

Shutesbury Conservation Commission

Minutes – 08/11/22

Approved – (09/22/22)

Virtual Meeting

Meeting Start: 7:00 p.m.

Commissioners Present: Miriam DeFant, Mary David, Robin Harrington, Beth Willson

Commissioners Absent: Scott Kahan

Other Staff: Carey Marshall (Land Use Clerk)

Other present: Janice Stone (SCC Consultant), Mark Rivers, Ryan Nelson, Mike Betcha, Gretchen Betcha, Alex Abdow, Steve Avonti, Hannah Kowalski, Penny Jaques, Evan Jones, Melissa Makepeace-O’Neil, Kevin Cooke, Chris Cummings, Bob Douglas, Simon Huang, Michael Hoostein, Frank McGinn, Mary Lou Conca, George Abdow, Tom Kalt, Bob Blanchette, Michael Vinskey, Anna Mancebo, and all other unidentified individuals.

Chair’s Call to Order at 7:00 p.m.

Meeting is being recorded

56 North Laurel Drive/Abdow NOI, DEP File #286- 0292: house demolition and reconstruction

Nelson screenshares the site plan for 56 North Laurel Drive for SCC to review via screenshare. Nelson: there is an existing house on the property, but the landowners are proposing to demolish and rebuild a new structure. The work is within two Resource Areas – the Bank of Lake Wyola and there is an intermittent stream that starts across the street and travels through a culvert and onto the property. DeFant: what is the distance from the Bank to the limit of work? Nelson: about 40 feet from the upper left portion of the limit of work but as the limit of work get closer to the Lake, the distance decreases to about 10-20 feet. The existing home has a walkout basement so the property does slope towards the Lake – new proposed home still has a walkout basement so it will be similar. There is a proposed garage that would be built with a gravel driveway. There would be minor re-grading and fill on the slopes of each side of the house. There is an existing retaining wall in the rear of the existing home but there are no plans to change that – they are proposing putting silt fence on the uphill side of the stone wall so no work would occur below that wall. There is an existing septic tank and pump chamber that are planned to stay and not change – the same design flow. There are a few trees that are close to the foundation area that may need to be removed – showing them all removed to be conservative just in case but they believe some will stay. There is an existing seasonal dock on the site but there is no permit that exists for it to his knowledge – part of the NOI, they are asking to maintain the seasonal dock so it be listed in the OOC and then the homeowners would apply for the permit. DeFant: she spoke with Mass DEP about it and they said the homeowners would need a Chapter 91 license for it. Willson: how will it be landscaped afterwards? Is the entire area of the limit of work and silt fence going to be excavated and be dirt or will some area stay vegetated? Nelson: their limit of work shown is more than what is going to be excavated and in terms of soil disturbance the house will be demolished, and the foundation will be removed – excavation will only occur within the demolition and slightly to each side of the former structure. Willson: what will be

replanted/reseeded? Nelson: once the grades are achieved, loam will be applied and seeded – on the steep areas there would note of erosion control blanketing used on slopes 4:1 or greater. Willson: will there be any work down by that lower retaining wall? Abdow: they are not proposing any work past the stone stairs leading to the retraining wall. Stone: is the entire site within 100 Buffer Zone? Nelson: yes. Stone: how much of an increase in developed land/impervious surface vs what is there currently? Nelson: currently it is 1850 sq.ft.square feet of developed land and the proposed structure would have 2395 sq.ft. of developed land – more than 500 sq.ft. increase. Nelson shares the existing structure site map for comparison via screenshare. DeFant: what is the shortest distance between project disturbance and a Resource Area? Nelson: from the structure it would about 26 ½ feet but in terms of limit of work it would be 13 feet. DeFant: where will you have stockpiles or dumpster placed? Nelson: unsure of the exact locations but he assume it would be in the front yard so it would be accessible to trucks. Willson: where does the current roof drainage flow to? Abdow: they discharge onto the land on either side – the roof is sloped towards the road. Willson: the outfall that you are proposing she is assuming that they sized it appreciably for the size of the roof. Nelson: yes it is the typical sizing for a single family home – 6-inch PVC foundation drains around the footings and then once those reach the main line collection point it turns from perforated pipe to solid pipe. At some point downstream on the solid pipe they would tie in the roof downspouts and then there would be a stone armored riprap layer outlet off to the side of that lower retaining wall. Jaques: since the footprint of the impervious surface is increasing significantly, is the applicant proposing compensation in terms of planting? Nelson: he is open to suggestions and what the applicant is amenable to. Willson: it sounded like the garden SCC saw on their site visit that had nice plants in it would be replicated and possibly enlarged. Abdow: they plan to keep the garden as it currently is and if it is disturbed during construction then they plan to restore it and possibly enlarge it. SCC has no further questions. Willson suggests adding the plantings into the plan. Jaques: when she was on SCC, the retaining wall and garden were part of a previous NOI and SCC would like to see that stay in place – does it include shrubs and perennials? DeFant: just perennials. She believes the site is currently nicely landscaped and seemed very stable. Jaques recommends SCC request shrubs be placed near the foundation drain outlet area for extra protection. Willson agrees. Mike Betcha: the slopes on each side of the slope are not steep, so water will not move quickly over that – a good lawn base should slow and stop that from happening. He adores the plan proposed. **Motion: David moves to close the Public Hearing for 56 North Laurel Drive NOI, Harrington seconds. Vote: David- Aye, DeFant- Aye, Harrington- Aye and Willson- Aye.** DeFant shares the OOC for 56 North Laurel Drive via screenshare for SCC to review. SCC reviewed Special Conditions. SCC gives DeFant permission to sign for the electronically. **Motion: David moves to approve the OOC for 56 North Laurel Drive, Harrington seconds. Vote: David- Aye, DeFant- Aye, Harrington- Aye and Willson- Aye.**

86 Sand Hill Road NOI, DEP File #286- 0293: Geothermal Energy System

Applicant for the 86 Sand Hill Rd project did not mail out Abutter Notification via Certified Receipt; therefore, the Public Hearing can't be opened. The rescheduled date will be determined at a further time. DeFant: do you have any questions regarding the NOI process and needed materials? Kowalski: when the site was delineated by the surveyor, they did not survey and flag the 200-foot Buffer Zone – she needs to contact them about further information about the survey and wants to make sure they need the 200-foot Buffer Zone flagged. DeFant: yes, we would

because SCC needs to be able to determine if that site is in the Riverfront Area – there is a perennial stream that runs through the property. If it is in the 200-foot Riverfront Area, then the NOI would have to be resubmitted because it was not indicated in the original application and the fee would need to be adjusted. Kowalski agrees. DeFant: the other feedback she gave to Kowalski via email communications because the site plan was missing pieces of information that the SCC has required for other projects; locations of erosion controls, location spoils pile containment area, all Buffer Zones marked on one site map to see the relation between one another, and distances between Resources Areas and the Limit of Work, including the trench. Kowalski has given DEP an updated site plan but does not have the distances. DeFant: we would want the closest distance to the Resource Area. If the applicant has submitted something updated to DEP, the Commission also needs a hard copy and digital copy. Kowalski: delay has been due to attempt to have everything packaged together and didn't get it in time for this meeting. DeFant: when do you want to hold the hearing? Kowalski and Chair will coordinate scheduling. Kowalski has received the email listing the feedback and confirms she is working on the list.

Site Visit Discussion:

35 Weatherwood Road/Huang – DeFant: SCC conducted a site visit and asked Huang to get a delineation done on the property due to evidence of wetlands – Ward Smith delineated the property within 24 hours. The removal of the deck and stairs would normally require an RDA, but Chair is concerned that deck and stairs are a safety hazard – deck is deteriorating and is not blocked off. An Emergency Certification, EC, seems more appropriate so it may be removed immediately. To do the EC, SCC needs to receive an order from a public agency declaring it is a safety hazard – she reached out to the Building Inspector but has not received a response. Stone: Board of Health may be able to deem it a safety hazardous. DeFant: with EC normally, it would be signed by herself and then ratified by SCC at a later date. DeFant had drafted an EC and shares it was SCC to review via screenshare. SCC agrees that the drafted EC is agreeable. DeFant: cannot issue the EC until the declaration of safety hazard by a public agency has been made. Huang will call the Board of Health tomorrow and update SCC.

29 Leverett Road/Pill – DeFant: proposed work includes the building of a garage and a professional delineation was given – showing a BVW (SCC measured that the limit of work to the edge of the wetland was about 35ft). Homeowners will submit an RDA.

66 Lake Drive/Douglas – Douglas: Thanks SCC for conducting their recent site visit. He filed an RDA with SCC recently and is wondering if he should withdraw the RDA and submit a NOI instead. DeFant: since the RDA has been submitted, SCC can't discuss the application outside of a public meeting. She advises that in the past SCC has required an NOI for less scope than what is being proposed in the RDA. When SCC had first written the letter regarding restoration work on the site back in April/May, SCC was originally looking for an NOI submission. Douglas plans to withdraw the RDA and resubmit application as an NOI. The SCC has informed LWA and LWAC about the permit application. Douglas will send them Abutter Notifications.

Forest Cutting Plan Reviews

SCC has received more Forest Cutting Plans that have yet to be scanned – DeFant tables the review/discussion of the Forest Cutting Plans for a further time.

Consider Minutes: 7/14; 7/28

Carey Marshall, Land Use Clerk, is still drafting both sets of minutes so there are no minutes to review at this time. Review of minutes will occur at a further time.

Follow-Ups/Updates

Lot O-32 permitting/resident complaint – DeFant: need to talk about complaints and concerns about work done without a permit; people who have written to the SCC are here tonight; Melissa Makepeace-O’Neill of the Select Board is here. DeFant summarizes status of the investigation: has had some conversations with Mary Grover (MassDEP) Circuit Rider, in regards to the issue which she will summarize; public can make comments. The SCC’s primary interests are protecting the values and interests of Wetlands Protection Act (WPA) and the Town Wetlands Bylaw, protecting water quality and quantity and wildlife habitat, SCC also wants to support Town projects, including the proposed new library, and to work collaboratively with the Town; want to be constructive and forward-looking; SCC cannot address any concerns that are outside of our jurisdiction.

Since the last meeting, SCC has received from the Town Administrator a wetlands delineation by Ward Smith of the Lot O-32 site from 2018; SCC was unaware that this delineation was done during the site visit for the RDA (Request for Determination of Applicability) submitted in 2021; SCC was unaware there was wetland delineation, current at that time, showing a BVW; process in 2021. SCC had determined that the RDA project was in the Buffer Zone of the BVW based on the SCC’s site inspection, but SCC was not aware site had also been professionally delineated.

At that time (last summer) that , the delineation was only 2 ½ years old, so it was still current then, but it is now out of date. Ultimately, it is not SCC’s the applicant’s responsibility to do that delineation;; the Town when applying for an RDA has the burden of proof to demonstrate they are meeting the performance standards in the WPA; it is the Applicant’s responsibility to show their project is not adversely affecting wetlands.

Some residents this year submitted complaints expressing concern about loam being brought onto the site last summer where the garage was demolished, and even more recently that the wet meadow BVW (Bordering Vegetated Wetland) on site was mowed sometime in late July. The SCC does not have information about when that mowing was done or for what reason. The concerns in the complaint emails were that the mowing took place during a Significant Drought period. We are now in a Severe Drought period. Concern was that mowing happened when habitat was already stressed. The Town plans to go forward with a new delineation, which is a good thing and benefits everyone. There has an approved Scope of Work for the Tier Classification investigation of the property –, which will hopefully resolve a lot of concerns and allow for the issues with Mass DEP to be resolved; these issues are not in which are not within the SCC’s jurisdiction, but we’re glad those things are going forward.

SCC needs to decide where our jurisdiction is and what activities need to be regulated with an RDA, at least, including perhaps through permits. If the Tier Classification investigations are within a Buffer Zone, the SCC may not require an RDA. If they are directly within a Resource Area, then they might require wetlands permit as stated by MassDEP Circuit Rider Mary Grover. Chair asks other Commissioners for comments. Willson: if the investigation is in the Buffer

Zone, some investigative work such as drilling, boring, or test pits are exempt under the WPA if they are for a future project to be presented to the SCC ; however, that exemption may not apply if the work is within a Resource Area itself. DeFant: DEP said same thing; delineation is critical because SCC doesn't know where the boundaries are or where the proposed work would be, so the SCC can't offer guidance without more information. DeFant: this feels like an uncomfortable position (for the SCC) to be in and imagine rest of SCC feels same way; we are a part of Town government and want to work collaboratively; want to support projects that the Town and residents have voted to support; we want to be collaborative and yet we are presented with information that was concerning at the last meeting; fill was added to a Resource Area as defined by the WPA without a permit; would like to move things along; based on the information SCC gathered at the last meeting, Chair believes the SCC should make a determination in a timely manner. DeFant proposes the notion of the SCC issuing a very limited and "friendly" Enforcement Order that would not be onerous to the Town, that would not cost the Town more money or interfere with the projects but would articulate a process for future deliberations that is clear and responsive to the concerns. DeFant does not believe requiring a restoration where the fill was brought in serves the interests of the WPA or the Town but having some clear statement about the regulatory process seems in order. DeFant has drafted an Enforcement Order to share with the SCC tonight; has not shared it with the SCC yet. DeFant invites discussion from the SCC. Harrington: she would like to see what the Enforcement Order says, was surprised and upset; saddened to learn about the mowing in a drought; would like to know why it occurred; it makes it harder to identify wetland plants, things that have gone on are concerning. Willson: agrees, important to establish a process; include all of the details we want discussed; EO could ask for the delineation; once delineation comes, then we have a better idea of how close these activities were to Resource Areas; we need to know where the fill and mowing were; was the mowing in a Resource Area? We can have EO say that, based on the results of the delineation, the Town has to discuss future mowing with the SCC. Willson and David: agree with comments; we need to have a clear process, agree with Harrington's comment. DeFant: SCC received an email from Rita Farrell (SB Chair) asking for SCC to postpone reviewing this topic at tonight's meeting and instead to have a combined meeting with the Selectboard and Town Counsel, Donna MacNicol. DeFant welcomes that proposal; believes that having a joint discussion with the Select Board would be constructive; however, a meeting with the Select Board is not the same as a meeting that SCC has convened for a regulatory purpose; not sure SCC can make regulatory decisions in joint meeting that we are not chairing or convening. She would still like to hold the joint meeting but not as a substitute for SCC making its own determination based on what is before us. A complaint has been filed. We need to make a decision; we can either decide there is evidence to support it and issue an Order or we can find the complaint is not supported with evidence. That's a regulatory decision we have to make in our own right, has to be independent of our collegial relationship with the Select Board as our Appointing Authority. This is complicated because the SB is our Appointing Authority and they are representing the landowner, as an Applicant, which is the Town of Shutesbury. It is complicated and we need to keep our lanes clear. DeFant invited Makepeace-O'Neill to ask questions or make comments if she wished. Makepeace-O'Neill did not have any questions; appreciates the kindness of the SCC tonight's determinations. Jaques: SCC has an agreement with another landowner to allow them to mow their wet meadow but only when seasonal conditions are dry; Jeff Lacy. DeFant: SCC also issued an OOC with Kestrel Land Trust recently that they can only mow their wet meadow when the ground is frozen. Jaques: encourages SCC to meet with the Select Board before issuing

the Enforcement Order, if SCC decides that is what they want to do, in order to have a broad discussion about process. Hootstein: understands it is difficult for SCC to have this discussion; he has heard SCC talk about due process; 14th Amendment has due process and equal protection clauses; it is important that the Town and Town Administrator be treated equal to a resident; important for SCC to issue the EO tonight; you would have issued an EO on any other landowner if they had spoken to you the way the Town Administrator did at the July 28 meeting; you are the WPA and Bylaw enforcers; not the SB or the Town Administrator; let the SB and Town Administrator know that this is your jurisdiction and you are legally authorized to make decisions about these laws; appreciate the SCC; thank you for your work; I'm committed to protecting drinking water and human health; the wetlands are natural filters; very important that we enforce our laws. Alix: as a person who submitted a complaint about Lot O-32 mowing, she wanted to point out that the mowing occurred close in time before the planned wetland delineation; thinks not a good thing; she is concerned it could change the results of the delineation; was done during a drought which seemed silly; see that the 2018 delineation was also done during a dry period in the fall, whereas the Conway School of Design delineation was done during the spring; two delineations look very different; Town could have done a delineation in the spring; seems deliberate.

DeFant: after the complaints about the mowing were received, back to due process issues; Chair emailed Torres today for information about the mowing and history around it; she has not gotten back to me; originally added language in the draft EO about the mowing but thinks it might need to be left out; think further investigation is needed; need to hear back from the Town; we should frame this narrowly on the issues we know for sure; make it as fact-based as we can; DeFant shares a draft Enforcement Order for SCC to review via screenshare; reads the EO draft aloud with chronology of events; Town had a professional delineation so had good reason to know where the jurisdictional Resource Areas were in 2021; complaint from Hootstein involved fill around the garage and excavation of a wetland on another part of the property; SCC site visit observed the fill added without a permit; Town Administrator shared with the SCC on 7/28 meeting that loam had been added to the site; on 8/8, SCC received complaint from Alix about mowing in a delineated wetland; work activities were conducted in a Protected Resource Area without a permit; Bylaw treats the Buffer Zone as a Protected Resource Area; Applicant had a delineation and had good reason to understand work was in a jurisdictional Resource Area; .

Jaques: she apologizes because she wasn't at the last meeting, so she is less aware of the issues; was the fill that was brought in only used for the highly altered area where the garage was removed? DeFant: yes, that is what the SCC has been told it was placed – not sure if any was used anywhere else. Jaques: that seems fairly trivial in the scheme of things - she; understands that filling in a wetland is not okay, but since the fill was used in a hole made by the removal of a building in this case it seems like a different category of problem in her mind.

DeFant: she understands Jaques's comment, but SCC would have preferred Town had come back to SCC for permission or included it in their RDA application, it's about the process if a permit is being issued; SCC could have considered modifying the permit if it had been asked; that's why SCC not requiring a restoration of the garage site. DeFant shared a draft EO Attachment with findings and conditions. Willson: concerned about the delineations during this drought period. DeFant: the SCC received some emails from residents asking the SCC to seek a Third-Party

Review of the delineation. If there is an application, we can use 53G statute if we want; if EO, we can do it with our own funds; need to not get ahead of our skis and see the delineation. David: if we are not comfortable with it, we can look at it in the spring. DeFant: we can have a consultant. Jaques: (in response to review the soils testing; postpone thinking for now. DeFant: is the date deadline OK, we want to move this process along. Willson: thinks it is OK. SCC reviewed the conditions and offered edits. Per of Condition #10 regarding wetland mowing, Jaques commented: SCC never required mowing to be done under an NOI before; seems onerous; it is done in several places around town in agricultural areas with just a letter of understanding with the SCC; recommends an RDA. DeFant: if it is agricultural mowing, it is exempt from the WPA. Jaques: only if the facility has an agricultural exemption, which she doesn't believe any farms in town have. Willson recommends writing the Condition to state that any mowing in Protected Resource Areas must be reviewed by SCC under an application. SCC agrees on a deadline of September 1 for the wetlands delineation report based on Library Director indicating report should be ready before that date; this date will allow report to be reviewed at the 9/8/22 meeting. Regarding the garage floor drain closure, the SCC defers to DEP for enforcement of the 310 CMR 27.00 Underground Injection Control Well regulations. SCC not making any final determination about alleged pollutant release due to the floor drain not having been removed in accordance with the state regulations. SCC requires that Town share information in a timely manner. SCC agrees on draft conditions with edits. Willson feels EO covers everything. Harrington agrees. DeFant: the intent of this Enforcement Order is not retaliatory or punitive –; the SCC is simply trying to be constructive and proactive to find a path forward to a good a resolution. SCC grants DeFant permission to sign for them electronically.

Motion: Willson moves to issue the Enforcement Order for Lot O-32 as amended, David seconds. Vote: David- Aye, DeFant- Aye, Harrington- Aye, and Willson- Aye.

Dam NOI extension and release MOU – In the last meeting the issue of the MOU between SCC and LWAC not being signed was raised and DeFant would like to sign it tonight. Jaques: when she was chair of SCC, she had signed this MOU. DeFant, Rivers and Marshall are unable to locate a copy that has been signed. SCC would like to proceed in signing it tonight regardless if it had been signed in the past. Jaques asks Rivers how it would be possible to have SCC be informed when the drawdown and refills occur by the Dam Keeper as originally stated in the MOU – SCC was not informed in the past. Rivers: he has spoken with the Dam Keeper and he requested that a name and contact information be given to him so he give notice when the drawdowns and refills occur. The Dam Keeper can contact the Chair.

Resident complaint about level of Lake Wyola Dam release – SCC received complaints from a Leverett resident and the Leverett Conservation Commission regarding the level of Lake Wyola because the Sawmill River is very dry at the moment, and they are concerned about the habitat and wildlife being affected. Rivers reached out to Howard and responded back to DeFant summarizing that at this moment, the Town is releasing as much as they are required to release and are slowly lowering the lake; DeFant has passed the information on to the people who submitted complaints.

Bylaw Regulation Consultation – DeFant: she reached out to Garner and he stated that he and Horsley have started to draft some language – has some question he would like SCC to think about.

- How would SCC like to set limits on what would need to be delineated for subsurface streams?
- How deep does SCC want to regulate a stream?
- During what time a year would subsurface streams be best delineated at?

Garner suggests having a zoom meeting to further investigate these questions. She invited them to attend the next meeting at 7:00 p.m.

Site Visit Scheduling: TBD

SCC will conduct site visit on Sunday August 21, 2022

- 17 Cove Rd
- 29 January Hills Rd

Motion to Adjourn: David moves to adjourn, DeFant seconds. Vote: David- Aye, DeFant- Aye, Harrington- Aye, and Willson- Aye.

Meeting Close: 9:15pm

Next Meeting: Thursday, August 25th @ 7 p.m.

Documents Used:

- Agenda
- 56 North Laurel Drive NOI
- 56 North Laurel Drive Site Plan
- 56 North Laurel Drive OOC
- SCC and Huang emails regarding Emergency Certification
- 36 Weatherwood Rd Drafted EC
- 35 Weatherwood Rd Site Visit Form
- 29 Leverett Rd Site Visit Form
- 66 Lake Drive Site Visit Form
- 66 Lake Drive RDA (withdrawn)
- Hootstein Lot O-32 Wetlands Violation Complain
- Hootstein Lot O-32 Mowing Complaint
- Alix Lot O-32 Mowing Complaint
- SCC and Mary Grover emails regarding Lot O-32
- Lot O-32 (66 Leverett Rd) Enforcement Order and Attachment
- SCC and LWAC MOU
- Complaints about Lake Wyola Levels

Respectfully submitted by Miriam DeFant, Commission Chair, 9/22/22