

Shutesbury Conservation Commission
Minutes – 11/17/2022
Approved – (1/12/23)
Virtual Meeting

Meeting Start: 7:00pm

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

Commissioners Absent: None

Other Staff: Carey Marshall (Land Use Clerk)

Other present: Matt Kissane (Fuss & O'Neill), Mary Anne Antonellis (Library Director), Elaine Puleo, Penelope Kim, Dale Houle, Gail Fleischaker, Michael Hootstein, Don Wakoluk (SCC Consultant), Emily Stockman (SCC Consultant), Grace Bannasch, Jeremy Mailloux, Jon Lawless, Katherine A. Powers, Katie Eagan, Matteo Pangallo, Meryl Mandell, Michael Vinskey, Penny Jaques, Rita Farrell (Select Board), Stephen Dallmus, Steve Bressler, Tom Siefert, Tracy McNaughton, Amanda Alix, Ziporah Hildebrandt, Jill Marland, Mary Lou Conca, John Buonaccorsi, Joyce Braunhut, Leslie Luchonok, Marty Arvanitis, Melissa Makepeace-O'Neil (Select Board), April Stein, and all other unidentified individuals.

Chair's Call to Order at 7:02pm

Meeting is being recorded

Continued Public Hearing for ANRAD for Lot O-32/66 Leverett Road, Town of Shutesbury, DEP File Number 286-0297

Due to a miscommunication during an exchange of emails between SCC and Fuss & O'Neill (F&O), April Doroski, wetland scientist of Fuss & O'Neill, is not in attendance as presumed by SCC. DeFant: Kissane are you prepared to talk with Emily Stockman, 3rd Party Reviewer, about her report and findings? Kissane: Fuss & O'Neill were hoping to continue the Public Hearing until the next meeting for the decision on the ANRAD. They are still processing and compiling the data gathered during the subsequent subsurface investigation that was conducted last week; Doroski went out to the site with another field staff member from Fuss & O'Neill to do test pit investigations in or around in some of the previous mapped resource areas to gather further in data – she is compiling a memorandum detailing her findings. Once completed they will send these documents to SCC and Stockman next week. If Stockman has any comments to these documents, then Fuss & O'Neill will respond and prepare an update to the wetland resource report and mapping. DeFant: SCC was prepared tonight to review Stockman's report and her recommendations, expecting that Doroski would be present to have a back and further discussion about the next steps. Based on Stockman's recommendations, SCC might have specific recommendations for the applicant; it wasn't clear that there would be no discussion tonight; only understood SCC would not close the Public Hearing tonight because there would be further investigation. She asks SCC how they would like to proceed because Stockman is here prepared to explain her report. Fuss & O'Neill has made some requests via email that SCC must discuss tonight at the very least. Kissane: am confused the reason for an interim discussion until that final report is issued in response to the peer review process; asks for purpose for having an interim discussion in advanced of them have presenting their revised delineation in response to the ongoing peer review process. DeFant: given that applicant is not prepared tonight, she doesn't believe it is appropriate to have a discussion of the revised ANRAD delineation; could possibly discuss next steps that SCC would like the applicant to respond to without getting into the substance of the delineation; there have been some requests from F&O made via email that SCC would like to address before continuing, if that is agreeable to Kissane. Kissane: agrees but notes there was a misunderstanding about focus of meeting tonight. DeFant: agrees there was a

misunderstanding; for the public's knowledge, due to this discussion, the SCC is going to postpone some of the review of this project to a later hearing date; for that reason this Public Hearing will be shorter; if the applicants are going change their submittal, SCC needs to review the final submittal before in-depth discussion. DeFant: F&O requested by email that SCC allow Stockman to do a peer review site visit without a Commissioner present. Kissane: asks DeFant to read the email out to him. DeFant: she doesn't have her email open, therefore is unable to; the request was if there could be a site visit without a Commissioner for the sake of efficiency. Kissane: yes, that was in regard to the work they did last week. Chair requested that the Commission could be present during the work, and they were concerned about their ability to their work efficiently. Fuss & O'Neill proposed that the SCC have Stockman only present. DeFant locates and reads text of email from Fuss & O'Neill. DeFant: Fuss and O'Neill is free to do any investigation desired without SCC or Stockman present, but if Stockman is to do another site visit, it is usually standard procedure to allow SCC the opportunity to be present if any Commissioners wish to be. Kissane: agrees to that but their concern was when they are doing field work and/or environmental investigation work, it is thought-intensive process and having multiple people present can affect their ability to efficient complete the work. SCC has the ability to come to the site whenever they like, and they welcome SCC to do so.

DeFant: there were some emails where Kissane was asking Stockman if it was agreeable to doing some additional investigations; will let Stockman respond to that; her understanding is that as the applicants can choose what they desire to do and resubmit. If there are significant revisions, don't know how much the ANRAD can be revised before a new submittal is required; expect the revisions will go under the original MassDEP project number. Kissane: revisions would be sent to Mass DEP as well; in the past with any other municipalities, it is done under the existing ANRAD even if they had major changes to the initial submission.

DeFant reminds applicant of SCC's winter delineation policy that was mentioned in September. Chair asked SCC to consider if it wanted to ask applicant to respond to Stockman's comments about the disclaimer about the accuracy of the measurements. Willson inquired about the reasons for changing the delineation plan. Kissane indicated changes are in response to Stockman's report and discussions in the field with Stockman. DeFant reminds applicant that discussions in the field do not constitute the Third-Party Reviewer's final conclusions and recommendations as reflected in her report; participants at the site visit were cautioned a few times about this during site visit. SCC would rely upon the Stockman's final written findings. Stockman: some discussion is typical during site visits; she and Doroski discussed what type of technical methodology was appropriate. Doroski took that discussion to move forward with further investigation as described by Kissane. Stockman reviewed email communication from Fuss & O'Neill, asking for clarifications which she is available to offer tonight as this is first time the Commission is meeting to review her work. She is available to answer any questions from the SCC since Fuss & O'Neill has already had a few weeks to ask her questions. Chair asks applicant for permission for SCC to ask some general questions of Stockman, without going into depth about the ANRAD delineation, since Doroski is absent. Kissane agrees.

Stockman explained her comments about submeter accuracy and GPS data. It is common for delineators to use submeter GPS when locating their flags; while the equipment has the capability of collecting data at a submeter accuracy, it doesn't mean there is an absence of potential interference, accuracy is not at a submeter level. She has made similar comments when reviewing other ANRADs for the SCC. SCC may request data from the applicant demonstrating that the points given were in fact submeter. Recommends that Commission clearly review maps that have been submeter GPS versus traditional location by survey. In addition, she noted there is an unusual disclaimer on the maps produced by Fuss & O'Neill; in her opinion, a final ANRAD with an accuracy disclaimer as was included in these maps is inappropriate; recommends SCC to

ask Fuss & O'Neill to discuss requesting regarding submeter accuracy and/or the removal of the disclaimer. For benefit of public, DeFant reads aloud the disclaimer text on the ANRAD maps indicating the maps are not for regulatory decisions. Chair asks Kissane for clarification. Kissane: site has not been professionally surveyed; he will follow-up regarding the disclaimer language and the documentation for submeter accuracy. If there are any issues with the accuracy of the points then they will discuss if they can return to the site to re-mark the flags using a handheld GPS.

DeFant: Stockman's report discusses the Army Corps of Engineers Wetland Delineation Supplement, particularly the chapter for delineation of difficult situations, hoping Stockman could explain how that methodology applies to this ANRAD.

Stockman: site visit, in her opinion, has disturbed landscape features including fill, buried soil horizons, and alteration of vegetation by historic and repeated mowing, there was a discussion that was reflected in her report that the section of the Wetlands Protection Act (WPA) Regulations 3.10 CMR 10.55(2)(c)3 applies; passage addresses BVWs on disturbed sites; on altered sites, wetlands may not show a predominance of wetland vegetation and need to be vetted as to whether or not they would meet the BVW criteria if they had not been altered or if restored. In more detail, the USACE (US Army Corps of Engineers) **Regional Supplement for the Northcentral and Northeast Region** gets into specific methodology for these circumstances as stated in the **Chapter 5, Difficult Situations**. Methodology states that, in altered or disturbed sites, a wetland boundary can be established if certain conditions are met; alterations to vegetation, such as continuous mowing that has occurred on parts of property, impact wetland delineation process. Can have areas where hydrology has been disturbed that require a more complex methodology; this site is challenging because of a long history of manipulation of vegetation, soils, and hydrology, all of which are used for delineation; some of the methods discussed in this chapter are appropriate for different areas on this site. Chair asked Stockman if she had any specific recommendations for Fuss & O'Neill for any future assessments? Stockman: no, she has confidence in Doroski's knowledge and work product; Doroski is aware of the *Difficult Situations* chapter.

DeFant summarizes the SCC the communication process with the applicants. Applicants are reevaluating the boundaries of two wetlands delineated in the original ANRAD report. Isolated Vegetated Wetland (IVW-2) is being reevaluated as a Bordering Vegetated Wetland (BVW) due to additional delineation work at site visit involving an abutting property (62 Leverett Rd). Stockman concurred with the boundary of BVW-1, but the applicant communicated in an email that they are reevaluating that boundary. If the applicant wishes to rebut its original delineation, it will need to meet the evidentiary standard in the WPA and Bylaw, that is a preponderance of scientific evidence, meaning credible evidence from competent sources, that meets a 51% standard; may be a steep hurdle to overcome due to this standard. Applicant is welcome to do whatever investigations they desire.

Stockman: concur with the original BVW-1 boundary as depicted; when out on the field site, she evaluated the vegetation and the soil within an area that would be considered inner Buffer Zone; concurs there are uplands upgradient of the wetland delineation flags. She subsequently went back to the office and did a more thorough review of the data forms prepared by Doroski documenting that wetland; she concurs with the original delineation based on the data presented. That said, sometimes delineated wetland boundaries include or incapsulate isolated uplands. During the site visit there was some discussion about whether some upland areas may have been delineated as wetlands; the applicant and representative have every right to review a boundary to get what is known as a tighter line to ensure there is no inclusions of upland boundaries. If they

choose to do so, then the appropriate methodology should be followed and documented and then presented to SCC for review.

Kissane: plan to further investigate the BVW-1 delineation line; a follow-up memorandum will be submitted with the new data.

DeFant reviews review process for additional delineation work and Third-Party Review (TPR). Once the TPR Stockman provides updated comments, applicant will have an opportunity in writing to respond. What has been done in the past is that the applicants take the TPR comments in order by number and give their response for each comment if any. Those responses may concur, offer a different perspective, or offer additional steps. Kissane agrees. SCC's next meeting is on December 8th and knows the applicant would like to continue to that date; is that enough time?

Stockman: review timeline may be tight if she is to provide comments 2 weeks before next meeting given holidays. If applicant can provide updates by early next week, then she would be happy to look at dates for the week of the 28st to schedule a return site visit with Doroski and SCC. Stockman agrees to try to provide comments to the SCC by December 1. If necessary, the SCC agreed to allow the TPR to submit her comments by December 5. Kissane commits to giving SCC any additional comments by December 5. SCC has no further questions. There are no more public comments. DeFant: given possible winter conditions, she will consult with Stockman about snow conditions so a determination can be made about site visit scheduling. Kissane agrees.

DeFant reviewed emails from the Town regarding NOI planning. This issue will not be discussed tonight; Select Board has proposed meeting sometime in December to discuss future NOI plans for BVW cleanup.

Public Comments:

Bannasch asked for a summary of the Public Hearing discussion. Chair summarized the discussion; because the Fuss & O'Neill wetland scientist, April Doroski, is not present, the SCC is not reviewing the wetlands delineations tonight. Discussion tonight involved following up on email communications, procedural questions, and requests for additional information. With the applicant's consent, the SCC's consultant, Stockman, was also asked to explain the methodology that she is recommending in her report. Doroski did not need to be here for the SCC to ask Stockman general procedural and technical questions. SCC is awaiting further data from the applicant and will conduct another site visit to review that data. Bannasch questioned why DeFant is only one offering information from the SCC. Chair invites other Commissioners to add comments. No comments offered

Hildebrandt: what is SCC's responsibility/ role is in any contaminants are found on the site?

DeFant: SCC is reviewing an application around wetland delineation; not reviewing any other projects tonight. Issues around ground contamination are reviewed by MassDEP – those investigations are under the jurisdiction of MassDEP, not SCC. There is a plan for a clean-up NOI for some wetlands that have fill and debris in them that need to be removed; Town will submit an application which will have a whole review process. Luchonok: submitted comments about the ANRAD; history of this property includes years of dumping abuse, two potential 21E sites close to abutter wells; the peer review by Stockman (in his professional opinion) is exemplary; it shows the inaccuracies of the original delineations and data prepared by Fuss and O'Neil. In Stockman's examination, she discusses historic fill and dumping, disturbed soils, buried debris, and surface litter making delineating the wetlands a challenge. Stockman

evaluated historic and past aerials; agrees with her recommendation for using the methodology from the USACE Manual.

Pangallo: process seems to be getting drawn out; when does the peer review process conclude? DeFant: SCC's interest is reviewing the delineation efficiently but carefully, give that this is a complex site with difficult delineations areas; SCC has to review a final delineation map and cannot issue a final order until this happens. Vinskey: who decides what methodology is used? Stockman: the *Difficult Situations* chapter in the Regional Handbook is a standard in the profession for historically disturbed and altered sites. Delineator can propose a different methodology, but SCC would determine what is acceptable; Fuss & O'Neill scientist is aware of industry standards. Kissane: Doroski is in process of completing follow-up investigation based on comments from Stockman.

DeFant: must the applicant justify the use of the methodology used? Various areas show complexity on site, but there may be more areas where standard methodology would work; do they need to justify the use of this in the particular area they are applying it? Stockman: the original delineation submitted with the ANRAD application utilized wetland delineation data forms from this same Regional Handbook; it is an industry standard. On those data forms, it asks specifically for the delineator to state whether or not the vegetation, soil, or hydrology are significantly disturbed. The delineator determines what parameters are significantly disturbed. She would anticipate this would be documented by Fuss & O'Neill on the data forms as well as the narrative.

SCC has no further questions. There are no further public comments. **Motion: David moves to continue the Public Hearing for the Lot O-32/66 Leverett Rd ANRAD on December 8th, 2022 @ 8:00pm, Willson seconds. Vote: David -Aye, DeFant- Aye, Harrington- Aye, Kahan- Aye, and Willson- Aye. So moved.**

Winter Delineation Policy

Willson put together a draft Winter Delineation Policy shared with SCC. SCC confirms they have reviewed the draft. Policy came from Weston Conservation Commission who has professional conservation staff person; wording has been edited to have the Chair make the determination if it had to be made for the next scheduled meeting, since the SCC has no Conservation Agent. SCC agrees. Purpose of this policy to ensure that projects are reviewed under site conditions where SCC can verify the wetland conditions. Jaques: believes policy is a good idea but wonders if, just as site visits are conducted by 2 Commissioners, could 2 Commissioners consult rather than just the Chair make the determination? DeFant: this kind of discussion would be considered deliberation outside of an open meeting. For same reason, the Chair can issue an Emergency Certification unilaterally.

Bannasch: SCC has a paid staff person; staff members have expertise and are more reliable on average than unpaid volunteer positions; not that volunteers are not dedicated, but because staff members are paid and provided more trainings than unpaid volunteers. She is disappointed in SCC for not valuing that expertise – very few committees get the benefit of an on-call paid staff member who will give up their time and personal life during the evening; to not take advantage or appreciate that is a mistake on behalf of SCC. It is important to her that the volunteers, for whom she spends extra unpaid time serving, appreciate and respect the paid staff, especially when it comes to SCC and the Land Use Clerk. DeFant: am confused; is Bannasch suggesting SCC should have Bannasch make these decisions? Bannasch: unsure how DeFant came to that conclusion. SCC should have more respect for the Land Use Clerk regardless of who holds the position. Willson: she was the paid staff for the Amherst Conservation Commission for 8 years and in terms of snow decisions, she would always check in with the Chair. There is no disrespect

in her mind for anyone who is a municipal employee because she is one in Amherst. Kahan: asks Bannasch if she is commenting on behalf of her position with the Town or as a private citizen? Bannasch: as a private citizen; is she informed by her work from the Town, but she is commenting right now as a private citizen, and would not use this tone as the Town Clerk.

Kahan asks DeFant about her thoughts as current Chair. DeFant doesn't have any issues with it; if she has any problems or questions then she can contact MassDEP for answers; MassDEP has winter policies discouraging the review of projects during the winter months; language for SCC's winter policy is also lifted from MassDEP's policy. This is a determination process which DeFant believes would be inappropriate to leave for the Land Use Clerk, because it would be legally binding. There was a permit issued last winter for which a BVW was missed because it was under snow cover. Jaques questions what will happen if DeFant is no longer Chair? Policy needs to be something SCC is comfortable with regardless of who the Chair is. SCC affirms that they are comfortable with this policy as written for any Chair in the future. Willson feels comfortable having the Chair making the decision. **Motion: David moves to approve the Winter Policy as written and reviewed, Willson seconds. Vote: David – Aye, DeFant- abstain, Kahan- Aye, Harrington- Aye, and Willson- Aye. So moved.**

Updates from Chair

Outside Counsel – Town Counsel Donna MacNicol cannot advise SCC on Lot O-32 because she is advising the Town/Select Board; MacNicol is in support of SCC hiring outside counsel. SCC asked the Select Board to allow SCC to obtain an outside counsel which will be reviewed at the next Select Board meeting next Tuesday; DeFant suggests hiring attorney Elizabeth Goodmen; Town Counsel, Donna MacNicol, has worked with her in the past, thinks highly of her, and believes she is well suited for SCC's needs. DeFant spoke with Goodmen earlier today; believes she is knowledgeable and understands the MassDEP regulations as well; works for other small towns therefore experienced in municipal laws. To make this process efficient, SCC needs to execute an agreement with Goodman who charges an hourly rate – Goodmen proposed that 8 hours would be sufficient. Goodmen would only be reviewing Lot 0-32. She would be available to come to Public Hearing to advise SCC about environmental regulations and accompany SCC when meeting with Select Board regarding Lot 0-32.

Michael Vinskey (391 West Pelham Rd): does it makes sense to hire attorney that works in the same office as MacNicol. DeFant: it would be considered a conflict of interest – MacNicol and Goodman do not work in the same office; both work for different towns and have recommended one another when having to recuse themselves in Town matters. She had gotten the recommendation for Goodmen first someone else before reviewing it with MacNicol.

If/when the Select Board funds, Goodman would come to the December 8th meeting and the next meeting/Public Hearing date as well. Goodman recommended that when setting up this meeting with the Select Board about BVW cleanup, to consider having a representative from MassDEP to come to the meeting to answer any questions. Goodmen can write a legal opinion letter to share with the Select Board stating her recommendation to not separate the NOIs; BWV clean-up and the library project; to summarize Goodmen's reasoning, MassDEP has a general policy to avoid multiple NOIs for a single parcel; cleanup of the BWV-2 and BVW-3, and a restoration project, will require heavy equipment to pass through the northern portion of the property, restoration could involve dredging contaminated material(s); ideally these activities should be sequenced with the construction of the library. **Motion: DeFant moves for the SCC to allow and agree Chair to pursuing whatever steps necessary to obtaining an agreement with Elizabeth Goodman, David seconds. Vote: David- Aye, DeFant- Abstain, Kahan- Aye, Harrington- Aye, and Willson- Aye. So moved.**

Site Visit

58 Lake Drive – DeFant did a site visit to check to erosion controls before beginning permitted work; erosion controls are in good standing.

56 North Laurel Drive – David: she did a site visit to check the erosion controls for an ongoing project; erosion controls are in acceptable condition.

Lakeview Road Culvert – DeFant, Willson, Catherine Hilton (Board of Health), Tim Hunting (Highway Department Superintendent), Wendell Conservation Commission, Howard Kinder (Dam Keeper), and Director of Pine Brook Camp met at the culvert on Lakeview Road near Fiske Brook. Hunting stated that the beavers were building a dam again in culvert; observed dam material in culvert that wasn't present at their last site visit (2 weeks ago). Hunting believes the culvert is not in immediate danger and was not recommending immediate action – it was recommended that he obtain a consultation from Michael Callahan from Beaver Solutions. It has been observed over time that beaver begin to build here in this location after the lake lowering is complete; it is hypothesized that the beavers have a lodge upstream and they are trying to protect it from being exposed from the lake lowering by damming this culvert. Due to this, a seasonal flow control device was discussed. Katie Eagan: lives near the culvert and agrees a seasonal flow control device would be more appropriate; since living in her home, she has grown fond of watching beavers in this area; she understands the structures and roads need to be protected but it is equally as important to protect and support wildlife. DeFant: thanks Eagan for her comments; recommends she speak with Select Board.

Site Visit Scheduling

Discussion has been postponed.

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

Meeting Close: 8:35 p.m.

Next Meeting: Thursday, December 8th, at 7 p.m.

Documents Used:

- Agenda
- 66 Leverett Rd/ Lot O-32 ANRAD
- Stockman Third Party Reviewer Report for Lot O-32, 11/3/22
- Emails between DeFant, Kissane, Stockman regarding questions about TPR Review
- Draft SCC Winter Delineation Policy
- Draft Legal Agreement-Elizabeth Goodman, Esq.
- *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region (Version 2.0)*, US Army Corps of Engineers, January, 2012.

Respectfully submitted by Carey Marshall, Land Use Clerk, 1/11/23