

Shutesbury Conservation Commission

Minutes – 7/12/2023

Approved – (9/28/23)

*Virtual Meeting*

**Meeting Start:** 6:00 p.m.

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

**Commissioners Absent:** Robin Harrington

**Other Staff:** Carey Marshall (Land Use Clerk)

**Other present:** Patrick Garner (SCC Consultant), Alex Abdow, Amanda Alix, Bob Blanchette, Bob Douglas, Carlos Fontes, Chris Claypool, Clint Kleciak, Don Wakoluk, Donna Brewer, Eric Bachrach, Eric Stocker (Select Board Member), Gail Fleischaker, Henry Geddes, Janice Stone, Jennifer Wallace, Jenny Kallick, Jill Marland, Jim Barron, Jon Lawless, Joyce Braunhut, Kate Pfordresher, Laurel Facey, Leslie Luchonok, Mark Rivers, Mary Lou Conca, Meaghan Mikolajczuk, Michael Hootstein, Mick Perry, Mike Vinskey, Paula Moore, Penelope Kim, Penny Jaques, Rebecca Torres (Town Administrator), Renee Moss, Rita Farrell (Select Board Chair), Robert Kibler, Charlene Galenski, Sharon Weizenbaum, Steven Mikolajczuk, Steven Bressler, Susie Mosher, Tracy McNaughton, Ziporah Hildebrandt, and all other unidentified individuals.

Chair's Call to Order at 7:00 p.m.

Meeting is being recorded

**Public Hearing for Shutesbury Wetlands Protection Bylaw Regulations**

DeFant welcomes everyone to the Public Hearing for Shutesbury Wetlands Protection Bylaw Regulations. She shares a slideshow presentation titled 'Regulations for the existing Shutesbury Wetland Bylaw Public Hearing' via screenshare for all participants to view. Hearing agenda will include introduction, feedback from Patrick Garner, SCC peer reviewer, and public comments.

Shutesbury has a Wetland Protection Bylaw and SCC has been working with Garner on revising the Regulations for the Bylaw. Bylaws are passed at Town Meeting and then become statutes after approved by the Attorney General's Office (AGO). These Bylaws established for wetlands protections include basic statements of jurisdiction, and procedures. Regulations are adopted by SCC under the Bylaw; not voted on at Town Meeting thus meaning they don't change the Bylaw. Regulations define specific terms and procedures that are necessary for the proper administration of the Bylaw including fee schedules and permitting details. She explains that as science changes and global climate change pressures continue, Conservation Commission must revise their Regulations to reflect current state of environmental science and law. SCC, like other Conservation Commissions, issues permits under both the Wetlands Protection Act (WPA) and the Shutesbury Wetlands Protection Bylaw (Bylaw).

Chair reviewed SCC's public comment policy for public hearings.

DeFant explains that SCC has received two legal opinions recently that they have not reviewed; thus, those comments have not been incorporated into this current draft. SCC will not be voting

on the draft Regulations or deliberating next steps at this meeting. It is highly likely that SCC will revise a new draft version once review of the legal opinions has been completed. A second public hearing would take place once a new draft is complete.

DeFant discussed nature of wetlands in local community, including maps and photographs of local wetlands. Mentioned that Resource Areas include Atkins Reservoir, Nurse Brook, Dean Brook, Lake Wyola, Ames Pond, Sawmill River, Fiske Brook, and South Brook. The 2022 Open Space and Recreation Plan sets long-term goals which align with the intent of the Bylaw and draft Regulations. Some sections of the Open Space and Recreation Plan highlight the protection of natural resources, sustainable management of stormwater and managing ecosystems for their benefit.

Bylaw was passed at Town Meeting in 1987 and approved by the AGO. It was amended in 1990. The current Regulations were adopted in 2000. The WPA provides minimal protection standards and has not kept up to date with the evolving environmental and climate science; more reason to revise the Bylaw Regulations. Bylaws are allowed to be more protective than state laws under Home Rule Law in Massachusetts. Local wetlands bylaws are a common practice within many communities throughout Massachusetts. Wetland Protection Bylaw differs from WPA. The standard in the Bylaw protects against significant or cumulative effects and includes defined wetland resources that are not protected under the WPA, including Vernal Pools, streams and rivers, subsurface streams, and the 100-foot Adjacent Upland Resource Area (AURA). The AURA is the 100-foot area surrounding another wetland Resource Area. The AURA is a bioactive area that supports wetland ecology and plays a critical role in global carbon cycle, and wetland health. Activities and alterations within the AURA are reviewed under the WPA, but they are not protected. The Wetland Protection Bylaw protects it as a Resource Area in its own right. DeFant reviewed examples of wetlands species that depend on a naturally vegetated AURA.

DeFant shares information about the Bylaw including a Severability Clause that indicates the body of the Bylaw is considered legally valid even if one provision is invalidated by a new law or court decision. SCC is currently reviewing a draft for a new Bylaw. The process for a new Bylaw requires multiple public hearings, legal review, and approval at a Town Meeting in the future. Regulations can be easily updated to closely match a new Bylaw in the future. The SCC's justification for needing new Regulations now includes the fact that the current Regulations lack many necessary standards and definitions, no standards for hardship waivers, outdated fees, and not enough exemptions, resulting in unnecessary reviews and costs to residents.

DeFant shares that in 2022, a SJC decision in the court case *Boston v Quincy* (2022) set a precedent for needing Regulations. Bylaws can be more protective and restrictive than the WPA but must be justified through Regulations supporting the Bylaws. Because of this important decision, there is an urgent need to update the Regulations.

DeFant shares a timeline for the Regulation revisions:

- 2020/2021 SCC Working Group reviewing the current Bylaw and Regulations
- 3/10/2022 ANRAD Public Hearing Discussion: SCC received legal advice from Town Counsel recommending the revision of new Regulations with urgency to define currently

undefined Resource Areas (i.e. Subsurface Streams) and update other administrative procedures

- 2022/2023: SCC work with consultants, Patrick Garner and Janice Stone
- May/June 2023 Public Comment Period began
- Tonight's Public Hearing
- Legal Review, TBA
- Revisions, TBA
- Adoptions, TBA

Regulation development process includes research, professional reviewers, legal review, and public input. Draft 2023 Regulations may seem long, technical, and complex to the public. This is due to the Regulations needing to use legal terms that are found in other regulations, statutes, and court decisions. SCC also needs to use precise sentence and language to prevent misinterpretation. The SCC provides instructions, checklists, and informal assistance outside of the Regulations and formal permitting process to landowners looking for guidance. All documents and application instructions are listed on their webpage.

The SCC is proposing new procedure called the Small Project Permit. This permit is a streamlined process for projects with anticipated minor impacts in AURA. The permit would be composed of a brief narrative, minimal fee, site visit, simple site plan (can be hand drawn), and timely approval at meeting. This procedure was designed to save applicant time and money. The new Regulations do not expand jurisdiction; they add clarity to what is already protected within the Bylaw. Landowners can still apply for Hardship Waivers for AURA projects such as for small lots or where there are no available alternatives. The goal for the new Regulations is from them to be reasonable, flexible, and fair.

New Regulations include procedures, updated scientific standards, definitions, an updated fee schedule. Regulations include scientific standards that take into account effects of climate change, drought, extreme weather, heat, increased stormwater flooding, and other environmental conditions.

Patrick Garner introduces himself as a wetland scientist and hydrologist; was once a professional land surveyor as well. He must leave the hearing at 8 pm due to another commitment. He spent 15 years on the Board of the Massachusetts Association of Conservation Commission (MACC), including being the President of MACC on two occasions. He currently has been working as a peer reviewer for Towns all over the state. He has been involved in writing and reviewing Bylaws, and experience in court regarding interested parties about environmental issues. He emphasizes that Shutesbury currently has a Bylaw and all Bylaws under state law are required to create Regulations; it is assumed that Conservation Commissions will keep their Regulations current and timely.

The WPA is the state law and governs all communities in the state without exemptions; any Town's that don't have a Bylaw are still governed by the WPA. The WPA was considered a well-constructed piece of legislation in the 1980's but is now four decades outdated. When it was original enacted it was envied by all environmental parties across the nation. Within the 40 years very little has changed in the WPA, whereas the science used to understand these processes has

changed rapidly. For example, the WPA requires an applicant to use a Stormwater Atlas that shows precipitation at different events which is called TP-40; issued by NOAA, National Oceanic and Atmospheric Administration in 1962. Garner was on the committee for the more recent NOAA Atlas. They discovered the required TP Atlas that WPA references was actually developed during a multi-year drought; it tremendously underestimates the amount precipitation during a 24-hour period. As a result, stormwater features like culverts are undersized. Due to this, some communities in the state have recently shifted over to a more current Atlas known as Atlas 14, which the draft Regulations stipulate. DEP is looking to adopt Atlas 14 at some point.

The Bylaw protects Resources within the community that are not adequately addressed by the WPA; each community is unique in geologic and geographic features. For example, Vernal Pools are breeding epicenters of dozens of species of frogs and salamanders. Vernal pools are highly active in early spring and are home to the offspring through their life cycles for 3-4 months. The WPA protects these in a limited way which was adequate during its early enactment. It is now commonly believed that these species will travel 500 to 600 feet during their life-cycle; they depend on that terrain to survive and thrive. In this case, the Bylaw allows a 100-foot Buffer Zone or AURA for Vernal Pools which is more protection granted by WPA but is still considered insufficient under current science.

What is referred to as the AURA in the Bylaw is mentioned in the WPA as the 100-foot Buffer Zone but, within the WPA, it only triggers the need for a permit; the WPA doesn't provide protection. This means an applicant can clear the area right down to the edge of the wetland as long as they can prove it won't directly impact the Resource Area. It is now known that changing the Buffer Zone/AURA has a direct effect in many cases on the Resource Area itself; by changing temperature, shading, groundwater, etc. Many communities are adopting the 100-foot or 150-foot Buffer Zone as a Protected Resource Area within their Bylaws. Shutesbury Bylaw also does this. Garner's view on the current Regulations, when first asked by SCC to review the current Bylaw and Regulations, are that they were an early attempt to define what the Bylaw was protecting, but the existing Regulations are wildly inaccurate. For example, the Bylaw protects Subsurface Streams, but the current Regulations do not mention them at all.

DeFant asks Garner to discuss or comment on language regarding significant and cumulative effect. Is it in state law? In our Bylaw, it is mentioned but not defined in the existing Regulations, but it is a standard that is established by the Bylaw. Garner states that DEP recognizes cumulative effects in various adjudicatory decisions, meaning that they were issued in Findings by an independent judge. If a project was appealed, DEP initially adjudicates, meaning they decide whether a Commission's decision was appropriate or not; DEP decisions can also be appealed, which would then be adjudicated by an independent court/judge.

Several of these decisions have recognized cumulative effect(s) from multiple projects. For example, an applicant with 100 acres may have worked with consultant on how to develop all 100 acres over a period of time, but they present them as phases to a Commission; not showing all phases at once; or a developer may not share the remaining acreage--after the first phase—that is planned to be developed within a few years. This results in a Commission being unable to look at the full effects of the full build, but MassDEP has stated such information is within the

purview of the Commission. DeFant asks if he could clarify if that is different than their Bylaw. Garner states it is a state-based standard; therefore, not the same but is similar.

David and Willson have no comments or questions.

Kahan thanks Garner for his summary and asks if he could share his perceptions as a wetland scientist on subject of allowing some minor exempt activities to occur in a way that doesn't have a material impact or detract from the wetland protections SCC is trying to ensure.

Garner states that the frustration that the public commonly has regarding both the WPA and Bylaw Regulations is that they commonly use unfamiliar terms due to them being based on science. This science usually flows from the U.S. Army Corps of Engineers, but consequently, the terminology is dense and difficult to parse through. For a larger project, this results in an applicant hiring a consultant from either an engineering firm or environmental scientist to help with the process. Common for small landowners to have small projects. If these activities are in the 100-foot Buffer Zone, they encounter Regulations. The current Regulations are fairly vague and fail to define the terms that are in the Bylaw which leaves the applicant unsure what to expect for this process, such as what is needed for the Commission to understand the level of their project. The revisions being proposed makes the interpretation of the existing Bylaw easier to understand; I applaud the Commission's effort to make things clearer and easier for the average person.

Kahan asks if Garner can speak about the exemptions as drafted. Do they resonate with Garner and other wetland scientists as types of activities that could be exempted as minor activities and be allowed free from all review because they don't interfere with the regulatory purpose? Are there other activities that should be reviewed by the Commission as exemptions?

DeFant clarifies for the public that the WPA has a list of minor activities that are exempt from any review under the WPA; like vista pruning or putting in a small pathway; they are considered minimal projects that don't have significant impact. The current Bylaw and current Regulations don't adopt any of these exemptions, so theoretically these activities still require permitting for very small projects. The SCC is proposing in this draft to adopt almost all currently listed minor exempt activities within the WPA including roadway/driveway maintenance. They are not proposing to adopt the exemption for accessory buildings in the outer 50 feet of the 100-foot Buffer Zone/AURA. If the accessory building was a small enough project, then it would fall under what is being called the new Small Project Permit and no RDA would be required; would save applicant money and time; Commission is proposing adopting many of the WPA exemptions and creating a streamlined approval process for some others.

Garner states that he examined the proposed exemptions; they closely mirror the WPA and are de minimis exemptions; they don't weaken the Regulations; if not exempt in the Bylaw and not mentioned in the Regulations, they can tie up the Commission's time unnecessarily; what is being proposed is appropriate and benefit the local residents.

SCC has no further questions for Garner. Chair invited public comments.

Bressler asks if the Bylaw should be updated first before adopting new Regulations, shared own experience with the Town's Zoning Bylaws. Garner: regarding the Atlas information, the WPA Regulations require the use of a 1962 precipitation database called TP-40 that was developed during a drought, data used for stormwater conveyances; conveyances are undersized as a result and are inappropriate; the Bylaw doesn't address it; the Bylaw had tremendous foresight, the weakness within the Town is not the Bylaw but it's the Regulations that were implemented to define the Bylaw itself. The current Bylaw is amazingly sound as it offers further protection for Vernal Pools and the AURA, but it is poorly defined and difficult to implement with the existing Regulations. He believes this is part of the reason why the Commission wants to update the Regulations in order to work under a document accurately reflecting the existing Bylaw. He read a recent legal review done by Attorney Gregor McGregor. McGregor states the Bylaw itself has one or two areas that need to be tweaked because of more recent court cases; that doesn't weaken the existing Bylaw. It just means that that small portion might bear scrutiny; right now, the Town is operating under an existing Bylaw with Regulations that over 20 years old, poorly defined and hard to understand; the revision is to flesh out those weaknesses and define them properly for the Commission's use.

DeFant follows up by asking Garner his view on the idea of SCC issuing permits without updated Regulations. There has been discussion of putting the Bylaw aside and not issuing any permits under this Bylaw until a new one was passed at Town Meeting.

Garner believes that is more of a legal question rather than technical; isn't sure if a Bylaw can be set aside or if a Commission can decide not to implement an existing Bylaw because since it is a legal document. Commission must operate under it unless a court suspended it; you cannot arbitrarily choose not to implement it; that is his non-legal opinion.

*Garner leaves the public hearing at 8:00pm*

DeFant: SCC has received written comments that have been shared with all of the Commissioners; if new comments are submitted, they will also be shared.

Sharon Weizenbaum, Pratt Corner Road: am a member of Smart Solar Shutesbury, which decided to hire an independent counsel to review the Regulations. This was done in support of SCC's efforts to create strong and effective Regulations and in their interest of protecting of the community's wetlands in light of climate change. She introduces Smart Solar's counsel lawyer, Donna Brewer, who wrote a review of the Bylaw and new Regulations which generally states SCC would be better with the new Regulations in place; easy to shift the new Bylaw when it is drafted/approved. She is also willing to answer questions about her review.

Gail Fleischaker: shares that during her many years on SCC they were aware of the need to update the Bylaw to better reflect the WPA. The discussed many times of revising the current bylaw, amended in 1990, but SCC never completed it. The Bylaw was based on the MACC Model Bylaw, which was a good model for that time, but the model has change considerably since then and several changes have been made to state law that affect the current Bylaw. That in mind, she must take issue with the comment in SmartSolar's letter to SCC that the Bylaw continues to serve the Town well after 35 years. She wonders what Smart Solar Shutesbury's

interests are in revising the Bylaw Regulations; why they warrant the expense of hiring a lawyer to support the SCC's draft Regulations and what the time sensitivity is that they refer to, if not the current challenges to the Solar Bylaw. The issue of solar generation in Shutesbury is a different matter. The subject of exploration by the Energy and Climate Action Committee with Regulations that would be established by Planning Board; it has no part in the revision of the Town's Wetland Bylaw Regulations. Though there is urgency to slow climate destruction of the town but doesn't lend time sensitivity to SCC's Regulations of the Town's wetlands. She is struck by the addition of new fees in the proposed Regulations; why \$50 for a small project permit required to a cut a tree in the buffer zone? The current fee for an NOI single family dwelling in an area regulated on the Bylaw is \$50, with the proposed fee of \$600. The SCC side by side review states that the current fees don't cover administration costs, but she believes the SCC's so-called administration costs need not necessarily or ordinarily include costly legal and consultant fees; the Commission has not historically incurred legal fees.

Donna Brewer: introduces herself as a municipal lawyer since 1998 and has also done land use law for longer; including wetlands. She has had a careful review of the Town's Regulations and Bylaw; she supports SCC's view that the Bylaw needs updated, but in the meantime, Brewer supports the Regulations being updated now. Proposed Regulations are effective and will serve the SCC well.

Charlene Galenski has lived at Lake Wyola as a part-time resident for 30 years. She has redone their home many years ago and at that time SCC was wonderful, ran into no problems and their house project only benefited Lake Wyola; including a new sewer system, new water, and a new foundation. The Regulations were well written and worked well for them as homeowners. She has read over the Bylaw and its Regulations, the new proposed Regulations and McGregor's legal review; she is concerned as a resident with the number of times the Commission has the right to request the applicant hire a hydrologist, arborist, or engineer. She worries as they are not inexpensive items. This was listed for four different instances where it is also clearly stated these consultants would be paid for by the applicant. In other words, in order to have the permit process to continue, then an applicant will have to put in a lot of money if SCC requests a consultant. In the legal review she read, they stated concern over the redundancy, and other legal points; it all needs to be re-looked at. She has sent the current and new proposed Bylaw Regulations to DCR for review; she believes the state needs to review this to give a finding as to how these Regulations and Bylaw will help or hurt the residents. She believes at this point it can be hurtful.

DeFant: as a point of information for the public, with a NOI under the state law, not under the Bylaw, the SCC could require an applicant to hire a consultant or develop/submit an engineer stamped plan. The state Regulations require engineer-stamped plans. There are provisions where SCC can waive those requirements, but they are not unique to the Bylaw as they exist under state law.

Carlos Fontes introduces himself as a member of SmartSolar Shutesbury. He clarifies that the reason that Smart Solar hired a lawyer to review the Bylaw Regulations was not to support or oppose the SCC, but to know if there is a sound Bylaw and set of Regulations. They want to

know if it is a useful instrument to protect the water resources in Shutesbury as that is our interest as a group.

Michael Hoostein states that he performed a comparative review of Brewer's and McGregor's legal reviews of the Shutesbury Wetland Protection Bylaw and draft Regulations. He finds Brewer's reasoning more persuasive; 'the current Wetlands Bylaw as a whole is a legally valid, defensible, local law. Massachusetts law allows local communities to adapt local wetland bylaws that more protective than WPA. In the case of this bylaw, the more restrictive requirements lie in the definition of alteration, the significant or cumulative effect standard and the protection of various resources areas that are not protected under WPA. Regarding attorney McGregor's statement that the bylaws significant and cumulative effects standard is improperly worded, I do not concur. My read of this passage of the bylaw is that it grants the commission the authority to make determinations about the likelihood of significant and cumulative effect, much as commissions do, with determinations of applicability and to then base permitting decisions and other actions on those determinations'. He found the discussion of bylaw and regulations to be a red herring machinated by the Select Board for the sole purpose of undermining our Wetland Protection Bylaw and the Commission; such reckless and irresponsible Town Hall conduct is certain to exacerbate the predicted climate change harm to protected Shutesbury Wetland resources from increased yearly rainfall, flooding and well water contaminations. Dangers best mitigated by diligent fair and impartial enforcement by the SCC free from Select Board threats and interference. He trusts SCC will fairly deliberate, giving no credence to the Select Board's attempted assault on the rule of law ever mindful of a quote from U.S Supreme Court Justice Brandeis.

Robert Douglas lives on Lake Wyola, is a wetland scientist and has been a conservation administrator for two different towns in the Commonwealth. He states that bylaws are important as he worked in towns with and without them. Bylaws protect all the interests in the Town that make it a wonderful place. It allows homes to be set farther apart, ensures healthy wildlife. He supports leaving the Bylaw in place and doing what can be done to make it stronger.

Paula Moore: thanks SCC for the hard work and effort and SmartSolar Shutesbury as well. Listening tonight, she understands there are great resources and intelligence present; hopes that everyone can work together.

Mary Lou Conca: thanks Hoostein for his input and she supports his comments. She appreciates the work done by SCC.

Leslie Luchonok: thanks the Commission for their hard work and taking on the responsibility of taking on this challenge. The authorities who have commented on the Bylaw have stated it still stands; Garner stated it is amazingly sound; McGregor states it needs small tweaks; Brewer stated the Bylaw is sound in of itself; but there is a real need to update the Regulations as they are outdated. He understands SCC is going through the reviews and trusts they will be do conscientiously; take this task as expeditiously as they can.

Mark Rivers: asks if he is concerned about public safety; is he correct in understanding that the proposed regulations prohibit the use of salt within the AURA? He asks because he has a steep

driveway that in winter is slippery with ice, preventing him from walking or driving up it without salting it; in this case would he be allowed to use salt on his driveway?

DeFant: Regulations are still being reviewed and appreciates questions. Rivers' need would be a good example where a Hardship Waiver could be requested.

Rivers asks if this means he would have to apply to salt his driveway? DeFant asks for Stone's input. Stone shares that she believes the concern would be that the salt would run off into the lake and disrupt the water quality; SCC should further discuss this aspect, perhaps consider exemptions for individual driveways of a certain size. DeFant admits this was something not thought of by SCC and that the SCC should reconsider given the safety concerns.

Rivers follows up by asking if a healthy, large tree that pose risk of falling and causing damaging to a home could be removed. DeFant confirm that healthy trees can be removed under a permit but that would be the case with the existing Bylaw Regulations. The Small Permit application being proposed in the new Regulations allows for the removal of up to five Compromised Trees (which healthy trees that are a safety hazard) up to a certain number; the applicant would have to prove tree(s) were Compromised then it could be approved for removal with the Small Project permit. Rivers clarifies he is discussing a healthy tree posing risks to home damages. DeFant believes that is another topic SCC should consider and discuss. Rivers requested more meetings to explain the Regulations.

Fleischaker: states she shared at an earlier Select Board meeting, she fears that in expanding the definitions and terms of the Bylaw Regulations, the SCC is using the Regulations to smuggle changes to the Bylaw through the backdoor. Whether or not that is true, in revising the Regulations, the Commission is putting the cart before the horse. That horse is old and tired; replacing the cart doesn't make the horse any younger or sturdier. There is a full complement of Commissioner who are energized to take on such tasks and have the backing of the Select Board, she urges SCC to update the Bylaw and then write succinct, clear, and reasonable Regulations that correspond to and follow the Bylaw terms and provisions.

Amanda Alix: understands that people have shared concerns over the Bylaw Regulations being revised first before the Bylaw. She understands that SCC wants the Regulations in place during the interim, since revising a Bylaw is a lengthy process. She asks if she is correct in understanding that Regulations can be updated as time goes on. DeFant confirms that is correct and that is not unusual for Commissions to update their Regulations every few years.

Conca: regarding Mark Rivers, he is concerned about the salt issue; there are nature-safe de-icing products available.

Galenski: shares that a reason for her concern about these new Regulation is due to a recent that occurred in Deerfield. There four new zoning bylaws that were proposed and a resident raised concern over their completeness and high detail. but the four bylaws were approved anyway. A few years later, Deerfield was planning to build a new park on a large piece of land they had purchased, but the Town was sued by a resident and their lawyer stating that those actions would be violating their own bylaw regarding green space. As well intentioned as the Commission may

be, have to be careful about legalities. She repeats her concern of the possible consultant costs she expressed earlier. She understands DeFant's earlier response but clarifies her concern is about additional consultants required during the permitting process if SCC determines it's needed.

DeFant thanks her for her comments and states the SCC always tries to be reasonable and to not be arbitrary; to unreasonably demand use of a paid consultant in a later point of the permit process would have to be highly justified; it is not anything the Commission would take lightly; would have to be a very unusual and rare situation for this to occur amidst a permitting process and not at the beginning.

Hootstein: asks if he is correct in his understanding that after deliberation, SCC can vote on whether or not to create new Regulations based on the Bylaw but to have the Town change the Wetland Bylaws it would take a 2/3 vote at Town Meeting. DeFant is unsure it takes a 2/3 vote to change since it is not a zoning change; believes a simple majority is all that is required.

Brewer confirms that is correct.

Fontes: notes that two lawyers review the current the Bylaw and Regulations, in which they both stated the Bylaw is sound. The Bylaw may need some tweaking, but the Bylaw is sound and the Regulations need to be revised to clarify the implementation of the Bylaw. He agrees the Bylaw could be updated as well, but in the meantime, the SCC should adopt these Regulations because they would be helpful now both to the Town and residents. He understands concerns raised by Galenski, but he doesn't agree with the other comments that Bylaw should be let go or that the current Bylaw is not valid.

Stone: shares that she believes it is important for the Regulations to be revised now because the current Regulations do not have any definitions and procedures for important parts of the Bylaw protections including the underground streams. There is no information for the applicant to know what needs to be done and no way for the SCC to be consistent on how to apply that; was an important impetus for the SCC to revise these Regulations; it puts the Town and SCC in a precarious legal situation when there is this undefined jurisdictional area that needs to be defined and implemented. This was the primary reasoning for the hiring of Garner based on his experience and what he has provided for the Regulations. It is one of the most important issues to keep the Town and the SCC legal.

DeFant: thanks Stone for her time and service to SCC as a Technical Consultant on the project. She asks if Stone could envision a pared-down version of these draft Regulations that removed more complicated permitting procedures and focused only the more science-based standards and definitions. Stone hasn't thought of it but understands that Garner had suggested that some sections or aspects could be used as attachments or reference materials for the procedures that are more easily changed; some pages could go into an appendix to reduce the size. DeFant was thinking of keeping Performance Standards, definitions, and scientific methodology, and maybe permitting details. Stone: this could be included as a checklist for applicants. DeFant believes SCC should reconsider review the Regulations to figure out what are the most essential components to make these Regulations functional with the Bylaw. Stone agrees.

Fleischaker: clarifies for Fontes she did not mean that the current Bylaw should be put aside as it a standing legal document that needs to be abided by, but it needs to be updated. DeFant: the SCC has discussed and drafted a new Bylaw that will be a focus in the future. DeFant can post the draft Bylaw on the SCC homepage if SCC agrees to it; it has not been legally reviewed. SCC would love Town support for a new Bylaw.

Weizenbaum: believes that that Regulations have gone unchecked and nothing had occurred in their small Town but due to the recent steps towards industrial solar and clear-cutting for it, residents are more aware of the deficiencies in the Bylaw and its Regulations; people didn't pay attention to wetlands protections, but it relates directly to our drinking water and climate resilience. She is in support of the new Regulations being passed now and is happy to hear a new Bylaw is being drafted. Many of us want to see the Regulations passed to support the Bylaw, which we do not feel is a tired old horse; it is working and is stable, according to our legal counsels.

DeFant: shares that there seems to be no disagreement that a new Bylaw with updated language would benefit the Town. It is not assured that new Bylaw would be approved at Town Meeting as it is up to voters. It is a complicated, lengthy process. We hope that tonight's discussion may help be a springboard for those discussion about why wetland protections are needed. A dilemma SCC is facing with this Bylaw vs. Regulations discussion, is that the SCC understands we are still bound by this Bylaw. We took an oath to uphold it. We don't have any authority to put it aside. If we don't have updated Regulations, we have been advised that our decision making might expose the Town to litigation if we do not adopt new Regulations; the best protection seems to be to update the Regulations. The SCC is struggling with what it must do now with permitting decisions when a Town Meeting would be months away. Putting Bylaw aside might be a dereliction of our duty and abuse of discretionary power; might also open up us to claims of being arbitrary and capricious. Could expose the SCC to complaints if we suddenly stop applying the Bylaw without good cause.

Stotz, 26 Lake Drive: shares that during their permitting process on their house it was very arduous process and the conditions placed in the permit costs them about \$20,000 for rain gardens, etc. He went to his attorneys and spent just about as much with them. They said they don't believe, based on the Bylaws and Regulations, that SCC had the right to place those conditions. He has no interest in suing the Town but asks what is SCC going to do about the past mistakes due to not have the proper Regulation and Bylaws in place. DeFant doesn't have an answer and believes this is the incorrect platform to being having this discussion. Stotz disagrees as it relates to the Bylaw and Regulations. DeFant is unsure what he is asking and SCC is not in the position to be talk about past permitting decisions; working forward with new permitting decisions. SCC cannot discuss a particular application project application or project tonight as it is not on the agenda. DeFant welcomes the commenter to bring up concerns at another SCC meeting.

Luchonok: the last comment highlights the need to move forward and get this done expeditiously.

DeFant: asks Brewer she has any comments on the dilemma of the Bylaw and the Regulations in terms of the best path forward to make good and fair decisions and not expose the Town to litigation; not relinquish their statutory obligations.

Brewer: states the Regulations under consideration will help SCC, applicants, and abutters in understanding of what SCC will be considering in approving, approving with conditions, or denying requests for permits. She agrees there is a lot of shared interest in updating the Bylaw, but it will take more time, a Town Meeting vote and will not go into effect until approved by the Attorney General. and then published. The process takes time. SCC will be in good position to move forward if the Regulations are clarified and amended, while working on the Bylaws; will be easier to amend these Regulations and adapt them to a new Bylaw, rather than starting from scratch.

Farrell states that it is unusual for DeFant to be consulting with an attorney at this meeting who doesn't work for the Town of Shutesbury but hired by Smart Solar Shutesbury, who has a specific agenda. She recommends that not occur again in the future.

Weizenbaum: adds that Smart Solar is a group of citizens who hired counsel to give clarity about this important issue. It is her understanding that anyone at this meeting is free to ask questions and that it can only help to clarify things .

Farrell: states that Brewer does not represent the Town of Shutesbury. The Select Board has had Special Counsel looking at these Regulations and the Bylaw. the preeminent environmental attorney of Massachusetts. She states it is inappropriate to seek legal guidance from an attorney hired by a special interest group.

Douglas: asks if SCC has acquired a legal counsel of its own? It is important to have your own legal counsel advising on this important issue.

DeFant: SCC has not been allowed to get a legal review at this moment. We have requested it, but we don't have it one at this time; the status is unclear.

Conca: thanks Brewer for her time. I appreciate it.

DeFant: confirms Farrell's comments are correct in that Attorney Brewer does not represent the Conservation Commission, but it is the Chair's understanding that in a Public Hearing, SCC can ask questions and have discussion with those present. Our goal for tonight is to have a fruitful discussion. Many important and helpful issues have been brought up tonight, and the Commission has a lot to think about; thanks all attendees.

Cerow: asks why SCC not been allowed to get their own legal representation.

DeFant: shares that she does not have an answer to that.

Cerow: asks who does have an answer?

DeFant: shares that the Select Board has informed SCC that the Select Board must approve any appointment of a Special Counsel; SCC did request the appointment of an attorney who has served as Special Counsel in the past for SCC. The SCC has proposed either paying for that legal review out of the SCC's own funds, rather than taxpayer funds, or, alternatively, someone in the community had offered to set up a donation account. We do not know the status of those requests.

Cerow: asks when this request was made and why there hasn't been a response.

DeFant: states the request was made on June 19 and 20, after the SCC found out our Town Counsel would not be doing the review because she was recusing herself. Cerow asked for more information. DeFant clarified that this matter is not under the purview of the SCC and cannot be addressed tonight.

DeFant: shares that SCC will be discussing the feedback from tonight's meeting but will not have any conclusions as not all Commissioners are present; anticipate there will be more public meetings and opportunities for discussion. DeFant thanks everyone in attendance for their help and feedback.

**Motion to Adjourn: David moves to adjourn, Willson seconds. Vote: David – Aye, DeFant – Aye, Kahan – Aye, and Willson – Aye. *The motion carries.***

**Meeting Close:** 9:03 p.m.

**Next Meeting:** July 13, 2023 at 6:00 p.m.

### **Documents Used**

- Agenda
- Draft Shutesbury Wetlands Protection Bylaw Regulations
- Shutesbury General Wetlands Protection Bylaw
- Shutesbury General Wetlands Protection Bylaw Regulations
- Draft new Shutesbury Wetlands Bylaw, provided to Town Boards on 6/20/23
- Town Counsel recusal and requests to Select Board to appoint Special Counsel for Regulation legal review requests to Select Board, various emails, 6/19/23-6/22/23
- Bylaw Regulations Public Hearing Slideshow
- Letter and Review of Draft Bylaw Regulations, Attorney Gregor McGregor, Select Board Special Counsel, 7/9/2023
- Letter and Review of Draft Bylaw Regulations, Attorney Donna Brewer, Smart Solar Shutesbury Counsel, 7/11/2023
- Letter, Attorney Gregor McGregor, 3/8/2023
- Letter, Attorney Elisabeth Goodman, SCC Special Counsel, 3/22/2023
- Written Public Comments submitted via email, various

*Respectfully submitted by Carey Marshall, Land Use Clerk, 9/12/23*