

# Shutesbury Planning Board Minutes

DRAFT Minutes – 06.13.2022

(Approved- 08.17.2022)

## *Virtual Meeting*

**Meeting Start:** 7:00pm

**Members Present (PB):** Deacon Bonnar, Michael DeChiara, Jeff Lacy, Nathan Murphy, Steven Bressler, Linda Rotondi, Robert Raymond

**Members Absent (PB):** None

**Associate Members (PB):** None

**Associate Members Absent (PB):** Ashleigh Pyecroft, Jake Messier

**Other Staff Members:** Carey Marshall (LUC)

**Other Present:** Miriam DeFant, and all other unidentified individuals.

Chair's Call to Order at 7:06pm

Meeting is being recorded

### **7PM Public comment**

None

### **Meet with Select Board 6/21 on Associate Member appointments**

Bonnar: Last time he spoke to Becky Torres, Town Administrator, the joint meeting with the Selectboard will take place at 5:50pm on June 21, 2022 but it has not yet been confirmed. Once he hears back from Torres confirming the meeting he will reach out to PB to notify them. Lacy and Murphy note they will not be able to attend. Lacy: you [Bonnar] have received verification from the two associates of their interest to continue? Bonnar confirms. Lacy: do the associates have to be present during the meeting? Bonnar: no, they do not because we have received confirmation of their interest to continue. DeChiara: Lacy was inquiring about the Associate Member legislation. Lacy and him went to the Selectboard a few months ago about the Associate Member legislation and the Selectboard was agreed that PB should review it. He suggested further discussing the Associate Member legislation during the same joint meeting if allowed by the Selectboard.

### **Representative to CPC**

DeChiara: He has been the CPC representative for the PB for 2 years but is now stepping down due to his appointment as Chair to the Energy and Climate Action Committee. He is looking for a member of the PB or someone outside of the board to replace his seat as the CPC representative – need someone by September, 2022. As CPC representative they would discuss projects relative to the PB – CPC is structured to support Recreation, Open Space, Housing and Historic projects. Bonnar: he suggests talking to Pyecroft and Messier first to see if either of them would like to take on this position – would be good to have them more involved. DeChiara agrees and volunteers to reach out to Pyecroft and Messier about this position.

### **Review of Annual Town Meeting**

DeChiara: he and Bressler were there representing the PB. The proposed ZBA Member Increase Bylaw was raised by the Selectboard and he stated the PB's recommendation based from the report Lacy had written – PB was in support for the new bylaw but due to two new resignations, PB no longer recommended passing the bylaw at that time. The citizen's petition was later brought up but there was not any conflict there because it was previously discussed. The ZBA Member increase Bylaw did not advance.

Energy storage – DeChiara: During the Town Library vote, there were about 480 voting residents present but by the time the proposed Energy Storage Bylaw was brought up there were only 66 voting residents. Donna MacNicol, Town Counsel, and he agreed that 99% of the intent of the proposed Energy Storage Bylaw had no issues. There were 3 residents with issues on the residential storage elements of the bylaw ('On Site Storage') – unfortunate because PB was intending that section to be easy for residents by only requiring site plan review and normal permitting. There was no discussion about the Commercial Energy Storage. Bressler: did they find the 'On Site Storage' restrictive? DeChiara: yes and that was the unfortunate part because the intent was not to be restrictive but that's how it was interpreted. To pass the proposed Energy Storage Bylaw needed 44 votes to pass but ended up receiving 43 votes – there was an immediate recount allowed by Paul Lyons, moderator, which ended in 42 votes affirmative votes. The proposed Energy Storage Bylaw did not advance. PB will discuss further steps later.

### **Tracer Lane decision and Solar Bylaw (Energy Storage Bylaw)**

DeChiara: Tracer Lane is the Waltham case that went before the SJC and the decision was made on June 2, 2022. Between the decision from SJC on the Tracer Lane case and the vote on the proposed Energy Storage Bylaw, PB has gathered more information to guide the board forward – DeChiara, Lacy, Bonnar, and town counsel, MacNicol discussed the new information. Lacy: After a lot of discussion, they came to the conclusion to open the Solar Bylaw to address some weaknesses it may have due to the decision on the Tracer Lane case – want the bylaws to stand up. He believes the bylaw is in better shape than Waltham's but there are some issues that PB can address. He doesn't want the bylaw to be challenged and have the SJC look at it and conclude it is similar to Waltham's in any way. He had a point in their conversation, that later others agreed with, that an Energy Storage is complicated/awkward as a stand-alone use – it is a component of solar and possibly of wind if they receive a wind project. If we open the Solar Bylaw and add an Energy Storage component in there it would be the neatest way to go. We would define it in the definitions and then list it in the Use Table as a principal use and write 'no' in those sections but add a citation to our [Shutesbury] Solar Bylaw that explains how it can be part of a Solar and Wind. We would write it once in our solar section and cite it in the wind section. DeChiara: By the end of their conversation, he agreed with Lacy's approach. The objective is avoiding litigation where you have to prove that you are complying the law.

The SJC decision in the Tracer Lane Case had a few things to take away from – Waltham effectively allowed solar for 1-2% of the town. SJC ruled that if a municipality is only allowing 1-2% then is it going against the will/welfare of the Commonwealth (due to the state's 2050 De-Carbonation Road Map). As Lacy said, Shutesbury is more giving more in terms of percentage of solar allowed but that is one thing that should revisited to ensure clarity. There was a proposed access road for a Solar Project in Lexington that would go through a residential area in Waltham

and go over into Lexington's Solar Project – Waltham made the decision to not allow the development because it determined that the solar was in non-residential). The SJC ruled that even although Waltham was not using a solar zoning bylaw, a municipality can only regulate solar is for public health, welfare and safety and considered the access road to be part of the solar development and therefore could not be unreasonably regulated. Due to this, MacNicol recommended to also fix/include explicit explanation for Shutesbury Solar Bylaw – ex. If they are trying to protect drinking water it would be of interest to public health and safety but make it more explicit. Lacy: to add to that, we may also want to look at the 'purpose' section in the Solar Bylaw and add that in there – expand on what they mean by Public Welfare. DeChiara adds that he started working on that this morning. Bressler: how would the state, in terms of a legal situation, how will it be defined? DeChiara: he plans to research how it pops up within the legal state context. He believes stating this would ensure understanding of town's rationale. Raymond: besides expanding these topics of discussion, is there any specific restriction in our bylaw that should be revisited? DeChiara: he doesn't believe so – more a matter of making the PB's reasons understood. As Lacy pointed out, there is a waiver section so it is not completely prohibited. Another thing he would like to add is, which MacNicol didn't know the answer to, what the SJC said they perceive access road to be part of parcel with the development and therefore was not considered a road but a party of the solar development. Originally when the PB was constructing the Energy Storage Bylaw as an accessory use, MacNicol had suggested that municipality can regulate accessory use but not prohibit it because it doesn't come under the state's solar prohibition – but it is conceivable that, because Energy Storage is required for the SMART application, it is part of development. This gets to Lacy's point of it being part of the Solar Bylaw. Lacy: he takes a different view when looking at the Shutesbury Solar Bylaw – need to review some the currently language and think of the view of how a court would perceive it. He did a small analyze on what Waltham would allow vs what Shutesbury would allow. In its decision, the SJC identified repeatedly that Waltham only allowed 1.5 - 2% of solar in their industrial district and determined this was not enough. He calculated what acreage 2% of Waltham is and concluded it is 174 acres - 2% of Shutesbury is 340 acres. Looking at the Shutesbury Solar Bylaw, there is numbered blocks of where solar can be used (8 left – some may not be available because they are DCR land). Say there is 8 of them and currently PB is limiting solar facilities to be 15 acres – 15 acres per 8 blocks comes to a total of 120 acres (less than Waltham). He worries about the Bio Map 2 restriction – there are two categories that are also listed in the Solar Bylaw where solar is prohibited, Critical Natural Landscape and Core Habitat. The Critical Natural Landscape is about 80% of Shutesbury and it excludes the Town's center and some roads – takes up most of the numbered squares allowing solar to be proposed. The Core Habitat is a sub group of the Critical Natural Landscape which is only 15% of Shutesbury. He suggests revisiting these prohibitions and keeping just the Core Habitat section since it is the more important of the two but listing the Critical Natural Landscape elsewhere that would require an applicant to provide analysis of some sort. He believes that the designated areas where solar development can occur are mostly comprised of Critical Natural Landscape and Core Habitat. DeChiara: he agrees with Lacy in being thoughtful – the concern, from his understanding, is that they have to be cognizant about how much is to be perceived as allowable. One comment that MacNicol made is that Shutesbury is different from Waltham because Shutesbury has a lot of forested land and if we believe it is legitimate to protect it that we should protect but go into that conversation knowing this is the concern of the SJC and figure how to articulate the components of welfare, health, and safety.

DeFant: the Conservation Commission, SCC, recently hired consultants to help with regulatory language that came up around our local wetlands bylaw. When she was interviewing some hydrogeologists, she spoke with Neal Price who is with an environmental company called Horsley and Whitten. He is currently consulting with Wareham as a Third Party Reviewer for a solar project and he developed a model for assessing the impact on well water and water quality for solar developments. She suggests talking to someone like him and think about what kind of evaluation or assessments you [PB] would like from an applicant. If you are looking for health and safety such as water quality protection there might be some hydrogeology modeling that might be important to have. DeChiara: MacNicol had referenced this in our conversation and she has suggested rather than coming up with an assessment that they should be tying it to a pre-existing state or federal standard – to take the burden off the PB.

Bressler: How does Critical Natural Landscapes relate to public health and safety. DeChiara: he believes that is the main question. In the bigger picture, how places like Shutesbury are contributing to fighting the climate crisis and what Shutesbury has to offer vibrant forests and water systems. If we start damaging those and cutting up forests they are no longer vibrant, then by extension you are reducing the public welfare – that is an argument that would get litigated. Bressler: the Core Habitat was 15% correct? What is that in acreage? Lacy: yes it is roughly 10-15% so it would be roughly 2,500 acres. Bressler: seems like we have two tiers, one being Critical Natural Landscapes and the other being the sub-set Core Habitat. One of those has to be protectable from litigation – an argument can be made that they both relate to public health and safety. DeChiara: he agrees and the more they can refine it and make strong connections between these two categories with public welfare, health and safety it will tighten up their argument.

Raymond: following up on DeFant's suggestions, is getting expert advice something PB should look into? DeChiara asks Bonnar if PB has sufficient funds for such and Bonnar is unsure. Bonnar: Lacy, when talking about the waivable provisions with respect to the Biomap 2, would that legal question arise? To him that question would only arise in a situation where the waiver was denied. Lacy: that is what we would hope but he is unsure if it would come up otherwise. He could understand having certain requirements that are waivable but having almost every project coming out have to seek a waiver might be too much. Bressler: it almost defeats the purpose of a zoning solar bylaw. DeChiara: it seems like we want to make sure that on its face people can't object. What the SJC did was 1-2% was too little and nothing else – they didn't say what was good or put in a standard.

Lacy: SJC did acknowledge that this was a different type of Section 3 prohibition on regulation than many of the others identified in the statute. SJC was clear in that towns can regulate more for solar than other uses. As far as public health, safety and welfare, he has heard all zoning described with that purpose – it is broad and there are examples around the country that the courts would look at.

DeChiara: aside from substance of the issue, we are also talking about timing so he would suggest that since there might be a special town meeting in the fall in regards to the school roof, he could work on this and have it ready for that special town meeting – the sooner we have this in place the better. Bressler: when you [DeChiara] talk about doing research, are you talking

about doing research to add substance to the big umbrella Lacy was referring to - public health, welfare and safety? DeChiara: he believes so – his general sense is the zoning has the purpose of protecting the public's health, safety, and welfare. A tight and explicit bylaw will reduce the probability from being sued.

### **Wheelock Report:**

Lacy: he called Joel Walker about a week ago and his voicemail was full so he sent him an email. He still didn't receive a response so he called again and got an answer. Walker had talked to contractor from Vermont and found out he had been in the hospital the day before the work would suppose to start. The contractor just recently got back to work so nothing has been done yet but Walker is planning to have the work done the week of June 19<sup>th</sup>. If goes as planned, he had suggested dates for a post-work site visit – July 5<sup>th</sup>, 6<sup>th</sup>, or 7<sup>th</sup>. Lacy and DeFant plan to do a site visit in the afternoon of July 5<sup>th</sup>.

### **Minutes 11/8, 12/6, 5/9, 5/18**

11.08.2021: Murphy took minutes during this meeting, will look into finishing them.

12.06.2021: 12.06 meeting was with Select Board – Murphy used the minutes approved by the Select Board (noted on the document). These minutes were approved during the 05.08.2022 meeting (as shown in the 05.09.2022 minutes). Murphy will sent this to Town Clerk.

05.09.2022: DeChiara had sent minor corrections to Land Use Clerk, Carey Marshall, for the 05.09.2022 minutes. Marshall had not yet seen them. DeChiara shares his edits for the PB to review. Motion: DeChiara moves to approve the 05.09.2022 minutes as amended, Bressler seconds. **Vote: Bonnar- Aye, Bressler- Aye, DeChiara- Aye, Lacy- Aye, Murphy- Aye, Raymond- Aye, and Rotondi- abstain (not present at meeting). So moved.**

05.18.2022: DeChiara had sent minor corrections to Land Use Clerk, Carey Marshall, for the 05.18.2022 minutes. Marshall had not yet seen them. DeChiara shares his edits for the PB to review. Motion: DeChiara moves to approve the 05.18.2022 minutes as amended, Lacy seconds. **Vote: Bonnar- Aye, Bressler- Aye, DeChiara- Aye, Lacy- Aye, Murphy- Aye, Raymond- Aye, and Rotondi- abstain (not present at meeting). So moved.**

**Motion to Adjourn: Bressler moves to adjourn, Murphy seconds. Vote: Bressler-Aye, Murphy-Aye, Raymond-Aye, Lacy-Aye, Bonnar-Aye, DeChiara-Aye. So moved.**

**Meeting Close: 8:25pm**