

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 2383CV00948

_____)
MORSE BROTHERS, INC.,)
)
PLAINTIFF,)
)
v.)
)
TOWN OF HALIFAX and THE TOWN)
OF HALIFAX SELECT BOARD,)
)
DEFENDANTS.)
_____)

MEMORANDUM OF LAW OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF THE PLAINTIFF'S MOTION
FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The New England Legal Foundation (NELF) files this memorandum of law as amicus curiae in the above-captioned case, in support of the Plaintiff's Motion for Judgment on the Pleadings.¹ This case pits the statutorily protected property rights of a Massachusetts agricultural landowner against a municipality's overreaching exercise of its local police powers. The primary issue is whether a municipality may exercise its nonzoning power to regulate earth

¹ NELF states that neither the plaintiff nor its counsel, nor any individual or entity other than amicus, has authored this memorandum of law, in whole or in part, or has made any monetary contribution to its preparation or submission.

removal, under G. L. c. 40, § 21(17), in disregard of a property owner's statutorily protected right to use its land for agricultural purposes, under the Dover Amendment to the Massachusetts Zoning Enabling Act, G. L. c. 40A, § 3 (1st ¶). Section 21(17) of c. 40 allows a municipality to "make such ordinances and by-laws, *not repugnant to law*, . . . [f]or prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use." *Id.* (emphasis added). The Dover Amendment, in turn, provides that "[n]o zoning ordinance or by-law shall . . . prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture."

This court should reconcile these two potentially conflicting statutes and conclude that it is "repugnant to law," under c. 40, § 21(17), for the Town of Halifax to require an earth removal permit, and to impose several onerous conditions on the issuance of that permit, when Morse Brothers, Inc.'s earth removal is essential to its agricultural land use, which the Dover Amendment protects from any prohibition, unreasonable regulation, or special permit. "[A] municipality may not, through the exercise of its [statutory police] power . . . , *undo the Dover Amendment.*" *Newbury Junior Coll. v. Town of Brookline*, 19 Mass. App. Ct. 197, 206 (1985) (emphasis added).

1. THE TOWN OF HALIFAX'S EARTH REMOVAL ACTIONS WERE "REPUGNANT TO LAW," UNDER G. L. C. 40, § 21(17), BECAUSE THEY VIOLATED MORSE BROTHERS' RIGHT, UNDER THE DOVER AMENDMENT, TO ENGAGE IN AN AGRICULTURAL LAND USE THAT IS FREE FROM ANY LOCAL PROHIBITION, UNREASONABLE REGULATION, OR SPECIAL PERMIT.

A. The Legislature Has Expressly Limited A Municipality's Exercise Of Its Earth Removal Powers In Ways That Are "Not Repugnant To Law," Thereby Preserving A Property Owner's Land Use Rights Under the Dover Amendment.

The Legislature has expressly limited a municipality's exercise of its earth removal powers in ways that are "not repugnant to law." G. L. c. 40, § 21(17). This statutory language codifies the fundamental canon of construction that, "where two or more statutes relate to *the same subject matter*, they should be construed together so as to constitute a *harmonious whole* consistent with the legislative purpose." *McNeil v. Comm'r of Correction*, 417 Mass. 818, 822 (1994) (cleaned up) (emphasis added). See also *Town of Concord v. Water Dep't of Littleton*, 487 Mass. 56, 60 (2021) ("Where two statutes appear to be in conflict, we endeavor to harmonize the two statutes so that the policies underlying both may be honored.") (cleaned up).

The Town has ignored this clear legislative mandate by attempting to regulate Morse Brothers' earth removal in disregard of the Dover Amendment, which limits the Town's police power by protecting an agricultural land use from any any prohibition, unreasonable regulation, or special permit. The Legislature has

essentially *rejected* the Town's argument that its earth removal powers under c. 40, § 21(17) are independent of the limits on its land use powers under the Dover Amendment:

The problem with this approach is that it views the municipal police power *in a vacuum*, whereas the law is clear that a municipality's independent police powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature in accordance with [§ 8 of the Home Rule Amendment to the Massachusetts Constitution].²

Rayco Inv. Corp. v. Bd. of Selectmen of Raynham, 368 Mass. 385, 394 (1975) (cleaned up) (emphasis added). The Dover Amendment is one such general law enacted by the Legislature in accordance with the Home Rule Amendment, and the Town has indeed exercised its earth-removal police power in a manner that frustrates the purpose of that law.

B. Morse Brothers' Earth Removal Is An Agricultural Land Use As Of Right Under The Dover Amendment, And The Town's Permit Requirement Constitutes An Unlawful Special Permit Under That Provision.

The Town's exercise of its police power was "repugnant to law," under G. L. c. 40, § 21(17), when the Town required Morse Brothers to obtain a permit for its earth removal. See *Larason v.*

² Section 8 of the Home Rule Amendment provides, in relevant part, that "[t]he general court shall have the power to act in relation to cities and towns, . . . by general laws which apply alike to all cities, or to all towns." Mass. Const. Amend. art 2, § 8.

Katz, 1991 WL 11258845, at *1 (Mass. Land Ct. 1991) (town could not, in exercise of earth removal powers under c. 40, § 21(17), require cranberry grower to obtain license for earth removal that was necessary for cranberry cultivation, because license would constitute "special permit" forbidden under Dover Amendment).

Morse Brothers' earth removal is an agricultural land use *of right* under the Dover Amendment because it is a necessary step in the commercial cultivation of cranberries. *See Fielding v. Old Tuck Cranberry Corp.*, 2006 WL 1487482, at *5 (Mass. Land Ct. May 31, 2006) (Piper, J.) (discussing traditional cranberry farming methods for using sand, in varying degrees of thickness, to create, maintain, and revive cranberry bogs). In particular, The Dover Amendment incorporates the broad definition of "agriculture" contained in G. L. c. 128, § 1A. "For the purposes of this section, the term 'agriculture' shall be as defined in section 1A of chapter 128." G. L. c. 40A, § 3 (1st ¶). That statutory definition, in turn, includes any farming activity that is "*an incident to or in conjunction with such farming operations.*" G. L. c. 128, § 1A (emphasis added).

Morse Brothers' earth removal is protected under that statutory definition because it is a necessary "incident" to its agricultural land use. The activity is part of "such changes to the land as may be reasonably necessary for such use, *preparation*

of land being an agricultural use as well as is the actual cultivation of plants." *Larason v. Katz*, 1991 WL 11258845, at *1. See also *Henry v. Bd. of Appeals of Dunstable*, 418 Mass. 841, 845 (1994) (incidental land use is protected agricultural use when, as here, it is subordinate to, and reasonably related to, primary land use).

Since Morse Brothers' earth removal is a protected land use under the Dover Amendment, the Town has no discretion and *must* permit the activity to proceed, subject only to reasonable regulation under that provision. See G. L. c. 40A, § 3 (1st ¶) (precluding unreasonable regulation of agricultural land use). Contrary to the Dover Amendment, however, the town has wrongly assumed that the land use *cannot* proceed as of right and, instead, requires the town's discretionary permission to proceed.

The town's permit requirement therefore constitutes the very "special permit" that the Dover Amendment expressly forbids. A special permit is "designed under c. 40A, § 9, to accommodate uses *not permitted as of right* in a particular zoning district." *Bible Speaks v. Bd. of Appeals of Lenox*, 8 Mass. App. Ct. 19, 33 (1979) (emphasis added). See also G. L. c. 40A, § 9 ("Zoning ordinances or by-laws shall provide for specific types of uses which *shall only be permitted* in specified districts *upon the issuance of a special permit.*") (emphasis added).

Under the Dover Amendment, a property owner's protected land use simply cannot be "dependent on the discretionary grant of a special permit by the board." *Bible Speaks*, 8 Mass. App. Ct. at 32. See also *Larason*, 1991 WL 11258845, at *2 ("[The town] may not require a special permit for the use of Plaintiffs' land for the growing of cranberries, including the preparation of the land for such use," by requiring an earth removal license under c. 40, § 21(17)).

C. The Town's Onerous Permit Conditions Violate The Dover Amendment Because They Amount To A De Facto Prohibition Or, At The Very Least, An Unreasonable Regulation Of Morse Brothers' Protected Land Use.

The Town's earth removal actions were also "repugnant to law," under c. 40, § 21(17), when the Town issued the permit but conditioned it on several onerous requirements that practically prevent Morse Brothers from undertaking the necessary maintenance and treatment of its cranberry bogs, in a seasonally timely manner. See Plaintiff's Memorandum of Law in Support of a Preliminary Injunction, at 5-6 (discussing same). These burdensome conditions, whether considered individually or collectively, violate the Dover Amendment because they amount to a de facto prohibition of Morse Brothers' cultivation of cranberries. See *Trustees of Tufts College*, 415 Mass. at 758 & n.6 (Dover Amendment protects against local regulation that practically prohibits the

protected use). See also *Cape Ann Land Dev. Corp. v. City of Gloucester*, 371 Mass. 19, 24 (1976) (“[T]he [town], in the exercise of its powers, may impose reasonable conditions which do not amount, individually or collectively, to a practical prohibition of the use.”).

At the very least, the permit conditions violate the Dover Amendment because they constitute an unreasonable regulation of Morse Brothers’ protected agricultural land use. See *Trustees of Tufts College*, 415 Mass. at 758 (Dover Amendment protects against “something less than nullification of a proposed [protected] use” that is unreasonable under circumstances). See also *id.* at 759-60 (property owner can establish unreasonable regulation “by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed [protected use], . . . without appreciably advancing the municipality’s legitimate concerns. Excessive cost of compliance with a requirement . . . , without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation of a[] [protected] use.”).

In sum, the Town added insult to injury when it subjected Morse Brothers to an unlawful permit requirement and then imposed numerous permit conditions that practically prevent Morse Brothers from succeeding in its commercial cultivation of cranberries.

D. The Town's Earth Removal Actions Suffer From Other Legal Defects Under The Dover Amendment.

In addition to the Town's permit requirement and its permit conditions, the Town's earth removal actions suffer from other legal defects under the Dover Amendment. Notably, the Town's bylaw prohibits earth removal *altogether*, except when it is necessary for constructing a building or street. Administrative Record (R.) 47. While the bylaw exempts "excavation not in excess of 1,000 cubic yards incidental to customary agricultural [land use]," *id.*, the Dover Amendment prohibits a town from prescribing a *fixed* and relatively small quantity of permissible earth removal for all future agricultural uses. Instead, the Dover Amendment requires a case-by-case, fact-specific determination of how much earth removal is reasonably necessary for a particular property owner's protected agricultural use. "[T]he question of the reasonableness of a local zoning requirement, as applied to a proposed [protected] use, will depend on the particular facts of each case." *Trustees of Tufts College*, 415 Mass. at 759 (emphasis added).

As a result of these legal defects, the bylaw violates the Dover Amendment because it summarily bars Morse Brothers, along with any other property owner seeking to remove more than 1,000 cubic yards of earth for its agricultural land use, from engaging in activity protected by the Dover Amendment. Accordingly, the

court should declare that the bylaw is invalid under the Dover Amendment.

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court allow the Plaintiff's Motion for Judgment on the Pleadings.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its counsel

/s/ Ben Robbins

Ben Robbins, Senior Staff Attorney
BBO No. 559918
Natalie Logan, President
BBO No. 685122
New England Legal Foundation
333 Washington Street, Suite 850
Boston, MA 02108
brobbins@newenglandlegal.org
(617) 695-3660

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CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this 7th day of October, 2024, I served the within memorandum of law by causing it to be delivered by eFileMA.com to: counsel for the Plaintiff, Nicholas Rosenberg, nick@gardnerrosenberg.com; and counsel for the Defendants, John Richard Hucksam, jrhucksam@bdboston.com, and Noemi Kawamoto, nkawamoto@bdboston.com.

Signed under penalties of perjury.

/s/ Ben Robbins

Ben Robbins, Senior Staff Attorney
BBO No. 559918
New England Legal Foundation
333 Washington Street, Suite 850
Boston, MA 02108
brobbins@newenglandlegal.org
(617) 695-3660