

THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A VIRTUAL SPECIAL MEETING ON TUESDAY, APRIL 26, 2022, AT 7:00 P.M., VIA GOTOMEETING: by web, <https://global.gotomeeting.com/join/683243525>; or by phone, United States: +1 (866) 899-4679, Access Code: [683243525#](https://global.gotomeeting.com/join/683243525).

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 for Avon.

Chair Feldman called the meeting to order at 7:05 p.m. There is a quorum of 6 Commissioners.

## I. OTHER BUSINESS:

Legislative Updates and Inland Wetlands Commission Training Requirements: Town Attorney

K. Olson began with FPA: CGS Section 22a-41. She reiterated that the Inland Wetlands Commission (“IWC”) has limited jurisdiction over development proposals to regulated activities and those activities within an upland review area that are likely to have a negative impact on the wetlands. It is truly a balancing act – if the IWC finds that the activity is significant and is likely to have a negative impact on the wetlands, that triggers the FPA (“FPA”) analysis where you have to determine whether there are ways to modify the proposed development to have less of a significant impact on the wetlands. This is an opportunity to for example, shrink the footprint of the development or provide wetlands mitigation like creating other wetlands somewhere else on the site. The definition of feasible is a matter of sound engineering, and prudent alternatives are those which are economically reasonable in light of the social benefit derived from the activity. Feasible is not just a monetary question but it would be a situation where they can present, or the IWC’s experts can present, an actual alternative to the development that will diminish the negative impacts on wetlands in a manner that is of sound engineering principles and economically reasonable. Vice Chair Sacks referred to a regulation from Meriden that suggests that one feasible alternative is to do nothing and he asked if the IWC could say to someone that building in an area that disturbs the wetlands is not appropriate and they should not build there. K. Olson said that you would have to look at if there are FPA to what the applicant wants to do and the IWC cannot prevent any reasonable development of someone’s property without addressing FPA. People have a right to develop their property within reason. If a regulation prevents any reasonable development on the property, then a claim of inverse condemnation could be brought. K. Olson said that by definition, feasible does not mean personal preference. It means a matter of sound engineering and economically reasonable in light of the social benefits derived from the activity. Vice Chair Sacks asked if every lot that the IWC looks at has been approved for construction. K. Olson said that if it is a permitted use in the zone, you need to try to balance development that is being proposed with a property owners right to use their property and if you determine that there is a FPA that the owner is unwilling to abide by, then that is grounds for denial. Vice Chair Sacks asked if the balancing act that the IWC has to perform is the balance between our consideration of what is important for the economic growth of the state and the use of an applicant’s land as stated in the Meriden regulations. He noted that it is the state’s concern we have to balance against the need to protect the environment and the ecology – it does not have any wording about an individual’s right to use the land as they want. K. Olson

said that it is a balancing act with the understanding that people do have a right to a reasonable use of their property, and if they are going to be denied any development of their property there is a potential claim of inverse condemnation which would require the town to give the property owner fair compensation for their property. It is a case by case analysis and the IWC is subject to the General Statutes which says that the IWC's jurisdiction is over wetlands and watercourses and regulated activities, including in the upland review area, that are likely to have a negative impact on the wetlands. If the IWC believes that there is a likelihood of a significant negative impact on the wetlands, you are required to do a FPA analysis. If the applicant is unwilling to consider or address FPA that is grounds for a denial of their application. She continued that if there is going to be a significant impact on wetlands and watercourses, the IWC cannot issue a permit unless they find that there is no FPA. K. Olson has not been involved in any case where there was a denial based on the fact that there was no FPA so there was no right to develop the property. The analysis is to look for FPA and if there is no alternative to what is being proposed in light of the social benefits to be derived from the development on the property, then you have a right to issue the permit. She continued that the IWC can deny an application if you believe there are FPA that have not been explored that would have less of a negative impact.

K. Olson stated that there are recent court decisions that say that you do not have to do a FPA analysis unless you find there is a significant negative impact on the wetlands. Once the Commission has determined that there is a significant impact activity proposed, the Commission will evaluate alternatives. If there is FPA that will have a less adverse impact on wetlands or watercourses, the IWC is obligated to propose on the record the alternatives that the applicant should investigate. You cannot deny or condition an application for a regulated activity in an area outside the wetlands or watercourses on the basis of an impact on aquatic plant or animal life unless the impact on those aquatic plants or animal life will likely impact or affect the physical characteristics or functioning of the wetlands or watercourses. This is the River Bend case where the court found that the tree frogs would have been impacted by the development and the tree frogs were integral to the proper functioning of the wetlands. In the River Bend case, the application was denied because they found FPA that would have less of an impact on the tree frogs, thus reducing impact to the wetlands.

K. Olson continued with conditions of approval. You can condition a permit, limit a permit, and modify what is being proposed. Examples of conditions of approval are reasonable measures that would mitigate any impacts like restricting the time of year for conducting the activity or conditions for restoring, enhancing, or creating productive wetlands. Conditions of approval are part of your FPA analysis. If somebody wants to fill wetlands, one option is to require enhancing other existing wetlands on the site by creating additional wetlands or improving the quality of the wetlands. This could be advantageous because sometimes wetlands do not have significant functionality so it is a good opportunity to allow development near a less than worthwhile wetland and actually enhance wetlands that are functionally superior.

K. Olson continued that once the IWC has rendered a decision, you have to notify the applicant by certified mail within 15 days, and publish notice of the decision in a newspaper of general circulation in the town. If you fail to publish notice of your decision, the applicant can publish their own notice within 10 days.

K. Olson stated that terms of permits have gotten a bit more complicated with the recent legislation, Public Act 21-163. Approvals that have not already expired by July 1, 2011, will expire not less than 14 years from date of approval, with a potential additional expansion not to exceed 19 years. Also, all permits shall be renewed upon request absent a finding of a substantial change in circumstances. There is a recent appellate court case that applied the impotent to reverse rule to a wetlands matter. K. Olson reiterated that if somebody has made an application to the IWC that has been approved or denied, and there is no substantial change to what is now coming before the IWC, there is not sufficient grounds for you to change that decision. Chair Feldman asked if a permit lasts for a minimum of 14 years and K. Olsen replied that it depends on when the permit was approved. Most land use permits like special permits or site plan approvals have also been extended due to Covid. K. Olson referenced Public Act 21-34 which says that subdivision, wetlands, and site plan approvals prior to the effective date of the Act that had not expired prior to March 10, 2020, shall now expire 14 years from the date of approval.

K. Olson cautioned the IWC Commissioners that no pending application should be discussed by any member once that application is filed. All discussions should take place in a public meeting or in the hearing process because the applicant cannot be denied due process and is entitled to know what is in front of you for consideration on their application. If there are communications going on outside the scope of a public meeting or hearing, applicants would have no ability to rebut it or address it. Likewise, the applicant should not be contacting you, giving you information on the side, or asking you to vote in their favor. Ex parte communications are a solid basis for having whatever decision you make overturned. The courts will look at what impact that ex parte communication had on the applicant's due process rights and the ultimate decision that was made. If you inadvertently get an ex parte communication, the first thing you should do is disclose that on the record so everybody on the IWC is aware of it and the applicant has an opportunity to address it. In those circumstances, the court is likely to find that the ex parte communication did not have a significant impact on the decision that was rendered. Ex parte communications also include issues like doing your own independent research or looking at social media on the topic. Emails or site visits by a quorum of the IWC that are not previously noticed as a meeting are problematic and will be considered ex parte communication. R. Breckinridge asked about independent research. K. Olson answered that it is the due process right of an applicant to know what information the IWC is absorbing in considering their application. As a commission, you should be asking the applicant whatever questions you may have. Chair Feldman asked if he could look at the wetlands regulations in between meetings when the IWC is considering an application. K. Olson replied yes – you are presumed to know your regulations and they are presumed to be a part of every application or appeal whether they are physically put into the record or not. K. Olson stated that a Commissioner should ask the applicant to provide you with whatever information you are requesting and/or ask your own consultants. If you have any specific expertise and want to opine on what is being presented to you, get your resume into the record because the applicant has the right to challenge you.

K. Olson said that bias is another place where a Commission's decisions can be challenged. You are required as a commission member to keep an open and objective mind on every application that comes before you. You should not make a decision until you have reviewed all the information and the applicant has presented everything. A problem arises when your bias prohibits you from being objective. Bias also requires introspection because nobody truly knows if you're biased one way or another except you. You need to ask yourself when an application

comes in, can you keep an open and objective mind, listen to the evidence, apply the law and your regulations, and understand that even if you don't think it is a good idea, if there is no significant negative wetland impacts that are proposed, then you do not have a solid basis to deny the permit. If you believe that you cannot be open and objective for any reason, then you should not be acting on the application. Chair Feldman asked if bias has to be based upon a financial or personal interest. K. Olson replied that even the courts recognize that we all have opinions and the question for a particular application is whether your general opinion is going to override an open and objective review of the information in front of you such that even if you believe there is no negative impact on wetlands you would deny the permit based on the fact that you do not like the project. You have to keep an open and objective mind to the information presented to you and apply that information to the law and the regulations. It also includes if you have an opinion about the applicant or the applicant's consultants. If you do not believe a consultant, then you need to have your own expert weigh in or you will likely lose on appeal. Just disagreeing with an expert when you are not an expert will not be upheld by our court. R. Breckinridge asked if there is a certified expert witness, and they are the only expert witness, and they present an opinion based on fact, if the IWC must accept their evidence as fact. K. Olson replied that unless you have alternative expert guidance that undermines their opinion or their findings, it would not be valid to discount that expert's opinion. K. Olson continued that the wetlands maps across the state for the most part are based on very broad strokes of mapping that was done in the 60s. Actually going to the specific property and delineating wetlands is the more accurate way. In the past, every 10 years Avon had taken all the wetlands mapping that has been done and updates its maps to mirror the approvals and information from the prior 10 years. Vice Chair Sacks asked if that is in the regulations and K. Olson replied that no, there is no law or regulation that requires this. The IWC has accepted, absent some new studies being done, the more recent wetlands mapping of a particular property as being more accurate in general than the old wetlands map. In a typical application process, the applicant has a soil scientist that maps out the wetlands for the property, then if the permit is approved, for all intents and purposes, that becomes the wetlands line for the property regardless of the old map. E. Kyle commented that it has been longer than 10 years since Avon updated its wetlands map.

K. Olson continued that predetermination is similar to bias. If a Commissioner cannot accept all the information and agree to look at it objectively and then render your decision because you have already made up your mind, that is predetermination. She said that you are entitled to have an opinion but if you do or say something that indicates that you have actually made up your mind on an application before you have heard all the evidence and the information, you have predetermination. It is about being objective, understanding that you are a Commissioner of an agency, and you have jurisdictional limitations on how your decisions are rendered, on the area that you can regulate, and the activities that you can regulate.

K. Olson said that once you have rendered the decision, the applicant has to appeal within 15 days of publication of the Notice of Decision and they have to be aggrieved which under the General Statutes can include an abutter or owner of land within 90' of wetlands or watercourses. The actual applicant who is appealing has to have a sufficient interest in the property to pursue not only the application but the appeal and that interest has to follow through for the entire time of the appeal. In a court trial, the first step is to prove aggrievement. That is why an application always requires the permission of the owner or some contractual right of an applicant to buy or that gives them an interest in the property. Decisions on appeal are based wholly upon the record

before you which again is the reason that if there is something influencing a Commissioner outside of the hearing process, you must get it on the record. The only time that somebody will be able to go outside the record is if they can establish something untoward like ex parte communication. The general standard for our Court to uphold a Commission decision is that there has to be substantial evidence in the record to support your decision. Chair Feldman said that it is his understanding that discovery and depositions are very limited in administrative appeals. K. Olson replied that the applicant would have to make a showing to the court that there is a reason to go outside the record. It is not fair to the applicant or to other Commissioners for one Commissioner to have information that all are not privy to – the IWC should act as a cohesive Commission. If the IWC gives a collective statement of reasons on the record for denying an application, any one of those reasons could be enough to sustain your decision. Where there is no collective statement of reasons, the court will search the record to find a sufficient basis. If the IWC is going to give a collective statement of reasons, make sure it is complete. If each Commissioner expresses their reasons for denying the application, that will help guide the court, as well as the applicant if they decide to re-apply. The decision should not be arbitrary or capricious. If there is an intervenor that files, that is another complicating factor so you may need to make additional findings when it comes to rendering your decision such as whether they have met their burden of proof establishing a reasonable likelihood of unreasonable pollution or impairment of the natural resources of the state. You cannot settle an appeal without a hearing before the court approving the settlement because notice has to be given that there is a potential settlement so that anybody who is interested can come and object. Generally settlement discussions are held in an executive session during a regular IWC meeting and then you would come out of executive session to determine whether you are going to agree to a settlement. The audience has a right to comment. There is no automatic right of appeal beyond the Superior Court to the higher appellate courts in our State unless you are granted a petition for certification of review. You have to make application and the appellate court can grant or deny and if they deny, the case is finished.

K. Olson stated that training is also required for wetlands staff as well as at least one Commission member. K. Olson encourages each Commissioner to get whatever training you think would help you to be a good IWC member. DEEP offer some training that will get more into the areas of wetlands science.

Vice Chair Sacks asked about making an article or research a part of the record. K. Olson replied that the Commissioner should state that there is an article (or DEEP training or research) that addresses this topic and tell the applicant and their experts that you'd like to put it into the record so the applicant and their experts can respond to it. You cannot pull it into deliberations when the applicant has not had an opportunity to address it. Vice Chair Sacks also asked what is the standing of decisions that were made by the IWC in the past. Can the basis of previous decisions be used in an appeal? K. Olson said it will be highly fact specific because every property is unique. Also, as a Commission you want your community to have confidence that you are fair and have integrity. It is not a bad thing to try to be consistent but consistency is not always going to work because no two properties are alike.

David Whitney, Consulting Engineers, LLC, asked if the IWC finds that an application might have significant impact and he has to list FPA, does he have to specifically list the no build option as an alternative? K. Olson replied that D. Whitney could list it but K. Olson would be

more focused on the FPA that allows a reasonable use of the property. Based on law and the cases, it is supposed to be a balancing of the preservation of the wetlands with peoples' right to use their property. An applicant is not entitled to the highest and best use of a property - they are entitled to reasonable use.

R. Breckinridge asked if it was appropriate for IWC members to be doing research and putting this on the record. K. Olson contrasted that with an example of a Commissioner that did DEEP training which addressed the issue. K. Olson said that if a Commissioner is relying on something to make a decision then it needs to get into the record. The applicant has a right to know what is influencing each Commissioner in their decision making. If it is a document that the Commissioner was given in specific wetlands DEEP training, they can articulate it verbally on the record. If a Commissioner needs more information, they should ask the applicant or get their own consultant. K. Olson advised the IWC to avoid anything that appears like a Commissioner has been doing independent research. Vice Chair Sacks asked what alternatives they have other than to hire the IWC's own expert. K. Olson said that he can ask the applicant's expert as many challenging questions as he wants. Vice Chair Sacks believes that we need to build into Avon's regulations the circumstances under which we can require an applicant to pay for an expert. R. Breckinridge believes if the IWC wants to have an expert witness to counter the applicant's expert, the town has to hire that witness. K. Olson said that if it is in the regulations, you can have the applicant pay the fees but currently there is no ordinance for fees in Avon so the town would have to pay for an expert witness. This has only happened in large projects in town. K. Olson said that that if you deny an application because there are FPA, the statute says that you should state what those FPA are so the applicant knows and you can get a sense from them whether they are willing to comply with them or not – though first you must find that there is a likelihood of a significant negative impact to the wetlands. D. Whitney asked what the criteria is for deciding significant impact. K. Olson said that it was about the functionality of the wetlands and things that are going to impact that. D. Whitney said that most of the applications are in the upland review area and not the wetlands themselves. K. Olson gave the example of steep slopes that might make something in the upland review area more likely to create an impact than a property that is flat. E. Kyle pointed out that in the definitions portion of the Town of Avon regulations it spells out the criteria for significant impact. K. Olson said that those are general criteria but it will be fact driven and it is going to depend on the activity, where it is and the functionality of the wetlands. D. Whitney agrees and believes that a functions, values and impact report would be critical for every wetlands application because how can the IWC make a finding of significance if they do not know whether the wetlands are valuable or not. K. Olson agrees that in any application where there is a direct regulated activity, that would be very appropriate, or in a case where the activity in the upland review area is significant enough to have an impact on a wetland or watercourse. D. Whitney reiterated that a lot of the applications are just in the upland review area and there is a big difference from the actual wetlands themselves. K. Olson agrees and said that the activity in the upland review area has to have a significant likelihood of a negative impact on a wetland or watercourse – it is not enough to just have an impact. D. Whitney said that some Commissioners feel that the upland review area is as sacred as the wetlands themselves and he sees a difference. K. Olson believes there is a huge difference though depending on the activity and the property, the upland review area could be significant.

II. NEXT REGULARLY SCHEDULED MEETING

The next regularly scheduled meeting is Tuesday, May 3, 2022.

R. Breckinridge made a motion to adjourn. Vice Chair Sacks seconded. The motion passed unanimously.

There being no further business, the meeting adjourned at 9:05 p.m.

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