

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT

NO. 1785cv00272

RICHARDSON-NORTH CORPORATION and

ELIAS RICHARDSON, III,

Plaintiff

v.

TOWN OF UXBRIDGE and UXBRIDGE

PLANNING BOARD,

Defendants

## ORDER AND MEMORANDUM OF DECISION

This case came before the Court on 1/18/2018 for a hearing on the Defendant's Motion for Preliminary Injunction. After hearing, and upon oral arguments, review of all submissions by counsel and the decisional law, this Court finds that the Town of Uxbridge, on its Counterclaim has a likelihood of success on the merits of their action. Further, the Court finds that the Town is entitled to injunctive relief, under the alternate standard for preliminary injunction, as the public interest in enforcing the Town's valid bylaws which ensure the health, safety and welfare of the citizens of the Town of Uxbridge, is in favor of the Town. See, Town of Brookline v. Goldstein, 388 Mass. 443 (1983); Commonwealth v. Mass. CRINC, 392 Mass. 79 (1984).

### BACKGROUND

This is an action, by the Plaintiffs which was originally an action in certiorari to correct errors made the Town of Uxbridge Planning Board relative to the issuance of an earth-removal permit.<sup>1</sup> The Plaintiffs subsequently amended their Complaint to bring additional claims alleging that the Defendants revoked the earth-removal permit, without notice, without hearing and without due

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<sup>1</sup> At the time of hearing, the original earth removal permit had expired on 1/11/2018 and was moot.

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process of law, and without legal authority. The Defendants have denied the Plaintiffs allegations and brought a Counterclaim for Declaratory and Injunctive Relief.

The parties were before the Court on 1/18/2018 for a hearing on the Defendants' Motion for Preliminary Injunction. It is the position of the Defendants that the soil importation use of the property located at 145/175 South Street, Uxbridge, MA is not "agricultural activity" and as such, a permit is required. The Town of Uxbridge By-Laws Chapter 182 et. seq. provides, in part: "Except as provided in Sec. 182-5, projects involving fill in the Town of Uxbridge are prohibited unless a written permit therefor is obtained from the Planning Board."<sup>2</sup> The Plaintiffs contend that they are exempt from this requirement under Chapter 182-5(G) which specifically exempts from the by law, "fill of materials which directly support forestry or agricultural activities...". Id.

On January 10, 2017 and February 17, 2017, the Building Commissioner of the Town of Uxbridge issued orders to the Plaintiffs to "cease and desist" their soil importation activity on the subject property. Both Orders concluded that the importation of fill onto the Property constituted a "principal use that is not permitted under the zoning bylaws". See, ZBA Decision 4/19/2017. The Plaintiffs appealed and there was a hearing over two days before the Town of Uxbridge Zoning Board of Appeals. After hearing the Board unanimously affirmed the findings of the Building Commissioner and upheld the Cease and Desist Orders.<sup>3</sup>

## ANALYSIS

The Town of Uxbridge has established a likelihood of success on the merits of its Counterclaim. The Town has enacted a valid bylaw through its home rule<sup>4</sup> powers requiring a permit for soil importation and fill activities over 10,000 cubic yards.

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<sup>2</sup> Chapter 181 of the Uxbridge bylaws was amended by Chapter 182 which now governs fill operations and prohibits the importation of fill without a permit.

<sup>3</sup> The Plaintiffs thereafter instituted suit in the Massachusetts Land Court further appealing the decision by the Town of Uxbridge Zoning Board of Appeals. See, Richardson-North Corporation et als v. Uxbridge Zoning Board of Appeals, et. als, Land Court No.: 17 MISC 000271.

<sup>4</sup> The Home Rule amendment authorizes a municipality to utilize its independent municipal powers and promulgate ordinances and bylaws for the protection of the public health, safety and general welfare. See generally, Board of Appeals of Hanover v. Housing Appeals Committee in the Department of Community Affairs, 363 Mass. 339 (1973).

The pertinent exception to this requirement is where the “[f]ill of materials which directly support ...agricultural activities.” See, Chapter 182-5(G). Clearly, there is a triable issue regarding the nature of the land use by the Plaintiffs and the nature of the soil importation on the subject property. To date the Town of Uxbridge Zoning Board of Appeals has determined, as did the Town Building Commissioner, that the soil importation work on the property is not incidental to agricultural use and is not except from the requirements of Chapter 182. This Court has reviewed the Administrative Consent Order instituted by the DEP for the soil reclamation work on the subject premises. That ACO establishes that this is a massive project which this Courts finds to constitute “quarrying activity”<sup>5</sup> which does not bear a reasonable relationship to agricultural use. Therefore, the Plaintiff is not exempt from the permitting requirements of Chapter 182; See e.g., Henry v. Board of Appeals of Dunstable, 418 Mass. 841 (1994). (holding that proposed excavation of 300,000- 400,000 cubic yards of gravel was not incidental to agricultural use of the land). Incidental use is defined as use which is “something minor or of lesser importance”; Old Colony Council- Boy Scouts of Am. V. Zoning Bd. Of Appeals of Plymouth, 31 Mass. App. Ct. 46 (1991). In this case, the scope of the Plaintiffs project is anticipated to last for a period of ten (10) years, will involve approximately 45 acres of land with an estimated 2.5 million tons of fill to be imported. The sheer size, magnitude and volume of the soil importation by definition, is not “incidental use” and cannot be said to bear reasonable relationship with agricultural use of the land. See, ACO; Id. at 845 citing Harvard v. Maxant, 360 Mass. 432 (1971).

Further, the Town of Uxbridge has established, under the alternate standard for a preliminary injunction, that the activities of the Plaintiffs in quarrying the land may adversely affect the public interest. See, Com. V. Mass CRINC, 392 Mass. 79, 89 (1984). In a suit involving a municipal authority, the standard of protection of the public interest, not immediate irreparable harm, is the proper measure for the need of injunctive relief. Id.; citing, United States v. D’Annolfo, 472 F. Supp. 220, 222 (D. Mass. 1979). In this case the Town is seeking to enforce a valid bylaw which is intended to protect the integrity of the natural resources in the town and to protect the health

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<sup>5</sup> It is not lost on this Court that at the time of hearing, Green Acres, LLC, appeared seeking to intervene in this action to prevent financial harm as that entity is the manager of the filling project on the subject premises. The Court did not allow the Motion as it did not comport with Superior Court Rule 9A, and did not allow Green Acres’ counsel to argue.

and welfare of the citizens of the town. The Town has a valid interest in ensuring that the soil imported onto the property does not harm the citizens of the Town and its ability to monitor that activity by requiring a permit is essential to protect its citizenry from the importation of contaminated soil and fill which would potentially leach into aquifers, wetlands causing permanent damage. While the Department of Environmental Affairs through its ACO has authority to monitor the project, the Town, through exercise of its home rule authority, has the right to regulate the importation of this massive amount of soil. That DEP is monitoring the project through its ACO does not negate the Town's legitimate right to protect its citizenry from potential environmental contamination.

## ORDER

### It is hereby Ordered and Adjudged:

1. That the Plaintiff, its agents, servants, employees, contractors, sub-contractors are hereby enjoined immediately from engaging in any soil importation or filling activities on the subject property located at 145/175 South Street, Uxbridge, MA.
2. That the Plaintiffs immediately apply for a permit in accordance with Chapter 182 of the Uxbridge General Bylaws as is required for filling projects.
3. That the Plaintiffs, its agents, servants, employees, contractors, sub-contractors are enjoined from resuming soil importation and or filling activity until a permit for this activity is issued by the Town of Uxbridge pursuant to Chapter 182.
4. This action is hereby **STAYED** pending determination by the Land Court of the appeal by the Plaintiffs of the Town of Uxbridge ZBA finding (4/19/20017). See, Richardson-North Corporation, et.als. v. Mark Wickstrom, Member of the Uxbridge Zoning Board of Appeals, Land Court action: 17 MISC000271.



Associate Justice Superior Court

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