

Shutesbury Planning Board Meeting Minutes
May 23, 2016 Shutesbury Town Hall

Planning Board members present: Deacon Bonnar/Chair, Jeff Lacy, Steve Bressler, Jon Thompson, Ralph Armstrong, Linda Rotondi, and Jim Aaron
Staff present: Linda Avis Scott/Administrative Secretary

Guests: Attorney Donna MacNicol/Town Counsel, Attorney Michael Pill/representing Lake Street Development, Zachary Schulman/Lake Street Development, Mickey Marcus/New England Environmental (NEE), Genny Beemyn/113 West Pelham Road, Miriam DeFant/74 Pratt Corner Road, Scott and Laura LaBonte/115 Pratt Corner Road, Mike Vinskey/391 West Pelham Road, Bill Wells/371 West Pelham Road, Gary Rehorka/86 Cooleyville Road, Colleen Chudzik/422 Pratt Corner Road, Cara Silverberg/Wendell, Michael DeChiara and Lucy Gertz/56 Pratt Corner Road, Lisa McLoughlin/Northfield-Nolumbeka Project, Penny Jaques/43 Old Orchard Road, Rolf and James Cachat-Schilling/187 Wendell Road, Gian DiDonna/86 Pratt Corner Road, Renee Richard/175 Montague Road, Jane Costello and H.L. Rivard/160 Pratt Corner Road, Lana Czanento/Connecticut, Alejo Zocarins/New Salem, Sarah Kohler/New Salem Planning Board and Historical Commission, Juhio Whitewolf Papo/Enfield CT - Arawak Taino Nation, Billy Myers/Mohawk Nation, Loril Moondream/Wendell - White Mountain Apache, J.J. and Janet LaFountain/Mohawk, Katy and Hannah Tarr, Jaime and Chris Donta/204 Montague Road, Leslie Cerier/58 Schoolhouse Road

Bonnar calls the meeting to order at 7:06pm.

Preliminary Subdivision Plan: Bonnar: the Planning Board has received the preliminary subdivision plan for Lot ZG2; the documents were received by the Town Clerk on 5.5.16.

Planning Board Vacancy: Bonnar: Thompson has turned down his write-in election and will be leaving the Board. Bonnar: per Mosher/Town Clerk, there is a failure to elect when the person with the most write-in votes is offered the position and declines; the position is not offered to the person with the next most votes. Lacy: anyone who is interested in joining the Planning Board should approach the Select Board.

Chapter 61/Notice of Intent to Convert/Cowls: Bonnar reads the 4.28.16 letter from Cinda H. Jones into the record. DeChiara: due to change of use, the property is being removed from Chapter 61 and the town can express interest in the purchase of the land being converted. Vinskey: the property is not for sale, it is being taken out of Chapter 61; it is not particularly clear what the options are. Lacy: land can be taken out of Chapter 61, however there is penalty fee. DeChiara: it is not first right of refusal. Bonnar: does not see the Planning Board urging the town to purchase the property. DeChiara cites two examples where towns purchased land and created a sacred space; suggests that Shutesbury could consider a similar project. Lacy suggests awaiting the arrival of MacNicol/Town Counsel for guidance on the matter.

Planning Board Minutes: Lacy moves and Armstrong seconds the motion to approve the 4.11.16 and 5.2.16 Planning Board meeting minutes as presented; all Board members approve the motion. Lacy: the 90 days from close of the Wheelock special permit public hearing to decision is actually 6.5.16 rather than 6.6.16.

Notice to Convert: MacNicol: the Select Board chooses whether to waive the right of first refusal; if there is a decision to purchase, an appraisal will be needed. MacNicol: if obtaining this land were part of the Master Plan, the Board would want to advise the Select Board, otherwise there is no Planning Board authority. Armstrong: how does this differ from eminent domain? MacNicol: the Chapter 61 statute gives the town the right of first refusal; once the change of use is declared, the owner has to wait 120 days before converting. Lacy: there is an active special permit on this site. Bonnar clarifies for the public that the notice to convert pertains to the Wheelock parcel. Lacy: is not aware this property is of special interest to the town; the Select Board may want to consult with the Open Space Committee.

Wheelock Solar Project Special Permit Deliberation: At 7:30pm, Bonnar requests an opening primer from MacNicol regarding relative legal matters specifically towards understanding the ceremonial site issues. MacNicol states there are two large issues of concern: 1. The evidence submitted subsequent to the close of the public hearing - clearly the issue was raised by Kohler before the hearing closed so there is no impediment to conditioning, however, so much evidence came in after the closing regarding location, numbers of sites including many emails, etc. that Lake Street has not had the opportunity to address; the Board needs to be careful about what is in the relative condition. 2. Massachusetts law is clear about placing a condition that may stall the project, i.e. an issue of substance not decided by the Board that is put off to later; the Board has to be careful about how the condition reads and how much it may put off approval of final plans by requiring something to come back to the Planning Board. MacNicol acknowledges the seriousness of the matter to those in the room. Lacy: the condition needs to be actionable by the applicant without being subjected to subsequent discretionary review. MacNicol: the concern is about a condition being speculative, i.e. "build in conformance, however..." would not pass this test; another leg of these cases is that there cannot be a condition that may require substantive changes. MacNicol acknowledges that this is a difficult matter and there is a need to acknowledge what (ceremonial landscapes/burial sites) may be on the land; Federal and State law may require a modification of the plan however the condition cannot be written in that way; requiring compliance with State/Federal law may require modification of the plan. Lacy reads Pre-Condition #1 into the record. MacNicol: if it is found that a significant portion of the site has ceremonial landscapes/burial sites that cannot be disturbed, the applicant will have to come back to the Board with a plan modification; the avoidance of the identified mound is not significant; we cannot define - "it will be found by the survey". Bressler asks MacNicol to define "significant". MacNicol: "significant" will be on a continuum and cannot be determined until the fieldwork is done; once the fieldwork is done, the applicant will come back if needed. Lacy: is a change in the number of panels a material change? Bonnar: what about a change if the project boundary? MacNicol: a footprint change would be material; does not see removing a number of panels as

material. Lacy: with this condition, has the Board gone as far as we can go. MacNicol: yes, a condition that orders the applicant back to the Planning Board cannot be included; the Board cannot insist private third parties be allowed on the property; once surveyed, the applicant may need to come back. Lacy: to what degree may we include experts? MacNicol: yes, the Planning Board can utilize outside consultants. Lacy: under Chapter 44 Section 53G? MacNicol: yes, if the applicant does not like the consultant, they can appeal to the Select Board only on the basis of credentials and expertise. Lacy: in addition to the applicant hiring an archeologist, can the Planning Board hire an archeologist? MacNicol: yes, only for peer review - not to do the work. Lacy: can the Planning Board hire an expert in Native American landscapes? MacNicol: yes, with appropriate credentials. Bressler: can the Planning Board experts be included in a condition? MacNicol: we did state the need for credentials. Lacy: those working for the developers have to have the credentials; how about those the Planning Board hires? Thompson: we already have peer review. MacNicol: yes, you can add similar language re: pre-condition #1. MacNicol: the Planning Board has the right to bring in an independent qualified expert in a particular field. It is noted that members of the audience need to be recognized by the Chair before speaking. MacNicol: Section 53G includes the credentials needed for peer reviewers; it is not clear this Section can be used after the permit is issued; Lake Street may challenge this. Bressler: can the Planning Board include an archeologist and Tribal Historic Preservation Officer (THPO) in the condition? MacNicol: for Lake Street or for who is going to accompany the Planning Board? Lacy: the Planning Board will decide what experts are needed. Bressler: if the Planning Board outlines the type of experience and credentials required by the applicant's surveyor, why would the Board need to hire an expert? Lacy: that is what the condition currently says - the field investigators are working for the applicant; someone may be hired to represent the Planning Board. MacNicol cautions the Board against being very specific on who is hired in the condition. Bonnar: instead of putting the onus on Lake Street to hire, put the onus on Lake Street to pay for the Planning Board hire. MacNicol: Lake Street will want to choose who they hire, then, the Planning Board can hire whom they want.

R. Cachat-Schilling states that he notified the Select Board and Historical Commission of the suspected burial grounds in Nov./Dec. 2015 and actually noted preservation concerns in Feb. 2015; states that he never received follow-up on his concerns from the Shutesbury Historical Commission; when he went to the Historical Commission, he was told not to share specifics about these sites as the Historical Commission would have to notify the Massachusetts Historical Commission (MHC). R. Cachat-Schilling seeks to establish his concerted efforts about preservation concerns without substantial response and notes that Bonnar did not recognize him at a meeting prior to 3.7.16. DeFant: the condition needs to include compliance with all state/federal laws; she noted the need to notify MHC earlier in the process; the Planning Board are not experts - there are experts in the room the Board may want to hear from. DeFant states that she provided the language for the condition; Traditional Cultural Properties (TCP) is a federally defined term; these property assessments are to be done by archeologists, however, you also look to cultural experts - THPOs are the go-to federally recognized experts in this area - the Planning Board has now been contacted by two of them - they are willing to enter into contract with the town. DeFant states that she wants to make it clear we mean that the TCP survey is to be done following federal guidelines; the mound is based on Lacy's observation

after the close of the hearing. Lacy: Rural Siting Principles Criteria 8.3-1(I) refers to “one or more mounds” (page 6). DeFant cites the recommendations from Dr. Curtiss Hoffman/Anthropology Department Bridgewater State University; in the condition, there should be no disturbance within a certain number of feet of a TCP; there is also a need for fencing of any TCPs to prevent vandalism; notes the language “the applicant may more intensively investigate the findings in the survey” versus stating the applicant “should”; cultural experts are one of the ways in which these resources are evaluated – they are the go-to experts. Bressler suggests adding a THPO to the experts in the condition. DeFant: yes, the best practice will be for the developer to contact a THPO. Lacy: is there a specific procedure in the federal guidelines? DeFant: Department of the Interior Bulletin 38 (“Guidelines for Evaluating and Documenting Traditional Cultural Properties”) by Thomas King (and Patricia Parker) - the go-to federal guidelines on what a TCP assessment looks like for any private/public property; developers should consult tribal experts. Lisa McLoughlin states that she works for the Nolumbeka Project, a nonprofit whose goal is to protect native resources; their anthropologists work with tribes; National Historic Preservation Act Section 106 is a requirement for a project with any federal involvement; Bulletin 38 explains the how, why, and when a tribal consultation should be done; consulting with the tribes is not optional; an archeologist is not an expert; you need THPO in the language; reads MGL Chapter 114 Section 17 into the record and references the definition of “Burial place, as referred to in this section, shall include unmarked burial grounds known or suspected to contain the remains of one or more American Indians” and states this law may interfere with the Planning Board’s rezoning of this land. McLoughlin: there are two matters - possible burial grounds and ceremonial stone landscapes; the THPO will look at the entire landscape – this should not be restricted to one mound. MacNicol: if the applicant is using any federal resources, they have to comply with federal/state law; through the condition, the Planning Board is requiring compliance. Bressler restates that THPO could be added. MacNicol: the Planning Board has to be careful about narrowing the condition; the applicant may not have to give notice under Section 106; the Planning Board is stating they suspect there is something there and that the applicant must get an archeologist on site; if it turns out Section 106 is not applicable, the applicant won’t have to do anything; the condition reads that the Planning Board wants this looked at. Lacy: has added Bulletin 38, if applicable, to the condition. MacNicol: if Bulletin 38 is applicable, the Planning Board wants the applicant to follow it; those who have spoken are articulate about their concerns. Rotondi: who determines if Bulletin 38 is applicable? MacNicol: we are requiring, at a minimum, an archeologist; a THPO may determine whether Bulletin 38 is relative. Lacy suggests adding “Bulletin 38, if applicable, as determined by the Planning Board”? MacNicol: the applicant will be in violation of the special permit if they do not do so; you may say, “in consultation” – if you take a THPO out there and they believe Bulletin 38 is applicable, the applicant will have to comply. Lacy: the Planning Board may utilize Section 53G to hire an expert to assist in the survey; adds the 15’ as an offset (per Hoffman). DeChiara, representing only himself, to MacNicol: regarding using Bulletin 38 for guidance, there are those in the room who are going to want the condition to be as specific as possible within the law; hiring a qualified consultant is not specific – hiring a THPO is specific. MacNicol: the Planning Board does not need to condition themselves; conditions on the developer can be specific. DeChiara recommends the conditions for the developer be as specific as

possible; based on his research, the federal government is clear the best practice is hiring a tribal expert. DeChiara regarding MacNicol's concern about information coming in after the fact: Lacy asked for input on conditions therefore the influx of conditions; suggests tonight is not the time for the Board to vote on the special permit conditions as all suggestions have not been read by all Board members; the way the condition is written, it does not say who chooses the expert – suggests “mutually agreed upon” – there should be no parameters on the survey – it is important the broadest portion of the parcel possible be surveyed – notes the need for facts and not to focus on one mound. DeChiara refers to bottom of page 11, “The applicant may more intensively investigate the findings” - it is against the applicant's best interest to do more – the investigation needs to be mandated. DeChiara refers to his handout and recommends the red section, read to the town meeting body, be included in the condition in order to be very specific. DeChiara reads this section into the record. Lacy to DeChiara: are you saying that I did not include everything in the condition that I said I would? DeChiara: it seems premature to vote, the Planning Board does not have all the information presented tonight; there is a need for a new draft. Lacy explains the Planning Board voting process; notes “surface” survey should be added to the first sentence in pre-construction condition #1. Bressler: this condition says, “...the survey shall meet the Secretary of the Interior's Standards for Identification and Evaluation of Historic Properties such that the results will be accepted by the State Historic Preservation Officer and also the Keeper of the National Register of Historic Places.” – does not think the Planning Board needs to spell out all ways the survey shall be conducted. Lacy: the applicant can investigate suspected sites further – the applicant could avoid the sites or investigate further. DeFant: how will you know if a comprehensive survey is not done? Lacy: the Board can make it clear that the survey involves all the disturbed areas on the site - this means +/- 20 acres. Pill states that he is concerned about inaccurate information; the Bulletin and Statute have been gone through – of course, we (the developer) will comply – Lake Street has a track record they have to protect – the Bulletin does not apply – they are trying to get you to rewrite your conditions to bring in something that is not applicable; of course we will comply. Gian DiDonna loudly complains about not being called on. DeFant: the Board needs to tell the developer that they need to file a project notification form with MHC; if you are asking them to do a TCP assessment, you are asking them to follow the guidelines – notes the need for clarity. Lacy rereads “the survey shall meet the Secretary of Interior's Standards of Identification...the Keeper of the National Register of Historic Places”. Lacy to DeFant: this is verbatim of what you told me; Bulletin 38 is a Department of Interior document. DeFant: the condition needs to be specific regarding notification of MHC and THPO – there are several regional tribes who have a collaborative agreement – they work together. Bressler suggests the THPO be hired to do the survey. DeFant states she cannot speak to the contractual arrangements – not sure about the appropriate relationship – survey should be given to the THPO – the credentials of the archeologist are important. Bressler to DeFant: you are not going to have a problem with the Planning Board on this. DeFant: it is disrespectful not to include the THPO; refers to language in “I” (page 6) – “either avoid or investigate”. Rotondi: if something might be there, the applicant can avoid the area rather than investigate. Eva Gibovic: works with several tribes to assist in mapping ceremonial landscapes; contracts can happen; the project proponent hires the tribes or the tribes enter into a memorandum of understanding with the town. Bressler:

either the applicant or the town can be added. Chris Donta/Archeologist explains that he has been doing Section 106 work for years at UMass; it is his understanding that Section 106 is not triggered in this case - there usually has to be a federal agency involved with a project; the federal agency will mostly give way to the state; the Planning Board could reference the standards; the federally recognized tribes in MA are the Wampanoag and Narragansett; Shutesbury is part of the Nipmuc tribal territory; if you are investigating a burial ground, the MHC has very specific procedures they will expect for an investigation; MHC would have oversight of the testing. DeFant appreciates Donta's information; is not clear there is no Section 106 jurisdiction; cites a recent CA court case where there was a federal loan guarantee matter; is concerned there is a funding stream the needs investigation. Bressler asks Donta about the difference between Section 106 and state guidelines. C. Donta: there is some leeway though state standards are usually more specific. Bressler: if state standards are more stringent, Section 106 is moot. DeFant: the tribes may have more authority in Section 106. McLoughlin: Section 106 puts the authority into the hands of the THPO. Bressler: what if we say the applicant needs to hire a THPO? McLoughlin: the Planning Board would have the archeologist working under the THPO; Bulletin 38 explains how to do this respectfully; we think Section 106 is involved; Chapter 114 Section 17 needs to be addressed. MacNicol: we cannot condition that the applicant is subject to Section 106. DeFant: can you rezone? Rehorka suggests saying "All applicable laws are to be obeyed"; it is a mistake to include specific laws. Kohler: on the other hand, MGL was specifically cited during the public hearing. MacNicol: we cannot tell a private landowner that they are subject to a law that is applicable to public land; the Planning Board does not have the authority to condition a statute that is not applicable. Kohler: as Section 17 was read, it applies to graves. Lacy to C. Donta: can you help me understand, the condition says the survey shall meet the "Secretary of the Interior Standards for Identification and Evaluation" - now we have Bulletin 38 by the Department of the Interior? C. Donta: Bulletin 38 was issued to include certain types of cultural heritage sites; MHC does not have the same expertise that tribes may have about ceremonial landscapes - these can be ethereal; there are specific qualifications and standards for these archeologists. Lacy reads the condition. C. Donta: ground penetrating radar may be problematic, it may give a clue though cannot tell it is a burial ground; you will not want an archeologist to do a surface survey. C. Donta: the above ground sites are included in Bulletin 38. MacNicol: does the condition's language include these? C. Donta: are we addressing the issue of possible burial ground and ceremonial land? MacNicol: do we need to add something to the language to ensure aboveground sites are evaluated? C. Donta: MHC does not have the resources; cannot give specific language; the National Register includes TCPs. MDF: why not include the THPO. Bressler agrees. Jamie Donta/Cultural Resources Specialist: including THPO may exclude people, i.e. the Nipmuc who are very familiar in this area. Lacy states he received communication that one THPO may be willing to represent all appropriate tribes. Gibovic: four federally recognized tribes do work on ceremonial landscapes. Lacy: it was offered that Doug Harris could perform the function of all relevant tribes for this site. Gibovic: there are actually five federally recognized tribes in southern New England and many non-federally recognized tribes; if asked, the tribes would figure out how to work together. DeChiara: in the language about identification, adding Bulletin 38 would capture all. C. Donta: the Planning Board would not want to limit to Section 38.

DeChiara recommends stating the Department of the Interior and Section 38. DeFant: as much as possible, we need to mimic the language in the bylaw. Lacy: the bylaw provides pre-application guidance. McLoughlin: MGL applies to the Planning Board; the town cannot take a burial ground and do something with it; the town needs to look into this before going further; the Planning Board will want to say the traditional property survey needs to be conducted by a THPO and the archeologist. Gibovic: and by one or more of the recognized tribes. DeFant: my sense is that the tribes would want to work together. Lacy: we need the sense of the Board on whether we are going to get THPOs involved; his sense is that the Board would want the THPO to work for us. Bressler: regardless of whose contract they are under, the THPO will come to the same result; confirms with Lacy that the applicant will hire an archeologist and a THPO. MacNicol: peer review may not be necessary in this case. Schulman states that he prefers the condition as written when he arrived. Pill: has no doubt many of the Native American folks are present in good faith; wonders if they are aware of the trespass order and notes that much of the public comment has been coming from a small group of people working to delay or prohibit the project; concerned about the fact that no permission has been asked of the landowner and that the landowner and applicant have not received any of the letters directly – only via the Planning Board; we can live with the condition as written; the Planning Board must realize what you are being drawn into with Bulletin 38; Section 106 and the state statute do not apply; respecting genuine concern is different from that coming from project proponents. R. Cachat-Schilling: ad hominem arguments are not allowed in a town meeting. Pill requests the Planning Board be impartial and not be lured to include a THPO and Bulletin 38. DeChiara: as a Jewish person, he thinks about Jewish cemeteries in Europe – we are trying to respect cultures that are dead – the ultimate disrespect is that someone would be lured – those present are here because of respect. Gertz: no one knew Sarah Kohler would be attending the 3.7.16 meeting; Pill is accusing people of dirty tricks – people are acting out of concern. DeFant: ad hominem attacks need to be controlled; does not want to add aspersions to other peoples' actions – is offended by the word “duped” in her effort to protect Native American ceremonial landscapes – Shutesbury should not allow this. Gertz notes that the police were notified about DiDonna's behavior. R. Cachat-Schilling is told that the Chair does not recognize him. Billy Myers/New York Mohawk: we probably have the oldest constitution; asks that the suggestions be given a go; cites the seven generations – you are going to pay a price in the future; appreciates being invited and having the opportunity to speak. Bonnar: the public comment needs to stop; the Planning Board work needs to continue. Lacy to MacNicol: the Board needs to write a condition that is reasonable and will not be overturned on appeal. MacNicol: after a quick look at Bulletin 38, it appears to be an evaluation process for a national historic site, which is not the case here. MacNicol is willing to do more research on Bulletin 38; is concerned about including any specific articles in the condition; there is a need to include the THPO on the survey; the THPO can report to the applicant and the Planning Board – they will have expertise others do not have; this will include the entire site; the THPO is included so that if there are sites the archeologist would miss, there is a tribal expert on site; if the applicant refuses, the Planning Board can hire the THPO. Lacy: the Board would feel better if we are hiring the THPO; because we will be reviewing the survey, it will be helpful to have the THPO working for the Planning Board; would this be accomplished with 53G? MacNicol:

include and see if the applicant agrees. Armstrong states that he agrees with including the THPO; as volunteers will we be able to do this? MacNicol: the THPO will attend the survey. Lacy: one or more Planning Board members will be accompanying the site surveys; it will be helpful to have a knowledgeable person/THPO on the walk. MacNicol: the Planning Board shall receive notice of any survey visits and the Board may accompany with an expert of their choosing. MacNicol: the Board may communicate with Doug Harris/Narragansett Indian Tribal Historic Preservation Office regarding whom they would recommend. Lacy: is the Planning Board free to pick one person? MacNicol: you need to talk with Harris for guidance on who will be the best person to accompany the Board; suggests inviting Harris to a Planning Board meeting. Bonnar confirms there will be no further public comment. Members of the public try to comment. Kohler: within the past ten days, there has been desecration on the site – stamping on a ceremonial stone. Pill asks if Kohler had permission to access the site. Kohler: public access is allowed. Lacy to MacNicol: should we work on the condition and reconvene? Lacy asks MacNicol if he can take direction from the Planning Board to finalize the condition? MacNicol: the condition needs to come back before the Board; there is a need for the Board to reflect on whether the condition is doing what they want. Lacy asks the applicant if they would agree to an extension of decision. Schulman: how long will the extension be? Pill: the applicant wants to cooperate in supporting the Board in having the time to discuss the condition with MacNicol. All Board members and MacNicol agree to meet on 6.7.16 at 7:00pm. MacNicol: 6.7.16 is the final meeting to approve. Lacy: per Chapter 40A Section 9, after the vote the Planning Board has 10 days to get the special permit to the Town Clerk. MacNicol: we want the applicant to extend the time for decision by a certain number of days; will the condition be finalized on 6.7.16? Lacy: there may be some edits; we could have the permit to the Town Clerk by 6.10.16. Pill: we agree; this will be it; can the Planning Board do so reasonably by the 6.10.16? MacNicol suggests extending the 90 days to decision to 6.13.16. Lacy: the Planning Board will decide on 6.7.16, then final action will be taken by the close of business on the 6.13.16. There is no objection from other Board members. MacNicol confirms: extend the 90 days to render decision to 6.13.16. MacNicol confirms Lacy will be drafting the final edits. Jacques will submit some written edits to Lacy. The “Agreement to Continue the 90 Day Post Decision” document is signed by Bonnar and Pill/on behalf of Lake Street Development and will be submitted to the Town Clerk.

Armstrong moves and Lacy seconds the motion to close the meeting at 9:52pm; all Board members agree.

Documents and Other Items Used at the Meeting:

1. 4.28.16 Cinda Jones letter re: Chapter 61/Notice of Intent to Convert
2. 5.23.16 Draft Special Permit for Wheelock Solar Project
3. 5.18.16 letter from Dr. Curtiss Hoffman/Bridgewater State University
4. 5.21.16 email from DeFant re: Special Permit condition
5. 5.23.16 letter from Doug Harris/Deputy Tribal Historic Preservation Officer/NITHPO
6. 5.23.16 email from DeFant: Information about Section 106 jurisdiction
7. MGL Chapter 114 Section 17
8. DeChiara suggested condition received 5.23.16

Respectfully submitted,
Linda Avis Scott
Administrative Secretary