COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. PLYMOUTH DIVISION SUPERIOR COURT
CIVIL ACTION NUMBER 2383CV00948

MORSE BROTHERS, INC.

vs.

TOWN OF HALIFAX & another[1]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Morse Brothers, Inc. ("Morse") filed this action seeking certiorari review of the decision of the Halifax Select Board ("Board") requiring it to apply for an earth removal permit and the Board's November 15, 2023 issuance of a permit with numerous conditions. For the reasons discussed below, Plaintiff's Motion For Judgment on the Pleadings is **ALLOWED** and the Town's Cross-Motion For Judgment on the Pleadings is **DENIED**.

ADMINISTRATIVE RECORD

Morse owns cranberry bogs located at 250 Lingan Street in Halifax which it has operated for more than forty-five years. It also operates bogs in Middleboro and Hanson. Industry best management practices include the regular application of sand to enhance growing and reduce the need for pesticides and fertilizer.

On September 1, 2023, the Town informed Morse that it was required to obtain a permit under Chapter 144 of the Town of Halifax Bylaws, which governs earth removal ("the Bylaw"). The Bylaw states: "No soil, sand, gravel or loam removal shall be permitted in any area unless and until a permit has been granted by the Board of Selectmen." The Bylaw contains five

[1]Town of Halifax Select Board

exemptions, one of which applies to: "Excavation not in excess of one thousand (1,000) cubic yards incidental to customary agricultural maintenance and construction as allowed by law on land in agricultural use."

By letter dated October 3, 2023, Morse informed the Board of its position that the Bylaw does not apply to the removal and transport of sand for maintaining and improving its cranberry bogs, which constitutes protected agricultural activity. Morse requested that the Board immediately confirm that the Bylaw does not apply to sand removal for agricultural purposes and that it could proceed without an earth removal permit. In the alternative, Morse's letter requested an earth removal permit in accordance with an application prepared by Grady Consulting, LLC to remove 20,000 cubic yards of soil from less than five acres for farming operations. The application indicated that the proposed removal would involve an estimated 250 truckloads of sand.

The application included a site plan showing the trucking route from Morse's property to Lingan Street to Monposett Street (Route 58). Morse stated that it was not paying an application fee, which would infringe on its right to engage in agriculture and constitute an unlawful tax. In its detail of compliance with the Bylaw, Morse asserted that it did not intend to drill monitoring wells, conduct finish leveling and grading, or complete reclamation of disturbed areas because its earth removal was for an agricultural use.

In an October 24, 2023 letter to the Board, PB Engineering ("PB") reviewed Morse's application for conformance with the Bylaw. PB opined that Morse's estimate of the number of truckloads was incorrect and 715 truckloads were required. PB opined that Morse's proposed earth removal complied with the Bylaw in most respects, but recommended time constraints on the trucking of material offsite so as not to create a nuisance for the neighborhood.

MassDEP and the Town conducted a joint inspection of Morse's property on October 4, 2023 in response to a complaint from a nearby resident about the dumping of truckloads of dirt and manure. The inspection report states that Morse grows cranberries on the 275-acre property and "[s]and and gravel mining operations are also being conducted on the property." During the inspection, the Town's Health Agent, Bob Valery, stated that he did not have any issues with Morse's activities at the site. The inspection report states that the site contains eleven cranberry bogs meeting the Wetlands Protection Act exemption for normal maintenance of land in agricultural use.

On October 13, 2023, the Board sent Morse's application to the Board of Health, Building Inspector, Conservation Commission, Police Chief, and Water Department asking that they provide the Board with their written approval or objection by October 27. The Board of Health indicated that it had no concerns and approved the application. No other department objected.

The Board held a public hearing on Morse's application on November 6, 2023, at which Morse and its engineers gave a brief presentation. Town Engineer Patrick Brennan stated that his only concern was excavation near the water table. He noted that no restoration was necessary because the excavation was not near wetlands and was part of Morse's ongoing operations. A member of the Conservation Commission noted that the inspection of the site found no violations and Halifax is a "right to farm" community. More than a dozen members of the public spoke at the hearing and expressed concern about the trucking traffic and safety issues on Lingan Street, the condition of the roads and the water and gas lines underneath, and protection of the groundwater.

At a public meeting on November 15, 2023, the Board addressed some of the neighbors' concerns, noting that the project affected only a tiny portion of the site and did not involve the commercial sale of the excavated sand. The Board also noted that Halifax is a right to farm community and Morse's request was not unusual for a cranberry bog operation. Again, numerous members of the public voiced their opposition to the requested permit. The Board discussed potential conditions on the permit and members of the public gave input on those conditions.

On November 15, 2023, the Board voted to grant Morse an earth removal permit for 20,000 cubic yards under the Bylaw ("the Permit"), subject to twenty-five conditions. The Board found:

> Morse Brothers conducts an earth removal use at the Property which consists of removal of soil from an area of the Property identified as the Whaleback, the sifting of the soil to separate sand from the soil, the depositing of the sand on the cranberry bogs at the Property and the transporting of soil and/or sand from the Property by trucking or otherwise only for use at other cranberry bogs operated by Morse Brothers and not for sale.

Among other conditions, the Board limited Morse to 25 truck trips per day and prohibited Morse from any activity other than from 7:00 a.m. to 2:55 p.m. on weekdays. The Board also prohibited any activity on holidays and the school vacation weeks of February 19-23 and April 15-19. The Board required that trucks loaded with soil not exceed 10 m.p.h. while on Lingan Street and stated that Morse's trucks shall not be present on Lingan Street during school bus pick up and drop off hours of 8:00-8:15 a.m. and 2:30-2:35 p.m. The Board further required that all truck drivers for Morse be provided with a list of rules and regulations regarding road safety and sign to acknowledge receipt of the list.[2] The Permit states that Morse shall be responsible for all

[2]The rules include the time restrictions and speed limit restriction set forth in the permit, that drivers must use extreme caution when entering and exiting Lingan Street, and that trucks must provide a four-foot buffer for any pedestrian or cyclist. The rules state that violations will result in a $300 fine.

spillage onto any public way from the earth removal and shall pay the Town the cost of any cleanup. The Board imposed a fee of fifty cents per cubic yard payable to the Town. The Board filed its written decision with the Town Clerk on November 16, 2023.

Morse filed this action on December 21, 2023. Count I of the verified complaint asserts under G.L. c. 249, § 4 that the Board unlawfully denied Morse an exemption for regular farming activities. Count II asserts under G.L. c. 249, § 4 that the Board imposed unlawful conditions on the Permit. Count III asserts under G.L. c. 249, § 4 that the conditions imposed exceeded the Board's authority. Count IV seeks a declaratory judgment under G.L. c. 231A, § 1 that Morse's routine farming practices are not subject to the requirements of the Earth Removal Bylaw, and Count V seeks a declaratory judgment that the Earth Removal Bylaw is invalid on its face.

DISCUSSION

Certiorari review under G.L. c. 249, § 4 is a limited procedure reserved for correcting substantial errors of law apparent on the administrative record. *Murphy* v. *Commissioner of Corr.*, 493 Mass. 170, 172-173 (2023). The court will reverse a local board's decision only if it was arbitrary and capricious, unsupported by substantial evidence, or based on an error of law. *Id.*

Counts I and IV

In Count I of the verified complaint, Morse contends that the Board unlawfully denied it an exemption for regular farming activities and erred in requiring an earth removal permit under the Bylaw. The Town promulgated the Bylaw pursuant to Chapter 40, section 21, which provides in relevant part:

> Towns may, for the purposes hereinafter named, make such ordinances and by-laws, not repugnant to law, as they may judge most conducive to their welfare,

> which shall be binding upon all inhabitants thereof and all persons within their limits.
>
> . . .
>
> For prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use in the whole or in specified districts of the town, and for requiring the erection of a fence or barrier around such area and the finished grading of the same . . . Any order or by-law prohibiting such removal hereunder shall not apply to any soil, loam, sand or gravel which is the subject of a permit or license issued under the authority of the town or by the appropriate licensing board of such town or by the board of appeal, or which is to be removed in compliance with the requirements of a subdivision plan approved by the town planning board.

G.L. c. 40, § 21(17). This statute gives municipalities the power to regulate earth removal activity independent of their zoning authority and without complying with the strict procedural requirements for adopting or amending zoning regulations. *Goodwin* v. *Board of Selectmen of Hopkinton*, 358 Mass. 164, 168, 170 (1970). However, a town's police power under this statute cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature. *Rayco Investment Corp.* v. *Board of Selectmen of Raynham*, 368 Mass. 385, 394 (1975).

Morse contends that the Town erred in requiring a permit under the Bylaw because its removal of 20,000 cubic yards of sand from the site was an agricultural use protected by the Dover Amendment, which 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 commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture . . .
>
> For the purposes of this section, the term "agriculture" shall be as defined in section 1A of chapter 128 . . .[3]

[3]That statute provides in relevant part: "'Farming' or 'agriculture' shall include 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 . . . 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." G.L. c. 128A, § 1A.

G.L. c. 40A, § 3. The Legislature enacted this statute to ensure that certain land uses would be free from local interference. *Tracer Lane II Realty, LLC* v. *Waltham*, 489 Mass. 773, 778-779 (2022). See also *Valley Green Grow, Inc.* v. *Charlton*, 99 Mass. App. Ct. 670, 679, rev. den., 394 Mass. 1102 (2021) (c. 40A, § 3 prohibits municipalities from barring or unreasonably regulating agricultural uses in any zoning district). This statutory protection extends to uses that are related to or incidental to the primary agricultural use of land. *Henry* v. *Board of App. of Dunstable*, 418 Mass. 841, 844 (1994). The Town therefore could not, under its zoning bylaw, require a special permit for earth removal that is reasonably necessary or incidental to cranberry farming. See *Larason* v. *Katz*, 1991 WL 11258845 at *2 (Mass. Land Ct.) (Cauchon, J.) (town could not use earth removal provision of zoning bylaw to require permit for preparation of land to grow cranberries or actual cultivation of cranberries).

The Town argues, however, that the Dover Amendment applies only to zoning ordinances and emphasizes that the Bylaw was enacted, not pursuant to Chapter 40A, but pursuant to G.L. c. 40, § 21(17). Nonetheless, the Town cannot exercise its independent licensing authority in a manner that undermines Dover Amendment protection. See *Rayco Inv. Corp.* v. *Board of Selectmen of Raynham*, 368 Mass. at 394 (municipality cannot exercise independent police powers in manner which frustrates purpose or implementation of general or special law enacted by the Legislature); *Larason* v. *Katz*, 1991 WL 11258845 at *2 (town could not use earth removal bylaw adopted under G.L. c. 40, § 21(17) to expand zoning use regulation in excess of limitations imposed by G.L. c. 40A, § 3, by requiring special permit to prepare land to grow cranberries). Cf. *Newbury Junior Coll.* v. *Brookline*, 19 Mass. App. Ct. 197, 206 (1985) (town could not use independent authority to license lodging houses under G.L. c. 140, § 23 to prohibit educational use protected by Dover Amendment).

Here, the Board acknowledged that Morse's removal of 20,000 cubic yards of material from the site was part of its agricultural use of growing cranberries,[4] but nonetheless required a permit because the amount removed exceeded the 1,000 cubic yard exemption in the Bylaw. This was an error of law, as no special permit should have been required for a normal and customary agricultural use. See G.L. c. 40A, § 3. Accordingly, the Board's November 15, 2023 decision requiring Morse to obtain a special permit must be reversed and Morse is entitled to judgment on the pleadings on Counts I and IV of the verified complaint.

Counts II and III

Count II asserts under G.L. c. 249, § 4 that the Board imposed unlawful conditions on the Permit and Count III asserts that those conditions exceeded the Board's authority. Where the decision being reviewed implicates the exercise of administrative discretion in imposing conditions on a permit, the court applies the arbitrary or capricious standard. *T.D. Develop. Corp.* v. *Conservation Comm'n of N. Andover*, 36 Mass. App. Ct. 124, 128, rev. den., 418 Mass. 1103 (1994). Although reasonable local regulation of a protected use is permissible, a zoning requirement that results in something less than nullification of a protected use may be unreasonable under the Dover Amendment. *Trustees of Tufts Coll.* v. *Medford*, 415 Mass. at 758. Reasonableness is determined on a case-by-case basis. *Id.* at 759.

Morse contends that the Town exceeded its authority in requiring that trucks loaded with soil not exceed 10 m.p.h. while on Lingan Street, not use the roads during school bus drop off or

[4]Compare *Henry* v. *Board of App. of Dunstable*, 418 Mass. at 844-847 (removal of 300,000 cubic yards of gravel from thirty-nine-acre parcel of forest land was not incidental to agricultural use, not protected under G.L. c. 40A, § 3, and required permit under local earth removal zoning bylaw); *Uxbridge* v. *Vecchione*, 2006 WL 2560280 at *6 (Mass. Super. Ct.) (Fecteau, J.) (removal of 5% of total area of property to build parking lot for farm stand was not merely accessory to farm use and therefore was subject to permit required by local earth removal bylaw).

pick up or during school vacations, and that all truck drivers for Morse be provided with a list of rules and regulations regarding road safety and sign to acknowledge receipt of the list. The purpose of earth removal bylaws promulgated under G.L. c. 40, § 21(17) is to regulate the stripping of topsoil to prevent the injurious effects of the creation of waste areas. *Stow* v. *Marinelli*, 352 Mass. 738, 742 (1967). A municipality may employ such a bylaw to regulate noise, dust, and other effects that are peculiarly related to earth removal operations. *Id.* However, § 21(17) does not permit a municipality to regulate traffic through measures aimed solely at sand and gravel trucking without any apparent basis for distinguishing between that and other types of traffic. *Id.* See also *Beard* v. *Salisbury*, 378 Mass. 435, 441 (1979) (town could not prohibit transportation of gravel and sand over local roads to other towns); *Kelleher* v. *Board of Selectmen of Pembroke*, 1 Mass. App. Ct. 174, 183 (1973) (town could not deny earth removal permit based on concern that truck traffic would create hazard). The administrative record contains no fact finding by the Board to support the conclusion that Morse's trucks pose any greater hazard than traffic in the area generally, although residents vehemently expressed the belief that they do. Accordingly, the traffic related conditions in the Permit were unreasonable, arbitrary, and exceeded the Town's authority.

In another permit condition, the Board imposed a fee of fifty cents per cubic yard payable to the Town. Morse contends that this "fee" was in fact an illegal tax on its earth removal activities. The nature of a monetary exaction is determined by its operation rather than its description. *Denver St. LLC* v. *Saugus*, 462 Mass. 651, 652 (2012). Fees are charged for a particular government service which benefits the fee-payer in a manner not shared by other members of the public, are paid by choice, and are collected not to raise revenue but to compensate the municipality for the expense of providing the service. *Id.* The focus is on

whether the services for which a fee is imposed are sufficiently particularized to justify distribution of the costs among a limited group, and whether the fee is reasonably designed to compensate the government for anticipated expenses. *Id.* at 660-661. With respect to a regulatory fee, the particularized benefit provided in exchange for the fee is the existence of the regulatory scheme whose costs are defrayed. *Easthampton Sav. Bank* v. *Springfield*, 470 Mass. 284, 296-297 (2014). See also *Silva* v. *Attleboro*, 454 Mass. 165, 170 (2009) (municipality may impose reasonable fee to defray cost of issuing license lawfully required to engage in particular activity). This is a fact-driven inquiry that is not appropriately addressed on certiorari review.

This Court need not analyze whether the fee at issue is an illegal tax because on the administrative record, the Board acted arbitrarily in imposing it. The Bylaw states that a permit "is subject to a fee in an amount to be set by the Board of Selectmen from time to time after public hearing."[5] This provision appears to contemplate the establishment of a uniform fee applicable to all earth removal permits rather than individualized to a particular application. The record contains no evidence that the Board complied with the requirements to establish a uniform fee. Rather, the public hearing minutes reveal that the Board discussed whether to impose a fee of twenty-five cents per cubic yard or double that amount, with reference to the former version of the Bylaw. Accordingly, the fee imposed was arbitrary and capricious and based on an error of law. See *Fieldstone Meadows Develop. Corp.* v. *Conservation Comm'n of Andover*, 62 Mass. App. Ct. 265, 267 (2004) (decision is arbitrary and capricious when based on reasons extraneous to regulatory scheme and related to ad hoc agenda). Morse therefore is entitled to judgment on the pleadings on Counts II and III of the verified complaint.

[5]Previously, the Bylaw authorized the Town to condition a permit on the imposition of a fee of twenty-five cents per cubic yard or more.

Count V

Finally, Morse seeks a declaratory judgment in Count V that the Bylaw is invalid on its face because the exemption for 1,000 cubic yards of earth removal "incidental to customary agricultural maintenance and construction as allowed by law on land in agricultural use" is too narrow and requires a permit for protected activity. Every presumption is made in favor of the validity of a bylaw or ordinance. *Marshfield Family Skateland, Inc.* v. *Marshfield*, 389 Mass. 436, 440 (1983). However, a bylaw may be invalid on its face where it conflicts with state law or exceeds the authority conferred by the enabling statute. *Id.*; *Ninety-Six, LLC* v. *Wareham Fire Dist.*, 92 Mass. App. Ct. 750, 756, rev. den., 479 Mass. 1104 (2018). See also *Rogers* v. *Provincetown*, 384 Mass. 170, 181 (1981) (local bylaw is in sharp conflict with state law where purpose of statute cannot be achieved in face of bylaw). Local requirements may be enforced against a protected use consistent with the Dover Amendment if shown to be related to a legitimate municipal purpose and bearing a rational relationship to the perceived concern. *Rogers* v. *Norfolk*, 432 Mass. 374, 378 (2000). However, a requirement that results in something less than nullification of a protected use may be unreasonable under the Dover Amendment. *Id.*; *Trustees of Tufts Coll.* v. *Medford*, 415 Mass. at 758.

In general, the Bylaw on its face is a valid exercise of the Town's police power under G.L. c. 40, § 21(17). However, the agricultural exemption is so limited that it will, in many cases, impermissibly restrict agricultural use by requiring a special permit for normal and customary agricultural-related activity. To that extent, the Bylaw conflicts with state law and is unreasonable. See *Rogers* v. *Norfolk*, 432 Mass. at 379 (court looks at whether bylaw acts to impermissibly restrict protected use). See also *Trustees of Tufts Coll.* v. *Medford*, 415 Mass. at

765 (local zoning law that improperly restricts protected use by invalid means such as special permit process may be challenged as invalid in all circumstances).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Plaintiff's Motion For Judgment on the Pleadings be **ALLOWED** and the Town's Cross-Motion For Judgment on the Pleadings be **DENIED**. The November 15, 2023 earth removal permit is **ANNULLED**. It is **DECLARED** and **ADJUDGED** that the Town of Halifax Earth Removal Bylaw is invalid as applied to Morse Brothers Inc.'s non-commercial normal and customary agricultural earth removal activities, which are not subject to a permit.

It is further **DECLARED** and **ADJUDGED** that to the extent that the Bylaw contains only a very limited agricultural exemption and thereby requires a permit for normal and customary agricultural earth removal activities, it is invalid as conflicting with state law.

Brian S. Glenny
Justice of the Superior Court

DATED: January 15, 2025