Review of Shutesbury's Draft Local ByLaw Regulations by Attorney Gregor McGregor
Reviewed with the Shutesbury Selectboard meeting of September 12, 2023

Thank you for the opportunity to comment on the draft regulations of the Conservation Commission, as presently proposed, to implement the wetland protection Bylaw of the Town of Shutesbury. We are aware of the changes made since the prior draft on which we commented earlier. These are the remaining legal issues in the draft, in our opinion, despite those several improvements. The remaining legal issues are many and serious.

1. The draft proposed regulations assert legal jurisdiction to protect vernal pools. There is no authority in the Bylaw for this. Vernal pools are not listed as a protected resource area. The Bylaw needs to be amended before this can be done. Also, the draft covers all vernal pools anywhere in Town, even outside resource areas. Yet the Bylaw protects only what is "adjacent" to the listed types of wetlands and types of water bodies. Furthermore, virtually no work or activity would be allowed (a presumed prohibition) within any vernal pool or its buffer zone (AURA). They would be off limits to anything.

2. The burden of proof for applicants (in two places) remains the legal test of "clear and convincing evidence." This is beyond the authority of the Bylaw in which the test is not that strict. We already recommended against this. The Town legally may not be stricter than the Bylaw in what it requires of applicants. The Bylaw is the enabling legislation from the Town's legislature, which is the Town Meeting. These regulations are to be the flesh on the bones, but the full skeleton must be there for legal support.

3. The "no practical alternative" test, which these regulations say is to be applied to most or all project applications, is good in theory (apparently adopting and adapting that state test in the Riverfront Area DEP rules as a model), but that test here sets a very high bar for all projects, expands the length and depth of Commission inquiries, and the wording is not fully supported by the words in the Bylaw. The Bylaw needs amending in this regard to explicitly allow imposition of this prerequisite to get approvals.

4. "Cumulative effects" remains a problematic concept, hard to apply without further fleshing out the wording per the *City of Boston v. Quincy* decision which we cited in our prior comment. And any substantive use of this term/test should be supported by amending the Bylaw. The regulations and the Bylaw both need further work on this aspect. The Commission may not merely turn down a proposed project for failure to satisfy such a general criterion. There need to be objective, substantive definitions an applicant can predictably meet.

5. The draft says it empowers the Commission to adopt its own formal BMPs (Best Management Practices) for stormwater. These will need to be promulgated in the future as new regulations so as to be legal. A later memo, policy or manual on BMPs would be guidance, not enforceable as a rule. Also, they may end up conflicting with the BMPs required by the DEP, your DPW, your Planning Board and others. A much

better approach is to enact a stormwater bylaw creating a stormwater board empowered to adopt uniform BMPs for the Town.

6. The draft tries to utilize hydric soils (in two places) as resource area indicators, which is a decent goal, but the provisions are hard to understand on paper, difficult to apply in the field, and will generate lots of questions and uncertainty.

7. The draft would impose a new legal requirement, actually a prohibition, of "zero impact" on any "listed" MA Endangered Species Act species. This would mean the Commission could never authorize it. This makes the Commission into a wildlife and plant protection board, likely to be challenged as being beyond the authority of the Bylaw. Also, the state NHESP MESA program for these species is not this draconian and unrealistic. It involves mapping, reporting, negotiating, revising and mitigating projects to avoid and minimize habitat loss, and allowing "takes" of species if unavoidable or mitigated with improved or newly created habitat, not just allowing nothing.

8. This "zero impact" ban on rare, threatened, endangered, and at risk species (what MESA protects, if the Commission intends this broad a reading) also seems vulnerable to legal challenge on its face and as applied, since the Bylaw is not an endangered species law. The Bylaw is limited to wetland and water-related resource areas, and merely protects wildlife habitat and not the creatures/plants themselves.

9. The regulations would ban all septic systems in any resource areas and their buffer zones or AURAs. That reach of control is a huge geographic area of the Town, affecting many thousands of existing and future residential, commercial and governmental lots. This prohibition far exceeds the state DEP Title 5 and any local Board of Health rules, which by the way contain only limited bans near the most significant wetland resources, water bodies, wells, and dynamic zones. The ban here would apply regardless the insignificance of the land to wetland or water values or the absence of any demonstrated adverse impacts of septic systems.

10. On that score, this outright septic ban (the Commission could never allow them even if the Board of Health has) seems to prevent reasonable development of real estate which has been long regarded as developable and taxed as such by the Town. The way it is written may prevent desirable redevelopment of existing lots, replacement of failed septic systems, and just updating system components. A better approach is the one in the state DEP Wetland Regulations. Those rules legally assume a Title 5 compliant system (as to design and operation) protects water and wetland resources (and groundwater). Those rules allow the Commission to regulate the location and impacts of the system construction.

11. A much better approach than making the Commission your septic system police is to adopt your own Town BOH regulations, as is allowed liberally by General Laws

chapter 111, for septic systems, package treatment plants, community (shared) systems, and tight tanks. These rules would deal comprehensively with permits and plans, ground water depths and perc tests, locations and setbacks, treatment methodologies, performance standards, pumping and maintenance, testing and reporting, failures and remedies, and retrofitting new technologies, with mandated upgrades to the extent practicable.

12. Dry weather conditions in two places in the proposed regulations are the subject of alternative or different site testing methods that are very complex. They had better be supported on the record of the "legislative history" of this draft by scientific consensus of professionals who practice in the field to be sure they are appropriate and "do-able."

13. Apparently, what is inside an AURA now, if these regulations are promulgated, may under no circumstances be replaced or removed (the meaning is unclear) with the result that over time everything in all AURAs will eventually be gone. This is a very strict result, a rigid form of land use control beyond the authority of the Bylaw, in our opinion.

14. We do suggest towns consider administrative types of approvals, such as Barnstable pioneered, for simple, repetitive and/or easily controlled, reliably conducted small projects. This approach must, however, be authorized in the Bylaw. The reason is that the Bylaw does not allow the Commission to lessen procedures and safeguards on its own initiative. Your Bylaw thus does not yet authorize these proposed simple permits. The SPP process in these draft regulations, while being a good idea, is not legal in our opinion unless and until authorized in the Bylaw.

15. The proposed provision remains in the draft regulations allowing the Commission to impose as permit conditions the real estate instruments known as Conservation Restrictions, Easements and Covenants. These types of documents are recorded in the chain of title and bind the property, not just the permitted project. It is patently illegal for the Commission to do this. Your Bylaw, being old, still has a CR provision in it. The Bylaw itself is legally vulnerable, but that is moot if the Commission never asks for a CR or requires one.

16. The reason this Bylaw CR provision and draft regulation are illegal and unenforceable is settled, indisputable law: the US Supreme Court in the so-called *Nollan-Dolan-Koontz* trilogy of decisions over the decades, decisions of the MA Attorney General on municipal bylaws, and advice of the MA Association of Conservation Commissions (MACC). In our prior comments we raised attention to this legal flaw. We cannot imagine how this provision still remains.

17. The draft regulations do have some climate resilience measures, which is good: requiring 2:1 compensatory flood storage, and using NOAA Atlas 14 instead of USGS for stormwater calcs and calc floodplain if needed. The Bylaw, however, doesn't have climate resilience, climate change impacts mitigation, or carbon sequestration as legal interests of the jurisdictional resource areas, so the Commission is limited in what it can impose without amending the Bylaw. This makes these draft regulations very weak on climate considerations.

18. The Commission should review the options in the Climate-Smart Wetland Bylaw/Regulations | Nashua River (climateresilient.wixsite.com) to build climate considerations into these regulations, and better still into the Bylaw which is sorely out of date in this regard. This work was done by, for and with the MA Association of Conservation Commissions (MACC) and excellent regional associations over the last few years. This linked reference is authoritative for the actual wording recommended for bylaws and regulations.

19. Eliminate the references in the draft regulations to the Wetlands Protection Act saying, in several places, these regulations are to intended to assist in the interpretation and administration of the Wetlands Protection Act and Bylaw. The reference should be the Bylaw only. Otherwise the administration of the Bylaw (submittal requirements, decision criteria, permit decisions, conditions imposed, and enforcement actions) will be vulnerable to being preempted by DEP rules, appeal decisions, and enforcement actions. This is called being "De Grace'd" by DEP, after the name of the leading court case years ago.

20. Our overarching prior comment remains true: your Bylaw is so out of date that as a matter of law, in our opinion, it is inadequate and insufficient to legally support so large, long, detailed, comprehensive, and aggressive a set of new Conservation Commission regulations. At the very minimum, if nothing else, the Bylaw should be amended to adopt the current MACC Model Wetlands Bylaw plus add climate considerations as per the above. This step, which many towns have taken, would allow some of the problematic provisions to be promulgated as regulations, but it would not solve the rest of the legal issues.