

Commonwealth of Massachusetts  
County of Essex  
The Superior Court

CIVIL DOCKET# **ESCV2004-00196**

Town of Newbury, by and through the Zoning Board of Appeals,  
Plaintiff(s)

vs.

David Brocher and Stanley Price, Jr.  
Defendant(s)

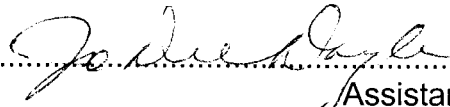
**JUDGMENT ON FINDING OF THE COURT**

This action came on for trial before the Court, Elizabeth Fahey, Justice,  
presiding, and the issues having been duly tried, and the Court having rendered  
"Findings of Fact, Rulings of law and Order of Judgment",

It is **ORDERED and ADJUDGED:**

That the plaintiff, Town of Newbury, by and through the Zoning Board of  
Appeals, take nothing, that the action be dismissed on the merits, and that  
the defendants, David Brocher and Stanley Price, Jr., recover of the  
plaintiff its costs of action, as provided by law.

Dated at Newburyport, Massachusetts this 9<sup>th</sup> day of May, 2006.

By: .....  .....  
Assistant Clerk

**COMMONWEALTH OF MASSACHUSETTS**

**ESSEX, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
NO: 2004-196 B**

**TOWN OF NEWBURY, by and through the  
ZONING BOARD OF APPEALS,  
Plaintiff**

**vs.**

**DAVID BROCHER and STANLEY PRICE, JR.,  
Defendants**

**FINDINGS OF FACT, RULINGS OF LAW AND ORDER OF JUDGMENT**

This action is brought by the plaintiff, the Town of Newbury (Town), by and through its zoning board of appeals (Board), seeking declaratory relief and judicial review of the Board's decision in the case of Mr. David Brocher (Brocher). The Town requests that this court find that Brocher's appeal of the Board's cease and desist order against him was not constructively granted pursuant to M.G.L. c.40A, §15 or, in the alternative, that this Court's review of the Board's denial of Brocher's appeal on its merits pursuant to M.G.L. c.40A, §17. For the reasons stated herein, judgment is to enter for the defendants.

**FINDINGS OF FACT**

By a preponderance of the evidence, I find the following facts:

I accept all of the agreed upon facts stated in the Joint Pre-trial Memorandum. The defendant, David Brocher, owns and operates his business, BC Landscaping, from property located at 83 Hanover Street in the Town of Newbury. David Brocher was a tenant on the property owned by his brother-in-law Stanley Price, Jr. and Brocher's sister from 1988 until October 2003<sup>1</sup> when

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<sup>1</sup> Although the Agreed-Upon Facts in the Joint Pre-Trial Memorandum indicate that Brocher's purchase was in October 2002, I accept his trial testimony.

Brocher purchased the property from them. At all relevant times, 83 Hanover Street is located in a district that has been designated “residential/agricultural.” There is no signage indicating that there is a business in operation on the property. The property is a rear lot located off the end of the easement roadway and is obscured from view from Hanover Street by distance, an embankment, and trees. In 1990, Brocher applied for a building permit for two storage trailers to be put on the property. On December 11, 1990, Brocher was issued a building permit to install two storage trailers on the property for “agricultural purposes.” Brocher contends that he informed Charles Powers, the building inspector in 1990 who is now deceased, that he wanted to install trailers on the property for the storage of his landscaping equipment. Brocher further contends that Powers told Brocher that such a use was “agricultural.” In 1990, the defendant installed two 10' by 20' trailers on the property. Brocher contends that he has used the trailers for the storage of his landscaping equipment since they were installed in 1990. Brocher contends that he has, from 1990 until the present, used the property in the morning before going offsite to clients’ homes for their landscaping projects. Brocher also contends that his clients do not come to the property for business and there is no advertising or signs for the business on the property. Brocher maintains the office for his landscaping business at 41 Middle Road in Newbury.

In 2001, Barry Davis, a resident of Hanover Street in Newbury, complained to the Town that Brocher was running a landscaping business from the property. Worthen Taylor, Building Inspector for the Town of Newbury in 2001, claims that he first became aware that Brocher was running a commercial business in a residential/agricultural zone in September 2001 as a result of Davis’s complaint. The Town contends that this was the first time that it received notice that Brocher was

running a landscaping business in a residential/agricultural zone.<sup>2</sup> On September 9, 2003, a Cease and Desist Order was issued by the Building Inspector for the Town of Newbury, ordering defendant Brocher to cease and desist any and all lawn mowing and/or landscaping business at 83 Hanover Street, as this property is in a residential/agricultural district. The Cease and Desist Order informed Boucher that his failure to comply with the order by September 20, 2003 would result in a fine of \$100.00 per day.

Defendant Brocher, through counsel, filed a notice of appeal on October 8, 2003, challenging the Cease and Desist Order. A hearing on the Brocher matter was scheduled by the Board for November 18, 2003, but continued to December 18, 2003 at Brocher's request. No written extension of the hearing was executed. On December 18, 2003, the Board held a hearing on the matter, at which Brocher was present with counsel. The Building Inspector who issued the permit, Charles Powers, was deceased at the time of the Board hearing. Brocher argued first that his business was agricultural - as a result of the plantings he claimed to maintain - and could be considered a permitted use in agricultural/residential zone. He further argued that, in any event, his use was permitted due to expiration of the statute of limitations. At the conclusion of the December 18, 2003 hearing, the Board decided that it needed more information and, as such, wanted to take more time to make a decision. One or more of the Board Members wanted to, and did, get advice from Town Counsel as to whether running a commercial landscaping business could be considered agricultural. The Board's minutes reflect the following:

[Chair]: If we are not comfortable making a decision tonight, we can continue to allow time to talk to Jim. [Board Member]: I'd like to do that, just the decision, not

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<sup>2</sup> The Town's Zoning By-Laws do not have any mechanism for any "use" variance to be issued with respect to the zone district.

the hearing, so I can look into this matter a little more. Mary Hyde - yes I'd would also [sic]. [Chair]: We can postpone our decision to the next meeting (January 29<sup>th</sup>). [Board Member]: There are matters we heard tonight that we didn't know previously. [Chair]: I wanted to hear both sides and didn't want to cloud it with anything from attorneys. Atty. Griffin advised that he would not fight the continuance and if any further information was needed, he would be glad to provide it. [Board Member]: Moved to continue the decision to the next meeting to allow for more time for investigation, seconded by [Chair] and vote unanimously.

Brocher and his counsel were present during, and participated in, this discussion and knew or should have known that the meeting was sought to be, and then was, continued to January 24, 2004, a date beyond the 100 days since Brocher filed his appeal. They did not express any objection to the continuance and I accept that they acquiesced in it.

The written minutes of the December 18, 2003 hearing have since been filed with the Town Clerk. On January 20, 2004, Brocher's counsel sent a letter to the Town of Newbury giving notice that it was his position, pursuant to M.G.L. c.40A, §11 and §15, that the 100 day period by which the Board was required to make its decision had expired. This January 20, 2004 letter from defendant further alleged that his appeal of the September 9, 2003 order was constructively granted as a result of the 100 day period expiring. Brocher's counsel sent a copy of this letter to all the abutters.

On January 29, 2004, the Board reopened the continued hearing on the Brocher matter. No one appeared on behalf of Brocher at the hearing on January 29, 2004. Chairwoman Noyes called the Board's attention to the letter received from the petitioner's counsel advising the Board that more than 100 days had passed from the time of the filing of the petition, and that the petitioner believed that he was entitled to a constructive grant of the petition. A discussion then ensued at the meeting as to whether the petitioner had agreed to a continuance at the last meeting. The Board decided that

it had acted in good faith and believed that the petitioner had verbally agreed to a continuance in accordance with the terms of the statute, and that the hearing should now continue on the merits of the relief requested. The Board then turned to a discussion of the facts before them from the prior meeting. At the conclusion of the discussion it was moved by board member Evelyn Noyes, seconded by board member Dan Gurlitz, and voted unanimously that the Board deny defendant Brocher's petition. In so voting, the Board found that the primary activity of the petitioner was the operation of a landscaping business in a residential/agricultural zone; that such operation included the trucking, operation, and storage of machinery at the site, as well as the storage of loam, gravel, landscaping materials including pots, and the placement of two large metal storage containers at the site. The Board found that the Newbury zoning bylaw prohibited such activity in a residential/agricultural zone. The Board further found that the growing of plantings at the site was only secondary and incidental to the primary use. The Zoning Board found that Brocher failed to prove that his use of the property was open. The Board issued its decision upholding the Cease and Desist Order after the January 29, 2004 meeting. To date, Brocher continues to operate his commercial landscaping business at the subject property.

I do not credit Mr. Green's memory of the conversation that Mr. Brocher had with the building inspector. I credit Mr. Brocher's memory of that conversation and, to his credit, Mr. Brocher's memory was less generous to himself than Mr. Green's. I just do not believe that someone would have a memory, the way that Mr. Green supposedly did, of a conversation fifteen years ago that did not involve him. I accept that Mr. Brocher told Building Inspector Powers in 1990 that he wanted to get a permit to put a couple of storage containers on the land for his landscaping business. I accept that Brocher told Powers that he did landscape construction and maintenance, had a lot of

plantings, and that he wanted to store all his landscaping materials and equipment at 83 Hanover Street.

It was a five-minute conversation according to both him and Mr. Green, so I do not find that there was discussion about Brocher's commercial use of the property. All that happened in five minutes is that Brocher filled out an application, had a brief conversation with the Building Inspector and answered honestly all the Building Inspector's questions concerning the permit. What he ended up with on December 11, 1990 was a permit to install two 10' x 20' storage trailers to be used for agricultural purposes. The permit does not effect any commercial use and I do not accept that there was any conversation concerning commercial use, then or since being made of that property. Frankly, it is not even necessary to determine whether Mr. Powers was on notice that Brocher was then commercially using the property. That is all the testimony that Mr. Brocher gave concerning his conversation with the Building Inspector Powers, so I do not accept that Mr. Powers was giving, or had even been requested to give, permission to operate a commercial landscaping business out of that property. Even if there had been such a conversation, the Building Inspector cannot provide legal authority or permission to vary the legal use that can be made of the land.

Mr. Brocher brings back to 83 Hanover Street the yard waste from the yards that he maintains. He leaves it in a big pile (10' x 20' x 8') turns it over once in a while, making it into compost and mulch. I do not accept that such activity is a substantial or primary use of that property for agricultural purposes. That landscaping supplies, gravel, loom and pots might be delivered there is not enough to make it an agricultural use. It is not enough that deliveries are made there and it does not show that the Town had any notice of Brocher's commercial use of the property prior to receiving Davis's complaint.

The only substantial use Brocher has made of that land, running a commercial landscaping business, is not legally permitted in a residential/agricultural zone. I accept that at all relevant times Mr. Brocher has had, at the end of each season, no more than fifty leftover plants; he does not harvest plants from his land for landscaping; he does all the landscaping work off site; at the end of each landscaping season, he puts the few plants that are leftover into dirt at 83 Hanover Street, no more than fifty a year, to winter over so that they can be used the next season. I do not accept that he really does any cutting of any firewood on his property. This amount of compost, an 8' x 10' x 20' size pile, together with the planting of no more than fifty plants, is not enough to make that actively a substantial agricultural purpose. The only real use that Mr. Brocher makes of the land is for the operation of his commercial landscaping business. There is no way that his operation can be grandfathered in because his use of it would have to have been in effect since 1959 and it was not. He did not begin to use the property in this fashion until 1988. So in terms of statute of limitations, an issue raised by the defendants, there is no statute of limitations issue because the building inspector cannot give permission for, or authorize, a non-legal use. This has always been and remains a residential/agricultural zone and, since 1988, the land has not been used for residential or agricultural purposes. It is only being used for a commercial landscaping purpose.

With respect to Brocher's appeal of the Cease and Desist Order, the Board hearing was originally scheduled for November 20, 2002. Mr. Brocher, on his own, requested a continuance, which the Board granted, to December 18, 2002. I accept that at the December 18<sup>th</sup> meeting there was basically the conversation that is outlined in Exhibit 7. I accept that Mr. Brocher and his lawyer were present and the two of them heard the request by the Board to continue the hearing for purposes of decision-making to the January meeting, and that everybody, including Mr. Brocher, was aware

that, if that occurred, it would be beyond the 100 days. If Brocher was not aware of it, he should have been. I do accept that what Brocher's counsel said was as contained in the minutes, i.e., "I will not fight you on the continuance and if you want any other information I'll provide it" or words to that effect. This court appreciates that the members of the Board are conscientious lay people, volunteering their time and who were not attuned to the difference between "I won't fight you" and an agreement to the continuance. The minutes reflect, and I accept, that without any objection by Brocher, the Board Members stated that the hearing would be continued. Everybody was on notice, including Mr. Brocher, that the hearing was continued to the next hearing date. which was also stated openly at the meeting, of January 29, 2004. So anyone present was on notice that the hearing was continued for all purposes to that date.

The defendants also raised an issue of a possible open meeting law violation. I do not find that there were any open meeting laws violations. I accept that at least one and perhaps all three of the Board members wanted information from Town Counsel. The practice then in Newbury was that Town Counsel or the building inspector would only attend the ZBA meetings if they were invited or their attendance was requested. I accept that Town Counsel was not there at this particular meeting. It strikes me as part of an attorney/client relationship that a member of the Board may seek legal advice of Town Counsel. I accept that at least one member of the Board had a conversation with Town Counsel outside the Board meeting concerning whether the storage of plants or the use of land for a commercial landscaping business brought the use within the "agricultural" designation. Board members ought to be encouraged to get legal advice from the town's lawyer, and I do not think the public always has the right to be in on those conversations. It is fine if it occurs during the meeting; the Board may not always go into executive session to get that legal advice, but I do not

think it is a violation of the open meeting law for one or more Board members to individually obtain legal advice from Town Counsel outside of a regularly scheduled public meeting.

I accept that 83 Hanover Street at all relevant times is open land, has no residence on it, no building or structure at all except for a small shed and, since 1990, the two trailers. The property has no frontage on Hanover Street, and the access to that property is only by way of the 538' long easement. All one can see from Hanover Street is a little bit down the easement, an unpaved roadway. I accept that, from the easement, one cannot really see onto the property that is now owned by Mr. Brocher and is at issue in this case. I accept that the Town was not on notice of the use that Mr. Brocher was making of this property until contacted by Davis in 2001. I accept that, even though his use of the property for the operation of his commercial landscaping business may well have been open and notorious to the abutters who could have, for at least some period of years, seen cars or small pick-up trucks driven by the employees of Mr. Brocher's business entering in the morning and leaving at the end of the work day and seeing those same employees driving dump trucks, pick-up trucks, landscape (vehicular) equipment when leaving the property shortly after they had arrived in other vehicles and then returning at the end of the work day. That open and notorious use as to the abutters was not known to Town officials until Mr. Davis complained to the Town in 2001. It is not disputed that Mr. Brocher uses the property for the running of a commercial landscaping business. He stores vehicles and landscaping equipment there as well as landscaping materials (paving stone/bricks/plants/gravel, etc.) of all kinds. He and his employees leave the 83 Hanover Street property each work day to go offsite and work at whatever landscaping jobs are scheduled. He does not begin and end his day working at his desk at his home; 83 Hanover Street is really the place where his business is operated. Of particular importance to 83 Hanover Street not

having any substantial or primary or major agricultural use is that there is no water source on that property. One cannot have the raising or nurturing of plants as anything more than an incidental and very minor use of property without water.

I accept that, when Mr. Brocher bought the property in October 2003, he was already on notice that the Town believed that his commercial use of the property was illegal and that the Town wanted him to shut down his illegal business at that location. By the time he bought the property, not only was he notice of the Town's position, he had sought legal advice as what to do. Notwithstanding that he knew that the Town thought his use was illegal, and that he wanted to contest this and sought legal advice to help him do that, he went ahead and bought the property anyway.

#### **RULINGS OF LAW**

I find that the Mr. Brocher's unlawful use is not one is protected by 40A, §§6 or 7. Permits, including the permit issued in this case, are not to be read expansively when considering the extent of their reach for purposes of either of those sections of the statute. I accept that Mr. Brocher's use was in violation and was never permitted by Exhibit 2, the building permit that issued to him in 1990 to install two trailers. But for the constructive grant issue raised by the defendants, judgment would issue for the plaintiff.

There is no dispute in this case that, unless the board complied with 40A, §15, the permit must be constructively granted.

M.G.L. c.40A states:

The decision of the Board shall be made within 100 days after the date of the filing of the appeal, application or petition except in regards to special permits provided in Section 9. The required time limits for a public hearing in said action may be

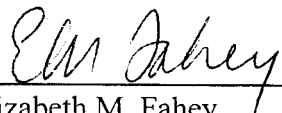
extended in written agreement between the applicant and the board of appeals. A copy of such agreement shall be filed in the office in the office of the City or Town Clerk. Failure to act within said 100 days or extended time if applicable, shall be deemed the grant of the appeal application or petition.

Given the case law that has been provided to me by defendants' counsel, constructive granting of Brocher's application must be allowed, albeit reluctantly and only because of two recent cases. Kupperstein is a rescript opinion and so has no precedential value. See Kupperstein v. Planning Board of Cohasset, 66 Mass. App. Ct. 905 (2006). Amberwood does not stand for the issue for which the defense cited it. See Amberwood Dev. Corp. v. Bd. of Appeals of Boxford, 65 Mass. App. Ct. 205 (2005). But the other two cases that the defendants cite, Craig and Devine, are on point. See Craig v. Planning Bd. of Haverhill, 64 Mass. App. Ct. 667 (2005) (minutes of a municipal meeting do not satisfy the requirement for a written extension agreement for purposes of construction approval under the subdivision control of law). Even if Craig can be distinguished from the instant case because of the strict requirement of the subdivision control law, the more recent case of Devine v. Bd. of Health of Westport, 66 Mass. App. Ct. 128 (2006), requires that constructive approval be granted due to the plaintiff's failure to strictly comply with the mandatory statutory requirement that a decision be rendered within 100 days. And given especially Devine, which concerns a Board of Health issue and a requirement that a written decision be made within 45 days, it strikes me, reluctantly, that the constructive granting has to be applied in this case. See Devine, 66 Mass. App. Ct. at 132. Yes, there was a writing in the sense of a mention in the Board minutes, and the minutes were filed with the Town clerk. However, an abutter cannot be expected to know that. The purpose of notice is to give notice to, not just the Board and the applicant, but notice to the world. It is unfair to expect that the world, by having to look at the minutes, would be on notice of an additional

granting of time. Given this statutory language and the very recent case law, judgment must enter for the defendants because the relief that they sought must be constructively granted.

**ORDER OF JUDGMENT**

Judgment is to enter for the defendants.

  
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Elizabeth M. Fahey  
Justice of the Superior Court

Dated: May 9, 2006