

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

PLYMOUTH DIVISION SUPERIOR COURT
CIVIL ACTION NUMBER 2023CV00948

MORSE BROTHERS, INC.

VS.TOWN OF HALIFAX & another¹**MEMORANDUM OF DECISION AND ORDER ON
MORSE BROTHERS, INC.'S
MOTION FOR PRELIMINARY INJUNCTION**

The plaintiff, Morse Brothers, Inc., has been operating cranberry farms in Halifax, Hanson, and Middleboro for several decades. In September 2023, the defendant town of Halifax informed the plaintiff that, for the first time, it was required to obtain a permit pursuant to the Halifax Earth Removal Bylaw. The defendant Halifax Select Board issued a permit, which included multiple conditions

The plaintiff filed a complaint, alleging that the bylaw was improperly applied, and the conditions were invalid. It now seeks a preliminary injunction to prohibit enforcement of the conditions. For the following reasons, the plaintiff's motion for a preliminary injunction is **DENIED.**

BACKGROUND

The following facts are drawn from the parties' pleadings and affidavits submitted in support of the pending motions.

The plaintiff has owned and operated cranberry bogs in Halifax for over forty-five years. It also owns and operates cranberry bogs in Middleboro and Hanson. There are multiple steps

¹ Town of Halifax Select Board

involved in maintaining cranberry bogs, including the application of soil and sand layers that are the primary issue pending in the case. In connection with such work, “Morse Brothers has historically relied on the sand available on its Halifax property to renovate and maintain its bogs both in Halifax and in nearby towns.” The plaintiff is presently upgrading its bogs at its Middleboro location and renovating its bogs at its Hanson location. During the past year, the plaintiff had been excavating soil, screening sand, and transporting the sand to Hanson as part of its renovation project.

The company has been engaged in these practices for decades, and its farming practices have been “in harmony” with the town. On September 1, 2023, the town informed the plaintiff, for the first time, that it was required to obtain a permit pursuant to the Halifax Earth Removal Bylaw or to “cease and desist any sand removal or transportation-related activities.” On October 4, 2023, the plaintiff submitted a request for an exception from the bylaw. The plaintiff noted in the request that applying the bylaw negatively impacted its “ongoing cranberry bog maintenance” and “unreasonably infringed on protections of land uses for the primary purpose of agriculture under state law.” Simultaneous with its request for an exemption, the plaintiff also submitted an application for an earth removal permit under the local bylaw.

On November 15, 2023, the Halifax Select Board granted the permit, subject to several conditions. For purposes of its motion for a preliminary injunction, the plaintiff disputes the following conditions imposed by the permit:

Condition No. 1. Earth removal shall not occur except between the hours of 7:00 a.m. and 2:25 p.m. Monday through Friday and in no case on a legal holiday. This shall include without limitation the starting of engines, loading and unloading of trucks and preparation for commencing of work;

Condition No. 3. Vehicles loaded with soil and/or sand shall not exceed 10 miles per hour while on Lingan Street;

Condition No. 4. To avoid conflicts with school buses, vehicles traveling to and from the project location for the purpose described in this permit shall not be present on Lingan Street during bus pick-up and drop-off times provided by the Town.

Condition No. 7. There shall be a limit of twenty-five (25) trips per day of vehicles loaded with soil and/or sand;

Condition No. 8. Each truck and driver entering or exiting the property shall be provided by Morse Brothers with Exhibit A, a list of rules and regulations regarding road safety. Each driver shall sign an acknowledging receipt of these rules and regulations. It is the responsibility of Morse Brothers to keep record of this information and provide it to the Town as requested; and

Condition No. 25. No activity allowed under this permit shall occur during the 2024 school vacation weeks of February 19th-23rd and April 15th-19th.

DISCUSSION

A. Standard of Review

In ruling upon a motion for a preliminary injunction, the court must assess “whether the moving party has shown that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party” (internal quotations and citations omitted). *Lieber v. President & Fellows of Harvard Coll.*, 488 Mass. 816, 821 (2022). “In cases in which a public entity is a party, a judge may also weigh the risk of harm to the public interest in considering whether to grant a preliminary injunction.” *Doe v. Worcester Pub. Sch.*, 484 Mass. 598, 601 (2020).

In applying these requirements, the court finds that the plaintiff is not entitled to a preliminary injunction because it has not shown proof of an irreparable harm.²

² Where the motion can be resolved through analysis of irreparable harm, the court does not address the remaining considerations at issue for ordering a preliminary injunction.

1. Irreparable Harm

“In the context of a preliminary injunction the only rights which may be irreparably lost are those not capable of vindication by a final judgment, rendered either at law or in equity.” *Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 617 n.11 (1980). Further, “[e]conomic harm alone [] will not suffice as irreparable harm unless ‘the loss threatens the very existence of the movant’s business.’” *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 227–228 (2001), quoting *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 399 Mass. 640, 643 (1987).

The plaintiff’s submissions set forth a lengthy description of the process by which an entity cultivates cranberry bogs and the materials necessary for doing so. The plaintiff essentially seeks unrestricted practices to maintain its bogs and transport materials, namely sand, to and from Halifax. The plaintiff argues that imposing the permit’s conditions would negatively impact the health of its bogs.

While framed as logistical difficulties, all these considerations go to the plaintiff’s ability to conduct its future business of cultivating and selling cranberries. Such considerations are purely economic and thus not irreparable in the event the conditions of the permit are ultimately deemed improper. See *American Grain Prod. Processing Inst. v. Department of Pub. Health*, 392 Mass. 309, 327-328 (1984) (enforcement of regulation concerning cultivation and sales of grain-based products did not pose loss of rights that could be vindicated should plaintiff prevail after full hearing on merits). Here, if the case proceeded through additional litigation and was decided on the merits, any interest fees, costs, or damages could be calculated in the normal course of resolving monetary civil disputes. There is no indication that the plaintiff’s claims are unique in that regard to justify entry of a preliminary injunction.

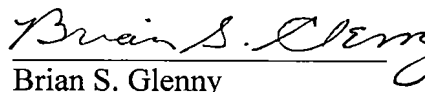
The plaintiff has also failed to show that the disputed conditions materially preclude it from performing ongoing bog maintenance, most notably the transportation of sand that is at the core of its objection to the permit's conditions. While perhaps its ordinary course is to store certain materials on its Halifax property and then transport them elsewhere, the plaintiff has not shown that shifting to a new operational model would create significant harm. For instance, based upon the record before this court, it does not appear the plaintiff is prohibited from transporting sand to the Hanson bogs from an outside source or vendor. The mere fact that the conditions may force the plaintiff to adjust its business model does not, on the record before this court, preclude it from cultivating and selling cranberries. Thus, such restrictions do not "threaten[] the very existence" of its business.

The court acknowledges that the plaintiff has asserted facts indicating that complying with the permit conditions immediately impacts its operations. However, urgency in addressing prospective economic damages is distinguishable from the irreparable nature of certain damages. The mere fact that complying with such conditions may presently pose a burden upon the plaintiff's operations does not render any prospective harm irreparable.

ORDER

For the foregoing reasons, the plaintiff's motion for a preliminary injunction is **DENIED**.

Dated: February 5, 2024


Brian S. Glenny
Justice of the Superior Court