

Shutesbury Conservation Commission
Minutes – July 18, 2024
Approved – December 12, 2024
Virtual Meeting

Commissioners Present: Beth Willson, Janice Rowan, Scott Kahan, Bob Douglas (7:11pm)

Commissioners Absent: None

Other Staff Present: Carey Marshall (Land Use Clerk)

Others Present: Donna MacNicol, Mark Rivers

Chair's Call to Order: 7:02pm

The meeting is being recorded.

Approval of Past Minutes

June 27, 2024. Motion to approve as drafted: Rowan; second: Kahan. Approved unanimously.

Chair's Comments

Willson asks Marshall how much the Commission pays for MACC membership. Amount is based on number of Commissioners and population size. The Commission paid \$120 for handbooks for the Commissioners and the incoming Land Use Clerk.

Willson asks for site visit to 30 Sumner Mountain Road and Kahan agrees to set it up. Willson notes there may be a wetland to check out on the parcel that was purchased within the CR. Kahan will follow up to verify the location of the wetland and doesn't think there are any concerns with regards to the CR itself.

Site Visits and Scheduling

RDA for next meeting regarding taking down trees at 678 Pratt Corner Road. Did an enforcement there a while ago. Would like to do it on the same day as Sumner Mountain Road, preferably on the Thursday of the next meeting at 3:45pm.

Penny Jaques would like a site visit to the Top-of-the-Lake Conservation Area. Probably a longer site visit so perhaps the week of Monday the 29th.

Kahan not available rest of the month. Rowan available and Douglas might be for Thursday.

Update on the Dudleyville Pond Dam. DEP had comments on the Commission's Emergency Certification. Willson prepared conditions reflecting the Certification and DEP's comments, including erosion controls. Consultant and DER had comments on the Order of Conditions. Still waiting for DER to secure funding, but Emergency Cert is only good for 30 days. DEP had questions about who exactly was determining there was an emergency. Rowan wants to be sure to do site visits once work begins. Willson notes other comment from DEP was about the

turbidity curtain; DEP advises no curtain in streams with such high volume and they suggest straw wattles staked in downstream. Another comment on language describing project as “reconstructing” the stream channel; this should be changed since the project is creating a new stream channel following the dam removal.

Review and Vote on OOC for Rivers, 70 Lake Drive NOI (DEP File #286-0306)

Willson reminds Commission that the public hearing was closed last meeting. Tonight the Commission will review and vote on the Order of Conditions.

Douglas recuses himself.

Willson shares the Order of Conditions and summarizes the contents. Notes there is no impact to resource areas but eight square-feet of impact to the AURA from the helical drillings. Notes that Natural Heritage submitted a letter on June 6 confirming the project is not within the estimated habitat area. Applicant needs to submit proof of having recorded the Order of Conditions for the previous project conducted at the site (DEP #286-0174).

Mark Rivers asks about process for obtaining proof because in 2002 there was no need to obtain a Certificate of Compliance. Willson asks if the Order of Conditions was ever recorded. Carey Marshall did find the Order and sent it to Rivers. Rivers will check to make sure it was recorded. Willson adds that once that is confirmed, there will be a site visit to confirm the work was done.

Another condition is that the Certificate of Compliance will not be issued until proof that the applicant’s Chapter 91 License for the dock has been secured. Would not be required to start construction on the deck, just to issue the Certificate after it is completed.

Notes need for a post-construction site visit once work is complete.

No further questions from Rivers. No further questions or comments from Commissioners.

Motion to issue the Order of Conditions for 70 Lake Drive: Rowan; second: Kahan. Approved unanimously with one abstention (Douglas).

Review Attorney General’s Approval Letter for Shutesbury General Wetlands Protections Bylaw, with Town Counsel Donna MacNicol

MacNicol invited by Wilson to review the AG’s comments. Notes first comment, on fees, is standard comment from the AG’s office. Fees need to have a reasonable relationship to the work being done and to actual costs of the Commission’s work.

Comments on the definitions section of the bylaw are to point out that State agencies are not under Commission jurisdiction. Willson notes that the State does not have to follow local bylaws, though sometimes they choose to do so; usually, though, they abide with procedures and rules that reflect the Wetlands Protection Act.

MacNicol brings up the security section and the idea of negotiable securities, such as stocks or financial pledges, as opposed to escrows. It is standard language and is in most bylaws regarding negotiable security bonds, but they are very hard to manage. When looking for financial security for a project, a bond or escrow account makes more sense. AG points out that it also needs to be set up so it does not go into general fund but remains in a designated special account. MacNicol warns that chasing security bonds is difficult and insurance companies do not like to pay out on them. Either way, like fees, the amount has to reflect the actual cost of the work.

About enforcement and entry on the property, MacNicol notes that permission is required to enter private property; without that, the Commission would require an administrative search warrant. Notes that in order to collect fines, the Commission needs to access property legally; illegal entry would disqualify the collection of a fine. Getting an administrative search warrant is simple and quick and courts are generally supportive if request is well documented. The only exception would be an emergency when access to the property is necessary immediately because of damage or something similar; even in that case, though, any orders following from that action could be challenged in court by the property-owner and it would be up to a judge to determine if it was actually an emergency. Willson notes that this is even for enforcements: Commission can't act on cease-and-desist portion of enforcement without prior permission to enter the property.

MacNicol explains that the point of informing the Police Chief if other law enforcement officers are coming into Town to do an enforcement investigation is so that they can be properly coordinated and supported and to respond to public inquiries. Notes the language is not entirely clear about this currently and suggests revising it to clarify.

MacNicol observes that the effective date needs to be filled in. Willson notes that it is effective May 30th and that the Town Clerk has posted it as such.

Willson suggests that if the bylaw ever goes before Town Meeting again to use that opportunity to clarify the law enforcement section. Kahan notes that the Commission has discussed trying to clarify the intent of that section. MacNicol suggests the word "involvement" is too vague.

Shutesbury Wetlands Protection Bylaw Regulations Revisions

Willson suggests starting with discussion and revisions of article 1 and shares the document. Describes changes made to 1.5 and 1.6 to reflect the new bylaw and use language from the bylaw. Rowan asks for clarification about 1.7.2 and whether there should be mention of the possibility of a step before the RDA if a person asks for advice about identifying a wetland or AURA. Willson notes people can file an RDA to see if they need to file an NOI. Rowan notes that people should be able to just contact the Commission for information if they need help and Willson agrees, and then the property-owner should hire a wetlands consultant to identify the actual location of the wetland. The Commission can advise them on minor activities within the AURA and what they can do that would not require filing at all.

In section 2, Willson suggests removing unnecessary and redundant content. Language in 2.4 and 2.5 repeats from 2.2 and from the presumptions in the sections on AURAs and buffer zones. No need for it to be repeated three times. None of this duplicative language was in original

regulations and there is no need for it to be added to the new regulations. Added language about climate change is useful and suggests keeping that, such as in 2.1. Rowan likes having climate change included in the thought process, but not comfortable suggesting the Commission has means adequate for measuring impacts into the future. Willson notes that the language in 1.5 about climate change comes from the bylaw and is used when evaluating projects. Douglas agrees it is difficult to gauge or quantify climate change impacts. Kahan suggests there are parts that can be quantified, such as the loss of biodiversity, but agrees that in general it would be difficult to interpret objectively concepts such as “resilience” and “adaptation”. Rowan notes that there is elsewhere a requirement to replace trees with new trees to ensure shade and temperature moderation but the way it is written here is vague. We can say we want these things and the general spirit of them, but this would be difficult to enforce. Perhaps “resilience” would mean something like using a different tree species, choosing something that will be better suited for a changing climate. Willson says she’s okay with the paragraph but Commission may want to tweak it later. Rowan adds another concern in 2.1 about the phrase “cumulative adverse effect” because it’s not clear to what that applies or how it should be interpreted. Willson suggests it refers to the same property if there are multiple applications that would impact on the resource area over time or if there were different aspects of one project that would, all taken together, have a cumulative impact on the resource area. Would not be appropriate to interpret this in regard to adjacent properties. Rowan agrees that any repetition, though, should be removed. Douglas is fine as long as average reader would still be able to find the information they need.

Willson notes that 2.3 would be a strong introduction to this section. 2.6 is also something that could be foregrounded in the section. Has some concerns about the quantity of section 2 that goes beyond what was in regulations originally and is concerned that the amount of repetition and the length of the revised regulations will make it difficult for people to find the information they need. Willson recommends removing content from this section that is repeated later in the regulations. Rowan agrees as does Kahan, though Rowan suggests waiting to delete them until after they’ve gone through all the other articles. Rowan is also worried that applicants won’t read these if they’re confusing. Willson notes that the previous Chair thought of regulations as being for the Commission than for applicants, but even in that case Willson concerned that repetition could result in confusion for Commissioners and the potential for internal contradiction. Regulations should be structured and direct, avoiding wordiness and repetition. Kahan agrees and notes that the bylaw itself is general so the regulations should be clear.

In section 3, Rowan suggests that because exemptions and exceptions in 3.1 only apply to public utilities and not private property that should be stated up front to avoid confusion. Kahan agrees and notes that 3.5 would apply to private property. Willson agrees to Rowan’s suggested change.

Rowan asks if 3.3 emergency projects would also only be applicable to public property. Willson answers that it would also apply to private property, as explained in Article V. The declaration of an emergency would have to be made by a public entity, such as DPW, Department of Health, or another agency. Example would be a beaver dam causing threat to road or bacteria in water supply. So it could be on private property but declaration of emergency would be made by public agency. Chair of Conservation Commission also has authority to certify an emergency. Rowan suggests adding word “certified” to start of 3.3. Willson notes 3.3 cites Article V, which already

specifies that it needs to be certified. Rowan worries general readers might not pick up on that. Willson thinks the cross-reference to Article V is fairly clear as written.

3.5 is about minor activities in the buffer zone and lists activities from the Wetlands Protection Act. Kahan notes final sentence of 3.5 identifies accessory structures over lawned areas exemption from CMR and points out that some projects the Commission is currently reviewing could fall under that exemption. Wants to return to this when we get to section 7 in the regulations. Willson wants to know if Commission should include paragraph e from the Wetlands Protection Act and is not clear on why it was omitted as a minor activity. Kahan thinks it should mirror the Act and is also not sure why it was omitted. Notes the bylaw has even more stringent protections than what the State requires. Is concerned that this might contradict the spirit of what was approved by Town Meeting when it voted for the bylaw. Willson notes that under the Small Projects section of the regulations there is a discussion about how to submit an application for this kind of work in that category rather than an RDA. Kahan recalls opposing viewpoint that some people might not know how close they are to a wetland and this might not be something that should be exempt as a minor activity but facilitating a site visit from Commissioners might help them stay compliant with the Wetlands Protection Act. Kahan notes that they often end up seeing lots of projects that are minor and have no wetlands impact which get approved. Willson looks up paragraph e in the Wetlands Protection Act which states that minor activities must be within 50 feet of the wetland. Kahan points out that Shutesbury's only exception to the Act is that the project has to be smaller than 120 square feet. Rowan recommends that this section should line up with what the regulations say later about Small Projects. Douglas notes that the regulations do leave a lot to the judgment of the Commission about what would qualify as a Small Projects. Kahan thinks the wording here is fine and would be open to revisiting this when the review reaches the Small Projects section.

That concludes review of Article I and Commission begins start of Section II, Definitions. Willson suggests moving all definitions to an appendix, rather than as their own Article at this point in the regulations, and going from Article I to Article III. Notes that other towns often do this. Proposes moving on to Article III at next meeting.

Adjournment

Motion to adjourn: Douglas; second: Rowan. Approved unanimously.

Adjourned: 8:45pm.

List of Documents Used:

- OOC for Rivers, 70 Lake Drive NOI (DEP File #286-0306)
- Attorney General's Approval Letter for Shutesbury General Wetlands Protections Bylaw
- Proposed revisions to Shutesbury Wetland Bylaw Regulations