

THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A VIRTUAL REGULAR MEETING ON TUESDAY, OCTOBER 11, 2022, AT 7:00 P.M., VIA GO TO MEETING: by web <https://global.gotomeeting.com/join/716274549>; or by phone, United States: +1 (571) 317-3116, Access Code: [716274549#](https://global.gotomeeting.com/join/716274549).

Present were Chair Michael Feldman, Vice-chair Michael Sacks, and Commissioners Robert Breckinridge, Gary Gianini, Carol Hauss, and Kevin Tobin. Also present was Emily Kyle, Planning and Community Development Specialist/Wetlands Agent and Attorney Joseph Szerejko of Murtha, Cullina LLP, Attorney for the Town of Avon.

Chair Feldman called the meeting to order at 7:00 p.m. There is a quorum of 6 Commissioners though K. Tobin will not be voting because he joined the IWC after the consideration of Application #781 began.

I. PENDING APPLICATION:

APPL. #781 – The Silvio Brighenti Family, LLC, Owner and Applicant; request for reconsideration of decision regarding regulated activities within the 100 foot upland review area: construction of house, driveway, utilities, and related site work on 7 Saddle Ridge Drive, Parcel 6210007.

Chair Feldman asked for the authority in the CT Statutes or Town of Avon Regulations for a reconsideration. J. Szerejko replied that he had reviewed the procedural history pertaining to this Application. He found that there is no statute or regulation which expressly allows for a land use agency to reconsider its decision after it has been rendered. There are instances in the case law that have allowed such reconsideration to take place provided that the request is filed with the agency before publication of the decision. It is J. Szerejko's understanding that the request here was filed two days after the September 6, 2022 decision and the decision was published on September 12, so this reconsideration would fall within that time frame. There also has to be a demonstration of good cause for the agency to entertain such a request. If there is a fundamental error and there is the need to correct a procedural abnormality, that may suffice though the request does not have to be granted by the agency. There is also a general concept recognized by case law pertaining to land use decisions that provide applicants with the right to fundamental fairness. So although there is no express statutory authority for a request for reconsideration, in the spirit of the law, it is permissible in certain cases.

Chair Feldman asked to confirm that it is discretionary on the part of the IWC whether to entertain this request for reconsideration. J. Szerejko and Robert Reeves, Attorney for the Applicant, agreed. Chair Feldman stated that the quorum tonight is different than the quorum at the meeting when the original vote was taken. He is concerned that a reconsideration could nullify the vote of the Commissioner not at this meeting. J. Szerejko said that any action taken tonight could supersede the original decision. J. Szerejko said that if the IWC entertains this, the wording of the motion could be as reopening the decision and that could alleviate any concerns about nullifying it. Vice Chair Sacks asked why this is not a public hearing. E. Kyle said that there are a set of criteria as defined in the Town's Regulations for the IWC to declare a public

hearing. The first is if the IWC determines that there is a significant impact activity from the Application influencing the surrounding wetlands or watercourses. The second is if a petition is filed. The third is a type of catchall. In order to reach that step, the IWC has to make that determination and declaration, and that did not happen during the last meeting. In this case if the IWC is reopening the application for reconsideration, the decision would need to be made via a motion of the IWC. Chair Feldman asked about the third criteria and whether that means that the IWC can have a public hearing if they believe it is in the best interest of the public to do so. E. Kyle agreed.

G. Gianini made a Motion to Reconsider Application #781 with respect to 7 Saddle Ridge Drive. R. Breckinridge seconded. The Motion passed unanimously.

R. Reeves said that he was not involved in the initial Application. His law firm asked for reconsideration of the IWC decision of September 6, 2022, as the IWC vote was tied, 3-3, which had the effect of denying a permit for 7 Saddle Ridge Drive. They also granted the IWC an extension of time until tomorrow to make a final decision. The Notice of the Decision was published in the newspaper on September 15, 2022, and once notice is published in the newspaper, an applicant has fifteen (15) days to appeal the IWC's decision to the Superior Court. If that process has not begun within those 15 days, the applicant has no further opportunity or method to make any further complaint about the decision. Because the decision was published, the Applicant had to take an appeal from it which was done late last month. There is a two step process to appeal a decision of a land use board – the first step is to serve the Town Clerk with the papers which was done late last month. The second step is to actually send those papers to the Court, which the Applicant has not yet done and does not need to do for approximately a month. He hopes this meeting will resolve this matter in a way that will not require him to pursue litigation as he does think that is in anyone's best interests. This lot was approved as a building lot in 2004 by the Avon Planning and Zoning Commission (the "PZC") after review by the IWC. The Applicant has been paying taxes on it as a building lot for nearly 20 years and the Application before the IWC now is nearly identical to what was approved by the IWC and the PZC. D. Whitney's letter to Chair Feldman dated October 12, 2022 contains attachments that show the layout of both plans. The house is in the same location, and the geometry, the driveway access, and the size of the building are very similar. R. Reeves believes it was improper to deny this Application. The IWC did not make a finding that the activity had the potential for a significant impact on the wetlands and that is the finding that typically triggers the need for a public hearing in the analysis of whether or not there is a feasible and prudent alternative to what has been proposed. It is hard to reconcile the fact that the IWC did not make a finding that this has the potential to significantly impact the wetlands with a later decision that denied the permit. The IWC denied an application that was nearly identical to the one previously approved, gave no reason for the denial, and most importantly, disregarded the only expert evidence presented before you as to whether or not this activity would have any adverse impact on the wetlands. This activity is solely in the upland review area – there were no direct wetland impacts. Eric Davison was the only soil scientist that gave any evidence in this matter and he clearly stated that the buffer and groundwater infiltration system will prevent any adverse impact to the wetland. So there is no expert evidence in this record to support a conclusion that the activity that was applied for in the upland review area will have an adverse impact on the wetlands. So for those reasons and because the IWC's decision effectively denies the landowner the previously

approved use of his property as a single building lot, he is asking the IWC to reconsider their decision and vote to approve this Application.

Chair Feldman was not aware that an appeal had been served on the Town of Avon. He asked when the previous approval was. R. Reeves replied that it was in 2004. Chair Feldman said that was an 18 year old decision made by a previous IWC and R. Reeves said that if you disregard that, it could be a confiscatory taking of the Applicant's property. He believes that if there are no changes in that time frame then the IWC is bound by the prior decision. Chair Feldman said that the regulations had been changed since then in terms of the distance of the size of the buffer zone. R. Reeves is aware that the upland review area was not a factor in 2004 but that it is a factor in 2022. Chair Feldman asked about whether paying property taxes as a building lot is a factor in deciding a wetlands application and asked if there was an authority for that. R. Reeves said he is not suggesting that it is a factor in deciding the Application but it shows that the Applicant has a vested property right in a single family building lot on this property. Chair Feldman reiterated that R. Reeves said that the IWC had not stated its reasons for denying the Application. Chair Feldman said that the IWC had three meetings that R. Reeves was not present at, the Application was discussed in great length, and the Commissioners voiced their opinions and questions. R. Reeves does not believe that constitutes a statement of the Commissioners' reasons and the IWC should state its reasons in a collective statement adopted into the decision. Chair Feldman asked if there was a specific format that the IWC has to make its findings and reasons. R. Reeves said that there is an abundance of case law that says that individual statements by individual Commissioners during their deliberations do not constitute formal reasons for decision by the IWC unless they are adopted in the IWC's actual decision. Chair Feldman said that it is his understanding that the provision that requires stating reasons for denial is a directory and not a mandatory requirement and he believes there is Connecticut Supreme Court case law to that effect. Chair Feldman asked R. Reeves if he had any authority that suggests that that is a mandatory requirement. R. Reeves answered that he has not researched that particular question. Chair Feldman asked R. Reeves if it was his view that the IWC has absolutely no discretion whatsoever to deny this Application. R. Reeves said he does not take that position. Chair Feldman asked if R. Reeves would agree that the IWC does have some discretion and R. Reeves said that in a theoretical sense you always have discretion, but in this case primarily because there was no expert evidence to the contrary, the IWC's denial of the Application was illegal and the IWC exercised their discretion in a way that the law will not sustain. Chair Feldman asked what the IWC is obligated to consider with respect to expert testimony – is the IWC entitled to disbelieve expert testimony if they find it not credible. R. Reeves agrees with that only if there is other expert testimony to contradict it. Chair Feldman asked if R. Reeves was aware of any case law that prevents the IWC from refusing to believe an expert. R. Reeves said that the law in the State of Connecticut is that if an expert gives an opinion, and there is nothing on the record to contradict it, the IWC acts illegally and abuses your discretion if you disregard that opinion. Chair Feldman asked if the Applicant was going to introduce any new evidence and R. Reeves said they were not. D. Whitney summarized the record in a letter to the IWC dated October 12 and was not planning on putting an additional presentation unless there were further questions.

R. Breckinridge said that he voted in favor of the Application but is concerned that if the IWC has voted, can they reversing the vote would set a precedent. Would an applicant always be able

to come back after a decision and ask for a reconsideration. J. Szerejko understands the concern though there are several things here which makes this unique, one of which was that there was a tie vote. Another was that there was no affirmative statement giving the reasons certain Commissioners voted no. Also, typically the reconsideration request is not filed within the window of time before the publication of the decision. This is an entirely discretionary exercise on the part of the IWC and is on case by case basis. R. Breckinridge said that the previous Nod Road application was a tie vote and it was not handled any differently than usual. That applicant had to reapply with an entirely new application and new information. He is not sure of the proper procedure here - would it be better to have the Applicant modify the Application and reapply. Chair Feldman agrees and added that Town counsel and counsel for the Applicant both agree this is discretionary. R. Breckinridge asked what happens if another application in the future is denied this right. Chair Feldman said that the IWC would have discretion then too.

Vice Chair Sacks said that he raised many objections to this proposal at many meetings. He asked if the current discussion enters into the record that the court would see. J. Szerejko said that he disagrees with R. Reeves because the record of the proceedings that led to the ultimate decision is a vehicle by which a decision can be deciphered. A court would presumably look to the comments which the Commissioners made during the previous three meetings where this Application was discussed. The CT Statute Section 22a – 42a does say that the decision shall be stated on the record and Section 11.3 of the Town of Avon Regulations mirrors that language. It is recommended that the IWC expressly state its reasons when it denies, approves, or approves with conditions, but the Commissioners' comments and any evidence that is in the administrative record would go towards a determination as to whether there is substantial evidence to support that decision. Vice Chair Sacks asked again if that includes what is said at this meeting. J. Szerejko said that the appeal has already been commenced and the pleadings have been served, and he is not aware of the Applicant's ability to amend the Complaint but he presumes the Applicant would attempt to make this part of the record. Chair Feldman said that this proceeding is on the record and the IWC has granted the reconsideration so he assumes that whatever is discussed tonight is going to be part of the record on appeal. He also thinks it is an unfair burden to expect the IWC to write or articulate a cohesive decision the way a judge would because the IWC is composed of seven individual Commissioners that vote and there is no opportunity to caucus, decide how to write, and give the reasoning. However now that the IWC has allowed reconsideration, he asks that any IWC member state their reasons for how they voted. Vice Chair Sacks said that he is concerned about the precedent of this reconsideration and the idea of an appeal without any change. He said the IWC had considerable discussion that this proposal was considered and approved in 2004 but that the change to the regulations had a major impact on how the IWC evaluated this and what they looked at. He said that there were many statements to the effect of a finding of significant impact. As to the disregarding of expert testimony, he looked to materials from the Connecticut Bar Association saying that the IWC does not simply rubber stamp what an expert says but rather the IWC can make an independent judgment on that expert testimony. The IWC can decide whether or not the effects that are discussed are significantly adverse. He referred to D. Whitney's comments that the area effected is so small compared to the broader area of the regional water system that the impact cannot be very large. Vice Chair Sacks believes that small effects are as important for the IWC to consider as large effects. He thinks that the IWC needs to look carefully whether this Application has an adverse impact or not. Some of the other arguments that were made include the idea that the trees and the canopy will

be unaffected because it would not increase the sun exposure that much. He visited the site and saw large trees on the edge of the property that would be removed. It looked like more light would be flowing in, drying the area out because of the light, and adding the potential for growth of invasive species. He is also concerned that the Applicant had not done a before and after analysis of the water that flows through the property. This is an area that consists of large numbers of very mature, tall trees on a very sloping area and if you remove a large proportion of those trees, place a lawn there, and put a drain where the water can flow, accumulate, and eventually overflow downstream into that area, so he thinks an analysis should have been conducted. The soil scientist argued that this “mimics natural hydrology” and Vice Chair Sacks thinks that to driveway and roof pouring water into a catchall drain which fills up with water and eventually overflows does not mimic the hydrology of a heavily treed area with a slope. He said that there was no other testimony from any other experts and he is concerned that there is a financial interest on the part of the experts. He asked if someone without a financial stake in the outcome could speak to the IWC. He also thinks it is critical that this is a headwater. Vice Chair Sacks could see water flowing when he visited the site, as well as an area down from the stream where the wetlands were and found black, soaking earth. He thinks this is a very important area not just in terms of where the water is flowing but also where it is flowing into. He is concerned that you will change the flow of water into this area. He did not feel that he had a satisfactory argument that convinced him this transformation would not have an adverse strip effect on the whole area below. He believes that the transformation that will occur will alter what you are going to see on the Town’s walking trails and the value of the recreation in those areas.

C. Hauss voted no on the Application and feels that it is the IWC’s responsibility to not just rubber stamp the soil scientist. She believes this headwater is an important, critical area. This is an area that has been heavily developed already with roads that should not be there and there is nothing the IWC can do about that now but this particular lot is more difficult than the other lots where D. Whitney provided mitigation. She is also concerned procedurally about setting precedent for this reconsideration.

G. Gianini voted in favor of this Application but he is concerned about the procedural issues. Section 10.2 of the Town of Avon Inland Wetlands Regulations list criteria for decision making. He was impressed with the mitigation and the evolution over the three meetings held on this Application. He feels that the IWC needs to be more specific on the language when a decision is made either in the affirmative or the negative.

Chair Feldman believes the IWC deliberated long and hard to consider all the facts and evidence that came before them. Each Commissioner walked the site and made their own observations and the IWC did approve 3 out of the 4 lots. He is disappointed that the IWC has been put in this position. He said that this lot constitutes a portion of the headwaters of Hawley Brook which then drains downstream into other wetlands and watercourses and ultimately the Farmington River. He is less concerned about the procedural aspects of this than other Commissioners and feels that if a mistake was made, it should be fixed. He did vote in favor of the Application for this lot but does not feel that the IWC made a mistake in not granting the permit. R. Breckinridge asked if the IWC does not grant a re-decision tonight, what is the recourse to the Applicant in terms of reapplying with an attempt to rectify some of the IWC’s concerns. Chair Feldman said

that the Applicant has already filed an appeal with the Superior Court so that is the recourse. E. Kyle said that if there was not an appeal, the Applicant could have reapplied.

Jeffrey Brighenti, representative for the Applicant, said that he is concerned with some statements made by Commissioners. First, he does not understand why C. Hauss feels that these roads should not be there. As to Chair Feldman's comment, J. Brighenti is also disappointed that the Applicant had to take this route – that the IWC put the Applicant in this position. As to Vice Chair Sacks' comments that degradation of D. Whitney and E. Davison as the Applicant's experts have a financial interest in their reports, J. Brighenti said the experts are paid whether this is denied or approved. Chair Feldman feels that those comments were not intended personally at D. Whitney or E. Davison. Chair Feldman said that the IWC appreciates D. Whitney's candor and helpfulness but the IWC does not have to agree with him every time.

R. Reeves said that he agreed with Vice Chair Sacks' statement that the IWC's function is to weigh the evidence. But here the IWC has an expert opinion and no countervailing expert opinion and the law in the State of Connecticut says that in that situation, you cannot disregard the applicant's expert whether you think he is biased or not. That is the mistake the Applicant is giving the IWC a chance to correct before they have to prosecute this appeal in Superior Court. Chair Feldman does not agree that there is no countervailing evidence as each Commissioner had walked the property and made their own observations. R. Reeves said there is no countervailing expert evidence which is what the law requires to disregard the opinion of an expert. Vice Chair Sacks said that is not what he read in the Connecticut Bar Association's materials. Chair Feldman agreed and said that the CBA's seminar materials say that you do not have to believe an expert's opinion about the ultimate issue before you - that the wetland impact is not significant. Such determinations are the IWC's to make.

After discussion about the proper motion, Chair Feldman asked for a Motion to Approve Application #781 with respect to 7 Saddle Ridge Drive. There was no motion forthcoming so the existing decision is still effective.

II. COMMUNICATIONS FROM THE PUBLIC: None.

III. STAFF AND COMMISSION COMMENTS (unrelated to any Application):

G. Gianini would like the Commissioners to consider how a 9:00 p.m. meeting cutoff time could impact applicants and would like to discuss this at a future meeting.

IV. APPROVAL OF MINUTES: June 27, 2022 – Special Meeting

Vice Chair Sacks made a Motion to Approve the June 27, 2022 meeting minutes. C. Hauss seconded. The Motion passed unanimously.

V. NEXT REGULARLY SCHEDULED MEETING: November 1, 2022

Vice Chair Sacks made a Motion to Adjourn. R. Breckinridge seconded. The Motion passed unanimously.

There being no further business, the meeting adjourned at 8:05 p.m.

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