KP | LAW
The Leader in Public Sector Law

101 Arch Street, Boston, MA 02110
Tel: 617.556.0007 | Fax: 617.654.1735
www.k-plaw.com

January 24, 2023

George X. Pucci
gpucci@k-plaw.com

BY ELECTRONIC MAIL ONLY

Robert Moriarty, Chair
Topsfield Zoning Board of Appeals
Topsfield Town Hall
8 West Common Street
Topsfield, MA 01983

Re: 252 Rowley Bridge Road, Connemara Farm
Appeal to Zoning Board of Appeals

Dear Mr. Moriarty:

You have asked for Town Counsel guidance on the law applicable to the above-referenced appeal now pending before the Zoning Board of Appeals.

As you know, the appellant, James Decoulos, Esq., of 226 Rowley Bridge Road, has appealed the Building Inspector's decision, dated October 31, 2022, regarding the use of the premises at 252 Rowley Bridge Road for wedding events and like businesses, alleging aggrievement by the purported failure of the Building Inspector "to enforce the Zoning Bylaw against [Kevin J. Guinee, Trustee Connemara Farm] regarding the activities of Connemara Farm in conducting wedding events and the like business under an open tent, in violation of the Topsfield Zoning Bylaws Article III, Section 2.17 by failing to obtain a Special Permit from the Planning Board, or otherwise conduct exempt agricultural activities." Under the Zoning Bylaw Use Table, in Section 2.17, use of property for a "Conference and Event Facility," such as an event facility for weddings, requires a special permit in the Outlying Residential and Agricultural Zoning District in which the property is located. In the Building Inspector's October 31, 2022 determination on appeal, the Building Inspector declined to change the prior Building Inspector's determination "that weddings and events conducted by Connemara Farm Agritourism are in keeping with the intent of the law" (and are thus exempt from the special permit requirement).

Under G.L. c.40A, §3, qualified agricultural uses are exempt from special permit requirements under a town's zoning bylaw. The statute provides, in pertinent part, as follows:

> 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, … nor prohibit, unreasonably regulate or require a special permit for the use … of structures thereon for the primary purpose of commercial agriculture, … including those facilities for the sale of produce, wine and dairy products, provided that either during the months of June, July, August and September of each year or during the

> harvest season of the primary crop raised on the land of the owner or lessee, 25 percent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 percent of such products for sale, based upon either gross annual sales or annual volume, have been produced in Massachusetts on land other than that on which the facility is located, used for the primary purpose of commercial agriculture … For the purposes of this section, the term 'agriculture' shall be defined in section 1A of chapter 128, …
>
> G.L. c.128, §1A, in turn, defines "agriculture" as follows:
>
> "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, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, 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.

The agricultural use exemption should be interpreted broadly. Tisbury v. Martha's Vineyard Comm'n., 27 Mass. App. Ct. 1204 (1989). The exemption applies not only to the primary agricultural use itself, but also to uses accessory or incidental to the principal agricultural use. See, e.g. Tisbury, supra (cannot prohibit a 4000 gallon fuel tank found to be an essential component of an exempt greenhouse). But compare Henry v. Bd. of Appeals of Dunstable, 418 Mass. 841 (1994) (holding that the extraction of 300 thousand cubic yards of gravel not an exempt activity in connection with development of an otherwise exempt cut your own Christmas tree farm). See also, Steege v. Bd. of Appeals of Stow, 26 Mass. App. Ct. 970 (1988) (riding academy and stables for boarding other owners' horses exempt).

There is no express statutory exemption for activities falling under so-called "agritourism," which has been described as a commercial enterprise that links agricultural products and processing with tourism to attract visitors while generating extra income for the farmer. Examples include pick-your-own operations, hayrides, farm stands, farm-to-table meal events, weddings and birthday parties, distilleries, etc. However, such activities could qualify as activities which are exempt from special permit requirements under the Town's Zoning Bylaws if found to be "incident to or in conjunction with" the primary agricultural activities at the property in question.

An "incidental" use is permitted as "necessary, expected or convenient in conjunction with the principal use of the land." See Board of Appeals of Dunstable, at 844-845. Whether the use qualifies as "incident" to the primary exempt use is a "fact-intensive" inquiry, which compares the net effect of the incidental use to the primary use and evaluates the relationship between the incidental and the permissible primary uses." Id. Further, in the context of zoning, the word incidental "incorporates two concepts." First, "that the use must not be the primary use of the property but rather one which is subordinate and minor in significance"; and second, "must incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant." Id.

As for the 25/50% gross annual sales or volume requirements in G.L. c. 40A, §3, above, this standard is not entirely relevant on the issues before the Board, as the appellant is not challenging the exempt status of the farm itself, but only the wedding event activities being conducted on the farm. However, gross annual sales or volume figures would be relevant on the standards governing the issue of whether the event activities qualify as a use "incidental" to the exempt primary use. For instance, in proposed legislation amending the statute to specifically cover "agritourism" activities, there is a proposed standard requiring that no more than 25% of the gross farm income derive from the agritourism activities to qualify for exempt status. Even though this standard has not yet been codified, it would provide a rational basis in assisting to determine whether the activities meet the "incidental" use standards from the Dunstable case, above.

I recommend that the Board analyze and make findings of fact under the standards from the Dunstable case, e.g. is the incidental use subordinate and minor in nature to the primary use, is there a reasonable relationship between the wedding events and the primary agricultural activities at the farm, etc. Factual findings along these lines, and then applying those facts to the foregoing guiding principles would form a rational basis for a decision on whether to affirm or deny the appeal. It is also worth noting that even in the event the Board were inclined to affirm the appeal, that does not necessarily mean a cease and desist needs to issue immediately, as enforcement could be stayed pending application and action on a duly filed special permit application.

I am available for questions on the foregoing.

Very truly yours,

George X. Pucci

GXP/man
847473/TOPS/0087