

Shutesbury Select Board Meeting Minutes  
April 5, 2021 Virtual Meeting Platform  
Joint Meeting with Planning Board & Historical Commission

Select Board members present: Melissa Makepeace-O’Neil/Chair, April Stein, and Rita Farrell

Staff present: Becky Torres/Town Administrator; Linda Avis Scott/Administrative Secretary

Planning Board members present: Deacon Bonnar/Chair, Jeff Lacy, Steve Bressler, Linda Rotondi, Robert Raymond, Michael DeChiara, and Nathan Murphy

Historical Commission members present: Henry Geddes/Chair, Miriam DeFant, Mary Lou Conca, and Greg Caulton,

Other Town Official present: Town Counsel Donna MacNicol, Kevin Rudden/Administrative Assessor, Town Clerk Grace Bannasch, former Town Clerk Susie Mosher, Mary David/Conservation Commission,

Guests: Attorney Michael Pill, Don Ogden, Eric Stocker, Diane Jacoby, Ken Lindsay, Seal Madeline, Leslie Cerier, Al Hanson, Leslie Bracebridge, Penny Jaques, Rema Loeb, Robert Seletsky, Priscilla Lynch, Laurel Facey, Steve Schmidt, Marina Gurman, Dina Stander and other unidentified participants

Amp Energy: Andrew Chabot, Camille Littlefield, Michael Larkin, and Evan Turner/consultant

Makepeace-O’Neil calls the Select Board to order at 5:39pm.

Bonnar calls the Planning Board to order at 5:38pm.

Geddes calls the Historical Commission to order at 5:38pm.

Section 8.10 Ground Mounted Solar Electric Installations:

Makepeace-O’Neil: the purpose of the meeting is to talk about the solar bylaw (Section 8.10) with support from Town Administrator Becky Torres and Town Counsel Donna MacNicol.

Torres suggests the Planning Board begin by explaining how the 2020 amendments were determined to be necessary. Michael DeChiara/Planning Board: to do so, would be defending what was approved during the 2020 annual town meeting; it may be appropriate for the Select Board to articulate their concerns and have the Planning Board respond. Makepeace-O’Neil: the purpose is not to backtrack, but to understand what prompted the changes, i.e., a simple rundown on the process prior to annual town meeting.

Jeff Lacy/Planning Board: without a solar bylaw, the (large-scale) Wheelock solar project was reviewed as a special permit under “light industrial”; as a result of that process, the citizens’ and Planning Board’s proposed solar bylaws were developed, the two proposals were reconciled, and the final version was adopted by town meeting. Lacy: subsequently, the Planning Board realizing that other sites could be eligible for large scale solar projects as well as learning about case law, decided to create the comprehensive bylaw adopted at the June 2020 annual town meeting; Pelham then adopted a similar bylaw. DeChiara: other municipalities are considering solar bylaws; in the Pioneer Valley Planning Commission’s report (“Solar Best Practices Guide”), Shutesbury is cited as having a model bylaw.

Makepeace-O’Neil: what are the challenges the bylaw might face, how restrictive is it? Farrell: we have been told it is very restrictive and could be challenged; an explanation of recent relevant

case law and where Shutesbury might be vulnerable to litigation is needed. Stein concurs with Farrell and Makepeace-O'Neil.

Town Counsel Donna MacNicol: the issue, as the Planning Board is aware, is whether the bylaw can be challenged under the Dover Amendment, Chapter 40A Section 3 which restricts regulation of certain uses including solar projects. MacNicol continues: solar projects can be subject to reasonable regulations; there are cases in the Land Court that are considering whether solar bylaws, in effect, restrict solar developments; judges are beginning to question, if overall, given the land uses in a town, solar arrays are so restricted they are impractical. MacNicol cites documents provided by Attorney Michael Pill and notes that restricting access through the Rural Residential district into the Forest Conservation district is one place that Shutesbury's bylaw could be challenged; under the law, if you have an access to a "use", the access is the "use" therefore, the Planning Board is proposing an amendment that states if use is allowed in the Forest Conservation district, access via the Rural Residential district is allowed. DeChiara clarifies and MacNicol confirms that the amendment will be to the Use Table portion of the Zoning Bylaw. Per MacNicol, Amp had four other issues each of which can be addressed either by a waiver or may no longer be relevant; one other Amp concern is the 1,000 foot maximum driveway length because for at least one site, Amp wants a 3,800 foot driveway from the access road; concerns about additional length include drainage and effects on abutters. Lacy concurs: the Planning Board will make the change to not restrict access via Rural Residential which was never intended; the driveway length limit has been in the bylaw since the 2008 revision; its purpose is to allow privacy but not to penetrate too deeply into the large forest block that characterizes our town; a 1,000 foot limit is a good thing to have however a Zoning Board of Appeals variance is a possible outlet.

Andrew Chabot/Senior Project Manager for Amp Energy introduces himself and offers an apology that the litigation issue was raised and notes that is not what Amp wants to do; access was their main issue and their goal is to work with the Town to figure out what works. Chabot is based in Massachusetts and is willing to provide Amp's perspective; there are engineers on his team. Evan Turner: Amp decided that Shutesbury should have its own project manager; Chabot is a solar veteran and will be Shutesbury's point of contact.

MacNicol: the language in Section 8.10-4 A.3 is concerning because the use of "(cultural or land affiliation) to the Shutesbury area" has some vagueness to it; there is strong support in the bylaw for protecting historic resources/landscapes. Miriam DeFant/Historical Commission refers to the report "Historical Preservation and Solar Development in Shutesbury" posted on the Historical Commission's webpage: the report discusses an interpretation of Town bylaw that involves archeological management criteria and consultation with an expert. Per DeFant, there are two federally recognized tribes in Massachusetts and Connecticut and one in Rhode Island; in addition, there are state recognized tribes that have ties to this area; there is a tribe in Wisconsin that originated in western Mass; these tribes are composed of descendants from this area. DeFant continues: the tribes coordinate with one another to determine which tribes will be involved with a site; the experts can easily shepherd a developer through the process. DeFant to MacNicol: town boundaries are not relevant to tribes; the process is to consult with the Tribal Historic Preservation Officer (THPO) of the appropriate tribe with a claim to this area. DeFant explains that earlier on 4.5.21, three members of the Historical Commission met (via Zoom) with Cinda

Jones, other Cowls staff and a (ceremonial landscape) researcher; as a result of this meeting, there is a proposal that still needs to be fleshed out; Cowls will need to coordinate with Amp Energy on the tentative plan to consult with an expert followed by a THPO to assist with interpretation; the report of the meeting is posting on the Commission's webpage.

MacNicol: regarding the term "Shutesbury area", the land subject to a permit is a finite area. DeFant agrees: there is no problem with a developer beginning consultation early in order to resolve potential difficulties and show their process in the application. MacNicol: it needs to be clear that a cultural landscape in Wendell would not affect a project in Shutesbury. DeFant: a series of stone landscapes in alignment with one another and other factors could be relevant. DeChiara: the language in this section is specifically about notification, i.e., invite wide and regulate specifically. MacNicol: the land (proposed project site) itself is looked at during the permitting process. MacNicol to Stein's question: there is no case law relative to solar projects and ceremonial landscapes/archeological sites; the Mass Historical Commission and local Historical Commissions are tasked with protection of archeological sites; there is a need to ensure the bylaw is not over reaching and the focus is on a specific site. DeFant refers to the Commission's report: the bylaw mimics what federal agencies require developers to comply with under Section 106 which is considered legal and reasonable on the federal level so it is hard to believe it would not be legal on the local level; options for approaching mitigation are offered in the report.

Stein: the proposed bylaw change gets us where we should be; Amp's not looking toward litigation is welcome. MacNicol: the Town is seeking a thoughtful balance on protecting resources and values along with financial concerns; in addressing Amp's concerns and sorting through the bylaw, access was the problem area; the rest of the solar bylaw is strict and that is what the town supported.

Torres reads the following sentence from Section 8.10-4 into the record: "Locations of all known, mapped or suspected Native American archeological sites or sites of Native American ceremonial activity" and asks if the word "suspected" is broader than it needs to be. MacNicol: "suspected" is broad and could be challenged for vagueness, however, the term is part of the art of archeology and is typical of its realm. DeFant: regarding "all known, mapped and suspected", the reason it makes sense is that to say "this is" may be a step too far and the site has to be interpreted by a tribal expert. DeChiara: due diligence cannot be done without knowledgeable parties creating an inventory.

Turner appreciates all who are present and for getting back into the bylaw before permits are submitted; with more clarity, there is a way through which will require work and coordination; there is a valuable way to do this (solar development) in forested towns. Chabot thanks those present for looking into the issues especially regarding access and making inroads in the process; he is willing to answer questions as they come up and will provide Torres with his contact information.

Farrell asks about the Planning Board process for drafting an amendment. Lacy: MacNicol is working on the one sentence access amendment; the Planning Board needs to determine where it will be inserted in to the Zoning Bylaws; once the Select Board receives the proposed

amendment and sends it back to the Planning Board, the Planning Board will set a public hearing date. DeChiara: the Select Board already returned the associate member amendment to the Planning Board. Deacon Bonnar/Chair: Planning Board meetings, as needed, will be scheduled to accomplish the process. DeChiara to Torres' question: the amendment will be to the "Use Table" not within the solar bylaw.

Kevin Rudden/Administrative Assessor: the Assessors will hold off on recommending a change to solar bylaw; a project like Amp's will benefit the Town either by direct property tax or via payment in lieu of taxes (PILOT); in the final climate change bill, residential solar remains exempt, however taxing large scale solar has been codified. Torres affirms the importance of this legislation.

Makepeace-O'Neil to Chabot's question about communication: email sent to [selectboard@shutesbury.org](mailto:selectboard@shutesbury.org) is received by all Select Board members and the Town Administrator. DeChiara: application questions need to be directed to the Planning Board. Lacy notes that the Planning Board will provide education and guidance prior to application submission, i.e., how the bylaw works and the application process.

Torres encourages committee members working in a group of two or more to form a subcommittee and post their meetings per Open Meeting Law. MacNicol: technically, to work on a project, a subcommittee needs to be appointed by the chair. MacNicol notes that she is most concerned about serial email communication and encourages care to not do so; if a group is acting like a subcommittee, post meetings and follow Open Meeting Law to avoid a challenge when you are doing important work. MacNicol to DeChiara's question about the size of a subcommittee, i.e., two individuals from a seven member board: Lacy and DeChiara working on a bylaw amendment with Town Counsel were not a subcommittee. Susie Mosher/former Town Clerk: as per Open Meeting Law, the size of a subcommittee has nothing to do with quorum, it has to do with discussing matters pertinent to a committee; if the individuals are doing the work of the committee, they are a subcommittee. Grace Bannasch/Town Clerk: a sub-quorum cannot make decisions on behalf of the community; the community needs to know the process. Attorney Michael Pill: this debate makes MacNicol's point, if you post, there is no issue, you err on the side of caution because any citizen can make a complaint. DeFant: what about situations where members went on a fact finding meeting to talk to an outside party to bring back information? MacNicol recommends posting; fact finding is not equivalent to a site visit. Bannasch: if you cannot provide a Zoom meeting, minutes of the meeting will suffice. It is noted that if Zoom is not available, a conference call could be used. Stein notes the need to be as open as possible even if the process takes a little longer. MacNicol: Lacy drafting an item and sending it to Town Counsel for review is not a violation even if DeChiara also sees it. MacNicol agrees with Pill, Mosher and Bannasch on the need to post. Lacy: principally, when there is an outside assignment, one person takes it on and may speak with Town Counsel and may want to bounce off another member; this is reasonable and the outside work will be brought to the Planning Board for discussion. Stein: if a Select Board member drafts an item, all comments go directly to the Town Administration; there is no exchange between the members. Lacy notes the difference in the size of the boards. Bannasch: in order to function, conversations need to be on the public's behalf. DeChiara: quorum determines if you can make a decision or not. Bannasch: content trumps numbers. MacNicol: the Open Meeting Law is not supposed to stop work from getting

done; all the actual Planning Board work is done in public; if you are tasked and come with the final version to the Planning Board, it could be a violation; if a red flag is raised, post. MacNicol to DeChiara: there is plenty of time between now and annual town meeting for the Planning Board amendment process. Bannasch is available to talk through concerns/questions with board/committee members. Makepeace-O'Neil: if there is any question, establish a subcommittee. Bannasch and Mosher emphasize the need for board/committee members, especially new members, to review the Open Meeting Law video posted on the Town Clerk's webpage.

Torres notes that Farrell left the meeting prior to adjournment. Makepeace-O'Neil thanks everyone present for attending.

At 7:07pm, Lacy moves and Murphy seconds a motion to adjourn the Planning Board. Roll call vote: Lacy: aye, DeChiara: aye, Rotondi: aye, Murphy: aye, Bressler: aye, and Bonnar: aye. Raymond is no longer in attendance. The motion carries.

At 7:07pm, Geddes adjourns the Historical Commission. Roll call vote: DeFant: aye, Caulton: aye, Geddes: aye, and Conca: aye by raised hand; the motion carries.

At 7:10pm, Stein moves and Makepeace-O'Neil seconds a motion to adjourn the Select Board. Roll call vote: Stein: aye Makepeace-O'Neil: aye. Farrell is no longer in attendance. The motion carries.

Documents and Other Items Used at the Meeting:

1. *Town of Shutesbury Zoning Bylaw* Section 8.10 Ground-Mounted Solar Electric Installations
2. 11.4.20 letter from the Office of the Attorney General "Shutesbury Annual Town Meeting of June 27, 2020 – Case #9829
3. "Report to Shutesbury Historical Commission – Cows, Inc. Zoom Meeting on Solar Permitting and Historical Preservation" by Miriam DeFant
4. 4.5.21 email from Donna MacNicol "Report on Meeting with Cows"

Respectfully submitted,  
Linda Avis Scott  
Administrative Secretary