

Shutesbury Conservation Commission
Minutes – 12/9/21
(approved 1/13/22)
Virtual Meeting

Meeting start: 7:00 pm.

Commissioners Present: Miriam DeFant (Chair), Mary David, Robin Harrington, Scott Kahan, Beth Willson

Others Present: Janice Stone, Don Wakoluk, Penny Jaques, Wm Levine, Joe Salvador, Mary Lou Conca, Elizabeth Fernandez-O'Brien, Carlos Fontes, Shane Bajnoci, Maria Firstenberg (TRC), Sharon Weizenbaum, Jane Costello, Kenneth Holt, Leslie Cerier, Ana Lua Fontes, Gabriel Fontes

Minutes:

Minutes for 11/11/21 are not yet available.

David moved to approve 12/2/21 minutes; Harrington seconded; approved by unanimous vote 5/0.

Site Visits Follow-Up:

--69 Schoolhouse Road BPA: David and Harrington visited site where a deck is to be replaced. No resource areas identified. Recommendation is to approve the building permit application.

--585 Wendell Road/Levine: The SCC visited this site for a building permit application for a new deck. The landowner plans to put in a buried electrical conduit from Wendell Road, going through the woods. The area is all a protected Riverfront Area. Because the conduit will go through the woods and not along the driveway, it is not exempt from the WPA regulations. The landowner will need to file a Request for Determination of Applicability when he is ready. Wm Levine noted he is awaiting the new poles installation by National Grid. Jaques noted he can still apply for the RDA because the decision is good for three years.

--410 Wendell Rd: The SCC visited the site for the new Vertex cell tower. No resource areas were identified. Recommendation is to approve the building permit application.

Road maintenance concerns on Wendell Road: The SCC discussed a 11/21/21 site visit on Wendell Road during which stormwater runoff and erosion were detected in two resource areas: South Brook (near #585) and a wetland near #549. DeFant had emailed the Highway Department (HD), Town Administrator, and Select Board on 11/22/21 asking to have the area repaired. DeFant shared an email from Mark Stinson of MassDEP regarding road repairs and WPA regulations. He recommends that towns develop routine maintenance Notices of Intent for road work in resource areas and is willing to assist the town in developing one. The SCC visited the problem areas again on 12/8/21 with the Town Administrator, the HD, Wakoluk, and Jaques. Several possible solutions were reviewed, including improving detention basins to collect runoff before it hits South Brook. A proposal was discussed that would involve digging out basins near South Brook and adding berms. The SCC also reviewed the area near #549. It is a complicated area where the wetland originally crossed the road. It is constantly wet and eroding. Options were discussed with the HD were discussed on the site visit with no conclusions reached. It may be a site that will require a culver in the future. Harrington found the meeting helpful. DeFant: it

was a good dialogue but we don't have a clear sense of what can be done. Jaques: the spring is coming up right in the middle of the road, it was a lousy place to put a road in 150 years ago; a long-term solution will be complicated and will require engineering.

The SCC reviewed the Memorandum of Understanding with the HD developed in 2014 to facilitate cooperation on minor road projects near resource areas. DeFant stated she was unclear where things stand with some portions of the MOU. DeFant: did the SCC ever provide the HD with a map of resource areas as required by the MOU? Jaques: yes, this was done. Wakoluk: there is a map from the Open Space Plan that would be helpful for the HD to use. It would be good for DPW to have a big map on the wall to refer to. Wakoluk doesn't understand why the HD is not contacting the SCC. Jaques: Tim Hunting said yesterday that he feels criticized on all fronts, from people who feel the roads are not safe enough and from people who are concerned about wetlands issues. Jaques noted the HD has a difficult job and needs to balance many factors. They feel they are doing the best they can, have limited resources, and feel criticized. DeFant stated that she understands and appreciates that the Highway staff are doing the best they can. David questions whether the HD is sufficiently staffed. DeFant proposed looking for a way to be proactive and preventative, rather than catching problems after the fact, that can feel like a criticism, how can the SCC and HD have conversations in advance about approaches? DeFant noted that the MOU calls for a two-way communication process, but this does not appear to be happening. She suggested the SCC could prioritize areas that are more environmentally sensitive, perhaps arrange a site visit with a DEP official. Wakoluk: this is also town-wide situation; at Lake Wyola, it will take years to resolve the stormwater problems.

A draft email written by DeFant was reviewed to follow-up on the site visit. DeFant suggested the SCC review what is exempt from WPA regulations. The DEP regulations indicate that repair and maintenance of paved roads is exempt from SCC oversight except if it involves changing/widening the footprint of the road or adding new stormwater management features. The application of this exemption to dirt roads is far from clear. Any sediment releases into a protected wetland area becomes subject to SCC jurisdiction. DeFant: Even an exempt activity is jurisdictional if it leads to a new point source discharge into a resource area. Kahan: the ditching and breaks that have been cut in the banks of dirt roads are a concern and do not appear exempt; the HD needs to comply with the regulations; the SCC should collaborate with the HD. Willson: a new point source discharge is not exempt. It would be good to have "country drainage" systems built outside of the SCC's jurisdiction when possible. It would be good to make improvements to stormwater management outside of buffer zones, such as adding drainage uphill from South Brook in an area outside of the 200' Riverfront Area. Willson added that detention basins are new stormwater features and are not exempt from the regulations. DeFant: we don't know if the location of the new proposed drainage cut discussed on the site visit is outside of the 200' Riverfront Area; how do we go forward in a way that works for everyone? MOU suggests we should have an ongoing dialogue. David: SCC needs to set up a process for reviewing problem sites by having regular agenda items to review with the HD. DeFant suggested the SCC develop with the HD a list of particularly challenging road repair areas that are within wetlands buffer zones to assist in the review and communication process. Willson: a lot of towns have routine maintenance NOIs that address these issues. An NOI would include communication and identify problem areas. Kahan: it is clear the SCC has jurisdiction in some of these areas but that does not mean there has to be an adversarial relationship he likes the idea of a maintenance NOI.

Wakoluk: I delegate hazard tree issues to the HD; part of the DPW job should be to recognize wetlands; could have a couple of meetings a year to review areas; DPW chief should be familiar with the WPA and have the skillset to recognize wetlands; it is not practical to have the SCC following the DPW around all day; the DPW needs to be able to approach the SCC with information and questions; the DPW has been aware of these concerns for a long time; violations keep occurring instead of contacting the SCC. DeFant: we should decide how to follow-up on the meeting. Stone: important to put in writing what is not exempt; state what is in writing; they have to adhere to the regulations just as everyone else; I've worked with 3 other towns. They all have a blanket NOIs. It is the common thing to do. An MOU is not as legal as an NOI. DeFant found the old draft of the NOI and sent to the SCC. DEP offered to assist with it.

Jaques: the SCC attempted to create a maintenance NOI and spent years drafting it and working with a consultant from FRCOG. The NOI never gained any traction with the town government. The Town Administrator told Jaques that a different town HD would have initiated the process, but this was not the case in Shutesbury. Jaques: the SCC finally gave up trying to develop the NOI and settled for a Memorandum of Understanding with the HD. This is a longstanding issue. She suggested the SCC may wish to revisit this discussion next year when there is a transition in the leadership of the HD. She noted that the HD has expressed feeling criticized when it receives emails from the SCC and others about road repair. David: Tim Hunting is retiring; we should be clear about expectations with a new hire. Jaques suggested that the SCC have a representative on the HD Chief search committee. Jaques: in the past, the SCC had a designated liaison to communicate with the HD, consider who might be the best person to work with the DPW staff. DeFant: the SCC should provide a written response to our communications. Kahan volunteered to revise a draft email to follow-up on the concerns. The revised draft will be reviewed at the 1/13/22 meeting.

DeFant commented on the HD's suggestion of creating a new stormwater bank cut above South Brook, which may be within the 200' Riverfront Resource Area. DeFant will send a brief email letting the HD know they need to communicate with the SCC if they are doing a new cut within 200' of South Brook. David suggested asking the HD to share its thoughts about next steps. Jaques noted that the HD has a narrow window of time in which it can do any repairs to the stormwater basins near South Brook before the ground freezes. DeFant thinks they should do the suggested repairs to the basins.

NOI application for 31 Lakeview Rd/Salvador, demolition and house rebuild: Site visit is scheduled for 12/16/21. DeFant noted that the applicant's engineer, Chris Stoddard, emailed the Chair that he was going to be providing some additional materials for the NOI application. DeFant inquired when those might be arriving. Salvador indicated the materials would come in the next couple of days. DeFant asked if he planned to provide the information required from MassDEP's review of the project. Salvador said his engineer would be providing the information. DeFant wondered if the SCC should hold off on a site visit until all the materials have arrived in case there are questions. DeFant wondered if the SCC had other requests for materials. DeFant had asked Salvador for a narrative of the phases of the project, where materials would be stockpiled, where would heavy equipment go, how will the property be planted to revegetate, etc. Jaques reminded the SCC that the NOI should not be discussed in any depth outside of the Public Hearing.

Continued Public Hearing for ZD-37 Carver/ Montague ANRAD: Firstenberg from TRC reported that she just sent an updated plan set and calculations to the SCC today in response to feedback from Stockman and Associates (SA). DeFant: the SCC has not had time to review the new documents and will need to have Stockman review the update and let the SCC know if the plans are now sufficient. Firstenberg asked if the SCC could ask Stockman to review the new plan set and provide feedback before the next Public Hearing date. TRC would like to close the Public Hearing and is looking to know whether there is more information that needs to be submitted. DeFant: Stockman in her written comments indicated there was some evidence of a non-delineated wetland along the northern border of the project area. TRC's response was that it did not have access to the abutters' property. Firstenberg shared the locus map with the SCC and identified the areas in question. Firstenberg noted that the delineated wetlands W-MBF-10 and W-GR-3 continue to the north onto an abutter's property, and it appeared to east on Plan Sheets #4 and #5. When the site was delineated with Stockman, it was observed that the whole forest area is Eastern Hemlock and might be a wetland area. Delineation would require soils delineation which was not conducted. Stockman noted this in her 2020 report as well. Firstenberg: there are different options that have been discussed to address this issue, the SCC could conservatively require TRC to show a buffer zone along the edge the wetlands delineations are conservative in terms of the buffer zones, this area is also subject to review by other boards, those buffers may or may not adequately DeFant: are you referring to the zoning setback requirement? Firstenberg: yes, it is up to the Commission to address that, it could be conditioned that there can't be anything within a certain distance of the property line. Stone: for the public record, might be good quickly go through Stockman report. DeFant: my question was whether we should hold off on that until Emily Stockman is here if we have questions. Firstenberg: this is an old issue; we cannot go on other people's property and have not been able to get permission to go on those properties; ideally, we would get to delineate these wetlands so that we can set the buffer zone; we cannot force permission. DeFant: what did TRC do to ask for permission? Firstenberg: I must ask the applicant what they did. DeFant: could you get the SCC the documentation of this effort for due diligence? Firstenberg agreed to investigate it. Fontes stated he is an abutter to this project area; he has questions about the wetlands mentioned in Stockman's report in item #4; that wetland boundary should be delineated; all diligence should be made, including getting permission from abutters; this is important; future projects could affect our wells; he encouraged the SCC to pursue this. Fontes: I want everything to be done to make sure my water is safe. Jaques: I was on the site visit; the simplest solution discussed then was to put a 100' buffer zone along that boundary. Jaques thought this had been agreed upon.

Firstenberg: this was not formally requested; the ideal would be to delineate but it requires permission from 2 abutters. Jaques: easiest thing would be to add 100' buffer to the boundary; Firstenberg: this is not particularly fair because we have some flags showing the wetland goes offsite; more fair to take that distance and say we can subtract that. DeFant expressed concern about the comment about a 100' buffer not being fair; she understood Firstenberg to be proposing it as a reasonable option and doesn't understand why Firstenberg is indicating it is now unfair; Firstenberg: I was recapping the range of options that were discussed with Stockman and Jaques in the field; the most accurate option is to delineate the wetland; the most conservative option is to conserve 100' buffer; typical to look at the information you have and do an educated guess; I was only giving you the two extremes, there are options in between.

DeFant: one option is the continue the Public Hearing to do further delineations with soils testing and maybe request access again from the abutters; the 100' buffer option seems more expedient. Jaques: it would be difficult to do this delineation during the winter. Firstenberg: I would like to hear from the other Commissioners about how they feel about that; we also need permission from property owners; a lot of landowners would not want to have flags on their properties; they don't want to acknowledge they have wetlands on their properties because that puts restrictions on them; usually when we reach out we are told no. DeFant: We don't know really what steps were taken or what abutters might want in this case. Willson: the SCC should see documentation of the efforts made to seek consent from abutters; I would accept a 100' buffer zone but it appears that is not being offered; the SCC deserves to have this area delineated; it may be tricky if the abutters are not cooperating; the SCC could also do a site visit. Kahan: that is what I was thinking; I don't know how obvious this wetland area is; a full delineation on the abutters' properties would be optimal; I would hope the abutters would cooperate; it would be good to do a site visit. Firstenberg: I will have to discuss this with our clients. Jaques: what is the zoning setback requirement for a Special Permit? Firstenberg: I don't know, it might be at least 50'. DeFant: I am not comfortable substituting zoning setback for wetlands delineation; ZBA can grant variants on zoning requirements; the wetlands delineations are locked in for 3 years. Jaques: if the zoning setback is 100', perhaps the applicant would be willing to just add the 100' buffer zone. Harrington concurs with the other Commissioners. David: I agree; we need to have this area delineated. Firstenberg: we walked the whole property edge when the site work was done; we know the wetland is off the property. Jaques: is it a problem for the applicant if Stockman is not available until the spring? Firstenberg will discuss the issue with applicants. If they agree, TRC would submit a revised site plan. DeFant: Emily Stockman is available to participate in meetings over the winter but cannot do any field work until the spring. Firstenberg: we would not want to be doing any site work in the winter anyway. Wakoluk: the plot plan does not have contours; it is helpful to have the entire map with topography; would be helpful to see the DEP GIS wetland layers to see the extent of these wetlands. Firstenberg: the new plans submitted tonight have the contours added per DeFant's prior request; the DEP maps don't show any wetlands in the area being discussed along the northern boundary. Weizenbaum asked where Firstenberg got the information that abutters don't want flagging on their properties. DeFant pointed out that we don't know whether it is the case that abutters have not given consent. Firstenberg clarified that it is a common reason, but she is not the person who communicated with the abutters. Weizenbaum: you didn't say it was a common reason, you said it was the reason, but it sounds like you don't what their reasons are. DeFant: Maria will provide information to the Commission about what steps have been taken to obtain abutters' consent. Weizenbaum: I am just concerned about the negativity of the comment about abutters. Fontes: as an abutter concerned about well water quality, expediency should not be a consideration, consideration should be to do the utmost to protect water. Fontes called for a full delineation of the wetlands because they are connected to groundwater. DeFant polled the Commissioners about their preferences for next steps. Willson would like to see the applicant try again to get abutters' consent and to provide the actual documentation of the efforts; would like to have Stockman be a part of the discussion and hear what she observed before deciding what kind of buffer is needed. Kahan: our job is to protect the wetlands; best course would be to do the delineation; if it is not possible, then discuss a more conservative buffer offset. David would like the applicant to try to do the delineation and share why they cannot do so before going to a secondary solution. DeFant proposes tabling this discussion until the January 13 meeting so that

Firstenberg can provide more information and the SCC can meet with Stockman. DeFant suggests that TRC provide written documentation of steps taken to contact abutters and make a proposal to the SCC for handling this area. Jaques: We've been focusing on northern boundary, is the same also true on the southeast corner on Sheets #24 and #25? Seems like same issue; wetlands go off the property. DeFant: was there any indication of wetlands off-site? Could also be true for #26, #29, #7, and #8. Firstenberg: only ever been a question about #4 and #5 because we could see from the property line that the wetland was turning; #24 and #25 wetlands follow a break in slope, and it is obvious it continues south; #4 and #5 was a question because we could see it turning but don't know how far away it from the property boundary. Jaques: how would you know that on #24 and #25 if you can't go off the property line? Firstenberg: we could see the break in slope; it would be clearer if you used the map with contours that we just sent. Jaques: it is challenging getting maps at 5:30 before a meeting. I hope you can acknowledge that. Firstenberg acknowledged this and that the Public Hearing needed to be continued because the SCC had not had enough review time. Firstenberg asked to screenshare the maps and pointed out areas of slopes; the steep slopes to the east and west indicate the wetlands do not border on the property line. The area along the northern boundary does not have any clear break in slope to indicate a change in the wetlands; this area would need to be delineated via soils analysis to determine the boundaries. The W-GR-3 wetland goes off-site to the north, but it is assumed it is large enough and to fall under the WPA jurisdiction, it must connect to a body of water somewhere to the north to be considered a Bordering Vegetated Wetland. Originally, TRC thought it was an isolated wetland, but it was expanded upon review by Stockman. DeFant: the SCC appears in agreement that we would like to see this area clarified further, or absent that, consider adding a 100' buffer to Sheets # 4 and 5. DeFant voiced that she is aware that what the SCC is asking could be time consuming and costly; the SCC is trying to be reasonable but also balance all of the concerns. Fontes inquired about item #11 in the Stockman Report about the need to calculate the square footage of wetlands W-GR-3, W-GR-16 and W-G-17, has this been assessed? DeFant: TRC sent the square footage for some wetlands today but there wasn't enough time to distribute it. Firstenberg: The W-GR-3 wetlands are more than 1,000 s.f. so they are being given a buffer zone and are protected under the town wetlands protection bylaw. TRC assumes these wetlands also fall under the state WPA regulations. DeFant summarized what the SCC is looking for at the next Public Hearing: documentation of efforts to get consent from abutters; asking TRC to provide a plan to either pursue further delineation, weather and time permitting and with our 3rd party reviewer present or redoing the delineations on Sheets #4 and #5 to add a 100' buffer zone. Firstenberg: if we do end up adding the buffer zone, I don't want it to be construed that we not doing things well; this approach is more conservative and more protective; more land is being protected with this route. She wants the public to understand this. If the applicant can wait until the spring, she understands the SCC's preference is to have the area delineated. **David moved to continue the Public Hearing for ZD-37 Carver/ Montague ANRAD to Thursday, January 13, 2022, at 8:15 p.m. DeFant seconded. Approved by unanimous vote, 5/0.**

Follow-up discussion about 11/17 meeting with Town Counsel and Select Board regarding South Brook Conservation Area: DeFant noted that that meeting was personally challenging for her. It did not feel collegial or appreciative of the work the Commission has been doing, especially without a Land Use Clerk. She was uncomfortable with the number of comments directed at her personally. The Town Counsel called DeFant the next day and apologized for the

process at the meeting. DeFant's understanding from the conversation with the Town Counsel was that the Commission was correct in its original assumptions about South Brook Conservation Area. The SCC does manage the South Brook Conservation Area and the Town Beach Conservation Area. Town Counsel would like to see some research conducted to learn how the original 1965 grant application was worded to see if the original intent was purely for conservation or also for recreation purposes. She also wondered about who funded the original capital improvements at Town Beach. Town Counsel suggested there might be a mechanism to remove the boat launch from the protected conservation parcel since it is not in keeping with the state regulations regarding only passive recreation uses. The SCC has the authority to put up signage on the conservation properties. Town Counsel expressed concerns about making sure the signage included accessibility language about handicap access. Harrington: it felt like people were yelling at the SCC in that meeting. Willson: DeFant sent a letter to the Select Board about the Open Meeting Law issue, since they did not circulate the agenda with the SCC. DeFant has inquired how a list of topics was sent to the Town Counsel and the Select Board for the joint meeting, but not to the SCC. This issue is still unclear. Wakoluk expressed concerns that he and Stone were not allowed to comment at the meeting when their role was being discussed. He expressed concerns about the process, including the Town Clerk being allowed to bring in an issue that wasn't on the agenda. He expressed concerns that the Town Counsel advised the SCC not to communicate with state officials when the SCC is tasked with administering the state wetlands law. He noted that the meeting was not collaborative. He felt personally devalued in the meeting. Willson expressed concern that some things that were said by the Town Counsel that were incorrect in terms of state law and the Wetlands Protection Act. Kahan expressed concern that the SCC didn't know what was going to be on the agenda until it was presented; it didn't allow the SCC to be prepared so that accurate information was given out in a public meeting; it would be good to correct things in the minutes; meeting didn't come across as professional; we are all volunteers doing the best we can. DeFant reported that she asked the Select Board in writing to allow the SCC to review the draft minutes before they were approved, since it was a joint meeting with the SCC, but received no response. The minutes were approved without SCC input. She suggested the SCC could consider requesting to add an addendum if any errors were found. David wondered about what recourse there is. DeFant: you can talk to the Select Board; the SCC can amend the minutes and post as the SCC minutes. DeFant will circulate the minutes to the SCC. She expressed concern that the process at the meeting was not accessible to the public as little explanation or context was provided for much of the comments from the Town Counsel. DeFant noted that the SCC is not a purely advisory board, as are some other town committees. It has a regulatory function that cannot be solely political. DeFant: the SCC should absolutely collaborate with other parts of town government, but it should not sacrifice its independence. DeFant has not removed the signs. They do not say that handicap vehicles are allowed. Kahan: state and federal properties have signage and none of them include all of the special permit conditions that exist; signs prohibiting unauthorized motor vehicles are widely used and accepted; folks needing special accommodations would need to contact the landowner; from his professional experience in land management and common sense, the approved signage was appropriate. David: I agree; assumption is that disabled individuals can access public land; she doesn't know what kind of motorized handicap vehicles would be appropriate for hiking trails. DeFant: under ADA, we are not required to make all hiking trails accessible, only required to make reasonable efforts; in the absence of a posted accessible trail, a disabled person needing an accommodation would need to make a request. Stone: I don't see signs with that level of

detail on conservation land. It might be helpful to look at what Land Trusts and other communities do to post their conservation properties. Maybe additional language could be added. Motor vehicles are still going into South Brook Conservation Area. DeFant indicated she has seen evidence of ATV tracks recently. David: signage should be clear so that someone does not mistakenly assume a trail is accessible when it is not. The Commissioners agreed to maintain the signage as now posted for the time being.

Proposed Pelham Hill Road Kestrel Fund land acquisition: The SCC received a draft CPC Determination of Eligibility form developed by DeFant, Jaques, and the Kestrel Land Trust (KLT).

Review of Open Space Plan Action Items for SCC: The SCC reviewed action items for the revised Open Space Plan. Several items that involved the SCC's mission were not assigned to the SCC. DeFant will send the Open Space Committee the feedback and revisions. There is a public forum next week.

FY21 Annual Report update: Harrington is working on a draft. Jaques will be assisting. DeFant wondered if she needs any help. Jaques suggested appointing a secretary to write the Annual Report and correspondence; I recognize that DeFant has been doing this but it is also good to share the burden. She used to do this. Draft report will hopefully be finalized at the 1/13/22 meeting. David wondered if a non-Commissioner volunteer could take minutes. DeFant: is it OK if we can't approve the Annual Report until January. Linda Scott is aware.

**Motion to adjourn: David; Harrington seconded. Approved by unanimous vote, 5/0.
Meeting Adjourned at 9:16 p.m.**

Next Meeting: January 13, 2022 @ 7 p.m.

Documents Used:

- Agenda
- DEP comments on Salvador/31 Lakeview Road NOI
- Draft letter to Select Board
- Site visit reports from 69 Schoolhouse Road, 585 Wendell Road/Levine, 410 Wendell Road/Vertex; Wendell Road HD
- Revised Montague/Carver ANRAD Plan Set
- Stockman & Associates Peer Review Report
- Draft CPC Determination of Eligibility form-Pearson Land Acquisition
- Draft Open Space and Recreation Plan Action Items

Respectfully submitted by Miriam DeFant, Chair, 1/14/22