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November 29, 2021

VIA EMAIL: concomm@westtisbury-ma.gov

West Tisbury Conservation Commission
c/o Maria McFarland, Board Administrator
1059 State Road
P.O. Box 278, 2nd Floor
West Tisbury, MA 02575

RE: Map 31 Lot 48/ 21 New Lane / Doane /Potential Wetlands Violation by Abutters at Map 31 Lot 68.1 41 Pond View Farm Road/ Eppel / Ratification of Enforcement Order issued 9/2/2021 (EO) revised and reissued 9/14/21 / Public hearing on restoration plan

Robert A. Doane, Trustee et als v. Nancy B. Eppel, Trustee et als.
Dukes County Superior Court #2174CV00030 (the "Lawsuit")

Dear Members of the West Tisbury Conservation Commission (the "WTCC"):

I continue to reserve all rights of my client Cheryl Eppel in the referenced matters. On November 9, 2021, Richard A. Reiling, Esq. wrote to your Commission in regard to what he adverted were personal "comments on Attorney Hall's repeated attempts at delay, mistruths, overheated rhetoric." I do not understand why he felt compelled to write a letter to you commenting on actions on-going in the Lawsuit which are simply not germane to the tasks and the matter before you. That being said, and I apologize in advance for the need to respond to these attacks in the wrong forum, but if I leave the air fouled by his accusatory remarks, I fear his odious methods might convince you something wrong is occurring due to my continuing efforts to point out that it has been and continues to be the Doanes themselves who are unilaterally barring the Eppels from meaningful participation in independently defending themselves and participating in a meaningful manner in the EO matter. It is solely the Doanes who have been barring Cheryl and her expert team from conducting the very study needed in advance of any effort to prepare and suggest an independent plan to address the charges brought forth by the Doanes unilaterally to the WTCC on which the EO was solely based.

I therefore must set forth the truth of the matters that do mean something in the context of the proceedings before you.

I am sorry Mr. Reiling on behalf of and, apparently, as he indicates, at the directive of the Doanes themselves, has chosen to engage in attacks against now me personally before your Commission which have absolutely nothing to do with the proceedings before you. This effort smacks of the ongoing and continuing effort to discredit the facts about which you all became aware during recent site visits (when confirmed by both Lucas Environmental and myself repeatedly in submissions to you), to wit, that the Doanes have only recently and for the first time during the Eppel ownership of 37 Pond View Farm Road posted NO TRESPASSING signs which threaten arrest all over the Area of Concern and associated trails regularly used by the Eppels and their predecessors in title for many, many decades. It is the DOANES WHO ARE NOT COOPERATING in permitting any of the Eppel experts from entering the area in concern, despite email requests to Mr. Reiling that followed the Discovery Demand under Rule 34 in the Lawsuit, email requests which specified persons and dates, and sought a permissive access to avoid the threat of arrest, under which NONE of the Eppel experts would risk!

However, rather than showing any level of continued cooperation in the context of the WTCC EO matter (whereunder your own EO's have permitted the Eppels to submit their own plans, but have not provided any order or directive to the Doanes to order, as part of the EO, entry into the area to truly permit that to occur) the Doanes have chosen NOT to permit Eppel experts to enter the area without risk of arrest for criminal trespass so they could freely conduct and perform studies and mapping of vegetation which "permission" has NEVER been barred by the court.

You all, during recent site visits must have "noticed" how suddenly between September 25, 2021 and October 3, 2021 "No Trespassing" signs were posted in the area. This has occurred for the first time during the 35 years of Eppel ownership and frequent open and obvious entry and use of the area in concern (and other trails)). The Doanes' attorney has now stooped to the new low of trying to confuse you into thinking your body could not order the Doanes to permit the Eppels' experts like entry because of a court order in the Lawsuit that merely stays discovery of which the Rule 34 request was but a part.

Yet, in the EO procedure, my client has implicitly sought to have you collectively, as part of the EO process, order that the Doanes refrain from threats of criminal sanctions for trespass and permit unfettered access to the areas of concern during such times (now practically restricted to next June or July) as may be reasonably necessary to perform an independent study. The order staying discovery does not stop the Doanes from still stipulating to permit the same as it their own threat of criminal arrest and prosecution that bars the Eppels' experts entry for such purposes, a threat that they could drop, or you could Order.

Mr. Reiling asserts "[t]he Doanes, however, made it clear to Hall that the Doanes would work

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with Ms. Eppel in good faith to establish a reasonable time and scope of a site visit and stood ready to conference the matter in accordance with Superior Court Rule 9C.”

Given Mr. Reiling’s propensity to try to deceive decision makers (much as he is now trying to do in the Lawsuit), I MUST respond to this intent to deceive you. Mr. Reiling’s statement is a half-truth and intended to mislead you. Since the court order staying discovery and motions was issued (subject to leave of court), the Doanes have intentionally mis-used the court order as an excuse to not otherwise stipulate, outside of the context of the Lawsuit, but for purposes of the WTCC proceedings under the EO and in furtherance of the good faith efforts of the Eppels to have their experts enter the area and timely perform a study and map the area for vegetation to prepare a report of what was cut together with any other evidence that can be collected and to use that report to prepare a plan to address the issues of concern under the Wetlands Protection Act and the West Tisbury Wetlands Bylaw.

Clearly, the Doanes do not wish to have such an independent point of view because they are in an eager rush to be the sole authority on directing the process, and on gaining your confirmatory order within the EO to immediately plant in the area of concern, destroying the Eppels’ ability to establish what had been cut and where. I urge you to ask why that is the case, and consider this ulterior motivation in your deliberations.

The OxBow submissions utterly lack any effort to map the area detailing each species of bush that was cut and exactly from what location. Instead, they submit only proposed planting locations which are not thus based on any mapping of the evidence of alleged cutting. Such planting plans are thus NOT based on remedying any cutting, but are speculative plans to not replace what may have been removed, but solely to try to fill in the historic view of the pond from the Eppel house, maintained for many decades by Mr. Eppel himself and by his predecessors in title.

By allowing late planting and disturbing the area, the Eppels’ experts will not be able to document the evidence that remains with any certainty. Moreover, by delaying the entry by the Eppel experts, the leaf drop that has already occurred from the existing vegetation and re-growth of cut stems, has made it not impossible to perform an expert study because the leafing out is essential to that study. Until re-growth resumes in the spring until the summer, any effort at performing a study by Lucas Environmental is hampered to a level of near impossibility.

My letter to you of November 8, 2021 was intended to point out in part as follows:

Despite being barred by the Doanes from being able to enter without threat of arrest, Lucas Environmental (“LE”) will be submitting their own letter today which implicitly reminds the WTCC that if the WTCC were to allow planting, despite the fact that we've just had frosts in West Tisbury over the prior nights, this has effectively barred Cheryl from presenting a meaningful independent scientific study of the areas to support either her own “remediation plan,” or to support alternative findings by the WTCC.

...

See Letter to WTCC 11/8/2021 at Page 1.

It appears the Doanes wish their own presentations, determinations and plan be the sole basis for both the EO and for a remediation plan the WTCC has ordered under the EO, rather than to act cooperatively with Ms. Eppel and as the WTCC had implicitly believed was within the realm of lawful possibility in the EO, and to stipulate and allow the LE team entry to perform the study needed for us to try to study the area and develop a response plan from the point of view of Ms. Eppel. I would ask you to consider why they are doing this. As a lawyer, it is apparent the Doanes seek an end-run around legal rules of evidence entitled “spoliation.” Spoliation occurs when a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results. However, should the WTCC as part of an order, direct such destruction by way of a planting plan, the Doanes will have unfairly been possibly given a “pass” from sanctions for the obvious spoliation that will occur in the Area of Concern.

Thus, Cheryl’s expert team has unfairly been continued to be barred from entry into the Area of Concern by the Doanes continuing threat of arrest for trespass. No expert retained by anyone other than the Doanes thus can perform the studies needed. This is obviously an effort to undermine Cheryl’s ability to more meaningfully participate in not only your process but the Lawsuit is well. It is vitally important that your orders do not undermine Cheryl’s ability to be fairly and fully heard under the EO and in the Lawsuit.

Cheryl and LE had hoped to perform these studies and mapping before the recent frost events in the area which have potentially and likely altered the presence of leaf re-growth which would have assisted greatly in determining the types of vegetation that had been present throughout the Area of Concern and where it was located through a mapping process. The ONLY time an effective independent study can now commence is after leafing-out during the spring has had time to fully progress to a reasonable degree, that being in late June, 2022.

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My client respectfully submits that any order that would enable the Doanes' team to start planting before LE has been able to access the area, study and determine the vegetation cut, where it was cut, map it, and complete a report of those conditions, wholly undermines her ability to preserve that evidence that could be lost due to the disturbance of the Area of Concern by any digging or placement of plants. Roots and stumps and re-growth evident by leaves, etc., could all be lost to any planting as now proposed. Preservation of the evidence is critical to any fair hearing whether before the WTCC or the Superior Court. Destruction of the critical evidence existing in the Area of Concern and surrounding environs, either by delay and the impact of seasonal change or by human disturbance as proposed by the Doanes could have a severe adverse impact on Ms. Eppel's ability to defend herself.

Instead, your body can further a fair process by accepting the Eppel proposals for a deferral of an planting plan order until a review in early July, 2022 by you, accompanied by a revised EO to order the Doanes to permit the Eppel team of experts access without threat of arrest so as to perform independent studies and mapping. This is only fair and reasonable, but would further show the even-handed nature of the process under which you have oversight and would likely further protect the WTCC from claims of complicity in the Doanes' efforts to end run the spoliation rules. We implore you to see the wisdom in the approach Cheryl proposes.

Thank you for your courteous help and attention.

Sincerely,

/s/ Benjamin L. Hall, Jr.

Benjamin L. Hall, Jr.

EC: William A. Schneider, Esq.
Richard Hennessey, Esq.
Richard A. Reiling, Esq.
Cheryl C. Eppel