

Shutesbury Conservation Commission

Minutes – 7/13/2023

Approved – (10/12/23)

Virtual Meeting

Meeting Start: 6:00pm

Commissioners Present: Miriam DeFant, Mary David, Beth Willson

Commissioner Absent: Robin Harrington, Scott Kahan

Other Staff: Carey Marshall (Land Use Clerk)

Other present: Amanda Alix, Jeff Gagner (DCR/Applicant), Elizabeth Fernandez-O'Brien, Sharon Weizenbaum, Jon Lawless, Ziporah Hildebrandt, Henry Geddes, Joyce Braunhut, Rebecca Fil, Penny Jaques, Michael Hoostein, and all other unidentified individuals.

Chair's Call to Order at 6:00 p.m.

Meeting is being recorded

Review draft minutes for 6/8/23 and 6/22/23

Discussion tabled

Continued Public Hearing for Camel Brook Bridge Repair NOI/DCR, 286-0299

Gagner and his team have requested to continue the public hearing as they are awaiting new documents/plans to be produced. He plans to have those documents/plan completed and shared with SCC at least one week prior to the new hearing date.

Motion: David moves to the continue the Public Hearing for Camel Brook Bridge Repair NOI on July 27, 2023 at 6:00 p.m., Willson seconds. Vote: David – Aye, DeFant – Aye, and Willson – Aye. *The motion carries.*

Public Comment

Elizabeth Fernandez-O'Brien: "Last night, we witnessed the Chair of our Select Board scolding the Conservation Commission for asking our legal counsel, Donna Brewer, questions. The Chair of the Select Board stated that it was inappropriate for you to ask her questions. That seemed odd to us because we are members or the public who presented findings from our lawyer on an issue directly relevant to the work of the Conservation Commission. Intuitively it seemed to us that the Conservation Commission needed a chance to review our findings, to make sure that they understood them, and to be able to ask any necessary or clarifying questions. We decided to check with Attorney Brewer, who is an expert in Municipal Law, whether there is any reason to believe that our Conservation Commission was misbehaving as our Select Board Chair has suggested, by asking questions at a public meeting related to a document submitted by a group of residents. That group of residents as you know is Smart Solar Shutesbury and our legal counsel, Donna Brewer, refers to herself as Smart Solar Shutesbury's legal counsel. The question is, 'Is it inappropriate for our Conservation Commission to ask the counsel of a resident's group questions about a public document submitted for consideration in a public meeting?' Donna Brewer answered 'Last night's meeting was a public hearing. It is a venue for the Commission to

engage with the public to ensure all views are considered before the Commission takes action. It is absolutely appropriate for the Commission to ask questions of counsel for a citizen's group on topic pertinent to the matter under discussion. The back and forth was akin to the Planning Board asking questions of an applicant's engineer, surveyor, or lawyer when discussing a proposed subdivision. While some of the questions likely would have been directed by the Chair to the Commission's lawyer, such as a quantum vote to approve an amendment to a general bylaw, the Commission did not have lawyer of its own that it could ask. The question and the answer were not reflective of any opinion agenda but were rather straightforward statements of law. As for other questions, again, there is no reason the Commission could not engage with an expert of interest as it is commonly done at public hearing of land use boards.'

Fernandez-O'Brien asks if it is okay to read aloud the other question and answer she has prepared. SCC grant her permission to continue. 'Is it inappropriate and or legal for the leader of the Select Board of our Town to attempt to close down a conversation between the Smart Solar Shutesbury Counsel (meaning Attorney Brewer) and the Conservation Commission, regarding a public document that is a part of the meeting?'" This is Attorney Brewer's answer, 'There is nothing illegal about a member of the Select Board voicing her opinion on whether the Conservation Commission should engage with counsel or an interested party. The member has as much of a right to speak at a public hearing as any other attendee. For that reason, I would not describe it inappropriate. It is, however, within the discretion of the Conservation Commission to decide what questions to ask and whom to direct the questions to. The Commission was fully aware of who I represented and can take that into consideration when weighing my responses. The point of the public hearing is for the Conservation Commission to get whatever information it would like from attendees. Nothing done last night overstepped the Conservation Commission's boundaries.'" Smart Solar Shutesbury would like to thank you for this moment to be able to read these and her answers and we hope this frees you up to do your good work on behalf of so many residents who appreciate and support it. Thank you.

Sharon Weizenbaum summarized that the legal review of the Bylaw and the Regulations done by Brewer were removed from the Conservation Commission's webpage; Smart Solar asked why it was removed and asked it be reinstated.

DeFant shares that she had removed it as it was requested by the Chair of the Web Committee. Weizenbaum asked for Brewer's opinion on the matter in which she stated that the Web Committee had the right to request it to be taken down, but it is also inappropriate and not supportive of the work of the Conservation Commission, and not in the public interest. Smart Solar is requesting to have this legal review posted on the webpage.

Update on Draft Bylaw Regulations for existing Wetlands Bylaw

Willson shares that she believes the hearing went really well; received feedback from both sides. There were statements of support and direct questions such as the one Rivers had given, which are important. She mentions DeFant's discussion with Stone of a shorter, more concise version of the Regulations and adds that this version is still a draft; would like to meet a bit more about it to continue working on it. David agrees with Willson's comments and states she was encouraged by the meeting. The feedback they received was helpful and some were repeated, thus making her believe those points of feedback are important to address. She likes the idea of making the

Regulations shorter, but expresses that even taking the definitions and placing them in the back as an appendix may still create confusion; making the reader have to flip back and forth through Regulations and Appendix. DeFant agrees it was good meeting and hearing opinions from both sides was good; appreciated that people went through and read the draft. She corrects David by saying the suggestions were to have the reference material and other auxiliary information be placed in a back section, not the definitions, as the definitions are an essential part of the Regulations. She is unsure if the draft can be shortened much and believes the draft currently isn't long, compared with other Town's Regulations. SCC has not had enough time to thoroughly review both legal reviews received. DeFant proposes that once she has read through them, and reviewed her notes from the meeting, she will revise the draft and share it with SCC to review. SCC agrees.

DeFant shares that the feedback regarding the removal of a healthy tree due to its posed risk for property damage is a matter she would like to reconsider and revise in the next draft. Willson shares that in such situations, it is common for SCC to review it through an Emergency Certification. DeFant agrees and notes SCC had done this for similar situations specifically in last year.

David suggests also considering the revising the 'No Salt Zones' or the possibility of alternative salt-like materials as suggested during the hearing. DeFant agrees and adds SCC would also need to consider that the Highway Department uses salt to treat the roads for road safety and for dust management. Highway Department sprays the dirt road with calcium chloride solution during the summer for dust management. Willson states that when revising this section, SCC should still consider that there are Towns throughout the state that are low-salt areas because they are within a drinking water watershed; don't want to be saying that it is OK to use salt anywhere; alternatives should be investigated. DeFant: in New York, highway departments cannot use calcium chloride within 100 feet of wetlands for dust management. Willson: in Amherst, they monitor groundwater for salt contamination.

DeFant asks Willson if she could review this section regarding salt use and see if she has any recommended changed language. Willson agrees.

DeFant shares she made an executive decision when SCC received documents from the Select Board on Monday morning and put them up on the website. Felt the public had a right to know about the comments. Also, people might ask for them, so it seemed better to make them available. Easier to have it posted. When received the 2nd opinion from Smart Solar Shutesbury, DeFant posted those as well since they were probably going to be discussed. Took them down at the request of the Web Committee, but also took down MacGregor's opinion. SCC needs to decide what it wants on its website. Neither of these opinions came from SCC's counsel or from the SCC's own edits. What kind of content does the SCC want on the website?

Carey Marshall, Land Use Clerk (LUC), suggests that since both legal reviews were brought up during the meeting that they could be posted as attachments to the minutes.

DeFant: we should also be referencing all of the written comments. Could list them all in the minutes or put them together in one pdf for the website. Sometimes, agencies list all of their

public comments. David: Public should be able to see the comments. Willson: could list all of the comments. Amherst has packets that are posted online. It is time-consuming and there is no requirement to do this. DeFant: would like to find a compromise; putting up all of the comments every meeting feels too time-consuming; suggest we only do it for Regulations and Bylaw work. Need a new subpage for the Bylaw because the Regulations subpage is getting cluttered.

Marshall: if SCC makes a new subpage, she can go through and organize the minutes, based upon the agendas.

DeFant: Select Board sent an email requesting that the SCC meet with the Select Board on Wednesday, 7/19, to discuss the request for appointment of a Special Counsel to review the draft Regulations and to discuss setting up a working meeting including the SCC, the SB, and their respective Special Counsels. DeFant has concerns about the payment mechanism for this use of any Special Counsel for the SCC. The original request was for approval of 5 hours of Special Counsel time for the Regulation review, but this did not include additional meetings with the Select Board. This would require additional legal time and it is not clear how the time would be paid for. She is reaching out to Attorney Goodman for an updated quote.

David not sure a working session would be productive.

DeFant: don't think a follow-up working meeting with the Select Board does not make sense until we have completed our editing and had a legal review by a counsel working for the SCC. A working session seems premature. Don't want to have a meeting until we are ready to do so, so it will be productive. SCC agrees it needs to have a meeting when all Commissioners are present and to review edits with Janice Stone. SCC does not have quorum for a meeting on 7/19.

DeFant emailed Town Administrator for clarification regarding about the amount of time to be authorized as the originally requested 5 hours of legal time was not including additional Select Board meetings. DeFant reached out to proposed Special Counsel, Attorney Beth Goodman, for a new estimated time, including the working group. David not sure having two attorneys being part of a working group is a reasonable use of funds and time. Funds should be used to review the SCC's draft first. Willson agrees.

New Bylaw Development:

David asks if Goodman would be reviewing the newly drafted Bylaw as well as the draft Regulations if approved as Special Counsel. DeFant elaborates that she would not; the the new drafted Bylaw would be separate from the draft Regulations, and she has not discussed it with Goodman. During the last Select Board meeting she attended regarding the Bylaw, DeFant understood the Select Board had interest in having MacGregor provide the legal review of the new Bylaw. DeFant not clear about how that would work. Willson states that MacGregor is the Select Board's Counsel in regard to matters with Lot O-32, but when it is in terms of the Bylaw, he is there to review the documents for the whole Town including SCC. Willson in favor of having MacGregor review a draft Bylaw if the Town wants that. DeFant agrees.

DeFant has produced a draft Bylaw. SCC needs to review it. About 90% of document is based on MACC Model Bylaw. DeFant added some additional content from other Town's Bylaws that have been approved by the AGO in the past two years. Also added content from an MACC training that Stone and DeFant attended, presented by Nathaniel Stevens, MacGregor law partner. It's a starting point for future reviews. Most of it will pass muster with MacGregor because either he or his partner wrote most of it. MACC Model Bylaw document is dated from 2016. Suggests using it as a starting point with Select Board. SCC agrees. SCC will need consultants for development. Stone has helped write Bylaws for multiple Towns and is a good resource. DeFant will share it with the SB. Need to determine how to structure the group to work on it. Draft covers all of the Resource Area protections. SCC will post it on the website. .

This discussion will continue at their next meeting

July 11 Meeting with Select Board Regarding Legal Counsel

DeFant summarizes that during the Select Board meeting regarding the policy for accessing Special Counsel services, there was some confusion about what the purpose of Goodman's engagement scope was. DeFant believes everything has been proper, appropriate, and within the scope authorized by Select Board and SCC. Willson states she doesn't know the specifics of it but, going forward, whenever SCC wants to have a Special Counsel, SCC needs to go through the Select Board to get the proper permission. DeFant was under the impression that the SB did vote to approve Goodman as Special Counsel. She gave the Select Board a copy of Goodman's engagement agreement to review and sign. DeFant: it is clear she was approved, but there was confusion about her scope. SCC agrees that going forward, they will ensure to more clearly state the scope of any Special Counsel services.

Response to resident donation

SCC received an inquiry from a resident about the process by which they could donate funds to SCC for the use of legal review for the Bylaw. The Town must accept the donation. DeFant has forwarded this information to the Select Board for it to be discussed at their next meeting.

This discussion will continue at their next meeting

Emergency Certification for Lakeview Road culvert beaver dam breaching and NHESP correspondence

The Emergency Certification that was granted on June 23, 2023 for the beaver dam breaching in the Lakeview Road Culvert; day after SCC met on June 22, 2023. DeFant shares this was to allow the Highway Department to remove the dam as it was starting to impound more water; also it posed as a safety hazard for the public who were trying to access the culvert to move kayaks and canoes across to the lake. In the conditions in the permit, it was required for the Town to submit a filing to Natural Heritage Endangered Species Program (NHESP), and provide proof, as the work was within NHESP jurisdiction. SCC has granted three Emergency Certifications with this condition, two down by the lake and one on Montague Road, but the Town had not done completed these filings. NHESP sent a letter to the Town ordering any work around the lake to stop until a filling was complete.

Motion: Willson moves to ratify the Emergency Certification for Lakeview Road culvert beaver dam breaching, David seconds. Vote: David – Aye, DeFant – Aye, and Willson – Aye. The motion carries.

Sawmill River Culvert Replacement Project Updates

DeFant, David, and Harrington met with the Contractor and Project Manager where the SCC expressed concerns about the dewatering plan being based on low-flow projections but, due to being in very high flow conditions, flooding conditions have existed in the work area. SCC inquired what the contingency plans were to address these high flow conditions they are experiencing. The Project Manager stated the current water level conditions are much higher than what they originally designed for and admit this may become a problem. The plan is to begin the in-water work on August 1, where they will need to use the bypass pump for about three weeks; it is possible the weather will change and be more favorable, but if not, it could lead to an emergency situation if need addressed. They have the option of bringing in a high-capacity pump as they have one reserved but wouldn't bring it on site until it is necessary since it is costly to rent. The Contractor shared they didn't have authorization to bring it to the site if they needed it, so SCC requested they make arrangements for any emergency conditions.

SCC, the Project Manager and Torres had discussion about other conditions including monitoring for any aquatic organisms that become stranded during the dewatering and monitoring for turbidity; SCC reviewed and approved the tree removals and erosion controls. Some changes to erosion controls were requested. DeFant suggests more site visits in the future.

Lot O-32 BVW Restoration Updates

DeFant and David had visited the site separately on the same day and then together the following day. DeFant shared that the site seemed to be in order; the restoration work to BVW-3 located in the back of the lot was minimal. Willson asks for clarification about the minimal work she saw. DeFant clarifies that soil had been removed a few feet horizontally and to a depth of about 2 feet. She hasn't gone back to the site after the recently heavy rain events to see how the erosion controls are holding. She admits that she mistakenly believed the conditions stated the report was due a month after the permit was issued, but realized that was incorrect; apologized to Antonellis. SCC agrees to conduct another site visit on July 19 at 3:30 p.m.

DeFant asks Jaques if she can confirm the monitoring of restoration will be carried out by Ward Smith and not Fuss and O'Neil. Jaques confirms.

Site Visits

Lot O-32 – Please view section '*Lot O-32 BVW Restoration Updates*'

Lakeview Culvert – Please view section '*Sawmill River Culvert Replacement Project Updates*'

373 Pelham Hill Road/Hanson (garage BPA) – DeFant and David conducted a site visit for a project to build a garage with a dug foundation; were concerned after seeing an abundance of wetland vegetation close to 30 feet from the work site and pooling water directly within the work site. SCC is recommending to have the landowners get a wetland delineation completed; landowners are in attendance of meeting and understand SCC's request.

Site Visit Scheduling

17 Cove Road RDA – July 15th at 12:00pm

West Quabbin Woodlands Conservation Area – Originally set for July 14 at 3:30 p.m., but due to the high chance of rain, it will more than likely be rescheduled.

South Brook Conservation Area – DeFant asks Jaques to attend a site visit to reevaluate the possible trails.; Jaques agrees. Jaques shares that Liam Cregan has provided a trail map/assessment, but it did not include everything they needed. Jaques has a small amount of CPC grant money left. DeFant suggests the possibility of discussing if SCC could provide additional funds to complete the project; she has been in contact with a contractor who can help with mapping and pricing out the cost of other needed actions such as mapping. DeFant asks if Jaques would discuss with CPC if they could use the left over funds to hire the individual DeFant is in contact with; Jaques confirms she will do so. DeFant will share information.

57-59 Shore Dr NOI – The landowners submitted an NOI to tear down and rebuild a new home which includes some alteration of bank, but a NHESP filing was not done; DeFant clarified with MassDEP that this filing needs to be completed in order to continue with the permit – MassDEP will not assign a file # until NHESP filing is done, and SCC can't open the public hearing without the file #. David suggests that due to the complexity of the project and its location, the site visit should have more Commissioners present; SCC agrees.

Chair Updates

Sumner Mountain CR Monitoring Site Visit – DeFant has reached out to Charlie Eiseman who has conducted the past several monitoring site visits to complete this year's visit; he has agreed. SCC agrees to hire Eiseman to complete the monitoring site visit.

Old Peach Orchard CR Monitoring Site Visit – TBA

Unanticipated Business

Top of the Lake Conservation Area – Jaques shares she has been struggling with glossy Buckthorn vegetation and is requesting a site visit with SCC to plan a strategy to manage the Buckthorn growth. SCC agrees and will schedule a visit when Harrington returns from vacation. Jaques invites SCC to visit the site before it is opening later this summer and gives an update that she has ordered signs as discussed earlier this year; will be placed within the next two to three weeks.

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

Meeting Close: 7:28 p.m.

Next Meeting: July 27th, 2023 at 6:00 p.m.

Documents Used

- Agenda
- Letter from Smart Solar Shutesbury and Attorney Donna Brewer
- New Bylaw Draft
- Draft Bylaw Regulations
- Sawmill River Culvert Replacement Project Site Visit
- Resident email to SCC regarding donation
- Emergency Certification for Lakeview Road
- NHESP Letter to Town regarding Emergency Certifications and MESA Filing

Respectfully submitted by Carey Marshall, Land Use Clerk, 9/14/23