KELLY

LAW OFFICES

February 20, 2024

Inland Wetlands Commission
Wilton Town Hall
238 Danbury Road
Wilton, CT 06897

Sent via email to elizabeth.larkin@wiltonct.org and mike.conklin@wiltonct.org

Re: Old Driftway LLC, application for permit, Mountain Road

To the Commission,

Please accept this letter in follow up to my earlier one of January 9th. The issues I wish to address are the following:

1. Title matters. Our title searcher, Joseph SanFilippo Esq. of Action Title in Fairfield has exhausted his search of the Wilton land records. As it is beyond the scope of this Commission, I do not provide the full 10-page title report, or 165 pages of deeds and maps to this Commission, but I have to the Commission's counsel Mr. Gelderman. The following determinations are worth noting:

A. The applicant's only access to the property are his common law rights to pass and repass over the driftway. His rights arise from common law as an being an abutter along a private road. Those rights are referenced in his deed, and importantly, there is nothing else in the land records which contradict those rights.

B. The applicant's common law right to use the driftway only reaches a public road by going south to Mountain Road. Mr. SanFilippo's research did not find the driftway's reaching a public road, present or abandoned, to the north of the premises. He believes it more likely that it terminated at another private property owner north of the Applicant's premises, which he says was a common occurrence.

C. The alternative access to the Premises referenced in the applicant's deed is error. The deed to the premises contains an appurtenant grant referenced in Volume 65 at Page 341 of the Wilton Land Records. This has been the subject of speculation as an alternate access. Despite the mutual references to Mountain Road and to the Carlsons, the title search has shown this to be error. The Vol 65 Page 341 grant pertains to *other property* formerly owned by Carlson, on Danbury Road at its intersection with Mountain Road, which was deeded to the State of Connecticut This property is located much further north and west of the insured premises. Refer to Map Nos. 2482, 4614 and 5067 on file in the Wilton Town Clerks Office, and mutual driveway easement recorded in Volume 709 at Page 180 of the Wilton Land Records.

D. There is no dispute of record as to the driftway's boundaries south to Mountain Road. In addition to surveys in the Applicant's chain, there are literally dozens of other deeds and maps replete with references to the driftway which abuts. It's boundary lines going south to Mountain Road are well established.

E. Despite the reference to the ROW being shared in the Applicant's chain of title, none of those who abut the driftway from the premises and south to Mountain Road were found to have rights to use it. Nor do any others need it. All abutter properties have other means of access they use through public roads, granted easements or over commonly owned adjacent parcels.

F. While it does not affect the Applicant's rights to use it, Mr. SanFilippo has still not solved the mystery of who owns the driftway. "A current owner or owners of the driftway could not be located on the Land Records as far back as the later 1800's. It may appear that the driftway was owned by multiple landowners, and the significant landowners around the driftway have been narrowed to several large colonial families." The references to Driftway or Old Driftway begins approximately 110 years ago. Earlier deeds referred to the same area in innumerable ways including "roadway" "highway" "old highway" "abandoned highway" "an unused lane" etc. "A highway is not a driftway. A "driftway" is a sometimes-private lane or narrow country road, so-called, from its use as a passage for herds or flocks. The status of the driftway here may have changed from highway to driftway or from driftway to highway over the years since it seems to have been referred to in deeds and maps of record as both." The solution, if desired by any, may well require a quiet title action in the Superior Court.

2. Alternate access by acquisition from a third party. It should be axiomatic to the Commission that it can't require any Applicant who owns property lawfully entitled to development, with access to a public way, to acquire additional property or property rights, from third parties. Inversely it is also true that it can't deny an application for a failure to do so. And it cannot require an applicant to acquire additional property rights, it is also axiomatic that the Commission cannot speculate on that possibility or inquire of the status of the Applicant's efforts in that regard, under the guise of "feasible and prudent" alternatives. The Regulations define "feasible". "Feasible means able to be constructed or implemented consistent with sound engineering principles." This is consistent with state law and caselaw. The definition does not include able to be constructed if the applicant bought his neighbor's property.

This mistaken interpretation has exposed itself in two ways: the town engineer's recommendations to acquire easement rights from neighbors, and several Commissioners' inquiry of Ms. Mochs about purchasing additional property or property rights from the State. These are not 'feasible' under any definition and the applicant is not required to pursue them at all. The Commission is clearly in error pursuing this line of questioning and in hopes no one is confused about this at the time of deliberation, the applicant will no longer respond to such questions on those grounds. If the Commission doubts this opinion, it should get clarification from its counsel.

3. As we look forward to the close of the public hearing, I would ask the Commission to ignore completely the comments made by its agent Mr. Conklin, at the start of the last hearing, and to request Mr. Conklin going forward to confine himself to his administrative purpose of assisting the Commission in receiving all the information it requires before closing the hearing, in order that the Commissioners can then make a rational decision based on facts and information presented relative to the requested permit after the hearing closes.

As noted in my comments, I found Mr. Conklin's presentation of "concerns" at the start of the last public hearing troubling. It was on a completely unrelated topic to the purpose of the public hearing, arguable enforcement but his own commentary revealed glaring violations of the Regulations on enforcement. The permit he was discussing was not any the Commission had issued, but a de minimus permit he himself issued. Again, his commentary revealed he required a permit for mere access, which is not a "regulated activity", and no permit is required for; FN1; and his issuance of the permit it issued was in violation of Section 12 and the definition of "minor activity." His statements were generally derogatory of the applicant, directly defamatory of the applicant's consultant, subjective, and self-serving. The more he spoke the more obvious it became that he either did not understand the Regulations, or he was willing to grossly disregard them. He then capped off his performance by misleading the Commission into joining his unlawful deprivation of administrative due process codified in the regulations (prior notice, hearing to show cause, opportunity to cross-examine witnesses and present their own) into voting to cancel the unnecessary, unlawful permit he issued. All to what point exactly if not to bias this applicant and application?

4. Procedure for submissions before the public hearing closes. The applicant asks that it be given the opportunity to speak last, before the close of the public hearing, in order to be certain it had the opportunity to respond to any and all questions from the Commission or comments from the intervenor or public. In order to insure this, we would ask that, in anticipation of the last continuation of the public hearing, an earlier deadline for submissions from the intervenor and the public be set than the deadline for submissions from the Applicant. We would respectfully request that earlier deadline be 3 full business days earlier than the deadline for the Applicant.

Respectfully submitted,

James G. Kelly

James G. Kelly
JGK/eka
Cc: M. Nogid, Peter Gelderman Esq.
Encls: Deed and Surveys

FN1 An owner may access his property across wetlands, watercourses and wetland soils without a permit. An owner's access (or that of his guest, agents or invitee) of his property from a public way is a matter of law. It is not lost merely because that access is over or through a wetland, wetland soils or a watercourse. Imagine being an owner of an island in the middle of a lake. Does any Commissioner think that the owner must obtain a IW permit before boating across that lake to get to his land? Absolutely not. While it may be true that wetlands can create an impediment (in my example, the need for a boat) an owner is entitled to access as a matter of law, limited only by the practical limitations of the means of access available to him.

The obligation to obtain a permit is triggered by whether or not the wishes to conduct a "regulated activity" in a regulated area. The definition of "regulated activities" in in Section 2.1 (z) (2) and (3). There are 11 different enumerated activities there. Access is not one of them. This is not oversight. Access to property from a public highway is a lawful right of every property owner, and exercise of one's lawful right of access alone does not fall within any definition of a regulated activity.