

THE INLAND WETLANDS COMMISSION OF THE TOWN OF AVON HELD A MEETING ON TUESDAY, APRIL 4, 2017, AT THE AVON TOWN HALL.

Present were Clifford Thier, Chair, Michael Beauchamp, Vice Chair, Bob Breckinridge, Dean Applefield, Martha Dean, and Jed Usich. Bryan Short was absent. Also present were John McCahill, Planning and Community Development Specialist/Wetlands Agent, and Kari Olson, Town Attorney, Murtha Cullina, LLP.

Mr. Thier called the meeting to order at 7:02 pm.

NEW APPLICATIONS:

APPL #751- Michael Flors, owner, Thomas J. Donohue, applicant: Requests within the 100' upland review area: 1) Proposed plantings to restore area within 100' upland review area. Location: 232 Avon Mountain Road, Parcel 1170232.

T.J. Donohue stated for the record that he was representing Cody's Angel Investments, LLC, which is the owner of the lot that is the subject of the application. He noted that the Commission is familiar with this lot because it is the subject of litigation by the Commission against the applicant. In the context of the lawsuit, Mr. Donohue and Mr. Flors (Cody's Angel Investments, LLC) have engaged David Whitney and Michael Klein to structure and present an application in hopes that this will resolve all issues.

David Whitney announced that he was the Professional Engineer who prepared the plan that was submitted with the application, titled "Site Restoration and Feasibility Plan". He described the site as being 3.5 acres in the RU-2A zone on the north side of Route 44, going up the mountain. The wetlands onsite consist of a watercourse that runs through the back of the property, and some adjacent wetlands soils. Mr. Whitney pointed to the green line on the plan that was displayed before the Commission, which showed the wetlands. He said that the wetlands were delineated by Michael Klein in 2016, but were flagged about a month ago and depicted on a survey prepared by Neriani Surveying. He mentioned that it is a Class A Survey, which means the boundary lines are accurate: the center of the site is based on field topography, and the edge of the cleared area is as accurate as you can be for a wooded tree line. Pointing to a dark green squiggly line on the plan, Mr. Whitney stated that previously, when they had been on the site, Neriani Surveying had located the edge of the clearing. He then pointed to a red line on the plan which represents the 100 foot upland review area, from all points of the wetlands. He said that the shaded area on the plan (~0.1 acres) is the area within the 100 foot upland review area that was previously cleared. Mr. Whitney stated that the plan is a collaboration between himself and Mr. Klein. He has indicated proposed plantings on the plan, per Mr. Klein's instruction. He noted that as far as the site layout outside of the upland review area, this is just a feasibility plan; it's not a final plan, nor is it anything that is definitely proposed.

In response to Mr. Applefield's question, Mr. Whitney answered that the shaded area outlined in dark green was the area in which the cutting occurred.

Michael Klein stated for the record that he was a Biologist and Soil Scientist who had been working with Mr. Whitney on this property for about a year. He first marked the wetland boundary (shown in green on the plan) in the spring of 2016. The primary feature is a perennial

stream that flows at the bottom of a deep ravine, and when you get to the very extreme down slope (western limit of the site) there is a limited area of wetlands soils. The principal function that this system provides is to convey drainage downslope. There is a little bit of this wetland soil which is a level area and provides a limited amount of flood storage. Mr. Klein indicated that the clearing work that was done in the 100 foot upland review area is all above the steepest sloping area. The limit of the top of the ravine coincides with the limit of field topography. The area was not grubbed and the roots and stumps were not removed. The clearing work had occurred before the first time he went out to the site and at that time, he didn't see any evidence of erosion on the bank or the ravine slopes. Mr. Klein said that he went out to the site a few weeks ago, and that assessment remained true; roots, stumps, and leaf litter are holding all the soil in place. The only activity that occurred that has affected the wetlands or the upland review area in any way is the tree removal.

Mr. Klein proceeded to provide a breakdown of the types of trees that were removed: predominantly oaks, and a few birches and maples. He stated that a few of the stumps showed some significant rot, but most of the trees were alive at the time of clearing. Half a dozen of the trees were less than 12 inches, eight were in the 12-18 inch category, two in the 19-24 inch category, and seven were larger than 24 inches. He explained that these measurements are the diameters of the stumps where the trees were cut off. This is at least a couple inches larger than the standard way to measure tree size, which is DBH (diameter at breast height).

Mr. Klein stated that the proposed house, as shown on the feasibility plan, is in an area that does not drain directly into the stream. There's a swale that runs through the center of the site, so the flow path would be to the northeast and then southerly. Similarly, the potential septic system location also doesn't drain directly into the stream and wetland. It would drain back toward the south into that swale in the center of the site. Mr. Klein stated his opinion that with conventional erosion controls, this plan could be completed without any adverse impact to the wetlands system.

The last thing Mr. Klein looked at was the work that occurred in the upland review area, and a plan for restoring that area. He identified the area of the clearing, which was outlined in dark green on the plan. He used the tree density requirements that the Army Corps of Engineers uses in their wetland mitigation guidance. He also determined that you wouldn't ever plant these trees any closer than 20 feet on center. They would be located in the field based on a place that will provide them with the highest likelihood of success. Mr. Klein said that they would propose to plant them within a 5-foot diameter mulch circle. The leaf litter and the roots that are there onsite are holding the soils in place quite nicely. The only additional measures that would be necessary are 1) irrigation: he would suggest installing a gator bag on each tree and watering them occasionally for the first growing season to make sure they survive, and 2) enclose the area in deer fence for the first couple of years: the restoration plantings are containerized plants susceptible to deer damage. Since it was mainly deciduous trees that were cut down, they would use deciduous trees: oaks, maples. The supply varies, so he has suggested a palette of red maples, sugar maples, red oaks, and scarlet oaks; rather than specify exactly how many of each, it would be a hopefully evenly distributed mix based on availability at the time of installation. He gave Mr. Whitney a series of planting notes and sequencing to add to the plans, which he has done. Mr. Klein stated his opinion that this would restore the area.

For the record, Mr. Whitney stated that per Mr. McCahill's request, he prepared a site walk map.

He indicated that he placed five stakes on the site with yellow ribbon, numbered 1-5.

Mr. McCahill noted for the record that the Town received correspondence from Jane Freeman, dated March 28, 2017. The Commission was presented with copies of this correspondence at the start of tonight's meeting. Mr. McCahill stated that it was Ms. Freeman's preference to defer any action on this application to the May meeting of the Inland Wetlands Commission.

Mr. Breckinridge asked, on average, what were the heights of the trees that were cut down; Mr. Klein responded that he had no idea and that the trees had been removed by the time he first got to the site.

Mr. Breckinridge asked about the size of the trees that they are proposing to plant there; Mr. Klein responded that they are not sized by diameter, and that they are container-grown, 5-6 foot tall trees.

In response to Mr. Breckinridge's questions, Mr. Klein answered that it would take more than 25, but less than 100 years to restore the area to what it was originally before the clearing work. Mr. Klein stated that cottonwoods, aspens, and birches grow more rapidly, but that these were not the types of trees that were removed. He did say that the mix could be adjusted in any way that the Commission saw appropriate.

Mr. Klein indicated that he did not believe that the trees that were removed contribute substantially to the functions and values of the wetlands system itself.

Mr. Breckinridge voiced his confusion about what the Commission's role is in resolving this issue. In response, Mr. Thier stated that they could vote on whether to accept this application and the plans as submitted, or they could ask for more information to be presented at the next meeting.

In response to Mr. Breckinridge's question, Mr. Thier stated that they cannot consider aesthetics. They are just looking to restore the upland review area to the condition that it was before the tree clearing work occurred.

Mr. Beauchamp stated that he is concerned about the size of the trees that were taken down, and the size of the trees that they are proposing to replace them with. He does not feel that 6-8 foot tall trees are adequate; it would take too long to restore the area. If this application is to be approved, he would want larger trees.

In response to Mr. Beauchamp's comments, Mr. Klein stated that while he understands the natural inclination to want larger trees, there were some elements to the decision that he made to go with the 6-8 foot tall trees. First of all, these trees are the industry standard for ecological restorations: wildlife grade/preservation grade plant materials. Also, smaller trees tend to grow faster and they recover from transplant shock more quickly. The size differential diminishes over time, fairly quickly. Lastly, even a much larger tree would still be substantially smaller than the trees that were removed.

Mr. Beauchamp asserted that they can plant larger trees. A good example is the new Mormon temple that was constructed on Route 44. He sees trees down there that are "a heck of a lot

bigger” than the trees that Mr. Klein is proposing. He stated that he would feel more comfortable with larger trees.

In response to Mr. Beauchamp’s comments, Mr. Donohue stated that his client is “chastened in a very low web”. He indicated that this has been a bad situation for Avon, but it’s been a nightmare for Mr. Flors. He attested that his client came in with good faith, not knowing the regulations. His client has a file full of contracts to cut trees, with reports that the land is buildable, with nothing reflecting the responsibilities he has to the wetlands and watercourses and to this Commission. Mr. Flors purchased the lot for under a hundred thousand dollars, and is now in litigation which is unpleasant and difficult; he’s in a horribly difficult position. Mr. Donohue stated that the ability of the Mormons to do what they did is extraordinary, but that it was a multimillion dollar project.

Mr. Thier indicated that it was not the Commission’s brief to consider the cost for his client.

Mr. Donohue said that it was his client’s goal to move forward in the easiest, quickest, and most feasible way possible for both him and the Town.

In response to Mr. Donohue’s comments, Mr. Thier stated that Mr. Flors did nothing for a year: he ignored several letters from this Commission and did not show up to any of the meetings which he was invited to. He could have resolved this in a faster and cheaper manner before costing the Town thousands of dollars in legal fees. Mr. Thier stated that Mr. Donohue’s client’s finances are not this Commission’s concern.

In response to Mr. Donohue’s comments, Mr. Thier reiterated that this Commission cannot consider the applicant’s financial ability to carry out his responsibilities. He requested that Mr. Donohue not refer to his client’s finances because it contains an implicit threat: if the Commission does not approve this application, Mr. Flors will not do anything.

In response to Mr. Their’s comments, Mr. Donohue stated that he thinks that is a good, practical observation. He admitted that Mr. Flors is a difficult client all around.

Mr. Thier inquired as to how Mr. Klein came up with his restoration planting list, and whether or not he had a budget when doing so. Mr. Klein responded that he did not have a budget.

Mr. Thier asked if Mr. Klein could have recommended taller trees, with larger diameters. To which, Mr. Klein responded that yes, he could have.

Mr. McCahill noted for the record that tonight was the first time the size of the trees was ever mentioned. Mr. Klein never specified sizes in his report.

Mr. Thier asked if the application is incomplete without the information about tree size. To which, Mr. Klein stated that it is complete in the sense that he has provided that information in his testimony tonight.

Mr. Beauchamp stated that the trees Mr. Klein is recommending are trees that you can find at Home Depot. These are Home Depot trees that Mr. Klein is recommending to replace trees that are 19-24 inches in diameter at the stump: “That’s gonna take forever”. Mr. Beauchamp said

that it's going to take forever to restore this property- "we could be 100 years old, and it still wouldn't be restored".

Mr. Klein indicated that he is going by the standard that they use for every restoration project.

Mr. Applefield inquired as to whether taller trees were available. To which Mr. Klein answered that yes, taller trees are available. But once you get into much larger caliper trees, you start to get more hybrids and cultivars.

Mr. Applefield asked what a cultivar was. To which, Mr. Klein gave an example of roses: there's the "American Beauty" variety, and the "pink tea" variety, and they're all hybridized and are not pure native stock. They are all bred and chosen for specific desirable characteristics: maybe disease resistance, or a certain shape. Mr. Klein indicated that for ecological restoration work, they very strongly prefer to use pure native strains, and those are typically available from native nurseries that provide them in these sizes. He said that there are some nurseries that are further away, from which they may be able to get native trees that are a little bit larger, but the local suppliers that they typically use only provide the 6-7 foot trees at tallest.

Mr. Beauchamp stated that you can get bigger trees than this; you can get any kind of tree you want, if you're willing to pay the price.

Mr. Thier sought to clarify the answer to Mr. Applefield's initial question: are there larger trees available? Mr. Klein confirmed that yes, there are.

In response to Ms. Dean's question about the cost of one of the 6-foot tall trees that Mr. Klein was proposing, Mr. Klein stated that the wholesale cost at a nursery is about \$15.

In response to Ms. Dean's question about the cost of a 10-foot tall tree, Mr. Thier commented that it is not the Commission's job to do a cost-benefit analysis for the applicant.

Ms. Dean asked if the size of the trees makes a difference in the restoration of the wetland. To which Mr. Thier responded that that is what the Commission is tasked with deciding; are they satisfied with the proposal?

Ms. Dean asked if this was a State approved restoration protocol that Mr. Klein was following. Mr. Klein answered that it is not State approved; it is the guidance that they have from the New England district Corps of Engineers in their "Compensatory Mitigation Guidance Manual". There are occasions where clients would choose to use larger trees, so he wouldn't want to represent to this Commission that in doing ecological restoration that's the only size they use. But it is the industry standard, and in this particular circumstance, Mr. Klein does not think that the larger trees will be necessary. He stated that in his opinion, the size differential is primarily an aesthetic consideration.

Mr. Usich voiced his opinion that the trees should be larger.

In response to Mr. Applefield's question about how many trees were cut down, Mr. Klein answered that he thinks 23 and that Mr. McCahill counted 24. Mr. McCahill stated that his was an estimate, and Mr. Klein stated that his was too. Based on the topography, it was between 20

and 25 trees that were removed.

Mr. Applefield asked if they were to decide on 15-foot tall trees, would they be able to install 25 of them in that space. To which, Mr. Klein answered yes, there were 25 trees in that space before, so they can accommodate that.

Mr. Breckinridge asked what would happen to the stumps. Mr. Klein responded that he would recommend that they be left in place because the roots are holding the soil in place.

In response to Mr. Applefield's comments, Mr. Thier stated that this application is not part of the litigation. He checked with their counsel, and the Commission's decision on this application will not affect the litigation. It may affect the calculations for the \$1000/day penalty. He said that Mr. Flors' counsel could make the argument that they made a good faith claim today and the clock should stop ticking today in terms of accruing penalties.

In response to Mr. Thier's questions, Ms. Olson answered that they do not yet have a trial date. She said that they do not have a pretrial either. She thought it made sense to let the Commission take in the application and then she could submit a case flow request to get a pretrial.

Mr. Applefield asked if the Commission's approval of this application is the only sanction relative to the case. To which, Mr. Thier stated that there are legal fees which the Town has accrued. He believes counsel will ask the court to have Mr. Flors pay for that.

Ms. Olson clarified for the Commission that they will have a say in whatever happens in court. Mr. Thier added that if a settlement was proposed, the Commission would have to approve it.

Mr. Applefield stated that he would have felt comfortable understanding what the settlement of the entire case is, and what role this application plays in it. He can appreciate that the Commission can act on this application separate and apart from that, and that an approval is not a necessary condition. He acknowledged that Mr. Donohue has spoken on behalf of his client, but his client has never come before the Commission. Mr. Applefield has no idea why these trees got cut or how they got cut. Mr. Donohue is suggesting his client had no idea what he was doing, but Mr. Applefield has no idea what really happened.

In response to Mr. Applefield's comments, Mr. Thier stated that a year ago, the Commission was told that this was a rogue operation by tree cutters. Mr. Flors didn't know that they were going to cut these particular trees, and they went a little overboard. The Commission was told that Mr. Flors is blaming the tree cutters.

Mr. Donohue stated that the position his client told him was that he had no idea there was any restricted area or upland review area. He hired a tree cutter and thought the tree cutter would know what the responsibility was to be in compliance with the Town. Mr. Donohue said that he does know there was a contract with the tree cutter, he has that documentation.

Mr. Thier asked who the tree cutter was. To which, Mr. Donohue responded that that information is in his office; he has the contract in his office. He said he can tell them, but he can't tell them tonight.

In response to Ms. Dean's questions, Mr. Klein stated that the concept of restoration does have some implication to make things the way they were at some point in the past. All of the trees that were removed were deciduous, so he has proposed replacing them with deciduous trees. He acknowledged that there are faster-growing softwood trees, and faster-growing hardwood trees: some of which are native, and some of which you would expect as successional or pioneer species. Black and grey birches are fast-growing; aspens and cottonwoods are fast-growing. He noted, though, that you would probably not see cottonwoods this high up on the slope. Mr. Klein said that there is no reason not to use faster-growing species, if the goal was to speed up the maturation of the wooded area.

Mr. Thier asked if Mr. Klein has ever recommended taller trees in any of his previous planting plans. To which, Mr. Klein responded that he does not believe so, and that he does not do ornamental landscape plans.

In response to Mr. Breckinridge's question, Mr. Klein indicated that he anticipates the Town would want to have the trees monitored for a certain period of time to ensure their survival. Mr. McCahill clarified for Mr. Breckinridge that that was in fact a recommendation in Mr. Klein's report.

In response to Mr. Thier's question, Mr. Klein stated that the best option would be to use gator bags on the trees.

In response to Mr. Usich's question, Mr. Klein explained that gator bags are the "green, plastic things that almost look like garbage bags around the base of newly planted trees". He said that these gator bags are filled with water that drips into the tree. Mr. Klein indicated that another reason for using native species is that after a fairly short period of time, they are able to survive on their own because they are already adapted to these conditions.

In response to Mr. Breckinridge's question about native species that would survive better in the event that they are not properly irrigated; Mr. Klein answered that birches are more adapted to harsher environments, but most of the trees that were removed were not birches, and birches are also not a climax species. He stated that he could include a mix of some of the native, climax trees, and some of the pioneer species. His goal is to try and match the existing condition as best he can. From an ecological standpoint, there is no reason not to widen the mix to include faster-growing species.

In response to Mr. Applefield's question about optimal time for planting, Mr. Klein answered that yes, the May/early June time frame or the fall. In many ways, fall is the optimal time; the water table is coming back up, and there is still a substantial period of time for the trees to become established before the frost. This would also allow a good length of time before the next harsh summer climate. If it is up to him, he would prefer to plant in the fall.

Mr. Breckinridge asked Mr. McCahill what type of stipulation the Commission can put on the planting process to ensure the trees will be properly irrigated for a period of time. Mr. McCahill answered that, in his report, Mr. Klein has recommended an inspection protocol that will go on for a period of three years. He has done that in the past where he will go out twice a year and inspect the trees, and the applicant will have to do what's appropriate in terms of replacing any trees that did not survive.

Mr. Beauchamp sought clarification that it would be up to the applicant to replace any trees, and Mr. Donohue stated that it would be up to the current owner of the property.

Mr. Applefield sought clarification from Mr. Donohue that if the property was sold, his client would no longer be beholden to the restoration plan. Mr. Donohue responded by saying that his client's goal is to get the lot in compliance and then put it on the market. The covenants which would be part of this application would be very apparent to the buyer and would run with the land.

Mr. Applefield stated that he would suggest the Commission receive a more comprehensive plan, which addresses all of the concerns they have raised tonight: what kind of trees, taller trees, something that identifies when planting is going to occur, how monitoring is going to occur, who is going to perform the monitoring. He wants to see what exactly is going to happen, in a single document that pulls this all together.

In response to Mr. Beauchamp's question about posting a bond, Mr. Thier answered that they could do that. Mr. McCahill added that this Commission and the Planning and Zoning Commission have often bonded mitigation projects.

Mr. Thier indicated that in order to calculate a bond, they would need to know the price of each tree.

Jane Freeman introduced herself, stating for the record that she was the property owner from Hunter's Run who is in closest proximity to the subject site. She indicated that she has a significant interest in the restoration plan. She said that she is pleased that Mr. Flors has finally filed an application for a restoration plan. Ms. Freeman stated that she first got notice of the application when the agenda for tonight's meeting was posted online. Upon receiving the notice, she contacted Mr. Donohue and asked him for a copy of the application. Mr. Donohue had told Ms. Freeman that he would give her a copy of the plan once it was available, but he did not provide her with a copy before filing the application. As such, Ms. Freeman has not yet had the chance to take the proposed restoration plan to a landscape architect for review. She stated that she is scheduled to meet with Mike Cegan of Richter & Cegan on Thursday morning. She requested that the Commission postpone voting on this application until next month's meeting so that she has a chance to consult the landscape architect and bring back his suggestions.

In response to Ms. Freeman's comments, Mr. Thier stated that he does not think the Commission can postpone voting on an application on the grounds that an adjacent property owner might bring in additional information if they wait for it.

Ms. Freeman stated that she thinks the application, as it is, is deficient. She has 40 years of experience as a land use attorney, and has never before seen a restoration plan that did not include the following: 1) a plating list specifying the number of trees and the species of trees, 2) the caliper of the trees at the time of planting, 3) the height of the trees at the time of planting, and 4) a quote from a nursery as to the estimated cost of the trees so that the Commission can determine, if it desires a bond, what the appropriate bond amount should be. Ms. Freeman respectfully submits that this plan needs to be revised to include the aforementioned elements. She also respectfully submits that the bond should cover not only tree replacement, but the cost

of monitoring. For these reasons she requests that the Commission defer action on this until the plan is updated to provide this critical information.

Mr. Thier asked Mr. McCahill if the applicant needs to agree on postponing a vote on the application. To which Mr. McCahill responded that no, the Commission has 65 days to act on the application.

Mr. Thier noted for the record that the Commission is not ready to vote on this application tonight, and would like more information and a more detailed plan.

Mr. McCahill pointed out one of the comments from his memo, which was his suggestion that the Commission considers a conservation restriction to protect the area that is going to be restored. He just wanted to get that topic out on the table so that the Commission can address it at the next meeting.

Mr. Donohue stated that his client has no interest in putting an easement enforceable by someone else on his property. He is opposed to having an easement on his property.

In response to Mr. Donohue's comments, Mr. McCahill stated that in the 22 years he has been staffing this Commission, he has not seen a plan where they haven't imposed a conservation restriction over an area where they required wetland mitigation and plantings of this nature.

Mr. Donohue commented that he doesn't believe the Commission has legal authority to require a conservation restriction. In response, Mr. McCahill stated that it's a request, and he was clear about the fact that it is a request. He indicated that the Commission cannot condition the application on a conservation restriction, but he made the request clear.

Ms. Olson stated that if there is going to be monitoring going forward, whoever owns the property has to allow access for that monitoring. Some type of easement would be necessary to ensure that the Commission can do the monitoring that they would be requiring.

Mr. Donohue stated that there would be a right to monitor, and access for sure. They would not resist that.

Mr. Breckinridge asked if that was technically an easement. Mr. Donohue stated that it depends, because it is a legal term that can mean a lot of things.

Mr. Applefield asked Mr. Donohue what exactly his client's objection was to the conservation restriction. To which, Mr. Donohue responded that his client's position is that he is opposed to it, almost violently. He doesn't want easement enforceable by others on his property. The easement is front and center to where the pro forma house would be.

Mr. Applefield stated that the easement, as he sees it, is at some level just a statement of the law. The Commission is asking the applicant to not remove the trees in the upland review area.

Mr. Donohue responded that that is a matter of the existing law; that is not a function of easement. The Commission has control over that as a matter of existing law.

Mr. Donohue noted that if his client had come before the Commission initially, wanting to cut trees in that area, they might have let him. He could have been granted a permit for that activity. The situation is most unfortunate.

Mr. Thier asked how soon the Commission could get a revised proposal; to which Mr. Klein responded: certainly in time for the next meeting.

In response to Mr. Thier's question, Mr. McCahill stated that they require information to be submitted three weeks prior to the meeting if they are handling an actual application.

Mr. Applefield stated that if they cannot get in the information within that time frame, they could withdraw the application and resubmit it with a revised plan.

Mr. Klein indicated that there is really not a lot of additional information required, but he needs to get authorization to do the work. Based on his schedule, he can provide the information two weeks before the next meeting; assuming he gets authorized to do the work.

Mr. McCahill clarified for Mr. Whitney that the next meeting is May 2, 2017.

Ms. Olson stated that, as far as the court case is concerned, the Town can agree to stipulate to a judgment in the case, they can agree to a settlement that moots the case, or they can agree to go forward to a trial. The application that is pending before the Commission is like any other application. She wants to assure the Commission that their action on this application won't have any impact on the court case; the one thing it might do is stop the penalty clock from running, if they were to approve something. She stated that she could certainly make a case flow request, so that they have a pretrial sooner than later.

Mr. Applefield stated that his fear is that a judge will see that Mr. Flors has an application pending and that he intends to restore the area, so it will undercut their case. He appreciates that that is legally not the case, but as a practical matter, that is his concern.

Ms. Olson noted that restoration would obviously be a part of any settlement; the ultimate objective is to ensure that the property gets restored.

Mr. Thier stated that there was another objective, and that was to maintain the integrity of the Commission: that they set a precedent that ignoring the Commission is costly. He doesn't want to undercut the Commission or Mr. McCahill.

Ms. Olson stated that judges don't always take these matters as seriously as they might hope they would. It's all at the discretion of the court.

Mr. Applefield stated that he would prefer to see an overall settlement: a stipulation between the parties. He would advocate that we move the court case forward.

Ms. Olson stated that the court case has actually been on a pretty fast track. She doesn't exactly know why the court didn't set a date for the trial, even though they approved the scheduling order which had those dates in it. She thinks it's just a function of a case flow hiccup, so she can just submit a case flow request. She noted that no settlement can be had until the Commission is

satisfied with a restoration plan.

Mr. Applefield commented that they could make the settlement conditioned on the approval by the Commission of a restoration plan.

Mr. Klein stated that he understands the Commission's position on enforcement, and he understands Mr. Thier's position on the economics of this, but "the pot is probably only so big".

Mr. Beauchamp indicated that Mr. Flors should have been there tonight pleading before the Commission. To which, Mr. Klein responded that though he understands the Commission's frustration, it was probably in everyone's best interest that Mr. Flors is represented by professionals.

Ms. Olson sought clarification that the Commission wanted her to submit a case flow request, and Mr. Thier confirmed that they did.

Ms. Olson stated that her position is that a Cease & Desist order was issued and Mr. Flors did not respond. The Commission affirmed the Cease & Desist order and commenced an injunction action. In her opinion, Mr. Flors has foreclosed any opportunity to argue that it was not a violation; liability is now presumed. Mr. Flors had administrative remedies to challenge that, and he chose not to take them. Ms. Olson has taken the staunch position that if you do that, liability is now presumed.

In response to Mr. Thier's comments, Ms. Olson stated that Mr. Flors has basically admitted to everything except his liability to the Commission. He doesn't admit or deny.

PUBLIC HEARING:

APPL #750 – Robert Krawczuk, owner/applicant: Requests within wetlands and within the 100' upland review area: 1) Fill approximately 1,115 sq. ft. of man-made wetlands (old cellar hole) for the construction of one single-family house; 2) Construction of proposed house, well, utilities, boulder row, driveway, and related grading; 3) Proposed area of "enhanced wetland buffer plantings" or proposed area of "wetlands creation". Location: 16 White Birch Lane, Parcel 4600016.

Before commencing the public hearing, Mr. Applefield raised a procedural question.

Mr. McCahill stated that we are in a public hearing format for this application, based on the fact that it had gone to a public hearing in the past. He worked with Mr. Whitney to schedule it for a public hearing tonight to expedite the process.

Mr. Applefield said that he doesn't believe Town staff has the authority to schedule a public hearing; only the Commission can do that. He stated that he did not know if proper notice was provided for the public hearing.

In response to Mr. Applefield's comments, Mr. McCahill stated that notice was provided, and that a legal notice was published consistent with the requirements.

Mr. McCahill stated that, historically, he has scheduled public hearings before without consulting the Commission.

Mr. Applefield stated that he thinks the Commission needs to make a finding that there is a potential significant impact on the wetlands in order to hold a public hearing.

Mr. Thier asked Ms. Olson whether or not public hearings can only be declared by the Commission.

Mr. Applefield stated that you can trigger a public hearing by a few different ways; one is a petition, but there was no petition in this instance. He believes what triggered a public hearing for this application is a decision by the Commission that there is a potential for significant impact to the wetlands.

Ms. Dean commented that the Commission never made that decision.

Ms. Olson stated that the statute says that you shall not hold a public hearing unless you find that there is a significant likelihood of impact on the wetland. She added that there is a caveat there, that if you feel strongly that it is in the public's interest to have a public hearing, you can call it for that reason. The third way to trigger a public hearing is by petition.

Ms. Dean indicated that the Commission needs to vote on this: they can't just get a recommendation from Town staff and call a public hearing.

At Mr. Whitney's request, Mr. McCahill provided the backstory of this application for Ms. Olson. He explained that this property was the subject of a previous application, and that that application went through the process of a public hearing. The application was denied and now the applicant has made changes to the plan and has resubmitted it in the application tonight. Based on the past history of this property, Mr. McCahill went ahead and scheduled this application for a public hearing.

In response to Ms. Olson's question about how the previous application went to a public hearing, Mr. Whitney and Mr. McCahill both answered that it was by vote of the Commission.

In response to Ms. Olson's question, Mr. Thier confirmed that this is a new and separate application from the previous one.

Ms. Olson stated that it would have been better if the Commission voted to hold tonight's public hearing, but at this point, it seems the only person who would be aggrieved by the Commission's decision to go forward with a public hearing is the applicant. If the applicant is willing to waive any claims that the Commission improperly sent this to a public hearing, then she would suggest they get that on the record.

Robert Krawczuk identified himself as the applicant and stated for the record that he agreed to a public hearing.

That matter having been resolved, David Whitney moved on to his presentation.

Mr. Whitney stated that he was here tonight, along with Mr. Klein, to represent Mr. Krawczuk. He indicated that the Commission was already familiar with the site, by virtue of the previous application, so he just provided a brief summary.

Mr. Whitney said that he wanted to look at the site plan from the last wetlands application (APPL #748, which was denied). He clarified for Mr. Applefield that this plan is Alternative F in Mr. Klein's report (dated March 24, 2017). Mr. Whitney indicated that the reason he wants to look at this plan is so that he can demonstrate to the Commission what has changed from the previous application. He stated that biggest change is that they are no longer proposing a septic system, but instead got an approval from the Avon Water Pollution Control Authority for a low pressure sewer line in the shoulder of the road, with an individual pump station on the lot. He explained that the Town Engineer and the AWPCA do not generally encourage the use of low pressure sewer lines when there is the realistic possibility of extending a public sewer down the middle of the road. Mr. Whitney reminded the Commission that they looked into extending the public sewer at length, but determined it was too expensive; none of the neighbors wanted to incur the cost of sharing the extension of the public sewer. Mr. Whitney indicated that in light of the denial of their previous application by the Inland Wetlands Commission, the AWPCA agreed to let him connect to the public sewer with a low pressure line. He said that he received an approval letter from the AWPCA (dated March 23, 2017), which contains a list of the conditions that the applicant would have to comply with in order to install this low pressure line and connect to the sewer. He confirmed that the applicant is agreeable to all of these conditions. Mr. Whitney added that there are a couple of low pressure lines across the street from this property, on Indian Pipe Trail, as well as in numerous locations around town. There is no history of problems with low pressure sewer lines; that is what swayed the AWPCA to grant their approval.

Mr. Whitney stated that the second major change from the previous application is the expansion of the conservation restriction area; it was 0.32 acres before, but now the applicant has agreed to encompass the entire rear portion of the property, which brings it to 0.55 acres.

He explained that on the old plan, they were proposing an area adjacent to the wetlands that included enhancement plantings, but that has now become one of two options on the current plan. The second option is wetlands creation in the area depicted on the plan: trees will be cleared; the ground surface will be lowered to match the elevation of the existing wetlands; and the area will be replanted with wetland plantings. Mr. Whitney commented that it would be a shame, and almost unnecessary, to go into a mature forested area and rip out all the trees in order to plant little wetland plantings. It seems to him that it would make more sense to go with option 1 and increase the number of plantings in the area. He indicated that he went to the site earlier in the day and determined that 14 trees (between 4 inches and 30 inches) would have to be cut down for option 2.

Mr. Whitney proceeded to briefly go over Sheet 3 of his plans: "Erosion & Sediment Control Plan and Construction Sequence". He indicated that it is very similar to the one he submitted with the previous application. It is an attempt to demonstrate how construction activity is going to occur on this lot and how he intends to protect the wetlands during construction.

Mr. Whitney also briefly went through the alternative plans that were included in Mr. Klein's report. Alternative A is the proposed plan for this application. Alternative F is the plan that was denied from the previous application.

To conclude his presentation, Mr. Whitney addressed Mr. McCahill's memo (dated March 27, 2017). He said that he doesn't believe that this memo requires any revisions to the plans. He noted that the Farmington Valley Health District's involvement now is limited to a well permit. The proposed well location is within adequate distance from the septic systems on the adjacent lots. Mr. Whitney pointed out comment 4 from Mr. McCahill's memo: "The plans recently submitted have adequately addressed previous comments (reference APPL. #748) from Town Staff; to include my comments and comments from Matt Brown, L.S., Assistant Town Engineer".

Mr. McCahill noted that comment 8 in his memo requested a wetlands planting list for option 2. He stated for the record that list was provided to the Commission tonight at the start of the meeting: "Compensatory Wetland Plant List Option 2".

Mr. Klein briefly went over the contents of his report; much of the information having been discussed in previous meetings regarding this lot. He noted that the plan now includes a conservation easement that is 70% larger than it was in the previous plan. Option 1 is the preferred alternative. He stated that by virtue of the boulder row, the rain gardens, and the traditional wetland enhancement plantings that have been included in this plan; it is his opinion that the proposed activity has no significant adverse impact on the wetlands.

He said that Mr. Whitney did a good job of summarizing the alternatives assessment, but proceeded to briefly go over the other alternatives. Mr. Klein stated that he does not believe there is any other alternative that has less impact than the preferred alternative. He believes that in total, the impacts are insignificant. His recommendations have been incorporated into the plan. There is no significant adverse effect on the functions and values of the wetlands systems on and around the site.

Mr. Klein indicated that alternative A with option 2 is not their preferred alternative because it is a general tenant of the wetland mitigation community to not take down mature woodlands to create new wetlands. There is no other feasible location to create new wetlands on this site, so that's the only option available. He does not see any advantage of pursuing this option.

Mr. Breckinridge stated his opinion that option 2 does not make any sense. Creating that new wetland area will only cause more issues with the existing wetlands, and he thinks they should just leave that area as is.

Mr. Beauchamp said that he appreciates all the work Mr. Whitney and Mr. Klein have put into this project, but that he is not comfortable with building a house so close to the wetlands. This Commission is responsible for protecting the wetlands, and he is just not comfortable with building a house 20 feet away from wetlands.

Ms. Dean stated that she was okay with the initial plans, and is even more so with these plans. She doesn't believe that, with option 2, creating wetlands and cutting down mature trees makes any sense. She referred to Mr. Klein's report (dated March 24, 2017), and cited his opinion that "if the home is constructed as shown on the plans, there will be no significant adverse effect on the functions and values of the wetlands on and around the site". She cited Mr. Klein's opinion that neither option 1 nor option 2 is required, though either could be implemented. Ms. Dean

doesn't believe that option 2 is helpful or advisable here. She is very comfortable with the plans as presented, especially with all the efforts made to create a significant conservation easement area and bringing in the low pressure sewer line.

Mr. Usich commented that Mr. Whitney and Mr. Klein did a great job in configuring this. He would agree that option 1 makes more sense than all the work required in option 2. He indicated that he never had any issue with constructing a house in place of an existing old cellar hole.

In response to Mr. Applefield's question about the area of wetlands that would be filled in, Mr. Whitney answered 1,115 square feet.

In response to Mr. Applefield's question about the area for option 1 or option 2, Mr. Whitney answered 2,530 square feet: more than twice the area of the cellar hole.

In response to Mr. Applefield's question, Mr. Klein explained that option 1 is to install wildlife attractive buffer and enhancement plantings parallel to the wetland edge. This is the preferred alternative. Option 2 is to excavate that same area, lower the grade by a foot, and replant it.

Mr. Applefield stated that option 1 is not wetland mitigation; you can't compensate for the taking of wetlands by planting plants. In his mind, option 2 is the only option.

In response to Mr. Applefield's comments, Mr. Klein indicated his position that the filling of the cellar hole wetland did not have any adverse environmental effect beyond the area that was filled. He doesn't think there is any need to expand the wetland resource base in this area.

Mr. Applefield asked if there was any other area on the lot where wetlands could be created, without having to disrupt the mature woodlands. To which, Mr. Klein responded no.

Mr. McCahill commented that he was on the site earlier in the day and had a thought: he is proposing that the two triangular areas just beyond the proposed boulder row could be turned into wetlands. The plan already suggests that they will be removing the boulders there and doing some plantings in that area, so he thinks they can take it one step further and regrade the area and incorporate it into the fringe wetland that exists there.

Mr. Whitney agreed that that could easily be done.

Ms. Dean sought clarification from Mr. Klein that mitigation could involve creation of wetlands, but that it could also involve the improvement or restoration of wetlands. In response, Mr. Klein confirmed that there are several different forms of mitigation, and said that there is a mitigation hierarchy. He indicated that creation of wetlands is actually considered the least desirable form of mitigation.

Mr. McCahill commented that the concern with this is that you are inviting the wetlands system closer to the proposed activity.

Mr. Whitney stated that those triangular areas come out to about 928 square feet.

Mr. Usich said that he doesn't feel it is necessary to turn that area into wetlands because it is

third on the mitigation hierarchy list.

Mr. Applefield commented that he hasn't heard anything that suggests the wildlife plantings are an enhancement, or restorative, or have any impact on the wetlands. He doesn't feel these plantings are compensatory in any way for the wetlands that are being taken. He indicated that one of the alternatives is no build.

Mr. Whitney stated that the applicant wouldn't agree that a no build option is a feasible alternative.

Mr. Applefield commented that most alternatives analyses have a no build alternative. He said that it clearly doesn't meeting the applicant's needs but it is definitely an alternative and should be compared to the other alternatives.

Mr. Klein indicated that that is a technique that's used when deciding whether or not to move ahead with a general objective. But in this case, when you have a specific piece of property which has been designated and taxed as a building lot, the no build alternative is a taking of property.

Mr. Applefield disagreed, and said that no one has sued the Town and asserted that there was a taking.

Mr. Klein confirmed that that was true, but that would be the next step. He stated that it doesn't need to come to that. They are happy to implement either of the options at the Commission's discretion.

In response to Mr. Applefield's question about whether any place else on the lot could be used for compensatory wetlands, Mr. Klein answered that the grade rises substantially in either direction. It would require a substantial amount of excavation and he is not sure there is room to do it on the east side of the property. On the west side of the property, the Town has a drainage outfall, so he is not sure it would be feasible there.

Mr. Whitney stated that he doesn't see why you would want to destroy a mature forest for some theoretical principle.

Mr. Applefield responded that he doesn't think it is a theoretical principle. The Commission's job isn't to secure the forest.

Mr. Beauchamp asked if the house could be moved closer to the road, to which Mr. Whitney responded that it could, by two feet.

Mr. Breckinridge said that he likes the idea of incorporating the triangular areas into the wetlands.

Mr. Usich restated his opinion that he doesn't feel the wetlands creation is necessary.

Mr. Applefield asked what Mr. Klein's recommended sources were for mitigation activity, from a resources standpoint. Mr. Klein responded that he would recommend the Army Corps

Compensatory Mitigation Guidance and the EPA Army Corps 404B1 Guidelines.

Mr. Whitney stated that if the Commission needs more information, they will be glad to come back. He said that he would like to think the plans are complete.

Mr. McCahill stated for the record that Mr. Kron (resident, 16 Ardsley Way) was pleased to see that there was no septic system proposed and that there is a conservation restriction on the rear of the property.

There being no further input, the public hearing was closed.

Mr. Usich motioned to approve **APPL #750 (without Option 1 or Option 2)**, subject to the standard approval conditions, as well as the additional conditions generally outlined by Mr. McCahill in his April 4, 2017 memorandum. Mr. Breckinridge seconded the motion. Ms. Dean, Mr. Breckinridge, Mr. Thier, and Mr. Usich were in favor; Mr. Beauchamp and Mr. Applefield opposed. The motion passed.

OUTSTANDING APPLICATIONS:

COMMUNICATIONS FROM THE PUBLIC:

OTHER BUSINESS:

STAFF COMMENTS:

Mr. McCahill reported that he spoke with Commissioner Short, and discovered that he has a time conflict for Tuesday nights. Mr. Short will be submitting a resignation letter for this Commission.

AUTHORIZED AGENT APPROVALS:

APPROVAL OF MINUTES: March 7, 2017

Ms. Dean stated that she hasn't gotten a chance yet to bring in examples of other towns' meeting minutes, but she has some in mind. She will send them to Mr. McCahill, who will circulate them to the Commission.

Mr. Applefield motioned to approve the minutes of the March 7, 2017 meeting, as submitted. The motion, seconded by Mr. Breckinridge, received unanimous approval.

NEXT MEETING:

The next regularly scheduled meeting is May 2, 2017.

There being no further business, the meeting adjourned at 9:47 pm.

Respectfully submitted,

Sitara Gnanaguru, Clerk
Inland Wetlands Commission