COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Appeals Court No. 2025-P-0260

TOWN OF HALIFAX and
TOWN OF HALIFAX SELECT BOARD

Defendants-Appellants

v.

MORSE BROTHERS, INC.

Plaintiff-Appellee

ON APPEAL FROM A JUDGMENT OF
THE PLYMOUTH SUPERIOR COURT

APPLICATION OF TOWN OF HALIFAX AND TOWN OF HALIFAX SELECT BOARD FOR FURTHER APPELLATE REVIEW

Dated: November 18, 2025

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COMMONWEALTH OF MASSACHUSETTS

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I. REQUEST FOR FURTHER APPELLATE REVIEW

Appellants Town of Halifax and Town of Halifax Select Board hereby respectfully request pursuant to Mass. R. App. P. 27.1 further appellate review by this Honorable Court of the Memorandum And Order Pursuant To Rule 23.0 issued by the Appeals Court on October 29, 2025, a true copy of which is appended to this Application together with a true copy of the Memorandum Of Decision And Order

On Cross-Motions For Judgment On The Pleadings of the Plymouth County Superior Court referred to in the Memorandum And Order Pursuant To Rule 23.0.

In addition to the interest of justice in the correct application of the Dover Amendment, G.L. c.40A, §3, the public has a substantial interest in the reasonable regulation of earth removal operations associated with agricultural uses to protect against damage to the environment.

II. STATEMENT OF PRIOR PROCEEDINGS IN THE CASE

On December 21, 2023, Morse Brothers filed its Complaint appealing the Soil Removal Permit and a Motion for a Preliminary Injunction. (A.24).

On January 5, 2024, the Court held a hearing on Morse Brothers' Motion for a Preliminary Injunction. (A.5).

On February 5, 2024, the Court issued a Memorandum of Decision and Order denying Morse Brothers' Motion for a Preliminary Injunction. (A.5).

On March 19, 2024, The Town and Board of Selectmen filed the Certified Copy of the Record of the Proceeding Under Review pursuant to Superior Court Standing Order, 1-96, Processing and Hearing of Complaints for Judicial Review of Administrative Agency Proceedings. (A.6).

On October 30, 2024, Morse Brothers' Motion For Judgment On The Pleadings and the Town's and Board of Selectmen's Memorandum and Cross Motion In Opposition To Plaintiff's Motion For Judgment On The Pleadings were filed pursuant to Superior Court Rule 9A. (A.6).

On December 19, 2024, a hearing on Morse Brothers' Motion For Judgment On The Pleadings and the Town's and Board of Selectmen's Opposition and Cross Motion For Judgment On The Pleadings was held before the Honorable Justice Brian Glenny. (A.6).

On January 15, 2025, Justice Glenny issued a Memorandum and Order and Judgment allowing Morse Brothers' Motion For Judgment On The Pleadings and denying the Town's and Board of Selectmen's Cross Motion For Judgment On The Pleadings. (A.7).

On February 12, 2025, the Town of Halifax and Town of Halifax Select Board filed their Notice of Appeal of Justice Glenny's Memorandum and Order and Judgment.

On October 1, 2025, oral argument was held before the Appeals Court on the Town of Halifax and Town of Halifax Select Board appeal of Justice Glenny's Memorandum and Order and Judgment.

On October 29, 2025, the Appeals Court issued its Memorandum And Order Pursuant To Rule 23.0.

No party is seeking a reconsideration or modification in the Appeals Court.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

On October 4, 2023, Morse Brothers filed an application (the "Application") with the Board for a permit pursuant to Chapter 144, Soil Removal, of the Town's General By-laws. (A.89).

The Application sought approval for the removal of approximately 20,000 cubic yards of earth at Morse Brothers' property identified as 250 Lingan Street in Halifax for use in cranberry bog maintenance. (PGB Engineering, LLC). (A.89).

The number of truckloads of earth stated in the Application, 350, was incorrect. The correct number of truckloads of earth was about 715. (PGB Engineering, LLC)(A.113,209).

On November 6, 2023, the Board opened a public hearing on the Application at which representatives of Morse Brothers, Town officials and members of the public presented testimony. (A.147).

At the Board's public hearing, residents who live near the Morse Brothers

property expressed concerns about the effect of Morse Brothers' trucks on the safety of their children and about the heavy trucks damaging their roads. The residents' concerns were based on first-hand observation of Morse Brothers' trucks travelling on their roads in the past. (A.206,209,216).

On November 6, 2023, the Board voted unanimously to close the public hearing.(A.147).

On November 15, 2023, the Board deliberated on the Application and voted 2-0-0 to grant to Morse Brothers a Soil Removal Permit pursuant to Chapter 144, Soil Removal, of the Town's General By-laws, subject to the Findings and Conditions set forth in the Permit. (A.164).

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT IS SOUGHT

A. The Town May Reasonably Regulate An Earth Removal Operation Associated With An Agricultural Use

The Appeals Court held that "the town's bylaw which required Morse Brothers to obtain a permit with numerous conditions was arbitrary and capricious, unsupported by substantial evidence, or otherwise an error of law." Morse Brothers argued that "[t]he requirement of obtaining a permit in the first place to engage in regular agricultural activities is prohibited by c.40A §3." [Morse Brothers' Brief,

p.17.] These assertions are incorrect as a matter of law. G.L. c.40A, §3 states: "[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 clear and unambiguous language must be given its ordinary meaning. Crossing Over, Inc. v. City of Fitchburg, 98 Mass. App. Ct. 822, 828 (2020). The Appeals Court erroneously found that G.L. c.40A, §3 applied to the By-law, which is a non-zoning, general earth removal by-law. M.G.L. c.40A, §3 by its clear and unambiguous terms applies only to a "zoning ordinance or by-law", not to a general, non-zoning earth removal bylaw such as the By-law. A.018, 019.

However, assuming for the sake of argument only that G.L. c.40A, §3 applies to the Soil Removal By-law, which it does not, it would forbid only prohibition, unreasonable regulation or requiring a special permit for Morse Brothers' earth removal operations. The Soil Removal Permit (the "Permit") is not a special permit and does not prohibit but rather authorizes removal of soil subject to reasonable conditions that address the legitimate concerns of residents who live near the Morse Brothers property, and which allow transportation of soil over a nearby road, do not prohibit the removal of soil from the Town and do not prevent or regulate in any way the application of sand to Morse Brothers' cranberry bogs.

Use of land for the primary purpose of commercial agriculture may not be prohibited but may be reasonably regulated. See, e.g., Cumberland Farms of

Conn., Inc. v. Zoning Bd. of Appeal of N. Attleborough, 359 Mass. 68, 74–75 (1971)("(1) Expansion of existing agricultural buildings and of agricultural use of land, even if great enough to amount to a change in the quality of agricultural use, may not be prohibited by a zoning by-law but it may be regulated. (2) De facto prohibition of the expansion of agricultural use of land may not be accomplished by unreasonable regulation. (3) … regulation must bear a reasonably direct relation to significant considerations of public health, morals, safety, and welfare based on findings justified by substantial evidence. …"); see also, Prime v. Zoning Bd. of Appeals of Norwell, 42 Mass. App. Ct. 796, 801 (1997)("[t]he *Cumberland* opinion does not suggest, however, that Cumberland was free of all permit requirements. To the contrary, the court observed that, while the construction of the new barn could not, in the circumstances, be prohibited by a zoning by-law, "it may be *regulated* " (emphasis in original). … This was so because § 5 (now § 3) did not preclude local regulation of a proposal for *new* farm structures; moreover, because the local regulation of new structures may adversely and improperly affect the agricultural use of the land (as in *Cumberland*), only regulations that are reasonable may be permitted in order to assure no material diminution of the protection provided by § 3 for the continued use of agricultural land"); see also, Larason v. Katz, 1991 WL 11258845 (Mass. Land Ct.; Cauchon, J.)("a special

permit may *not* be required for such activity, although reasonable regulations, which do not serve to prohibit the use may be established").

The clear and unambiguous term "unreasonably regulate" must be given its ordinary meaning. The use of this term demonstrates that a town may reasonably regulate an earth removal operation associated with the use of land for the primary purpose of commercial agriculture.

The Appeals Court in effect rewrites G.L. c.40A, §3 to delete the term "unreasonably" and completely prohibit the reasonable regulation of an earth removal operation associated with the use of land for the primary purpose of commercial agriculture. That is not the ordinary meaning of the clear and unambiguous term "unreasonably regulate." The Appeals Court decision conflicts with well-established case law holding that use of land for the primary purpose of commercial agriculture may not be prohibited but may be reasonably regulated. See, e.g., Cumberland Farms of Conn., Inc. v. Zoning Bd. of Appeal of N. Attleborough, 359 Mass. 68, 74–75 (1971).

B. The Appeals Court's Holding That The Town And Board Required Morse Brothers To Obtain A Special Permit Is Clearly Erroneous

G.L. c.40A, §3 prohibits requiring a special permit for the use of land for the primary purpose of agriculture. The Board did not require Morse Brothers to obtain

a special permit. The Soil Removal Permit (the "Permit") issued to Morse Brothers by the Board is not a special permit. The Permit is a general by-law, non-zoning earth removal permit authorized by G.L. c.40, §21(17).

The Appeals Court recently held that the major purpose of an earth removal by-law is to protect against damage to the environment. Currence v. A.D. Makepeace Company, 106 Mass. App. Ct. 71, 79-80 (2025)("Our conclusion is consistent with the genesis of such earth removal regulations. 'Historically, earth removal regulation was initiated to curb the effects of the uncontrolled stripping away of topsoil and other earth materials.' Toda v. Board of Appeals of Manchester, 18 Mass. App. Ct. 317, 320 n.8, 465 N.E.2d 277 (1984)).

Special permits have a completely different purpose from non-zoning, general by-law earth removal permits. Special permits are authorized by the Zoning Act and are found in zoning ordinances and by-laws. G.L.c.40A, §9 states: ("[z]oning 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. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use. ...".

The Appeals Court's decision in effect rewrites G.L. c.40A, §3 to delete "special permit" and to prohibit requiring any permit of any kind for an earth removal operation associated with the use of land for commercial agriculture. That is not the ordinary meaning of the clear and unambiguous term "require a special permit" and conflicts with established law that agricultural uses may be reasonably regulated.

C. The Soil Removal Bylaw Is Not Invalid On Its Face Or As Applied

The Superior Court states in its Memorandum Of Decision And Order On Cross-Motions For Judgment On The Pleadings that "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." A.022. The Superior Court committed clear error by finding that the Bylaw required a special permit and by failing to recognize that the Bylaw allows non-zoning, general bylaw earth removal permits to be issued by the Board for excavations 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. For the reasons stated below, it is clear that the Bylaw is not invalid on its face or as applied to Morse Brothers.

"Terms used in a zoning by-law should be interpreted in the context of the by-law as a whole and, to the extent consistent with common sense and practicality, they should be given their ordinary meaning." Hall v. Zoning Bd. of Appeals of Edgartown, 28 Mass. App. Ct. 249, 254 (1990). The Soil Removal By-law includes §144-2.C.(4), which authorizes the Board to waive procedures when such waiver is in the public interest. A.132. In addition, §144-2.D.(20) of the Soil Removal By-law authorizes the Board to waive any and all conditions when such waiver is in the public interest and consistent with the general intent of the chapter. A.135. The waiver provisions of the Soil Removal By-law cited above authorize the Board to grant a permit for earth removal in excess of one thousand (1000) yards incidental to customary agricultural maintenance and construction as allowed by law on land in agricultural use.

Beyond the waiver provisions of the Bylaw, the Superior Court and Appeals Court apparently confused the "Exemptions" and "Prohibited earth removal" sections of the By-law. Section 144-2.A.(1) of the By-law, entitled "Exemptions," states the types of excavations that do not require a permit under the Bylaw. A.129,130. These exemptions from the requirement of a permit under the Bylaw include "(b) 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." A.129.

However, excavations 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 are not prohibited under the Bylaw. There are only two types of earth removal projects that are prohibited under the Bylaw. Section 144-2.C.(3)(a) of the Bylaw entitled "Prohibited earth removal" states:

"(a) No earth removal permit shall be issued for earth removal projects which:

[1] In the opinion of the Board of Selectmen, will endanger the general health or safety or constitute a nuisance; or

[2] In the opinion of the Board of Selectmen, will result in detriment to the normal use of adjacent property by reason of noise, dust or vibration." A.131,132.

These are the only two types of earth removal projects that are prohibited under the Bylaw. Excavations 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 are not prohibited under the Bylaw. The Bylaw clearly did not prohibit but rather authorized the Board to issue the Permit to Morse Brothers.

D. The Administrative Record Demonstrates The Hazards Caused By Morse Brothers' Trucks

The Soil Removal Permit allows the transportation of soil over a nearby road subject to reasonable conditions that address the legitimate concerns that residents who live near the Morse Brothers property stated during the Board's public hearing on Morse Brothers' application ("my concerns are about my children and the other children in the neighborhood walking and riding their bikes …; their previous road-dirt removal projects have caused negative impact to our property, to our roads …"") . (A. 206, 209). The Superior Court's finding that "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" is clearly erroneous where the record includes the testimony of neighborhood residents based on their firsthand observations. A.020. The conditions in the Soil Removal Permit allowing the transportation of soil over a nearby road are reasonable and address the legitimate concerns of residents who live near the Morse Brothers property about the effect of Morse Brothers' trucks on the safety of their children and about heavy trucks damaging their roads. The residents' concerns were clearly expressed during the public hearing on the Application and are based on the residents' first-hand observations of Morse Brothers trucks travelling on their roads in the past.

The Permit does not prohibit or regulate in any way the removal of soil from the Town. The case cited by the Superior Court for the proposition that G.L. c.40,

§21(17) "does not permit a municipality to regulate traffic through a measure aimed solely at sand and gravel trucking without any apparent basis for distinguishing between that and other types of traffic" is inapposite here because the entire basis of the Court's decision is the fact that the by-law at issue prohibited the removal of earth beyond the boundaries of the Town of Salisbury. Beard v. Town of Salisbury, 378 Mass. 435 (1979). The Permit does not prohibit the removal of soil from the Town of Halifax.

E. The Inspection And Permit Fee Condition Should Be Upheld

The inspection and permit fee condition in the Permit complies with the Soil Removal By-law and state law. A.144. The permit fee was set by the Board after the public hearing on the Application and therefore complies with the requirement of the Soil Removal By-law that the fee be set by the Board of Selectmen after a public hearing. Payments for inspections by a board's engineer are specifically authorized pursuant to G.L.c.44, §53G. The inspection and permit fee condition complies with the Soil Removal By-law and G.L.c.44, §53G and should be upheld. The Superior Court's finding, upheld by the Appeals Court, that the inspection and permit fee condition was arbitrary and capricious, unsupported by substantial evidence or based on an error of law is clearly erroneous and therefore the Appeals Court's decision should be reversed.

V. BRIEF STATEMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

A. The Public Has A Substantial Interest In The Reasonable Regulation Of Earth Removal Operations Associated With Agricultural Uses To Protect Against Damage To The Environment

In addition to the interest of justice in the correct application of the Dover Amendment, G.L. c.40A, §3, the public has a substantial interest in the reasonable regulation of earth removal operations associated with agricultural uses. The major purpose of an earth removal by-law is to protect against damage to the environment. Currence v. A.D. Makepeace Company, 106 Mass. App. Ct. 71, 79 (2025). "In our view the 'major purpose' of the earth removal bylaw is to protect against damage to the environment, as that term is defined in § 7A. Land — earth — is a critical natural resource, and Carver regulates earth removal activity by bylaw to protect the use of that natural resource and to guard against the environmental effects of such uses. Moreover, the systematic stripping of land from a substantial area can easily qualify as 'damage to the environment.'" Currence v. A.D. Makepeace Co., 106 Mass. App. Ct. at 72–73 (2025).

Unregulated earth removal operations associated with agricultural uses allegedly have caused significant environmental damage in southeastern

Massachusetts.[1] Most of the Morse Brothers site is located within the Town's Zone II Wellhead Protection Area for the Town's drinking water wells 3 and 4 in the Town's Aquifer and Well Protection District (A114). The Soil Removal Permit invalidated by the Superior Court and Appeals Court in this appeal includes Condition No. 16, requiring Morse Brothers to drill monitoring wells, conduct tests to determine groundwater elevations and to limit all excavation to at least four feet above groundwater elevation. There is a significant public interest in preventing damage to public drinking water supplies from earth removal operations associated with agricultural uses.

TOWN OF HALIFAX and
TOWN OF HALIFAX SELECT BOARD
Defendants-Appellants,

By their attorneys,

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[1] See, *Sand Wars In Cranberry Country-An Investigation By The Community Land And Water Coalition*

Certificate of Compliance
Pursuant to Rule 20(a) of the
Massachusetts Rules of Appellate Procedure

I, John Richard Hucksam, Jr., hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains 2282, total non-excluded words as counted using the word count feature of Microsoft Word for Microsoft 365.

ADDENDUM

Judgments and Orders:

Memorandum And Order Pursuant To Rule 23.0

Memorandum of Decision & Order on Cross-Motions for Judgment on Pleadings

CERTIFICATE OF SERVICE

I, John Richard Hucksam, Jr., hereby certify that the foregoing Reply Brief and Appendices were served upon the following attorneys of record for the Plaintiff/Appellee by the Massachusetts Supreme Judicial Court E-Filing System on November 18, 2025:

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

25-P-260

MORSE BROTHERS, INC.

vs.

TOWN OF HALIFAX & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The town of Halifax, through its select board (town), pursuant to its nonzoning police power to regulate earth removal under G. L. c. 40, § 21 (17), and its earth removal bylaw (bylaw), required Morse Brothers, Inc. (Morse Brothers) to obtain a permit with numerous conditions[2] to continue cranberry bog sanding, which it had been conducting for over forty-five

[1] Select Board of Halifax.

[2] The permit contained a list of twenty-five conditions, which among others, restricted the time, days, and manner in which Morse Brothers was permitted to engage in its bog maintenance; restricted the transport of sand on the town's public ways; made Morse Brothers strictly liable for "spillage" on public ways; required Morse Brothers to pay a "fee" based on the volume of sand used; and required Morse Brothers to provide the town "free access to the Property to conduct weekly inspections at any time without prior notice."

years. Morse Brothers applied for the permit under protest, and claimed an exemption to the bylaw because the removal and transport of sand for maintaining and improving its cranberry bogs were protected agricultural activities under G. L. c. 40A, § 3.

Morse Brothers filed a Superior Court action in the nature of certiorari, see G. L. c. 249, § 4, which challenged the permit and its conditions.[3] On cross motions for judgment on the pleadings, a Superior Court judge allowed Morse Brothers's motion and denied the town's motion. The town appeals, and we affirm.[4]

A civil action in the nature of certiorari under G. L. c. 249, § 4, is "to relieve aggrieved parties from the injustice arising from errors of law committed in proceedings affecting their justiciable rights when no other means of relief are open." Figgs v. Boston Hous. Auth., 469 Mass. 354, 361 (2014), quoting Swan v. Justices of the Superior Court, 222 Mass. 542, 544 (1916). "The scope of judicial review for an action in the nature of certiorari under G. L. c. 249, § 4, is limited." Retirement Bd. of Somerville v. Buonomo, 467 Mass. 662, 668

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[3] Morse Brothers also sought declaratory relief pursuant to G. L. c. 231A, § 1.

[4] We acknowledge the amicus brief filed by Pioneer New England Legal Foundation.

(2014). The judge's role on certiorari review is to "correct substantial errors of law apparent on the record adversely affecting material rights." Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540-541 (2014), quoting Firearms Records Bur. v. Simkin, 466 Mass. 168, 180 (2013). We review the record to determine whether the municipality's decision was "arbitrary and capricious, unsupported by substantial evidence, or otherwise an error of law." Hoffer v. Board of Registration in Med., 461 Mass. 451, 458 n.9 (2012). Finally, we review a decision allowing a motion for judgment on the pleadings de novo. Delapa v. Conservation Comm'n of Falmouth, 93 Mass. App. Ct. 729, 733 (2018).

The town claims the judge erred by determining that Morse Brothers was entitled to an agricultural exemption to the permitting process required by the bylaw. We disagree. At play in this case is the intersection and application of two statutes: G. L. c. 40, § 21 (17), which regulates a landowner's earth removal activity, and G. L. c. 40A, § 3, which protects a landowner's right to engage in agricultural land use. These potentially conflicting statutes must be construed in a manner which harmonizes them to be consistent with their legislative purposes. See Concord v. Water Dep't of Littleton, 487 Mass.

56, 60 (2021); McNeil v. Commissioner of Correction, 417 Mass. 818, 822 (1994).

Section 21 of chapter 40 includes an express limitation of a local government's authority to regulate earth removal, prohibiting towns from acting in a manner that is " repugnant to law." G. L. c. 40, § 21. Importantly, G. L. c. 40A, § 3, expressly prohibits towns from requiring a special permit to engage in agricultural activity. Section 3 states: "No zoning ordinance or by-law shall . . . 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 . . . ." (emphasis added).

As is readily discernible, the intersection of these statutes does not redound to the town's benefit. Here, the town's permit requirement for the Morse Brothers's cranberry bog sanding operation is repugnant to G. L. c. 40A, § 3. In broader terms, when a landowner engages in earth removal activity that is also a protected land use under G. L. c. 40A, § 3, a town may not exercise its police power in ways that are "repugnant to" the landowner's protected agricultural activity. See Newbury Junior College v. Brookline, 19 Mass. App. Ct. 197, 206 (1985) (municipality may not, through exercise of statutory power to

license lodging houses, "undo" G. L. c. 40A, § 3, which protects dormitories as educational land use).

The town also claims that G. L. c. 40A, § 3, applies only to zoning ordinances, and that the bylaw was not enacted pursuant to § 3, but rather pursuant to G. L. c. 40, § 21 (17), which relates to earth removal projects. However, as the judge properly determined, the town cannot exercise its licensing authority in a manner that undermines the protection found in G. L. c. 40A, § 3. See Rayco Inv. Corp. v. Board of Selectmen of Raynham, 368 Mass. 385, 394 (1975) (municipality cannot exercise independent police powers in manner which frustrates purpose of general or special law enacted by Legislature). In other words, a property owner's protected land use simply cannot be "dependent on the discretionary grant of a special permit by the [town]." The Bible Speaks v. Board of Appeals of Lennox, 8 Mass. App. Ct. 19, 32 (1979).[5]

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[5] The town also claims that it is not prohibiting Morse Brothers's agricultural use of its land, but is merely subjecting that use to reasonable conditions similar to a site plan review bylaw. However, the cases the town relies on in support of this claim are inapposite. See Valley Green Grow, Inc. v. Charlton, 99 Mass. App. Ct. 670, 674 (2021) (cannabis production expressly excluded from agriculture protected by G. L. c. 40A, § 3); Dufault v. Millennium Power Partners, L.P., 49 Mass. App. Ct. 137, 139 (2000) (site plan review of electric generating facility unrelated to agriculture); and an unpublished Land Court decision related to solar facilities, not agriculture protections.

Similarly, the town's imposition of numerous and onerous conditions in the permit would substantially impede Morse Brothers's ability to grow its cranberry crops, making the conditions repugnant to G. L. c. 40A, § 3. See Trustees of Tufts College v. Medford, 415 Mass. 753, 759-760 (1993). As the judge held, the permit conditions are arbitrary and capricious. The judge properly determined, "[t]he administrative record contain[ed] no fact finding by the [b]oard 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." In fact, the board made no actual findings of any specific traffic concerns tied to any of the specific permit conditions.

In addition, the judge also properly determined that the town had no basis or authority for the transportation restrictions imposed by the permit conditions. Section 21 (17) of chapter 40 does not confer power on towns to restrict transportation even if arguably related in some fashion to earth removal. See Stow v. Marinelli, 352 Mass. 738, 742-743 (1967). Although Morse Brothers must abide by the laws and regulations that apply to the inspections, licensing, speed, liability, and operations of all vehicles and operators on the town's public ways, the town simply lacks authority to apply separate traffic

regulations under its earth removal bylaw. See id. at 743 ("General Laws c. 40, § 21 (17), does not confer upon towns an additional power to regulate traffic"). The conditions restricting transportation are invalid.

The town also acted "repugnant to law" when it imposed a costly fifty cent "fee" for each cubic yard of sand that Morse Brothers excavated and transported to its other properties. While Morse Brothers argued that the "fee" was an illegal tax, we agree with the judge that we need not reach that question because, based on the administrative record, the town failed to comply with its own internal procedures for the establishment of a uniform fee for all earth removal permits, instead choosing to impose a particular fee to this individual case. As a result, the fee imposed here was arbitrary and capricious and based on an error of law. Id.

In conclusion, the town's bylaw which required Morse Brothers to obtain a permit with numerous conditions was arbitrary and capricious, unsupported by substantial evidence, or otherwise an error of law. Because the bylaw conflicts with, and is repugnant to, the agricultural protections found in G. L. c. 40A, § 3, it is unreasonable, and it may not be applied to

the Morse Brothers's cranberry sanding operation.

Judgment affirmed.

By the Court (Meade, Neyman & Walsh, JJ.[6]),

Clerk

Entered: October 29, 2025.

[6] The panelists are listed in order of seniority.

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 o

[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