949-25 ZBA

McCormick, Murtagh & Marcus
ATTORNEYS AND COUNSELORS AT LAW

9/2/25

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Kathleen M. McCormick, Esq.
Haley G. Schopp, Esq.

Pd ✓

July 21, 2025

Zoning Board of Appeals
Great Barrington Town Hall
334 Main Street
Great Barrington, MA 01230

RE: Application to the Zoning Board of Appeals, 87 Alford Road, Great Barrington, MA

Dear Zoning Board of Appeals:

Our firm, McCormick, Murtagh & Marcus, represents Peter Ungar and Ginhee Ungar (hereinafter "my clients") in the purchase of 87 Alford Road, Great Barrington, Massachusetts 01230 (hereinafter the "Premises"). My clients are under contract to purchase the Premises from Abigail Haupt, LLC, contingent upon zoning approval.

Enclosed herewith please find the following documents relative to the above-referenced application:

1. Original application to the Zoning Board of Appeals seeking an appeal;
2. Request for Zoning Interpretation sent to Matthew Kollmer, Building Commissioner for the Town of Great Barrington on June 16, 2025;
3. Certified current list of abutters within 300 feet of the Premises;
4. Portion of assessors map identifying the Premises. We request the requirement of a plot plan be waived and the attached map be accepted in its place.;
5. Check in the amount of $350.00 made payable to the Town of Great Barrington representing fees for the filing herein.

Also enclosed are ten copies of the above-stated documents as required by the Zoning Board of Appeals. An electronic version has been emailed to Chris Rembold, Town Manager. Kindly render your decision at your earliest convenience. Do not hesitate to contact our office with questions or concerns.

Sincerely,
McCormick, Murtagh & Marcus

Kathleen M. McCormick

Enclosures: Application to the Zoning Board of Appeals; Certified abutters list; Map; Check

ZBA-1
Rev. 6/2024

Town of Great Barrington
Massachusetts

Application to the
Zoning Board of Appeals

INSTRUCTIONS

You may download this form and fill it in on your computer. Fill out all applicable information. Save and print the form, and sign it where required. When you are ready with your form and all supporting plans and materials, call the Planning Dept to set up a time to file the application. You will need to submit the original and 10 full copies of the entire package. A PDF of the entire application packet must also be submitted electronically; any PDFs with plans must be clear and scalable. Incomplete applications and those not accompanied by the required fee or copies may be rejected. The Planning Dept can be reached at (413) 528-1619.

FOR OFFICE USE ONLY

Number Assigned: 949-25
Filing Date: 7/23/25
Received and checked for completeness by: CR
Date filed with the Town Clerk 8/4/25

FOR ZBA USE:
Advertising dates: 8/8 & 8/15
Public hearing date: 9/2/25

TIMELINE: The Zoning Board of Appeals (ZBA) will set a public hearing date that is at least 45 days but no more than 65 days from the date of your filing. The hearing date will be posted at Town Hall and in accordance with the Open Meetings Law, and notice of the hearing will be sent to the Applicant and/or Applicant's agent and abutting property owners by mail, and advertised for two consecutive weeks in the local newspaper.

A. WHAT ARE YOU SEEKING?

Check all that apply. If you are unsure, please consult with your attorney, or the Town Planner or Building Inspector.

- VARIANCE (exempts a property from some Zoning requirements)
  You must complete portions A., B., C., D., G., H, I., and J. of this form.
- SPECIAL PERMIT (for changes to nonconforming uses, structures)
  You must complete portions A., B., C., E., G., H, I., and J. of this form.
- ✔ APPEAL (to overturn a decision of Building Inspector or a Board)
  You must complete portions A., B., C., F., G., H, I., and J. of this form.
- 40 B Comprehensive Permit (call ahead)

B. SITE / PROPERTY INFORMATION

Address of Subject Property: 87 Alford Road, Great Barrington, MA 01230

Assessor's Map: 033.0 Lot: 00850.0

Registry of Deeds Book: 2499 Page: 1

Zoning District (s): R4

Overlay District(s), if any:

C. APPLICANT AND OWNER INFORMATION

Applicant's Information

Name (please print): Peter Ungar and Ginhee Ungar
Phone (area code first): 617-955-4758
Street Address: 18 Fellsway West
City, State, Zip Code: Somerville, MA 02145
If Applicant is a corporation, provide name of contact person:
Email Address: ginhee@ tastingcounter.com; peter@tastingcounter.com
Signature: DocuSigned by: 5758B56ABC14431... DocuSigned by: Peter Ungar FF9E0C996CC548E...

Check here if Applicant and Property Owner are the same, and skip to the next section.

Check here if Applicant is different than the Property Owner, and to verify that you have the Property Owner's permission to file this Application. Note that the Property Owner must sign below to indicate permission to file this Application.

Enter Property Owner's information EXACTLY as it appears on the most recent tax bill.

Property Owner's Information

Name (please print): Abigail Haupt, Manager of Abigail Haupt LLC
Phone (area code first): 413 429-1211
Street Address: P.O. Box 891
City, State, Zip Code: Great Barrington, MA 01230
Email Address: Abigailhaupt@yahoo.com
Signature: Signed by: 8838355A673B4E7...

D. VARIANCES

If you are requesting a variance, please answer all of the following. Attach additional sheets if necessary.

1) From which Section(s) of the Zoning Bylaw do you request a variance?	
2) What will the requested variance(s) enable you to do?	
3) If the variance(s) is not granted, what hardship will that cause you?	
4) What special circumstances relating to soil condition, shape or topography of land or structures, affect your property but not other properties in the same zone?	
5) Explain why your special circumstances are not a result of your own actions.	
6) If the variance(s) is not granted, what rights will you be deprived of that other properties in the same zone enjoy?	
7) Explain why a variance will not give you any special privileges that other properties in the same zoning district don't have.	

E. SPECIAL PERMITS

If you are requesting a special permit, please answer all of the following. Attach additional sheets if necessary.

1) A special permit is being requested in order to (please describe project):	
2) This application is made under the following Sections of the Zoning Bylaw (check all that apply)	Section 5.2 Section 5.3 Section 5.5 Section 5.6 Section 5.7 ☒ Section 10.4
3) Reason(s) that this property is not in conformance with the Zoning Bylaw	
4) Are there any previous Special Permits or Variances for this property?	No Yes If yes, provide date(s), and name of issuing Board

F. APPEALS

If you are seeking an appeal, please answer all of the following. Attach additional sheets if necessary.

1) This application is to appeal the decision of	✔ Building Inspector Planning Board Selectboard
2) Date of decision	*N/A*
3) Nature of the decision	Non-response to Request for Zoning Interpretation pursuant to M.G.L.c. sect. 7
4) Applicable Section(s) of the Zoning Bylaw	*Section 3; Section 8.2.2.8*
5) Describe your interpretation of the nature of the decision and the remedy you seek. Attach additional sheets if needed.	*See attached narrative*

G. REQUIREMENTS FOR ALL APPLICATIONS

By checking the items below, applicant acknowledges that each application is accompanied by each of the items listed below.

Plot Plan of the entire property or tract. The Board may require the plan to be signed by a licensed surveyor or engineer, particularly if the matter involves dimensional issues. The plan should include those items listed in Section 10.5.3 of the Zoning Bylaw, including two locus maps--one USGS survey map and one current zoning map-- illustrating property location.

✔ A current list of all abutters within 300 feet of the property, including address of owner, map and lot number. The list must be obtained from the Assessor's office and certified by the Assessor's office. Call 413-528-1619.

✔ At least one copy of the application and plans / specifications shall be no larger than 11 x 17 inches.

H. APPLICATION FEE

Application fee is $350.

✔ Check here to confirm that your check in the appropriate amount is enclosed. Make checks payable to Town of Great Barrington.

I. TECHNICAL REVIEW FEES

✔ The Zoning Board of Appeals may hire independent consultants whose services shall be paid for by the applicant(s) under the terms of the Rules and Regulations of the Zoning Board of Appeals, and in accordance with Chapter 44, Section 53G of the Massachusetts General Laws. Check here to acknowledge and be bound by these regulations. Failure to acknowledge shall cause this application to be rejected as incomplete. ** *Please also sign here:* DocuSigned by: 5758B56ABC14431... DocuSigned by: Peter Ungar FF9E6C996CC548E...

J. ADDITIONALINFORMATION

Recommending Boards: All applications to the Zoning Board of Appeals are referred to the Planning Board, Conservation Commission, Board of Health, and Board of Selectmen for comments and recommendations. Applicants should be prepared to attend those meetings in order to brief those boards of their project and answer any questions.

Site Visits: The ZBA and recommending Boards may contact the Applicant to request a site visit. Applicants agree to facilitate access to the site at a mutually convenient date and time.

Timeline/ Procedures: The ZBA conducts its business in accordance with Massachusetts General Laws. Accordingly, the ZBA will hold its Public Hearing not later than 65 days after the filing of the application. A decision for a variance or appeal will be rendered not later than 100 days from the filing date. A decision for a special permit will be made not later than 90 days after the close of the Public Hearing. The decision will be filed with the Town Clerk within 20 days of the date of the decision. The appeal period lasts for 20 days after the filing with the Town Clerk. On the 21st day, if no appeals are filed, or once all appeals are resolved, the applicant shall have the decision certified by the Town Clerk. The Applicant is responsible for then filing the decision with the Registry of Deeds, at which time the decision becomes effective.

Guidance and Counsel: In preparing this application and when presenting the case to the ZBA, applicants are advised to be fully familiar with, or seek counsel from a qualified person who is familiar with, the Zoning Bylaw and other rules, regulations, and laws as may be appropriate. If you wish to discuss the completeness of this application, or have any questions about this application, please contact the Planning Dept. at 413-528-1619. However, we will not discuss the merits or strategy of your case.

Applicant's Signature: "I have read and I understand all of the information on this application. I have also read and understand the pages entitled IMPORTANT GUIDANCE AND INFORMATION FOR APPLICANTS."

DocuSigned by: 5758B56ABC14431... DocuSigned by: Peter Ungar FF9E6C996CC548E... (signed) 7/16/2025 (date)

Parcel Number	GIS Number	Cama Number	Property Address	Owner Name	Co-Owner Name	Owner Address	Owner City	Owner State	Owner Zip
031.0-0000-0010.0	M_44146_885605	31-10-0	HURLBURT RD	JLBP LLC		110 EAST 87TH ST PH	NEW YORK	NY	10128-4101
031.0-0000-0010.B	M_44246_885882	31-10-B	11 HURLBURT RD	SIMONS ROCK OF BARD COLLEGE		84 ALFORD RD	GT BARRINGTON	MA	01230-1978
031.0-0000-0012.A	M_44175_885308	31-12-A	61 ALFORD RD	REINS JENNIE		34 BRIDGE ST #200	GT BARRINGTON	MA	01230-3105
031.0-0000-0016.0	M_43826_885240	31-16-0	50 HURLBURT RD	JORDAHL ERIC A & LAURA L		50 HURLBURT RD	GT BARRINGTON	MA	01230-1552
031.0-0000-0016.A	M_43707_885155	31-16-A	54 HURLBURT RD	LANOUE THOMAS V & CHERYL A		54 HURLBURT RD	GT BARRINGTON	MA	01230-1552
031.0-0000-0016.B	M_43594_885319	31-16-B	HURLBURT RD	JORDAHL ERIC A & LAURA L		50 HURLBURT RD	GT BARRINGTON	MA	01230-1552
031.0-0000-0020.0	M_42749_885312	31-20-0	LOCUST HILL RD	BERLE MARY ALICE TRUSTEE	LILAS MOUNTAIN FARM NOM TR	P O BOX 21	GLENDALE	MA	01229
031.0-0000-0025.C	M_43100_885037	31-25-C	1 BRIDLE PATH LN	WALLACE BENJAMIN	SUZUKI KAE TOMAE	30 WEST 63RD ST #29MN	NEW YORK	NY	10023-7103
031.0-0000-0025.D	M_43327_885074	31-25-D	3 BRIDLE PATH LN	TIMPANE PHILIP B & JANIS L		3 BRIDLE PATH LN	GT BARRINGTON	MA	01230-8928
031.0-0000-0004.A	M_42782_885753	31-4-A	58 ROUND HILL RD	KRAMER ROBERT M		410 PARK AVE #510	NEW YORK	NY	10022
031.0-0000-0004.B	M_42656_885846	31-4-B	50 ROUND HILL RD	KGM BERKSHIRE REALTY LLC	KAREN MANDELBAUM	6368 NW 23R WAY	BOCA RATON	FL	33496-3610
031.0-0000-0005.0	M_42852_885956	31-5-0	44 ROUND HILL RD	LEWIS MARTIN L & SHARON S		PO BOX 1039	GT BARRINGTON	MA	01230-6039
031.0-0000-0006.0	M_42974_886083	31-6-0	40 ROUND HILL RD	40 ROUND HILL ROAD LLC		218 BLUE HILL RD	GT BARRINGTON	MA	01230-1213
031.0-0000-0009.A	M_44204_885993	31-9-A	6 HURLBURT RD	SIMONS ROCK INC		84 ALFORD RD	GT BARRINGTON	MA	01230-1978
031.0-0000-0009.C	M_44198_886086	31-9-C	85 ALFORD RD	SULTAN SUSAN R TRUSTEE	SUSAN R SULTAN REV TR	85 ALFORD RD	GT BARRINGTON	MA	01230-9700
031.0-0000-0009.D	M_44075_885898	31-9-D	12 HURLBURT RD	BARD COLLEGE	BARD COLLEGE AT SIMONS ROCK	PO BOX 28	GT BARRINGTON	MA	01230-0028
031.0-0000-0009.E	M_43982_885811	31-9-E	16 HURLBURT RD	BARD COLLEGE	BARD COLLEGE AT SIMONS ROCK	PO BOX 28	GT BARRINGTON	MA	01230-0028
032.0-0000-0038.0	M_44248_886581	32-38-0	92 ALFORD RD	MAJDALANY RONALD		92 ALFORD RD	GT BARRINGTON	MA	01230-9700
032.0-0000-0041.0	M_44233_886169	32-41-0	ALFORD RD	SIMONS ROCK INC		84 ALFORD RD	GT BARRINGTON	MA	01230-2499
032.0-0000-0042.0	M_44718_886224	32-42-0	ALFORD RD	SIMONS ROCK INC		84 ALFORD RD	GT BARRINGTON	MA	01230-2499
032.0-0000-0079.0	M_44817_885986	32-79-0	84 ALFORD RD	SIMONS ROCK INC		84 ALFORD RD	GT BARRINGTON	MA	01230-2499
033.0-0000-0073.0	M_43263_886168	33-73-0	17 ROUND HILL RD	PECHUKAS PHILIP	BRIER RACHEL	17 ROUND HILL RD	GT BARRINGTON	MA	01230-1557
033.0-0000-0073.B	M_43432_886193	33-73-B	11 ROUND HILL RD	VEINOGLOU GEORGE T TRUSTEE	VEINOGLOU FAMILY NOMINEE TRUST	11 ROUND HILL RD	GT BARRINGTON	MA	01230-1557
033.0-0000-0074.0	M_43569_886343	33-74-0	SEEKONK RD	SEEKONK ROUND HILL REALTY LLC		17 SEEKONK RD	GT BARRINGTON	MA	01230-1562
033.0-0000-0075.0	M_43779_886309	33-75-0	3 SEEKONK RD	TAYLOR AMY		3 SEEKONK RD	GT BARRINGTON	MA	01230-1558
033.0-0000-0078.0	M_44028_886302	33-78-0	95 ALFORD RD	VADAKIN DAVID & HAILEY		95 ALFORD RD	GT BARRINGTON	MA	01230-9700
033.0-0000-0079.0	M_44041_886262	33-79-0	93 ALFORD RD	SALVI GENE F & PATRICIA		93 ALFORD RD	GT BARRINGTON	MA	01230-9700
033.0-0000-0081.0	M_44067_886216	33-81-0	ALFORD RD	MAJDALANY RONALD		92 ALFORD RD	GT BARRINGTON	MA	01230-9700
033.0-0000-0082.0	M_44088_886238	33-82-0	91 ALFORD RD	MAJDALANY RONALD		92 ALFORD RD	GT BARRINGTON	MA	01230-9700
033.0-0000-0083.0	M_44044_886202	33-83-0	ALFORD RD	MAJDALANY RONALD		92 ALFORD RD	GT BARRINGTON	MA	01230-9700
033.0-0000-0084.0	M_44120_886192	33-84-0	89 ALFORD RD	RACE MICHAEL		89 ALFORD RD	GT BARRINGTON	MA	01230-9700
033.0-0000-0086.0	M_43728_886162	33-86-0	7 SEEKONK RD	ZWENG MARIA		10 EAST END AVE #12B	NEW YORK	NY	10075-1156
033.0-0000-0087.0	M_43656_886039	33-87-0	9 SEEKONK RD	FULLER JOSEPH B & RUTHANNE		163 SUFFOLK RD	CHESTNUT HILL	MA	02467-1219
033.0-0000-0088.0	M_43194_886046	33-88-0	27 ROUND HILL RD	SIGEL EFREM TRUSTEE	SIGEL FREDERICA E TRUSTEE	101 WEST 12TH ST #12J	NEW YORK	NY	10011-8125

The above list of abutters to the subject property is correct according to the latest records of this office.

Emily A Schilling

7/18/2025

Emily A. Schilling

McCormick, Murtagh
& Marcus
ATTORNEYS AND COUNSELORS AT LAW

William Cullen Bryant House
390 Main Street, Suite 2
Great Barrington, MA 01230

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Kathleen M. McCormick, Esq.
Haley G. Schopp, Esq.

SENT VIA CERTIFIED MAIL and
SENT VIA EMAIL to mkollmer@berkshire.build

June 16, 2025

Matthew Kollmer, Building Commissioner
Great Barrington Town Hall
334 Main Street
Great Barrington, MA 01230

RE: Request for Zoning Interpretation of 87 Alford Road, Great Barrington, MA 01230

Dear Mr. Kollmer:

Please be informed that my office, McCormick, Murtagh & Marcus, represents Peter Ungar and Ginhee Ungar (hereinafter referred to as "my clients" or the "Ungars") with regard to zoning matters at 87 Alford Road, Great Barrington, MA 01230.

Pursuant to M.G.L. c. 40A § 7, I hereby request your determination on Agricultural uses per M.G.L. c. 40A § 3 and the Town of Great Barrington Zoning Bylaw on the following matters:

1. Is the accessory use of a 48-seat integrated farm-to-table restaurant on a 200-acre farm exempt from use regulation under M.G.L. c. 40A § 3?
2. Is there a limitation on the number of Accessory Dwelling Units (ADUs) per lot when used to support the primary purpose of commercial agriculture in accordance with § 8.2.2.8 of the Town's Bylaw?

Statement of Facts

1. My clients are under contract to purchase 87 Alford Road, Great Barrington, MA. As part of this purchase, my clients will acquire approximately 200 acres of agricultural land and an abutting lot of a 14.632-acre parcel currently containing a residential structure and barns ("Premises").
2. The Premises is located in an R4 Large Acreage Residential District.
3. My clients intend the primary use of the Premises to be agriculture. Fully integrated into and accessory to the agricultural use proposed is a 48-seat restaurant, an educational component, and the construction of staff housing on the Premises.
4. Agricultural Use. The goal is to sustainably farm the ±200-acre parcel. The products will be used on site at the proposed restaurant and sold to third parties.

5. Restaurant Accessory Use. The concept is a 48-seat farm-to-table restaurant. This will be a ticketed, all-inclusive experience offering one seating for lunch, and two seatings for dinner, with all operations stopping by 10:00 p.m. As the farm develops, the goal is to source 100% of the restaurant's products from the farm. This would represent approximately 50% of the farm's products, with the remaining products being sold to third parties. While the farm's produce begins to develop, our client's intent would be to source some products for the restaurant from local Massachusetts farms.
6. Accessory Dwelling Units. The concept is to construct staff housing in the form of Accessory Dwelling Units to support the operational needs of the agricultural, educational, and restaurant uses.

Argument

1. Restaurant/ Accessory Use.

It is our position that M.G.L. c. 40A § 3 is applicable, protects the Agricultural use and exempts the use from zoning regarding land use including restrictions related to use defined in the Town of Great Barrington Zoning Bylaw, specifically § 3 Use Regulations and § 8 Special Residential Regulations.

The purpose of M.G.L. c. 40A § 3 is to promote agricultural use and production to benefit the municipality "within all zoning districts in a municipality". See M.G.L. c. 40A § 3; *Building Inspector of Mansfield v. Curvin* (1986). A town's zoning bylaw may not unreasonably prohibit or regulate the use of land zoned and used for agricultural purposes. The Court noted that the "agricultural use" and exemption should be "interpreted broadly." *Town of Tisbury v. Martha's Vinyard Comm'n* (27 Mass. App. Ct. 1204, 1205 (1989)). My clients intend to support the growth of their farm by operating a farm-to-table restaurant on the Premises. Without this fully integrated approach to agriculture (i.e. accessory uses), their operational model would not be successful. The Court upheld the notion that accessory uses were key to the agriculture's success in *Von Jess v. O'Neal*, Misc. Case No. 142973 (Land Court 1991).

My clients' intent comports with applicable state guidelines pertaining to accessory uses to agriculture. The farm-to-table restaurant concept will be exempt from land use restrictions under M.G.L. c. 40A § 3. § 3 lays out a test to determine whether a use is exempt from applicable zoning ordinances. At least 25% of the products for sale during the harvest season (calculated either in gross sales volume or in dollars) must be produced by the owner, on the land, or at least 25% of the products for sale annually must be produced by the owner on the land in addition to at least 50% of products for sale being produced elsewhere in Massachusetts. As previously stated (refer to Statement

of Facts No. 5, Restaurant Accessory Use), my clients will begin with outsourcing from local Massachusetts farms while their own farm and produce develop. My clients intend to increase the percentage of products for sale produced on the land as the farm's produce develops with a long-term goal of sourcing as close to 100% of products sold on the Premises from the farm. Preliminarily, my clients estimate that at least 75% of the products used in the restaurant will be produced on the land, and that at least 50% of the farm's products will be supplied directly to the restaurant.

What constitutes agricultural products ought to be interpreted broadly in light of M.G.L. c. 40A § 3's purpose to promote agricultural production and the economic viability of agricultural endeavors. As in *Town of Natick v. Modern Continental Const.* (1998), "the courts have interpreted the language of § 3 to permit the sale of foods as "agricultural products" [and] the fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them." *Town of Natick v. Modern Continental Const.* (1998). Rather, such products prepared in a restaurant are afforded statutory protection under M.G.L. c. 40A § 3.

After establishing the primary use of the Premises as agricultural, M.G.L. c. 40A § 3 is applicable to govern use regulation on the Premises. The farm-to-table restaurant concept is incidental to the operation of a farm on the Premises given the restaurant will be both subordinate and attendant to the principal, primary use. The operation of a farm-to-table restaurant qualifies as an exempt accessory to agricultural use and is therefore allowable.

2. Accessory Dwelling Units.

Town of Great Barrington Zoning Bylaw § 8.2.2.8. Special Residential Restrictions for Accessory Dwelling Unit for Farm Dwellings removes the restriction on the number of allowable ADUs when ADUs are solely used for farm employees. Please determine if this provision applies to all primary agricultural and accessory employees.

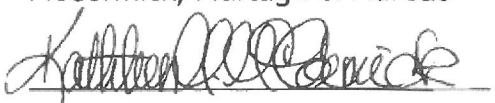
Conclusion

On this basis, my clients, Peter and Ginhee Ungar, contend that:

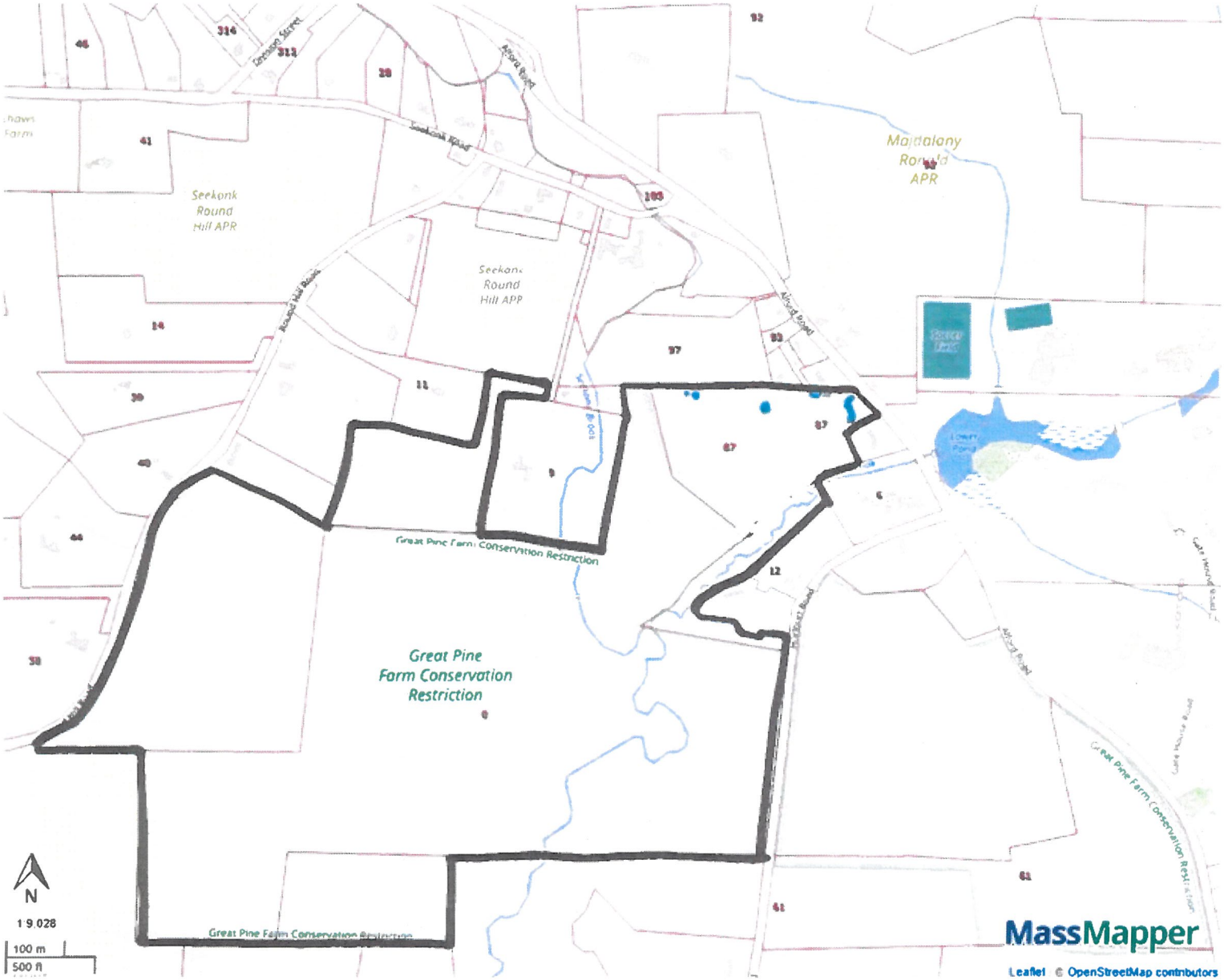
1. M.G.L. c. 40A § 3 is applicable, and the operation of a 48-seat integrated farm-to-table restaurant on the Premises is exempt from use regulation under M.G.L. c. 40A § 3.
2. There are no limitations on the number of Accessory Dwelling Units that can be constructed on the Premises and used as staff housing, as the Premises will be used for the primary purpose of commercial agriculture.

I appreciate your consideration of this matter. Kindly render your decision within fourteen days as stipulated in M.G.L. c. 40A § 7.

Sincerely,
McCormick, Murtagh & Marcus



Kathleen M. McCormick


Seekonk Round Hill APR
Seekonk Round Hill APR
Maddalony Round APR
Great Pine Farm Conservation Restriction
Great Pine Farm Conservation Restriction
Great Pine Farm Conservation Restriction
Great Pine Farm Conservation Restriction
Seekonk Road
Arnold Road
Rocky Hill Road
Lower Pond
N
1:9,028
100 m
500 ft
MassMapper
Leaflet © OpenStreetMap contributors

Town Hall, 334 Main Street
Great Barrington, MA 01230

Telephone: (413) 528-1619, x.7
Fax: (413) 528-2290

TOWN OF GREAT BARRINGTON
MASSACHUSETTS

ZONING BOARD OF APPEALS

IMPORTANT GUIDANCE AND INFORMATION FOR APPLICANTS

When applying to the Zoning Board of Appeals (ZBA) for a Special Permit or a Variance per Section 5 of the Great Barrington Zoning Bylaw, the Applicant is asking for "zoning relief," to use land or to build a structure in a way that is not usually allowed or is prohibited in a particular zoning district. The ZBA takes these requests very seriously and asks the Applicant to do the same. The Applicant also needs to be aware that not all requests are granted and there is never an automatic approval. The ZBA will follow a careful decision making process in keeping with the regulations of MGL Chapter 40A (the Zoning Act) and the local Zoning Bylaw. The ZBA offers this guidance to help Applicants prepare for this important process.

Please be aware that you are not eligible to be granted a ZBA Special Permit or Variance if your preexisting use was illegally begun or your preexisting structure was illegally built. The provisions of Section 5 of the Zoning Bylaw—the ability to change a nonconforming use or a nonconforming structure—do not extend to uses or structures that are not lawful. The ZBA cannot grant your application unless you can prove your use or structure is legal to begin with. For example, if a building in a residential zone is used for an industrial purpose, and if the Zoning Bylaw prohibited this at the time the use began, you may not be entitled to zoning relief.

This concept is similar to being "grandfathered," but it is not the same. Being grandfathered means zoning enforcement action cannot be taken against your use or structure, but it does not make your use or structure legal. Your use or structure is legal if it was used or built in that manner before zoning regulations, or a particular zoning regulation, came into effect. Establishing the date your use began or your structure was built, and establishing the date of the relevant zoning regulations, is therefore critically important to your case. The ZBA expects that you will, as part of your presentation, provide evidence establishing your argument that your use or structure is legal. If you cannot provide this evidence, the ZBA may deny the Application.

There are ways to establish dates for when uses commenced or buildings were built. Property deeds may refer to when a building was built or how it was used; presenting such a chain of title back to the date of the appropriate zoning bylaw is frequently used to furnish proof of dates. Historic maps of town, including insurance maps for example, and photographs, if they can be dated, may be a valuable resource in showing when your structure was built. Documents and records, particularly old building permits, from the Assessor or Building Department or a licensing bureau (state or town) might also be useful. Other sources might include business address directories or advertisements. Sometimes personal knowledge is all that can be found, and you might gather sworn affidavits from knowledgeable persons.

Please note that you are not required to have an Attorney represent you or prepare your application, but you may wish to do so because of the complexities of land use and zoning law.

Please turn the page

Other Information and Procedures

Timeline/ Procedures: The ZBA conducts its business in accordance with Massachusetts General Laws, Chapter 40A. Accordingly, the ZBA will hold its Public Hearing not later than 65 days after the filing of the application. The ZBA will make its decision for a special permit not later than 90 days after the close of the Public Hearing. The ZBA will make its decision for a variance or appeal not later than 100 days from the filing date. Decisions will be filed with the Town Clerk within 20 days of the date of the decision.

Once the decision is filed with the Town Clerk, the applicant and abutters are notified of the decision, and a 20-day appeals period begins. If no appeals are filed, then on the 21st day, the Applicant shall have the decision certified by the Town Clerk. (If an appeal is filed, then the decision is certified once the appeal resolved.)

It is the Applicant's responsibility to then file the decision with the Registry of Deeds, ensuring the decision (and the rights and responsibilities conferred by the decision) becomes part of the chain of title of the property.

Site Visit: A site visit is generally held the same day as the Public Hearing and will be coordinated with the Applicant. The site visit is for the ZBA to see first-hand how the requested use or action will affect the site and the area. The Applicant and/or the Applicant's representative is expected to be present at the site visit.

Recommending Boards: Prior to the Public Hearing, your application will be referred to the Planning Board, Conservation Commission, Board of Health, and Selectboard for comments and recommendations. Applicants should be prepared to attend those meetings in order to brief those boards of their project and answer any questions.

TASTING COUNTER BERKSHIRES

Great Barrington ZBA Review Submission

Tuesday, October 7, 2025

Project Overview

Tasting Counter Berkshires is, first and foremost, a working farm ("The Farm"), with a restaurant as an accessory use whose purpose is to showcase The Farm's production by sourcing the majority of its menu from on-site harvests. Agriculture is the primary use (by land area, daily activity, and mission) while the restaurant tells The Farm's story. For on-site product sales, The Farm will document compliance using the statute's volume method in a clear, transparent, and verifiable way.

Statutory Framework & Measurements

Under M.G.L. c.40A §3, We will use the statute's volume option (weights/liters) for any on-site agricultural products sales activity. At least 25% of eligible products sold at The Farm will be produced on our parcel, and at least 50% will come from other Massachusetts farms from the onset.

Land Use Program

~29% Active agriculture (fields, greenhouses, wash/pack, composting,orchards/perennials); ~62% Conservation Restriction non-agricultural (wetlands/buffers, riparian corridors, steeper slopes, woodlands); ~6% Managed tree borders (hedgerows, windbreaks, habitat plantings); ~3% Farmstead/hospitality core (restaurant, small service yard, limited parking, ADA paths, utilities, educational areas) and residential. The hospitality footprint is deliberately compact and subordinate to The Farm.

Of the full property's ~198 acres, ~168 are in existing Conservation Restriction, and ~30 are outside of this restriction.

Of the ~168 acres is subject to the Conservation Restriction:

- ~73 are currently forest and will remain so (light management for forest health, wildlife habitat value, and timber stand improvement as outlined in existing Conservation Restriction)
- ~49 are currently mixed grassland and trees along Seekonk and Long Pond Brooks, and will remain so (light management for native habitat and water quality)
- ~46 are currently cropland and will remain so (including organic vegetables, small fruits, tree fruits, and small grains)

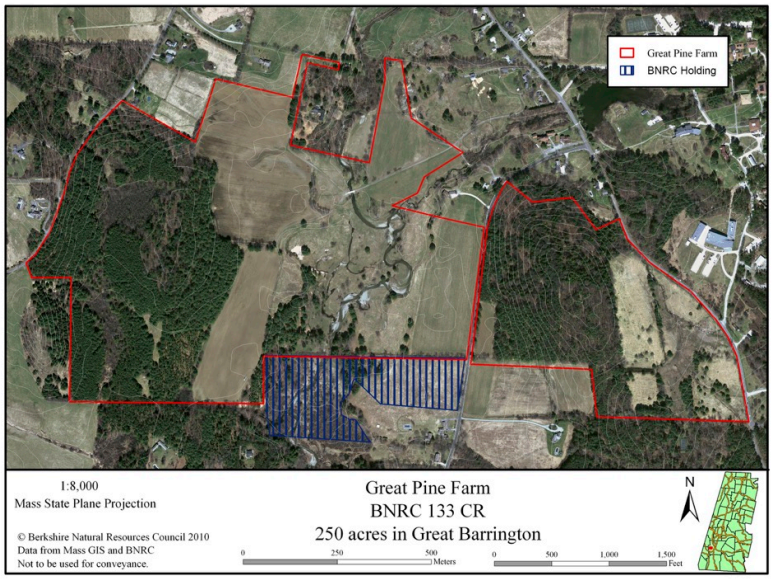
*note: these are Prime Agricultural soils of statewide significance as defined in the "Soil Survey of Berkshire County MA" as published by USDA Soil Conservation Service (1988).

Of the ~30 acres outside of the Conservation Restriction:

- ~8.8 acres are currently cropland and will remain so
- ~3.5 acres are currently equestrian paddocks and will be converted to vine and small fruit production
- ~4.8 acres are currently open and will be converted to barns, farm stand, restaurant, and related uses
- ~1.5 acres is residential and will remain so
- ~11.4 acres are tree borders, field edges, or alongside Long Pond Brook and will remain open (light management for native habitat, water quality, and invasive species removal)

Conservation Restriction

The purpose of the Conservation Restriction is to assure that the property will be retained predominantly in its natural scenes and open space condition for agricultural and conservative purposes. There is permanent protection of water resources and sensitive habitats through the Berkshire Natural Resources Council Inc, Conservation Restriction. Allowed: Agricultural, habitat restoration, invasive management, native plantings, low-impact trails, limited forestry under an approved stewardship plan. Prohibited: new primary structures, paving, unnecessary clearing, or activities that degrade water or habitat.



Operations Plan
The Farm grows and processes; the restaurant showcases the agricultural products. Year-round production (greenhouses in winter, fields in season) supports The Farm and the restaurant, with preservation/fermentation extending harvests. The Farm also will operate as the on-site sales facility: orders are accepted at The Farm, inventory is picked/packed on site, and deliveries go to customers or local pickup points.

Compliance Tracking (Volume Basis)
All products carry origin codes: TC-GROWN, MA-PARTNER, OTHER. We roll up monthly/annual volumes in standard units (lbs. for solids, L for liquids) and maintain invoices, harvest/batch logs, pick/pack tickets, and bills of lading to substantiate origin and volume.

Site & Environmental Practices
Buildings, circulation, and utilities are concentrated in the farmstead/hospitality core, away from natural resource conservation areas. We will maintain stream/wetland buffers and use low-impact stormwater (permeable surfaces, bioswales, rain gardens) with dark-sky lighting.

Farm Plan & Partner Network
Near-term plans include greenhouse and shoulder-season crops, summer rotations, a perennial block, and a preservation calendar converting The Farm's harvests into value-added products. A curated network of Massachusetts partner farms (dairy, grains, meat, fruit, honey, wine/cider inputs) ensures we comfortably exceed the 50% MA-grown share. Annually, we publish a one-page methods memo summarizing the volume election, unit standards, and on-site/MA-partner percentages.

Housing/ADUs & Tree Clearing
Any ADUs for farm staff, if proposed, are small, clustered within the farmstead core, and capped by local rules and our traffic/wastewater capacity—no speculative housing. Tree clearing is limited to building envelopes, utilities, and safety in working zones; no clearing in the Conservation Restriction except as allowed by an approved plan. Where trees are removed, we replant with native species of value to wildlife habitat and riparian corridor water quality.

Compliance Maintenance
We will maintain logs: (1) a one-page annual statement of The Farm's volume-based 25%/50% results and measurement standards; (2) a brief ingredient-provenance summary for the restaurant (informational only); (3) a land-use diagram; and (4) representative documentation (harvest/batch sheets, vendor origin attestations, invoices, pick/pack tickets, bills of lading) available for staff spot-check.

Business Plan
The Farm will feature kitchen gardens, greenhouses, and fruit orchards to supply fresh, seasonal ingredients, along with a compact culinary facility. Additional zones will enrich the property's ecological and visitor experience: wildflower pastures will support pollinators, and former horse trails will be converted into walking paths through orchards, fields, and forests.

Agroforestry areas will include apples, stone fruits, elderberries, nuts, and mushrooms, contributing both culinary ingredients and long-term ecological benefits. The woodlands will be managed with a focus on conservation and may later support silvopasture systems. Existing structures will help offset build-out costs, including a house suitable for the owner-operators' residence, a heated two-stall horse barn with a hayloft, and multiple garages for farm vehicles and equipment.

Great Barrington's "right to farm" provision permits a restaurant as an accessory to agricultural operations, supporting a sustainable business model. The property includes 15 acres of buildable land for The Farm and more than 180 acres permanently conserved by the Berkshire Natural Resources Council, supporting small-scale crop production and limited livestock.

The restaurant will prioritize ingredients from our farm and nearby purveyors, strengthening the regional economy, supporting small farms, and advancing biodiversity, organic practices, and environmental stewardship. By reducing food miles and minimizing reliance on industrial systems, The Farm is moving deliberately toward a zero-waste operational footprint. This local-sourcing model deepens community ties and celebrates the region's natural abundance.

The Farm's Volume Production & Purchasing

1. Food Expense Breakdown:
Summarizes annual food costs by category, showing each category's share of total expense. Applies an average wholesale price per pound to each category to estimate the required production volume for planning and compliance calculations.

FOOD	2027	2028	2029	2030	2031	Exp %	Av $/lb
Vegetables	$253,368	$525,739	$798,110	$893,880	$938,574	30%	$2.00
Fruits	$84,456	$175,246	$266,037	$297,960	$312,858	10%	$3.00
Meat/Fish	$168,912	$350,493	$532,073	$595,920	$625,716	20%	$7.00
Grains/Pulses	$126,684	$262,870	$399,055	$446,940	$469,287	15%	$1.75
Dairy	$168,912	$350,493	$532,073	$595,920	$625,716	20%	$4.00
Sweets/spices	$42,228	$87,623	$133,018	$148,980	$156,429	5%	$15.00
Total Food Exp.	**$844,560**	**$1,752,464**	**$2,660,367**	**$2,979,600**	**$3,128,580**		

2. Beverage Expense Breakdown:
Details annual beverage costs by category and converts volumes (liters) to weight (pounds/tons) using standard density assumptions. This weight-based view provides the figures needed to plan purchasing and production volume and to support our compliance calculations.

BEVERAGE	2027	2028	2029	2030	2031
Liters	18,065.45	37,485.75	56,906.05	63,735.27	66,921.82
Pounds	39,744.00	82,468.65	125,193.30	140,217.60	147,228.00
Tons	19.87	41.23	62.60	70.11	73.61
Est. cost per liter	$22	$22	$22	$22	$22
Total Bev Exp.	**$397,440**	**$824,687**	**$1,251,933**	**$1,402,176**	**$1,472,280**

3. Farm Production Forecast:
Projects the first five years of food and beverage volumes sold. Converts figures from the Food & Beverage Expense Breakdowns into tons (industry standard) for consistent planning. Identifies the minimum on-site and Massachusetts-sourced volumes required to meet the 25% on-site and 50% MA thresholds.

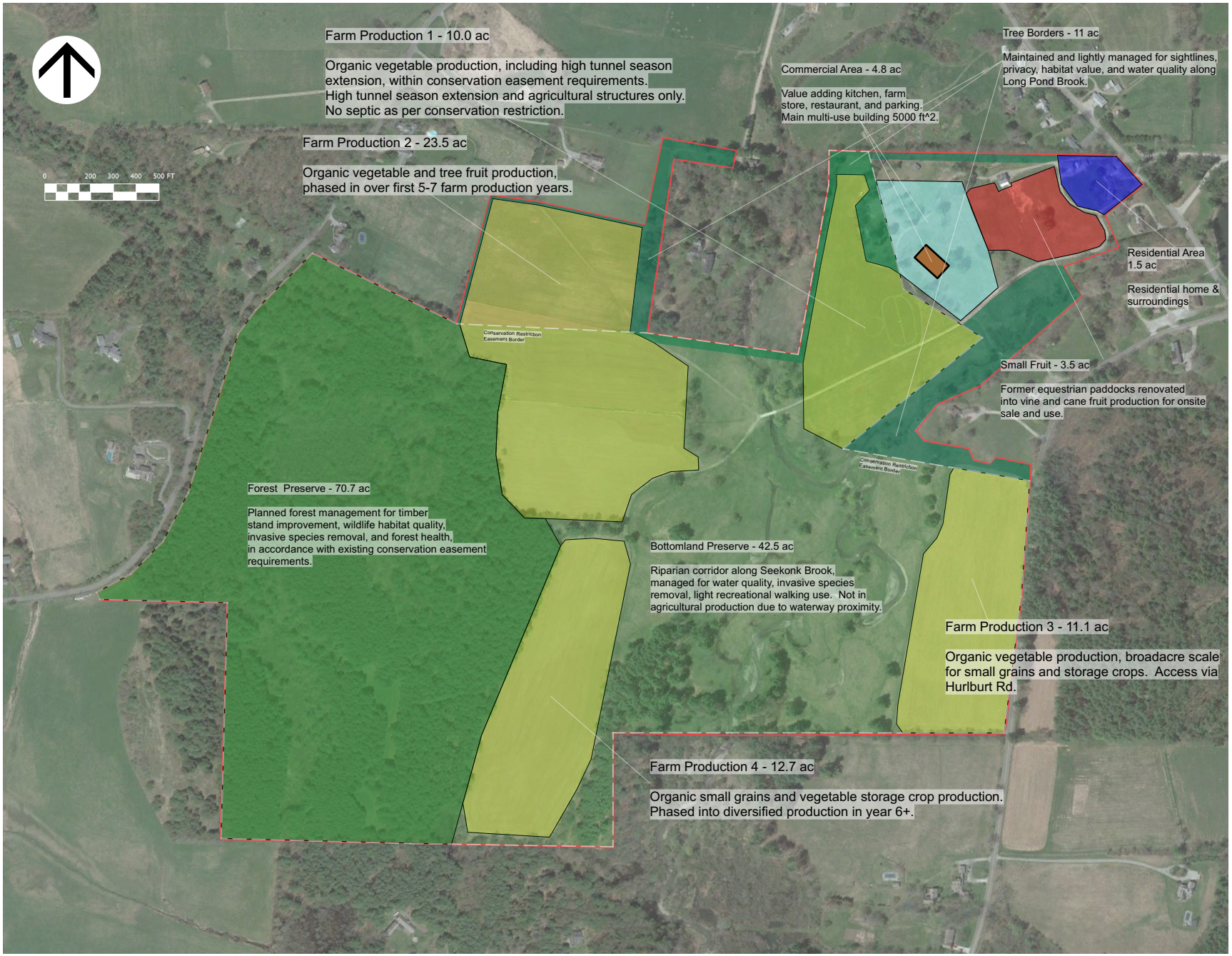
	Est. Lbs.	Estimated Tons				
FOOD	2027	2027	2028	2029	2030	2031
Vegetables	126,684	63.3	131.4	199.5	223.5	234.6
Fruits	28,152	14.1	29.2	44.3	49.7	52.1
Meat/Fish	24,130	12.1	25.0	38.0	42.6	44.7
Grains/Pulses	72,391	36.2	75.1	114.0	127.7	134.1
Dairy	42,228	21.1	43.8	66.5	74.5	78.2
Sweets/spices	2,815	1.4	2.9	4.4	5.0	5.2
	Total Food	148.2	307.5	466.8	522.8	549.0
	Total Beverage	19.9	41.2	62.6	70.1	73.6
	Total F&B	168.1	348.7	529.4	593.0	622.6
	On-site - 25%	42.0	87.2	132.4	148.2	155.7
	MA - 50%	84.0	174.4	264.7	296.5	311.3

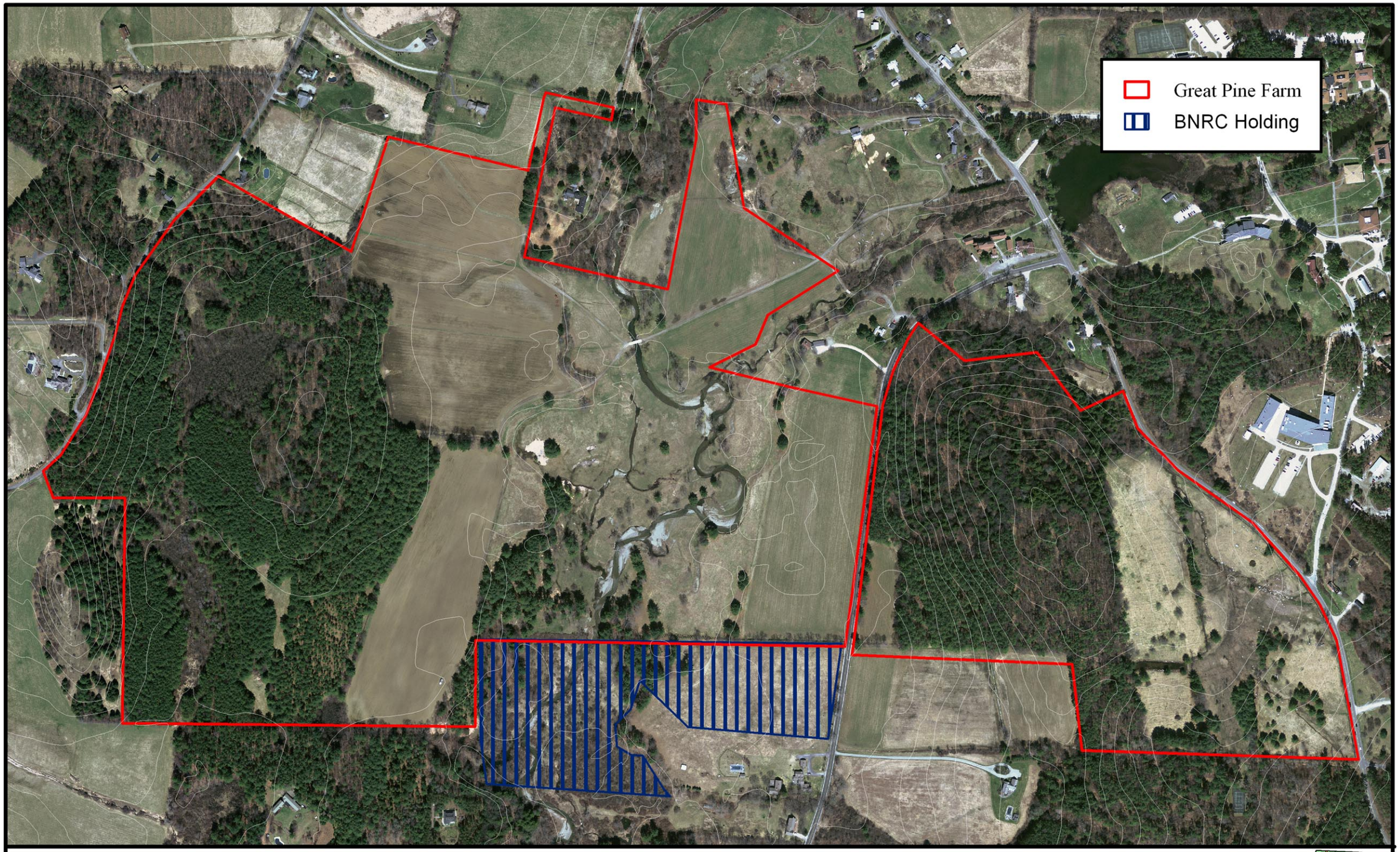
4. Farm Production Acreages:
Using projected on-site yields based on Massachusetts organic benchmarks and a steady annual ramp-up typical of small farms, we allocate acreage by food category and year. These figures feed the next chart, which calculates final on-site yield totals (in tons) to show that at least 25% of products sold are produced on the Farm, meeting the on-site 25% statutory threshold.

		Acres				
Tons Per Acre Yield		2027	2028	2029	2030	2031
6	Vegetables	5.0	10.0	16.0	18.0	20.0
8	Fruits	2.0	3.5	6.0	8.0	10.0
1.25	Grains/Pulses	0.0	1.5	3.0	4.5	6.0
	Total Acres	7.0	15.0	25.0	30.5	36.0

5. Compliance Comparison (Volume Basis):
Our comparative calculations show on-site production well exceeds 25% of total product volume. We also fulfill the 50% Massachusetts-sourced requirement through targeted purchasing in dairy, meat/fish, and vegetables, ensuring solid margins above both statutory thresholds.

	Estimated Yield (Tons)				
	2027	2028	2029	2030	2031
Vegetables	30.0	60.0	96.0	108.0	120.0
Fruits	16.0	28.0	48.0	64.0	80.0
Grains/Pulses	0.0	1.9	3.8	5.6	7.5
Total On-site	46.0	89.9	147.8	177.6	207.5
On-site - 25%	27%	26%	28%	30%	33%


Farm Production 1 - 10.0 ac
Organic vegetable production, including high tunnel season extension, within conservation easement requirements.
High tunnel season extension and agricultural structures only.
No septic as per conservation restriction.
Farm Production 2 - 23.5 ac
Organic vegetable and tree fruit production, phased in over first 5-7 farm production years.
0 200 300 400 500 FT
Commercial Area - 4.8 ac
Value adding kitchen, farm store, restaurant, and parking.
Main multi-use building 5000 ft^2.
Tree Borders - 11 ac
Maintained and lightly managed for sightlines, privacy, habitat value, and water quality along Long Pond Brook.
Residential Area 1.5 ac
Residential home & surroundings
Conservation Restriction Easement Border
Small Fruit - 3.5 ac
Former equestrian paddocks renovated into vine and cane fruit production for onsite sale and use.
Conservation Restriction Easement Border
Forest Preserve - 70.7 ac
Planned forest management for timber stand improvement, wildlife habitat quality, invasive species removal, and forest health, in accordance with existing conservation easement requirements.
Bottomland Preserve - 42.5 ac
Riparian corridor along Seekonk Brook, managed for water quality, invasive species removal, light recreational walking use. Not in agricultural production due to waterway proximity.
Farm Production 3 - 11.1 ac
Organic vegetable production, broadacre scale for small grains and storage crops. Access via Hurlburt Rd.
Farm Production 4 - 12.7 ac
Organic small grains and vegetable storage crop production.
Phased into diversified production in year 6+.



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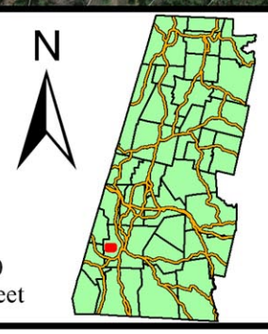
Mass State Plane Projection

Great Pine Farm
BNRC 133 CR
250 acres in Great Barrington

0 250 500 Meters

0 500 1,000 1,500 Feet



M E M O R A N D U M

TO: Members, Zoning Board of Appeals

FROM: Peter J. Most

DATE: September 30, 2025

RE: October 7, 2025 Meeting: 87 Alford Road Appeal

To assist consideration of the 87 Alford Road appeal scheduled for hearing on October 7, 2025, I have attached, in chronological order, the applicable statute together with legal authorities interpreting key terms.

Exhibit A: M.G.L. c. 40A § 3

Exhibit B: *Deutschmann v. Board of Appeals of Canton*, 325 Mass. 297 (1950)

Exhibit C: *Parrish v. Board of Appeal of Sharon*, 351 Mass. 561 (1967)

Exhibit D: *Town of Harvard v. Maxant*, 360 Mass. 432 (1971)

Exhibit E: *Moore v. Zoning Bd. of Appeals of Middleborough*, 360 Mass. 630 (1971)

Exhibit F: *von Jess v. O'Neal*, No. 1991 MISC 142973, 1991 WL 11258265 (Mass. Land Ct. Jan. 4, 1991) (Sullivan, J.)

Exhibit G: *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841 (1994)

Exhibit H: *Town of Natick v. Modern Continental Const.*, 8 Mass.L.Rptr. 524 (1998)

Exhibit I: *Garabedian v. Westland*, 59 Mass.App.Ct. 427 (2003)

Exhibit J: *Simmons v. Zoning Bd. of Appeals of Newburyport*, 60 Mass.App.Ct 5 (2003)

Exhibit K: *Teti v. Town of Sherborn*, No. 2013 MISC 414330, 2013 WL 6410547 (Mass. Land Ct. Dec. 6, 2013) (Scheier, C.J.)

PJM

EXHIBIT A

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VII. Cities, Towns and Districts (Ch. 39-49a)
Chapter 40A. Zoning (Refs & Annos)

M.G.L.A. 40A § 3

§ 3. Subjects which zoning may not regulate; exemptions; public hearings; temporary manufactured home residences

Currentness

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products, provided that either during the months of June, July, August and September of each year or during the harvest season of the primary crop raised on land of the owner or lessee, 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, or at least 25 per cent of such products for sale, based on either gross annual sales or annual volume, have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 per cent of such products for sale, based upon either gross annual sales or annual volume, have been produced in Massachusetts on land other than that on which the facility is located, used for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, whether by the owner or lessee of the land on which the facility is located or by another, except that all such activities may be limited to parcels of 5 acres or more or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least $1,000 per acre based on gross sales dollars in area not zoned for agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as 1 parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to the General Laws. For the purposes of this section, the term “agriculture” shall be as defined in section 1A of chapter 128, and the term horticulture shall include the growing and keeping of nursery stock and the sale thereof; provided, however, that the terms agriculture, aquaculture, floriculture and horticulture shall not include the growing, cultivation, distribution or dispensation of marijuana as defined in section 2 of chapter 369 of the acts of 2012, marihuana as defined in section 1 of chapter 94C or marijuana or marihuana as defined in section 1 of chapter 94G; and provided further, that nothing in this section shall preclude a municipality from establishing zoning by-laws or ordinances which allow commercial marijuana growing and cultivation on land used for commercial agriculture, aquaculture, floriculture, or horticulture. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and cable or the energy facilities siting board shall, after notice given pursuant to section

eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and cable or the energy facilities siting board shall after notice to all affected communities and public hearing in one of said municipalities, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public. For the purpose of this section, the petition of a public service corporation relating to siting of a communications or cable television facility shall be filed with the department of telecommunications and cable. All other petitions shall be filed with the energy facilities siting board.

No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term "child care facility" shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Family child care home and large family child care home as defined in section 1A of chapter 15D shall be an allowable use and no city or town shall prohibit or regulate such use in its zoning ordinances or by-laws.

No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.

No zoning ordinance or by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a manufactured home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such manufactured home shall be subject to the provisions of the state sanitary code.

No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of facilitating ingress or egress of a person with a physical disability, as defined in section thirteen A of chapter twenty-two.

No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

No zoning ordinance or by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator. Zoning ordinances and by-laws may reasonably regulate the location and height of such antenna structures for the purposes of health, safety, or aesthetics; provided, however, that such ordinances and by-laws reasonably allow for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or by-law.

No zoning ordinance or by-law shall prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single accessory dwelling unit, or the rental thereof, in a single-family residential zoning district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations, including, but not limited to, 310 CMR 15.000 et seq., if applicable, site plan review, regulations concerning dimensional setbacks and the bulk and height of structures and may be subject to restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G. The use of land or structures for an accessory dwelling unit under this paragraph shall not require owner occupancy of either the accessory dwelling unit or the principal dwelling; provided, that not more than 1 additional parking space shall be required for an accessory dwelling unit; and provided further, that no additional parking space shall be required for an accessory dwelling located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station. For more than 1 accessory dwelling unit, or rental thereof, in a single-family residential zoning district there shall be a special permit for the use of land or structures for an accessory dwelling unit. The executive office of housing and livable communities may issue guidelines or promulgate regulations to administer this paragraph.

Credits

Added by St.1975, c. 808, § 3. Amended by St.1977, c. 860; St.1982, c. 40; St.1983, c. 91; St.1985, c. 637, § 2; St.1987, c. 191; St.1989, c. 106, § 1; St.1989, c. 341, § 117; St.1989, c. 590; St.1990, c. 521, § 2; St.1991, c. 481, § 6; St.1993, c. 450; St.1994, c. 276, §§ 1, 2; St.1995, c. 225, § 1; St.1997, c. 164, §§ 65, 66; St.1999, c. 127, § 54; St.2006, c. 123, § 36, eff. June 24, 2006; St.2007, c. 16, § 4, eff. Feb. 22, 2007; St.2008, c. 215, §§ 46, 47, eff. July 31, 2008; St.2009, c. 33, §§ 1, 2, eff. July 16, 2009; St.2010, c. 240, § 79, eff. Aug. 1, 2010; St.2016, c. 351, § 1, eff. Dec. 30, 2016; St.2017, c. 55, § 7, eff. July 28, 2017; St.2024, c. 140, § 76, eff. July 1, 2024; St.2024, c. 150, § 8, eff. Feb. 2, 2025; St.2024, c. 205, § 63, eff. Sept. 12, 2024; St.2024, c. 239, § 37, eff. Feb. 18, 2025.

Notes of Decisions (804)

M.G.L.A. 40A § 3, MA ST 40A § 3
Current through the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

EXHIBIT B

325 Mass. 297
Supreme Judicial Court of Massachusetts, Norfolk.

DEUTSCHMANN
v.
BOARD OF APPEALS OF CANTON.
TOWN OF CANTON
v.
DEUTSCHMANN.

Argued Dec. 5, 1949.
|
Decided Feb. 7, 1950.

Synopsis

Tobe Deutschmann brought a suit in equity against the Board of Appeals of Canton to review the action of the board in affirming the action of the selectmen of the Town of Canton denying the plaintiff a permit to build a stand on his farm for the sale of dairy products and ice cream made from products raised on the farm. The action was tried along with suit between the Town of Canton and Tobe Deutschmann.

The Superior Court, Goldberg, J., rendered a decree in favor of Tobe Deutschmann and the Board of Appeals in Canton and the Town of Canton appealed.

The Supreme Judicial Court, Counihan, J., held that the ice cream and dairy products were farm products within meaning of zoning ordinance and that erection of stand for sale of such products was authorized.

Decree affirmed.

Attorneys and Law Firms

***298** ****314** E. J. Galligan, Town Counsel, Canton, for defendant Board and Town of canton.

E. J. Flavin, Boston, for appellee.

Before ***297** QUA, C. J., and LUMMUS, WILKINS, SPALDING and COUNIHAN, JJ.

Opinion

COUNIHAN, Justice.

These are appeals from final decrees entered in suits tried together in the Superior Court. The judge made findings of fact and rulings of law, and the evidence is reported. The suits involve the construction of s. 6(e) of the zoning by-law of the town of Canton alleged to have been adopted by virtue of G.L. (Ter.Ed.) c. 40, § 25, as appearing in St.1933, c. 269, § 1, which in effect authorizes a town by by-law to divide the town into districts and within such districts to regulate and restrict the use of land. There was some doubt about the validity of this by-law because of imperfections in its adoption, but it was later validated by St.1949, c. 178.

The judge after a hearing on a statement of agreed facts, with some oral testimony, found that Deutschmann was the owner of a large parcel of land in Canton on which he operated 'Indian Line Farm,' a dairy farm, with a large number of well bred cattle and a substantial investment of money in modern equipment for farming and the production of dairy products; that he duly applied for a permit to build a structure to be used, as he stated in his application, for '*Dairy products-Ice cream stand * * * Products to be principally sold are raised on the premises*' (emphasis supplied); that after a denial of the application for this permit by the selectmen, he duly appealed to the board of appeals of Canton; and that after an adverse decision by that board he duly appealed to the Superior Court sitting in equity as provided by said c. 40, § 30, as appearing in St.1933, c. 269, § 1, which in so far as material reads, 'Any person aggrieved by a decision of the board of appeals * * * may appeal to the superior court sitting in equity * * *. It shall hear all pertinent evidence and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board, or make such other decree as justice ***299** and equity may require.' The pertinent part of the Canton zoning by-law (§ 6), in so far as material, reads, 'In single residence districts * * * no new * * * structures shall be * * * constructed and no land * * * structure or part thereof shall be used except for one or more of the following purposes: * * * (e) *Farms * * * and the sale of products raised on farms in the town of Canton from any suitable form of roadside stand, providing the products principally sold are raised on the premises*'. (Emphasis supplied).

It was agreed, and the judge so found, that the proposed structure was a suitable form of roadside stand. The judge further found that Deutschmann proposed to sell from this stand milk in cartons and in paper cups, milk shakes, ice cream and cheese; that the ice cream was to be made on the farm from milk and cream produced on the farm with the addition of sugar, flavoring and gelatin; and that the

ingredients of the milk shakes, except flavoring, and of the cheese would be raised on the farm. The judge further found that the representatives of the town agreed that, if the sale of such ice cream came within the purview of § 6(e) of the zoning by-law, Deutschmann was entitled to build the proposed structure and that, if this were so, the bill of the town should be dismissed. The judge so found and ordered decrees to be entered accordingly.

The town, however, asserts and argues that relief should be denied Deutschmann because he began to construct the roadside stand without a permit after the denial of his appeal by the board of appeals, and that he is therefore in equity without clean hands. This contention cannot be sustained. The doctrine of clean hands is not one of absolutes and should be so applied as to accomplish its purpose of promoting public policy and the integrity of the courts. MacCormac v. Flynn, 313 Mass. 547, 549-550, 48 N.E.2d 24; ****315** Walsh v. Atlantic Research Associates, Inc., 321 Mass. 57, 65-66, 71 N.E.2d 580. To bar Deutschmann the relief afforded by G.L. (Ter.Ed.) c. 40, § 30, as appearing in St. 1933, c. 269, § 1, would result in unusual hardship, disproportionate to his action in starting the building in that it would forever preclude him from ***300** obtaining a permit to build which we now say he was legally entitled to receive. No such penalty ought to be inflicted in all of the circumstances of this case.

We therefore consider the issue here involved on its merits. It has been decided by our court that farming activities are not confined to the tilling of land and the harvesting of crops. Land may be utilized for grazing by livestock, or in raising hay for cows for the production of milk and other dairy products. Town of Lincoln v. Murphy, 314 Mass. 16, 19, 49 N.E.2d 453, 146 A.L.R. 1196. See also Winship v. Inspector of Buildings of Town of Wakefield, 274 Mass. 380, 174 N.E. 476; Moulton v. Building Inspector of Milton, 312 Mass. 195, 43 N.E.2d 662. Our attention has been directed to no decision of our court upon the particular issue here raised, and we have discovered none. A similar issue, however, was decided in Kimball v. Blanchard, 90 N.H. 298, 7 A.2d 394, 396, wherein a zoning by-law, similar to that here, exempted from its restriction a farm and permitted the owner to sell 'farm produce on the premises.' There, as here, the owner of the farm asserted the right to sell 'ice cream made on the farm from the products of the farm, milkshakes, [and] cheese,' free from the provisions of the zoning by-law. At page 301, of 90 N.H., at page 396 of 7 A.2d, it was said, 'we conclude that it could not have been the purpose of the provision in question to prohibit a farmer * * * from selling on his own land a commodity composed primarily of agricultural raw material there produced. The interpretation for which the defendants contend would place under the ban such common farm-'manufactured' products as cider, maple syrup, butter and cheese. If there had been any intention to restrict the farmer's sales to farm produce in its natural state, the qualifying phrase could easily have been employed.'

The judge relied on this case in arriving at his conclusions and we agree with him.

We are not unmindful of decisions in Commissioner of Corporations & Taxation v. Assessors of Boston, 321 Mass. 90, 94-95, 71 N.E.2d 874, and in Assessors of Boston v. Commissioner of Corporations & Taxation, 323 Mass. 730, 744, 84 N.E.2d 129, on which the town relies. In each of these cases there were circumstances ***301** which materially distinguish them from the cases at bar. The fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them. We believe that the nature of the article to be sold is not the sole test, but where, by whom and in what fashion the article is produced are considerations of importance. We do not believe that one who on his premises processes milk and cream from cows on his premises thereby ceases to be a farmer, selling on his farm products there raised. See State v. Christensen, 18 Wash.2d 7, 33, 137 P.2d 512, 146 A.L.R. 1302.

Decree affirmed.

All Citations

325 Mass. 297, 90 N.E.2d 313

EXHIBIT C

351 Mass. 561
Supreme Judicial Court of Massachusetts, Norfolk.

Malby V. PARRISH
v.
BOARD OF APPEAL OF SHARON.

Argued Nov. 9, 1966.
|
Jan. 9, 1967.

Synopsis

Suit in equity by owner of dairy farm in single residence district for permit to construct building in which owner proposed to sell prepackaged ice cream, milk, cream, and fruit punch in half-gallon bottles. The Superior Court, Tomasello, J., entered final decree that decision of town board of appeal, affirming denial of application for permit, exceeded board's authority and was therefore invalid, and appeal was taken. The Supreme Judicial Court, Spiegel, J., held that proposed sale of fruit punch was not mere de minimis violation of town zoning bylaw prohibiting use of property in single residence districts for organized business or commercial purpose except farm purposes, including products raised on premises only, and thus refusal of permit was proper.

Reversed; decree entered that decision of board did not exceed its authority and that no modification thereof was required.

Attorneys and Law Firms

***561** ****83** Daniel G. Rollins, Brookline, for defendant.

Edward M. Dangel, Boston (Leo E. Sherry, Boton, and Dewey C. Kadra, Framingham, with him) for plaintiff.

Before WILKINS, C.J., and SPALDING, CUTTER, SPIEGEL and REARDON, JJ.

Opinion

***562** SPIEGEL, Justice.

This is an appeal by the defendant board of appeal from a final decree of the Superior Court that a decision of the board affirming a decision of the inspector of buildings denying the plaintiff's application for a building permit exceeded its authority and was therefore invalid. The judge viewed the locus and made a 'Report of Material Facts, Findings, Conclusions and Order for Decree,' which he subsequently adopted as a report of material facts. The evidence is reported.

The material facts do not appear to be in dispute. The plaintiff, a dairy farmer, is the owner of thirty-eight acres of land, more or less, and buildings at the intersection of Bay Road and East Street in Sharon. Since 1932 he has 'continuously conducted an extensive milk and dairy products producing business upon * * * (the) premises * * * (and has) a dairy herd now numbering approximately twenty cows. * * * (A)pproximately fifteen per cent of the milk sold has been produced on the premises * * * (and) the customers in the area number approximately 2,000.' In his desire to 'stabilize the financial upkeep of the dairy business during the slack summer season, and thus to dispose of its products,' the plaintiff applied for a permit to erect a frame building about forty-five feet in length and twenty-six feet in width. The building would be used for the manufacturing, storing and selling of ice cream. According to the plan of the proposed construction there would be windows on the outside to 'be used for people that would come to buy the ice cream such as cones, milk shakes and this type of thing. They would be what * * * (is called) outside service windows.'

The 'method of operation of the * * * dairy farm * * * included the bottling, packaging and sale of dairy products both produced upon the premises and purchased from other sources for resale, including milk, ice cream, cheese, and orange fruit drinks * * * which have been sold and distributed to the customers upon the retail milk routes of the * * * (plaintiff) * * *. (He) intends to sell ice cream in cones as well as packages of the same, and also milk shakes, frappes ***563** and sundaes, none of which will be consumed within the contemplated structure, but will be delivered through three windows of the usual type found in ice cream stands. * * * (T)here will be ample parking space for cars to enter the premises * * * (to make) purchases without interference with any parking upon the highways approaching the locus. * * * (T)he * * * structure will be some distance from the streets with entrances of approach therefrom.'

The building would have a self-service room with open-top freezer and refrigeration ****84** cases. Prepackaged ice cream, milk and cream would be sold from that room. Fruit punch in half-gallon bottles would also be sold from the self-service room.

Section 2(A) of the zoning by-law of the town of Sharon provides: 'In the single residence districts, no new building or structure or part thereof shall be designed, constructed

or used and, except as provided in Section 6, no building or structure or part thereof shall be altered, enlarged, extended, reconstructed, or used and no premises shall be used for any organized business, trade, manufacturing or commercial enterprise, or except for one or more of the following purposes: * * * 6. Farm, market garden, nursery or greenhouse; including the sale of products raised on the premises only.' The trial judge ruled '(t)hat the proposed sale of dairy products aforesaid does not come within the contravention and intent' of the above zoning by-law or of G.L. c. 40A s 5; '(t)hat the granting of the building permit would not be contrary to the provisions and intent of the Zoning By-Laws of the Town of Sharon'; and that 'the Building Inspector and the respondent Board of Appeals acted arbitrarily and capriciously in denying said permit.'

The board's first contention is that the by-law prohibits the use of premises in a single residence district for 'any organized business, trade, manufacturing or commercial enterprise' even though it is a farm use. It argues in effect that if the proposed use can be characterized as an 'organized business * * * (and so forth)' it is forbidden, even ***564** though the use is also for a farm purpose. We do not agree. Section 2(A) of the by-law, contains a specific reference to 'any organized business' and it is clear from par. 6 of this section that farming is exempt from the restriction pertaining to an organized business as defined in s 18, par. 1, of the by-law. [1]

The board next contends that the proposed structure is not exempt from s 2 of the zoning by-law either as a nonconforming use under s 6 of the zoning by-law [2] or ****85** under G.L. c. 40A, s 5. Although the judge did not specifically ***565** so state, it seems clear that his decision was based, at least in part, on a finding that the proposed building would either constitute an 'alteration, enlargement, extension, reconstruction, raising or moving of a non-conforming building, or * * * changing, extension or moving of a non-conforming use' within s 6 of the zoning by law or would not 'amount to (a) reconstruction, extension or structural change, * * * (or to an) alteration * * * to provide for * * * (a) use for a purpose or in a manner substantially different from the use to which it was put before alteration * * *' within G.L. c. 40A, s 5.

Since no building existed in which the sale of farm products was carried on in the manner here contemplated, the proposed construction of the ice cream stand is clearly not exempt from s 2 of the by-law either under s 6 of the by-law or under G.L. c. 40A, s 5. Chilson v. Zoning Bd. of Appeal of Attleboro, 344 Mass. 406, 413, 182 N.E.2d 535; Town of Stow v. Pugsley, 349 Mass. 329, 331, 332, 207 N.E.2d 908.

The only remaining issue is whether the proposed use of the building comes within the requirements of s 2(A) and should be permitted as a conforming use. The board argues that the sale of products other than 'products raised on the premises only' is contemplated and therefore s 2(A), par. 6, of the by-law is not satisfied. There is uncontradicted testimony that the milk and cream to be used to produce the ice cream sold from the stand will be produced only from the cattle on the plaintiff's farm. [3] One question is, therefore, whether certain products which the trial judge found the plaintiff intends to sell, namely, 'ice cream in cones as well as packages of the same, and also milk shakes, frappes and sundaes * * *,' are 'products raised on the premises only.'

In Deutschmann v. Board of Appeals of Canton, 325 Mass. 297, 299, 90 N.E.2d 313, 314, we held that 'milk in cartons and in paper cups, milk shakes, ice cream and cheese * * * (where) the ice cream was to be made on the farm from milk and cream ***566** produced on the farm with the addition of sugar, flavoring and gelatin; and * * * (where) the ingredients of the milk shakes, except flavoring, and of the cheese would be raised on the farm' were 'products raised on the farm of their owner.' The zoning by-law being construed in that case permitted the use of buildings for the purpose of farming 'and the sale of products raised on farms in the town of Canton from any suitable form of roadside stand, providing the products principally sold are raised on the premises.' The holding in that case did not rely on the word 'principally' in order to include the gelatin, flavoring and other ingredients of the products to be sold in the category of 'products raised on the farm.'

'The fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them. We believe that the nature of the article to be sold is not the sole test, but where, by whom and in what fashion the article is produced are considerations of importance. We do not believe that one who on his premises processes milk and cream from cows on his premises thereby ceases to be a farmer, selling on his farm products there raised.' Id. 301, 90 N.E.2d 315.

****86** We see no significant distinction between 'ice cream in cones as well as packages of the same, * * * milk shakes, frappes and sundaes' which the plaintiff in the case at bar intends to sell and the milk shakes and ice cream which the plaintiff in the Deutschmann case proposed to sell. The sale

of such products on the premises in the proposed manner is not proscribed by the Sharon zoning by-law, provided that the milk and cream used in the preparation come solely from the plaintiff's farm. But in the instant case the items to be sold are not confined to those permitted by the by-law. There is uncontradicted testimony by the manager of the dairy [4] that fruit punch is to be sold in half-gallon bottles in the so called self-service room of the ice cream stand. It is impossible to characterize fruit punch ***567** as 'products raised on the premises only' (emphasis supplied), even under the Deutschmann test.

It is true that per. 12 of s 2(A) of the zoning by-law permits '(s)uch accessory purposes as are customarily incident to the foregoing purposes * * *.' In the case of Town of Needham v. Winslow Nurseries, Inc., 330 Mass. 95, 101, 102, 111 N.E.2d 453, 457, we said, 'An incidental or accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use.' We held that the sale of garden tools, severed Christmas trees, and wreaths made from materials which had not been raised on the premises was not 'part of the nursery or greenhouse business and * * * not incidental thereto.' It seems to us that the sale of fruit punch is likewise not incidental to the sale of dairy products raised on the premises. See Lexington v. Menotomy Trust Co., 304 Mass. 283, 284, 23 N.E.2d 559; Mioduszewski v. Saugus, 337 Mass. 140, 143-144, 148 N.E.2d 655.

The sale of fruit punch in the proposed structure is not permitted by the Sharon zoning by-law or by G.L. c. 40A, s 5, either a conforming use or as the continuance of a nonconforming use, and it was error for the trial court to annul the decision of the board. The sale of this single item cannot be treated as a de minimis violation of the by-law; if it were so treated it would seem but a short step to allow as an equally de minimis violation the sale of items such as soft drinks, coffee, and other articles generally sold at roadside stands.

It does not appear that the board based its decision on the proposed sale of fruit punch. This is of no consequence. 'Upon appeal, it is the duty of the judge to hear all the evidence and to find the facts. He is not restricted to the evidence that was introduced before the board. The decision of the board is competent evidence to enable the judge to ascertain what conclusion the board reached in order that he may determine whether upon the facts found by him the decision of the board should stand or should be annulled or should be modified. * * * (T)he judge makes his own findings of fact, independent of any findings of the board, and ***568** determines the legal validity of the decision of the board upon the facts found by the court, or if the decision of the board is invalid in whole or in part, the court determines what decision the law requires upon the facts found.' Bicknell Realty Co. v. Board of Appeal of Boston, 330 Mass. 676, 679, 116 N.E.2d 570, 573. Where the evidence clearly shows facts which justify the decision of the board, its action should be sustained even though its decision was not based on that evidence.

The final decree is reversed and a decree is to be entered stating that the decision of the board did not exceed its authority and that no modification of its decision is required.

So ordered.

All Citations

351 Mass. 561, 223 N.E.2d 81

Footnotes

1 'An organized business * * * (and so forth) is one in which the owner, manager or agent employs other persons in such number or conducts the enterprise in such manner as to give to the premises used therefor the appearance of a place of business, industry, trade, or manufacturing as distinguished from or in addition to a place of residence.'

2 'Section 6. Non-Conforming Buildings and Uses.

'(A) Any lawful use existing in any building or premises at the time this by-law takes effect may be continued in the same building, premises or in the same part or parts thereof, even though not conforming to the use regulations of the district in which located.

'(B) No non-conforming building shall be altered, enlarged, extended, reconstructed, raised or moved, and no non-conforming use in any building shall be changed, extended or moved until a permit has been granted by the Inspector of Buildings, which permit shall not be issued unless the proposed alteration, enlargement, extension, reconstruction, raising or moving of the non-conforming building, or the proposed change, extension or moving of the non-conforming use will conform in every way to the provisions of this By-Law.

'(C) The Inspector of Buildings may grant a permit for the alteration, enlargement, extension, reconstruction, raising or moving of a non-conforming building, or for the changing, extension or moving of a non-conforming use, provided that:

'1. Such non-conforming use is changed to a use authorized in the district, or

'2. Such non-conforming use is not changed to a different non-conforming use, and

'3. Such change does not involve any alteration, enlargement, extension, reconstruction, raising or moving of any non-conforming building or use in any manner such that said alteration, enlargement, extension, reconstruction, raising or moving requires costs which are in excess of fifty (50) per cent of the assessed value of such non-conforming structure or use as determined by the records of the Board of Assessors existing at the time this provision is made part of this By-Law, and

'4. In a single residence * * * district, such non-conforming use is not extended or moved into any building or part of building that is designed, intended, arranged or devoted to a conforming use.'

Another relevant section of the Sharon zoning by-laws is s 18, par. 10: 'A nonconforming building is a building the use of which in whole or in part does not conform to the regulations of the district in which the building is located,' and par. 11: 'A non-conforming use (is a use) which does not conform to the use regulations of the district in which such use exists.'

3 We note, too, the following statement in the decision of the board: 'All the milk used for the ice cream would be produced on the * * * premises.'

4 The dairy is operated by a 'family corporation' consisting of the plaintiff, his wife and two sons, one of whom was the witness.

EXHIBIT D

360 Mass. 432
Supreme Judicial Court of Massachusetts, Worcester.

TOWN OF HARVARD
v.
William MAXANT.

Argued Sept. 16, 1971.
|
Decided Nov. 9, 1971.

Synopsis
Bill in equity by town against property owner to enjoin property owner from using or permitting use of land owned by him for the landing or taking off of aircraft. The Superior Court, Worcester County, Meagher, J., entered final decree in favor of the town and the property owner appealed. The Supreme Judicial Court, Quirico, J., held that private aircraft landing strip was not use that was 'customarily incidental' to residential use of property and was not permissible as accessory use of the property.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***432** ****348** Morris N. Gould, Clinton (C. A. Peairs, Worcester, with him), for defendant.

Morton C. Jaquith, Town Counsel, for plaintiff.

Before TAURO, C.J., and CUTTER, QUIRICO, and HENNESSEY, JJ.

Opinion

QUIRICO, Justice.

This is a bill in equity brought by the town of Harvard (town) against William Maxant (defendant) to enjoin him from using or permitting the use of land owned by him for the landing or taking off of aircraft, which use is alleged to be in violation of the town's zoning by-law. The defendant contends that this use of his property is lawful either as a permitted primary use or as accessory to a permitted use. The case is before us on the defendant's appeal from a final decree in favor of the town.
***433** We have a report of all the evidence presented at the trial. It consists principally of oral testimony. The trial judge was not requested to file a report of material facts found by him. G.L. c. 214, s 23. However, he voluntarily filed a written decision which included detailed findings of facts. In this situation we 'examine the evidence and decide the case according to our own judgment, accepting as true the findings of the trial judge, whether based wholly or partly upon oral evidence, unless they are shown to be plainly wrong, and finding for ourselves such other and additional facts as we deem to be justified by the evidence.' Sulmonetti v. Hayes, 347 Mass. 390, 391—392, 198 N.E.2d 297, 298. Accordingly, we summarize the facts as found by us and by the trial judge.

Prior to October 21, 1968,[1] the defendant spoke to the chairman of the town's board of selectmen about the proposed use by him and his son of two parcels of land in the town for an aircraft landing strip. One of the parcels was then owned by the defendant's son and it consisted of 14 acres. The other was an adjoining parcel consisting of 20.47 acres. The selectmen discussed the matter with the town counsel who gave them a written opinion on October 24, 1968, that the proposed use was not permitted by the town's zoning by-law (by-law). On October 28, 1968, the selection sent the defendant a copy of the opinion letter. On November 5, 1968, the defendant wrote the selectmen informing them that he had purchased the 20.47 acre parcel and that he wanted to make the announcement that he and his son would use a part of the parcel as 'a personal landing strip' for landings and takeoffs by his and his son's personal planes. The defendant acquired title to the 20.47 acre parcel by a deed dated December 17, 1968, and recorded on December 30, 1968.

The defendant never applied for or obtained any permit from the town to use the property as a private landing field. He was not required to obtain any permit for the landing field ***434** from the Massachusetts Aeronautics Commission, but he was required to notify the Commission in writing that he was constructing or maintaining the field. G.L. c. 90, s 39B.[2] He gave such notice not later than January 10, 1969.

****349** During the ten years before the defendant purchased his land, about fifteen acres of it had been used by a tenant for growing corn in the area now occupied by the defendant's airstrip. About one acre of the land contained apple trees. After the defendant purchased the land, he did some clearing, planting of clover and mowing in the area where the airstrip is located. He also placed some beehives in three places on the property. There was no building on the property when the defendant purchased it, but prior to the trial in the Superior Court he erected a structure which he

used for storing agricultural equipment. His building permit application described this structure simply as a 'storage building,' but the defendant hoped to use it for storing his aircraft in winter.

The airstrip has been used for only six landings and takeoffs. Three were made by the defendant and three were made by his son, each piloting his own single engine plane. These landings and takeoffs involved no extraordinary noise, and neither caused nor resulted in any smoke, odor, fumes or mechanical disturbance. The defendant used the airstrip for his personal pleasure and recreation, and intended to continue to use it for that purpose. He and his son lived about five miles from the airstrip, the defendant in the town of Harvard, and his son in Ayer.

The by-law, at all times material to this case, divides the town into five types of districts: Agricultural-Residential (AR), Business, Commercial, Commercial-Industrial, and ***435** Watershed Protection and Floodplain. The defendant's 20.47 acre parcel is in an AR district. The by-law prohibits certain described or specified 'injurious, offensive, or otherwise detrimental' uses in all districts of the town.[3] The list of specified prohibited uses does not include airports, airstrips, landing strips or the storage of aircraft.

The by-law states that premises shall be used only as therein permitted, and that '(a)ny accessory use may accompany the main use.' It defines the word 'accessory' as follows: 'An accessory use or structure is one clearly subordinate to, and customarily incidental to, and located on the same premises with the main use or structure to which it is accessory.' It expressly prescribes and limits the uses which are permitted in each of the five types of zoning districts. Section 5.2 of the by-law provides that the uses permitted as of right in an AR district include one family residences, limited types of home occupations, the renting of rooms to nontransients, various forms of agriculture including housing for farm help and the sale of natural produce of the farm, and certain religious, educational, conservation or municipal uses. Additional limited uses are allowed subject to special permits or other approval required therefor. None of the uses permitted in an AR district, whether as of right or upon special permit or approval, includes airports, airstrips, landing strips or the storage of aircraft. Neither is any of such uses expressly permitted in any of the other four types of districts.

****350** The defendant argues that since a private landing strip does not fall within any of the uses prohibited by s 5.1, it ***436** follows that it must therefore be permitted in an AR district, and perhaps in all five of the zoning districts. We do not agree with this oversimplified reading of one section of the by-law without regard to the other sections. There is no requirement that zoning by-laws or ordinances follow any particular pattern or structure. They may take the form of prescribing uses permitted or prescribing uses prohibited, or a combination of the two. The town adopted a by-law which combines the two. It prohibits certain uses from all zoning districts of the town, and it also prescribes and limits the uses permitted in each district. This by-law is 'both permissive and prohibitive in form.' Building Inspector of Chelmsford v. Belleville, 342 Mass. 216, 217, 172 N.E.2d 695, 696. The defendant's use is not made lawful solely because it is not prohibited by s 5.1 of the by-law. It must also be a use which is permitted in an AR district under s 5.2. Considered as the primary use made of the land, the private landing strip does not meet this test.

The defendant next argues that his use of the private landing strip is lawful because it qualifies as 'customarily incidental' to the residential use of the property. If this issue is decided on the record which comes to us from the Superior Court the defendant is barred at the threshold because on that record he made no residential use to which he could claim the private landing strip to be accessory. He gains nothing by resort to the by-law's provision permitting accessory uses since there is no use made of the property except for the landing strip. Village of Old Westbury v. Hoblin, 141 N.Y.S.2d 186 (N.Y.Supr.Ct.). See Adley v. Paier, 148 Conn. 84, 86, 167 A.2d 449; Mahler v. Board of Adjustment of the Borough of Fair Lawn, 94 N.J.Super. 173, 180, 227 A.2d 511, affd. 55 N.J. 1, 258 A.2d 705; Mola v. Reiley, 100 N.J.Super. 343, 348, 241 A.2d 861. Cf. Baddour v. Long Beach, 279 N.Y. 167, 175, 18 N.E.2d 18, app. dism. 308 U.S. 503, 60 S.Ct. 77, 84 L.Ed. 431. For the foregoing reasons, the final decree must be affirmed.

At the argument before this court the defendant offered a document entitled 'Additional Argument Supplementing Brief for Appellant.' stating that since the decision of the ***437** case in the Superior Court he 'has applied for and received a building permit and has in fact constructed a permanent residence which he now occupies as his domicile on the 20.47 acre parcel of land in Harvard which is the subject of this proceeding.' The town agreed only that the permit had been issued. The additional facts thus offered cannot be placed before us by the unilateral action of the defendant. Coonce v. Coonce, 356 Mass. 690, 693, 255 N.E.2d 330, and cases cited. However, since the additional facts, it treated as properly before us, would not change the result, and because both sides have argued the question

whether the private landing strip would be permitted as accessory to a residential use, we think that by expressing our opinion upon that question we may prevent further litigation between the parties. Wellesley College v. Attorney Gen., 313 Mass. 722, 731, 49 N.E.2d 220, and cases cited. Simeone Stone Corp. v. Board of Appeals of Bourne, 345 Mass. 188, 192, 186 N.E.2d 457.

For the purpose of the present discussion we are assuming that the defendant occupies a residence located on the same premises where the landing strip is located. The only question therefore is whether the use of the landing strip is 'customarily incidental' to the residential use. A review of decisions construing these and similar words will be helpful.

In Needham v. Winslow Nurseries, Inc., 330 Mass. 95, 101, 111 N.E.2d 453, 457, we said that '(a)n incidental or accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use,' and held that the sale of garden tools and equipment, the sale of certain merchandise not grown on the premises, ****351** and the use of the premises as the headquarters for a contracting business were not permitted as accessory uses to 'greenhouses' and 'nurseries.' In Pratt v. Building Inspector of Gloucester, 330 Mass. 344, 113 N.E.2d 816, we held that the keeping of two show horses was not within any accessory use impliedly permitted in a residence district. We said, pp. 346—347, 113 N.E.2d, p. 817, 'When the question arises as to uses which in general tend to become deleterious to a neighborhood of homes it would seem that the most liberal test open to us ***438** must be whether the use is one that is so necessary in connection with a one family detached house or so commonly to be expected with such a house that it cannot be supposed the ordinance was intended to prevent it. We do not believe that a stable for horses for family use could pass that test either as of 1927 when the ordinance was originally adopted or as of 1950 when it was reenacted. If the same question were presented as of the year 1900, for example, it is possible that a different answer would be required.'

The following helpful discussion of the meaning of the words 'subordinate and customarily incidental' in a zoning by-law provision for accessory uses is contained in Lawrence v. Zoning Bd. of Appeals of North Branford, 158 Conn. 509, 512—513, 264 A.2d 552.

'The word 'incidental' as employed in a definition of 'accessory use' incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word 'subordinate' included in the definition in the ordinance under consideration. But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use.

'The word 'customarily' is even more difficult to apply. Although it is used in this and many other ordinances as a modifier of 'incidental,' it should be applied as a separate and distinct test. Courts have often held that use of the word 'customarily' places a duty on the board or court to determine whether it is usual to maintain the use in question in connection with the primary use of the land. See 1 Anderson, (American Law of Zoning s 8.26) loc. cit. In examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed above. The use must be further scrutinized to determine ***439** whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. * * *

'In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties.'

The judge made no express finding on the factual issue whether a private landing strip is or is not 'customarily incidental' to a residential use. No finding was required on the issue because he found that 'there is no residence upon this land, nor is there any agricultural use conducted on the premises, * * * the respondent wants to use this landing strip for purely his personal use and for pleasure, * * * (and) the use of this air strip is not attached to any residential use or agricultural use of the premises in question.'

The defendant relies in part on cases which have held such uses as tennis courts, swimming pools and amateur radio towers to be accessory to residential uses. ****352** Wright v. Vogt, 7 N.J. 1, 80 A.2d 108; Skinner v. Zoning Bd. of Adjustment of the Township of Cherry Hill, 80 N.J.Super.

380, 193 A.2d 861; Bloomfield v. Parizot, 88 N.J.Super. 181, 211 A.2d 230; Hardy v. Calhoun, 383 S.W.2d 652 (Tex.Civ.App.). For additional citations and discussion of similar recreational uses held to be accessory to residential uses, see Rathkopf, The Law of Zoning and Planning (3d ed.) c. 23, s 36 at pp. 23—53 to 23—59, and Supplement thereto. We do not consider those cases applicable to the question before us.

Each of the parties has cited to us a decision in another State on the question whether a private landing strip is accessory to a residential use. The defendant relies on Schantz v. Rachlin, 101 N.J.Super. 334, 244 A.2d 328, affd. ***440** 104 N.J.Super. 154, 249 A.2d 18, and the town relies on Samsa v. Heck, 13 Ohio App.2d 94, 234 N.E.2d 312. In each case the zoning ordinance permitted accessory uses subordinate to the principal use and located on the same lot therewith. The ordinance in the Schantz case required that a claimed accessory use be 'clearly incidental' to the principal use, whereas that in the Samsa case required that it be 'customarily incident' thereto. Thus, the ordinance in the latter case was almost identical to that before us. In the Schantz case the court held the private landing strip use was permitted as accessory to a residential use, and in the Samsa case the court held that it was not. We consider the decision in the Samsa case more persuasive because of the similarity of the ordinance involved there to the ordinance before us.

In the case before us the defendant testified that his was the only private landing strip in the town of Harvard, and that he knew of none in adjoining towns. Even if we take notice of the increasing use of private aircraft as a means of business travel and transportation and for pleasure purposes, such use has not become so prevalent in Massachusetts that it can now be held that it is one 'customarily incidental' to the residential use of property. See Building Inspector of Falmouth v. Gingrass, 338 Mass. 274, 276, 154 N.E.2d 896. This conclusion is limited to the factual situation presented by the record before us, and we intend no suggestion that a private landing strip may not some day become 'customarily incidental' to a residential use.

Decree affirmed.

All Citations

360 Mass. 432, 275 N.E.2d 347

Footnotes

1 The exact date the conversations started is unclear, but there is some evidence that they may have started as early as April, 1968.

2 Section 39B, inserted by St.1946, c. 607, s 1, provides in part that 'no * * * airport, restricted landing area * * * shall be maintained or operated unless a certificate of approval of the maintenance and operation thereof is granted and is continued in force by the commission.' However, it also provides that the section shall not apply 'to restricted landing areas designed for non-commercial private use * * * provided, that each person constructing or maintaining a restricted landing area for non-commercial private use shall so inform the commission in writing.'

3 Section 5.1 of the by-law provides as follows: '5.1 GENERAL. No use is permitted which is injurious, offensive, or otherwise detrimental to the neighborhood or community because of a. concussion, vibration, noise, or other mechanical disturbance, b. Smoke, dust, odor, fumes, or other air pollution, c. glare, fluctuating light, or electrical interference, d. danger of fire, explosion, radioactivity, or other danger, or e. wastes or refuse (except at the Town Dump), or other characteristics. The customary character of normal farm operations permitted in the Bylaw is not considered detrimental. The collection or open storage of junk or abandoned autos, the commercial raising of swine or fur animals, the manufacture or commercial storage of explosives, a fertilizer plant, a slaughter house, or a race track are specifically prohibited.'

EXHIBIT E

360 Mass. 630
Supreme Judicial Court of Massachusetts, Plymouth.

Norman H. MOORE et al.
v.
ZONING BOARD OF APPEALS
OF MIDDLEBOROUGH.

Argued Nov. 4, 1971.
|
Decided Dec. 15, 1971.

Synopsis
Selectmen ordered owners to cease operation of mink ranch in residence district and the owners appealed to town's zoning board of appeals. The board denied owner's request for review of selectmen's order and bill of equity was brought. The Superior Court, Lurie, J., sustained owner's appeal and zoning board of appeals appealed. The Supreme Judicial Court, Cutter, J., held that mink ranch was not a 'farm' within zoning bylaw permitting farms, nurseries and buildings thereon devoted to agricultural purposes in residence districts.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***630** ****713** George C. Decas, Middleboro, for defendant.

Felix F. Perrone, New Bedford, for plaintiffs.

Before TAURO, C.J., and CUTTER, REARDON, BRAUCHER and HENNESSEY, JJ.

Opinion

CUTTER, Justice.

The Moores own about four acres of land (locus) in a district zoned for residences by the Middleborough zoning by-law. Two acres are cleared and two are woodland. The Moores reside on the locus and since 1966 have used a portion (the mink area) of the land (150 feet by 130 feet), enclosed by a wire mesh fence, for raising and breeding mink. The mink area contains a wood and wire shed about twelve feet by 118 feet. An additional and similar shed is in the process of construction. The sheds will house 160 female breeders and forty male breeders throughout the year. There will be 500 to 600 young mink ***631** from May until November each year. The locus is 'well maintained for the purposes' of its present use. [1]

The zoning by-law (s IV A 1) lists among the uses permitted in a residence district 'c. Farms, nurseries and buildings thereon devoted to agricultural purposes.' The by-law was adopted June 16, 1958. [2] It ****714** contains no definitions of 'farm' or of 'agricultural purposes.'

About September 26, 1967, the selectmen, acting through the town manager, ordered the Moores to cease operating the mink farm within thirty days of receipt of the order. Upon appeal to the town's zoning board of appeals, the board, after hearing, voted to deny the Moores' request for review of the selectmen's order. Upon this bill in equity under G.L. c. 40A, s 21, the facts were agreed. A superior Court judge properly treated the matter as presented upon a case stated. On September 9, 1968, an order for a decree (remanding the matter to the board for a de novo hearing) was made prior to our decision on April 2, 1969, in Commonwealth v. Proctor, 355 Mass. 504, 246 N.E.2d 454. After that decision, a final ***632** decree was entered on September 15, 1969, sustaining the Moores' appeal from the selectmen's order and ruling that the 'operation . . . of a mink farm is within the (z)oning (b)y-law and that the order of the . . . (s)electmen is illegal and void.'

1. Prior to the adoption of the by-law, the term 'farms' under somewhat similar zoning by-laws had been held not to include the peculiarly offensive occupation (see Pendoley v. Ferreira, 345 Mass. 309, 312—313, 187 N.E.2d 142) of raising pigs for market, see Lincoln v. Murphy, 314 Mass. 16, 19—22, 49 N.E.2d 453, or the raising of greyhounds. See Mioduszewski v. Saugus, 337 Mass. 140, 145, 148 N.E.2d 655. More recently (Hume v. Building Inspector of Westford, 355 Mass. 179, 181—182, 243 N.E.2d 189) maintenance of a dog kennel was held not to be a permissible accessory use in a residential area. Cf. Jackson v. Building Inspector of Brockton, 351 Mass. 472, 475—479, 221 N.E.2d 736, where the cases relating to dairy farming are reviewed. Cf. also Cumberland Farms of Conn. Inc. v. Zoning Bd. of Appeal of No. Attleborough, Mass., [a] 267 N.E.2d 906 (dealing with a statute clearly intended to affect local zoning ordinances and by-laws, because it is included in, and by way of amendment of, the zoning enabling act, G.L. c. 40A.

A mink ranch would probably not have been regarded as within the normal concept of a farm, or as an agricultural

pursuit, in 1958 when the Middleborough by-law was adopted, or under the Massachusetts decisions just cited. Essentially the same question, as is now before us, was decided in Commonwealth v. Proctor, 355 Mass. 504, 505, 246 N.E.2d 454. Proctor was convicted of violating a Haverhill zoning ordinance (perhaps less restrictive than the by-law now to be interpreted) by raising mink in a residence and rural district.[3] This court sustained the conviction, holding that ***633** 'mink are not included in the phrase, 'domestic or other animals,' and that the land was not 'devoted to agricultural purposes.' The opinion proceeded (pp. 505—506, 246 N.E.2d p. 455), 'Mink are not domestic animals within the meaning ****715** of the ordinance since the word 'domestic' as applied to animals ordinarily carries the meaning of 'tamed, associated with family life, accustomed to live in or near the habitations of men.' . . . Nor are the mink covered by the term, 'Other animals.' We think that these words 'including the raising of domestic or other animals' must be read with the words immediately preceding them, namely, 'a tract of land devoted to agricultural purposes.' This strongly suggests that the term, 'other animals,' refers only to those similar to domestic animals and of the sort commonly associated with agricultural pursuits.'

The Moores contend that the Legislature has now expressly provided that mink are to be treated as domestic animals. See G.L. c. 128, s 8B, inserted by St.1969, c. 37, s 2, quoted in the margin.[4] Chapter 128 deals with the regulatory activity of the State Department of Agriculture. A similar contention was dealt with in the ***634** Proctor case, 355 Mass. 504, 506, 246 N.E.2d 454, 456, where this court said, 'In support of his argument that the raising of mink made his premises a 'farm' the defendant relies on the fact that he held a certificate under G.L. c. 131, s 105A, and hence the mink were 'domesticated animals' and he was engaged in 'an agricultural pursuit.' . . . The classification of mink and mink raising under s 105A is irrelevant to an interpretation of the zoning ordinance. A 'farm' under the ordinance must be determined in the context of the ordinance and not by a statute dealing with a different objective.' The court (see the Proctor case, 355 Mass. 504, 505, fn. 2, 246 N.E.2d 454) had already referred to the provisions of s 105A in some detail and had noted that similar provisions (see fn. 4, supra) had been inserted, as G.L. c. 128, s 8B, by St.1969, c. 37, s 2.

Lincoln v. Murphy, 314 Mass. 16, 19—22, 49 N.E.2d 453, also supports the view that the Moores are not conducting a 'farm' within the meaning of the by-law. There considerable emphasis was placed (pp. 19—20, 49 N.E.2d p. 456) upon the circumstances that no land was cultivated and that not 'a pound of the food furnished to the hogs . . . (was) produced upon the premises' there discussed. A similar situation exists in the present case (see fn. 1).

The present case is governed by the Lincoln and Proctor decisions. Viewed ****716** in the context of the Middleborough by-law, 'farms' does not include this mink ranch. General Laws c. 128, s 8B, is not to be read as having affected, upon its enactment in 1969, town by-laws theretofore in existence any more than its 1950 predecessor statute (G.L. c. 131, s 105A), in the Proctor case, affected the 1956 Haverhill zoning ordinance (see fns. 3, 4, supra).

2. The final decree is reversed. A new final decree is to be entered declaring that the order of the zoning board of appeals was within the board's jurisdiction and that no modification of the order is required.

So ordered.

All Citations

360 Mass. 630, 276 N.E.2d 712

Footnotes

1 The record shows the following further facts, among others: 'The mink are raised for . . . their pelts . . . (which are) sold on the wholesale fur market. The young mink are graded and then killed by the injection of a chemical into their lungs. This is done either inside the shed or in the (mink) area . . .. The . . . pelts are removed . . . in the outside area and . . . then transported elsewhere for scraping. The Moores have a small vegetable garden on their premises for their . . . use only. None of the feed required by the mink is produced on the . . . (locus) but is . . . brought on to the . . . (locus) in buckets. This feed is a processed combination of fish, horse meat, chicken, cheese, tomatoes, cottage cheese, liver, and other ingredients.' The owners of

land immediately adjacent to the locus did not object to the mink ranch. More distant neighbors did object. There was reference to a 'potential odor, nuisance, and rat problem.'

2 The selectmen constitute the enforcing agency under the by-law (s VII B). Section VII A 1 provides in part: 'Before any dwelling, building, or structures (except farm buildings and farm structures other than dwellings) of one hundred fifty square feet or more in area on the ground or eight feet or more in height is erected . . . on any lot in all types of districts, the applicant shall file a petition for a permit with the (s)electmen . . . with a plot plan drawn substantially to scale which shall show the lot dimensions, adjacent ways, the location of dwellings, building, or structures already on the lot, and the exact size and location of the dwelling, building, or structure proposed to be erected . . . and a statement of the intended use of the premises, buildings, and structures existing and proposed. If such proposed dwelling, buildings, or structures and use thereof . . . conform to the provisions of this (b)y-(l)aw, the (s)electmen shall take final action on all petitions for permits within thirty days of their filing.'

a Mass.Adv.Sh. (1971) 357, 358, 362.

3 In such a district, the Haverhill ordinance (which the original papers show to have been adopted in 1956) permitted '(f)arms, market gardens, nurseries, and greenhouses.' A farm was defined in the ordinance as 'a tract of land devoted to agricultural purposes, including the raising of domestic or other animals, and including the buildings accessory to such agricultural purposes and the dwelling of the farmer.' Another provision of the ordinance prohibited the 'keeping of birds and animals . . . except on farms.'

4 Statute 1969, c. 37, is entitled 'An Act placing the supervision of mink ranches under the department of agriculture.' (See 1969 House Bill No. 1670.) The pertinent statutory provisions theretofore had appeared somewhat illogically in connection with provisions relating to the Department of Natural Resources. See G.L. c. 21, s 6A (as amended through St.1965, c. 665, s 1), and c. 131, s 105A (inserted by St.1950, c. 424, and repealed by St.1967, c. 802, s 1). Section 8B of c. 128 reads (emphasis supplied): 'Mink that have been propagated in captivity for two or more generations shall be considered domesticated mammals subject to all the laws of the commonwealth with reference to possession, ownership and taxation as are at any time applicable to domesticated animals; such domesticated mink and the pelts or products thereof shall be deemed agricultural products and shall not be subject to the provisions of chapter one hundred and thirty-one. The breeding, raising, producing in captivity and marketing thereof shall be deemed an agricultural pursuit. For the purposes of this section, a mink ranch shall be deemed to be any place where mink as defined by this section are raised and propagated in captivity. Each mink ranch shall be listed with the department . . . each year, and the premises and the breeding records may be inspected by the commissioner of agriculture . . . at any reasonable time. The fee for such listing shall be three dollars annually for which fee a certificate shall be issued by the department . . .. Such certificate shall be posted in a conspicuous place . . . at all times. The burden shall be upon the owner of such a ranch to prove that all mink possessed are domesticated as defined above. Whoever violates any provisions of this section shall be punished by a fine . . .'

EXHIBIT F

1991 WL 11258265
Only the Westlaw citation is currently available.
Massachusetts Land Court.

F. David VON JESS, Plaintiff
v.
Charles D. O'NEAL, Alfred S. Glavey, Raymond M. Cornish, Sally Bowers, Janis R. Plaue, B. Kenneth Ammenwerth, Nancy R. Bradbury, Michael Knupp and Paul J. Liddell, as they are members of and alternate members of and constitute the Board of Appeals of the Town of Littleton, and the Town of Littleton, Defendants

No. 142973.
|
Jan. 4, 1991.

DECISION

SULLIVAN, J.

***1** The plaintiff F. David von Jess of Acton, in the County of Middlesex appeals pursuant to the provisions of G.L. c. 40A, § 17 from a decision of the Zoning Board of Appeals of the Town of Littleton denying him, in substantial measure, relief from a decision of the Littleton Building Inspector. The plaintiff also alleges in his complaint pursuant to the provisions of G.L. c. 240, § 14A that the Littleton Zoning By-law conflicts in part with G.L. c. 40A, § 3 and accordingly is invalid. I concur with the plaintiff's position and find and rule that this litigation is governed by the state statute.

The plaintiff, together with his siblings and extended family, seeks to establish a farm stand selling local crops, grown by him or under his direction, produce and other agricultural, horticultural and viticultural products obtained from third persons, baked goods and handcrafted goods all made by family members, jams, jellies, dairy products, flowers, nursery stock and related kitchen utensils. The structure intended to accommodate the operation is a handsome barn historically used for storage and renovated to serve as a showcase for the plaintiff's stock.

The present controversy has its roots in the treatment by the local zoning by-law of a farm stand as a permitted accessory use only in a residential district. It encompasses the related question as to the permissible limits that may be placed on the stock of a farm stand. Finally, the propriety of the inclusion within the building of offices for the agricultural personnel is raised.

A trial was held in the Land Court on September 5 and 7, 1990, at which a stenographer was appointed to record and transcribe the testimony. Fifty exhibits were introduced into evidence, some with multiple parts and one a video tape showing locus and other areas within Littleton, which are incorporated herein for the purpose of any appeal. Six witnesses testified: the plaintiff testified in his own behalf; he also called Douglas Roberts, a marketing specialist for the Massachusetts Department of Food and Agriculture, and Cecelia Ann White and Jennifer von Jess, both plaintiff's sisters. Roland Bernier, Littleton Building Commissioner and Zoning Officer, and John W. Flagg, a local farmer, testified for the defendants.

On all the evidence, I find and rule as follows:

1. The plaintiff acquired title to Lots 2 and 3, situated on King Street (also known as Routes 2A and 110), as shown on a plan entitled "Plan of Land in Littleton, Mass.", dated July 1983 by Richard J. Ludwig and recorded as Plan No. 1102 of 1983 in the Middlesex South District Registry of Deeds (to which all recording references relate) (Exhibit No. 18) from Lawrence J. Kenney, Jr., Trustee, by deed dated January 18, 1990 and recorded in Book 20334, Page 103 (Exhibit No. 1). Lot 2 contains 40,000 square feet and on it is situated the farm stand and its parking; the other, a larger lot, contains 100,750 square feet upon which are situated two green houses and which will be devoted to the raising of flowers and nursery stock.

***2** 2. There has been a barn on locus for many years, and it now has been substantially renovated to house the plaintiff's proposed farm stand, offices and storage. The plaintiff intends to add loam and to fertilize the area to assure the land's ability to support crops. The proposed farm stand venture includes a nursery, greenhouses, a landscaping division, the growing and selling of crops, plants and flowers, assorted items referred to above and various similar or related items to be sold in connection therewith. Five rooms are planned for the second floor to accommodate offices for various aspects of the operation: nursery/greenhouse, crop farming, farm stand management, accounting/personnel/inventory and the plaintiff's office for overall enterprise management.

3. Prior to purchasing the land the plaintiff investigated various aspects of the zoning in Littleton including a review of

the various farm stand operations located in the town. One of the plaintiff's sisters spoke to Mr. Roland Bernier, the building inspector, in an effort to obtain his opinion as to the proposed farm stand prior to the plaintiff's purchase of the locus. He advised her that if the plaintiff stayed within the building's "foot steps" (i.e., footprint), there should be no difficulty. He then handed her a copy of the "Cataldo Decision" so-called and informed her that as to farm stands, it represented the high water mark in decisions of the defendant Zoning Board of Appeals ("ZBA"). Therein, the board permitted the sale by Cataldo of nursery and many related items proposed by von Jess; stock such as cut Christmas trees, evergreen wreaths and other items "which bear the same relationship to products of the land as those noted [here] are also allowed as an accessory use". The landscaping use proposed by Cataldo was limited to the transplanting of nursery items; no section of the by-law is cited. The decision also permitted the sale of produce regardless of origin.

4. In November, 1989 the plaintiff wrote to the building inspector to obtain his opinion as to the operation he proposed and explained that he expected "to raise a majority of produce through on-site and leased cultivation" (Exhibit No. 5A). A general list of items he sought to sell included "vegetables, fruits, herbs, dairy products, jelly, jam, candy, nuts and items immediately associated with their preparation for consumption [as well as "family crafted handiworks]". Moreover, the greenhouse and nursery business would include the "propagation, holding and sale of plants, the sale of cut flowers, sale of seasonal plants, flowers and small nursery items [to be used in their landscaping operation and sold to the general public]". In this regard, sales would also include "peat, humus, bark mulch, woodchips, firewood and fertilizers. Seasonally [the stand] would offer: (1) Christmas trees, wreaths, roping, swags and decorations; (2) seeds and flats of annual flowers and vegetables [sic]; (3) corn sheaths, gourds, pumpkins, bulbs and chrysanthemums, and similar items". Finally, the letter stated "[o]ur model for this operation is other local, active farms and nurseries with year-round farmstands [sic], together with their accepted sales and associated sales, such as Nashobaside Farm in Littleton...." A nearly verbatim letter was sent a month later together with a more complete list of items for sale (Exhibit No. 5B).

***3** 5. Mr. Bernier replied by letter dated December 13, 1989 (Exhibit No. 6). In short, he acknowledged that use of the premises as a farm, nursery or greenhouse was permitted of right, as was the importation of loam (as opposed to the removal of soil). The letter continued, "[p]roducts not produced by the owner of the land on which the farm, farmstand [sic] or nursery is located ie: [sic] vegetables, fruits, herbs, dairy products, jellies, jams, candies, nuts and other food items, *are not permitted"* (emphasis in original). In addition, handcrafts were not permitted, as well as cut Christmas trees not produced by the owner and related items. Finally, the landscaping business was permitted, but only "for the sole purpose if transplanting stock grown from the nursery or farm...."

6. The Littleton Zoning By-law was first adopted in 1951. The May, 1988 Town Meeting repealed all previous versions and substituted therefore the by-law which is now Chapter 173 from the Code of the Town of Littleton (Exhibit No. 2). Section 173-26 of the current by-law qualifies "Agricultural Uses", as "Farm, greenhouses", and permits such a principal use as of right in all four zoning districts; "Roadside stands (agricultural)" are also permitted of right in all zoning districts, but only as accessory uses. It is this latter provision which the plaintiff challenges as invalid. The only guidance as to the scope of this regulation is the definition of Accessory Building or Use, § 173-2 of the by-law, as "[a] building not attached to any principal building, or a use customarily incidental to and located on the same lot with the principal building or use". Section 173-53 describes "Accessory Uses" as "[c]ustomary access [sic] [accessory] uses are permitted as specified in § 173-26B. Uses shall not be considered accessory if they occupy more than thirty percent (30%) of the floor area or more than fifty percent (50%) of the land area of any lot".

7. The plaintiff appealed to the ZBA from the decision of the building inspector. In a decision dated February 21, 1990, the ZBA, after a public hearing, sustained the building inspector in part, but in addition to the items approved by the building inspector for sale at the farm stand, allowed the sale of cut Christmas trees and the "sale of farm products grown elsewhere under the direction of the owner of the land on which the farm stand is located...." The Town and the ZBA adhere to the position that the sale of farm products grown elsewhere under the direction of the owner of the land on which the farm stand is located may be sold at the locus. This is in accordance with decisions of the Superior Court.

8. In addition to the land owned by von Jess, acreage scattered throughout Littleton, Concord and Lancaster is under lease or sublease with Fieldstone Farm as "leasee" [sic], the entity under which the venture will operate. The plaintiff is the sole stockholder and president of Fieldstone Farm, Inc. and for

purposes of this decision the corporate veil is pierced. First, the plaintiff, as sole stockholder and president of Fieldstone Farm, Inc. entered into a lease agreement as lessee, with Littleton House Nursing Home (Exhibit No. 8) on August 27, 1990. The 38.7 acres which is the subject of that agreement and located at 191 Foster Road, Littleton, is described as an apple orchard and sets forth certain directions as to Work, Time, Contract Payments, and Contract Documents. In particular the lease states that the lessor (the Nursing Home) is bound to "manage and control [the tract] pursuant to conditions established in a certain Agreement, with the Town of Littleton, to keep the land open, to preserve open spaces, and to promote agricultural uses". Article 1 of the contract further states that "[t]he Contractor [unidentified but apparently Fieldstone] shall *manage and control* the above referenced premises in a manner harmonious with the land subject to the following requirements and conditions", (emphasis added), with such requirements and conditions thereafter enumerated.

***4** 9. A second lease (Exhibit No. 9) is between Fieldstone Farm, Inc ., as lessee and Mountain Laurel Realty Company, as lessor, demising approximately one hundred acres on Shirley Road in Lancaster and signed by the plaintiff on May 15, 1990. The lease states that the land is "leased for horticultural purposes". Further, in Article I thereof, "Fieldstone Farm, Inc. shall *lease, manage and control* the above mentioned parcel of land in a manner harmonious with the land subject to [certain] requirements and conditions" (emphasis added). Subsequent articles are substantially the same as in Exhibit No. 8, except additional provisions include the express identification of a "subcontractor" as "a person who has a direct contract with the Leasee [sic] to perform any of the Work at the site". Finally, the contract prohibits the assignment of "any interest in this Contract, and ... the transfer of any interest in the same (whether by assignment or novation), without prior written permission from the Lessor". No evidence of any such assignment or transfer was offered.

10. Finally, a third agreement (Exhibit No. 10) dated May 1, 1990 is a standard form of commercial lease (in fact a sub-lease) between J. William Kenney of Concord, lessor, and F. David von Jess d/b/a Fieldstone Farm, Inc., lessee, for thirty five acres of "farm land" in Concord, the term of which is "concurrent with the lease of J. William Kenney from the owner"; otherwise there is no indication in the record or the sublease of the duration of the grant. The sublease is expressly for the "cultivation and harvesting of vegetables and related agricultural activities". Certain farm equipment was included in the lease.

11. Three separate personal services agreements between William J. Kenney and Fieldstone Farm were marked Exhibits No. 11, 12 and 13 and are dated May 1, 1990. Exhibit No. 11 pertains to work to be performed by Kenney in relation to a property on Lowell Road in Concord and described in Exhibit No. 10. In particular, the contract provides:

> Whereas William J. Kenney has rights to a certain Thirty Five acre parcel of real estate located at Lowell Road Concord, Massachusetts:
>
> Now, therefore, William J. Kenney and Fieldstone Farm, Inc. agree as follows:
>
> Article 1 The Work
>
> Fieldstone Farm, Inc[.] shall utilize the above-mentioned parcels [sic] of land. William J. Kenney shall manage and control the above referenced premises in a manner harmonious with the land subject to the following requirements and conditions:
>
> (a) William J. Kenney shall maintain the premises for the purpose of cultivating and shall clear, fill, irrigate, spray, cultivate, trim and plant for the specific purpose of harvesting for Fieldstone Farm, Inc.;
>
> ...
>
> Article 3 Contract Payments
>
> The terms of contract payments shall be made under a separate employment Agreement.
>
> Article 4 Cultivation
>
> 4.1 Fieldstone Farms, Inc. shall supervise and direct the Work and shall be solely responsible for all means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.
>
> ***5** 4.2 Fieldstone Farm, Inc. shall provide and pay for all labor, materials, tools, construction equipment, and machinery, water, utilities, transportation, and other fascilities [sic] and services necessary for the proper maintenance of the fields.
>
> 4.3 Fieldstone Farm, Inc. shall secure and pay for all necessary permits, fees, and licenses necessary for the execution of the Work.

> 4.4 Fieldstone Farm, Inc. shall give notices and comply with all laws, ordinances, rules, regulations, and orders of public authority bearing on the performance of the Work.
>
> Article 5 Changes In the Work
>
> Any change in the Work shall be determined by mutual agreement.

Mr. Kenney then signed as "Manager" and von Jess as President of Fieldstone Farms. Exhibits No. 12 (regarding an eleven acre parcel on Old Bedford Road in Concord) and 13 (pertaining to an approximately sixty acre tract at Hawthorne Lane in Concord, together with the structures thereon) are similar agreements, with one exception; appended to the agreement which is Exhibit No. 11, is another agreement regarding rental payments associated with the Lowell Road parcel.

12. There are various types of farm stand operations throughout the Commonwealth with the evidence concentrating on those open year round. In order for an operation successfully to be opened year round it must be able to sell products purchased from third parties, because the growing season in the Commonwealth is limited at best. The four hundred to five hundred farm stands that exist in Massachusetts range in size from card table-like operations, to "huge farm stand[s]", as described by Douglas Roberts of the Massachusetts Department of Food and Agriculture and that about one hundred of these, with approximately $100,000.00 in annual gross revenues or better, are open year round. Of those the witness personally visited, none relied solely upon its own production; the owners turn to third parties and the wholesale market to make up the difference, for otherwise the enterprise would not be economically viable. Most of such farm stands sold cider, milk, butter, cheese, coffee (by the cup and in bulk) and other such dairy or farm products not in their natural state, and many sold baked goods; some sell handcrafts and kitchen appliances. Many of these same items, and those proposed to be sold by Fieldstone Farm, are sold by other farm stand operations in Littleton. While it was argued by counsel for the Town that these farms are afforded grandfather protection, the evidence was to the contrary; the Cataldo farm stand, relied on in the first instance by plaintiff, was started about 1986, and John W. Flagg, the owner of Nashobaside Farm in Littleton, testified that many items he now sells have been introduced in the past five to twenty years. 13. Chapter 808 of the Statutes of 1975 extended state protection to the use of land for the primary purpose of agriculture, horticulture or floriculture. As amended through the date of the hearing before the ZBA section 3 of Chapter 40A read as follows:

> ***6** No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or reasonably regulate the expansion or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, insofar as the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

The General Court had already adopted and the Governor signed on December 8, 1989 a further amendment to section 3 which became effective ninety days later, on March 8, 1990. This amendment inserted "regulate or require a special permit for the use, expansion" in substitution for "regulate the expansion". More importantly here it substituted "provided that during the months of June, July, August and September of every year the majority of such products for sale, based on either gross sales dollars or volume" for the previous phrase

"insofar as a majority of such products for sale". Section 3, in pertinent part, now reads:

> No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or reasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law.

***7** It is clear from the legislative history set forth in paragraph 13 that it is the policy of the General Court to encourage agriculture within the Commonwealth, reflecting in part the position of the Massachusetts Farm Bureau Federation, *Cumberland Farms of Connecticut, Inc. v. Zoning Board of Appeal of North Attleborough,* 359 Mass. 68, 73-74 (1971), by promoting farm stands for the sale of the fruits thereof including produce, wine and dairy products. Local authorities are prohibited from unreasonably regulating, requiring a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture or viticulture or prohibiting, unreasonably regulating or requiring a special permit for the use, expansion or reconstruction of existing structures therein for the primary purpose of agriculture, horticulture, floriculture or viticulture including facilities for the sale thereof. The legislature does permit cities and towns to require that there be a minimum of five acres for such activities, but Littleton has not done so. It has, however, improperly authorized as agricultural uses only farms and greenhouses and relegated farms stands to an accessory use only. This was impermissible when the building inspector made his ruling and the ZBA held its hearing. Since the effective date of the most recent amendment to G.L. c. 40A, § 3, the local provisions unquestionably contravene the legislative policy and cannot stand. The Commonwealth has preempted this field. *Cumberland Farms of Connecticut, Inc. v. Zoning Board of Appeal of North Attleborough,* supra at page 74.

The parties have sparred over the proper meaning of agriculture, horticulture, floriculture and viticulture as used in the statute with each concentration on the extent of agriculture. The counsel for the defendant attached certain definitions to his requests for findings of fact and rulings of law when the plaintiff has moved to have stricken. I take no action on such motion since the decided cases make it clear that judicial tools in this field include the dictionary definitions and the statutory use in other contexts. See *Building Inspector of Mansfield v. Curvin,* 22 Mass.App.Ct. 401 (1986); *Town of Tisbury v. Martha's Vineyard Commission,* 27 Mass.App.Ct. 1204 (1989). Moreover, there does not appear to me to be any serious question as to the activities which the statute protects and in which the plaintiff wishes to engage. The decided cases, even before the legislative revisions, had held that farm products did not have to be in their natural state. *Tobe Deutschman v. Board of Appeals of Canton,* 325 Mass. 297, 301 (1950); *Parrish v. Board of Appeals of Canton,* 351 Mass. 561 (1967). In addition, the sale of products related to a nursery such as fertilizer has long been upheld. *Needham v. Winslow Industries, Inc.,* 330 Mass. 95 (1953).

As the statutory protection now stands, the sale of products related to the four protected categories need reflect fifty percent production by the owner of the land (but not necessarily from the land on which the stand is located

with land elsewhere leased as well as owned meeting the statutory requirement) only during the months of June, July, August and September. In the remaining eight months the products may be obtained elsewhere so long as they are agricultural, horticultural, floricultural or viticultural in nature. Baked goods and handcrafted items generally fall without any relationship to the ends sought to be promoted by the legislation, and they may not be sold of right unless, for example, they have a fruit component as many baked goods do or are handicrafts from natural products.

***8** A question has arisen as to the propriety of using the second floor for offices of persons engaged in the protected activities. In today's world the word processors, computers and the like are necessary for success in the operation of even country oriented activities. Just as a 4,000 gallon fuel tank was deemed by the Appeals Court to be an integral part of a greenhouse in *Town of Tisbury v. Martha's Vineyard Commission,* supra at page 1205 and a saw mill of a tree farm, *Roberts v. McNiff,* Franklin Superior Court No. 89-004, the offices for executives of the agricultural, horticultural and floricultural operation are an integral part thereof and consequently permissible. Care, of course, must be taken that the operation must not blossom into an extensive retail operation divorced from its roots.

The parties filed extensive requests for findings of fact and rulings of law on which I have not specifically ruled in the light of my own.

On all the evidence therefore I find that the provisions of the Littleton Zoning By-law which limit a farm stand to an accessory use contravene the provisions of G.L. c. 40A, § 3 and are invalid; that in addition to farms and greenhouses presently permitted within the category of agricultural uses the latter and the other uses protected by section 3 must be broadly construed; that the farm stand proposed by the plaintiff falls within the statutory protection, including the offices therein, and the proposed stock for sale so long as it has a protected component; and that only during the months of June, July, August and September inclusive need the plaintiff produce fifty percent thereof based on the statutory criterion.

The plaintiff in his brief has requested the award of costs pursuant to the provisions of G.L. c. 40A, § 17, but a separate motion should be marked up for argument if the plaintiff still wishes to push this position.

Judgment accordingly.

All Citations

Not Reported in N.E.2d, 1991 WL 11258265

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EXHIBIT G

418 Mass. 841
Supreme Judicial Court of Massachusetts,
Middlesex.

Kathleen B. HENRY
v.
BOARD OF APPEALS OF DUNSTABLE.

Argued Sept. 9, 1994.
|
Decided Nov. 16, 1994.

Synopsis

Town Board of Appeals denied landowner's application for permit to remove 300,000 to 400,000 cubic yards of gravel from steep grade on property to provide safer access to "cut your own" Christmas tree operation. The Superior Court, Middlesex County, Robert H. Bohn, Jr., J., entered judgment for landowner, and the Appeals Court, 36 Mass.App.Ct. 54, 627 N.E.2d 484, affirmed. On application for further appellate review, the Supreme Judicial Court, Abrams, J., held that the proposed gravel removal would not be "incidental" to agricultural or horticultural use of operating Christmas tree farm, and thus was subject to local zoning by-law prohibiting commercial earth removal.

Reversed and remanded.

Attorneys and Law Firms

****1334** ***841** Robert J. Sherer, Boston (Francis A. DiLuna with him) for plaintiff.

Richard W. Larkin, Town Counsel, for defendant.

****1335** Tara Zedeh, Sp. Asst. Atty. Gen., for Dept. of Food and Agriculture, amicus curiae, submitted a brief.

Before LIACOS, C.J., and WILKINS, ABRAMS, NOLAN and LYNCH, JJ.

Opinion

ABRAMS, Justice.

We granted the defendant board's application for further appellate review to consider its claim that the excavation and removal of 300,000 to 400,000 cubic yards of gravel from a hilly five-acre portion of the plaintiff's thirty-nine acre plot is not incidental to an agricultural or horticultural ***842** use of the land and therefore is subject to the local zoning by-law prohibiting commercial earth removal. See generally § 15 of the zoning by-law of the town of Dunstable.

The plaintiff's property is in an R–1 residential district within the town of Dunstable. In an R–1 district an owner may remove or transfer earth within the property boundaries. However, Dunstable's zoning by-law prohibits commercial earth removal in an R–1 district as of right. The plaintiff applied to the Dunstable board of selectmen (selectmen) for a special permit. The selectmen denied the plaintiff's application.

The board denied the permit on the ground that the removal operation would be "injurious, noxious or offensive to the neighborhood" within the meaning of the applicable by-law. The plaintiff appealed to the Superior Court on the parties' stipulation of facts. A Superior Court judge determined that the proposed use was exempt from regulation by the Dunstable zoning by-law, under G.L. c. 40A, § 3 (1992 ed.), [1] as incidental to an agricultural use, and that the plaintiff could proceed with the earth removal operation. The Appeals Court affirmed. *Henry v. Board of Appeals of Dunstable,* 36 Mass.App.Ct. 54, 627 N.E.2d 484 (1994). We allowed the board's application for further appellate review. We reverse the judgment of the Superior Court.

I. *Facts.* We summarize the following from the parties' stipulation of facts. Kathleen B. Henry owns thirty-nine acres of land on High Street in Dunstable, a rural area classified as an R–1 residential district. The plaintiff's plot is forest land within the meaning of G.L. c. 61 (1992 ed.), and has been under a G.L. c. 61 forestry management plan for over ten years.

For the past several years, the plaintiff has used a portion of this property to cultivate 1,000 trees to restore the forest and to begin a Christmas tree farm. After consulting experts, ***843** the plaintiff realized that a "cut your own" Christmas tree farm would be much more profitable than a saw log operation. During winter, neither mechanized farming equipment nor customers of a "cut your own" operation would be able safely to have access to the proposed five acre area unless the steep grade of the land, created by an esker, is leveled by removing 300,000 to 400,000 cubic yards of gravel.

To realize her contemplated "cut your own" tree farm, the plaintiff planned to hire a contractor to remove 100,000 cubic yards of gravel annually until the necessary gravel was

removed (at least three to four years). The contractor would sell the gravel at the market rate, currently one dollar per cubic yard, and share any profits with the plaintiff, which she planned to invest in startup costs of the "cut your own" operation. Eight years after completion of the excavation and planting a sustainable annual crop of 700 to 1,000 Christmas trees is expected, which currently would sell for thirty dollars a tree.

II. *Incidental use.* Because § 3 of the Zoning Act, G.L. c. 40A (1992 ed.), does not define "agriculture" or "horticulture," we look to the plain meaning of those terms in deciding whether the plaintiff's activity is agricultural. See, e.g., *Building Inspector of Peabody v. Northeast Nursery, Inc.,* 418 Mass. 401, 405, 636 N.E.2d 269 (1994). The planting of evergreen trees for either a saw cut operation or a "cut your own" Christmas tree farm is within the commonly understood meaning of agriculture or ****1336** horticulture. The board does not contend otherwise.

The board asserts that the plaintiff's proposed earth removal does not qualify for the exemption because it is a major independent commercial quarrying project, separate and apart from any agricultural or horticultural use. Two statutory provisions provide guidance in interpreting whether the scope of the agricultural use exemption for a proposed evergreen farm includes an initial, large-scale excavation project. First, G.L. c. 128, § 1A (1992 ed.), defines "agriculture" and "farming" to include practices by a farmer on a farm incident to or in conjunction with the growing and harvesting ***844** of forest products.[2] Second, G.L. c. 61A, § 2 (1992 ed.), defines "horticultural use" to include uses "primarily and directly" related to or "incidental," and "customary and necessary" to commercial raising of nursery or greenhouse products and ornamental plants and shrubs.[3] Thus, the scope of the agricultural or horticultural use exemption encompasses related activities. Because the proposed excavation of 300,000 to 400,000 cubic yards of gravel is not primarily agricultural or horticultural, the issue is whether the proposed excavation is incidental to the creation of a "cut your own" Christmas tree farm.

Uses which are "incidental" to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law. 2 E.C. Yokley, Zoning Law and Practice § 8–1 (4th ed. 1978). An accessory or "incidental" use is permitted as "necessary, expected or convenient in conjunction with the principal use of the land." 6 P.J. Rohan, Zoning and Land Use Controls, § 40A.01, at 40 A–3 (1994). Determining whether an activity is an "incidental" use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses. In analyzing the plaintiff's proposed earth removal ***845** project, the focus is on the "activity itself and not ... such external considerations as the property owner's intent or other business activities." *County of Kendall v. Aurora Nat'l Bank Trust No. 1107,* 170 Ill.App.3d 212, 218, 120 Ill.Dec. 497, 524 N.E.2d 262 (1988).

The word "incidental" in zoning by-laws or ordinances incorporates two concepts: "It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance.... But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use." *Harvard v. Maxant,* 360 Mass. 432, 438, 275 N.E.2d 347 (1971), quoting *Lawrence v. Zoning Bd. of Appeals of N. Branford,* 158 Conn. 509, 512–513, 264 A.2d 552 (1969).

The plaintiff's activity meets neither aspect of an incidental use. The proposed gravel removal project is a major undertaking lasting three or four years prior to the establishment of the Christmas tree farm. That project cannot be said to be minor relative to a proposed agricultural use nor is it minor in relation to the present operation. Nor can ****1337** the quarrying activity be said to bear a reasonable relationship to agricultural use. *Jackson v. Building Inspector of Brockton,* 351 Mass. 472, 221 N.E.2d 736 (1966) (construction of new building to operate agricultural machine on farm in residential district was reasonably related to farming activities and thus permitted under zoning ordinance). We conclude that the net effect of the volume of earth to be removed, the duration of the project, and the scope of the removal project are inconsistent with the character of the existing and intended agricultural uses.

We think that the plaintiff's case is governed by *Old Colony Council–Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth,* 31 Mass.App.Ct. 46, 574 N.E.2d 1014 (1991). In *Old Colony Council,* the Boy Scouts of America applied for a permit under a Plymouth zoning by-law to excavate 460,000 cubic ***846** yards of earth in order to create a cranberry

bog near a campsite in a "Rural Residential District." *Id.* at 49, 574 N.E.2d 1014. The Plymouth zoning board of appeals denied the application on the ground that a special permit was required for such an excavation project. The plaintiff appealed to the Superior Court which affirmed the denial of the permit. The Appeals Court also affirmed on the ground that, considering the volume of earth to be excavated, the duration of the project, and the funds involved, the excavation was not incidental to the proposed cranberry bog. *Id.* (because "the proposal involved the removal of 460,000 cubic yards of fill over a two and a half year period and an excavation which would provide substantial funds in excess of the cost of constructing the bog, the judge was warranted in upholding the boards's conclusion that the excavation of material was not incidental to the construction and maintenance of a cranberry bog").

In its reasoning, the Appeals Court stated the plain meaning of "incidental" to be "something minor or of lesser importance." *Id.* at 48 & n. 2, 574 N.E.2d 1014, quoting Webster's Third New Int'l Dictionary 1142 (1971) ("subordinate, nonessential, or attendant in position or significance") and American Heritage Dictionary 664 (1976) ("[o]ccurring as a fortuitous or minor concomitant: incidental expenses"). Applying this definition of "incidental" use, the court then considered the net effect of the proposed activity on the surrounding area.

In our view, the Appeals Court in *Old Colony Council, supra,* correctly considered the "net effect" that the proposed cranberry bog would have had in the rural residential area and concluded that the effect was so great that the excavation could not be said to be incidental (or attendant or minor) to the cranberry bog. *Id.* at 49, 574 N.E.2d 1014 (given amount of gravel to be excavated, estimated duration of excavation of project, and profit to be made from the excavation, excavation was not incidental to proposed cranberry bog). Interpreting accessory use provisions to require both that an incidental use be minor relative to the principal use and that the incidental use have a reasonable relationship to the primary one is essential to preserve the power and intent of local zoning authorities. ***847** Any other construction of the statute would undermine local zoning by-laws or ordinances. Applying the same reasoning to this case, considering the amount of gravel to be removed, the duration of the excavation and the monies to be realized from the excavation, the removal of gravel cannot be said to be minor or dependent on the agricultural use. [4]

The magnitude of the plaintiff's mining operation, if permitted, would be "a de facto quarry operation to be carried on in violation of the [Dunstable] zoning [by-law]." *County of Kendall v. Aurora Nat'l Bank Trust No. 1107, supra* 170 Ill.App.3d at 219, 120 Ill.Dec. 497, 524 N.E.2d 262. We conclude the special ****1338** permit was properly denied because, "[t]o hold otherwise would be to allow the statutory exemption to be manipulated and twisted into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property. The [town's] zoning power would thus be rendered meaningless. The Legislature cannot have intended such a result when it created a protected status for agricultural purposes." *Id.*

This matter is remanded to the Superior Court for entry of a judgment affirming the board's denial of a permit.

So ordered.

All Citations

418 Mass. 841, 641 N.E.2d 1334

Footnotes

1 General Laws c. 40A, § 3 (1992 ed.), reads in pertinent part: "No zoning ordinance or by-law shall ... unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture [or] horticulture...."

2 Section 1A provides in part: " 'Agriculture' and 'farming' shall include ... the growing and harvesting of forest products upon forest land ..., and any practices, including any forestry or lumbering operations, performed

by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations....”

3 Section 2 provides: “Land shall be deemed to be in horticultural use when primarily and directly used in raising ... nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling such products in the regular course of business or when primarily and directly used in raising forest products under a program certified by the state forester to be a planned program to improve the quantity and quality of a continuous crop for the purpose of selling such products in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products and preparing them for market.”

4 The Appeals Court cited, 36 Mass.App.Ct. 54, 58, 627 N.E.2d 484 (1994), out-of-State cases in support of its conclusion. See, e.g., *Atwater Township Trustees v. Demczyk,* 72 Ohio App.3d 763, 596 N.E.2d 498 (1991) (excavation to create lake and track for horses on fifteen year old horse farm held incidental to agricultural activity); *VanGundy v. Lyon County Zoning Bd.,* 237 Kan. 177, 699 P.2d 442 (1985) (quarrying rock to construct pond for irrigation was incidental to primary agricultural activities). However, in each of the cited cases, the net effect of the “incidental” use was minor in comparison to the primary use, especially because the agricultural use predated the excavation. Furthermore, to the extent that those cases are inconsistent with the result we reach, we decline to follow them.

EXHIBIT H

8 Mass.L.Rptr. 524
Superior Court of Massachusetts.

TOWN OF NATICK and others [1]
v.
MODERN CONTINENTAL
CONSTRUCTION, d/b/a Marino Lookout Farm

No. Civ.A. 96–03843–J.
|
March 27, 1998.

MARGOT BOTSFORD, Justice.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS–MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

***1** The plaintiff, the Town of Natick (town) filed this motion for summary judgment on two counts of its complaint. The counts allege that the defendant, Modern Continental Construction, d/b/a Marino Lookout Farm (Modern), is in substance operating a restaurant for members of the public on its farm premises in violation of zoning requirements (Count IV) and without a common victualler's license (Count I). Modern has filed a cross-motion for summary judgment. The motions present no disputed issues of fact.

On the zoning count (Count IV), the determinative issue is whether Modern's activities are protected by G.L. c. 40A, § 3, which exempts the activities of agricultural operations from zoning and special permit requirements provided certain conditions are met. For the reasons discussed below, Modern's cross-motion for summary judgment on Count IV will be ***allowed***. As to the town's common victualler's license claim under G.L. c. 140, § 2 (Count I), the summary judgment motion of each side will be ***allowed in part and denied in part***.

BACKGROUND

Modern owns and runs Marino Lookout Farm and Market (Lookout Farm), a 110 acre farm located at 89 Pleasant Street in Natick. The property is located in a residential zoning district, and is subject to an agricultural preservation restriction. Lookout Farm has been in continuous agricultural use for over 300 years. Modern purchased Lookout Farm in 1991, when the farm was in receivership. Since then, Modern has undertaken ambitious plans to improve and expand the farm's operations. Modern has planted new orchards with over 60,000 apple trees and 10,000 pear trees; many varieties of strawberry, raspberry, blackberry and blueberry plants; grape vines; and other fruits and vegetables. Modern has also built greenhouses, installed irrigation systems and brought to the farm an impressive array of livestock and poultry.

Of Lookout Farm's 110 acres, approximately 60 acres are devoted to orchards, 10 acres to vegetable fields, 10 acres to animal pasture, and 10 acres to roads and structures; the remaining acreage lies fallow. The farm grows a range of produce, including apples, pears, peaches, plums, melons, strawberries, lettuce, cucumbers, squash, onions, pumpkins, peppers, and herbs. [2] Lookout Farm also raises chickens, goats, pigs, lamb, deer, ostrich, and buffalo, and it harvests eggs. The agricultural products are sold at Lookout Farm as well as to other retailers and to Ristorante Marino in Cambridge, a separate entity owned and operated by a sister corporation.

Modern operates on Lookout Farm a year-round farmstand and market (farmstand), a seasonal "U-pick" business (U-pick) with an associated pavilion where food is also sold, and is building a slaughterhouse. [3] It also holds some agricultural "festivals" in the spring, summer, and fall.

The Farmstand: The farmstand is located close to the entrance to Lookout Farm on Pleasant Street. It sells Lookout Farm poultry, eggs, farm produce—vegetables and fruits—and items processed from that produce, such as cider, gelato, mustards, jams and salsas. Once the slaughterhouse is operational, presumably lamb, pork and other meats will also be sold. In addition to Lookout Farm items, the farmstand also sells a number of non-farm items: dairy products, ice cream, bakery goods such as pies and breads, deli meats and other processed meat products, sandwiches, and coffee and tea. The total farmstand sales for 1997 (through October) were $641,183, of which $59,027 consisted of miscellaneous food, and $120,903 was gelato. The farmstand does not presently contain any seating, but the addition of ten picnic tables with a seating capacity of up to 35 people has been proposed.

***2** The greenhouses and garden center, which are now part of the farmstand market complex, sell fertilizer and other gardening-related items.

A concession cart selling hot dogs, popcorn and soft drinks was used at Lookout Farm in conjunction with a spring festival in May 1996. The record does not make clear whether it has ever been used again.

The Pavilion: The pavilion is a 40 foot by 80 foot structure situated in the orchards, approximately one-half mile from the public road. The pavilion is open seasonally, from May into October. It serves as the center for Lookout Farm's U Pick program (where members of the public may pick their own fruits and vegetables). It also appears to be a primary site during the farm's seasonal festivals. At the festivals and during the U Pick season, Modern serves hot dogs, hamburgers, sausages, pizza, gelato, pastries, soft drinks, and snacks at the pavilion. The present structure contains a wood burning grill and oven, a rotisserie, and approximately six to eight picnic tables. A proposed addition to the pavilion would add two more woodburning grill/ovens, restroom facilities (16 stalls), and additional picnic tables and benches for increased seating, up to 35 people. The proposed cooking facilities would be used to prepare chicken, hamburgers, hot dogs, corn on the cob and other grilled foods; also offered would be pies, croissants and beverages including hot apple cider. Modern also plans to build, or has built, a new cider press building next to the pavilion where apple cider would be prepared and demonstrations performed.

The Agricultural Festivals: In 1996 and perhaps before, Lookout Farm hosted a "Spring Fest" in late May, featuring wood carving demonstrations, musical guests, a children's tent with games and clowns, amusements including pony rides, hayrides, and a horse show, food, and gardening demonstrations; it has also hosted a "Harvest Moon Pow–Wow and Festival" in one or more fall seasons featuring "native singing," dancing, drumming, hayrides, children's activities, apple picking, food, and live animals such as a deer herd, a buffalo herd, sheep, ostrich, and llama. There is no fee to enter these festivals.

The U-pick. The U-pick is open during times when there are fruits and vegetables ready to be picked. The public is welcome and no entrance fee is required. Apple picking is emphasized, but during the summer visitors may pick other fruits and vegetables. Customers may also tour the farm and view the live animals and other farm operations.

The Agricultural Preservation Restriction: Lookout Farm has been subject to an agricultural preservation restriction (APR) since 1980. The APR prohibits the construction or placing of buildings or structures on Lookout Farm except for agricultural purposes. It does, however, provide for the construction of permanent structures for "agriculturally related retail sales or of other agriculturally related commercial purposes." It appears that Modern has sought and has now received approval to amend the APR to permit additions to the pavilion and the farmstand.

***3** Since 1992, the town's board of health has issued Modern a food service permit to operate a "retail food establishment" at Lookout Farm. A permit was in effect at the time this action was brought. In 1995 or 1996, the town informed Modern that it also needed a common victualler's license in order to serve prepared food at Lookout Farm. Modern applied to the town for common victualler's licenses for both the farmstand and the pavilion, without waiving the right to contest the license requirement. After a public hearing on May 6, 1996, the board of selectmen denied a license as to each location.

Following the license denials, Modern continued to maintain it was not obliged to have a common victualler's license in order to carry on its food service activities at the farmstand and the pavilion. The town then commenced this suit seeking to enjoin Modern from carrying on these activities in violation of applicable zoning requirements and without a common victualler's license. [4]

DISCUSSION

This court grants summary judgment where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716, 575 N.E.2d 734 (1991). *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553, 340 N.E.2d 877 (1976). Mass.R.Civ.P. 56(c). Because the record before me reveals no disputed factual issues of a material nature, [5] the case may properly be resolved by summary judgment.

1. The Town's Zoning Claim; the Agricultural Use Exemption.

General Laws c. 40A, § 3(§ 3) provides in relevant part:

> No zoning ordinance or by-law shall ... prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture or viticulture; nor prohibit or unreasonably regulate, or require a special permit for the use, expansion or reconstruction of existing structures thereon for the primary use of agriculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce and wine and dairy products, provided that during the months of June, July, August, and September of every year, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner of the land on which the facility is located....

"The obvious purpose of the Act ... is to promote agricultural use within all zoning districts in a municipality." *Building Inspector of Mansfield v. Curvin,* 22 Mass.App.Ct. 401, 402–403, 494 N.E.2d 42 (1986). See *Cumberland Farms of Conn. Inc.* v. *Zoning Bd. of Appeal of N. Attleboro,* 359 Mass. 68, 74, 267 N.E.2d 906 (1971). The agricultural use exemption embodied in § 3 is interpreted broadly in order to promote the economic viability of agricultural enterprises in Massachusetts. See *Tisbury v. Martha's Vineyard Comm.* 27 Mass.App.Ct. 1204, 1205, 544 N.E.2d 230 (1989). Where the agricultural use exemption applies, the exemption is "complete and unconditional ... [and] is not limited to agricultural uses that do not injure a residential neighborhood.... [V]arious uses indubitably to be classed as agricultural may be detrimental to a residential neighborhood." *Moulton v. Building Inspector of Milton,* 312 Mass. 195, 197, 43 N.E.2d 662 (1942). The exemption operates even where the agricultural use in question is retail or commercial in nature. See *Prime v. Zoning Board of Appeals of Norwell,* 42 Mass.App.Ct. 796, 800, 680 N.E.2d 118 (1997) ("[T]he abutter's] suggestion is that a 'retail' operation is inconsistent with the agricultural use of land, and therefore not within § 3. The argument has been answered ...: 'All agriculture conducted for profit is commercial in some degree' "), quoting *Cumberland Farms of Conn., Inc., supra,* 359 Mass. at 76, 267 N.E.2d 906.

***4** Applying the foregoing principles, the courts have interpreted the language of § 3 to permit the sale of foods as "agricultural products":

> The fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them.... We do not believe that one who on his premises processes milk and cream from cows on his premises thereby ceases to be a farmer, selling on his farm products they raise.

Deutschmann v. Board of Appeals of Canton, 325 Mass. 297, 301, 90 N.E.2d 313 (1950). Accord, *Parrish v. Board of Appeal of Sharon,* 351 Mass. 561, 566, 223 N.E.2d 81 (1967). See *Modern Continental Constr. Co. v. Building Inspector of Natick,* 42 Mass.App.Ct. 901, 674 N.E.2d 247 (1997) (slaughterhouse used for butchery of animals raised on premises is agricultural use); *Von Jess v. Board of Appeals of Littleton,* Land Court, Misc. Case No. 142973, Jan 4, 1991, slip op. at 11–16 (hereinafter *von Jess* (baked goods are agricultural products so long as they contain a fruit component). The sale of fertilizer and mulch products related to a greenhouse and nursery are also deemed agricultural products. See *Tisbury v. Martha's Vineyard Comm., supra,* 27 Mass.App.Ct. at 1205, 544 N.E.2d 230.

In 1982, the scope of § 3 was significantly expanded by the addition of the "fifty percent rule." Before the fifty percent rule, non-farm-owned products were not afforded statutory protection. See, e.g., *Parrish, supra,* 351 Mass. at 566–567, 223 N.E.2d 81 (dairy farmer not permitted to sell fruit punch at ice cream stand). With the addition of the fifty percent rule, all sales of farm owned and non-farm owned agricultural products are permitted as of right throughout the calendar year so long as more than fifty percent of the sales during the primary harvest season are of the farm owner's products. See *Eastham v. Clancy,* 44 Mass.App.Ct. 901, 902, 686 N.E.2d 1093 (1997) (party seeking agricultural use exemption must show that majority of products for sale during primary harvest season are produced by him); *von Jess, supra,* slip op. at 15 ("[T]he sale of products related to the four

protected categories [agriculture, horticulture, floriculture or viticulture] need reflect fifty percent production by the owner of the land ... only during the months of June, July, August and September. In the remaining eight months the products may be obtained elsewhere so long as they are agricultural, horticultural, floricultural or viticultural in nature."). In determining whether a particular non-farm item may be sold, the inquiry centers on whether the item in question is an agricultural product. See *von Jess, supra,* slip op. at 15. A farm may sell a different category of agricultural product than the farm itself produces so long as the farm meets the fifty percent rule. See *id.* In this instance, the town has not argued that Lookout Farm does not satisfy the fifty percent rule; moreover, the amount of acreage under cultivation suggests that such an argument would be futile. On the record before me, the only reasonable inference to draw is that Lookout Farm does satisfy the fifty percent rule. [6]

***5** The town's principal contention is that § 3 does not permit Modern to operate what the town deems to amount to a grocery store and a commercial restaurant in a residential district as of right. [7] In light of the acreage devoted to agricultural and livestock operations, as well as of the general nature of the farm's business, the primary purpose of Lookout Farm is without question agricultural. Compare *Easton v. Clancy, supra,* 44 Mass.App.Ct. at 902, 686 N.E.2d 1093 (primary purpose of 5.5 acre property not agricultural where slightly less than one third of the premises had been cleared for growing). As stated above, § 3 permits Lookout Farm to sell agricultural products as of right. See *von Jess, supra,* slip op. at 15. Thus the sale of fruits and vegetables, and any prepared or processed foods containing fruits and vegetables —the jams, jellies, salsas, fruit gelato, pies and pastries which Modern offers—even if the fruits and vegetables are not from Lookout Farm, is permissible so long as Modern satisfies the fifty percent rule. See *id.* The same is true of the dairy products offered, including ice cream, again provided that Modern satisfies, as it currently does, the fifty percent rule. See *Deutschmann v. Board of Appeals of Canton, supra,* 325 Mass. at 301, 90 N.E.2d 313. Additionally, and with the same provisios, Modern may sell eggs, chicken, meats and meat products derived from its chickens, lambs, pigs, etc. as well as meat products from non-farm sources. See *von Jess, supra,* slip op. at 15. More problematic are those items such as non-fruit baked goods, breads, coffee and tea. Nevertheless, while not related to produce of Lookout Farm, these all appear to qualify as agricultural products within the meaning of § 3. See *Prime v. Zoning Bd. Of Appeals of Norwell, supra,* 42 Mass.App.Ct. at 800, 680 N.E.2d 118. [8] The evident purpose of adding the fifty percent rule to the statute was to promote the economic viability of farm-owned farmstands. Accordingly, agricultural products should be interpreted broadly. See *Modern Continental Constr. Co., Inc. v. Building Inspector of Natick, supra* 42 Mass.App.Ct. at 902, 674 N.E.2d 247; *Tisbury v. Martha's Vineyard Comm., supra,* 27 Mass.App.Ct. at 1205, 544 N.E.2d 230. Nothing in the language of § 3 requires the courts to micromanage the shelves of local farmstands in general or Modern's in particular Finally, the record demonstrates that the food service offered at both the farmstand and the pavilion, with a major focus of the service being farm-produced foods, are related and incidental Lookout Farm's agricultural operations at both sites, *viz.,* the sale of farm-grown and farm-raised produce and products, and the U-pick activities. See *Tisbury v. Marth's Vineyard Comm., supra,* 27 Mass.App.Ct. at 1205–1206, 544 N.E.2d 230. Compare *Henry v. Board of Appeals of Dunstable,* 418 Mass. 841, 844–847, 641 N.E.2d 1334 (1994), (proposed excavation and removal of gravel from five-acre portion of 39–acre lot to help area suitable for cultivating Christmas trees was not agricultural nor incidental to an agricultural use, but rather qualified as an independent commercial quarrying project).

***6** In sum, the sale of food and the food services which Modern offers at the farmstand and the pavilion are protected activies under § 3. [9] That said, however, § 3 only provides an exemption from the town's zoning requirements; it provides no exemption for licenses of any kind. The question remains, therefore, whether Modern is required to obtain one or more common victualler's license in connection with its food service operations.

2. The Town's Common Victualler's License Claim [10]

The issuance of the common victualler's license is governed by G.L. c. 140, § 2, which provides that "licensing authorities may grant licenses to persons to be innholders or common victuallers." The statute does not define the term "common victualler," but it has been interpreted, "by long usage," to mean "the keeper of a restaurant or public eating house." *Commonwealth v. Meckel,* 221 Mass. 70, 72, 108 N.E. 917 (1915). Accord, *Liggett Drug Co., Inc. v. License Comm'rs of North Adams,* 296 Mass. 41, 49, 4 N.E.2d 628 (1936). Moreover, a common victualler at all times is required to be "provided with suitable food for strangers and travelers[,]" and to have on the "premises the necessary implements and facilities for cooking, preparing and serving food for strangers and travelers[.] " G.L. c. 140, §§ 5,6. What these statutory

provisions and cases indicate, therefore, is that the term "common victualler" refers to one who operates a restaurant-like facility where food is prepared and then offered to the public to be eaten on the premises. See *Liggett Drug Co., Inc., supra,* 296 Mass. at 51, 4 N.E.2d 628 (describing common victualler's business as "[t]he sale of food for immediate consumption on the premises of the vendor ... ").

The farmstand. The record indicates that Modern's current operation at its farmstand consists of selling a variety of produce and prepared food—e,g., gelato, sandwiches, ice cream, drinks—for take-out purposes. At the present time, there appear to be no seating facilities inside or outside the farmstand. [11] At the pavilion at the approximate center of the property, there are grills, ovens and seating, and plans to increase both the cooking facilities and seating.

As the discussion of § 3 above reveals, I consider the sale of items such as prepared foods and even of hot foods such as steamed hot dogs for take-out consumption as incidental to the agricultural use of the property, so long as Marino continues to meet the fifty percent rule. While food is sold at the farmstand on a year-round basis, Modern does not offer at that location any facility for on-premises consumption, and there is no evidence that the food is offered in a way that calls for or invites the buyer to eat it on the premises —for example, selling a plate of hot food accompanied by eating utensils and napkin. In these circumstances, Modern cannot be said to be operating the farmstand as a "common victualler." Cf. *Deutschmann v. Board of Appeals of Canton, supra,* 325 Mass. at 299, 300, 90 N.E.2d 313 (sale of milk in cartons and in paper cups, milk shakes, ice cream and cheese from plaintiff's roadside stand was permissible under bylaw allowing sale of products raised on farms from roadside stands; no discussion of need for common victualler's license). Cf. also *Parrish v. Board of Appeal of Sharon, supra,* 351 Mass. at 562–563, 565–566, 223 N.E.2d 81 (1967) (by-law authorizing structures to be built and used for "[f]arm [purposes] ... [,] including the sale of products raised on the premises only" would permit construction of farmstand with outside service windows where members of the public could buy ice cream cones, milk shakes, frappes and sundaes made from milk and cream produced on plaintiff's dairy farm; no mention of common victualler's license). [12]

***7** Modern contemplates adding ten picnic tables, with a seating capacity of 35 persons, to its farmstand and market location. It also appears to propose adding a convection oven (price: $3,350) and a "mobile char broiler" (price: $2977). If these changes were made, and the selection of prepared foods offered were increased—again, as apparently contemplated—it is possible perhaps that the food service operation at the farmstand would become one for which a common victualler's license were required, because of the transition to an operation where a significant portion of the food being offered was cooked or otherwise prepared on the premises for immediate consumption on the premises. See *Liggett Drug Co., Inc. v. License Comm'rs of North Adams, supra,* 296 Mass. at 45, 49, 51, 4 N.E.2d 628. But this is not the situation at present, and the town may not currently require Modern to obtain a common victualler's license for the farmstand.

The pavilion. The pavilion is different from the farmstand. Modern offers for sale there grilled and cooked foods including hamburgers, hot dogs and sausages, and a variety of other prepared foods; it also provides seating. With the addition of the new buildings, facilities and food preparation equipment, Modern plans to offer a greater variety of cooked and grilled foods, will have more seating and will be able to provide bathrooms. Because Modern currently cooks and offers prepared food to all members of the public for immediate consumption on the premises at the pavilion, the town is authorized to require Modern to obtain a common victualler's license for the pavillion.

Modern argues that it does not qualify as a common victualler in connection with its pavilion (or farmstand) operations because the common victualler's license is only required for those serving food in a building, see G.L. c. 140, § 4, as illustrated by the mandate that an applicant for the license submit plans containing the restaurant's cooking, seating, and restroom facilities, G.L. c. 140, § 6. Modern submitted such a plan for the farmstand and pavilion locations. [13] The plans indicate that at present there are quite extensive cooking and seating facilities, almost all of which are housed, and plans to increase these facilities as well as to add restroom facilities. The layout and facilities of the pavilion, even though much of the seating is technically "outside," in every other respect resemble a restaurant. [14] I do not read the reference to "building" in G.L. c. 140, § 4 as narrowly restricting the "premises" (the word used in § 6) of the common victualler to an enclosed structure with four walls and a roof.

Modern also contends that it is not a common victualler in connection with the pavilion (and farmstand) because the statutory scheme distinguishes between take-out establishments or sites and full service restaurants. See, e.g.,

G.L. c. 140, §§ 47(coffee and tea houses), 49 (lunch carts). Whatever distinctions may be recognized in G.L. c. 140 among establishments offering food to the public, at the present time, at least with respect to the pavilion, Modern offers cooked and prepared food, a restaurant-like facility and seating, and clearly invites members of the public to eat what they buy right there on the premises. The pavilion does not qualify as a "take out" establishment.

***8** According to Modern, its operations at the pavilion cannot require a common victualler's license because a common victualler must offer food to all "strangers and travelers," but the pavilion is a half mile off the public way and will primarily be used by persons at the U pick and the agricultural festivals. I disagree. These activities are open to the general public and thus are available to all "strangers and travelers," even though not located directly on the road. Moreover, while the festivals occur only on a defined date or dates, it seems that the U-pick activities are offered on a continuous or at least regular basis during the summer and fall months when the picking of various fruits and vegetables takes place. The common victualler license statute does not require that the premises subject to the license be open on a daily basis, or for twelve months a year. [15]

ORDER

For the foregoing reasons, the motion of the plaintiff Town of Natick to dismiss Counts II and III of its complaint is ***allowed***. The plaintiff's motion for summary judgment is ***allowed in part and denied in part*** as to Count I of its complaint, and ***denied*** as to Count IV. The cross-motion for summary judgment of the defendant Modern Continental Construction, d/b/a Marino Lookout Farm, is ***allowed in part and denied in part*** as to Count I of the plaintiff's complaint and ***allowed*** as to Count IV. Counsel are to communicate with the clerk of the session to arrange for a conference concerning the terms of judgment to be entered in this case.

All Citations

Not Reported in N.E.2d, 8 Mass.L.Rptr. 524, 1998 WL 517698

Footnotes

1 The Natick Board of Selectmen, John Moran, Chairman, Mel Willens and Edward Dlott; and Frederick Coney, Town Manager.

2 For the 1996 growing season, Lookout Farm expected to produce 300,000 pounds of apples, 145,000 pounds of pears, and thousands of pounds of other fruits and vegetables.

3 The slaughterhouse is not at issue in this motion. A prior action determined that the slaughterhouse was permissible agricultural activity under G.L. c. 40A, § 3. See *Modern Continental Construction Co. v. Building Inspector of Natick,* 42 Mass.App.Ct. 901, 674 N.E.2d 247 (1997).

4 The complaint also alleged violations of the APR and the State Sanitary Code (Counts II and III of the complaint). The town has now moved to dismiss these counts. The motion is ***allowed***.

5 Modern argues that if its cross-motion for summary judgment is denied, then the town's should be as well because the question whether Modern qualifies as a "common victualler" in need of a common victualler's license is one of fact requiring a trial. I disagree. What is in dispute is not the underlying facts but the legal conclusion to which they lead. In these circumstances summary judgment is appropriate.

6 Besides the acreage breakdown, the record contains the gross receipts for the farmstand for the first ten months of October 1997, of which approximately 9% was miscellaneous food. This figure also suggests that the majority of the farmstand's sales during the harvest season were from farm-owned products. Additionally, the farm sells its produce to other retailers and operates the U-pick. Taken together, these facts support the

inference that the percentage of non-farm products sold by the entire Lookout Farm operation during the harvest season is significantly less than 50%.

7 To the extent the town complains that Modern's food service operations constitute a commercial enterprise and as such are undeserving of protection as an agricultural use, the argument clearly fails. See *Cumberland Farms of Conn., Inc. v. Zoning Bd. Of Appeal of N. Attleborough,* 359 Mass. 68, 76, 267 N.E.2d 906 (1971). Accord, *Prime v. Zoning Bd. Of Appeals of Norwell,* 42 Mass.App.Ct. 796, 800, 680 N.E.2d 118 (1997).

8 I decline to follow the distinction set forth in *von Jess, supra,* between fruit and non-fruit breads.

9 It is not clear whether the town challenges Modern's right to put on seasonal agricultural festivals themselves or only the food service aspect of those festivals. There do appear to be components of the festivals that would not qualify as “agricultural” or incidental to agricultural use—for example, musical entertainment and amusements for children.

10 There is no longer any dispute in this case that Modern has obtained the appropriate permit from the town's board of health to serve food—in the words of the permit, to operate a retail food service establishment—at both the farmstand and the pavilion. The common victualler's license at issue is an additional requirement the town argues Modern must satisfy in order to offer prepared foods at Lookout Farm. Modern challenges on the facts presented the town's claim that its operations are sufficiently restaurant-like to require a common victualler's license. However, Modern does not appear to disagree that the town may require a person or entity running a facility which does qualify as a restaurant to obtain both a permit from the board of health and a common victualler's license.

11 Marino has announced, but I infer was not yet implemented, a plan to add picnic tables around the farmstand and associated market that would sit up to 35 people. The plan is discussed below.

12 In the *Parrish* case, the court ultimately ruled that the board of appeal could permissibly deny a permit to the plaintiff because he was intending to sell fruit punch along with the ice cream cones, frappes and other prepared dairy product items, and fruit punch was neither from items “raised on the premises,” nor, in the court's view, incidental to such items. *Parrish v. Board of Appeal of Sharon,* 351 Mass. 561, 567–568, 223 N.E.2d 81 (1967). This holding is not relevant to this case because § 3 with a fifty precent rule is far more broad than the by-law discussed in *Parrish.* Moreover, *Parrish* is cited here not for its discussion of the zoning issue but for the point that the roadside farmstand, with its service window offering “take-out” ice cream cones, frappes and milk shakes, did not appear to raise to the parties or the court any questions concerning the plaintiff's possible status as a common victualler.

13 Modern submitted the plans while maintaining that it was not required to have a common victualler's license.

14 Some of the seating is within the pavilion, which is a roofed structure, although it does not have enclosing walls.

15 However, if the only time Modern offered food services at the pavillion were in connection with a few agricultural festivals each year, I agree that Modern would not be likely to qualify as a common victualler. Modern also suggests that if it were to charge a fee for its agricultural festivals and perhaps also its U pick activities, then it could not be deemed a common victualler. Modern relies on an opinion of the Attorney General for this proposition. See Rep. A.G., Pub.Doc. No. 12, (1921), p. 204. There is merit in Modern's position. If a fee were charged, the provision of prepared food to participants would seem to be an incidental aspect of the fee-generating activity, *viz.,* the fruit-and-vegetable picking endeavor (U pick) or the festival.

EXHIBIT I

59 Mass.App.Ct. 427
Appeals Court of Massachusetts,
Worcester.

John H. GARABEDIAN
v.
Mary WESTLAND & others [1]
(and three companion cases).

No. 01–P–1309.
|
Argued April 11, 2003.
|
Decided Sept. 26, 2003.

Synopsis

Land owner who operated what he described as a "private airport" brought declaratory judgment action against town officials and neighbors regarding whether he could bring fill onto his land as matter of right in order to extend runway. Land owner also sought review of building inspector's cease and desist order regarding runway and denial of permit to build second hangar. Neighbors brought motion to dismiss under anti-strategic litigation against public participation (anti-SLAPP) statute. The Superior Court Department, Worcester County, James P. Donohue, J., granted the anti-SLAPP motion, and the trial court, Francis R. Fecteau, J., granted land owner's summary judgment motion on fill claim, which was affirmed on appeal. Following trial, the court entered judgment for neighbors and town officials on issue of whether land owner was entitled to build second hangar, entered judgment for land owner on issue of whether first hangar and airstrip were permitted, and affirmed denial of permit to build extension to first hangar. On appeal, the Appeals Court, Kass, J., held that: (1) neighbors were not entitled to dismissal under anti-SLAPP statute; (2) airstrip and hangars were not accessories to primary use of land as single family residence; (3) neighbors had notice barn was used as hangar more than six years before they asked building inspector to enforce zoning laws and thus enforcement was barred by statute of limitations; (4) defense of laches precluded neighbors from challenging existence of airstrip; and (5) expansion of airstrip was not accessory to primary residential use of land.

Vacated in part; otherwise affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Summary Judgment.

Attorneys and Law Firms

****441 *428** John O. Mirick (Patricia L. Davidson with him), Worcester, for John H. Garabedian.

Jonathan Shapiro, Boston, for Michael Johnston.

Barry A. Bachrach, Worcester, for Board of Selectmen of Southborough.

Gary S. Brackett, Worcester, for Mary Westland.

Present: PORADA, KASS, & GREENBERG, JJ.

Opinion

KASS, J.

At the center of four actions that were consolidated for trial is a controversy over whether John H. Garabedian could maintain and expand an airplane hangar and a landing strip —facilities he described in a letter as "my private airport"— as an accessory use customarily incidental and subordinate to his residence. The parties also dispute whether G.L. c. 231, § 59H (the "anti-SLAPP" statute), is applicable to Garabedian's complaint for a declaratory judgment about whether he could bring fill upon his land as matter of right.

1. *Facts.* We take our facts from the careful and detailed findings of the trial judge. Garabedian, who is in the radio broadcasting business, lives at 24 Fairview Drive, Southborough, a property located in a residential zoning district. He restores and flies classic airplanes as a hobby. Garabedian first acquired a pilot's license in 1976. He flies about 100 hours per year. Until he built his own airstrip, he most often stored his airplane at, and flew in and out of, the Marlborough Airport, some six miles away from his residence.

In 1984, Garabedian received permission from the Federal Aviation Administration (FAA) to build a private grass airstrip, 1,800 feet long, fifty feet wide, usable between sunrise and sunset only, and only in VFR (visual flight rules) conditions. There would be no lights. With that permission in hand, Garabedian visited with the building inspector of Southborough to ***429** talk about his plans for the airstrip. The building inspector, who was aware of ****442** three extant private turf airstrips in Southborough, talked in turn to town counsel. On the basis of that consultation, the building

inspector determined that Garabedian's proposed strip was a use accessory to his residence, and that he required no permit to do the required land work. Garabedian, therefore, did not apply for a building permit for the airstrip.

A hangar for his airplanes (by then he owned more than one aircraft) did, however, require a building permit, and Garabedian applied for one on September 11, 1984. "Airplane hangar" was not among the preprinted use boxes on the permit application; upon consultation with the building inspector, Garabedian checked the box marked "other" and wrote "barn." FAA documents that Garabedian submitted to the building inspector were part of the building permit application.

Garabedian began work on the airstrip in the summer of 1984 and on the barn/hangar in the autumn of 1984. The airstrip was usable in the autumn; the hangar, a metal-clad wood-frame structure, was completed in the spring of 1985. For ten years, Garabedian used his private airport without incident. His collection of planes grew to ten, seven of which he customarily stored in Southborough. During that period he paved the central thirty feet of the airstrip and, with FAA permission, installed low intensity runway lights so that he could land in the evening. The number of flights to and from his Southborough strip did not increase.

At the end of the airstrip the grade dropped sharply. To give himself more "run out" space on landings, Garabedian hired a contractor in August, 1995, to truck in fill to even the grade and extend the runway. Eighteen-wheel gravel haulers rumbled by, or worse, stacked up along the property of neighbors. The neighbors complained to State and local officials, who required certain equipment repairs and removal of unclean fill, but the authorities did not order the job to stop. One neighbor, Johnston, a party to this case, photographed truckers with a video camera. They in turn attacked him and grabbed his camera. When work resumed at the end of February, 1996, the temperature of the antagonists was markedly higher. Now the neighbors protested vigorously at town hall. On February 28, 1996, the building ***430** inspector issued an order to Garabedian to desist from bringing fill onto his land.

In the face of the altercations that had taken place and the cease and desist order of the building inspector, Garabedian on March 15, 1996, brought a complaint for declaratory and injunctive relief regarding whether he could, as he maintained, bring fill onto his land as matter of right; i.e., that no State or local law forbade his so doing. The complaint named as defendants—in addition to the town selectmen, building inspector, and director of public works—the two neighbors, Johnston and Westland, who had challenged his right to bring in fill. Johnston and Westland responded with a special motion to dismiss under the anti-SLAPP [2] statute, a motion that a judge of the Superior Court allowed. We shall consider the correctness of that action presently.

Garabedian also sought review of the building inspector's cease and desist order from the Southborough board of appeals (board). The board decided on June 19, 1996, in addition to affirming the building inspector's denial of a permit for Garabedian to build a second hangar, that Garabedian had the right to bring fill onto his property, albeit subject to restrictions that the board established. From those administrative ****443** decisions, Garabedian appealed to the Superior Court in a second action, under G.L. c. 40A, § 17. One aspect of the controversy has been disposed of. A second judge of the Superior Court, i.e., not the one who allowed the anti-SLAPP motion in the declaratory judgment action, decided on Garabedian's summary judgment motion that no by-law of Southborough precluded Garabedian from filling his land. She ruled that the town could not conjure a restriction on Garabedian's right to fill on the basis of their anticipation that he would attempt to make an unlawful use of the re-graded property (i.e., an expanded airstrip with a second hangar). The town officials and Johnston and Westland appealed to this court and we, in an unpublished memorandum and order under our Rule 1:28, affirmed the reasoning and decision of the ***431** Superior Court judge. See *Garabedian v. Zoning Board of Appeals of Southborough,* 52 Mass.App.Ct. 1101, 749 N.E.2d 723 (2001). [3]

That left before a third Superior Court judge the following matters for consolidated trial: (a) Review under G.L. c. 40A, § 17, of whether Garabedian was entitled to a permit to build a second hangar on the ground that, as his growing airplane collection was just a hobby, the new structure, as the first hangar, was an accessory use, i.e., customarily incidental and subordinate to his residence under the town zoning by-law. The trial judge decided the second hangar was beyond customarily incidental use and ruled that the board, in affirming the building inspector's denial of a permit for the second building, had acted within its authority. (b) Whether the original barn/hangar was an accessory use within the meaning of the by-law. The two neighbors, acting under G.L. c. 40A, § 7, had requested that the building inspector enforce the zoning law and order Garabedian to stop using the

first hangar and the airstrip because they were not accessory uses within the meaning of the by-law. The building inspector declined to do so; the board of appeals affirmed; and the neighbors asked for judicial review of that board decision. Again, the trial judge decided the board had acted within its authority. (c) Review of denial of a permit that Garabedian had applied for to build a 104–foot by 48–foot extension to the first hangar. The trial judge affirmed the denial.

2. *Dismissal of declaratory judgment complaint under anti-SLAPP statute.* Opposition activity to Garabedian's earth moving operations had come from certain of his neighbors, notably Johnston and Westland. They told drivers of trucks bringing in fill that the drivers were engaged in an illegal operation and might be liable for what they were doing. Johnston, a television cameraman, photographed trucks, an act that the grading contractor thought sufficiently hostile and intimidating to warrant reciprocation in the form of beating up Johnston and taking his camera. There was also, ultimately, official action in the form of the building inspector's cease and desist order.

In that venomous and unstable setting, Garabedian filed his complaint for a declaration, pursuant to G.L. c. 231A, that he ***432** could bring fill onto his land as a matter of right, and for an injunction restraining interference with that right. The complaint states that Garabedian had received a cease and desist order from the building commissioner. Orders of public officials are not generally appropriate subject matter for declaratory judgment, if, as ****444** in the case of a building inspector, there are administrative remedies to exhaust. *East Chop Tennis Club v. Massachusetts Commn. Against Discrimination,* 364 Mass. 444, 450–451, 305 N.E.2d 507 (1973). [4] Compare *Iodice v. Newton,* 397 Mass. 329, 333–334, 491 N.E.2d 618 (1986). None of the defendants has raised the point, however, and, in any event, the complaint for declaratory judgment directs itself materially to the private challenges against Garabedian's project.

As noted, a judge of the Superior Court allowed the special motion of Johnston and Westland brought under G.L. c. 231, § 59H, to dismiss the complaint. Some of the challenges thrown up by the defendants Johnston and Westland to Garabedian had the character of "petitioning activity" as that has been described in the anti-SLAPP statute, G.L. c. 231, § 59H, and by decisional law interpreting that statute. They had made representations to town and State officials in hope of obtaining public intervention in Garabedian's land filling work, they had summoned police, they had leafleted the neighborhood to encourage opposition at public meetings, and they had organized residents to attend public meetings. Other aspects of their intervention, however, were private and lacked the characteristics of petition, namely the harassing of Garabedian's contractor and the somewhat intrusive surveillance of Garabedian's activity.

A motion to dismiss under G.L. c. 231, § 59H, lies if the movant shows that the plaintiff's claims are based on the petitioning activities of the movant alone and have no substantial basis beyond those activities. *Duracraft Corp. v. Holmes Prod. Corp.,* 427 Mass. 156, 167–168, 691 N.E.2d 935 (1998). *Baker v. Parsons,* 434 Mass. 543, 550, 750 N.E.2d 953 (2001). Petitions, by definition, are addressed to ***433** someone. The direct action of the individual defendants on the ground, involving Garabedian's grading contractor, the proclamations and warnings to the contractor's truck drivers, and the picture taking, were activities based on assertions by the neighbors of a legal position and involved no supplication to higher authority. [5] The target of those activities was Garabedian. His declaratory judgment action, therefore, was not based alone on the petitioning activities of the neighbors. Contrast *MacDonald v. Paton,* 57 Mass.App.Ct. 290, 295, 782 N.E.2d 1089 (2003). For that reason, if no other, the motion to dismiss should not have been allowed, and there were other reasons to have denied it.

A complaint for a declaratory judgment is the least aggressive of complaints. Its purpose "is to remove, and to afford relief from, uncertainty and insecurity with respect to right, duties, status and other legal relations." G.L. c. 231A, § 9, inserted by St.1945, c. 582, § 1. See *Boston v. Keene Corp.,* 406 Mass. 301, 304–305, 547 N.E.2d 328 (1989). There was plainly a difference of opinion between Garabedian and certain neighbors about whether he had a right to bring in fill and change the grade on some of his land. With his project begun and under siege, Garabedian was not doomed to proceed at risk of acting in violation of law, becoming obliged to undo work done, or to be liable for damages. He was, under ****445** G.L. c. 231A, § 1, entitled to find out what his rights were. The declaratory judgment action asserted no wrongdoing on the part of the defendants; it asked for no damages. [6] Such assertions are hallmarks of the bullying sort of action that the anti-SLAPP statute aims to discourage. Here, the neighbor defendants were not placed at risk of paying damages and, had they been content to do so, could have let the town carry the case for them. [7] The declaratory judgment action did not expose them inevitably to legal fees. Section 59H speaks in ***434** terms of the assertion of a civil claim, counterclaim,

or cross claim against a party. [8] The petition for declaratory judgment here made no claims against a party in the sense of the statute.

A third reason to have denied the § 59H motion to dismiss is that such a motion shall not be granted if the nonmoving party shows by a preponderance of evidence that the petitioning activity is "devoid ... of any arguable basis in law" and the moving party's acts caused "actual injury to the responding party." G.L. c. 231, § 59H. See *Baker v. Parsons,* 434 Mass. at 552–555, 750 N.E.2d 953. There was no showing of a basis, in the by-laws of Southborough or elsewhere, to regulate the kind of land filling that Garabedian was carrying on. The board of appeals of Southborough conceded as much in the summary judgment proceedings that resulted in a ruling in Superior Court, affirmed on appeal, that as Garabedian's land was neither in a flood plain district nor contained a wetland, no statutory prohibition limited Garabedian's right to place fill on his property to equalize the grade. [9] As to injury, the delays and consequent costs imposed on Garabedian supplied that condition.

3. *Whether the second hangar and enlargement of the first hangar were accessory uses within the meaning of the by-law.* No provision in the Southborough zoning by-law speaks to the building and use of an airstrip or a hangar for airplanes. The handle in the by-law at which Garabedian grasps is that concerning accessory uses. These facilities, he contends, are accessories to the primary use of his land for a single-family residence. The Superior Court judge concluded that the proposed second hangar, the extension of the first hangar, and the extension of the airstrip did not qualify as accessory uses because those facilities were not customarily incidental in Southborough to the primary allowed use, single-family residence. This is not the first time that Massachusetts courts have had occasion to consider whether a private airstrip and an airplane storage shed, ***435** i.e., a hangar, are permissible accessory uses. In *Harvard v. Maxant,* 360 Mass. 432, 275 N.E.2d 347 (1971), the court interpreted a zoning by-law definition of accessory use that was substantially similar to the one in force in Southborough. Section II of the latter ****446** provides: "Accessory Building or Use: building, structure, or use customarily incidental and subordinate to the principal permitted use of building or land, located on the same lot as the principal permitted building or use, and not prohibited by this By–Law."

An incidental use, the court wrote in *Maxant,* is one that is "dependent on or pertains to the principal or main use." *Id.* at 437, 275 N.E.2d 347. By way of illustration, the court recalled that in *Pratt v. Building Inspector of Gloucester,* 330 Mass. 344, 346–347, 113 N.E.2d 816 (1953), it had decided that a stable for the keeping of two horses for show purposes and as family pets was not commonly to be expected in connection with a single family house, although "[i]f the same question were presented as of the year 1900 ... it is possible that a different answer would be required." *Id.* at 347, 113 N.E.2d 816.

By way of further explication of what "incidental" and "customarily" mean as they bear on the zoning classification of "accessory use," the court said that "incidental" meant the use was subordinate and minor in significance. *Harvard v. Maxant,* 360 Mass. at 438, 275 N.E.2d 347. "Incidental" also incorporates the idea of subordinate to the primary use (in this case a dwelling) and in reasonable relation to the primary use. *Ibid.* See *Lawrence v. Zoning Bd. of Appeals of N. Branford,* 158 Conn. 509, 512–513, 264 A.2d 552 (1969), to which the *Maxant* court cited extensively. The word also connotes something minor or of lesser importance. *Old Colony Council—Boy Scouts of Am. v. Zoning Board of Appeals of Plymouth,* 31 Mass.App.Ct. 46, 48, 574 N.E.2d 1014 (1991). *Cunha v. New Bedford,* 47 Mass.App.Ct. 407, 411–412, 713 N.E.2d 385 (1999). By those criteria, a garden shed, a plant conservatory, a garage, a swimming pool, and a tennis court might be examples of accessory uses to a residence. "Customarily" implies a certain commonality of usage, a history of the lesser uses in conjunction with the primary uses. If the usage is rare, it is not customary. *Harvard v. Maxant, supra* at 439, 275 N.E.2d 347.

An 1,800–foot airstrip and airplane hangar are not minor. The ***436** taking off and landing of airplanes have an impact well beyond the boundaries of the land on which the airstrip and hangar are located. It is a very large scale activity. Keeping elephants is different than keeping a dog, and it toys with language to say maintaining a landing strip and hangars is incidental to a single family house. Activity of a certain magnitude is no longer incidental. *Burnham v. Hadley,* 58 Mass.App.Ct. 479, 484, 790 N.E.2d 1098 (2003). Neither is maintaining an airstrip and hangar common. According to the record, there were three airstrips in Southborough, one with an accompanying hangar, before Garabedian built his facilities in 1984. Precedent is not the equivalent of common, and one such airplane hangar and three airstrips in a town of 14.1 square miles do not constitute a common use. [10] It follows that such uses are not customarily incidental to a single-family house. For those reasons, the trial judge rightly

decided that the board of appeals had acted within its authority in affirming the building inspector's denial of a permit to build the second hangar and the extension to the first hangar. [11]

****447** 4. *Status of hangar built in 1984.* Not until March 11, 1996, did neighbors of Garabedian ask the building inspector to enforce the zoning law (see G.L. c. 40A, § 7) by requiring Garabedian to remove the hangar he had completed in 1985 and had used for the intervening eleven years. The building inspector declined to do so on the ground, as he put it, that the statute of limitations had expired. The board of appeals affirmed that action.

Section 7 of G.L. c. 40A, inserted by St.1975, c. 808, § 3, provides that "if real property has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized," no action shall lie to seek "abandonment, limitation or modification of the use allowed" by such a permit, unless commenced within six years of the alleged violation of law. Within a month of filing his building permit application, Garabedian had furnished the building ***437** inspector with approvals of the FAA for his airstrip. That was on November 7, 1984.

Garabedian's neighbors [12] complain that they were deceived because his building was described on the building permit as a "barn," the term that the building inspector chose. Given the accompaniment of FAA materials, any person inspecting the building permit documents would not have supposed the barn was for animals. They would know that the barn was for the storage of things mechanical, a purpose consistent with one of the lexical definitions of a barn. See Webster's Third New Intl. Dictionary 177 (1993). Certainly the taking off and landing of airplanes, which preceded and followed construction of the hangar, served notice to the neighbors what permission had been granted, even without reference to documents on file at town hall.

The trial judge, who found as a fact that the neighbors knew about the use of the structure built from the inception of the process, correctly ruled that the challenge to the first hangar was barred by the permit-related six-year limitations period in G.L. c. 40A, § 7.

5. *Status of airstrip constructed in 1984.* Neither by the definition of structure in the Southborough by-law, nor that furnished in case law, see *Williams v. Inspector of Bldgs. of Belmont,* 341 Mass. 188, 190–191, 168 N.E.2d 257 (1960), was the airstrip a structure. The airstrip, therefore, does not enjoy the benefit of the ten-year limitations period under G.L. c. 40A, § 7, for *structures* erected without a permit. See *Lord v. Zoning Bd. of Appeals of Somerset,* 30 Mass.App.Ct. 226, 228, 567 N.E.2d 954 (1991).

The town does not challenge the existence or use of the existing airstrip, but the neighbors do. As against them, Garabedian raised the defense of laches. The trial judge found that the neighbors had slept on their rights for eleven years before filing a complaint, and that Garabedian has changed position by improving and maintaining his airstrip and buying airplanes to use on it. To that degree, the inactivity of the neighbors contributed to a prejudicial change of position by Garabedian. The elements of laches are present. See ***438** *West Broadway Task Force v. Boston Hous. Authy.,* 414 Mass. 394, 400, 608 N.E.2d 713 (1993); *Myers v. Salin,* 13 Mass.App.Ct. 127, 137–140, 431 N.E.2d 233 (1982); *Feinzig v. Ficksman,* 42 Mass.App.Ct. 113, 118, 674 N.E.2d 1329 (1997). The findings of fact as to laches by the trial judge, when based on oral evidence, will not be disturbed by a reviewing court unless clearly erroneous. *Myers v. Salin, supra* at 138, 431 N.E.2d 233. There is no such error here.

****448** 6. *Expansion of the airstrip.* By parity of reasoning to our earlier discussion of whether the hangar was customarily incidental to the primary residential use, the airstrip expansion does not qualify as an accessory use.

Conclusion. In the declaratory judgment action, the judgment is vacated and a new judgment shall enter dismissing the action against all defendants on the ground of mootness. (See note 3, *supra.*) The judgment and order in that case awarding attorney's fees and costs to Westland and Johnston under G.L. c. 231, § 59H, are also vacated. We affirm judgments denying enforcement relief as to the existing airstrip and the existing hangar; affirming the decision of the board of appeals of Southborough to deny a permit for construction of a second hangar; and affirming the decision of the board of appeals of Southborough to deny a permit for construction of the proposed extension to the existing hangar.

So ordered.

All Citations

59 Mass.App.Ct. 427, 796 N.E.2d 439

Footnotes

1 Michael Johnston; Robert Garfield (building inspector of Southborough); John Boland (director of the department of public works of Southborough); Thomas McAuliffe, David W. Parry, and William Christensen (the selectmen of Southborough).

2 The acronym SLAPP stands for “strategic litigation against public participation.”

3 After our decision, the trial judge (see *infra*) dismissed as moot Garabedian's declaratory judgment action against the town officials.

4 But see G.L. c. 240, § 14A, which provides for declarations of rights under municipal land use ordinances or by-laws. For an illustration of the application of that statute, see *Radcliffe College v. Cambridge,* 350 Mass. 613, 215 N.E.2d 892 (1966).

5 We are not unaware that the judge who considered the § 59H motion to dismiss concluded that petitioning activity was the target of the declaratory judgment action; but the fact of the encounters between the neighbors and Garabedian's contractor is not disputed.

6 The injunctive relief sought in the complaint was dependant upon, and simply a mechanism for enforcement of, any favorable declaration Garabedian obtained.

7 General Laws c. 231A, § 8, requires that all persons who have any interest which would be affected by the declaration of rights sought shall be made parties to the declaratory judgment action.

8 The statute, in pertinent part, provides: “In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.” G.L. c. 231, § 59H.

9 Garabedian's contractor acceded to the orders to remove improper fill. That issue was not involved in the declaratory judgment action.

10 Hornor, Massachusetts Municipal Profiles 2002–2003, at 279 (Information Publications 2002). The population of Southborough in 1990 was 6,628 and in 2000 was 8,781. *Ibid.*

11 Of course, a community may adopt zoning by-law provisions that allow airstrips and hangars, most likely subject to special permit. Southborough, as noted, does not currently have such a provision.

12 In terms of this litigation, the only neighbors involved are Johnston and Westland.

EXHIBIT J

60 Mass.App.Ct. 5
Appeals Court of Massachusetts,
Essex.

William F. SIMMONS [1] & others [2]
v.
ZONING BOARD OF APPEALS
OF NEWBURYPORT & others. [3]

No. 01–P–1164.
|
Argued Jan. 21, 2003.
|
Decided Nov. 14, 2003.

Synopsis

Neighbors brought action against zoning board of appeals and landowners alleging that landowners' stabling of three horses on their property violated zoning ordinance. The Superior Court Department, Essex County, S. Jane Haggerty, J., awarded summary judgment to zoning board of appeals and landowners. Neighbors appealed. The Appeals Court, Perretta, J., held that: (1) stabling of horses was not an agricultural use, and (2) stabling of horses was a permissible accessory use.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

**1026 *5 William H. Sheehan, III, Peabody, for the plaintiffs.

Marc D. Kornitsky, Peabody, for the defendants.

Present: PERRETTA, COWIN, & GREEN, JJ.

Opinion

PERRETTA, J.

This appeal brings before us the question whether the applicable provisions of the Newburyport zoning ordinance allow the defendants (the Joneses) to stable three horses on a portion of their land, which is zoned for residential use. The defendants use the horses for recreational purposes and derive no financial gain from them. The plaintiffs argue that the *6 stabling of the horses violates § V–B of the ordinance. [4] The building inspector, the zoning board of appeals of Newburyport (board), and a Superior Court judge (on cross motions for summary judgment) concluded that the defendants were not in violation of the ordinance. [5] We conclude that the stabling of the horses is an accessory use and affirm the judgment.

1. *The undisputed facts.* All the lots in question are located in the "residential two" (R–2) district of the city of Newburyport, a district in which only one-family and two-family houses are allowed. [6] There is a two-family dwelling on the plaintiffs' lot. A single-family structure and the stable for the three horses are situated on the defendants' lot. As previously stated, the horses are kept for pleasure, such as riding, from which no financial benefit is derived. Section III–B of the ordinance prohibits, in both residential zones, R–1 and R–2, uses that would "detract from the desired residential character" and uses that would "otherwise interfere with the intent" of the ordinance.

2. *Discussion.* It is the plaintiffs' position that the keeping of the stable and three horses in an R–2 zone is both an impermissible agricultural and accessory use of the property.

a. *Agricultural use.* Section V–E(3) of the ordinance, concerning agricultural and open space use, describes "agricultural use" as:

> "Farms for the raising, keeping, and/or sale of cattle, horses, sheep, goats, dogs, and poultry, but not for hogs, providing that no animal is kept within fifty (50) feet of any property line, and for the growing of all agricultural products, including fruits, vegetables, hay, grain and all dairy products and eggs.
>
> *7 "Stall or stand for selling farm or garden products, the major portion of which **1027 is raised or produced on the premises by the owner or lessee thereof.
>
> "Greenhouse and nursery.
>
> "A stall or stand for the sale of nursery and greenhouse products." [7]

The ordinance also requires that land that is not situated within an area zoned as an "agricultural/conservation district," but is put to agricultural use involving the above-described animals, must be at least five acres. Additionally, no

animal on property being put to agricultural use is to be kept within fifty feet of any property line. The undisputed facts of the matter are that the defendant's lot is situated in an R–2 zone, it is a 2.4 acre lot, and the west side of the stable is located within twenty-five feet of the plaintiffs' property line.

The plaintiffs argue that the defendants are maintaining a farm on a lot too small for agricultural use. The flaw in their argument is that it conflates "farm" with any form of agricultural activity. The mere fact that a use is agricultural in character, a vegetable garden for example, does not convert the land into a farm. In assessing whether property is a farm, it is entirely appropriate to consider the scale of the activity. Applying the ordinance to the undisputed facts, we conclude that the defendants' stabling of their three horses does not constitute a farm and, accordingly, is not an agricultural use within the meaning of the ordinance.

b. *Accessory use.* Our conclusion, that the defendants' lot is not a farm and, therefore, does not contain an impermissible agricultural use of property situated within a residential zone, brings us to the question whether the stable for the keeping of three horses for purposes of riding and as pets is a permissible accessory use.

Section II–B of the Newburyport ordinance defines an "accessory use" as a "subordinate use, structure, or building, the purpose of which is incidental to that of the principal use or ***8** building and on the same lot." [8] In *Harvard v. Maxant,* 360 Mass. 432, 438, 275 N.E.2d 347 (1971), the court had occasion to consider the meaning of the word "incidental" when used to define an accessory use. In doing so, it quoted with approval and at length from *Lawrence v. Zoning Bd. of Appeals of N. Branford,* 158 Conn. 509, 512–513, 264 A.2d 552 (1969):

> "The word 'incidental' as employed in a definition of 'accessory use' incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. Indeed, we find the word 'subordinate' included in the definition in the ordinance under consideration. But 'incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use." See *Henry v. Board of Appeals of Dunstable,* 418 Mass. 841, 845, 641 N.E.2d 1334 (1994), discussed in note 8, *supra.* See also *Garabedian v. Westland,* 59 Mass.App.Ct. 427, 435, 796 N.E.2d 439 (2003).

Although § II–B of the Newburyport ordinance defines an accessory use in terms of "subordinate" and "incidental," ****1028** it neither uses the word "customary" nor specifies or otherwise describes the various uses that are accessory uses. "Generally speaking, an accessory use needs to be both customary and incidental. See *Harvard v. Maxant,* 360 Mass. at 438, 275 N.E.2d 347. Courts consider the question whether a particular use is customary where the zoning ordinance does not specify what *types* of uses are permitted." *Cunha v. New Bedford,* 47 Mass.App.Ct. 407, 411 n. 5, 713 N.E.2d 385 (1999). Based upon the language of the Newburyport ordinance as well as *Maxant* and *Cunha,* our analysis focuses on whether the defendants' use of the stable and keeping of three horses is subordinate to the primary residential use of the property, is reasonably related in function to the primary residential use, and is customary.

***9** The undisputed facts establish that the defendants' stable and three horses are subordinate and incidental to the primary use of the land. Their home is situated on the lot, and their horses are used by family members and guests for recreational purposes rather than financial benefit. The building inspector, with whom the board agreed and with whom we have no basis for disagreement, concluded that the three horses were pets. [9] The keeping of pets is, of course, reasonably related to the primary residential use of the property. [10]

In determining whether the defendants' stable and horses are a customary use of residential property, we do not confine ourselves to zone or district boundaries. Instead, we again look to *Harvard v. Maxant,* 360 Mass. at 438–439, 275 N.E.2d 347. There the court found instructive the discussion of the meaning of the word "customarily," as set out in *Lawrence v. Zoning Bd. of Appeals of N. Branford,* 158 Conn. at 513, 264 A.2d 552:

> "In applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even

> though it is not necessarily found on a majority of similarly situated properties."

See *Pratt v. Building Inspector of Gloucester,* 330 Mass. 344, 346, 113 N.E.2d 816 (1953); *Building Inspector of Holden v. Johnstone,* 357 Mass. 768, 768, 258 N.E.2d 72 (1970), decisions in which the court spoke in terms of uses in the "neighborhood" or "area."

***10** There is undisputed evidence in the record to establish the rural character of the area and the presence of animals, numerous in number and kind, on residential ****1029** property. More specifically, there is undisputed evidence to establish that there are a number of lots in the R–1 zone, smaller in size than the R–2 lot of the defendants (see note 6, *supra*), upon which numerous horses, assorted chickens, rabbits, goats, sheep, beef cattle, cows, heifers, and calves can be found. In determining whether the defendants' stable and horses are customarily associated with the primary use of the property, the size of the lot is but one fact among several to be considered. Among those facts, the most significant is that all the lots upon which a number of animals can be found are situated in areas zoned for residential use. [11] Moreover, we extend a measure of deference to the determinations of local officials on issues of local enforcement, particularly where the essential question requires a factual determination of what is customary. See *Sacco v. Inspector of Bldgs. of Brockton,* 3 Mass.App.Ct. 749, 749–750, 327 N.E.2d 924 (1975).

We digress from our analysis to consider the plaintiffs' insistence that this case is controlled by *Pratt v. Building Inspector of Gloucester,* 330 Mass. at 346–347, 113 N.E.2d 816. There the court held that a stable for the keeping of two horses used for purposes of show and treated as pets was not "so necessary in connection with a one family detached house or so commonly to be expected with such a house that it cannot be supposed the ordinance was intended to prevent it." It was on that basis that the court concluded that the plaintiffs' use of their property was not a permissible accessory use within the contemplation of the ordinance as adopted in 1927 and as reenacted in 1950. The plaintiffs maintain that the only significant difference between *Pratt* and the instant case is the number of horses involved.

There are several important distinctions between *Pratt* and the present case. First, the ordinance at issue in *Pratt* made no provision for any accessory uses. This circumstance led the ***11** court to consider whether, construing the ordinance in a reasonable manner, the stable and horses at issue reflected a use *impliedly* permitted as an incident of a single-family structure. The test formulated by the court was restrictive because to do otherwise would thwart the drafters' intention to make no provision for accessory uses. [12]

Further, our close reading of *Pratt* shows that the court was focused more on the utility of horses rather than their status as pets. As earlier noted, in concluding that the stabling of two horses was not an accessory use of residential property as ****1030** of the dates of the ordinance's enactment and reenactment, 1927 and 1950, the court stated that "[i]f the same question were presented as of the year 1900, for example, it is possible that a different answer would be required." *Id.* at 347, 113 N.E.2d 816. We think it reasonable to infer from that statement that the court could have deemed a stable "so commonly to be expected" with a dwelling in 1900, because horses were then a primary mode of transportation, whereas by 1927, and certainly by 1950, they were not.

Finally, and most critically, the ordinance at issue in *Pratt* specifically listed stables among a number of "more or less undesirable uses" permitted only in business districts and, even then, only with the written approval of the municipal council subject to any conditions the council might impose. *Id.* at 345, 113 N.E.2d 816. A very restricted and undesirable use could hardly be deemed a necessary or commonly expected aspect of a dwelling.

We think the facts before the court in *Pratt* are a far cry from ***12** those before us. The ordinance allows for accessory uses in general terms and without specification as to those types that are either permissible or prohibited. The keeping of various and numerous kinds of animals has been shown to be a fairly common feature of residential lots. See note 11, *supra.*

3. *Conclusion.* It follows from what we have said that there was no error in the judge's decision that the defendants' stabling of three pet horses on their residentially zoned property is a permissible accessory use.

Judgment affirmed.

All Citations

60 Mass.App.Ct. 5, 798 N.E.2d 1025

Footnotes

1 Individually and as trustee of 138 Low Street Realty Trust and 140 Low Street Realty Trust.

2 Thomas E. Simmons and Annette M. Simmons.

3 Thomas Jones and Gertrude R. Jones, trustees of the Thomas Jones and Gertrude R. Jones Realty Trust.

4 Section V–B provides: “Except as provided in this ordinance, no building, structure, or land shall be used except for the purposes permitted in the district, by right or by special permit, as described in this section.”

5 Although the parties submitted competing affidavits regarding the presence or absence of noxious odors and flies, there was no claim of nuisance before the judge. In the Superior Court, the parties acknowledged that there were no material facts in dispute and that the sole question before the judge was one of law, that is, the interpretation of the zoning ordinance and its applicability to the defendants' property.

6 Only single-family houses are allowed in the “residential one” (R–1) zoning district.

7 The other uses included within § V–E(3) are country clubs and public parks and playgrounds.

8 This definition somewhat parallels the description of an “incidental use” given by the court in *Henry v. Board of Appeals of Dunstable,* 418 Mass. 841, 844, 641 N.E.2d 1334 (1994), wherein the court noted that the word “incidental,” when used in the context of zoning, incorporates two concepts: (1) subordinate to the primary use and minor in significance; and (2) reasonably related to the primary use.

9 In determining whether certain animals may be considered pets, we look not only to species but also to the manner and purpose for which the animals are kept and maintained. See, e.g., *Steege v. Board of Appeals of Stow,* 26 Mass.App.Ct. 970, 972, 527 N.E.2d 1176 (1988) (property owners' purchase, raising, and sale of young horses constituted agricultural use); *Sturbridge v. McDowell,* 35 Mass.App.Ct. 924, 926, 624 N.E.2d 114 (1993) (raising and training of dogs for purposes of sale held to be an agricultural use).

10 Although it was open to the board to find, as matter of discretion, that the keeping of three horses, rather than one or two, was neither subordinate nor minor in respect to the residential use of the property, it did not do so. See *Cunha v. New Bedford,* 47 Mass.App.Ct. at 412, 713 N.E.2d 385; *Burnham v. Hadley,* 58 Mass.App.Ct. 479, 485, 790 N.E.2d 1098 (2003).

11 The plaintiffs claim that the judge erred in denying their motion to strike the exhibits and affidavits setting out undisputed facts concerning the many animals kept on properties in the area. We see no error. The undisputed facts therein recited were relevant to the factors discussed in *Harvard v. Maxant,* 360 Mass. at 438–439, 275 N.E.2d 347. We have not, however, considered any of the lots zoned for agricultural/open use upon which animals are kept.

12 As explained in *Henry v. Board of Appeals of Dunstable,* 418 Mass. at 844, 641 N.E.2d 1334:

> “Uses which are ‘incidental’ to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law. 2 E.C. Yokley, Zoning Law and Practice § 8–1 (4th ed.1978). An accessory or ‘incidental’ use is permitted as ‘necessary, expected or convenient in conjunction with the principal use of the land.’ 6 P.J. Rohan, Zoning and Land Use Controls § 40A.01, at 40 A–3 (1994). Determining whether an activity is an ‘incidental’ use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses.”

798 N.E.2d 1025

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EXHIBIT K

2013 WL 6410547
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court, Middlesex County.

Nancy E. TETI, as Trustee of Coolidge Street Realty Trust, and Jennifer Hawkins, Plaintiffs
v.
The TOWN OF SHERBORN [1], Michael S. Giaimo, et al., as Members of the Zoning Board of Appeals of the Town of Sherborn, John A. Knapp, Jr., and Katherine M. Knapp, Defendants.
John A. Knapp, Jr. Katherine Knapp, Albert Michaud, and Patricia Michaud d/b/a Sweet Meadow Farm, Plaintiffs
v.
Michael Giaimo, et al., as members of the Sherborn Zoning Board of Appeals, and Jennifer Hawkins, Defendants.

Nos. 09 MISC 414330(KFS), MICV 2009–04025(KFS).
|
Dec. 6, 2013.

DECISION

KARYN F. SCHEIER, Chief Justice.

***1** These cases involve two separate appeals from a decision of the Town of Sherborn's Zoning Board of Appeals (ZBA) involving certain activities at Sweet Meadow Farm in Sherborn (Decision). The individual non-municipal parties include the owners of the farm and their abutting neighbors. In the Land Court Case (09 MISC 414330), Nancy E. Teti and Jennifer Hawkins, abutters to Sweet Meadow Farm, appealed a portion of the Decision that allows the continued operation of a farm stand at Sweet Meadow Farm. In the Superior Court Case (MICV 2009–04025), the owners and operators of Sweet Meadow Farm appealed a different portion of the Decision, which determined that the continued operation of an animal feed business at Sweet Meadow Farm is not allowed. [2]

Nancy E. Teti, as Trustee of Coolidge Street Realty Trust (Teti), and Jennifer Hawkins (Hawkins) initiated the Land Court Case on October 16, 2009, by filing a complaint appealing the portion of the Decision upholding the Sherborn Zoning Enforcement Officer's (ZEO) refusal to take enforcement action against the farm stand on Sweet Meadow Farm. Defendants in the Land Court Case chose not to file answers, as permitted under G.L. c. 40A, § 17.

The Superior Court Case was filed on the same day as the Land Court Case by John A. Knapp, Jr., Katherine Knapp, Albert Michaud, and Patricia Michaud d/b/a Sweet Meadow Farm (hereafter referred to as Sweet Meadow Farm or the Knapps [3]). Hawkins is a named Defendant in the Superior Court Case because she was one of the applicants before the ZBA on the enforcement action and G.L. c. 40A, § 17 requires that she be named along the members of the ZBA. In its complaint, Sweet Meadow Farm challenges the portion of the Decision invalidating its operation of an animal feed business at Sweet Meadow Farm. The ZBA concluded that the ZEO should not have refused Hawkins' request to enforce the Town of Sherborn Zoning By–Laws (By–Laws) with respect to the animal feed business because that operation is not a protected agricultural use under either the By–Laws or Section 3 of the Zoning Act, G.L. c. 40A. The ZBA found Sweet Meadow Farm to be in violation of the By–Laws and voted unanimously to issue a cease and desist order. Sweet Meadow Farm also asserted in its complaint that Hawkins is not an aggrieved person, the ZBA wrongfully concluded Hawkins had standing, and the ZBA, by allowing Hawkins' appeal, usurped the authority of the Board of Health.

In response to Sweet Meadow Farm's complaint in the Superior Court Case, Hawkins and the ZBA members filed separate answers. Hawkins asserted that she is harmed by the activities at Sweet Meadow Farm. The ZBA asserted several defenses, responding to Sweet Meadow Farm's allegations regarding the standing issue, as well as the ZBA's jurisdiction, and the substantive merits of the Decision.

On April 8, 2011, the Knapps filed a Motion to Dismiss pursuant to Mass. R. Civ. P. 12(b)(1) in the Land Court Case, and, along with the Michauds, filed a Motion for Summary Judgment in the Superior Court Case. [4] The court denied both motions, finding that the Knapps failed to sufficiently rebut the presumption of standing for Hawkins and Teti. Specifically, the court held that the Knapps failed to rebut Teti's claims of alleged harm resulting from the noise, odor and dust caused by the farm stand and animal feed business, and Hawkins' claims of alleged harm resulting from the noise, odor and light from trucks. [5] The court further ruled that it would not consider any harms alleged by Teti and Hawkins arising from farm activities *not* at issue on appeal or in the

ZBA's Decision, such as previous construction and operation of the horse ring, animal pens, and the Knapps' removal of screening trees, none of which had been the subject of challenges timely filed by Hawkins or Teti.

***2** The court viewed the parties' properties on June 5, 2012 in the presence of the parties and counsel, and a two-day trial was held on July 25 and 26, 2012. The court heard testimony from Albert Michaud, a lessee and the operator of Sweet Meadow Farm; Stephen Knapp, the farm's business manager; Walter Avallone, the ZEO and Building Inspector; Nancy Teti, Plaintiff in the Land Court Case; and Jennifer Hawkins, Plaintiff in the Land Court Case and Defendant in the Superior Court Case. In addition to the exhibits entered in evidence, several chalks were used at trial. The parties declined to have a court stenographer present. [6]

Based on the credible testimony, exhibits, stipulations, and other evidence entered at trial, as informed by the court's observations at the view, and the reasonable inferences drawn from the evidence, this court finds the following facts in addition to the facts previously established in this court's Order Denying Motion to Dismiss and Order Denying Motion for Summary Judgment dated February 29, 2012 (Summary Judgment Order), and the facts agreed to by the parties in their Joint Pre–Trial Memorandum:

1. The Knapps own Sweet Meadow Farm, a 24–acre farm at 111 Coolidge Street in Sherborn (Property), which they purchased in 1999 (Sweet Meadow Farm or the Farm). The Farm is located in the Residence A District under the By–Laws.

2. In 2001, the Knapps received a building permit to construct a building on the Property (Building # 1).

3. In 2006, the Knapps received a building permit and constructed a second building on the Property (Building # 2). Thereafter, the Knapps moved the animal feed business into Building # 2.

4. The Farm has approximately six acres of hay fields. TA v.1 at 10:54. In addition to Buildings # 1 and # 2, the Farm also includes a number of additional structures: a riding ring, animal pens, paddocks, a greenhouse and a barn.

5. In 2007, John Knapp and Albert Michaud began operating a farm stand out of Building # 1, where they initially sold only eggs and Sweet Meadow animal feed products. TA v.2 at 9:24.

6. In 2009, the farm stand began to carry flowers, herbs and other plants such as bushes and small trees. Some plants were grown in the greenhouse at the Farm and some were purchased from a local nursery. TA v. 1 at 3:31.

7. Two houses are located immediately south of the farm buildings, at 99 Coolidge Street and 95 Coolidge Street. They are approximately 500 to 600 feet from Buildings # 1 and # 2. TA v. 1 at 12:00. Located between Buildings # 1 and # 2 and 95 and 99 Coolidge Street are several other structures, such as a riding ring, a barn and an animal pen (located directly next to 99 Coolidge Street). TA v. 2 at 3:36–37.

8. On April 5 and 6, 2009, Hawkins sent two letters to the ZEO requesting enforcement action against Sweet Meadow Farm. Hawkins specifically requested enforcement against, among other things, the farm stand and the animal feed business based on alleged zoning violations. Ex. 14, 15. The ZEO rejected these requests, determining, in relevant part, that farms are expressly entitled under G.L. c. 40A, § 3, to sell a certain percentage of produce from land not owned by the farm and still take advantage of the protection afforded agricultural uses.

***3** 9. Hawkins appealed the action of the ZEO to the ZBA on May 13, 2009. The question before the ZBA was whether the farm stand and the animal feed business qualified for the protections afforded by G.L. c. 40A, § 3 and By–Laws § 3.4.

10. G. L. c. 40A, § 3 states in relevant part:

"[n]o zoning ordinance or By–Law shall regulate or restrict the use of materials, or methods of construction of structures ... or ... prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture ... nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture ... provided that either during the months of June, July, August and September of each year or during the harvest season of the primary crop raised on land of the owner or lessee, 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, or at least 25 per cent of such products for sale, based on either gross annual sales or annual volume have been produced by the owner or lessee of the land on

which the facility is located and at least an additional 50 per cent of such products for sale ... have been produced in Massachusetts on land other than that on which the facility is located ...” [hereinafter “the agricultural exemption”].

11. By–Laws 3.4 states:

> “[u]ses that qualify for the exemption for parcels of 5 acres or more or 2 acres or more as described in Chapter 40A, sec. 3 relating to agriculture, horticulture, silviculture, viticulture, aquaculture or floriculture shall be uses allowed as of right provided that appropriate and reasonable screening of buildings and structures, such as hedges or fences, as determined by the Planning Board in light of the nature of the proposed use and the character of the surrounding area be provided. Such determination shall be made within 30 days based on a screening plan submitted as part of an application for a building permit, and referred to the Planning Board by the Building Inspector, in connection with any buildings or structure to be erected within 200 feet of a public way or lot line.”

12. The ZBA issued its decision on September 21, 2009. [7] In its Decision, the ZBA concluded that it did not have enough evidence to determine whether 25 percent of the farm stand's produce during the growing season was produced by Sweet Meadow Farm, as required by G.L. c. 40A, § 3. The ZBA could not reach a unanimous decision (voting 2–1 to reverse the ZEO). A unanimous vote is required in order to overturn the ZEO. Therefore, the ZEO's decision not to take enforcement action against the farm stand was sustained.

13. In its Decision, the ZBA concluded the animal feed business was not operating for the primary purpose of agriculture because some of the animal feed ingredients were not grown on or made at Sweet Meadow Farm itself. The ZBA issued a cease and desist order requiring the Knapps to stop using Building # 2 to package and sell products not “exclusively” produced on the Farm. [8]

***4** 14. Both Teti and Hawkins allege they are harmed by the operation of the farm stand and the animal feed business due to the noise, fumes, dust and lights from trucks that service them and from other vehicles that are associated with those two operations at Sweet Meadow Farm. Teti and Hawkins claim standing based on these allegations of harm.

15. Hawkins hears trucks entering and exiting Sweet Meadow Farm while inside her home at 95 Coolidge Street. TA v. 2 at 2:43, 2:55.

16. She also occasionally notices diesel fumes and odors from trucks visiting the Farm. TA v. 2 at 3:37.

17. From her property Hawkins hears people and trucks braking and reversing related to all the activities at Sweet Meadow Farm, likely including activity related to the farm stand and the animal feed business.

18. Nancy Teti hears trucks entering and exiting Sweet Meadow Farm while inside her home at 99 Coolidge Street.

19. She also occasionally notices odors from trucks visiting Sweet Meadow Farm. TA v. 2 at 3:37.

20. Some trucks visiting Sweet Meadow Farm do not serve either the farm stand or the animal feed business. TA v. 1 at 12:07. The animal feed business attracts approximately five to seven trucks per month. TA v. 1 at 11:56, 2:09–15. The farm stand has no large trucks associated with it. TA v. 2 at 9:42.

Animal Feed Business

21. Albert Michaud and his employees package, sell and ship all Sweet Meadow animal feed products out of Building # 2. The majority of animal feed products are formulas created by Patty Michaud. The products include hay products, grain pellets, apple sticks and, to a lesser extent, sales of other treat items, such as papaya and banana chips. TA v. 1 at 10:33–34.

22. This line of animal feed products include “first-cut” and “second-cut” hay products. First-cut hay comes from the first harvest in May, and second-

cut comes from all subsequent harvests beginning in July.

23. All first-cut hay sold during the growing season of June through September is hay harvested from the Farm during the same year. Albert Michaud often uses the Farm's own hay from the previous year in sales of second-cut hay in June and July, and uses the Farm's own hay in second-cut animal feed products sold in August and September. TA v. 1 at 10:59.

24. On occasions when there is not enough leftover second-cut hay in June and July, hay from outside vendors is used in the animal feed products.

25. Steven Knapp maintains the Farm's financial records and is responsible for insuring the Farm's compliance with the Commonwealth's agricultural exepmtion. In so doing, assumes that all of the first-cut hay sold during the growing season is made of hay grown at the Farm.

26. Sometimes, the Farm does not have any of its second-cut hay left over in June and July. To account for this, Stephen Knapp assumes that half of the second-cut hay products sold in June, July, August and September are not grown on the Farm. TA v. 1 at 10:59.

***5** 27. The percentage of Sweet Meadow animal feed sales that are products made of hay grown on the Farm were 35.01% in 2007, 37.53% in 2008, and 37.99% in 2009. TA v. 1 at 3:18—29.

28. On average, Stephen Knapp's above calculation (Fact Paragraph 27) is conservative as a measure of the percentage of all animal feed products produced at the Farm because in some years, there is enough second-cut hay grown on the Farm to supply the animal feed business in June and July. TA v. 1 at 10:59.

29. The animal feed business records for 2007 through 2009 show how much each type of hay product the animal feed business sold in each of the three years.

30. The animal feed financial records show that the percentage of sales attributable to "treat" products not made of hay or wheat is de minimis. TA v. 1 at 11:28.

Farm Stand

31. Some nursery stock sold at the farm stand is grown in greenhouses on-site, some at a greenhouse leased by the Knapps off-site, and some is purchased from a nursery. All plants are watered daily, pruned, repotted and fertilized on-site for some length of time before sale. The Farm staff removes withering leaves and rotates the plants in and out of doors to ensure adequate sun, shade and protection from the elements. In the fall, the Knapps cut back the perennials that have not been sold, bury them on-site and later dig them out and put them in a greenhouse to sell the following year. TA v. 1 at 3:35

32. Prior to 2009, the farm stand operated on an honor system, using a cash box for 2007 and 2008. No separate records were kept and annual sales amounted to less than $3,000.00.

33. The farm stand's cash register tapes and ledgers from 2009 indicated that 49.93% of the stand's sales during the 2009 growing season came from nursery stock and 47.9% came from eggs and Sweet Meadow animal feed products. [9]

34. Prior to 2011, eggs and animal feed products were 'booked' into the same category by the farm stand's cash register, so the Knapps had no means of estimating the breakdown of sales attributable to each.

35. In calculating percentages of products sold from the farm stand before the Farm utilized a sophisticated cash register, Stephen Knapp approximated the percentages of various items sold based on his observations. To be conservative, Mr. Knapp assumed all sales in this category were sales of animal feed products (further explaining that because virtually all eggs sold are produced by the Farm's own chickens, attributing any sales to eggs would only increase the percentage of those products produced on the Farm). He concluded that 30% of the animal feed products sold were made up of hay grown on the Farm. This calculation was confirmed by data from 2011, when the Farm was utilizing a new cash register. He ultimately concluded that 30% of total sales were Sweet Meadow Products.

36. As of 2011, the cash register receipts allows the Farm staff to track precisely how much of each

product has been sold. The data from this register showed that 32% of farm stand sales during the 2011 growing season were from products made from hay grown on-site. Based on this evidence and the testimony of Stephen Knapp regarding years prior to 2011, and drawing inferences from the 2011 receipts, the court finds that his calculations of sales percentages has been substantially consistent over the years in question.

Standing

***6** The Knapps allege that Teti and Hawkins lack standing to challenge the ZBA Decision because they produced no evidence establishing aggrievement. [10] The court's Summary Judgment Order, resolved parts of this question. Teti and Hawkins alleged aggrievement from odor, noise, dust and light caused by activities conducted on and by Sweet Meadow Farm. The court narrowed the scope of the aggrievements alleged by Teti to noise, odor and dust caused by activities specifically tied to the farm stand and the animal feed business. The harms alleged by Hawkins were limited to noise, odor and light from trucks.

G.L. c. 40A, § 17 provides for judicial review of decisions of zoning boards of appeal and special permit granting authorities to the extent the appellant is a "person aggrieved" by the decision. Abutting landowners are "parties in interest" to zoning matters under G.L. c. 40A, § 11. As "parties in interest," abutters are presumed to be aggrieved by a decision of a zoning board for purposes of G.L. c. 40A, § 17. *See Valcourt v. Zoning Bd. of Appeals of Swansea,* 48 Mass.App.Ct. 124, 127, 718 N.E.2d 389 (1999); *Marotta v. Bd. of Appeals of Revere,* 336 Mass. 199, 143 N.E.2d 270. 204, (1956). Therefore, as abutters, Hawkins and Teti are entitled to a presumption of standing. *Marinelli v. Bd. of Appeals of Stoughton,* 440 Mass. 255, 257, 797 N.E.2d 893 (2003).

This presumption is rebuttable. *Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass.App.Ct. 208, 212, 794 N.E.2d 1269 (2003). One may effectively rebut an abutter's presumptive standing by presenting evidence to the contrary. *Marinelli,* 440 Mass. at 258, 797 N.E.2d 893. If a challenge to standing is supported by evidence, the abutter's presumption of standing disappears. *Valcourt,* 48 Mass.App.Ct. at 127–28, 718 N.E.2d 389; *Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc.,* 421 Mass. 106, 111, 653 N.E.2d 589 (1995). A defendant may either proffer evidence showing that the alleged basis for standing is unfounded or rely on the plaintiff's lack of factual foundation for asserting the alleged aggrievement. *See Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 35–36, 849 N.E.2d 197 (2006) (stating that a defendant was not required to support a motion for summary judgment with affidavits attacking each of the plaintiffs' claimed aggrievements, but could rely on the plaintiff's lack of evidence, obtained through discovery, with equal force).

Once properly rebutted, the burden shifts to the plaintiff, and requires the plaintiff to establish with direct facts, and not by speculation opinion, that his or her injury is special and different from the concerns of the rest of the community. *Kenner v. Zoning Bd. of Appeals of Chatham,* 459 Mass. 115, 118–19, 944 N.E.2d 163 (2011). A plaintiff whose presumptive standing is rebutted will remain a party to the case if the plaintiff suffered a "definite violation of a private right, a private property interest, or a private legal interest." *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge,* 27 Mass.App.Ct. 491, 493, 540 N.E.2d 182 (1989). [11] The plaintiff must demonstrate—and not merely speculate—that some legal right has been infringed. *Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass.App.Ct. 208, 211, 794 N.E.2d 1269 (2003). To meet the burden of proof, the abutter must "put forth credible evidence to substantiate his allegations." *Marashlian,* 421 Mass. at 721, 660 N.E.2d 369. [12] This evidence must entail more than "unsubstantiated claims or speculative personal opinions." *Denneny,* 59 Mass.App.Ct. at 212, 794 N.E.2d 1269.

***7** If the evidence at trial introduced by the Knapps rebutted the presumptive standing enjoyed by Teti and Hawkins, the burden shifts to them to come forward with specific facts to support their status as aggrieved persons. *Rattner v. Planning Bd. of West Tisbury,* 45 Mass.App.Ct. 8, 10, 695 N.E.2d 669 (1998). Here, Teti and Hawkins both contend they suffer the type of aggrievement recognized under the By–Laws, specifically injuries caused by noise, dust, light and odor. By–Laws § 1.3.

"A review of standing based on 'all the evidence' does not require that the factfinder ultimately find a plaintiff's allegations meritorious. To do so would be to deny standing, after the fact, to any successful plaintiff. Rather the plaintiff must put forth *credible* evidence to substantiate his allegations." *Kenner,* 459 Mass. at 118, 944 N.E.2d 163 (citing *Marashlian,* 421 Mass. at 721, 660 N.E.2d 369 (italics added)). This turns standing into a question of fact for the court, and allows for a degree of discretion. *Kenner,* 459 Mass.

at 119–20, 944 N.E.2d 163 (citing *Paulding v. Bruins,* 18 Mass.App.Ct. 707, 709, 470 N.E.2d 398 (1984) ("[W]hether a party is 'aggrieved' is a matter of degree ... and the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule")). The court must now determine whether the Knapps have sufficiently rebutted the presumption of standing and shifted the burden to Hawkins and Teti. If yes, the question becomes whether, based on all of the evidence without the benefit of the presumption, Hawkins and Teti have put forth credible evidence to substantiate their claims.

Noise

At trial, the Knapps challenged Teti and Hawkins' presumption of standing relating to noise with direct testimony from Albert Michaud and Stephen Knapp, which this court credits. [13] Mr. Michaud testified as to the minimal truck traffic directly attributable to the farm stand and the animal feed business. According to Mr. Michaud, at its busiest peak in 2009, the animal feed business drew approximately seven to nine trucks per week; currently, only five to seven trucks of various sizes visit the animal feed business per month. TA v. 1 at 11:56, 2:09–15. Mr. Michaud further testified that virtually no trucks visit the farm stand, as Stephen Knapp uses his personal pick-up truck to transfer the stand's nursery stock and almost all other inventory is grown on or obtained from elsewhere on the farm. TA v. 1 at 9:42. Other trucks, such as a moving truck owned by Mr. Michaud, are used on the farm for activities unrelated to either the farm stand or the animal feed business, and would continue to operate on the farm even if the farm stand and animal feed business ceased operations. TA v. 1 at 12:07.

Mr. Michaud and Mr. Knapp further testified that traffic on Coolidge Street is generally heavy, with Mr. Michaud describing noise from the street as "constant." [14] TA v. 1 at 11:55–56. Both testified that traffic on Coolidge Street is heavy and consistent, but that noise from trucks entering the farm is "minimal," as drivers are required to turn off their engines immediately upon entering the Property. TA v. 1 at 12:03; TA v. 2 at 4:02–4:04. Michaud and Knapp based their testimony on their own observations, and did not call a noise expert to testify.

***8** Both Hawkins and Teti also testified at trial regarding their observations regarding noise caused by traffic to and from the Farm, and also did not call a noise expert. Both cited the beeping sound made by trucks travelling in reverse as the main noise harming them. [15] Hawkins testified on cross examination that she currently observes trucks a few times a week, and hears them braking and reversing, and has noticed a "slight" decrease from 2009 to 2012. TA v. 2 at 2:43; 2:55:47. All parties based their testimony on their personal observations. Neither party produced a noise expert or other supporting evidence or documentation detailing the level of noise caused by trucks visiting the Farm generally or the farm stand or feed business specifically. Although Hawkins and Teti could not definitively distinguish between trucks visiting the farm stand and animal feed business and those servicing other areas of the Farm, Hawkins testified she sees trucks in the farm stand and animal feed business areas "frequently." TA v. 2 at 2:43:50. Teti testified she does not usually notice the noise from general Coolidge Street traffic, but can hear the trucks backing up on the Farm. TA v. 2 at 3:39:40. While it is a close call, this court finds and rules that the Knapps failed to produce sufficient evidence rebutting the presumption of aggrievement from truck noise enjoyed by Teti and Hawkins. They therefore have standing and the court has jurisdiction to review the Decision of the ZBA.

Having found that both Teti and Hawkins have standing based on their presumption, which was not adequately rebutted with respect to noise, the court need not find that they have suffered harm from any other activity generated by the farm stand or the animal feed business. Nonetheless, the court briefly addresses below its analysis of the other harms, or lack thereof, presented by Teti and Hawkins. While a few of the issues were disposed of at summary judgment, there was testimony from both sides regarding them at trial.

Dust

Hawkins alleges that trucks visiting the Farm create dust during the summer months when entering and exiting the Property. The court has already disposed of this alleged aggrievement at summary judgment, ruling that recent paving of the driveway used by trucks to enter and exit the farm has reduced the amount of dust released to the air. In any event, Hawkins could not establish where the dust originates, but she conceded that the dust came from the animal pens and riding ring on the Farm, two facilities housing activities outside the scope of the ZBA Decision and this appeal. Therefore, this court finds that the Knapps rebutted Hawkins' presumption of standing through her own testimony, and that she has not produced sufficient credible evidence with respect to the alleged harm from dust caused by the farm stand or the animal feed business to establish her standing.

Teti also testified at trial that she could not pinpoint which farm facility or activity most likely creates dust and stated that she has seen dust blown toward the farm stand from the animal pens and riding ring. Teti agreed that the dust probably originates from the animal pens and riding ring, or from a specific truck used by Albert Michaud for haying and general farm activities unrelated to the farm stand or animal feed business. Thus, the court finds and rules that the Knapps sufficiently rebutted Teti's presumption of standing through her direct testimony, and like Hawkins, Teti has not produced sufficient credible evidence of harm from dust caused by the farm stand or the animal feed business to establish standing.

Odor and Lights

***9** Once a presumption of standing has shifted, plaintiffs must bring forward credible evidence proving their alleged aggrievements constitute more than "unsubstantiated claims or speculative personal opinions." *Denneny,* 59 Mass.App.Ct. at 212, 794 N.E.2d 1269. Hawkins and Teti must show they suffer from more than a "minimal or slightly appreciable harm." *Kenner,* 459 Mass. at 121, 944 N.E.2d 163. As previously mentioned, the court, at the summary judgment stage, narrowed allegations of harm from light to the light caused by trucks only. At trial, Hawkins testified that she has since noted a "distinct improvement" in the alleged harm caused by truck lights and that she sees truck lights only in winter, when it turns dark during business hours. She further testified that she only "occasionally" notices odors caused by trucks. Teti also testified that she notices bothersome odors only "on occasion." TA v. 2 at 3:37.

Hawkins and Teti also provided only vague, speculative testimony as to frequency of disturbance from lights from trucks and other vehicles visiting the Farm. By its nature, this harm is restricted to non daylight hours and occurs only during part of the year, as the farm stand and animal feed business are open only during business hours. In addition, as was true generally with observations of trucks, neither Teti nor Hawkins established whether the trucks operating headlights were specifically visiting or servicing either the animal feed business or the farm stand, or were there for other purposes. Neither Hawkins nor Teti could provide definitive links between the trucks and the two activities at issue here. The infrequent lights and odors does not rise to the level of a substantial injury; therefore, the alleged aggrievement due to lights and odors fail to support standing. Of the four injuries alleged by Hawkins and Teti, they retain the presumption of standing regarding noise only. The Knapps rebutted the presumption of standing regarding dust, odor and light, and Hawkins and Teti failed to carry their burden of proof once the presumption vanished. [16]

The Knapps Produced Sufficient Evidence That The Farm Stand and Animal Feed Business Fall Under The Agricultural Exemption

The Land Court Case and the Superior Court Case both stem from a decision of the ZBA. Hawkins and Teti, Plaintiffs in the Land Court Case, and the Knapps, Plaintiffs in the Superior Court Case, appealed pursuant to section 17 of the Zoning Act. G.L. c. 40A, § 17 states: "[a]ny person aggrieved" by a zoning board of appeals decision may seek judicial review. The court "shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require."

In a G.L. c. 40A, § 17 appeal, the court employs a combination of *de novo* review of the evidence to establish the relevant facts and a deferential posture toward the board's action in light of the facts found by the court, so long as the board has reasonably exercised its discretion. The court must give "a measure of deference" to a local board's interpretation of its own zoning By–Laws and ordinances. *APT Asset Mgmt., Inc. v. Bd. of Appeals of Melrose,* 50 Mass.App.Ct. 133, 138, 735 N.E.2d 872 (2000); *Advanced Dev. Concepts, Inc. v. Blackstone,* 33 Mass.App.Ct. 228, 231, 597 N.E.2d 1372 (1992). This deference is due to a local zoning board's special and unique knowledge of the "history and purpose" of the town's By–Laws. *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica,* 454 Mass. 374, 381, 909 N.E.2d 1161 (2009) (citing *Duteau v. Zoning Bd. of Appeals of Webster,* 47 Mass.App.Ct. 664, 669, 715 N.E.2d 470 (1999)).

***10** The appropriate deference to a board's construction is not, however, without limit. *See, e.g., Needham Pastoral Counseling Ctr., Inc. v. Bd. of Appeals of Needham,* 29 Mass.App.Ct. 31, 32, 557 N.E.2d 43 (1990). An incorrect interpretation of a zoning provision by a local board or building inspector, for example, is not entitled to deference. *Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley,* 461 Mass. 469, 475, 961 N.E.2d 1055 (2012). The task of a court in reviewing *de novo* a local zoning decision under G.L. c. 40A, § 17 is to determine the legal validity of the

board's decision based on the facts found by the court, giving no evidentiary weight to the board's findings. *Roberts v. Southwestern Bell Mobile Sys., Inc.,* 429 Mass. 478, 485–86, 709 N.E.2d 798 (1999); *Pendergast v. Bd. of Appeals of Barnstable,* 331 Mass. 555, 558–59, 120 N.E.2d 916 (1954).

The reviewing court focuses solely on the "validity but not the wisdom of the board's action." *Wolfman v. Bd. of Appeals of Brookline,* 15 Mass.App.Ct. 112, 119, 444 N.E.2d 943 (1983). A board's decision will not be overturned unless it is "based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary." *Britton v. Zoning Bd. of Appeals of Gloucester,* 59 Mass.App.Ct. 68, 72, 794 N.E.2d 1198 (2003) (citing *MacGibbon v. Bd. of Appeals of Duxbury,* 356 Mass. 635, 639, 255 N.E.2d 347 (1970)).

In its Decision, the ZBA ruled that the ZEO should not have refused Hawkins' request that he enforce the zoning By–Laws with respect to the operation of the animal feed business on the Farm, and that neither the By–Laws nor G.L. c. 40A, § 3 provided a right to use a residentially-zoned property for the processing, storage, packaging or shipping of products not grown on the Farm. The Board issued a cease and desist order for the animal feed business. With respect to the farm stand, the Board was unable to reach a unanimous decision regarding the legality of the farm stand's operation, as required in order to reverse a decision of the ZEO, so operation of the farm stand was permitted to continue. [17]

Farm Stand

G.L. c. 40A, § 3 provides that no zoning ordinance or By–Laws shall "prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion or reconstruction of existing structure thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture." The "obvious purpose" of this agricultural 'exemption' is to "promote agricultural use within all zoning districts in a municipality," *Bldg. Inspector of Mansfield v. Curvin,* 22 Mass.App.Ct. 401, 402, 494 N.E.2d 42 (1986), and the courts have interpreted this exemption broadly. *Tisbury v. Martha's Vineyard Commission,* 27 Mass.App.Ct. 1204, 1205, 544 N.E.2d 230 (1989).

Under the agricultural exemption, facilities selling produce, wine and dairy products are allowed, "provided that ... during the months of June, July, August and September of every year ... 25 per cent of such products for sale, based on either gross sales or volume, have been produced by the owner or lessee of the land on which the facility is located." G.L. c. 40A, § 3. Albert Michaud and Stephen Knapp testified regarding the operations of the farm stand and introduced evidence demonstrating that at least 25 percent of the farm stand's gross were from products produced by the Farm owners during the months required by statute. The court finds their testimony credible.

***11** The Farm first began collecting money from farm stand sales in 2007. Mr. Michaud testified that the farm stand operated on a honor system basis, with customers putting money into a cash box. TA v. 1 at 2:27. For the 2009–2010 period, the Farm had a cash register, but it was not a sophisticated one. The Knapps introduced in evidence handwritten daily tabulations of the farm stand register tapes and there was considerable testimony, on both direct and cross, regarding the accuracy of the tapes. In 2011, a sophisticated cash register was installed with the capacity to categorize sales by product type. TA v. 1 at 3:36.

Nursery stock, eggs and Sweet Meadow products constitute the main product categories sold at the farm stand. In order to determine whether its sales fall under the agricultural exemption, the question becomes what products, if any, were "produced by the owner or lessee of the land." G.L. c. 40A, § 3. If the nursery stock, eggs or Sweet Meadow products fall under this definition, then the farm stand is protected provided that at least 25 percent of its sales derive from those qualified products. The cash register records, together with the testimony, establish that the farm stand sales fall within the agricultural exemption.

G.L. c. 40A, § 3 provides that nursery stock will be considered produced by the owner or lessee of the land if it is "nourished, maintained and managed while on the premises." Testimony by Mr. Knapp and Mr. Michaud described the nursery stock as including vegetable plants, woody plants (such as trees and bushes), some of which are purchased offsite and some which are grown onsite from seedlings. TA v. 1 at 3:31–42. Farm employees provide "constant maintenance" for this stock, in the form of pruning, repotting, watering, and fertilizing. *Id.* Unsold flowers are reburied in trenches in order to be resold the following year. While no precise definition of the nourishment and maintenance required under G.L. c. 40A, § 3 could be found in case law, the plain language of the statute itself implies that the actions of the Knapps constitute nourishment, maintenance and management. [18]

G.L. c. 128, § 1 applies only as used in that chapter. G.L. c. 40A, § 3 expressly incorporates the definition of "agriculture" found in G.L. c. 128, but says nothing about adopting other definitions, such as nursery stock. A prior Land Court case, when faced with a similar issue, concluded that growing and keeping nursery stock for later sales, even if only kept onsite for one to six weeks, and nourishing and maintaining that stock as necessary, qualified for the agricultural exemption. *Vieira v. Barry,* 4 LCR 295 (1996). When applying the agricultural exemption under § 3, it appears clear that nursery stock will be considered "to be produced by the owner" if it is nourished, maintained and managed *while on the premises,* but does not have to be "planted in their ground or grown from seedlings" in order to qualify. *Vieira,* 4 LCR at 288 (italics added). Based on the testimony and the court's observations at the view, this court concludes that the Sweet Meadow farm treatment of nursery stock over time constitutes nourishment, maintenance and management.

***12** Having found that the nursery stock qualifies as products "produced by the owner" under § 3, the next question is whether gross sales of those products rise above the 25 percent threshold. This court finds that they do. Based on Mr. Knapp's credible testimony, sales of nursery stock comprised 49.9% of total sales during the 2009 growing season. On those sales alone, the farm stand qualifies for the exemption.

Mr. Knapp testified in further detail about the two main product categories sold at the farm stand: nursery stock, and eggs and other Sweet Meadow products. Based on his experiences and observations at the farm, he concluded that the farm stand sales mirror those of sales from Building # 2. Mr. Knapp tracks the sales, which consistently show each year that approximately one-third of sales of Sweet Meadow products are sales of hay *grown on the farm.* TA v. 1 at 3:38. Therefore, Mr. Knapp was able to testify that, in 2009, one-third, or 30 percent, of Sweet Meadow products sold at the farm stand are grown by on the farm itself. *Id.*

A more sophisticated cash register, installed in 2011, provided more detailed information as to the amount of Sweet Meadow products sold. In 2011, 32 percent of farm stand sales during the growing season were of products made from hay grown on-site. This detailed information, coupled with the credible testimony of Mr. Knapp regarding prior years, demonstrates that at least 30 percent of Sweet Meadow products and eggs sold at the farm stand were produced on-site. [19]

Animal Feed Business

The ZBA concluded that the animal feed business did not fall under the agricultural exemption and issued a cease and desist order for its operation. The ZBA stated that neither the By–Laws nor G.L. c. 40A, § 3 provided for the use of a residentially-zoned property to process, package, store or ship products not grown on that property. In the ZBA's view, the animal feed business did not qualify as "agricultural," and it prohibited the Farm from using Building # 2 "for the purpose of receiving shipments of, storing, processing, packaging, repackaging, or distributing agricultural or other products, *except ... such products which are produced exclusively on the subject property* ...." Ex. 18 at 2 (Decision) (emphasis added). The ZBA also relied on Town By–Laws 1.5, defining "farm" as:

> an establishment devoted (apart from residential use) wholly or predominantly to the commercial production of vegetables or other crops, fruit, dairy products, cattle, sheep, goats, poultry, eggs, maple products, or honey, or any combination thereof, including as an incident of the operation of such establishment the sale by its proprietor of its products only, either in their natural state or forming the major ingredients of processed commodities. The term "farm" does not include an establishment devoted (apart from residential use) *wholly or predominantly to processing or distributing farm products dissociated from their production,* and does not include a commercial greenhouse or fur farm or nursery or a piggery.
>
> ***13** By–Laws 1.5 (emphasis added).

The ZBA relied on this definition to support its ruling that the processing of material *not produced on the premises* was not an approved farm use. Using this definition, the ZBA allowed the processing and packaging of produce exclusively grown on the Farm, but prohibited any processing of products grown elsewhere.

The Knapps allege the ZBA erred both in their interpretation of By–Laws 1.5 and in their reliance on *Jackson v. Bldg. Inspector of Brockton,* 351 Mass. 472, 478, 221 N.E.2d 736 (1966) (finding that use of produce not raised on the farm itself nor intended for use on the farm falls outside the definition of "farming"). They argue the animal feed business falls under the agricultural exemption because it is a structure used for the primary purpose of commercial agriculture. They correctly note that *Jackson* involved an interpretation of a town By–Law defining farming and does not discuss the

agricultural exemption. *Jackson* further states that "farming" is a more restricted term than "agriculture." *Id.* at 475, 221 N.E.2d 736. Because an exemption for agriculture extends more broadly than one for farming, activities falling outside permissible farming uses may still qualify as agricultural. *Id.* at 475, 221 N.E.2d 736 (citing *Lincoln v. Murphy,* 314 Mass. 16, 21, 49 N.E.2d 453 (1943)).

Therefore, a use may fall outside permissible *farming* uses under town By–Laws but still qualify as an agricultural use under G.L. c. 40A, § 3. The agricultural exemption incorporates the definition of "agriculture" found in G.L. c. 128, § 1A, which includes:

> farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, *including preparations for market, delivery to storage or to market or to carriers for transportation to market.*
>
> (italics added).

The activities of the animal feed business fall under "preparations for market," as the Knapps process and package the hay grown on the Farm in Building # 2.[20] They also process and package to sell their own formulated animal feed products, which include hay grown both on and off-site. This is an integral part of the Farm and is necessary for the Farm's economic survival. TA v.1 at 12:21. Under the agricultural exemption, the courts have allowed "many activities to be conducted on land which is being used primarily for agricultural purposes despite conflicting provisions of local zoning By–Laws." *Tisbury v. Martha's Vineyard Comm'n,* 27 Mass.App.Ct. at 1205, 544 N.E.2d 230. Structures "furthering an agricultural use" cannot be prohibited or unreasonably regulated when they are an "essential component" to the agricultural use of the property. *Id.* Here, the animal feed business is essential to the total operation of the farm and is covered under the agricultural exemption.

***14** Because the court finds the animal feed business is engaged in commercial agriculture under G.L. c. 40A, § 3, it may continue to operate. Yet even if the animal feed business did not fall under commercial agriculture, it could still remain open, provided that it clears the statute's 25 percent rule. The Town contends that the agricultural exemption applies only to farm stands and not to all structures or uses on a property. However, the clear language of the statute provides no such limitation. Instead, it only mentions "structures," including "those facilities for the sale of produce, wine and dairy products." G.L. c. 40A, § 3. Facility is a broad term, and the statute contains no other qualifiers or limitations. Limiting the statute to farm stands, without any such indicators from the statute's language itself, contradicts the broad interpretation generally applied to the agricultural exemption. *Tisbury,* 27 Mass.App.Ct. at 1205, 544 N.E.2d 230.

At trial, Mr. Michaud and Mr. Knapp both testified as to the amount of products sold from Building # 2. They included, for purposes of simplicity at trial, only those products made of hay harvested from Sweet Meadow Farm. All of the "first-cut" hay sold during the growing season was grown on the Farm. Approximately half of the "second-cut" hay was grown on-site. Based on their calculations, products made from hay grown on-site constituted over 35 percent of the Farm's sales during the growing seasons 2007, 2008 and 2009. The court found their testimony credible, which places the Farm well over the 25 percent required under the exemption.

Lastly, the Town argues that the 25 percent rule also does not apply because the animal feed business sells additional products that the Town characterizes as non-agricultural, such as yogurt nibbles and papaya snacks.[21] However, the simple fact that the animal feed business sells additional items not related to the produce grown on-site does not remove it from the protection of G.L. c. 40A, § 3. The primary purpose of Sweet Meadow Farm is agricultural. The definition of agriculture and agricultural products is interpreted broadly. *Tisbury,* 27 Mass.App.Ct. at 1205, 544 N.E.2d 230. A farm may sell a different category of agricultural product than the farm itself produces so long as the farm meets the percentage rule. *Town of Natick v. Modern Continental Construction,* 8 Mass. L. Rep. 524 (Super.Ct.1998).[22] Products not related to the produce of the Farm (the hay) can still qualify as agricultural products under G.L. c. 40A, § 3. *Town of Natick,* 8 Mass. L. Rep. 524 (Super.Ct.1998) (stating that products unrelated to a farm's produce, such as baked goods, breads, coffee and tea qualified as agricultural products within the meaning of the agricultural exemption and could be sold at

a farm stand). The court in *Town of Natick* also allowed the sale of food, such as pizza and hamburgers, at an on-site pavilion located separately from the farm stand, finding those sales were related and incidental to the farm's agricultural operations. [23] At Sweet Meadow Farm, a small quantity of products not produced from the hay grown on-site, such as the yogurt nibbles and related items, is sold. TA v. 1, at 11:28.

***15** Accordingly, the court finds that both the farm stand and the animal feed business operated by the Knapps at Sweet Meadow Farm fall under the protection of the agricultural exemption, pursuant to G.L. c. 40A, § 3. The Decision by the Town of Sherborn Zoning Board of Appeals regarding the animal feed business, at issue the Superior Court Case, is overturned, as its interpretation of the agricultural exemption is based on legally untenable grounds. Its decision regarding the farm stand, at issue in the Land Court Case, is upheld to the extent that it upheld the ZEO's refusal to take enforcement action against the farm stand.

Judgments to issue accordingly.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

NANCY E. TETI, as TRUSTEE of COOLIDGE STREET REALTY TRUST, and JENNIFER HAWKINS, Plaintiffs

v.

THE TOWN OF SHERBORN [1], MICHAEL S. GIAIMO, et al., as MEMBERS of the ZONING BOARD OF APPEALS OF THE TOWN OF SHERBORN, JOHN A. KNAPP, JR., and KATHERINE M. KNAPP, Defendants

09 MISC 414330(KFS)

JUDGMENT

This is one of two cases involving two separate appeals from a decision of the Town of Sherborn's Zoning Board of Appeals (ZBA) regarding certain activities at Sweet Meadow Farm in Sherborn (Decision). In this case, Plaintiffs Nancy E. Teti and Jennifer Hawkins, abutters to Sweet Meadow Farm, appealed the portion of the Decision that allowed the continued operation of a farm stand at Sweet Meadow Farm. [2]

Plaintiffs initiated this action on October 16, 2009, by filing a complaint appealing the portion of the Decision upholding the refusal of the Sherborn Zoning Enforcement Officer (ZEO) to take enforcement action against the farm stand. [3] Defendants did not file answers, as permitted under G.L. c. 40A, § 17.

A two-day trial was held on July 25 and 26, 2012. A decision of today's date has issued in both cases. In accordance with that decision, it is hereby:

ADJUDGED and ORDERED that the farm stand operating at Sweet Meadow Farm falls within the protections afforded agricultural uses under G.L. c. 40A, § 3 and the Zoning By–Laws § 3.4; and it is further

ADJUDGED and ORDERED that, to the extent the Decision upheld the ZEO's refusal to take enforcement action against the farm stand, the decision is ***AFFIRMED.***

All Citations

Not Reported in N.E.2d, 2013 WL 6410547

Footnotes

1 The Town of Sherborn is a named Defendant, but there does not appear to be any count that is directed at the Town, as opposed to the ZBA members.

2 On April 7, 2010, Robert A. Mulligan, Chief Justice for Administration and Management of the Massachusetts Trial Court, assigned Judge Karyn F. Scheier to sit in the Superior Court Department for the purpose of hearing Superior Court case no. MICV 2009–04025, then pending in the Superior Court Department.

3 From this point forward, references to the Knapps will include both the Knapps and Michauds.

4 Both the Knapp's Motion to Dismiss and the Knapp–Michaud's Motion for Summary Judgment raised the issue of standing. The record for both motions comprised the same documents therefore, the court treated the Motion to Dismiss as a Motion for Summary Judgment pursuant to Mass. R. Civ. P. 12(b)(1), and addressed the motions together.

5 The court did find that the Knapps successfully rebutted Hawkins' claims of alleged harm from dust (due to the recent paving of the road) and lights mounted on Building # 2 located on the farm (due to the recent removal of those lights).

6 Due to the absence of a written trial transcript, any citations to trial testimony refers to the Courtsmart trial audio file as TA v. 1 or v.2 (depending on whether the reference is to the first or second day of trial) followed by the time stamp of the testimony in question.

7 Teti was not a petitioner before the ZBA in the appeal of the ZEO's refusal to enforce against the Farm, nor is she a party to the Superior Court case.

8 The cease and desist order requires Sweet Meadow Farm to: “cease and desist using the Subject Property for the purpose of receiving shipments of, storing, processing, packaging or repackaging, or distributing agricultural or other products, except (1) such products which are produced exclusively on the subject property, or (2) such products, regardless of where produced, which are used and consumed for agricultural purposes on the subject property, or (3) such products sold at the retail farmstand at the subject property provided that the farmstand qualifies for the exemption described in G.L. c. 40A, sec. 3.”

9 When he calculates percentage of product produced on the Farm, Mr. Knapp counts 100% of the nursery stock as “produced by the Knapps,” since it is “nourished, maintained and managed while on the premises,” even though not all of the nursery stock is grown from seed at the Farm.

10 On the issue of standing, Hawkins and Teti incorporate their Opposition to the Knapps' Motion for Summary Judgment, which argues that the ZBA has already determined the issue of standing in favor of Hawkins and Teti. However, the court reviews appeals of local zoning board decisions under G.L. c. 40A, § 17 *de novo,* as discussed *supra,* at 12–13.

11 An individual may rely on provisions of a local zoning ordinance to support standing. *See Gale v. Movalli,* 18 LCR 330 (July 1, 2010) (standing exists when plaintiff alleged injury to property value, light and air all of which were protected by local By–Laws). The Town of Sherborn Zoning By–Laws § 1.3 specifically mentions noise, odors, fumes and dust as potential injuries that the By–Laws protects against.

12 “Credible” evidence contains both quantitative and qualitative elements: “[q]uantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury will likely flow from the board's action. Conjecture, personal opinion and hypothesis are therefore insufficient.” *Butler v. City of Waltham,* 63 Mass.App.Ct. 435, 441, 827 N.E.2d 216 (2005) (citing *Marashlian,* 421 Mass. at 724, 660 N.E.2d 369).

13 The Knapps note in their post-trial brief that Hawkins no longer resides at 95 Coolidge Street and returns only on weekends. The Knapps allege she now lacks standing due to this change in circumstances. However,

Hawkins remains the owner of 95 Coolidge, despite this relocation. Therefore, she still enjoys a presumption of standing as owner of an abutting property.

14 The Town of Sherborn and the Knapps have both stipulated to a traffic study submitted to the Board of Selectmen in June 2008, detailing the total daily vehicular trips on Coolidge Street. This study reflects the traffic of Coolidge Street generally and does not speak to traffic specifically linked to Sweet Meadow Farm. The court's observations at the view confirmed that the traffic on Coolidge Street is constant, as it is a main thoroughfare.

15 Teti also conceded that employees of her husband's company often visit her own property, sometimes in commercial vehicles that cause the same beeping noise.

16 In addition to challenging standing, the Knapps also argue that any complaint regarding the animal feed business is time-barred under a statute of repose and laches. Because this court finds that both the farm stand and the animal feed business qualify for the agricultural status under G.L. c. 40A, § 3 and are not illegal activities violating the By–Laws, it is unnecessary to reach a determination on any time-barred defenses.

17 The Board stated that the farm stand would not require a special permit if it satisfied the agricultural exemption under G.L. c. 40A, § 3, although it ultimately concluded it had insufficient information to reach a determination as to whether the farm stand constituted an agricultural use. The Board also could not decide which party carried the burden of proving whether the agricultural exemption applied. Generally, the party claiming the agricultural exemption carries the burden of proof, *Trustees of Tufts College v. Medford,* 415 Mass. 753, 616 N.E.2d 433 (1993), which in this case is the Knapps. They, however, claim that the By–Laws expressly incorporates G.L. c. 40A, § 3, making the farm stand and the animal feed business allowed agricultural uses by right. Accordingly, they allege the Town, Teti and Hawkins carry the burden of proof as the parties seeking enforcement. Since this court finds that the Knapps have provided sufficient proof that both contested activities (the farm stand and the animal feed business) fall under the agricultural exemption, the court need not determine which party bore the burden of proof in these circumstances.

18 Teti and Hawkins argue that the process of selling tress and bushes planted elsewhere, then delivered ready for sale, does not qualify for the exemption, as any business selling plants would need to provide some water and nutrients to keep them alive. However, Teti and Hawkins rely on. G.L. c. 128, § 1, which defines nursery stock as “trees, shrubs, woody plants and strawberry plants, whether wild or cultivated, and parts thereof *for propagation.*” (Italics added). Because the Knapps do not propagate-plant or cause organisms to spread-their nursery stock, Hawkins and Teti state they must fall outside of the agricultural exemption.

19 In 2007 and 2008, the farm stand operated on an “honor system,” with customers leaving money in a cash box. Sales were less than $3,000 for both years and featured only Sweet Meadow products and eggs. Since hay grown on-site consistently makes up 30 percent of Sweet Meadow products and virtually all eggs are produced on-site, the court finds that the Farm reached the 25 percent requirement during those two years.

20 “Hay” falls under the Town's definition of produce. By–Laws § 3.2(6).

21 The Town also argues that the sale of additional products it categorizes as “non-agricultural” precludes the animal feed business from qualifying for the agricultural exemption

22 In 2006, the minimum percentage required under the agricultural exemption was lowered to 25 percent from 50 percent. *Town of Natick,* decided in 1998, applied the 50 percent rule. However, the same logic and reasoning in interpreting the rule applies, despite the change in percentage.

23 The Town cites a case decided a few months after *Town of Natick,* by the same judge, *Minty v. Arena,* 1998 Mass.Super. LEXIS 109, 1998 WL 282964 (Mass.Super.Ct. May 15, 1998), for the proposition that the

agricultural exemption is not a blanket exemption: simply because a locus is subject to the exemption does not automatically mean every facility or activity on the locus benefits from the exemption. However, *Minty* addressed whether the exemption applied to a facility selling *primarily non-farm agricultural products,* where the facility owner, a farmer, raised crops at the facility locus but sold those crops at a farm stand facility located on a separate, independent parcel. In the instant case, the Knapps sell predominantly agricultural products on the parcel in which they were produced. They are not seeking to sell their products on a separate, unrelated parcel.

1 The Town of Sherborn is a named Defendant, but there does not appear to be any count that is directed at the Town, as opposed to the ZBA members, who are properly named in accordance with G.L. c. 40A, § 17.

2 The second case was filed in the Superior Court Department (MICV 2009 04025). All parties assented to the transfer of the related case from the Superior Court to the Land Court. On April 7, 2010, Judge Scheier was assigned by the Chief Justice for Administration and Management of the Trial Court to sit in the Superior Court Department for the purpose of hearing the Superior Court Case in conjunction with this case.

3 The ZBA vote was 2–1 *in favor* of overturning the ZEO's action denying the request for enforcement. This vote was insufficient to overturn the administrative action, which requires a unanimous vote of the threemember ZBA. Accordingly, the Decision is deemed to be one upholding the ZEO's refusal to enforce.