following would have to be known: the areas of impact, explained on a map; and a sense of the additional costs for future applicants, etc.

Vice-chair Beauchamp expressed his agreement with statements made by the other Commissioners this evening. He reiterated the need for specific examples for reasons why the current regulation should be changed. Rather than focusing on concerns, specific information is required. He inquired of Attorney Smith regarding Dr. Klemens' credentials.

Attorney Smith referenced the previously submitted curriculum vitae (CV) of Dr. Klemens, who is a biologist with extensive experience throughout Connecticut and other states. Dr. Klemens has served on various commissions in Connecticut and New York, and has a PhD in zoology; he has worked for many municipalities and developers in the State of Connecticut; and he has also provided expert testimony in court proceedings.

Vice-chair Beauchamp stated that he had listened and understood the concerns from the present audience. He raised the potential scenario of a life-long resident of the Town of Avon who intended to subdivide two acres of land. The resident would be burdened with the costs to subdivide due to an inland wetlands regulation amendment. Increased costs would likely be borne by many residents with future land development. It is very important to allow for future development. As a member of this Commission for the past 15 years, there has not been a problem with the regulations since the increase in the upland review area of properties, currently in place, and effective in 2006.

Commissioner Breckinridge raised the issue that expert testimony was not provided in order for the Commission to ask its necessary questions. The application involves the request for a change in regulations that the Commissioners believe is significant. There are no witnesses here this evening to corroborate the presentation. He did not see how it was possible for the Commission to approve the application in its present form. The effects on landowners could be potentially huge, as noted. Mr. Dornbos, Executive Director of the Farmington River Watershed Association (FRWA), submitted a letter in support of the application, from FRWA's headquarters in Simsbury. The Town of Simsbury has many areas of wetlands and watercourses. Why is the Town of Simsbury's distance regulation for watercourses only 100 feet? Sometimes it is valuable to look at the regulations of other towns, and Simsbury is a very progressive town in its regulations. It is curious why this issue has not been raised in Simsbury. It would be helpful to know why Mr. Dornbos has not expressed similar concerns in Simsbury.

Attorney Smith indicated that Mr. Dornbos was a supporter, and not a witness, for the application.

Commissioner Breckinridge stated that two letters from Mr. Dornbos have been provided to the Commission for this application. Since Mr. Dornbos is not present to support his statements, the inability to question his position is disappointing.

Attorney Smith indicated that he was made aware, only at the end of the business day, that expert testimony at tonight's meeting would not be available.

Chairman Thier inquired about Attorney Smith's earlier reference regarding the meaning of the term *steep slope*, in terms of degree of the angle of steepness.

Attorney Smith responded that he would confer with Dr. Klemens for the proper definition and later submit the information to John McCahill.

Chairman Thier inquired about the meaning of the federal designation of the Farmington River as a wild and scenic river, and how it affords greater protection of the river. The designation does not seem to achieve or require anything. What is the significance of the designation aside from signaling that the river is important?

Attorney Smith responded that it was representative of examining regulations at the local level.

Ms. Barney commented that \$22,000 would be appropriated toward committee management for the protection of the river from major federal projects, such as new damming. The appropriation process is administered by the National Parks Administration. It enables the towns to decide how the wild and scenic designation will be implemented. The lower Farmington River and Salmon Brook are eligible for monies to be approved by congress in the approximate amount of \$175,000. This designation has been assigned more often in the West, but is exceptional for the New England region.

Chairman Thier stated that the Commission is already charged with protecting the Farmington River.

Commissioner Breckinridge commented that the upper Farmington River had received the designation of a wild and scenic river in the past. He asked for examples of other towns' appropriation of monies. For what purposes are the monies spent?

Ms. Barney stated that she did not have the answers to the questions of the expenditures. She indicated that the funding implementation has been left to the decision-making of the relative towns. The lower Farmington River encompasses the area from the Goodwin Dam to the Connecticut River. Sally Rieger is the chairperson for the Lower Farmington River and Salmon Brook Wild and Scenic Study Committee. Ms. Rieger would be able to speak to this issue and she could be asked to present before this Commission.

John McCahill stated that a letter from Sally Rieger, dated July 3, 2019, had been received for the record.

Chairman Thier expressed his disappointment with the applicant's presentation. The applicant's expert witness, Dr. Klemens, was not present at this hearing and also did not prepare a report in support of his letter submitted to the Commission. If the applicant appears before the Commission again, for any reason, and is not prepared with supporting data reports, etc., the Commission requests that John McCahill postpone the meeting.

Attorney Smith indicated that if the Commission were willing to continue the hearing, the applicant's parties would present prepared testimony before the Commission.

Chairman Thier stated that if the Commission were to agree to a hearing continuation, the Commission would request supporting documents at least 10 days prior to the meeting. He stated that documents for all meetings and public hearings of the Inland Wetlands Commission should not be distributed on the evening of a meeting; documents must be received in advance, according to the regulations of the Town of Avon Inland Wetlands Commission.

Vice-chair Beauchamp inquired about the Connecticut town in which Dr. Klemens lives.

Attorney Smith responded that Dr. Klemens resides in a hamlet of Salisbury.

Commissioner Breckinridge pointed out that Salisbury regulates 75 feet from wetlands and 150 feet from watercourses.

Commissioner Applefield stated that he was uncertain as to the Commission's stance at the moment; however, the applicant may wish to consider withdrawing the application. He was uncertain as to the legal effect of the Commission's decision to deny the application.

Chairman Thier inquired of John McCahill whether or not it would be possible to submit a withdrawn application at a later date.

John McCahill responded in the affirmative. The Commission needs to decide procedurally if there is a motion to continue the public hearing.

Attorney Smith requested a brief recess to confer with his party.

Chairman Thier stated there would be a five-minute recess.

Attorney Smith stated that he had consulted with the applicant. He and his client thanked the Commission for its consideration this evening, and the applicant respectfully agrees to withdraw the application.

John McCahill requested that Attorney Smith provide a written statement of withdrawal to be added to the record.

Attorney Smith responded in the affirmative.

Chairman Thier closed the public hearing.
NEXT REGULARLY SCHEDULED MEETING:

The next regularly scheduled meeting is Tuesday, September 3, 2019.

There being no further business, the meeting adjourned at 8:32 p.m.

Susan Guimaraes, Clerk
Inland Wetlands Commission
Town of Avon Planning and Community Development