THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A VIRTUAL SPECIAL MEETING ON WEDNESDAY, MARCH 23, 2022, AT 7:00 P.M., VIA GOTOMEETING: by web, https://global.gotomeeting.com/join/427030989; or by phone, United States: +1 (877) 309-2073, Access Code: 427030989#.

Present were Chair Michael Feldman, Vice-chair Michael Sacks, and Commissioners Michael Beauchamp, Robert Breckinridge, Gary Gianini, and CJ Hauss. Also present was Emily Kyle, Planning and Community Development Specialist/Wetlands Agent and Attorney Kari Olson, the Town Attorney.

Chair Feldman called the meeting to order at 7:00 p.m. There is a quorum of 6 Commissioners.

I. OTHER BUSINESS:

Legislative Updates and Inland Wetlands Commission Training Requirements: Town Attorney

Chair Feldman indicated that this is the only item on our Agenda and he turned the meeting over to K. Olson. K. Olson thanked the Commission for inviting her and commended each Commissioner on their volunteer service. She has represented municipalities and local land use boards and commissions, including wetlands commissions, for more than 20 years. Avon is among her oldest clients. She will have a slide presentation on the screen.

Freedom of Information Act ("FOIA"). Commissioners are public officials which means that they are subject to the FOIA which provides that the public has the right to attend meetings and obtain public records from public agencies, with certain exceptions. The goal is to promote open government. The Inlands Wetlands Commission (the "IWC") is a public agency for the Town of Avon. The FOIA provides the public with the right to receive information from and to attend meetings of public agencies. The meeting is defined as any hearing or other proceeding of a public agency or any convening or assembling of a quorum of a multi-member public agency or any communication by or to a quorum of a multi-member agency, regardless of the medium, when the purpose is to discuss or act upon any matter over which you have supervision, control, jurisdiction, or advisory power. If you are discussing a matter that is the business of the IWC and you have a quorum, the public has a right to advance notice and a right to attend. The failure to provide that could constitute an illegal meeting under FOIA. K. Olson advised that if less than a quorum gets together to talk, it is arguably not an illegal meeting but if you have an application pending, especially one that requires a public hearing, you should not communicate about it at all regardless of the number of individuals. K. Olson confirmed that is the best way to avoid a challenge. K. Olson continued that a quorum in general is a majority of the members of a public agency but it could be defined differently by charter or ordinances. With respect to the IWC, it would be a 4 member panel. No substantive action can be taken at a meeting without a quorum except that the one thing you can do is set the time and place for the next meeting. If you lose a quorum, any substantive business must stop. Substantive business means the discussion of an application or anything over which you have jurisdiction or advisory control. There are exceptions to the quorum requirements including what should be on the agenda (listing it but not substantively discussing it) or when the next meeting should take place. A quorum can happen by accident and it can happen anywhere. The minute that you communicate with a quorum of

people from the IWC about anything of substance, it becomes a public meeting by definition which must be noticed in advance and the public has a right to attend. R. Breckinridge asked about discussion of an application that has been completed. K. Olson replied that it depends on what the discussion is - talking to a member of the public is not a public meeting but you cannot do that before an application is completed. M. Beauchamp asked if he visited a site and ran into another Commissioner, could he ask the other Commissioner what they thought in a casual conversation? K. Olson advises against it, not because of FOIA but other reasons that pertain to predetermination and ex parte communication. Once an application is filed, there is a different set of rules that apply, which are the land use rules that also dictate that you do not discuss a pending application. K. Olson stated that there are exceptions to public meetings such as chance meetings, social meetings, and a caucus of members of a single political party (the law recognizes that members of a political party have the right to convene to discuss strategy). K. Olson continued that there are other exceptions including communications to or from a quorum about the time and place of a meeting, communications about what is going to be on the agenda (not the substance), attendance at a noticed meeting of another public agency, attendance at meetings of single member public agencies, and attendance at caucuses of members of a single political party. However, the presence of third parties, including someone from another political party, an independent, a consultant, a news reporter, or some other member of the public who is not a member of a political party negates the caucus – it destroys the sanctity of the caucus. Also, the public has a right to attend the IWC meetings and observe without having to register – they cannot be forced to disclose who they are and sign in in order to attend a public meeting. They also have the right to record, photograph and broadcast a public meeting though they cannot be disruptive. During normal IWC meetings (not public hearings), there is no right for the public to speak or be heard. If you allow public comment, you have to allow everybody an opportunity to speak. Vice Chair Sacks asked if you could limit the amount of time that an individual can speak. K. Olson replied that yes you can limit the time for anyone to speak whether it is during public comment or a public hearing but you should set the ground rules from the beginning. The IWC should state the ground rules and ask that the public not repeat comments that have already been made – if someone agrees with comments that were already made, they can simply state that they concur with the prior speaker. The IWC should state that everything submitted into the record will be considered. If a member of the public has more to say, they can be allowed to speak again after everyone else has had a chance.

K. Olson continued that there are three types of public meetings. There are regular meetings that the IWC posts a schedule of before January 31 of each year, posts the Agenda 24 hours prior to the meeting, allows other business if added by a separate vote of 2/3 of the Commissioners present, and posts minutes for the meeting within seven days. There are special meetings that the IWC must post a notice and agenda with the Town Clerk 24 hours prior to the meeting and other business cannot be added. Special meetings occur between regular meetings and are usually called by the Chairperson of a board or commission. The FOIA expects that if the public is interested in what a commission is doing, they will show up at regular meetings and will be there if new business is added. But for a special meeting, they will make a decision whether to attend based on the agenda so you cannot add other business or discuss other business. Lastly, there are emergency meetings which have very limited circumstances where you can call one and it requires no agenda or advance notice but it has to be really critical for example, a tornado hitting the town. If you have to move or reschedule a meeting, for example, if you have a controversial

application pending and the typical meeting room is not sufficient to hold all the people who might be interested, ideally you should give 30 days' advance notice to the Town Clerk and at a minimum, you should post a notice on the door of the usual location.

K. Olson repeated that notices, agendas and the minutes should be posted on the Town's website. The purpose of an agenda is to give adequate notice to members of the public of the business that is being transacted. The minutes should denote the time and place, the members present, the business transacted including any votes, whether there was an executive session, including the grounds for the executive session, and the time the meeting was adjourned. A notice of votes is supposed to be recorded separate and apart from the minutes within 48 hours of any meeting. As to executive sessions, under the FOIA there are very specific and limited reasons that you have the right to exclude the public. First, you need a 2/3 vote to enter into executive session. During that motion, you have to state the applicable statutory basis for going into executive session. You can invite others into executive session to provide relevant information if necessary but once they have provided that information, they need to leave the executive session. The basis for executive session will most likely be a pending claim or pending litigation which means someone is appealing a wetlands decision or threatening to do so in writing. You also cannot vote in executive session, even a straw vote. Chair Feldman asked about discussing a settlement strategy in executive session. K. Olson stated that a settlement strategy discussion does not require a vote but you can discuss with legal counsel any pending litigation and what the Commission thinks is the appropriate course of action or how counsel can proceed in defending the Commission. This is different than voting on a settlement offer which must be done on the record with a motion to approve or disapprove a settlement. The FOIA also requires the ability of the public to access public records including the minutes of meetings, or any types of records typed, hand written, taped, recorded, printed, photographed, or anything stored electronically. Any emails to IWC members about IWC business are public records including anything on your personal phone or computer and could be subject to inspection or subpoena. K. Olson recommends that IWC use a separate Town email address (if available) or a separate personal email address only for IWC business. As to public records, there are exceptions but you should not put anything in writing that you would not want made public.

K. Olson moved on to speak about the Connecticut Inland Wetlands and Watercourses Act (the "IWWA") and provided the statutory cites. The Connecticut Department of Environmental Protection (now the Connecticut Department of Energy and Environmental Protection, "DEEP") delegated to local municipalities, the authority to regulate inland wetlands and watercourses and provided that every municipality is obliged to designate an inland wetlands and watercourses agency. The jurisdiction of the IWC is inland wetlands and watercourses, not Long Island Sound or tidal waters. Connecticut ("CT") defines its wetlands based on soil type. That is a critical distinction and in general requires the expertise of a soil scientist to tell you whether or not by definition you are dealing with wetlands under the IWWA. The IWC can only control regulated activities which are operations within a wetland or watercourse involving removal or deposition of any material, or any obstruction, construction, alteration or pollution of such wetlands or watercourses but excludes certain activities that are exempt. The regulated activities have a right to include within your scope of review a buffer or upland review area. However, the activities to be conducted in the upland review area have to be likely to affect wetlands. The IWC's ability to regulate wetland impacts or upland review impacts that involve an obligate species, like the

wood frog, are strictly limited to a link between those obligate species and the actual quality and effect and impact on the wetlands. Vice Chair Sacks asked if you discovered an obligate species would be destroyed by changing the upland review area, would that be sufficient reason to turn down an application. It has to be a wetland obligate species that impacts the overall functioning and integrity of the wetland or watercourse before it is the IWC's jurisdiction. K. Olson stated that the Supreme Court has made it very clear that even a wetland obligate species is not a basis for the IWC to legislate unless there is a link between the obligate species and the quality of the wetlands itself. Vice Chair Sacks asked for specific cases to look at more closely. K. Olson pointed to River Sound Development, LLC v. Old Saybrook IWC.

Chair Feldman asked whether determining and defining wetlands soils (as well as other technical issues that come before the IWC) requires expertise and expert testimony. If the IWC is presented with someone that is clearly an expert but the IWC feels he is biased or has testimony that is internally inconsistent, is the IWC able to disbelieve him and reject his testimony? K. Olson replied that the CT Supreme Court has said that whether you believe a particular expert is within your realm of jurisdiction. But if it is the only expert evidence and you do not get another consultant or no one on the IWC has the appropriate expertise, then you will be exposed if you dismiss the expert testimony. K. Olson reiterated that the IWC will put itself in peril if it does not have contrary expert evidence to rely on. The IWC can request an independent consultant and if there is a Town ordinance, you can hire private consultants and charge it to the applicant. Vice Chair Sacks observed that sometimes it is a more subtle thing than soil science – it is the maps and the questions of testimony that says there will be no significant damage to the wetlands while an independent consultant might judge it significant. K. Olson told the IWC that if they had other credible evidence that suggests the applicant's expert is wrong, then you need to make sure that that evidence gets into the record. There has to be evidence in the record to countermand an expert – the Supreme Court has made clear that ordinary members of a wetlands commission cannot simply disbelieve the only expert evidence on a particular issue with respect to a wetlands permit without providing something else to rely on - unless you are an expert which means that you have to put your resume and training on the record. Vice Chair Sacks asked what would allow the IWC to ask for an independent consultant. K. Olson indicated that it was based on the Town's regulations. E. Kyle stated that it is her understanding that it would need to be written and adopted into the Town's regulations and ordinances which at present it is not. Vice Chair Sacks asked how would we get that done. K. Olson could provide examples from other towns to consider and then it would adopted like a text amendment or map amendment to the regulations including a public hearing. The fees are usually set through an ordinance which means that the Town Council would have to agree. R. Breckinridge indicated that he had been on the IWC for a long time and during his tenure, he only remembers once when the IWC has called in an independent soil scientist. He is concerned about calling in a third party and believes that the IWC should accept that most of the soil scientists they are dealing with are not trying to mislead the IWC. The one time that the IWC did call in a third party was for a very controversial project. K. Olson believes that most of the soil scientists in the area would not put their personal integrity on the line. Again, you do not have to believe every expert but if the only expert on whether property is wetlands or not is contrary to your opinion and you do not have another expert to countermand that, then the Supreme Court will say that is not substantial evidence to deny. Chair Feldman feels that the IWC would not want to hire a consultant for every case but if the IWC entertains having a regulation that would allow an independent consultant, there would

be some conditions that would be attached to it. K. Olson stated that if the IWC perceives what is happening as a significant wetlands impact, then having your own consultant does not necessarily mean that they would advise you on a basis to deny but they may advise you on appropriate mitigation or in balancing your objectives and understanding that you have to allow people reasonable use of their property.

There are activities that are not regulated. These are listed in the power point presentation but it is basically uses that are attendant to the normal use of an individual's property, or deal with the State's ability to put in drainage pipes, outdoor recreation, or conservation measures (provided that they don't disturb the natural indigenous character of the wetlands and watercourse by the removal of a lot of material, or the alteration or obstruction of water flow or pollution of a wetland or watercourse). In the first instance, whether a proposed activity is a non-regulated use within our wetland or watercourse area is within the jurisdiction of the IWC to determine under Section 22a-40. Wetlands delineation is also an issue for the IWC so they need to know what map applies. The original wetlands maps for the entire state are based on aerial and on the ground large area testing that occurred in the 1960s, though some of it was updated through the 1980s. When the IWWA was adopted, most towns adopted as their baseline, the Natural Resources Conservation Service (the "NRCS") maps. So if your property shows up on the NRCS maps, you would have to go to the IWC and prove differently. These maps are, however, merely an approximation – it was something that towns can rely on as a basis but with the understanding that an individual property owner who owned a smaller footprint within the overall mapping area, had the right to come in with a soil scientist to establish clearly the wetlands on their own property. K. Olson and R. Breckinridge discussed what size acreage the NRCS maps dealt with and agreed that it was somewhere between 5 and 20 acres. If there is a piece of property that meets the definition of a wetland or watercourse under the Inland Wetlands Act, the IWC has the right to regulate it. If testing establishes that there are wetlands or watercourses that do not appear on the NCRS maps, the IWC does have the right to regulate. Most local regulations, including Avon's, acknowledge that field conditions prevail over the official map. The Town has routinely accepted soil scientist's field analysis as the designation of wetlands or watercourses on any particular piece of property, and approximately every 10 years, the Town would compile all of the permanent information that has transpired in the previous 10 years. All of the wetlands delineations that had been officially done by boots on the ground would be used to amend the maps to be consistent with those permitted activities. K. Olson stated that it was generally the practice of Avon to periodically update the NCRS map to be consistent with and adopt the actual soil testing that had occurred on specific properties within approximately a 10 year period. E. Kyle believes that the last update was 2004. Chair Feldman asked if an update had to come before the IWC to be approved. K. Olson replied that it did. Wetlands mapping and re-delineation requires a certified soil scientist and it requires an application for an amendment to the existing wetland maps and the IWC can also make its own application to amend the wetlands map. The other way the map gets updated de facto is when it is made in conjunction with an application for a regulated activity. Again, the courts recognize that boots on the ground testing is more accurate than the 1961 aerial global multi-acre analysis that was done. It requires an application, a public hearing, filing of the proposed changes 10 days in advance of the public hearing, majority vote of the IWC, a statement of your reasons for the change on the record, setting of an effective date, filing with the clerk, and copying DEEP within 10 days. You are not required to believe any witness but you cannot disregard the only expert evidence available on an

issue when you lack your own expertise or knowledge. This is set forth in the Huck v. Inland Wetlands & Watercourses Agency of the Town of Greenwich case. Once you have agreed to a delineation of a wetland for a permit for a particular property, that then becomes essentially the wetland mapping for that property so absent some expert testimony to the contrary, someone would have a justifiable basis to say that you have already circumscribed the wetlands and watercourses on their property and they have a right to rely on that. Basically a wetlands delineation with an application becomes the new wetlands boundary for that particular property, regardless of the existing formal map. No Commission should be subjected to the whims of elections or appointments because your duty is to apply the law within the realm of your jurisdiction and if a Commission has fully and fairly done that, a new Commission member should not undermine or overturn you. A Commission does not have the right to change its mind on a permit unless you can establish a substantial change in circumstance.

K. Olson moved on to when is an IWC application required. This includes: when someone is proposing regulated activity, including activities in the upland review area; when someone is proposing a map amendment; when someone is claiming an exempt activity – the IWC can decide whether a proposed activity is regulated or not; and when an IWC activity is in conjunction with applications for various planning and zoning approvals including site plans, special permits, and subdivisions. The regulations spell out what is required for the application process – the form, the fee, and a complete application (if the application is not complete, you have a right to deny it on that basis alone). The receipt of an application (and this is important only for purposes of the clock that's running on your decision) is the date of the IWC's next regularly scheduled meeting which is the one that you told the Town Clerk that you would have the second Thursday of every month, for example, or 35 days from the date that an applicant actually filed it with the Town and it was stamped. Whichever of those dates is earliest is the date that starts the clock on your statutory obligation to render a decision. It does not matter if the regularly scheduled meeting is cancelled for any reason including weather or lack of a quorum.

An administrative review only happens if authority is delegated to your wetlands officials and it can only be delegated if the conduct will not occur directly in a wetland or watercourse and will provide no greater than minimal impact on wetlands or watercourses. The applicant must publish notice of the Agent's decision within 10 days and the Agent's decision is only appealable to the IWC within 15 days after noticed by publication.

There are a few things that will trigger public hearings in the wetlands context including if the IWC finds the proposed activity may have a significant impact on wetlands and watercourses, if the IWC receives a petition signed by 25 people who reside in the Town and that petition is filed not later than 14 days after receipt (which is either the next regularly scheduled meeting of the IWC or 35 days from the actual date the application was received and stamped by the Town, whichever is sooner) of the application, or the IWC finds that it is in the public interest to have a public hearing – even if you do not think there is a significant impact but just feel a lot of pressure and want public input. If no public hearing is required, the IWC has to wait 14 days to allow anyone who wants to petition to do so. A public hearing has to start within 65 days after receipt and you must public notice. It does take a couple of weeks to meet all of the notice requirements under state law. You are also required to close the public hearing within 35 days

and render a decision within 35 days after the close of the public hearing however, all of these deadlines can be extended by the applicant up to a total of 65 days overall. K. Olsen stated that you need to make a determination as to whether you believe that there is a likelihood of a significant impact and set the hearing at the outset. When the IWC receives the application, the hope would be that you determine whether you think that there is going to be a significant impact based on the application as it stands and then set a public hearing at that time. Chair Feldman asked when does the IWC actually make that decision. K. Olson stated that you have to make at least a perfunctory, preliminary determination as to whether you think it is likely that what the applicant is proposing will have a negative impact on wetlands or watercourses. You have to use your best judgment at the beginning to make a reasonable preliminary determination. Vice Chair Sacks asked if the IWC believed that an application would have a significant impact on the wetlands, could it be rejected or would you have to have a public hearing. K. Olson replied that if you think it's likely to have a significant impact, then you have to hold a public hearing. Part of the purpose of a public hearing is to allow the applicant to provide evidence of feasible and prudent alternatives or the lack thereof. Vice Chair Sacks then asked if a feasible and prudent alternative is to do nothing because doing something is destructive. K. Olson replied that the IWC's objection is to protect wetlands and watercourses but you are expressly required to do essentially a balancing act weighing an individual or property owner's right to use their property for a permitted purpose with the preservation of wetlands and watercourses. You cannot tell someone that they have no right to use their property for any permitted purpose if there is not going to be any impact on the wetlands at all. Vice Chair Sacks asked if there is significant impact to the wetlands, isn't that a grounds for rejecting a proposal? K. Olson stated that if there is significant impact, then you get into the feasible and prudent alternative discussion. K. Olson stated that the IWC's objective is to try to balance the rights of property owners to use their property for permitted purposes with the desire to preserve wetlands and watercourses. To tell anyone who owns property that they cannot use their property for any permitted purpose because it will impact wetlands is effectively an inverse condemnation of their property. She continued that the law says, when it comes to inverse condemnation, you don't have the right to every use of your property that you want – you have the right to reasonable use of your property. Chair Feldman asked if there are any circumstances that a commission can outright deny an application and if so, what are those circumstances? K. Olson said based on the law, it is where an applicant has failed to property investigate or propose feasible and prudent alternatives that a commission has identified. Chair Feldman asked if the applicant proposes a feasible and prudent alternative, is the IWC required to accept it. K. Olson replied not necessarily – it depends. For example, a single family home is going to be deemed by any court something that needs to be allowed within reason, so insisting that the owner do nothing with their property as a feasible and prudent alternative will expose you to an inverse condemnation claim. Chair Feldman asked if the IWC has discretion to reject an application? K. Olson replied that again it would be a feasible and prudent alternative analysis. If the IWC believes that there are feasible and prudent alternatives, the IWC has the right to deny the application. If the applicant refuses to agree to the IWC's feasible and prudent alternative, it will be on a case by case basis. Vice Chair Sacks asked if someone bought a piece of property and there is so much wetlands on it that you cannot really put a house on it, even if they did not realize this, do they have the right to build on that property? K. Olson asked firstly if this was an approved building lot that has been recognized as such on a subdivision map by the assessor. An approved building lot has rights depending on the zone, and if the IWC said that they cannot use that property for any permitted purpose because it

is going to impact wetlands or watercourses as opposed to balancing and trying to come up with a way to mitigate the impact, it puts the IWC in a precarious position. She said that you do need to insist on mitigating any wetlands impacts as much as you can but if you have a residential building lot that's approved, you are going to be hard pressed to say that they cannot use it for a single family home of any type or any sort. People do not have the right to the most lucrative use of their property or the most expanded use of their property, but only reasonable use of their property. The issue now is that we are becoming so populated that most of the lots that are available are not the prime lots.

R. Breckinridge would like look at wetlands Regulations Section 7.9 regarding a discussion on applications that are being sought for renewal or amendments.

II. NEXT REGULARLY SCHEDULED MEETING:

The next regularly scheduled meeting is Tuesday, April 5, 2022.

The meeting was adjourned because there was no longer a quorum.

There being no further business, the meeting adjourned at 9:20 p.m.

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