

Shutesbury Planning Board Meeting Minutes
June 7, 2016 Shutesbury Town Hall

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

Guests: Zachary Schulman/Lake Street Development, Penny Jaques/43 Old Orchard Road, Gail Fleischaker/62 West Pelham Road, Miriam DeFant/74 Pratt Corner Road, Genny Beemyn/113 West Pelham Road, Attorney Donna MacNicol/Town Counsel, Attorney Michael Pill/representing Lake Street, Linda Gagnon/Enfield CT, Andrea Cummings/69 Pratt Corner Road, Geoffrey Pray Whittum/Suffield CT, Loril Moondream/Wendell-White Mountain Apache, Eva Gibavic/Leverett -Ceremonial Landscapes Research LLC, James and Janet LaFountain/Mohawk Iroquois, Strong Oak/Metis, B.N. Ducco/Athol-Iroquois, Beth Adams/Leverett, Don Wakoluk/215 Leverett Road, Roger Tincknell/78 Pratt Corner Road, Sarah Kohler/New Salem – Planning Board, Historical Commission, Bill Wells/371 West Pelham Road, Julie Stepanek/65 Pratt Corner Road, Michael Suter/Pratt Corner Road, Michael DeChiara and Lucy Gertz/56 Pratt Corner Road, Mike Vinskey/391 West Pelham Road, Colleen Chudzik/422 Pratt Corner Road, and Alejo Zacarios/New Salem.

Bonnar calls the meeting to order at 7:08pm and announces that Sarah Kohler is videotaping the meeting.

Wheelock Solar Project Special Permit Deliberation: Bonnar: Lacy will go through the changes to the special permit, there will then be one half hour for public comment followed by Planning Board deliberation. Lacy: goal was to create consensus relative to the special permit conditions via communication with the applicant and consultation with Attorney Donna MacNicol/Town Counsel. Lacy made small edits throughout the document and referred to the project in a consistent matter as “the Project”; most of the revision time was spent on Pre-construction Condition #1. Lacy: this version of the condition is similar to previous versions; he sent one version to DeFant and DeChiara that was then reviewed by MacNicol leading to the current version.

Lacy reads Pre-Construction Condition #1 into the record. Lacy: to ensure the site is surveyed in its current condition, no tree cutting is stipulated; prior versions said “such that the results will be accepted by the State Historic Preservation Officer and also the Keeper of the National Register of Historic Places” – the applicant rejected this language as it seemed to indicate an intent to list the property on the National Register of Historic Places – this was not the intention. Lacy: the applicant will pay for the outside consultant; the applicant wanted to include that the Planning Board consultant have the same credentials as those of the applicant’s consultant; the Planning Board will attend the survey along with their outside consultant. Lacy: regarding follow-up investigations, the applicant strongly opposed having the survey sent to any required parties other than the Planning Board; there is no need to list other required parties because, as a public document, the Planning Board can send the results to any interested party. Lacy: the no disturbance 15’ offset from any “Native American Traditional Cultural Property (TCP)

site or sites of Native American burial grounds identified in the survey or confirmed by the applicant's further investigation, if undertaken" is incorporated. Lacy believes the applicant agrees with the condition. Schulman nods his agreement.

Lacy regarding Pre-construction Condition #8: MacNicol provided input on the language and reviewed all the conditions to ensure they are doing what is intended. Lacy reads Pre-Condition #8 into the record; the applicant worked out "the payments over time" with Cowls.

Lacy regarding Operating Condition #11: this condition was written in response to concern about the creation of the wildflower meadow in the approved plan. Lacy reads Operating Condition #11 into the record. Lacy: some have suggested growing a wildflower meadow in acidic soil, while leaving the soil profile intact, will not be successful; this condition leaves the door open to accept an alternative of native plants. Lacy concludes review of the three conditions requiring revision.

Bonnar opens the one half hour public comment period.

Jaques states that she is generally supported of changes to the special permit, however, is concerned about the need for a built-in mechanism – an impartial observer to ensure there is no erosion during a rain event. Lacy asks if Marcus/New England Environmental is present to address this concern. Marcus is not present. Pill: several months were spent reviewing the plan with the peer reviewer and project engineer; this issue is addressed within the permit and been fully dealt with. Fleischaker: this is not a wetland issue, it is about erosion control and would be consistent with a consultant hired via Chapter 44 Section 53G. Pill: 53G is clear in its authority regarding consultants hired prior to permit issuance; to be fair relative to Native American issues, the applicant is willing to pay for the Planning Board consultant; the erosion control is an engineering issue – if there is erosion, the Building Inspector has the right to issue an enforcement order. Lacy: one condition gives the Building Inspectors and Planning Board and Conservation Commission (SCC) members the ability to inspect the site after leaving a phone message; if any eroded material gets into the 100' buffer zone, the SCC will become involved and will be able to use 53G to hire a consultant. Pill agrees with this condition (General Condition #4). Lacy: this condition ensures the contractors will not let erosion happen. Jaques: will NEE be monitoring the project? Schulman: yes, along with the Stormwater Pollution Prevention Plan (SWPPP) required reports. Jaques states that she does not feel it should be a volunteer board's responsibility to monitor the project. Lacy: as a professional, he monitors larger projects with tighter constraints; intends to monitor this site – surely when it rains – most of this project is fairly high, dry, and flat – points to areas on the plan that may be of concern – forest soils will remain intact around the site and protect the 100' buffer – there are 3-4 areas where problems may occur that will need monitoring. Jaques affirms there has been adequate attention to her concern.

DeFant regarding Operation Condition #8: this condition allows the spot use of herbicide – the applicant agreed to no herbicide use. DeFant referring to the Decommissioning Conditions: what happens if decommissioning occurs before the cost is fully covered? DeFant refers to early public hearing testimony by Garner: it is routine to have a third party monitor; states her concern about soil amendments and the potential impact of runoff into wetlands especially in relation to pH. DeFant regarding Pre-Condition #1: concerned about changes to this condition; the discussion on 5.23.16 indicated that an archeologist may not be sufficient to do a TCP assessment and that tribal authorities are

needed – it may make sense to have peer to peer discussions, however, different areas of expertise are needed – tribal experts are the go-to resource. Lacy asks Schulman about the timeline for reaching the full decommissioning amount. Schulman: he does not know offhand; has yet to hear of a project ending early unless a catastrophic event occurs. Pill: there is insurance for such an event. Lacy asks MacNicol for guidance on the potential need to decommission before the surety is fully funded. MacNicol: the goal is to ensure the town has access to these funds if there is a need to act; we do not know the timeline for funding the escrow therefore she will review the escrow document. Schulman confirms that he does not know offhand. Pill: it is correct that there is no record of these sites being decommissioned early; lenders want to ensure they will get paid back; concerned about “spaghetti throwing”. MacNicol acknowledges Pill’s concern, though, what if a project ends short of escrow? Schulman: the escrow will definitely be fully funded before the 20 years elapses. Pill suggests leaving this matter to MacNicol, acknowledging that MacNicol will be fair in protecting the town. MacNicol: assumes Cowls will want this to be fully funded as well; would ask Pill/Schulman to provide the schedule for funding and, if there are concerns, Town Counsel be allowed to address the concerns with Pill and Lake Street. Schulman agrees to fully fund the escrow account within 10 years. Pre-Construction Condition #8 is amended to read: “The surety may be established through payments over time from the lessee to the owner of the Project site *and shall be fully funded within 10 years*. Any documents establishing such surety agreement shall be submitted to Shutesbury Town Counsel for approval prior to construction and shall assure Shutesbury’s access to the *full* fund should the lessee or owner fail to decommission the Project as provided herein.” Schulman: we will pay \$7,000 per year until fully funded then compounded interest until funded. MacNicol: that would not fully fund the account until the 18th year; what you talked about before will not work. Pill: we are not happy with this condition though will deal with it somehow; it will be \$12,000/year instead of \$7,000. Bonnar: we are set with this for now? MacNicol: confirms changes as noted by Lacy on his draft of the document.

Lacy: the wording for Operating Condition #8 relative to herbicide use came from another permit. Lacy reads this condition into the record; herbicides are allowed for use only on invasive plants and must come from an approved list. Bonnar: should the Planning Board approve such use? Lacy: hopes this will not be the case.

Lacy regarding Pre-Construction Condition #1: there is nothing that prohibits a tribal consultant from being hired if they meet the requirements; there is nothing that prevents either the applicant’s consultant or the Planning Board consultant from hiring a tribal expert; they are not excluded.

Whittum recalls Leslie Bracebridge leading him to extreme archeological sites, i.e. monks caves, in Shutesbury; Eva Gibavic finds cairns in the middle of a brook in this area; identifies himself as a self-taught archeologist and woods walker; it is in this context and his belief that this is a site where Native Americans laid. Whittum appreciates DeFant’s seeking for tribal elders to have intense involvement in the process of the Board’s decision making; requests the dead of a long ago culture be respected – let the heart, the soul, and the common sense of the Board and developer prevail. Lacy: in putting this special permit together, he reviewed many other special permits and did not see any with a condition like Pre-Construction Condition #1 – requiring a survey and Planning Board involvement – it is a survey with a built in consequence. Whittum sites

the need for reverence. Kohler: wishes to reaffirm DeFant and Whittum and requests this language "the Planning Board shall request a tribal elder be included" – how could the Board see it any other way? Lacy: does not know about the expertise of a Tribal Historic Preservation Officer (THPO), i.e. degrees, licensures; learned from DeFant and her brother what specific credentials are needed for such a survey – these credentials do not rule out the use of THPOs. Kohler: no culture has the right to claim expertise about another. DeFant: Lacy may be misrepresenting her – she did not intend that a professional archeologist is all that is needed; TCP assessments require a THPO; understands Lacy spoke with Doug Harris – THPOs are recognized by the federal government and the tribes – we need to be cautious not to impose our cultural Eurocentric bias; appreciates the condition does not preclude a THPO – could we ask the developer to agree to use a THPO? Lacy affirms that he spoke with Harris however did not ask about his qualifications – there is no limit on the part of the Planning Board consultant's use of a THPO. DeFant: when you say professional archeologist – a degree is not the terminal degree of the cultural expert; would the applicant be willing to respond? Pill: would like to hear from DeChiara. Gibavic states that she works with four recognized tribes and is familiar with the fifth recognized tribe – none of them meet the credential requirements. DeChiara regarding the 5.23.16 discussion: it was agreed that THPOs are important; we heard from Chris Donta that archeologists do not know about TCPS – we agreed THPOs are important and we were in agreement that THPOs would be written in. DeChiara regarding Operating Condition #8: we had multiple conversations about not using herbicides and Marcus agreed; why do we now have an exception? Pill: I have lived in Shutesbury since 1982 and am the attorney for the applicant; the Planning Board has forwarded communications from DeFant and others to the applicant and myself; none have been received directly – folks need to speak directly to applicant; the condition (Pre-Condition #1) goes so far beyond what the State law and the Shutesbury zoning bylaw allow – we have heard and are concerned about the comments that have been made so we are willing to live with this condition – this is as far as we will go – notes that others may not agree with this condition; he is happy to provide his email/phone number and is willing to address Native American related concerns – come and talk with us and/or NEE as well as Marnin Lebovits/Lake Street Development – a religious Jew – you have a group of people waiting to hear directly from you. Schulman: the Board should also speak with Cows about the decommissioning fund in order to have one fund. MacNicol confirms that there will be one decommissioning fund. Lacy: under 53G, the Planning Board will seek advice from a tribal consultant - it will not be putting the THPO in charge. Pill: regarding an adversary situation, the answer is no – trusts the Planning Board will be fair minded and objective – we would rather not have Pre-Construction Condition #1, however, it is important concerns are addressed in a fair, impartial manner – trusts the Planning Board will do their job and MacNicol will do the same. Lacy: would you consider a slight amendment? Pill: no further amendment to #1 (Pre-Construction); agrees the Planning Board has the flexibility to do what Lacy said. Bressler: if an archeologist is not qualified to perform part of the survey, the Planning Board can seek the guidance of the appropriate expert. Pill: in the interest of being fair-minded, agrees - stipulation by the applicant if the Planning Board or outside consultant sought advice from an outside professional? MacNicol: the condition requires Lake Street Development to pay for the Planning Board consultant - if a tribal expert is required, the

Planning Board has the right to use one – if our archeologist is concerned about what may be on site, a THPO may be consulted. Lacy: the Planning Board is, of course, free to consult with a THPO – we are free to pay for such a consultation ourselves. MacNicol: the language does not preclude this; the Planning Board can always hire whom they want. DeChiara quotes “The Planning Board may utilize outside consultants under Section 53G of Chapter 44 of the General Law to advise it relative to the survey.” MacNicol: that is in regard to what the applicant will pay for; there is nothing in this condition that precludes the Planning Board from bringing in a THPO; the Planning Board can always bring in whom they want. Wakoluk speaking to the public: there have been enough comments, asks for quiet to allow the Planning Board to do their work. Bonnar: the public comment period is over.

Thompson moves the question be called. Armstrong seconds the motion.

Bonnar: the Planning Board will discuss the special permit amongst our selves.

Bressler: “Prior to earthwork including tree cutting, the applicant shall have a surface survey conducted that includes an assessment of TCPs” – if the qualified archeologist cannot do this, can we hire a tribal expert? MacNicol: this is assuming the expert will have met both criteria – their identification of historic properties is relative to TCPs as these are the historic properties on the site – the archeologist has to be qualified to do so. MacNicol: there will be two qualified experts and having a THPO to verify makes sense. Lacy asks the Planning Board about herbicide use – concern is that on construction sites, soils that are brought in may include invasive species – the contractor is not supposed to bring in soils to this site. Armstrong: we need to look at all the species that may be bring in invasive species, i.e. birds bringing in bittersweet – without herbicides, we are left with mechanical means of removal, which is difficult. Lacy: we are talking about spot herbicide treatments. Armstrong: mechanical means do nothing to the subsoil presence of invasives. Rotondi: mechanical means create more soil disturbance.

Lacy: at this point, there is only one directive for rewriting.

MacNicol: a motion is needed to grant the special permit as written. Lacy: with one amendment to Pre- Construction Condition #8 as agreed to in the minutes. MacNicol assists the Planning Board in composing the wording for the motion.

Thompson addresses the Chair and moves that the Planning Board grant the special permit and site plan approval to Lake Street Development with the written general findings, specific findings and conditions as detailed in the draft special permit and site plan approval document dated 6.7.16 as amended regarding Pre-Construction Condition #8. Armstrong seconds the motion. There is no further discussion. The Planning Board votes unanimous approval of the motion. Lacy: will entertain the motion just approved and reduce the special permit to final form by making the amendment and delivering the document in final form to the Chairman for signing and subsequent delivery to the Town Clerk to await the appeal period. Armstrong seconds the motion; Planning Board members unanimously approve this motion.

Wheelock Tract Preliminary Subdivision Plan: Bonnar in response to DeChiara’s inquiry about the preliminary subdivision plan for Lot ZG2: it is not important at this point because the special permit has been granted. Pill: the Attorney General’s Office has yet to approve the solar bylaw, therefore, Cows and Lake Street would like to leave the preliminary plan on the table; we cannot withdraw it until the bylaw is approved. Lacy

suggests the Planning Board take no action at this time; there is no consequence to taking no action. Pill agrees; this does not bind the Board in any way – it is the placeholder for grandfathering and, if needed, we will get the subdivision plan to the Planning Board within the 7-month time period. Pill, on behalf of Cowls and Lake Street Development, stipulates that letting the 45 days run does not abridge or affect in any way the Planning Board’s ability to act on a definitive plan. DeChiara: if the Attorney General’s Office says “no”, the subdivision grandfathers the site for 8 years? MacNicol: if they follow-up by filing a definitive plan; under Chapter 40A, once the 20 day appeal period runs, this project will be grandfathered anyway – refers to Section 6 – a zoning ordinance or bylaw shall not apply to any special permit issued prior to the first publication of a public hearing on a bylaw and there is nothing in the works right now. Lacy moves the Planning Board pass on taking action on this preliminary subdivision plan. Thompson seconds and all Board members approve the motion.

Planning Board Vacancy: Bonnar: MacNicol has provided a definitive email regarding the process for filling the vacancy; Miriam DeFant has voiced her request to be appointed to the position to both the Select Board and Planning Board. MacNicol: if the Planning Board does not notify the Select Board of the vacancy by 8.1.16, the Select Board fills the position. MacNicol reviews the process as per her email – the one-week notice is so the general public is aware of the vacancy and may, if interested, submit their name for the position. Pill: because of his yearlong involvement as an advocate for the project, he may be interested in being on the Planning Board, however, could not participate in any discussion relative to the project. MacNicol notes that DeChiara has speaking as a citizen to a board to which he does not have a decision-making role. Pill: DeFant cannot play a role in overseeing the project due to her involvement. Lacy: the potential conflict of interest has occurred to him. MacNicol asks DeFant if she is an abutter; at the time of the joint meeting, DeFant will need to be asked about a potential conflict of interest. Pill cites regulations regarding impartiality. DeFant understands she would need to recuse herself; would hope her right to petition and free speech would not affect her impartiality. MacNicol: for example, you would need to recuse yourself regarding the choice of a tribal expert; you would need to stay away from Lake Street matters. Gertz: we don’t know the Planning Board members feelings about the project - what is the difference? MacNicol: the Planning Board is charged with being neutral – “I a may feel one way, however, will listen to both sides”- DeFant had a real voice in trying to get the project changed; the Planning Board does not advocate for their opinions until they have heard all sides. DeChiara: DeFant would need to recuse herself from choosing a THPO? MacNicol: she would have to recuse herself from anything related to Lake Street Development.

The final invoice from Tighe & Bond is considered. There may be an additional billing because Lacy spoke with Christy subsequent to the 4.2.16 invoice.

Approval of the 5.23.16 Planning Board meeting minutes is carried over to the next meeting.

Lacy will assist Scott with managing the timing/logistics for mailing the special permit decision to the abutters.

Next meeting: Monday, 7.11.16.

A motion to adjourn is made, seconded, and approved by all Planning Board members at 9:05pm.

List of Documents and Other Items Used at the Meeting:

1. 6.7.16 Draft Planning Board Special Permit for PB-SP-6/5/16
2. 6.6.16 email from Attorney Donna MacNicol re: "Opening on PB"

Document Received 6.7.16

1. Testimony from Elizabeth Adams/Leverett – Mass. Forest Rescue

Respectfully submitted,
Linda Avis Scott
Administrative Secretary