

THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A VIRTUAL SPECIAL MEETING FOR A PUBLIC HEARING CONTINUATION ON THURSDAY, NOVEMBER 5, 2020, AT 7:00 P.M., VIA ZOOM: <https://zoom.us/j/97049951568>; Dial by your location+1 646 876 9923 US (New York), Meeting ID: 970 4995 1568#.

Present were Chair Clifford Thier, and Vice-chair Michael Beauchamp; and Commissioners Bob Breckinridge, and Jed Usich. Absent were Commissioners Martha Dean and Michael Feldman, (and Commission member vacancy). Also present was John McCahill, Planning and Community Development Specialist/Wetlands Agent, and Town of Avon Attorney Kari Olson.

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

Chair Thier welcomed those who had joined the meeting and stated that the meeting was being coordinated and recorded by a meeting consultant, hired by the Town of Avon, to assist those participating in complying with the rules and protocol process regarding the virtual Zoom meeting. Chair Thier read aloud the protocol and processes related to the meeting for the map amendment application.

PUBLIC HEARING:

APPL. #768 – Blue Fox Run Golf Course, LLC, Lisa Wilson Foley, applicant; Blue Fox Run Golf Course, LLC, owner; Nod Road Properties, LLC, owner; and Corner Properties, LLC, owner: Requesting to amend the Town of Avon Inland Wetlands and Watercourses Map, per Section 15 of the Regulations, to update the map for the subject properties to depict accurate information based on detailed field mapping and soil evaluations. Locations: 65 Nod Road, Parcel 3290065; 117 Nod Road, Parcel 3290117; and 231 Nod Road, Parcel 3290231.

Present was Attorney Janet Brooks, speaking on behalf of the petitioners Blue Fox Run Golf Course, LLC, Nod Road Properties, LLC, and Corner Properties, LLC, in this proceeding to officially amend the map of Inlands Wetlands and Watercourses Town of Avon, CT. She stated that the petitioners were before the Commission in a map amendment proceeding, which is addressed differently in the Town's regulations, than those regulations which address the permitting process. She stated that a proposal to undertake regulated activities was not relevant in this application at this time; this application establishes a science-driven determination of wetlands boundaries. She referenced the Town's regulations in that the Town's wetlands and watercourses map is a general one and not controlling related to the actual conditions in the field. The application seeks to amend the Town's map to reflect accurate wetlands delineations on the map. She stated that the petitioners were before the Commission so that the Commission may amend its map as more accurate information becomes available, according to the Town's regulations. The new data presented in this application represents the work of 38 new shovel pits, 12 new backhoe pits, and the opinion letter from the third-party review completed by the North Central Conservation District (NCCD), which provided a neutral and scientific opinion. She referenced that the NCCD's opinion which stated the wetland delineation proposed by the petitioners accurately and optimally represented wetlands boundaries and soil conditions observed during their field inspection.

Michael Cegan, ASLA and Land Planner, of Richter and Cegan, Landscape Architects and Urban Designers, summarized the application for those meeting participants who were not at the first date of the public hearing. He referenced Map 1.0 and stated that the 230.4 acre Blue Fox Run Golf Course represented three parcels of land, located along East Main Street and Nod Road; and noted that the Farmington River runs through the middle of the acres and along a portion of the western border. The map amendment application represents the portion of the golf course east of the river, which is approximately 163 acres. He referenced Map 2.0 regarding the areas on the map which were wetlands and watercourses represented in blue color, and the alluvial soils on the map which were represented in brown color. He stated that the golf course ownership was in the middle of a comprehensive review of its operations, however, there were no development plans or proposed wetland activities that were part of this application proposal. He stated that there had been a request from a Commissioner, on the first date of the public hearing, to see a map with illustrated comparisons of the field-delineated wetlands from the proposed map amendment to the Town's existing wetlands map. He referenced Map 4.1, which showed the Town's map and the red-outlined portion of the subject site, from an aerial perspective. He referenced Map 4.2, which was a portion of the Town's wetlands map which showed only the subject property area, and the Town's mapping as it exists. He stated that in his career he had never seen a town's map match the conditions in the field for property where wetlands had been delineated by a soil scientist, whereby wetlands on a town map cannot be confirmed by field data; and also wetlands that are not identified on a town's map, however, are sometimes delineated in the field by a soil scientist. Both of these scenarios presently occur within the subject property. He referred to the applicant team's field-delineated wetlands and watercourses mapping, shown in a green color, and seen in Map 4.3. He stated that the comparison graphic, of subject property field-delineated wetlands and watercourses relative to those of the Town's map, was illustrated in Map 4.4. The turquoise color represented the overlapping areas of the subject property delineation and the Town's map; the blue color areas represented the Town's map only, but were shown not to be wetlands based on field data; the green color areas were from the field delineation mapping only and were not represented on the Town's map. He stated that the graphics on this map do not result in any removal of wetland resources, instead they accurately represent the existing resources.

Robert Russo, primary Certified Soil Scientist for the applicant, with CLA Engineers, Inc., reiterated the purpose of the application. He stated that his field delineations of wetlands and watercourses was peer-reviewed by Michael Klein, of Davison Environmental, and further reviewed by the NCCD. He referred to Map 2.1 which represented over 100 field-data points within the subject property area. The area is a mixture of soils that were disturbed and those which were not disturbed, which warranted a high level of investigation. He stated that the subject property maps before the Commission represented significantly more data than what was presented for this property in the past. He summarized the timeline of investigations conducted in the field on the subject property. He stated that the NCCD soil scientists agreed that the soils delineation was accurate. He stated that the delineation was not based upon a surrogate FEMA map. An elevation is used as a factor in determining the alluvial soils at the site and it is an appropriate tool in the determination. He stated that alluvial soils are deposited by water which seeks a level elevation. An elevation is established to encompass all of the alluvial soil deposits. He referenced the CT Eco website, run by the University of Connecticut and the Connecticut Department of Energy and Environmental Protection (CT DEEP), and stated that there exists a

listing of use limitations for the soils survey data. He quoted from that website, "The natural resources conservation service will not provide any evaluations of these maps for purposes related to solely state or local regulatory [entities] ...the data center is not for use as a primary tool in permitting or siting decisions." He reiterated the findings of the NCCD and quoted from the consultant's review letter.

Michael Klein, Certified Soil Scientist and peer reviewer with Davison Environmental, introduced himself and stated that he was part of the applicant's team since he had worked on this highly disturbed site for many years. He responded with specific information to public comments and questions that had been received by the Town, including those he believed to represent inaccuracies and irrelevancies, as related to this application. He discussed topics such as the following: state and local regulations and timelines regarding wetlands testing; soil genesis, existing soil conditions, and disturbed soils related to the golf course; the methodology of and science behind soil testing; existing and established soils testing research; the professional credential of the NCCD; the four flood controls measures that exist upstream of the Farmington River; issues of flooding events; risks of flooding from the Farmington River; the general regulation for building structures at a level related to the 500-year storm; and the commentary that was general in definition but not relevant to this particular site. He highlighted a particular issue regarding the inaccuracy of the Town's wetlands and watercourses map, in that there are two large ponds that are not identified on the Town's existing map; this is evidence that the Town's map was meant for use in general planning and not as an indication of existing soil evidence and boundaries; and in three or four sections of the Town's regulations, verbiage recognized that the Town map was not meant for purposes of existing wetland delineations. He stated that it would not be prudent to go through a review process of restructuring possibilities for the golf course without first knowing the wetlands delineation; and the Town's regulations require the delineation for permitting of wetlands activities.

Commissioner Usich noted that FEMA flood boundaries tend to be increasing over the years. He inquired whether or not that was relevant given that there are multiple dams upstream which control water flow along the Farmington River; and what the potential was for FEMA to raise the boundaries, with relevance to the existing dams, if an elevation is used in determining alluvial flood lines.

Mr. Klein stated that flood control measures that exist upstream of the Farmington River were built to a higher standard than the 100-year flood plain, and they control the flooding downstream. The dams were built in response to the floods of 1938 and 1955, and the notion that climate change will affect those elevations is not grounded in fact. He confirmed that the dam structures were the factors that control the elevation of the river and that climate was not the factor.

Commissioner Breckinridge inquired about the dams upstream and whether or not soil scientists looked at the land as it was before the dams were installed in order to obtain greater accuracy of the soil characteristics on the site.

Mr. Klein responded that there are not many locations with undisturbed soils where alluvial soil formation can be found. He stated that the dams were built approximately in the 1960s and

alluvial soils take a much longer period of time to form, and characteristics of alluvial soils would not disappear within that time frame. The construction of the dams did not affect the delineation. He stated that test pits were excavated down to 6-8 feet. They did not dig test pits in the berms or greens on the site.

Mr. Russo reiterated and expanded upon Mr. Klein's statements. He stated that in certain undisturbed areas, present prior to the construction of the dams, alluvial soils were mapped and used as the boundary for the site.

Vice-chair Beauchamp stated that the presentation had been thorough and he did not have further questions at that time.

John McCahill stated that Town staff had been diligent about posting application materials and documents to the Town of Avon Inland Wetlands Commission website, especially in order to build the record; materials received prior to approximately 2:00 p.m. that afternoon had been posted. He stated that there was one correspondence received after that time today, from Christopher Jackson, of 232 Nod Road, and summarized the letter aloud and included excerpts of the letter.

Chair Thier asked John McCahill to remind participants how to use the Zoom feature, *raise your hand*, in order for participants to request commentary. John McCahill stated that participants can click on the participant list, which is at the bottom of most screens, where someone will see the *raise your hand* feature and icon. A diagram illustrating the tip for this Zoom feature had been posted to the Town's Inland Wetlands Commission webpage.

Attorney Brian Smith, of Robinson & Cole, LLP, representing Nod Road Preservation, Inc. (NRP) stated that his party would request the ability to provide testimony that evening. He also requested for the Town's Inland Wetlands Commission to provide clarity on the status of his party's Petition to Intervene. He referred to the responses of his party, those of Attorney Brooks, and those of the Town Attorney. He requested to be heard on these points, in order to discuss what rights his party might have from the viewpoint of the Commission.

Chair Thier gave the opportunity to speak on these points to Attorney Smith. Attorney Smith introduced Attorney Evan Seeman.

Attorney Evan Seeman, of Robinson & Cole, LLP, also representing NRP spoke about the reasons why the Town of Avon Inland Wetlands Commission should grant intervenor status to NRP, as it has filed a certified request for intervenor status. He stated that the previous application for these properties, brought before the Commission in 2019, was substantially the same by the applicants in requesting a map amendment using the 100-year flood boundary line. He stated that in the previous application, NRP was granted intervenor status by the Town's Commission, over the objection of the applicants in that the map amendment application that the amendment did not construe conduct. The applicants, in 2019, took the case to the Connecticut Superior Court to challenge the intervenor status; the Superior Court rejected the applicants' argument and concluded that NRP's intervenor status was appropriate in the case of a wetlands and watercourses map amendment application. He stated that Attorney Brooks, currently

representing the applicants, had made substantially the same argument as the one in 2019, when intervenor status was granted to NRP, and that the Commission should grant intervenor status again now, considering the court's decision on these parcels, and without a change in circumstances that should cause the Commission to change its decision on intervenor status. He stated his party's disappointment in Town Attorney Olson's memorandum, provided that day. He stated that the memorandum was an update to Attorney Olson's previous memorandum provided to the Commission in 2019, and he quoted from that memorandum. He stated that in contrast to Attorney Olson's memorandum of 2019, her memorandum of 2020 did not contain a similar recommendation to grant NRP intervenor status. He stated that nothing had changed in this period of time except that the CT Superior Court decision had supported NRP's intervenor status. He stated that what was relevant was that NRP, Inc. was granted intervenor status in 2019, related to a very similar application, and that the Commission should be guided by these earlier decisions and grant intervenor status related to this present application.

Attorney Olson stated that there was no change in her position, and at all times the decision has been the Commission's. It had been made very clear through the appellate process that even if the Commission were to ultimately find that intervention were ultimately not appropriate, it would automatically give NRP standing to challenge. When it came to the appeal of the last denial, standing was a big issue before the court. She stated that the Commission would have to determine, based on statutes, whether or not it met the Commission's jurisdictional venue. She stated she was in disagreement with Judge Berger's position that a map amendment constitutes conduct or conduct negatively affecting wetlands and watercourses. She would not change her position absent an appellate court decision. She stated that she did not understand how delineating a map, where there is expert input which has stated there is no wetlands within the delineated area, how the Commission can determine that it has jurisdiction of it, and how this can negatively impact wetlands and watercourses. It is the Commission's decision to determine if the burden has been proven. An appellate court decision might be necessary.

Attorney Brooks stated that changing the map is an action, however, conduct under the Environmental Protection Act has different meaning with regard to the destruction of wetlands. She stated that it seemed hard to envision that the movement of the line on paper would likely cause unreasonable pollution, impairment, or destruction of wetlands and watercourses, considering that there is no approval to undertake regulated activities. Any regulated activities would be an appropriate mode for intervention.

Attorney Olson concurred with Attorney Brooks on this point. Attorney Olson stated that regulated activities are defined, and they do not include the delineation of a wetlands map. She stated that these were legal opinions, however, the decision to decide the intervenor status was ultimately the Commission's.

Chair Thier stated that the Commission had four voting members at this meeting and would not want to create a tie-vote situation, if not necessary.

John McCahill stated that there would be 35 days after the close of the public hearing in order for the Commission to vote on a decision. The options are that a vote could take place on the status for intervention and a vote could also be rendered on the pending application at the next public

hearing continuation date; or the public hearing could be continued from that point if there were a need.

Commissioner Usich inquired what the outcome would be if there were a 2-2 tie in voting.

Chair Thier responded that a majority would be needed if there were to be an approval, and a 2-2 tie vote would mean that the motion would automatically fail. Chair Thier wished to put off voting to a different meeting, considering only four Commissioners were present.

Vice-chair Beauchamp concurred with Chair Thier in waiting on voting. Commissioners Breckinridge and Usich also agreed on waiting to vote.

Attorney Olson stated to be clear, that regardless of whether or not the Commission voted on the intervention that evening, that NRP and any other member of the public had the right to be heard; she wanted to ensure that they had the opportunity to present their arguments. Those arguments may inform the Commission on whether or not it was appropriate to grant intervenor status to NRP.

Attorney Smith requested that the hearing be left open.

Chair Thier stated that at the next meeting, the first vote would be whether or not to grant intervenor status, and the second vote would be on whether or not to approve the application.

John McCahill stated that there would be 65 days to conduct the public hearing, and currently the Commission's count was at day 30. The December 1, 2020 meeting would be at a count of 56 days, within that window, and without needing an extension from the applicant.

Commissioner Usich sought clarification on the vote of the intervenor status.

Attorney Olson stated that the Commission would need to decide whether or not the intervenor status was appropriate in the jurisdiction of the Commission. If the Commission voted to allow NRP to intervene, they would have party status in these proceedings as well as standing to appeal whatever decision the Commission renders. If intervenor status is denied, NRP, would similarly likely have a basis to appeal, arguing that NRP was entitled based solely on its verified complaint to intervene. She stated that the battle would begin at that time with regard to what NRP has argued what constitutes conduct within the jurisdiction of this Commission for purposes of the action. In the case of a tie-vote regarding a motion to allow the intervention, then under the fall-back guidelines of Robert's Rules of Order, the motion would fail.

Attorney Smith stated that his party's witnesses were present at this meeting and requested that they be able to speak. If they had party status, they would be able to speak for longer than the five-minute period allotted for per-person public commentary.

Attorney Olson stated that any Commissioner not present at this meeting or at meetings prior, related to this application, would need to listen to virtual meeting audio recordings for verbatim

verbiage to become updated on hearing information in order to act on this application. Anyone who acts on this application will have the benefit of the presentation of Attorney Smith's party.

Chair Thier clarified that the applicants would have the opportunity to respond to Attorney Smith's party's presentation.

Attorney Smith proceeded with the discussion on the merits of the application, as proposed by the applicants. He stated that the applicants had done more soil work on the subject property, however, his party had engaged their own soil scientist to speak about the applicant's delineation work. He introduced Timothy Welling, Certified Soil Scientist.

Mr. Welling stated that he had not been in the field to look at the applicant's soil delineation, but that he had studied the documents and materials that were presented in the application. He noted the nature of the complicated site with much disturbed soil. He would want to see a map of areas that were disturbed and those that were not disturbed, related to wetland, alluvial, and floodplain soils. He stated that the number of disturbed areas were significant, and the applicant soil scientist referred to a secondary criteria; the word *secondary* was concerning because it was not really defined, and the scientists have used the word *elevation*. It would be difficult to find the word elevation in the USDA Guide to Soil Taxonomy. Secondary criteria are used quite often in federal jurisdictional terminology but not in Connecticut, as the criteria are based on soil type; not what a secondary soil criteria suggests it could be. He stated that the current map lines up well with the 100-year flood elevation line. This line is an engineering number that is used for a number of functions. The most important data is the soils. A projection was made based upon where the 100-year flood line is, and not that the alluvial soils would tell you where the flood plain is. The soils will dictate where the flood elevation is, as the soils formed through flooding and deposition. The situation is complex, and there is elevation and partial data but not both. He stated that it was hard to come up with anything other than what is originally mapped on the Town's map as being significantly different based upon the disturbed soils; a difference could not be shown. He stated that the Town's map had been created at a coarse scale, and used as a guideline, but since the site had been disturbed, it is not shown as distinctly different than the area mapped on the Town's map. The Town of Glastonbury regulations state, for example, that the soils and wetlands are very different in their determination than the flood elevations. He stated that the soil scientists had used a secondary criteria of elevation, which is synonymous with the 100-year flood elevation, and it is not a soil criteria.

Attorney Smith reiterated Mr. Welling's commentary regarding the applicant's soil scientists' use of the elevation, the 100-year flood line, as a surrogate, in reverse protocol. He stated, with regard to a policy discussion, that the Commission was being asked to legislate. The applicant's soil scientists' methodology does not fit, related to this site with disturbed soils. He referenced an excerpt from the Town's regulations, along with the general statutes, requiring the precise location of soils. If the Commission begins to look at the application from a policy perspective, then there is the issue of climate resiliency. NRP does not suggest the use of the 100-year flood line or the use of the 500-year flood line. He requested that the Commission continue to use the Town's Map until the proper methodology can be employed by the applicant. He introduced Dr. Klemens to speak.

Dr. Michael Klemens, an ecological scientist who works on policy, referred to Attorney Brooks' statement regarding that a line on paper does not constitute conduct. If the line were to be removed, within this large piece of land, the level of protection would be gone. He spoke about the last application where development of the property was raised; and in this new strategy there was no development proposed. This would strip the Commission's regulation of the site. A level of review and regulation would be eliminated with the stroke of a pen, and it was a big issue. If the map amendment were to be approved, a large portion of land would be removed from the Commission's permitting purview. He questioned why the applicant would not propose a development in this process, and stated it was a classic case of segmentation of the decision-making process into pieces in order to obscure the effect. He was aware of the flood control structures on the Farmington River. Many dams have failed as a result of remarkable flooding events, which were never anticipated, and a 500-year flood would result. He questioned the benefit to the Avon public, and could only see the benefit to the applicant. He stated that lines on paper matter.

Attorney Smith summarized his party's reasons for opposition to this particular application; in that the Commission was being asked to legislate the approval of the application and not look at the pure science in determining the locations of the wetlands, as his party's soil scientist had remarked. He stated that the science was not being attacked, it was that there was not enough science done. He stated that the state statute did not indicate the use of the elevation line. He stated that the zoning line is very different than the wetlands line, which is supposed to be based upon scientific analysis, and the zoning line is pure policy with regard to zoning areas. If the wetlands line is taken away, then the prohibitions are allowed to vanish. Then activities, which are presently illegal such as wetlands filling, would be allowed. The unreasonable pollution comes in, without the proper foundation for changing the map, and then wetland and alluvial soils become exposed to activities freely. He asked the Commission to deny the application, stated his request that the petition to intervention be granted, and recognized that the issue of intervenor status would be presented further at the next meeting.

Attorney Brooks sought clarification that the public hearing was being left open for argument on whether or not the intervention petition was granted, and whether or not her party was presenting the final rebuttal. She inquired if her party's rebuttal should be held off until the next meeting.

Chair Thier stated that both matters would be continued at the next meeting. He confirmed that Attorney Brooks' party's rebuttal could be held off until the next meeting, if preferred.

Attorney Brooks proceeded with the rebuttal.

Mr. Russo responded to Attorney Smith's comments by saying in was not the case that by changing the boundary, the wetlands and alluvial soils would be exposed to impacts and filling. This proposed map amendment was a clarification of the regulated area of wetlands. If the Town map changes, it does not mean that something that is wetlands is no longer regulated by the Commission. Regarding the use of elevation as one of his party's soil mapping criteria, the NCCD soils scientists indicated in its letter to the Commission that it was an appropriate technique to use on this site; and those two soil scientists have decades of experience in the state of Connecticut, including work for the State of Connecticut. He summarized and reviewed points

in his letter to the Commission, dated October 20, 2020, as part of his prepared statement in response to comments of Mr. Welling and Dr. Klemens. He pointed out an area in his party's site soils mapping, a pond on the site adjacent to Nod Road, that does not appear of the Town's map. He stated that it is a regulated resource that needs to be added to the Town's map, among other areas, as it is clear that the Town's map needs to be amended. He pointed to those areas on his party's soil mapping. He reviewed the large area of soils, formerly called the "blob," and stated that the soil series is different than what appears on the Town's wetlands map, and it is non-alluvial soil. He responded to Mr. Welling's comments regarding the mapping flags. He verified the accuracy of his soils delineation and of those flags mapped by a licensed surveyor. He noted the difference in his preliminary map, from the spring of 2020, to the map presented before the Commission at present, which represents agreement from his party's soil scientists and the NCCD soil scientists. He quoted from the NCCD letter regarding this matter. He reviewed a map with delineation lines that had previously been provided in the original submittal to the Commission, which now highlighted overlay lines to clarify points, including the FEMA mapped line, and the line of field-mapped limits of alluvial soils. He stated that the lines do not match, and his team was not substituting a FEMA map for on-site soils delineation. He emphasized the independent review completed by the NCCD which concurs with his delineation and reiterated that elevation is an appropriate tool to use in indicating floodplain and alluvial soils. He reviewed the issue of *wet* wetlands that have been filled and how to delineate them based on a field guide tool, which he followed as a tool in his delineation, which was also submitted with his letter to the Commission; and if there are remaining aquic conditions in soils. He summarized a point in clarifying the methodology, and standard criteria related to previously reviewed soil taxonomy, for precisely delineating wetland soils. He stated that the precisely mapped delineation received concurrence from the two NCCD soil scientists. He reiterated that his party was not using the FEMA mapping as the boundary for floodplain and alluvial soils. He stated that there did not need to be a development proposal before this Commission, and that several other municipalities where he has been part of wetlands application processes require wetlands commission delineation applications, first, before development applications through zoning commissions. He stated that the 100-year flood elevation is very accurate on this site because the soil data supports it, as alluvial soils are present from that line closer to the river but not from that line farther away from the river. The 100-year flood elevation line may not work on other sites. He reviewed what constitutes impact to wetlands. It was his opinion, after decades in working in the field, that by changing a line on a map does not create impact to wetlands; this would be defining a resource and not removing wetlands from a map. He reiterated his summary of the soils delineation work in this application.

Mr. Klein stated that the flood plain mapping was not relevant to this issue, as the FEMA flood mapping speaks for itself. He referred to Dr. Klemens' October 30, 2020, letter. He stated that there might be extensive areas of water on the ground that might not be from flooding from the Farmington River. He stated that the Town's map is a general guide, and the protection of wetlands is determined by the exact conditions of the land. He referenced Dr. Klemens' acknowledgement that he was not a soil scientist; and that Dr. Klemens did not have expertise on soil data and could only rely on the Town's map. He reviewed the NCCD third party involvement and review of his party's soil delineation. He stated that the Commission would be charged to consider any regulated activities anywhere on the land related to any flood line according to the conditions of the soils. He stated that the dams were designed to accommodate

the flood of record. He responded to Attorney Smith's letter of October 28, 2020, and stated that his party's soil mapping did not use the FEMA map; they used soil criteria supplemented by elevation data. He reiterated Mr. Russo's statements regarding area of equal elevation to locations where alluvial soils were found, were also included in the delineation because those areas might have been disturbed and the alluvial soil characteristics might have been removed by the work to create the golf course. He reiterated that the NCCD had stated that the delineation accurately and optimally represents the wetland boundaries. He stated that it would not cause any impairment to the resources. He commented that Mr. Welling had never been on the site or examined the soils on the site; and the soil scientists who have examined the site have agreed to the accuracy. He explained the ideas of segmentation, introduced by Dr. Klemens, which he referred to as related to construction of housing and scenarios regarding the number of housing units related to adverse impact. He refuted the relevancy of the notion of segmentation with regard to this application. He stated that any proposal for use of this property would require a wetland permit for regulated activities.

Attorney Brooks referred to paragraph no. 7 in the petition for intervention, specifically, the acreage proposed to be removed from regulation and subject to unregulated development. She stated that this was not true in Avon. She referred to the Town of Avon's regulations 2.1. x, where Avon had adopted that, "The Agency rule that any other activity located within such upland review area or in any other non-wetland or non-watercourse area is a regulated activity if it finds, after a hearing for which the landowner is provided adequate notice, that such activity is likely to impact or affect wetlands or watercourses in a substantial and detrimental manner." She stated that everyone should understand that the Inland Wetlands Commission retains its authority to protect wetlands and watercourses.

Chair Thier restated that the Commission's decision was not one on activities on anything other than what the Commission believed the applicant wished to change within the Town's map, warranted by concrete findings. If the Commission felt that the applicant had met the burden of proof, and had shown the Commission that the map was wrong and the proposal would make it accurate, that would be all that the Commission would decide in taking a vote.

Attorney Brooks referred to paragraph no. 18 in the petition for intervention, related to feasible and prudent alternatives. She stated this application was not a wetlands application for regulated activities.

Chair Thier stated that feasible and prudent alternatives have nothing to do with the Commission's decision.

Attorney Brooks stated that if the Commission allows the petition for intervention of NRP, there would be a two-step process that the Commission would take on as an additional duty. The first step would be if the Commission determines that the proposed map amendment is reasonably likely to cause unreasonable pollution, impairment, or destruction of wetlands. If the Commission determines that there would be unreasonable impact, as stated, then the Commission must determine if there are feasible and prudent alternatives. She questioned how there could be a feasible and prudent alternative to a science-based soils delineation of the wetland boundary. She explained that there was no development proposed in this application.

She questioned if the petition for intervention were allowed, how unreasonable impact would be found and also how feasible and prudent alternatives would be found. She stated that this regulation is not in the Town of Avon's regulations but found in the Environmental Protection Act statute that causes this two-step process.

Chair Thier requested clarification that the two-step process was applicable in a regulated activity application but silent on this type of petition. He stated that this would be debated by the Commission before taking a vote. He stated that the Commission would consult with the Town Attorney.

Attorney Olson confirmed Chair Thier statement and that it was the Town's position.

Attorney Brooks confirmed Chair Thier's comments that the statute was written related to the issue of activity. She stated it might be the reason why conduct in intervention is inappropriate.

Attorney Olson reiterated her agreement with Attorney Brooks that her first question, when it comes to taking a vote on the intervention, is the question of whether the applicant is proposing conduct that is likely to cause an unreasonable pollution, impairment, or destruction of wetlands. She stated that the Commission should decide those matters related to this subject site. Her legal position was that she did not agree that there were clear and unequivocal facts regarding the impact to wetlands. She stated again that she did not agree with Judge Berger's ruling. She stated that if the Commission decided there would be such impact to the wetlands, then the next step would be to decide if there were feasible and prudent alternatives.

Chair Thier inquired, hypothetically, whether or not removing a circle on the map, one representing wetlands, is detrimental to wetlands. He stated that the elimination of a wetlands is certainly an impact.

Attorney Olson stated that the jurisdiction of the Commission is over wetlands and watercourses. If all of the evidence provided to the Commission establishes that there are no wetlands or watercourses within the area being delineated, then it is out of the Commission's jurisdiction, by law. She stated that there could be an argument under certain circumstances regarding the impact to wetlands and watercourses; however, it was the Commission's decision based upon the weight of the experts' testimony. She stated that if what was being proposed was to carve out areas that have no wetlands and watercourses, then what is carved out, the Commission has no jurisdiction over, other than with respect to the upland review.

Attorney Brooks responded to Chair Thier's statement regarding eliminating a wetland area; that the soil examination showed there not to be wetlands in an area, the wetland would not be eliminated. The issue was to correct the Town's map as to the existence or non-existence of wetlands. It would not be eliminating by destroying; accurate corrections would be made to a general Town map.

Chair Thier asked if the parties wanted to respond to the arguments discussed this evening, in writing, it should be within the next two weeks. He did not believe that anything more could be added this evening.

Attorney Brooks wanted to confirm with Chair Thier that there was not any information outstanding, requested by the Commission of the applicant, that would need to be provided at the next meeting.

Chair Thier stated that if any Commissioner had further questions, to forward them in writing to John McCahill for distribution to all parties prior to the next meeting.

John McCahill stated that the general public would need to provide their input if desired.

Commissioner Breckinridge motioned continue the public hearing to the next regularly scheduled (virtual) meeting on December 1, 2020, at 7:00 p.m. Commissioner Usich seconded the motion. The following members voted in favor: Chair Thier, Vice-chair Beauchamp, Commissioner Breckinridge, and Commissioner Usich, with none opposed. The motion carried.

COMMUNICATIONS FROM THE PUBLIC:

Chair Thier stated that due to the lateness of the meeting in the evening, the general public would be able to provide any and all input at the December 1, 2020, the upcoming regularly scheduled meeting, when the public hearing will continue.

PENDING APPLICATION:

APPL. #767 – Michelle and Anthony Angeloni, applicants; Jason L. Addison, owner: Request: 1) partial elimination and redirecting of existing intermittent watercourse (eroded drainage swale); 2) construction activities within 100' regulated area; proposed activities include construction of single family residential house, driveway, septic system, detached garage, pool, retaining wall, and related site grading. Location: 4 Vermillion Drive, Parcel 4420004. **(Public hearing date to be determined; no discussion at this meeting.)**

John McCahill stated that the applicant had advised the Commission, in writing, that the applicant was not ready to schedule the public hearing at this time.

OTHER BUSINESS:

There was no other business.

STAFF COMMENTS:

There were no other staff comments.

APPROVAL OF MINUTES:

- Minutes - October 6, 2020 – Regular Meeting and Public Hearing: Commissioner Usich motioned to approve the minutes as submitted, and Commissioner Breckinridge seconded the motion. The following members voted in favor: Chair Thier, Vice-chair Beauchamp, and Commissioners Breckinridge, and Usich, with none opposed. The motion carried.

- Minutes – October 20, 2020 – Special Meeting: Vice-chair Beauchamp motioned to approve the minutes as submitted, and Commissioner Breckinridge seconded the motion. The following members voted in favor: Chair Their, Vice-chair Beauchamp, Commissioner Breckinridge, and Commissioner Usich, with none opposed. The motion carried.

NEXT REGULARLY SCHEDULED MEETING:

The next regularly scheduled meeting will be on Tuesday, December 1, 2020, at 7:00 p.m., via virtual Zoom platform. At that time the public hearing continuation will be held for Appl. 768.

Vice-chair Beauchamp motioned to adjourn the meeting. Commissioner Usich seconded the motion. The following members voted in favor: Chair Thier, Vice-chair Beauchamp, Commissioner Breckinridge, and Commissioner Usich, with none opposed. The motion carried.

There being no further business, the meeting adjourned at 9:59 p.m.

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