



Office of the

Board of Health

City Hall

166 Boulder Drive – Suite 108
Fitchburg, Massachusetts 01420
978-829-1870

An organizational meeting was held on September 1, 2016 at 5:00 pm.

Present were: Ian Murray, Chairman; John Bogdasarian, M.D. Member; Sandra Knipe, R.N.B.S.N. Member; Stephen Curry, Director; Jean-Francois Leblanc, Sanitary Inspector; Jack Maloney, Ducharme & Dillis; Mark Sumner, Jane Sumner, Howard Sumner Jr., Althea Sumer, Rhonda Neforas, Tom Neforas, Ingrid Wheeler, Tony Eringi, Duane King, Attorney John Bosk.

Hearing Request – Arn How Farm Road, Sumner Property: Attorney John Bosk states Arn How Farm Trustee Howard Sumner Jr. and counsel moves this Board to withdraw the Order to Remove Abandoned Vehicles and to rescind the findings of inspector Jean-Francois Leblanc. Atty. Bosk distributed copies of all correspondence and pictures of the property to date. Mr. Leblanc stated the property is entirely cleaned up.

Atty. Bosk stated the Sumner's want to get along and made an effort to comply with some of the requests however because they took some medial action at the request of the City of Fitchburg they are not waiving any rights and claiming they are exempt from the complaints as issued because they are a bona fide farm. Attached is an affidavit from Howard Sumner Jr., who as a Trustee and Beneficiary of the Trust who is standing in for his cousin Arnold Jr who lives in Missouri.

The Sumner's feel that the Board of Health over reached in this instance and are upset that this is based upon an anonymous complaint and don't believe that it's right. The Sumner's want to be cooperative citizens but at the same time they are standing by their rights to operate their farm in a manner they see fit not injuring public health and public safety and being operated following historic farm operation standards in the United States as well as Massachusetts.

Attorney Bosk stated the memorandum of law touches on each of the subject matters that he has just raised with regards to the statutory exemptions of farms. The overreaching broad application of health standards is incorporated and a cover page including the Health Code MGL 125. **(See attached exhibit 7)**. Atty. Bosk stated the City of Fitchburg Health Code follows the same format and the same intent. The intent is the statue and ordinances are geared towards primary residence and/or apartment and landlord/tenant type situations as opposed to the situation with the farm which is different. The Sumner's have a vested interest in seeing that the farm is safe and secure and healthy not creating any hazards and they do that on a regular basis. People driving by may be offended by some of the vegetation, it's a farm, there is no vermin, no problems with rat infestation occurring.

The Sumner's are diligent with maintaining the property but want the Board of Health to understand that nothing that was mentioned in this complaint reached beyond there exemption.

Tony Eringi (neighbor) stated he has not noticed any odor, there was a small amount of debris but has been cleaned up, and there were never any other issues as long as he lived, which is nearby.

Rhonda Neforas (neighbor) stated she has lived nearby for many years and never had any issues.

Dr. Bogdasarian stated from what he has heard all issues have been remedied. Attorney Bosk stated all issues have been remedied without the Sumner's waiving their rights.

Mr. Sumner would like to be contacted by the Board of Health in the future for any complaints so they can be dealt with.

Mr. Leblanc asked in regards to waiving their rights what part they are referring to. Attorney Bosk stated the farm exemptions under Massachusetts Statue that are included in the Memorandum (exhibit #7) see attached. Mr. Leblanc stated his understanding the right to farm exempts farms from complaints about odors and noise that come from farm operation. This does not include trash or abandoned vehicles therefore the owners are not waiving their rights in any way as no violation was cited pertaining to the right to farm.

Sandra Knipe made a motion to withdraw the order. Mr. Curry's recommendation to the Board is to sustain the order and recognize the conditions of the order have been corrected to the satisfaction of the Health Department. Attorney Bosk objects to the order to sustain and would move to rescind the order. Dr. Bogdasarian stated all the complaints have been addressed and the Sumner's have complied with effort and sees no reason not to rescind the order.

Sandra Knipe made a motion to rescind the order.

Motion was seconded by Ian Murray. All were in favor. Motion carries order is rescinded.

Local Upgrade Approval for 223 Alpine Road:

Jack Maloney from Ducharme & Dillis is here to present for Don Rice (unable to attend) a Title 5 local upgrade approval;

- 1) Requesting a Local Upgrade approval for the required four foot separation between the bottom of the S.A.S. and the high groundwater elevation to a three foot separation. The Presby System allows for a separation of 2 ft. transmittal

Sandra Knipe made a motion to approve the Local Upgrade Approval. Motion was seconded by Ian Murray. All were in favor. Motion carries.

Local Upgrade Approval for 705 Mt. Elam Road:

Mr. Curry stated Whitman and Bingham submitted a design but not was allowed inside the property so they designed the system to what they could see. There were no Local Upgrade approvals needed. When they started digging to install the system according to plan they found there were two drains from the house, the drain they saw was only

18-24 inches below the ground the other was 3 feet below which pushes the system deeper in the ground. Mr. Curry stated he was forced to make a decision on site to grant the local upgrades to reach maximum feasible compliance. He also imposed conditions such as a one piece tank or properly sealed tank and the installation of boots to prevent water penetrating the inlet and outlets. The following was requested:

- 1) Increase in the 36" maximum allowable depth of system components. (About 42" to top of tank and pump chamber).
- 2) Reduction of the required 4 foot separation between the bottom of the leach area and the estimated seasonal high groundwater table.
- 3) A Sieve Analysis may be performed if a percolation test cannot be performed. (Sample taken for Sieve Analysis due to high groundwater).
- 4) Reduction of the required 12" separation between tank inlet and outlet tees, and the estimated seasonal high groundwater table. (Less than 12" separation is provided).

Sandra Knipe made a motion to approve the Local Upgrade. Motion was seconded by Ian Murray. All were in favor. Motion carries.

Body Art Regulation Discussion: Tabled until October meeting.

Request for Funding for Training Employees – Soil Evaluator Agreement Amendment:

- a. Kujanpaa Fund - Mr. Curry is requesting to use these funds for a Soil Evaluator Training Course and send four inspectors at \$965.00 per inspector for a total amount of \$3,860.00 from the Kujanpaa Funds.

Sandra Knipe made a motion to allot the money from the Kujanpaa Fund to send four inspectors to training. Motion was 2nd by Ian Murray. All were in favor. Motion carries.

FHS Health Fair Discussion: Sandra Knipe stated there will be another health fair coming up at the high school and would like to participate. Mr. Curry stated there may be an Opioid table and a Mass in Motion table as well promoting physical activity and healthy eating.

Meeting of the Meeting: Sandra Knipe made a motion to accept the June 2, 2016 meeting minutes. Motion was 2nd by Dr. Bogdasarian. All in favor. Motion carries.

Ian Murray made a motion to adjourn.

Sandra Knipe seconded the motion.

Meeting adjourned at 6:35 pm.

8. The property is clearly marked "No Trespassing" on road frontage near the barn, but some of the forest section is in 61A for recreational use. Hunting is by permission only.
9. I harvest a hay crop from the farm once or twice a summer, depending upon the rain.
10. The hay gets stored in the hay barns and trailers.
11. Some of our smaller and more valuable farm implements are stored in the trailers.
12. The trailers are all secured. The fact that they are on wheels allows us to move them from time to time as the need arises.
13. It is a common farm practice to use trailers for storage. They do not need to be registered. All of the trailers on our property are in current use. None are "abandoned".

14. As a matter of fact, I dispute the allegations set forth in the Violations notice as follows;

1. *There is a large pile of metal and rubbish on the left side of the main barn.*

This pile of scrap metal was cleaned up from the farm and was being recycled at a licensed recycling facility.

2. *There is a rotting abandoned truck by the road.*

The truck is not rotting or abandoned. It is a restorable 1969 Ford flatbed which was used for hauling hay. The Fitchburg Police Dept. asked Arnold Sr. to block the driveway going to the barn and we rolled it there at their direction. We have rolled it out of sight of the road and left the road to barn open.

3. *There are several trailers that appear to be abandoned.*

None of the trailers on the property are "abandoned". All are in current use for storage of personal and agricultural equipment. They are all secure and off the road on private farm property. Trailers are a traditional method of storing agricultural material.

4. *The front and sides of all buildings are littered with tires, TV's, containers, batteries and other rubbish.*

First of all, any of the items which were there could not be viewed without trespassing on the property. Second, any tires on the property were used for trucks or tractors, some even had the original sales stickers still attached. Third, we don't recall leaving any batteries around. But it is not uncommon to remove batteries from tractors or trucks when not in use so they won't be stolen or lose power.

All the tires have been put in closed storage. There was no rubbish, but there may have been construction material which has been stored elsewhere.

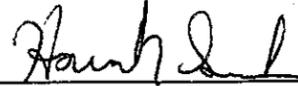
15. Any cooperation on the part of the Sumner Trust to these allegations was not an admission of

wrongdoing , an acceptance of Board of Health jurisdiction, or an effort at mitigation. It was done solely as an act of good faith on the part of the Sumner family.

16. We are very offended that the Board of Health would investigate an alleged "Anonymous" complaint and trespass on our property. We believe that in America, a person has the right to confront their accusers.
17. We believe these complaints are not valid nuisance or health complaints, but are complaints of an aesthetic nature which are not within the jurisdiction of the Board of Health as it relates to bona fide farm property, which is exempt under M.G.L. 111§125a and MGL 40a § 3 .

SWORN AND SUBSCRIBED UNDER THE PAINS AND PENALITES OF PERJURY

Dated: August 31, 2016



Howard Sumner Jr. , as Trustee and
Manager of the Property

COMMONWEALTH OF MASSACHUSETTS

WORCESTER,SS

CITY OF FITCHBURG
BOARD OF HEALTH
Dk# S 22-33-0

BOARD OF HEALTH)

v)

ARN-HOW FARM)

DEFENDANT'S MEMORANDUM
OF LAW

PROCEDURAL HISTORY

On May 23, 2016, Inspector Jean-Francois Leblanc of the Fitchburg Board of Health made an inspection of Lot S 22 -33-0 , identified hereafter as Arn-How Farm. On May 24th, he mailed an Order to Remove Abandoned Vehicles [Exhibit 1] and a Notice of Code Violations [Exhibit 2] to Arnold Sumner Jr. in Chesterfield, Missouri, the apparent owner of record of the named property.[Ex.3]

After some miscommunication and confusion amongst the Sumner family, Howard Sumner Jr. contacted counsel to collect complete copies of the complaints and exhibits and to correspond with the Board of Health. Counsel finally received that material on June 2nd .

On June 3rd , after communicating with the Inspector, hand-delivered a letter to the Board of Health requesting a Hearing and Extension. [Ex.4] The Board granted the Hearing and Extension to September 1st. [Ex.5]

In the interim, the Sumners made a good-faith effort to comply with some of the complaint , without waiving their rights to have an adjudication.

FACTS

There may be a preliminary question of who is the actual owner of the parcel cited by the Inspector, and whether the alleged violations are even on the property

cited. Counsel will ask the Board and witnesses to view the plot map during to hearing.[Ex.6]

Without waiving improper notice as a defense, and treating the issue as a family problem - Howard Sumner Jr., as Trustee and Manager of the Howard Sumner portion of the estate, undertook to comply with some of the order.

There can be no dispute that the Arn-How Farm is a bona fide, registered farm and part of the land is subject to 61 A provisions. There can be no dispute that it has been in business since before the current City Health Code was enacted, it is in an Agricultural-Residential zone, it has been operated continuously as a farm since 1947, it is larger than 20 acres, and it is in current use. Arnold and Howard Sumner, the brothers who established the farm, died recently. Prior to their deaths, their homes and the land were put in separate trusts to preserve the property as a whole.

Although some small lots were sold off to developers for house lots prior to their deaths, and another parcel was deeded to the Mass. Wildlife Conservancy, the bulk of the farm remains intact.

Indeed, when the City of Fitchburg desired to build a new, model "suburban" high school, it approached the Sumner brothers in order to secure the necessary acreage. Unfortunately, this was also a cornerstone to the effort by some folks at City Hall to suburbanize the entire north side of Fitchburg with the hopes of expanding the tax base.

In any event, some expensive homes have been built in the neighborhood, a new "model" high school occupies 70 acres next to the farm, and traffic on the former Scripture Road, renamed Arn-How Farm Road in honor of the grantors, has increased considerably.

So the Arn-How farm, once an isolated family operation in a quiet rural area on the north side of town that provided fresh milk to the local residents has apparently become an eyesore to some anonymous person or persons who decided

to make an anonymous complaint to City Hall. Or, for all we know, the complaint might have originated *within City Hall*, an even more shameful proposition.

That is the context in which this matter is perceived by the Sumner family.

ARGUMENT

A. LACK OF JURISDICTION - EXEMPTION

The Defendant claims to be exempt from the “nuisance” portions of the City Health Code and the State Sanitary Code as applied to it, pursuant to M.G.L. 40A and MGL 111 §§ 1, 125A and 143, [See Appendix, Ex.7, attached]

“Agricultural use” exemption is interpreted broadly, and many activities conducted on land being used primarily for agricultural purposes are allowed despite conflicting provisions of local zoning bylaws.” Tisbury v Martha’s Vineyard Com., 27 Mass. App. Ct. 1204, 544 N.E.2d 230 (1989).

The complaint itself is twofold: first, an “abandoned vehicle” complaint [Ex.1] which is not really a Board of Health issue; and the second part [Ex.2] cites portions of the Code which refer to “vegetation, overgrowth and land condition” which clearly fall within the farm exemption.

The purpose of the State Health Code is to protect the public health. American Friends Service Comm. v Commissioner of the Dept. Of Env’tl. Protection, 30 Mass. App.Ct. 457,461, 569 N.E. 2d 833 (1991).

In the absence of evidence that there is a real threat to public health or safety, such as a rat infestation, or a sick herd of cattle, or bad milk, or poisoning of a water supply, the Board of Health has no authority over farm operations. For example, there was no allegation that the tires (many of which were new) had standing water and were breeding mosquitoes, or the scrap pile was infested with vermin, or the Ford was leaking gas and oil on the ground. Although these particular tires were mostly new truck and tractor tires, and not “scrap” as alleged, they would be exempt

because scrap tires are commonly used in agriculture to hold down silage tarps.

Where it is clear that the Arn-How Farm is a bona-fide farm as defined by Mass. statutes, in the absence of a clear threat to public health or safety, and in the absence of any evidence that the activities complained of are not generally accepted agricultural practices, the Defendant is exempt from enforcement of the Health Code as cited.

B. THE CHARACTERIZATION OF THE OBJECTS WAS SUBJECTIVE

Clearly, the truck and trailers are not "abandoned". Abandoned property is defined as "that to which the owner has relinquished all right, title, claim and possession, with the intention of not reclaiming it or resuming its ownership, possession or enjoyment. There must be concurrence of act and intent...to relinquish..." Black's Law Dictionary, 5th Ed.

The Order even refers to the "4 cargo trailers" implying that they are, indeed, used for storing cargo - clearly an agricultural purpose. See Inspector's photos, [Ex.8,group]. If that is the case, what about the City's similar use of a trailer at the FHS baseball field, just behind the farm? [Ex.9] Shouldn't the Defendant be entitled to equal protection under the law?

And what farm in America would be complete without a *rusting* (not "rotting") Ford farm truck? Not only can it potentially be restored and put to use in the future, it is an American icon which deserves respect, not towing to a scrap yard. It actually *creates* a pleasing aesthetic, even for jaded yuppies driving by the farm.

"The large pile of metal and rubbish"? It was a scrap pile of valuable metal, cleaned up from around the farm, in a responsible manner, and stored while Howard waited for the price of steel to rise to defray the expense of trucking it to the scrap yard for a fair price.

Isn't the Board of Health supposed to encourage recycling?

"The trailers that *appear* abandoned". Once again, utility is in the eye of the beholder. Everyone uses trailers for storage, not just farmers. Is the Inspector asking the Defendant to put a fresh coat of paint on them? Do the Sumners have to prove they use them daily or weekly to prove they are not "abandoned"? Where would the Inspector like the Sumners to keep those offensive tires, if not inside a trailer?

"The front and sides of all buildings are littered with..." He makes it sound like a real dump, but aside from the scrap metal pile, his pictures show construction material and tractor tires organized in an area where they can be easily accessed. If these items had no value, they would not be kept.

C. THE CODE IS OVERBROAD AS APPLIED

The City Health Code follows the State Health Code, which is prefaced as follows:

"The purposes of 105 CMR 410.000 are to protect the health, safety and well being of the occupants of housing and of the general public, to facilitate the use of legal remedies available to occupants of substandard housing, to assist boards of health in their enforcement of this code and to provide a method of notifying interested parties of violations of conditions which require immediate attention."

It goes on to state that the title of the State Sanitary Code is
"Minimum Standard of Fitness for Human Habitation"

[Ex.9]

Clearly as written, this Code was designed to be applied to landlord/tenant and residential situations, and *as applied* to the Arn-How Farm is *constitutionally overbroad*.

D. THE INSPECTOR TRESPASSED UPON PRIVATE PROPERTY

In order to take some of the photographs which were supplied as evidence, and to make some of his observations, it was necessary for the Inspector to go onto private property without consent, notice, or an administrative warrant.

Aside from the constitutional issues this trespass raises, with regard to the admissibility of the alleged evidence, it begs the question, could a public health threat exist on posted property if it requires a trespass for the public to be put at risk?

The allegations of the Inspector, taken as a whole, imply the concept, "public nuisance" without actually using the phrase. By listing these "eyesores" and demanding they be removed from **public** view pursuant to its Health Code, the City has placed an unconstitutional demand upon the Defendant farm for an "unreasonable restriction upon the rights of the citizen in ownership, and use of real property as they stood at common law." *Durgin v Minot*, 203 Mass. 26 , 89 N.E. 144 (1909). Does the public benefit in this case override the rights of the Defendant property owner?

E. THE COMPLAINT WAS ANONYMOUS, AND SHOULD BE VOID

It is a fundamental right under Art.XII of the Mass. Declaration of Rights and the Sixth Amendment of the United States Constitution that an accused has a right to confront and question their accuser:

"No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; *to meet the witnesses against him face to face*, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life liberty, or estate, but by the judgment of his peers, or the law of the land."

Art. XII, Mass. Declaration of Rights

While the Board of Health may demur that the Inspector is the "witness-accuser", the reality of the case is that someone complained to the Inspector in order to cause him to go to the farm and investigate. Who is this person, or persons? What are their interests in the condition of the farm? In what way has *their* health or safety been threatened? Do they have a financial or political interest in initiating this complaint? Or some other motive?

We do not live in the former GDR {East German Democratic Republic}. City Hall is not staffed by Stasi members who exploit complaints from anonymous informers to suppress the freedom of the citizens.

It sets a bad example, and starts us down the slippery slope of fascism, when people can secretly bring grief down upon another with a whisper to a government official. If some neighbor has been aggrieved, shouldn't he or she have first tried to speak with their neighbor?

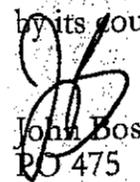
The Board of Health should not be used as a proxy in such a case and no complaints should be processed unless they are made by an identifiable person. Anything less is un-American.

CONCLUSION

For the foregoing reasons, the Order should be withdrawn and the Complaint rescinded. The Defendant has met the standard as a Farm, it is entitled to employ the statutory exemption, the Ordinance as applied in this case is overbroad, the items complained of are being used for a legitimate agricultural purpose and are not abandoned, entry was gained illegally and the evidence is not admissible, there is no compelling threat to public health or safety, and City Hall should not be encouraging people to sow discord by pursuing anonymous complaints.

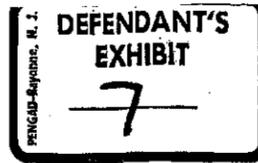
September 1, 2016
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Respectfully submitted
Arn-How Farm, Defendant
by its counsel,



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MASSACHUSETTS "RIGHT TO FARM" LAWS



The Massachusetts General Laws contain three different chapters which provide farmers relief from excessive regulation or nuisance complaints. They are:

CHAPTER 40A. "ZONING"

This section of zoning law restricts areas which cities and towns may regulate relative to commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture. This section relates to many areas, including farm buildings, retail farm stands, etc. on parcels of 5 acres or more or on parcels of 2 acres or more that meet income requirements. There is a great deal of specific caselaw in our files relative to court decisions which effect agriculture. The first paragraph of M.G.L. Chapter 40A, Section 3 reads as follows:

Chapter 40A: Section 3. Subjects which zoning may not regulate; exemptions; public hearings; temporary manufactured home residences

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law 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, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, 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 land of the owner or lessee, 25 per cent 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, or at least 25 per cent of such products for sale, based on either gross annual sales or annual volume, have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 per cent 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, aquaculture, silviculture, horticulture, floriculture or viticulture, whether by the owner or lessee of the land on which the facility is located or by another, except that all such activities may be limited to parcels of 5 acres or more or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least \$1,000 per acre based on gross sales dollars in area not zoned for agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as 1 parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to the General Laws. For the purposes of this section, the term "agriculture" shall be as defined in section 1A of chapter 128, and the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

CHAPTER 111 "PUBLIC HEALTH", SECTIONS 1, 125A AND 143

Public health statutes provide a key protection for farming operations conducting generally accepted farming activities from being deemed a nuisance by the Board of Health. Such accepted activities include the spreading of manure on farmland, noise from farm operations, etc. The three relevant sections of Chapter 111 are Section 1 (Definitions) which contains a definition of "Farming" or "Agriculture", Section 125A that contains the nuisance exemption language, and Section 143 which removes piggeries from the exemption in Section 125A. The laws are as follows: