WEST TISBURY

CONSERVATION COMMISSION

MINUTES OF MEETING

November 29, 2021

The meeting was held via Zoom in accordance with the Governor’s order suspending certain provisions of the Open Meeting Law, G.L. c.30A sec.20. Public participation will be via remote participation (Zoom) pursuant to M. G. L. Chapter 20 of the Acts of 2021.

**Present:** Geraldine Brooks, Whit Griswold, Angela Luckey, Donna Paulnock, Peter Rodegast and Michael Turnell

**Absent:** John Brannon

**Staff Present**: Maria McFarland

**Also present for all or part of the meeting**: Robert Doane, Cheryl Eppel, Ben Hall, Richard Hennessey, Richard Johnson, Chris Lucas, and Scott Smyers

**Map 31 Lot 48**: a public hearing under the requirements of G.L. Ch.131 § 40, as amended, and West Tisbury Wetlands Protection Bylaw and regulations, to consider aRestoration Plan submitted in response to an Enforcement Order issued by the Commission to Nancy B. Eppel individually, and as Trustee of the Nancy B. Eppel Revocable Trust u/d/t dated October 31, 2014, and Cheryl C. Eppel for a wetland violation that took place on property located at **21 New Lane** owned by Robert A. Doane and Cynthia L. Doane, Trustees of the Irrevocable Living Trust of the Doane Children u/d/t dated May 3, 1989 as amended. The quorum for this public hearing which began on October 12, 2021 is Angela, Donna, Geraldine and Peter.

The following documents are noted for the record:

* Map 31 lot 48: Revised Restoration proposal and plan from Oxbow Associates dated November 4, 2021
* Email from David Paulson of NHESP dated November 5, 2021
* Map 31 Lot 48: Email from Richard Reiling dated November 2, 2021 transmitting a copy of lawsuit filed by Ben Hall Jr re: *Robert A. Doane et al. v. Nancy Eppel et al*. presently pending in the Dukes County Superior Court (Civil Action No. 2174CV0030).   Note: To date, the Commission has not been formally served with this complaint.
* Map 31 Lot 48/Email from Ben Hall dated November 4, 2021
* Map 31 Lot 48/ Letter from Ben Hall dated November 8, 2021
* Map 31 Lot 48/ Letter from Lucas Environmental, LLC dated November 8, 2021
* Letter from Ben Hall dated November 29, 2021.

No testimony was taken at the November 9 meeting because of an error in the link for meeting held via Zoom.

Whit called on Scott to go over the proposed changes to the restoration plan that were discussed at the October 26 meeting and detailed in the draft restoration plan dated November 9, 2021.

The current proposal is to plant one Cherry tree, two cedar trees and one beech tree (approximately 1” diameter/ 6-8 ft high and 18 native shrubs at least 18 to 24 inches in height and /or in one-gallon containers. Shrubs would be concentrated in the northern area above the yellow line shown on the plan. The proposed location of the trees takes into consideration the open canopy. In Scott’s opinion, the best canopy is closer to the edge of the wetland. the soil surface is stabilized by the existing root structures.

 Shrubs will include a mix of sweet pepperbush arrowwood, high bush blueberry, and swamp azale.

Soils will be hand dug, placed on a tarp or plywood and reused around the new plants. No new soils will be imported. Staff from Oxbow Associates will monitor the work and submit a progress report within 10 business days of completion and annual reports for two growing seasons by October 31.

Issues Discussed:

Trees: After a very lengthy discussion about the tree selection all parties agreed that t

Michael recommended that only cedars be used because they are native, like being in the sun and will provide screening. In Mike’s opinion, there are so many cherry trees they are almost invasive, and the Oak trees would have to be small when planted. If oaks are used they should be White Oak. Mike did not think the beech tree was a good choice because nothing grows under them and the roots are shallow. Scott said his recommendations were based on the existing surrounding trees and the property owners desires.

Anglea said evergreens are fine. She would include a white Oak.

Peter said he agreed with Dick Johnson’s prior assessment that there are too many Cherry trees in the area.

Robert Doane asked what the ecological reason to not have a black Oak. He would like to have

Angela responded that Beech trees can take over so it doesn’t make sense to plant another one is this area.

Contrary to the board’s request that no new vegetation be planted within 10 feet of the top of the bank/ edge of wetland flagging, Scott argued that the it was the only area where the tree canopy was open enough.

There are Eastern Red Cedars in this area and according to Scott, at least one is was definitely cut.

Scott asked why Dick Johnson opposed Black Cherrys but is ok with poision ivy. . Dicik commented that a holly would be fine but if there were no holly’s removed. No beech trees were removed and there is one large beech in the this area.

Maria reminded that Mike brings many years of landscaping experinces and that posison ivy is a native species.

After some back and forth about the benefits of

Peter recalled that the board asked that there be no planting within 10 feet of the top of the bank.

Scott said the bank is close and is the best place for sunshine. Photos of the area were shown.

A photo of Mike standing approximately 10 feet from the top of the bank shows a fair amount of open space. Scott said he would prefer to have the flexibility to plant where he sees fit. Maria asked why there is a need to plant trees near the top of the bank where none existing before.

Scott replied that they are trying to jump start the ecosystem here. Again the photos were looked at

There is some disagreement about how dense the vegetation along the top of the bank was.

Michael asked if anyone had been to the site since the October site visit the Commission did. Given the warm Fall weather, he said it is possible there has been more regrowth. He noted that the root structures of what was cut remains and will refurbish.

Whit asked the board if, given the delays in approving this and the time of year does the board want to revisit the timing of the planting. Members did not.

Mike asked Scott to confirm the size of the trees. For the Oaks they will be the size already stated. For the Cedars he was vague. He wants to consult with his client. They settled on 4- 6 feet. Mr. Doane said he was ok with whatever is chosen as long is it replicates what was there as long as it is ecologically ok. He said he was ok with the cedar and oak choice but he would prefer to exactly what was removed replaced.

Scott confirmed that they will go with 2 white oaks and 2 cedars. The combination of shrubs can be from the submitted list and the size.

Public Comment:

Ben asked about the quorum. Maria explained that the quorum count began with the formal posted public hearing which was October 12. The quorum was stated at the beginning of tonight’s hearing.

Ben said there as been a lot of deliberation with no consideration to the Eppels concerns.

Ben stated that, in his opinion the mapping that has been submitted is insufficient in that it does show stumps of everything that was cut.

Ben stated that at the October 26 meeting the board made it clear that there should be no trees planted. Maria clarified that there was a discussion about no trees being planted but that there was no final decision made on anything related to this plan at that meeting.

Ben Hall continued to assert his claims on behalf of his client, Cheryl Eppel that the Commission should not make a desction on this restoration plan until his client has an oppputnity to have her experts view and prepare an alternative restoration plan. (The Enforcement Order does not require Cheryl or Nancy Eypel to submit a restoration plan; only the Doanes were required to do so.) Whit responded to Ben’s objections stating that he views Ben’s objections and argument that there was no way for representatives of the Eppels to submit their own restoration plan is a delay tactic.

Ben said he was on the site with the Insurance adjustor on August 5 and has taken numerous photos of the site over time from the Eppel property and that he only observed dense matting of green brier growing back. Whit replied that it would be almost impossible to figure out what was there without extensive work to remove the top soil. He disagreed that there is a desire to remediate the site to exactly as it was. Trying to remediate something that happened that was not a “ tragic rape of the land” but it was disturbed and we are trying to put it in order with a simple, straightforward plan. The board is trying to determine if this proposal is reasonable.

Ben responded that the board specifically invited the Eppels to submit their own restoration plan. Maria clarified that the EO says the Eppels “may” submit an alternative plan? But it was not required. For details of Ben’s statements, reference is made to the tape of this hearing.

Ben says the board can exercise its discretion as a quasi-judiciary authority to require the Doanes to allow the Eppels access to the Doane property. Maria said the board would need advice from counsel.

Ben said his client is being prejudiced by this proceeding and he stated his objections.

Scott replied to Ben’s comments about the lack of a plan that maps the stumps. He said it is a matter of scale. What is shown on the plan is the amount of area that was impacted by the mowing ( approximately 2, 600 square feet. ) They could have hung a flag on every single stem that was cut. Some would be saplings. It isn’t necessary. He gave the example of a wetland deliation. Typcially flags are hung every 30 – 40 feet not every two feet.

Scott said they provided a plan with an appropriate scale.

Whit acknowledged that Ben and his experts have been barred from the property but they could have stood at the border of the property and look and anyone with reasonable common sense could come up with some outline of plan.

Chris Lucas of Lucus Environmental, hired by Cheryl Eppel was present in place of Tom Liddy. He told the members that he could not speak to the details of restoration plan because he hasn’t been to the site. The notes his associate took at the October 26 meeting indicate that the board wanted all trees removed from the proposal, that shrubs be removed north of the yellow line and concentrated south of the yellow line. He advocated waiting until June 2022 to do any planting and reassess in September.

Whit explained to Chris that the board debated delaying approving a restoration plan until 2022 but decided to proceed.

Geraldine made a motion, seconded by Peter to accept the restoration plan as amended.

Discussion on the motion:

Richard Henessary, attorney for Nancy Eppel stated that he supports Attorney’s Hall’s statement about access to the Doane property to be able to prepare a comprehensive or competing restoration plan. He suggested that Town counsel could advise the board on requiring the Doanes to provide access to the Eppels. The Commission needs to understand the position of the Eppels. In his opinion this whole process is being dictated by the Doanes. To the extent the Enforcement Order contemplates some concenous on a restoration plan, the Eppels should be allow to submit their own restoration proposal.

Richard Reiling attorney for the Doanes, said that Nancy Eppel has made no effort to visit this site except one time in August. He claims that in August, both Nancy and Ceryl Eppel were granted access to the property in August to take photos or hire a consultant and did not. As noted by Ben Hall, the insurance inspection was done in August. The Eppels failure to hire a consultant has caused repeated delays. The restoration plan being proposed is modest and there is no reason not to proceed.

Told the meeting that Nancy Eppel visited the property in August and had access to the area in question then. Nancy Eppel has not identified an expert who might submit an alternative restoration plan but has been aware of this matter since it occurred in June 2021.

Ben stated that if the Commission allows the area in question to altered without giving the Eppels an opportunity to respond, they will have sponsored spoliation of evidence.

Chris Lucus requested that if there is going to be a timeline for the work to be done, we time line before they can start the work to see if the area naturally restores itself . Have it inspected in June 2022 with work to be done is September or October 2022. Whit replied that he would like to leave the timing of planting to the Doanes.

Maria summarized what details of the restoration plan to be approved by the motion: the proposed restoration narrative and plan prepared by Oxbow Assocates dated November 9, 2021 will be revised to show 2 white Oaks and 2 Cedars and 18 shrubs may be planted with no plantings done within 10 feet of the top of the bank

2 White Oaks and 2 Cedar trees of the stated sizes, 18 shrubs; quantities and sizes to be chosen by Oxbow Assocaites as detailed in the plan. No planting is permitted within 10 feet of the top of the bank Maria suggested the motion be more detailed to read that Time line a progress report

Peter suggested there be a site visit to check on the progress. Report on July 1.

The restoration plan proposes a progress

The members discussed the need for a start date. It will be left up to the Doanes and their consultant based on planting conditions. Ben asked that the start time be fall of 2022. No time to commence will be given.

Discussion on monitioring and reporting Members discussed requiring a time line, and monitoring. Scott stated that the plan already proves for a summary report within 10 business days of completion with monitoirn reports to be provide for two growing seasons( one per seaon by October 31.

Whit aadded that a site visit will be done after notice that the work is complete.

Maria explained that the approval will be in the form of the letter.

Administrative: The December 14, 2021 meeting will be held at 4:30 to accommodate a lengthy agenda for that evening.

The approval will be in the form of the letter.

Roll call vote on the motion: Angela -aye, Donna-aye, Geraldine -aye, and Peter -aye.

After the vote Michael asked if there will be any requirements for the planting. Maria answered that they are already detailed in the proposed narrative.

Scott will make the changes to the narrative and the plan. Scott will submit it and Maria will write an approval letter to be signed by the Chair.

There being no other business to discuss, the meeting was adjourned at 6:26 PM

Respectfully submitted,

Maria McFarland

Board Administrator