

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT DEPARTMENT
CASE NO. 2676CV00070

BERKSHIRE CONCRETE CORP.,

Plaintiff/Defendant-in-Counterclaim,

v.

THE TOWN OF DALTON; THE DALTON
PLANNING BOARD; ZACH R. MCCAIN,
III, JARRED MONGEON, DONALD A.
DAVIS, JR., DENNIS T. CROUHWELL,
and ROBERT COLLINS, solely in their
capacities as members of THE DALTON
PLANNING BOARD,

Defendants,

And

BRIAN DUVAL, in his capacity as Building
Commissioner/Zoning Enforcement Officer for
the TOWN OF DALTON, and the DALTON
BOARD OF HEALTH,

Plaintiffs-in-Counterclaim.

VERIFIED COUNTERCLAIMS

Plaintiff-in-Counterclaim Brian Duval, in his capacity as Building Commissioner/Zoning Enforcement Officer for the Town of Dalton (the “Building Commissioner” and/or “ZEO”) and Plaintiff-in-Counterclaim, the Dalton Board of Health (the “BOH”)¹ (collectively, the “Town”), hereby submit the following counterclaims in response to the Plaintiff/Defendant-in-Counterclaim, Berkshire Concrete Corp.’s (“BCC”) Complaint:

¹ The Building Commissioner and BOH join this matter as necessary parties pursuant to Mass. R. Civ. P. 13(h) and 19(a).

COUNTERCLAIMS

PARTIES

1. The Building Commissioner is a plaintiff-in-counterclaim. The Building Commissioner serves as the Zoning Enforcement Officer for the Town of Dalton. The Building Commissioner's principal place of business is Dalton Town Hall, 462 Main Street, Dalton, MA.

2. The BOH is a plaintiff-in-counterclaim. The BOH is a duly appointed municipal board with a principal place of business at Dalton Town Hall, 462 Main Street, Dalton, MA.

3. The defendant-in-counterclaim Berkshire Concrete Corp. is a Massachusetts corporation with a principal place of business at 550 Cheshire Road, Pittsfield, MA.

FACTS

4. During the later part of 2024, BCC conducted mining and earth removal activities on a parcel of land located at Dalton Assessor's Map 105-16 without any approval from the Town of Dalton.

5. BCC's unpermitted mining activities on Lot 105-16 resulted in extensive clearing of trees and vegetation creating a corridor for wind to carry dust from BCC's property onto residential properties in the abutting neighborhood.

6. The Town's Health Department began receiving complaints about dust and sand impacting the abutting residential neighborhood on Deming Street and Florence Street during January 2025.

7. During February of 2025, the Town's Health Agent consulted with the Massachusetts Department of Environmental Protection ("MassDEP") regarding enforcement authority relative to air quality.

8. MassDEP sent a letter to the Town's Health Agent on or about February 21, 2025 outlining the BOH's enforcement authority and including recommendations for means of performing air quality testing. A true and accurate copy of the February 21, 2025 letter is attached hereto as Exhibit A.

9. During early March 2025, the Health Agent received a complaint from the owner of 30 Prospect Street regarding dust and sand covering his property.

10. Based on the ongoing reports of nuisance conditions created by dust and sand coming from BCC's property, the BOH issued a nuisance abatement order to BCC on or about March 12, 2025. A true and accurate copy of the Nuisance Abatement Order is attached hereto as Exhibit B.

11. BCC's counsel sent a letter to the BOH in response to the Nuisance Abatement Order on or about March 26, 2025, indicating that BCC would cease all mining operations on the Dalton Pit and would design and implement a dust mitigation plan. A true and accurate copy of the March 26, 2025 letter is attached hereto as Exhibit C.²

12. On or about April 10, 2025, the BOH sent a letter to BCC indicating that failure to implement a satisfactory dust mitigation could result in the issuance of fines pursuant to G.L. c. 111, Section 31C. A true and accurate copy of the April 10, 2025 letter is attached hereto as Exhibit D.

13. On or about June 13, 2025, BCC's counsel emailed the Health Agent indicating that all site improvements contained in the Dust Mitigation Plan were completed.

² Due to the automatic date updating software applied to the original letter sent by BCC's counsel to the BOH, Exhibit C reflects the date of May 15, 2026, as this was the day the document was put into PDF format. However, when the BOH received the original version of this letter it contained the date stamp of March 26, 2025.

14. The BOH retained the services of Berkshire Environmental Consultants, Inc. (“BEC”) to review BCC’s Dust Mitigation Plan.

15. On or about August 14, 2025, BCC submitted an as-built plan to the Town entitled “Topographic Survey Prepared for Berkshire Concrete.”

16. On or about October 1, 2025, BEC prepared a written report for the BOH summarizing the shortfalls of BCC’s Dust Mitigation Plan. A true and accurate copy of BEC’s October 1, 2025 report is attached hereto as Exhibit E.

17. Importantly, BEC determined: “The submitted Topographic Survey and accompanying completion letter lack sufficient detail of an effective Dust Mitigation Plan and do not sufficiently address the BOH Order to implement a Dust Mitigation Plan outlining both immediate and long-term actions to address the ongoing impacts.” See Exhibit E.

18. BEC’s report includes numerous recommendations for inclusion as part of an updated Dust Mitigation Plan.

19. Despite numerous requests and orders from the BOH, to date, BCC has failed and/or refused to incorporate any of BEC’s recommendations into the Dust Mitigation Plan.

20. On or about October 15, 2025, the Building Commissioner sent a zoning enforcement order to BCC ordering that BCC restore the entirety of Lot 105-16. A true and accurate copy of the October 15, 2025 zoning enforcement order is attached hereto as Exhibit F.

21. On or about February 24, 2026, the Building Commissioner sent a second enforcement order to BCC, again ordering full restoration of Lot 105-16. A true and accurate copy of the February 24, 2026 enforcement order is attached hereto as Exhibit G.

22. On or about April 21, 2026, the Building Commissioner sent another enforcement order to BCC requiring submission of a plan for complete restoration of Lot 105-16 by April 24, 2026. A true and accurate copy of the April 21, 2026 order is attached hereto as Exhibit H.

23. Beginning around November 19, 2025 and continuing through February 25, 2026, BCC participated in a public hearing process before the Dalton Planning Board seeking a special permit allowing BCC to mine in the same areas that resulted in the dust nuisance conditions impacting the abutting neighborhood.

24. On or about March 18, 2026, the Planning Board voted unanimously to deny BCC's special permit application without prejudice. A true and accurate copy of the Planning Board's decision is attached hereto as Exhibit I.

25. On or about March 2, 2026 and March 19, 2026, the BOH issued fines to BCC in the amount of \$5,000 and \$10,000 pursuant to G.L. c. 111, Section 31C. A true and accurate copy of the fines is attached hereto as Exhibit J.

26. On or about March 31, 2026, the Health Department received a written complaint from the owner of 140 Raymond Drive showing dust/sand spikes on an air monitor and dust/sand on a pool cover. A true and accurate copy of the March 31, 2026 complaint is attached hereto as Exhibit K.

27. On or about April 2, 2026, BCC, through its counsel, requested an appeal of the fines before the BOH.

28. The BOH held a public hearing on or about April 28, 2026 regarding BCC's appeal of the fines.

29. The BOH voted unanimously to uphold the fines. A true and accurate copy of the BOH's decision is attached hereto as Exhibit L.

COUNT I – ENFORCEMENT, PURSUANT TO G.L. c. 40A, §7

30. The Town restates and realleges paragraphs 1 through 29 as if fully restated herein.

31. As of the date of the verification of this Counterclaim, BCC has failed and/or refused to comply with the Building Commissioner's zoning enforcement order.

32. BCC's refusal to completely revegetate Lot 105-16 continues to result in dust and sand nuisance conditions adversely impacting the abutting residential neighborhood during wind events.

33. The Town is entitled to enforcement of its validly promulgated Zoning By-Law.

COUNT II – PUBLIC NUISANCE

34. The Town restates and realleges paragraphs 1 through 33 as if fully restated herein.

35. BCC's mining operations during the later part of 2024 and early 2025 resulted in the creation of dust and sand nuisance conditions adversely impacting the abutting residential neighborhood.

36. BCC was ordered by the BOH pursuant to G.L. c. 111, Section 122 and G.L. c. 111, Section 31C to cease its mining operations and implement a dust mitigation plan for its operations adequate to abate the dust nuisance conditions.

37. To date, BCC has failed and/or refused to address the concerns with the dust mitigation plan raised by the BOH's peer reviewer, BEC.

38. To date, BCC has failed to implement a dust mitigation plan adequate to abate the dust and sand nuisance conditions caused by its mining operations.

39. The Town is entitled to injunctive relief compelling BCC to abate the nuisance conditions it created which continue to adversely impact the public health and impair the comfort and convenience of the abutting neighborhood.

COUNT III – BREACH OF CONTRACT

40. The Town restates and realleges paragraphs 1 through 39 as though fully restated herein.

41. Assuming *arguendo* that the Memorandum of Decision appended to the Complaint as Exhibit B constitutes a binding contract, BCC has breached numerous provisions of said contract.

42. BCC's breaches of said contract have caused damages to the Town.

WHEREFORE, the Plaintiff-in-Counterclaim respectfully requests the Court to:

- A. Issue a preliminary injunction ordering BCC to fully restore Lot 105-16 and otherwise implement a dust mitigation plan sufficient to abate the ongoing nuisance conditions impacting the abutting neighborhood;
- B. Enter judgment in favor of the Town granting permanent injunctive relief compelling BCC to implement a comprehensive dust mitigation plan adequate to prevent any future nuisance conditions;
- B. Award the Town all fines assessed against BCC by the Building Commissioner and BOH;
- C. Award the Town all of its costs and counsel fees in the preparation and prosecution of this matter; and
- D. Award such other relief as the Court deems just and equitable.

Respectfully submitted,

DEFENDANTS,

TOWN OF DALTON AND THE DALTON
PLANNING BOARD,

By their attorneys,



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Dated: May 15, 2026

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CERTIFICATE OF SERVICE

I, A. Alexander Weisheit, hereby certify that on the below date, I served a copy of the foregoing *Counterclaims* by electronic filing on all counsel of record.

Dated: May 15, 2026



A. Alexander Weisheit