

# Shutesbury Conservation Commission

Minutes – 7/27/2023

Approved – (10/26/23)

*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:** Rebecca Torres (Town Administrator), Jeff Gagner (DCR), Scott Campbell (DCR), Elisabeth Fernandez-O'Brien, Joseph Salvador, Sharon Weizenbaum, Rebecca Fil, Jon Lawless, Don Wakoluk, Brenda Woods-Ewing, Amanda Alix, Mary Lou Conca, Tracy McNaughton, Mike Stotz, Mike Vinsky, Susie Mosher, Matthew Styckiewicz, Gail Fleischaker, Catherine Hilton, Penelope Kim, and all other unidentified individuals.

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

Meeting is being recorded

## **Continued Public Hearing for NOI for Camel Brook Bridge Repair/DCR, DEP File # 286-0299**

Gagner shares the updated site plan for the Camel Brook Bridge Repair via screenshare for SCC to review. DeFant: this is a continuation of a previous discussion where it was decided new plans were needed. The project, located on DCR land over Camel Brook, in Riverfront Area, proposes to repair the road, construct a retaining wall, add stormwater features, and repair the abutments for the new metal bridge to sit on. Gagner shares that after the last hearing, revised plan in connection to land under water; the purpose of the work in Land Under Water, LUW, is two remove the less than dozen stones that have fallen in the brook from the abutments; total of 15 s.f. and less than 2 cubic yards. DeFant asks if the abutments will meet the Stream Crossing openness ratio requirements; Gagner confirms and states it is listed in the stormwater calculations documents.

Gagner explains another revision is to the stormwater conveyances, design is similar to check dam with a stone channel. Their goal was to slow down the water as it moved down the slope of the area; avoiding resource areas. Stormwater calculations for both the energy dissipating channel and the riprap slope with splash pad were provided in these plans to show what they are predicting for their performance. It is not a level spreader as originally described. The calculations also include 10-year storm predictions and overall demonstrate their efforts in meeting the intended standards of providing a non-erosive discharge before the wetland. Plans show temporary bank and BVW disturbance areas. Gagner notes that there was a DEP comment about the size of the limit of work areas as they are large. The reasoning for this is due to experiences in other projects where they did include enough space to work; creating unsafe working zones. By making the limit of work larger, the area would allow for a safer working zoning.

DeFant asks if they could clarify why the 25 square feet wetland disturbance alongside the abutment that is proposed to be riprap was characterized as temporary and not permanent. Campbell explains that during his conversation with Stinson, he was informed that the area that was characterized as BVW isn't a vegetated wetland but instead an area under high water mark of that abutment. Willson asks if any photos of this area as it currently stands are available. Gagner shares photos for SCC to review. DeFant notes that a pre-construction visit will be required. She asks when they plan the work will start. Gagner not sure. The only work that would not be done by then would be the tree removal, meaning they would contract a company for that work. DeFant asks if the crane use for the removal of the trees was added to the

narrative as they have discussed. Gagner states it was not and asks if it could be added to the OOC. DeFant agrees. SCC has no further comments or questions.

DeFant shares the drafted Special OOC for the Camel Brook Bridge Repair NOI via screenshare for SCC, Gagner and Campbell to review; edits are considered.

**Motion: David moves to close the Public Clearing for Camel Brook Bridge Repair Project, Willson seconds. David – Aye, DeFant – Aye, Kahan – Aye, and Willson – no vote. *The motion carries.***

***SCC grants DeFant permission to sign for them digitally.***

**Motion: David moves to approve the OOC for Camel Brook Bridge Repair, Willson seconds. David – Aye, DeFant – Aye, Kahan – Aye, and Willson – Aye. *The motion carries.***

### **Lake Wyola lake level conditions and dam release and enforcement concerns**

DeFant summarizes that the current project is focusing on the Locks Pond Road Culvert Replacement that was permitted in 2020 with a Control of Water Plan. There was a pre-construction site visit and there was a discussion about a lake lowering as part of the sequence. In 2023, SCC reached out to the Town regarding the updated construction schedule and inquired about having another discussion whether or not a lake lowering would be included as part of the construction sequence. SCC has had multiple discussions with the Project Manager, Matt Styckiewicz from Nitsch Engineering, who assured the SCC that a lake lowering was no longer being considered nor requested.

In July, there were two site visits with DeFant, David, Torres, and two contractors from MAS Building and Bridge, in which there were discussions about concerns with the dewatering plan. On July 7, SCC held an emergency meeting with the Project Manager to consider the Town's request to alter some components of the OOC to accommodate their scheduling needs; these changes were granted. At this meeting, SCC was again assured that the water control plan was still considered to be sufficient and no plan for a lake lowering was being considered. Since then, there has been lake lowering activities documented by the Commission. DeFant and David have visited the site several times and DeFant has been monitoring the lake level gauge. Between July 22 and 24, the lake was lowered about 10 or more inches in a 48-hour period. The Performance Standards for lake lowering, that was a part of the Culvert Project NOI and the Winter Drawdown NOI, states that a lake shouldn't be lowered more than 2 inches in a 24-hour period because rapid lowering exposes mudflats quickly and doesn't allow enough time for aquatic organisms to migrate into deeper waters leading to wildlife die off. SCC did not receive any communication regarding this rapid release matter but understands generally that water was being released from the dam because of high water levels earlier in the month. DeFant finds the lack of communication regarding the rapid release concerning since SCC was actively reaching out specifically regarding this matter. The SCC had made repeated offers to work with the Town on this issue. In the Locks Pond Culvert Replacement Project OOC, it states that lake will be managed in a way consistent with the Winter Drawdown OOC. That OOC does not specifically discuss summertime stormwater management, but it includes the DFW Performance Standards for drawdowns. Those Performance Standards do discuss summer time water level management.

David expresses concern because during this process she brought up these concerns regarding the lake drawdown from the community at Lake Wyola; during those meetings, SCC was assured a drawdown wouldn't occur. She shared this information to the lake community and committees; it was concerning to her when she heard how the lake had lowered to 7 inches below neutral, with no communication, and that it was affecting boats on their lifts. Later, it was discovered that someone had informed LWA that the lake was going to be drawn down 7 inches for the culvert project. During the pre-construction visit, it was mutually agreed upon that if anything were to change or in an event of emergency, then the SCC would

be notified and would consider an Emergency Certification; for this process to not occur after being agreed upon leaves her with more concern going forward.

DeFant shares that during her site visit on July 22, the lake level was 4 inches above neutral meaning it was not in flooding conditions and it was not raining; hard to understand what emergency would justify the drastic drawdown in a short period. If there was an emergency, the Town has the opportunity to apply for an Emergency Certification as previously advised by SCC. She discussed the issue with MassDEP Circuit Rider, Mark Stinson, who shared that in a case of flooding, then SCC could order a drawdown to correct the flooding, but it couldn't be lowered more than usual to allow for more stormwater storage for possible future storms; that would be consider prevention and not an emergency. Actions for prevention can't be approved under an Emergency Certification; need to be condition in a permit. When speaking with the Project Manager Styckiewicz, he shared that he was under the impression there was going to be a lake drawdown for the culvert project from his communications with Town officials; this was opposite of what had been previously discussed and agreed upon.

Torres shares that Styckiewicz is unavailable until 7:45 p.m. She explains that she relies on Styckiewicz' support for this project and will do her best explaining what she understands. She was present at the same meetings as DeFant and David where she understood Howard Kinder, Dam Keeper, would keep the lake level between 1 inch and -1 inch as normal during the summer months. When the large rain event occurred, she was informed by Kinder that he was making some corrections because of these large storms, but she was not in communication with him from Saturday July 22 to Tuesday July 25, during which time he acted on his understanding of the culvert project in regards to the lake level. Unfortunately, he did not follow what we had been talking about; she has been reasserting with him that we needed to keep within the bounds set by SCC; she recommends maintaining better communication with the SCC. She contacted him this morning to go over everything to ensure he has a clear understanding. She also discussed with him the SCC recommendation that the lake level should stay between +1 inch to -1 inch around neutral; my understanding is that ideally the gates should not be adjusted much during the summer months and that the lake level should be maintained close to the -1 to +1 level as possible. This means that the spillway would be the main component of keeping the lake level maintained. At the moment, the gate is open about half an inch as it usually is in the summertime. If the spillway levels grow over 12 inches, then it will flow onto the lower spillway for another 8 inches; if it continues to spillover that, then it would flood the yards of the abutting properties. She explains the intention going forward is to ensure that everyone is on the same page and have no deviation. She has confirmed with Kinder that if he wants to make any adjustments, then communication with SCC needs to occur before anything is done; he doesn't use email or attend Zoom meetings. She plans to be the party in the middle to make clear and consistent communication with SCC.

DeFant appreciates Torres's comments and her support in the communication will be helpful. She clarifies that SCC doesn't decide when emergencies occur, the Town does. If there is a threat to human health and safety or infrastructure, SCC doesn't decide that that threat exists, it is in the purview of other departments of the Town such as Board of Health, Fire Department, Police, etc. That is not the SCC's responsibility; the Town is responsible. If you think there is an emergency, we are asking that you communicate with the SCC and we will cooperate with the Town. If someone's house is being flooded, we don't want the Town saying they can't do anything because the SCC won't let it. What is an unclear issue that should be discussed at a future meeting is what SCC considers to be the appropriate amount of minimum flow; tabling that discussion for a different meeting; needs to be a shared understanding of how SCC interprets the OOC and how Kinder is operating under them. Torres agrees this information would be helpful. She also plans to have some Emergency Certification applications on hand in case of emergency so they may be submitted as quickly as possible.

DeFant notes that the SCC is trying to be collaborative; she is not proposing an Enforcement Order tonight; instead, she proposes to SCC that they issue a Violation Notice, which is a letter, to the Town to outline their concerns and ask the Town to make some remedial steps to address the issue; these are potential violations, want to ensure what SCC would expect going forward, not trying to be punitive, don't want to embarrass anyone or point fingers.

In relation to this, she has recently been corrected about the expiration of the lake drawdown permit. It was believed to be expiring by this fall, but it was recently clarified that due to COVID Pandemic State of Emergency, there is an extra 462 days added to the permits expiration; now expires January of 2025. She understands that Town has been discussing hiring a consultant to put together a new NOI application but advises the Town that they should request to amend the OOC to resolve the deficiencies until the new permit application is ready. Torres shares she has received one proposal from a consultant but is hoping to hear from more soon. She agrees as this process should be clearer for all parties involved. DeFant agrees and notes that she understand Kinder works under an Operations and Maintenance Manual which is not referenced anywhere in previously related permits; no record of it being approved by the SCC; would be good to have them referenced going forward so that SCC can have a better understanding.

Kahan shares support of the letter as it accomplishes their goal of improved communications with the Town on these issues. He expresses appreciation for Torres's commitment and effort as the intermediary party in communications with SCC going forward and to ensure the work is compliant with the permit. David shares that she struggles with this not being an Enforcement Order as there were clear violations despite multiple meetings where these issues were addressed; violations still happened; we agreed on communication but it was not followed. Kahan hears and understands David's concern but adds that doing this interim step doesn't preclude an Enforcement Order if these issues are to continue in the future. DeFant agrees with Kahan, adding that it is a better practice to issue a violation notice first as it will provide a clear path forward to an Enforcement Order if the issues were to continue. This is the first conversation with SCC and Torres about this matter in regard to the compliance concerns.

DeFant understands that permitting costs the Town money and is time consuming, resulting in concern that permitting hurdles will interrupt project schedule. In several conversations over the past 6 months with Town officials and project proponents, they have stated to the SCC that they did not want to amend the culvert replacement permit because it would result in a mandatory notification to Natural Heritage and Endangered Species Program (NHESP), due to Lake Wyola being designated as priority habitat for an endangered species. This concerns her and she has spoken to NHESP about this matter, where it was made clear they were not likely to interfere with the project in any substantial manner. To go this far to avoid submitting a mandatory application to the state agency is concerning as it is SCC's requirement when reviewing applications in priority habitats. We protect wildlife habitat. NHESP is independent of the SCC's jurisdiction. Two Emergency Certifications have been issued this year in relation to Lake Wyola Lakeview Road culvert, both of which required proof of filing to NHESP. SCC recently received a letter in July addressed to the Town saying those filings did not happen and NHESP is now requiring a retroactive filing from the Town. We don't want these situations coming up. These conditions have to do with state law. We need to know if NHESP has conditions so we can incorporate them into our permits. We are asking in the future that NHESP not be viewed as the thing that must be avoided. Torres shares that, even though it is no excuse, the Town was having a hard time funding the funds for the application (\$300) but will now do the filings with the new fiscal year.

David recommends that SCC conduct more site visits to the project area. Willson agrees with the proposed path in resolving the matter and that communication will be key in moving forward. She believes part of the confusion is tied with this project involving two permits which will be discussed in more depth later this meeting. She recommends that it may be helpful to SCC if Kinder were able to comply with a small report to document any changes that happen in the lake so that SCC could be aware.

DeFant screenshared a draft letter for SCC to review; edits are considered. DeFant reads though the letter aloud with Torres and SCC. Minor spelling and grammatical errors were corrected. SCC has no comments, questions, or concerns.

**Motion: Willson moves to issue the reviewed Violation Notice to the Town regarding drawdown issues at the lake and the Locks Pond Culvert Replacement Project, Kahan seconds. Vote: David – Aye, DeFant – Aye, Kahan – Aye, and Willson – Aye. *The motion carriers.***

**Public Meeting for RDA for 17 Cove Road/Avonti (home addition)**

Avonti explains there is an addition on the house that was done before they had purchased the property that is 17 feet by 5 feet. The addition contains a mudroom and bathroom but they are looking to expand the addition 3 feet wider to make the bathroom handicapped accessible. The addition will be on 6 piers for a foundation. For erosion controls, he plans to place straw wattles around the work around to ensure no runoff enters the lake. DeFant understand that he is looking to remove shrubs from the property as well and wants to replace them with Viburnum. She asks if the species of Viburnum he is planting will be native. Avonti confirms that the species of Viburnum is looking to plant, Dentatum Viburnum, is a native plant. Willson asks if the access to the site and staging will be on the side of the home opposite of the lake. Avonti explains that all the materials will be place and stored in the driveway and that any materials that will be removed from the site will be placed in a dumpster. SCC has no further questions. There is no public comment.

**Motion: Willson moves to close the Public Meeting for 17 Cove Rd RDA, Kahan seconds. Vote: David – Aye, DeFant – Aye, Kahan – Aye, and Willson – Aye. *The motion carriers.***

DeFant shares the drafted DOA for 17 Cove Rd RDA via screenshare for SCC to review; edits are considered. She reads the draft aloud to SCC. Minor spelling and grammatical errors were corrected. SCC has no comments, questions, or concerns.

**Motion: Willson moves to approve and issue Determinations of Applicability under both the Wetlands Protection Act and under Shutesbury General Wetland Protection Bylaw for 17 Cove Rd, David seconds. Vote: David – Aye, DeFant – Aye, Kahan – Aye, and Willson – Aye. *The motion carriers.***

**Public Hearing for NOI for 57/59 Shore Drive/West (home demolition and reconstruction), DEP File # 286-0300**

*The Public Hearing for NOI for 57/59 Shore Drive was not opened due to no landowners or representatives being present in tonight's meeting. A new public notice will be required.*

**Locks Pond Culvert Replacement Project, DEP File #286-0272:**

Styckiewicz: halted construction due to water levels at the dam; design is undersized for current flow; option is to increase size of bypass; may be too expensive and time-consuming; may not be practical; moving forward with the design but not likely to change system; hoping that water levels will drop; designed for average flow of 2-2.5 cubic feet per second flow; designed for 8 cfs and had contingency for 19 cfs; impacts of this will affect time of year restrictions; request to extend restrictions past September 30; permit expires in November of this year. DeFant: pandemic tolling may affect this permit; it was permitted during the State of Emergency; SCC removed the out-of-water time of year restriction, but in-water restriction is substantive; suggest an Amended Order of Conditions request. DeFant is troubled that the plan is not to enlarge the dewatering system when the water flow has been over the design capacity for the past month; concerned that you will begin the in-water work and then encounter an emergency. Styckiewicz: we won't begin the in-water work unless we are confident about the 8 cfs flow. Torres:

proposed costs are over \$100,000; trying to move each option forward; risk in only one option. Styckiewicz: third option is to delay to next year; cheaper to delay. DeFant: confidence in the current dewatering system is not high right now. Styckiewicz agrees. DeFant: seems it was undersized to begin with. Styckiewicz agrees; this season has been unusual; think they will proceed with an Amended Order of Conditions. DeFant: SCC would like to be informed when construction resumes and would like regular inspection of erosion controls during the pause period. Torres: Town will address it and maybe the Highway Department can assist; need inspection after weather events; this is a major project with many factors to consider. Jacques: thinks the expiration date would be 6/14/2024 with the tolling. SCC reviewed process for submitting the Amended Order of Conditions request. Town needs to notify NHESP as soon as possible. SCC may want a 53G consultant for the review. Styckiewicz inquired about Streamstat model that SCC used to estimate flow conditions. DeFant: historically, estimated flow has been considered to be 50% of the flow at the USGS gage on the West Branch of the Swift River; it is a separate watershed but is in the same general area; used as an approximate analog; in all of 2022 it was barely above 2 cfs; was up to 65 cfs in July of this year.

### **Review draft minutes for 6/8/23, 6/22/23, and 7/13/23**

*Discussion Tabled*

### **Site Visit Discussion**

**373 Pelham Hill Road:** sent a wetland delineation report; SCC fine with the delineation; work is outside of SCC jurisdiction; no permit required.

**Lot O-32:** restoration area is doing well

**Locks Pond Culvert:** see above

**17 Cove Road:** see above

**57/59 Shore Drive:** lot of missing pieces in site plan; redesign is needed; there is a culvert that drains from the road to the lake. NHESP told them to resubmit.

### **Site Visit Scheduling:**

64 Lake Drive BPA: aim for August 4 at 4 pm

**Discussion of draft Bylaw Regulations:** SCC has asked for approval of Special Counsel to review the draft; SCC also asked for approval of use of Special Counsel if there are any legal questions related to the enforcement issues related to the Lake Wyola permits. Select Board has asked for another meeting which would include review of the request for a Special Counsel for 5 hours of time; this was initially approved with Town Counsel before she recused herself. SCC made this request in June and Select Board tabled it at the joint meeting on July 11; also on the agenda would be the offer of a donation from a private resident and the Select Board's proposal for a joint working session with the SCC and their respective Counsels. Plan currently is to meet on August 10 at 5:30. DeFant: not sure it makes sense to have a working meeting before Special Counsel does review because she would not be prepared for the discussion. Attorney Goodman quoted 5 hours to review the draft Regulations and attend one meeting with the Commission; any additional meetings with the Select Board would be on top of those 5 hours, so there would need to be a plan and funding mechanism for this. Jacques: why is your access to counsel so restricted? DeFant: SCC has no authority over this. David: concerned about the proposal; seems very expensive; recommend that we complete our work and send it to the SB to get their written opinion. Kahan: has a conflict on August 10. DeFant: difficult to get a quorum for joint meetings; worked to get a quorum for the July 11 joint meeting; it is frustrating that the requests were not considered at joint meeting; SCC made its case, and it is up to the Select Board to decide what to do. If a working session, SCC technical advisors who worked on the Regulations should also be present to answer technical/scientific questions. Willson: concerned and would like more information about what a working meeting would be. DeFant: development of Regulations is under the SCC's statutory jurisdiction; confused about purpose of a working meeting; not sure if this is about developing a new Bylaw or talking

about the draft Regulations. DeFant: is the approval of a legal review tied to an agreement over a working session? Torres: Select Board feels, because of concerns raised by Attorney McGregor, that it wants to make sure the SCC is considering what he is advising. DeFant: concerned about Kahan not being able to be present; would like to have the whole SCC present; need to poll everyone about availability. Updated FAQs are put up on the website. Hearing that people would like another public hearing. Some comments have been that people want a level of explanation about each portion of the Regulations that does not seem practicable given available resources. DeFant: will update Regulations, perhaps with an abbreviated version if the SCC is unable to get a legal review, maybe just performance standards and definitions, which are essential for permitting activities. These are primarily based upon scientific standards and not legal considerations. McGregor did not really question the performance standards much; those were written with assistance from Patrick Garner. David: think we should proceed with full version of Regulations. DeFant wants public to understand that the proposed Regulations include exemptions which will mean reduced level of SCC review. Salvador: if there is a suit, who would represent the Town? DeFant: typically, legal issues based on an appeal of a permitting decision; don't know what kind of suit there could be. Salvador: does the Town have an attorney handling the Regulations? DeFant: SCC is seeking its own Special Counsel due to Town Counsel being recused.

### **Unanticipated Business:**

SCC encountered issue with a landowner who submitted a Legal Notice with the incorrect language; Chair consulted with Town Counsel; she did not advise requiring landowner to submit a new ad; Town Counsel strongly advises that the SCC submit the Legal Notices and have the applicant pay for them. She also recommended updating the Regulations to reflect this. Marshall explained procedure for doing this. SCC will begin this new procedure immediately. DeFant will look to ensure that this is codified in the new Regulations.

FRCOG is holding a site visit for the Lake Wyola Watershed Plan on August 12. Information has been sent to the SCC. Public is welcome.

**Approve invoice for Special Counsel services for FY23:** DeFant proposes paying invoice with a combination of encumbered leftover SCC expense account funds and the fee account. SCC agrees.

**Motion to Adjourn:** David moves to adjourn, Willson seconds. **Vote: David: aye; DeFant: aye; Kahan: aye; Willson: aye. The motion carries.**

**Meeting Close:** 9:00 p.m.

**Next Meeting:** August 10, 2023, 7:00 p.m.

### **Documents Used**

- Agenda
- Draft Bylaw Regulations
- Bylaw Frequently Asked Questions
- Camel Brook Bridge Repair/DCR NOI + Site Plan
- Draft Camel Brook Bridge Repair/DCR OOC
- Lake Wyola Lake Lowering Violation Notice
- Orders of Conditions for Locks Pond Culvert Project and Lake Wyola Drawdown (#286-0279 and #286-0272)
- DFW Performance Standards for Drawdowns
- 17 Cove Rd RDA
- Draft 17 Cove Rd DOA (WPA + Shutesbury General Wetlands Protection Bylaw)