

Shutesbury Planning Board Meeting Minutes
February 13, 2017 Shutesbury Town Hall

Planning Board members present: Deacon Bonnar/Chair, Steve Bressler, Jeff Lacy, and Linda Rotondi

Planning Board members absent: Jim Aaron and Ralph Armstrong

Guests: Miriam DeFant, Michael DeChiara, Elaine Puleo, Penny Jaques, Attorney Roger Lipton/Green Miles Lipton LLP, Michael Suter, Lucy Gertz, Robert Kibler, Sarah Kohler, Mary Lou Conca, James Schilling-Cachat, Miles Tardie, Attorney Donna MacNicol/Town Counsel and Eric Johnson/UMass Archeological Services

These minutes have been compiled from the Planning Board audio recording of the meeting.

Bonnar calls the meeting to order at 7:00pm.

Wheelock Solar Project:

Lacy: Eric Johnson's report was received by the Planning Board this afternoon allowing only a short time for review prior to the meeting; the SWCA report ("Supplement to Phase 1A Archeological Pedestrian Survey, Town of Shutesbury, Franklin County, Massachusetts" dated 1.19.17) and construction drawings (Conti Enterprises, Inc. "Construction Plans PV Ground Mount Photo voltaic System" dated 10.4.16) are available on the Planning Board's webpage; Johnson's report will also be posted on this page.

Johnson: the most significant element of the SWCA Supplement is that the project plans have been revised to protect areas containing mounds with a 15' buffer around them; new information has been received indicating that the perched rock will also be protected. Johnson reviews his 2.13.17 "Review of the Report Titled: 'Supplement to Phase 1A Archeological Pedestrian Survey, Town of Shutesbury, Franklin County, Massachusetts'", including the "effective feature avoidance strategies" (page 1-2) as prudent and necessary precautions and "Requested Revisions Addressed in the Supplement" (page 2-3). "Other Requested Revisions" and "Recommendations" (page 3-4) are also reviewed.

Lacy: per Johnson, the Traditional Cultural Properties (TCP) survey has not been conducted (page 3), however, this is the title of the survey required in "Special Permit Pre-condition #1". Johnson is asked for clarification. Johnson: the TCP survey, as discussed in the Secretary of the Interior's documents on archeological and TCP surveys, has been requested however has yet to be conducted; archeologists are not qualified to conduct this type of survey; a THPO or THPO designee is qualified to conduct a TCP survey, as defined by the National Park Service. Lacy confirms that a THPO would participate in the survey; the Planning Board used the term "TCP survey" in the condition, however, does not believe the Board has the authority to require a Section 106 review.

Johnson did not have access to the construction plans when writing his 2.13.17 report. Lacy, referring to these plans, asks Johnson if any of the mounds, as identified in the study, have been omitted. Johnson cannot state for sure; using a Conti site plan, indicates which ones he is uncertain about, hence, the recommendation for a base map of the project area identifying all documented features tied to a data sheet or table. Lacy asks Johnson if the multiple mounds, to be properly excluded, would require field location by an archeologist. Johnson: yes. Lacy asks Johnson if he has changed his conclusion about the first report concluding the mounds are the result of natural causes. Johnson: no, he still agrees that the features are the result of natural events. Bressler asks if non-invasive testing, i.e. ground penetration radar, magnetometry, and phosphate testing, would rule out that these are not burial mounds. Johnson would anticipate the results to be ambiguous – the rockiness of soil would affect radar; phosphate testing, as recommended by Curtiss Hoffman, is no longer done – it requires small soil samples that would be compared to surrounding soils and is not definitive. Bonnar: would the phosphate tests be relevant to the mounds. Johnson: that is his recollection. Lacy: SWCA study noted mortuary practices and burials; are there studies more relevant to this area? Johnson: there have been published accounts - Peter Mills did a synthesis of burials in the Deerfield area; there have been a number of burial excavations that, due to the sensitive nature of the locations, are not recorded. Lacy asks Johnson if he is aware of any peer review studies of valley tribes that had a practice of burying in an area, like Shutesbury, with thin rocky soils. Johnson is not aware of any such studies. Lacy asks Johnson if he has suspicions about any other areas on site that bear further investigation. Johnson, having walked the site twice, once thoroughly, did not observe any areas that he thought needed testing. Bonnar: the Planning Board has been operating under the assumption that the Board has not had the legal right to require the type of investigation being asked for by some; asks Johnson if, in a typical construction project, there is another level of review where that might be required. Johnson: it could be required if there is a federal or state undertaking. Bonnar: the applicant states the project is not a federal or state undertaking. Johnson: it is not up to the applicant to determine whether the project is a federal or state undertaking; the federal/EPA or state agency would determine whether a project is an undertaking thereby subject to Section 106 or state review. Lacy: can the Planning Board invoke this type of review? Johnson: no, it is the federal or state agency's responsibility; if that is the case, the agency would consult with the THPO, State Preservation Office, the Mass Historical Commission, and the THPOs for the tribes who have an interest in the area: the Narragansett, Aquinnah, Stockbridge Munsee, and possibly the Nipmuc and Mashpee Wampanoag, and local organizations including the Planning Board. Bonnar, noting that the Board has been operating under the assumption that it cannot require a THPO, affirms with Johnson that another agency may do so. Lacy notes that the neither the applicant or their representative is present to answer questions about the SWCA report. Lacy agrees with the SWCA report and Johnson's conclusions regarding the origins of what has been detected as being from natural cause; states his concern that the applicant is changing the plan to avoid these areas by cutting them out of the array area; any change in shape and/or configuration is a concern therefore requests the applicant provide large-scale hard copies of the newly developed construction plans to the Planning Board.

Lacy: there are questions about the modifications, i.e. one of the 15' setbacks for a mound appears to be within a detention basin, there are drainage excavations necessary to route water where the northern multiple mounds are located, and, on the construction plan, the driveway note states "20' wide access road typical" while the Board purposely conditioned the driveway to be narrower.

Bonnar: the Board needs to initiate a process to require the applicant to be present.

Lacy notes the need to stay within the bounds of the condition, however, following the condition changes the plan therefore the Board needs revised plans to meet required conditions. MacNicol/Town Counsel: given the study, the plans can be modified to keep construction 15' from the suspect areas; when the special permit was issued it was not thought this condition would require the applicant to come back with modified plans; the applicant will need to address how they will modify the plan. MacNicol: panels will need to be moved to accommodate the three areas on the south side; the other three suspect sites are in areas integral to construction. MacNicol: the Board needs to determine which of Johnson's recommendations the applicant will be required to implement; most seem to be of natural causes, however, if they are staying 15' away from any suspect TCP site, the sites will not be disturbed. MacNicol is not clear that these are the only suspect sites; Johnson cannot be clear either until there is a plan that can be used to walk the site to identify the suspect areas. Bonnar recommends a written document that outlines the Board's concerns. MacNicol advises the Board to reference the recommendations in Johnson's report. Lacy would not have imposed the condition of fencing off these sites as there is not a preponderance of evidence that they need preservation; is concerned that the drainage and driveway are constructed properly and that panel reconfiguration does not push the project into other areas on the original plan. Bressler is concerned about modification of the footprint; recommends the applicant work the 15' into the approved footprint. Lacy: because Johnson's report arrived today, more time is needed. Bressler: the applicant needs to come before the Board and the Board needs to advise them of the questions to be answered. The Board agrees for Lacy to draft a letter to the applicant advising them of required next steps: respond to Johnson's report, address footprint changes, i.e. is it only cutouts, the driveway – 20' width noted on Conti's plans, provide hard copy full size constructions plans, address detention basins and drainage excavations. Bressler: the Board needs to decide which of Johnson's recommendations are essential for the applicant to respond to. Lacy recommends waiting for the applicant to respond before deciding which of Johnson's recommendations are essential. Bonnar: in the process of writing the letter, other problems may be identified. Bressler: if the applicant stays 15' away from the identified sites, there is no need to do further non-invasive investigation. Johnson: to clarify, TCPs do not need to be constructed by people, they can be natural objects and therefore have no material traces; that is why a TCP survey requires a person with this knowledge.

Public comment:

Miriam DeFant affirms need for revised site plans and need for comment from Tighe & Bond if the storm water plan is being revised as this may impact a wetland; encourages the Board to ask for the inventory and data field recommended by Johnson; asks Johnson if there are any peer reviewed articles as archeologists do not have a good understanding of what happened - we do not know what the burial practices were; many people died during the early contact period when there were infections, epidemics, and genocide and

we do not know where they are buried. Johnson: there is a lot we do not know about that time period; there is some documentation and oral tradition; a lot of people died in disease epidemics, a lot of people moved, and some people stayed and “sort of disappeared in plain site, if you will” – Marge Bruchac has written about this topic. Bressler: we do know that there have been over 300 years of European settlement in this area and that no part of this region is untouched by farming and logging; this activity has probably disturbed the area we are talking about; land use maps show where the settlement was located in this region; there is evidence, as per Johnson, of wind blow and pit and mound. Michael DeChiara: Johnson is asking for more information to make decisions; the applicant is filling in around the edges and not going to the core of the issue – where are and what are the features that need to be protected; a TCP survey has not been done and it has been explicitly asked for. DeChiara reads portions of Pre-Construction Condition #1 into the record: “Prior to any earthwork including tree cutting, the applicant shall have a surface survey conducted that includes an assessment of Traditional Cultural Properties...The survey shall be conducted by someone who meets or exceeds the Secretary of the Interior’s Qualifications for an Archeologist and the survey shall meet the Secretary of the Interior’s Standards for the Identification and Evaluation of Historic Properties”; the Board is stating the qualities of the required survey – the applicant must comply or they are “gong nowhere”; you cannot backtrack. Lacy: his conundrum is that the wording of the condition can be construed to mean that the Board is requiring what amounts to as a Section 106 and we do not have the authority to do that; are we going too far with the special permit condition against the advice of Town Counsel and as case law may indicate. Lacy: the Board has asked a couple of THPOs, who have not accepted, if they would consult with the Board and Johnson. MacNicol, referring to the condition: it talks about the assessment of TCPs and that the qualifications meet the “Standards for the Identification and Evaluation of Historic Properties” which does not require a THPO; the property owner will not allow a THPO on the property and the Board does not have the authority to require them to do so; we were hoping to find a THPO that would look at the documentation, however, it is understood that a THPO would want to go on the property. MacNicol: the applicant needs to provide a map, as recommended by Johnson, stay 15’ away from any suspect area, and Johnson will walk the site to confirm these areas and determine if there are any other suspect areas; the applicant cannot be required to do something that they would not be required to do under the law while, at the same time, there is a need to have the property assessed. DeChiara, referring to the condition: “includes an assessment of” TCPs - either the applicant sues that this is an overly bearing condition or, if the Board backtracks, people could sue the other way; it is not appropriate for the Planning Board to say we are not clear so we are not going to hold the applicant to the condition. MacNicol: between the initial report, Johnson’s review, the addendum, Johnson’s second review, and a third applicant report, the Planning Board can determine whether an adequate assessment of TCPs has been done for their purposes. DeFant: the developers have painted themselves in the corner by not sitting at the table with THPOs; the Planning Board cannot say this is a TCP assessment. MacNicol: the Planning Board will choose whether assessment and survey mean the same thing. DeFant: during the 8.17.16 Planning Board meeting, Doug Harris stated that he wanted to consult with the Board to avoid any desecration – he was unable to attend tonight; other THPOs may be willing to

come, i.e. Bettina Washington. Lacy states that he has made efforts with both Harris and Washington. DeFant believes there is more interest than Lacy perceives. MacNicol: Washington stated unwillingness in her letter; it would be great news if the THPOs have changed their minds. DeFant: there needs to be a communication bridge towards getting the THPOs to have a conversation with the town. Lacy has yet to receive a response to the voicemail he left Washington. Rob Kibler: New England Environmental needs to signoff on Conti's plan as a fair representation of their plans; the Planning Board should have received a narrative from Conti outlining the major changes from the original NEE plans; recommends the Board require plans with an overlay showing the stormwater systems, the fencing and shade reduction areas, panel locations, and where the mounds are – this is the only way you are going to see what has changed and insist upon a narrative explaining the differences. Lacy: the letter will ask the applicant to reconcile the plans; acknowledges Kibler's recommendation that NEE sign off on Conti's plans. DeChiara: what are the penalties for disturbing a feature? MacNicol: there are penalties for violating special permit conditions; statute does allow a special permit to be revoked; the best method is to ensure there is adequate monitoring. Johnson suggests, as per Curtiss Hoffman, there be a monitor hired to conduct inspections to ensure adherence. MacNicol: the Planning Board can use consultants. Mary Lou Conca asks a question of MacNicol: has the Planning Board consulted with the EPA and, to the Board: understands the special permit requires that a TCP survey be completed which by definition means a THPO must conduct the survey since no one but a THPO is trained for that expertise and nor has the right to claim that position therefore asks the Planning Board to correct their mistake and not become a part of the erasure of our Native American brothers and sisters; it would be sad for her to live in a town that contributes to that erasure. Lacy, regarding the EPA question: he was contacted by Thelma Murphy/EPA Stormwater and Permits Section who asked questions about the project, i.e. whether there would be any filling of wetlands that border on waters of the U.S.; trees or rivers in the vicinity; drainage. DeFant states she spoke with Murphy and with Harris – the Narragansett Tribal Historic Preservation Office has formally contacted EPA requesting consultation; the EPA is supposed to red flag this permit and put it on hold until the consultation occurs; the problem is that sometimes projects “slip under the wire” – we do not know what name the project will be under; this process is out of our hands. Kibler to Lacy: did he let the other members know of his conversation with the EPA? Lacy: it is on the record as of this meeting; this is the first time he has been with the other Board members subsequent to the conversation. Kibler: all members need to have the same level of information on this issue. Lacy, regarding enforcement, refers to General Conditions #1-4 and reads into the record #2 – “Applicant shall comply with all relevant local, state and federal regulations and laws, including the acquisition of all necessary certificates and licenses; #3 – Violation of any condition contained herein or failure to comply with the recorded plans and letter shall subject the applicant to a zoning enforcement action in accordance with the remedies set forth in Chapter 40A of the General Laws; #4 – The Building Inspector, Electrical Inspector, or any member of the Shutesbury Planning Board or Conservation Commission may, after notification by phone or phone message left, enter the site for purposes of inspection and assessment of compliance with this special permit or any permit subject to their jurisdiction.” MacNicol: there is a penalty for zoning violations. Lacy expects he will inspect the site frequently as he is adamant that the

project be constructed as required. DeChiara, referring to the other pre-conditions, asks if they have been complied with. Lacy: the applicant needs to go through the conditions in order. The audio recording ends at this point in the meeting.

Per verbal report from Bonnar, the minutes for the 12.12.16 Planning Board meeting were unanimously approved as amended.

Bonnar also reported that the Bonnar, Patton, Patton ANR was postponed due to lack of a quorum once he recused himself. A separate Planning Board meeting will be scheduled to attend to this matter.

Documents and Other Items Used at the Meeting:

1. SWCA “Supplement to Phase 1A Archeological Pedestrian Survey, Town of Shutesbury, Franklin County, Massachusetts” dated 1.19.17
2. 2.13.17 Eric Johnson “Review of the Report Titled: ‘Supplement to Phase 1A Archeological Pedestrian Survey, Town of Shutesbury, Franklin County, Massachusetts.’”
3. 10.4.16 Conti “Construction Plans PV Ground Mounted Photovoltaic System Shutesbury, MA 01072
4. 2.13.17 email from R. Cachat: “What would the supposed agriculture purpose of this stonework be?”
5. 2.13.17 email from M. DeFant: “Decorum and Rules of Order for meeting tonight”
6. 2.12.17 email from Curtiss Hoffman: “SCWA report”
7. 2.13.17 email from R. Cachat: “Please Enter the Attached Response and Objection to Your Public Records”
8. 1.3.17 email from M. L. Ferro: “Draft Minutes of the Planning Board Meeting, December 12, 2016”

Respectfully submitted,

Linda Avis Scott

Administrative Secretary not present for the 2.13.17 Planning Board meeting