

THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A VIRTUAL SPECIAL MEETING ON TUESDAY, JANUARY 16, 2024, AT 7:00 P.M., VIA GoToMeeting: by web <https://meet.goto.com/973800493>; or by phone, United States: [+1 \(517\) 317-3116](tel:+15173173116), Access Code: [973800493#](https://meet.goto.com/973800493).

Present were Chair Michael Feldman, Vice Chair Michael Sacks, and Commissioners Robert Breckinridge, Gary Gianini, Carol Hauss, and Thomas Kassan. Commissioner Daniel Carvalho joined later. Also present was John McCahill, temporary Planning and Community Development Specialist/Wetlands Agent, and Hiram Peck, Director of Planning and Community Development.

Chair Feldman called the meeting to order at 7:02 p.m. J. McCahill did roll call and there is a quorum of 6 Commissioners present at the start of the meeting.

I. ELECTION OF OFFICERS:

Chair Feldman thanked J. McCahill for stepping in and welcomed the two new members, T. Kassan and D. Carvalho. Vice Chair Sacks made a Motion to Nominate M. Feldman for Chairperson of the IWC. R. Breckinridge seconded. The Motion passed unanimously. G. Gianini made a Motion to Nominate M. Sacks for Vice Chairperson. C. Hauss seconded. The Motion passed unanimously.

II. COMMUNICATIONS FROM THE PUBLIC (unrelated to any Application): None.

III. OTHER BUSINESS:

A. Discussion of Potential Regulation Modifications:

H. Peck said he will give a brief overview, will answer any questions, and will research if needed. He said there are three parts to this regulation. The first is the Town ordinance that needs to be amended to allow the IWC to charge this fee. Section 45-23 refers to the Planning and Zoning Commission (the "PZC"), the Zoning Board of Appeals, and the IWC. There are portions of the Section which talk about the various applications that the IWC may entertain including plenary hearings, summary hearings, summary rulings, and the new section which talks about allowing the IWC to charge an additional fee to cover the cost of a complex application. The authorized agent will give an estimate for the fees of a complex application. The funds can be charged to the applicant and if there is any balance left over, it will be returned to the applicant within thirty (30) days of the publication of the IWC's decision. It is fairly straight forward and adds the fee to the Regulations to allow the IWC to charge that fee.

The next section which H. Peck and the Town Attorney believe are important makes clear to applicants what could be involved for a specific application so these applicants do not get into the process without knowing ahead of time what is involved. Section 19 of the Regulation talks about fees and specifically what the purpose of this is and what the procedure is. Section C talks about the consultant selection. He believes that the IWC must be careful that an applicant thinks they do not need a third-party review or that their application is not complex. This Section tries to move the process forward as quickly as possible if an application comes in which Town staff

determines needs an outside review. The IWC could also decide later that a pending application is a complex application. There are two ways that this decision could be made. One is that the Town staff makes a determination based on their experience which moves the process forward fairly quickly. The fee required is outlined in the regulation as well as how the applicant supplies the information while the Town staff makes a determination as to the third-party consultant which would participate in that review. H. Peck said that the Town has a list of consultants such as environmental scientists, wetland scientists or soil scientists. The Town does not recommend anyone specifically to applicants. The applicant will hire someone on the Town's list or another qualified professional to put together an application. If a third-party review is needed, the applicant can again review the list to find another qualified consultant. The Town staff may also recommend a qualified consultant. Vice Chair Sacks asked if the third-party consultant is chosen by the applicant. H. Peck answered that the applicant will choose but if the IWC has a reason that person is not appropriate, not qualified, or not acceptable, then it becomes a matter of discussion. He feels that it is important to maintain the IWC's credibility throughout the process, to work with the applicant, and select a qualified person or firm to move forward with. The IWC does not have the authority to say that a particular person must do the review. C. Hauss said that the IWC may not be looking for a third-party review, they may be looking for an expert who has not weighed in on an application – for example, the IWC may want a vernal pool expert to say what the impact is on an endangered species or an environmentalist to talk about climate change. H. Peck said that is the same thing and the basic idea of this process is to get the information that the IWC thinks is necessary and appropriate for any application in a fair, clear and objective way. So this process does two things (in addition to defining what a complex application is) including how the process will work so an applicant can know ahead of time what they can expect. The IWC will get what it needs to make an appropriate decision and the applicant knows what may be required. G. Gianini understands that H. Peck is talking about procedural expectations for the applicant and fairness but G. Gianini feels that the applicant choosing the third party expert is not what the IWC wants. H. Peck gave an example from the PZC where there can also be the need for a third-party review. If an applicant picks a consultant but the PZC feels that other consultants would be better, there is hopefully a short but clear process with a decision based on both the applicant's and the PZC's desires. The applicant will work with the PZC and hopefully pick one of the PZC's choices. There should be no criticism of anyone's qualifications – just work with the applicant to come to a compromise so the situation works out for the benefit of both parties. G. Gianini said that it would be a give and take to pick a consultant and H. Peck agreed. He gave an example when there was a vernal pool and he called an expert in vernal pools who was not available for six months. The applicant did not want to wait for six months when there may be another consultant available sooner. The Town would like to have the ability to work with applicants so everyone believes the process is fair – the IWC gets what it wants and the applicant gets a fair review process. J. McCahill said that paragraph C on page 2 puts the Town staff in the driver's seat as it relates to the selection process. He said that Town staff get involved with a number of potential specialists that do the job and can then relay that information both to the IWC and to the applicant to work it out. G. Gianini wants the IWC to be an actual part of the decision. R. Breckinridge asked what would happen if there was no expert available. He does not see anything that covers what happens if no one can get an expert in a timely manner. H. Peck said that if 5 Commissioners of the IWC want a third-party review, it is incumbent upon the IWC to find someone qualified to do that. If the IWC wants a third-party review and the applicant cannot find anyone, the IWC can declare the application

incomplete and deny it. This provides stimulus for everyone to work together and find someone who can do the work in a reasonable period of time. The IWC has the ultimate say with regard to making a decision if they do not get the review they want in a timely fashion. The IWC has certain statutory timelines to abide by, can declare an application incomplete, and ask the applicant to come back when they have all the information. R. Breckinridge asked why H. Peck choose five votes for a third-party consultant. H. Peck said that the IWC has seven members and it should be more than a simple majority to make the applicant spend additional money. R. Breckinridge asked what would happen if there were only four Commissioners at a meeting. H. Peck would like to encourage IWC members to make every effort they possibly can to attend. It adds more credibility to the IWC as does five votes to require a third-party consultant. He took that number from different towns that have used this process. C. Hauss said that the PZC is only a vote of four of seven Commissioners. H. Peck said that the PZC had only used this regulation one time in eight years. C. Hauss sees a conflict with inconsistent regulations and she thinks four out of seven is a substantial number of members. H. Peck will talk to the Town attorney regarding this and said he would like to build credibility with the public, the developers, and the attorneys that this office deals with regularly. C. Hauss disagreed and focused on the inconsistency between IWC and PZC and would like an answer on this from the Town attorney that is clear, unemotional and rational. R. Breckinridge asked if H. Peck could think of any situation where the fees for an expert witness would make it impossible for an applicant to apply and this would create a potential lawsuit. H. Peck said he would not expect a lawsuit but he did put in the Regulation an ability for the IWC to waive the fee if the applicant cannot pay. R. Breckinridge clarified that the IWC could insist they need a third-party review and H. Peck agreed and suggested that the IWC be very clear about their reasons. T. Kassan said that his understanding of the IWC is to preserve and protect the wetlands for the benefit of the people of Avon and future generations and he wants to understand why there is a concern about the IWC's credibility. He feels that the burden of proof needs to be more on the applicant's credibility as opposed to a volunteer Board whose main goal is to preserve and protect the wetlands which the State of Connecticut has deemed appropriate 40-50 years ago. He feels that a simple majority would be appropriate when voting on a third-party consultant.

Chair Feldman turned to the definition of a complex application. H. Peck added seven specific criteria which were not in earlier drafts based on the DEEP model regulations. Chair Feldman said that the IWC's research shows no other towns that have a regulation for a complex application listing these seven criteria. H. Peck said he asked that question of DEEP and they said that each town makes up its own mind. H. Peck explained his concern with making a decision based on something that does not exist in the regulations and there are other people that agree that having a definition which is close to provisions already in the regulations is important. Chair Feldman said that other towns have this regulation without the need for any definition of complex application and certainly not the one being proposed here with seven highly technical criteria. He feels if other towns have successfully adopted this regulation without this language then why is Avon the first town to need this. H. Peck said that we are clarifying language and many of the towns with this regulation have never used it. Chair Feldman said this definition is not required by the Enabling Statute (Section 8-1c) or the DEEP model regulations and asked how you would establish that any of these seven criteria are met. H. Peck said that some are fairly straight forward and others have to do with Town staff experience. The Town staff have relied on these definitions for a long period of time. If the IWC has specific questions for the

applicant as to whether these definitions are met or not, it is up to the applicant to answer. H. Peck said that without a definition the IWC has no ability to say what the applicant should do. Chair Feldman said that each of the seven criteria would require some evidence to support the criteria exists, and you would probably need a hearing with expert testimony to establish it. For example, the first criteria talks about an activity removing material that would have a substantial effect on wetlands. He feels you would need an expert just to prove that. J. McCahill said that those criteria are parameters that the Town staff has used for years, that come from the current Town regulations, and which have been used continually for about 25 years. He feels they are straight forward and he could decide what might be a trigger and only one has to be met, not all seven. Chair Feldman disagrees and thinks that each of the seven criteria would need to be established by expert testimony. ***(Clarification requested by Chair Feldman: “He acknowledges that while only one criteria would need to be established, it would probably require expert testimony.”)*** He understands that this language comes out of the significant impact definition but that definition identifies these seven criteria not as exclusive but says that it may include but not be limited to these seven. He asked what if there are criteria that are not encompassed by these. He does not want to be handcuffed by these seven criteria and he feels that this opens the Town up to litigation if Town staff decides one of these criteria are met but there is no expert testimony. H. Peck disagrees and said that these criteria clarify what the IWC can look at. Many times the IWC gathers information outside the public hearing record and it is not necessary to have a public hearing to decide whether an application is complex. The criteria is here to allow the IWC, in addition to Town staff expertise, to make the determination. Chair Feldman thinks it will be very difficult to implement this. T. Kassan said that if the IWC’s job is to review applications and determine the impact on wetlands, he thinks being boxed into these seven criteria makes it harder for the IWC to hire another expert. H. Peck asked what the decision would be based on and T. Kassan said it would be based on the IWC’s collective ability to make a decision that they wanted a certain type of expert. H. Peck said that if the IWC had certain expertise, such as a traffic engineer, you need to put that information on the record. If you are a Commissioner without that expertise, it would be reasonable to have a basis to determine what that third party criteria selection process would be. Chair Feldman said that commissions are given discretion in some situations by courts and the IWC does not need to be handcuffed by technical criteria. The IWC can use its discretion similar to when there is a need for a public hearing because the IWC believes that it is in the public interest. There is no definition or criteria for what is in the public interest. He thinks the IWC needs more discretion than what is allowed by the seven criteria. H. Peck said that he is suggesting what he thinks will move this regulation to the Town Council so they can then hold a public hearing. Vice Chair Sacks said that this regulation will go to the Town Council in the form that the IWC wishes and the IWC will do this themselves if H. Peck is not willing. Vice Chair Sacks believes the seven criteria setting forth a particularly significant impact on a wetland is beyond what is needed and not the direction the IWC would like to go. He feels that an application is complex if it is complex to members of the IWC – they will make a judgment that it is complex for them. A proposal may be complex if an evaluation requires an understanding of scientific evidence with the application of engineering techniques unfamiliar to the IWC or contains assertions by experts that members of the IWC find controversial or insufficiently convincing. He feels it is complex if the IWC thinks it is beyond their expertise. An applicant will pick a soil scientist that will support their proposal but there may be another opinion from a different soil scientist. He said the IWC would never consider anything other than a strong impact on the wetlands but the strength of the impact should not

determine the complexity of the application. He thinks the reason for a third-party expert is that there is a lack of expertise on the part of the IWC to make a decision. He also feels that saying that the Town Authorized Agent has the sole discretion to select the person or entity to perform such study or consultation is a very strong statement. He thinks the IWC can get input from the Town staff and then make their own judgment about it in their sole discretion. He thinks the determination of what soil scientist to use should be in the sole discretion of the IWC and the IWC will decide whether or not another study is necessary. He said that Section A says that the proposal has to have a massive effect in order for the IWC to get outside expertise and he does not think that it has to be extraordinary – it just has to have a significant impact. To say that the expertise is not the expertise of the IWC but of the Town staff is not what he wants and it is reflected in all the other towns' regulations. He would like these regulation proposals to be changed to the way the IWC wants - there is a gap between what is written and what the IWC originally asked for. Chair Feldman agrees with Vice Chair Sacks on many points including the definition of complex application which he is still troubled by. He would like to either eliminate the definition of complex application altogether or come up with a more discretionary standard as Vice Chair Sacks suggested. Chair Feldman would like to come to an understanding so H. Peck, the Town Attorney, and the IWC will be comfortable. If not, there will be two versions and the IWC will see what the Town Council says. T. Kassan said it is not a priority to make it as easy as possible to develop a piece of property that has wetlands. It is the applicant's burden of proof to prove that whatever development or construction they are planning to do on a piece of land with wetlands is safe for the environment, safe for the people living downstream or upstream, does not cause additional damage from flooding, and does not damage the ecosystem. The burden of proof should not be on a commission that has no financial bearing on whether this gets passed or not but should be on the developer who has the sole interest and financial motivation to get their application passed. They need to prove to the public which the IWC is representing that the proposal is a safe development and will not impact the wetlands. Chair Feldman will provide written comments and hopes to work toward some language that is agreeable to everyone.

B. Staff and Commission Comments (unrelated to any application):

G. Gianini noticed how other towns write their approval letters when he was researching other towns' regulations. These towns incorporate the wetlands regulation language to show that the wetlands commission has done a thorough review and use the sections' exact wording as criteria for their decision. He will pull examples from other towns and share with J. McCahill to pass to the IWC. He thinks that when you reference the regulations then the IWC's decision is on more solid ground and likely to stand up to scrutiny. Chair Feldman thanked G. Gianini for all his research.

C. Approval of Minutes: December 5, 2023 – Regular Meeting.

Chair Feldman asked to table the Minutes until the next meeting.

IV. NEXT REGULARLY SCHEDULED MEETING: February 6, 2024.

R. Breckinridge made a Motion to Adjourn. C. Hauss seconded. The Motion passed unanimously.

There being no further business, the meeting adjourned at 8:02 p.m.

Janet Stokesbury  
Clerk, Inland Wetlands Commission  
Town of Avon Department of Planning and Community Development