

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Department of Agricultural Resources,

Petitioner

v.

Docket No. MS-23-0254

We Grow Microgreens, LLC,

Respondent

Appearance for Petitioner:

Katherine A. Foote, Esq.,
Department of Agricultural Resources
100 Cambridge St., 9th Floor
Boston, MA 02114

Appearance for Respondent:

Lisa Evans
We Grow Microgreens, LLC
10 Weld Street
Roslindale, MA 02131

Administrative Magistrate:

James P. Rooney

Summary of Decision

The Department of Agricultural Resources refusal to grant an urban farm a composting registration is affirmed because the proposed composting area does not meet the 100 foot setback requirement from the property boundary of the agricultural unit. See 330 CMR 25.04(14.)

DECISION

On March 29, 2023, the Department of Agricultural Resources denied We Grow Microgreens, LLC's application to register an agricultural composting program on the lot it owns in Roslindale, Massachusetts because the proposal could not meet the regulatory 100 foot setback requirement from "a property line." See 330 CMR 25.04(14). Lisa Evans, one of the company's owners, filed an appeal. At a prehearing conference, the parties agreed to have this matter decided on the papers. See 801 CMR 1.01(10)[c].

The Department filed an affidavit of its Agricultural Compost Program Coordinator, Sean F. Bowen, plus four exhibits (Exhibits A-D). Ms. Evan made filings on June 14 and June 22, 2023 to which she attached five exhibits (Exhibits 1-5), some of which duplicate the Departments's exhibits. The parties also exchanged emails around that time. I have included those emails as Exhibit 6. I have admitted these exhibits and described them in an appendix.

Findings of Fact

Based on the documents submitted and reasonable inferences from them, I make the following findings of fact:

1. We Grow Microgreens, LLC operates an urban farm at 21 Norton Street in Hyde Park, Massachusetts. As its application for a composting registration describes it, the farm grows edible flowers, herbs and vegetables in greenhouses and raised beds on the property. (Exs. B and 4.)

2. On December 29, 2022, We Grow Microgreens applied to the Department of Agricultural Resources to obtain permission to perform agricultural composting on its site. The farm occupies 35,000 square feet with the proposed composting area made up of three 16' x 8' composting areas each 5'3" deep. The farm plans to compost some material grown on the farm, such as leaves from plants in the greenhouse, vegetative material, and microgreens cuttings. It also intends to bring in other vegetative material and wood chips from outside the farm.¹ (Exs. B and 4.)

3. The farm property is shaped like a bow tie with a narrow section in the middle that broadens out at either end. A paper street called Manila Avenue runs along the northwestern

1. Ms. Evans later added that the farm intended to bring in two 64-gallon trash cans of scraps every two weeks, and that these scraps would include "vegetable scraps and lobster shells from an organic restaurant and a seafood restaurant." (Microgreens June 14, 2023 letter.) Fish waste is considered allowable compostable material. *See* 330 CMR 25.02 (Table 1.)

side of the property. On the other side of this street are six landlocked, undeveloped lots owned by the City of Boston. The farm and the City each have an ownership interest in the paper street to the middle of the street on their respective sides of the street.² The farm has had a generally co-operative relationship with the City of Boston. The City allowed the installation of a community walking path proposed by the farm. This path is mainly on the paper street, but at one point it crosses onto City property. (Exs. B, 4, and 5.)

4. To the southeast of the farm are two lots, 15 and 19 Norton Street, that are adjacent to the narrow portion of the farm property. The deeds to these lots are in the name of High Board, LLC. Lisa Evans, who is one of the farm's owners, also owns High Board, LLC. The farm has an existing lease of the backyard of 19 Norton Street and has installed raised beds on that lot. High Board, LLC purchased 15 Norton Street in April 2023. Ms. Evans informed the Department on June 18, 2023 that her lawyer was working on a combined lease for 15 and 19 Norton Street that would allow farming on both properties. (Exs. B and 4; Microgreens June 14, 2023 letter.)

5. The application depicts the proposed compost area in the northern portion of We Grow Microgreens lot. A diagram depicting a circle with a 100 foot radius extending from the composting area shows that the circle will encompass a portion of the paper street and touch a City of Boston lot and will also extend well into the 15 and 19 Norton Street lots. (Exs. B, 2, 4 and 5.) A map from Exhibit 5 is attached showing these locations and the 100 foot circle.

2. The law regarding interests in paper streets is as follows:

As a general rule, the title of persons who acquire land bounded by a street or way runs to the center line of the way, G.L. c. 183, § 58, and carries with it the right to use the way along its entire length. The rule is applicable even if the way is not physically in existence, so long as it is contemplated and sufficiently designated.

Brennan v. DeCosta, 24, Mass. App. Ct. 96 (1987) (citations omitted).

6. We Grow Microgreens application was reviewed by Sean F. Bowen, who works for the Department as an Aquaculture Specialist and Agricultural Compost Program Coordinator. When he first went to the site, he did not see any location on the property where compost bins could be placed 100 feet from the property's boundary line. (Bowen affidavit.)

7. On December 16, 2022, Ms. Evans emailed Mr. Bowen regarding the farm site, the adjacent paper street, and City of Boston properties. She acknowledged that she did "not see a location that two sets of compost bins could go that would be 100 feet from our property line." She stated however that she believed "the City of Boston will give us permission to have the bins within 100 feet of their property." (Ex. C.)

8. On January 26, 2023, Mr. Bowen wrote Ms. Evans that obtaining the City of Boston's permission to locate compost bins within 100 feet from its property would not allow the Department to issue the farm a composting permit because "330 CMR 25.00 does not have a provision for a variance from the setback requirement." He informed her that the Department could not issue an agricultural composting permit and told her of her right to appeal. Ms. Evans timely appealed on January 28, 2023. (Ex. D, 3, and Bowen Affidavit.)

9. The parties continued to negotiate and discussed the two properties that bordered the Microgreens lot on Norton Street. Mr. Bowen conducted another site visit on March 28, 2023. He again reached the conclusion that no location on the farm property was 100 feet from the boundary of the lot owned by Microgreens and that there was no potentially permissible location for compost bins of any size on the property. (Ex. 1 and Bowen affidavit.)

10. On March 30, 2023, Ms. Evans reiterated to the Department her desire for a hearing. On April 13, 2023, the Department forwarded her appeal to the Division of Administrative Law Appeals.³ (Ex. 1.)

Discussion

A farm that intends to compost material brought onto the farm from offsite must obtain a composting registration from the Department of Agricultural Resources. 330 CMR 25.01. Because that is what We Grow Microgreens proposes to do, it must obtain a composting registration from the Department.⁴

The Agriculture Composting Program regulations provide that:

All materials, buildings, and infrastructure that are part of the Agricultural Composting Operation shall be located . . . at least 100 feet from a property line.

330 CMR 25.04(14). The use of the phrase “a property line” seems deliberately vague. The vagueness no doubt relates to an well known feature of agricultural production, namely that farmers do not necessarily own the land they farm. These same regulations reflect this by defining “owner” as:

Any person who alone or in conjunction with others has legal ownership, a leasehold interest, or effective control over the real property upon which an Agricultural Composting Operation is located.

330 CMR 25.02.

3. Whether there are two separate appeals or instead the March 30, 2023 “appeal” is simply a reiteration by Ms. Evans of her earlier request for a hearing after a period of reconsideration by the Department has no effect on the resolution of this matter other than to show that the Department was aware of any additional information that came to light during the few months the Department was again reviewing the proposal.

4. Mr. Bowen told Ms. Evans that “[i]t would seem that if you are not bringing materials from offsite, you would comply with the City of Boston setback of 5 feet.” (Ex. C.)

We Grow Microgreens proposed composting area presents two problems with respect to the 100 foot radius requirement. First, the 100 foot setback line extends over Manila Avenue, the paper street separating the farm's land from lots owned by the City of Boston. It is not immediately clear whether the "100 feet from a property line" requirement should be read in this instance to refer to the farm's property line, in which case the composting proposal would not meet the requirement, or to the City of Boston's property line, in which case it would meet the requirement. If the regulation is read as referring to the lots over which the applicant has some form of ownership or leasehold interest, then We Grow Microgreens proposal would not pass muster. The definition of owner, by focusing on ownership and leasehold interests, tends to suggest this result. If the concern, however, is that a composting area be 100 feet away from a neighboring lot so that the neighbors are not bothered by any odors from the composting area, then it would seem that the current proposal serves that purpose. The vague "a property line" phrase in the portion of the regulation establishing the 100 foot setback might be read as supporting this.

I therefore look to other portions of the regulations to resolve this issue. The regulations require the applicant to have an odor management plan that will "minimize the production and migration of odorous compounds" and "outline remedial actions that may be utilized to address production and migration of any odors . . . if odors occur beyond the property line of the Agricultural Unit." 330 CMR 25.02 (definition of odor management plan). An Agricultural Unit is:

A parcel of land for which the Department determines that:

- (a) the use is predominantly agriculture as defined in M.G.L. c. 128, § 1A; and
- (b) an agricultural product is sold as a normal course of business.

330 CMR 25.02 (definition of Agricultural Unit). I take that to mean that the Department is concerned with odors drifting beyond the land owned or leased for agricultural purposes, not whether it drifts beyond the border of a property separated by a street from the agricultural unit. Given the focus of the regulations on “agricultural units” and the regulation requiring farmers to address odors from composting area that go beyond the borders to the agricultural unit, it is most likely that the 100 foot setback requirement looks to the boundary of the parcels that comprise the agricultural unit.

The circle representing the 100 foot setback from the proposed composting site extends across Manila Avenue, the paper street, and touches the boundary of a City of Boston property on the other side of the street. The farm has an ownership interest up to the midline of the street, while the City on its side of the street has the same interest up to the midline of the street.

Brennan v. DeCosta, 24, Mass. App. Ct. 96 (1987). I need not attempt to determine whether the farm’s Agricultural Unit extends to the farm lot’s property line or the middle of the paper street because, either way, 100 feet from the composting site extends beyond land in which the farm has an ownership interest. That means that even if the regulation were read most generously to We Grow Microgreens, the proposed composting area is within 100 feet of land owned by the City of Boston and on which it has no present legal basis to conduct an agricultural operation. Hence, the present proposal does not meet the 100 foot setback requirement.

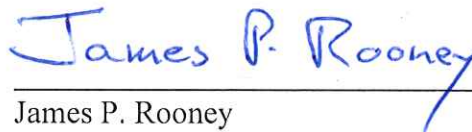
Although this is enough to lead to the denial of the registration, I note as well the second problem with the proposal meeting the setback requirement, namely that the 100 foot radius extends onto the 15 and 19 Norton Street properties. These properties are owned by a separate limited liability corporation. We Grow Microgreens has a lease to perform agricultural operations in the backyard of 19 Norton Street and has raised beds in that yard. That would

seem to make the farm's Agricultural Unit extends onto 19 Norton Street. When the Department reviewed the application, High Board, LLC had yet to purchase 15 Norton Street. Hence, at the very least, the proposed project does not meet the 100 foot setback requirement with respect to 15 Norton Street. Once We Grow Microgreens has a lease to conduct agricultural operations on a portion of both 15 and 19 Norton Street, it may be in compliance with the 100 setback requirement with respect to the Norton Street properties because it is likely that the property boundary of concern then would be the boundary of those two leased lots. However, the composting proposal would still be out of compliance with the 100 foot setback with respect to the paper street.⁵

Conclusion

For the reasons stated, the Department of Agricultural Resources' decision denying We Grow Microgreens, LLC's application to register a composting operation on its property is affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS



James P. Rooney
Acting Chief Administrative Magistrate

DATED: **AUG 24, 2023**

5. And this would not be the only obstacle. Because the lots on Norton Street have houses on them, Department counsel pointed out that another regulatory setback requirement would apply. This one requires composting areas to be at least 300 feet from a residence. 330 CMR 25.04(14). It does not appear from the diagrams submitted that the composting area is at least 300 feet from the houses on those two lots.

APPENDIX 1 - EXHIBITS

Affidavit of Sean F. Bowen with attachments A-D

Ex. A. 310 CMR 16.00 and 330 CMR 25.00

Ex. B We Grow Microgreens, LLC's application for registration of agricultural composting operation

Ex. C Email correspondence

Ex. D. Denial letter

We Grow Microgreens, LLC filing on June 14, 2023

Ex. 1 MDAR March 29, 2023 denial and We Grow Microgreens March 30, 2023 appeal

Ex. 2 Property maps

Ex. 3 MDAR January 26, 2023 denial

Ex. 4 We Grow Microgreens, LLC's application for registration of agricultural composting operation

We Grow Microgreens, LLC filing on June 22, 2023

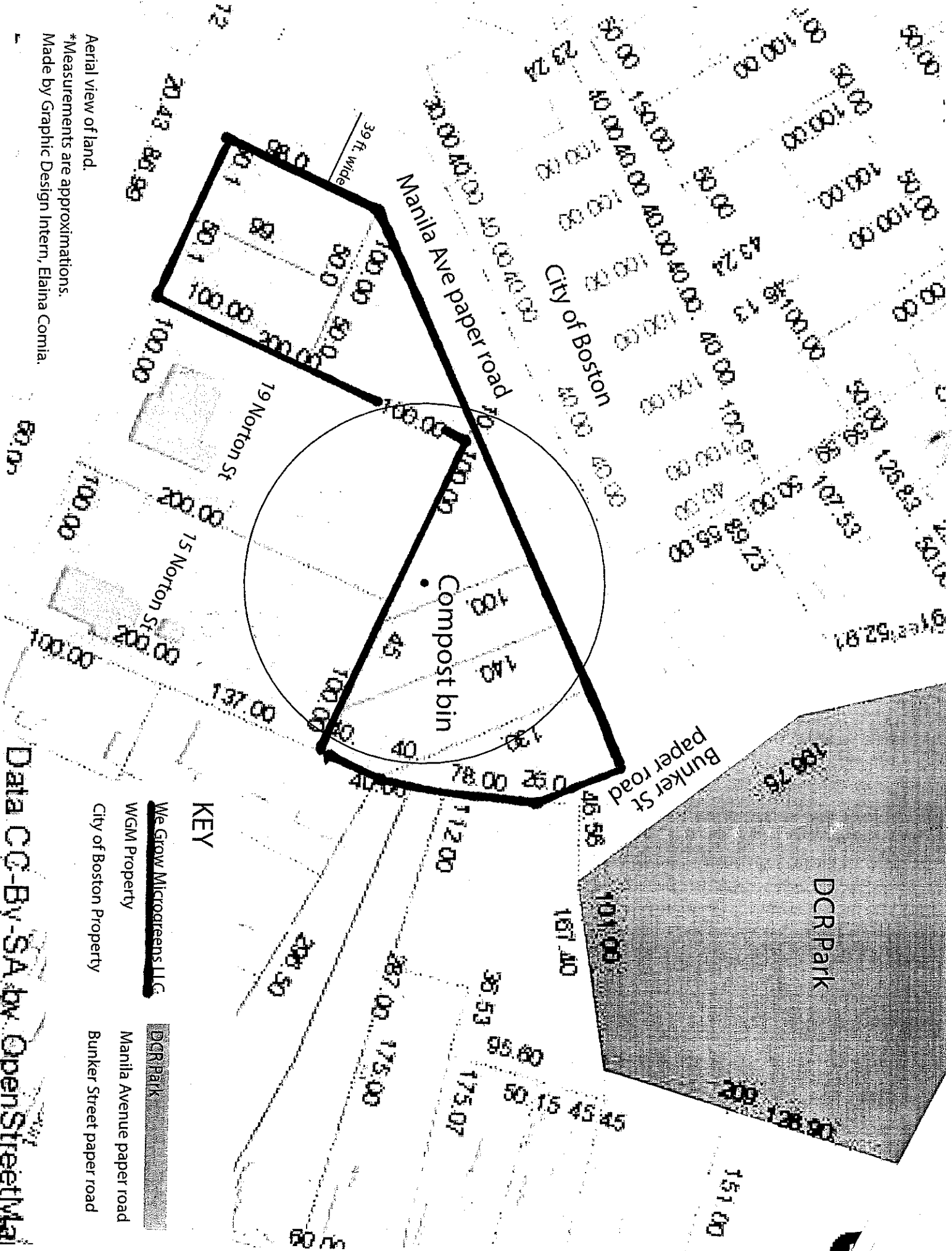
Ex. 5 City of Boston correspondence (August 2, 2019)

Ex. 6 Email communications by the parties between June 16 and June 22, 2023

Aerial view of land.

*Measurements are approximations.

Made by Graphic Design Intern, Elaína Comia.



KEY

- We Grow Microgreens LLC
- DCR Park
- WGM Property
- Manila Avenue paper road
- City of Boston Property
- Bunker Street paper road

Data CC-BY-SA by [OpenStreetMap](#)