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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

**OHIO DEPARTMENT OF
AGRICULTURE**

Plaintiff

vs.

DARRELL ENFINGER, ET AL.

Defendants

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CASE NO. 2017 CVH 00898

Judge McBride

DECISION/ENTRY

Office of the Ohio Attorney General, Assistant Attorneys General James R. Patterson, Angela M. Sullivan, and Lydia Akro Zigler, counsel for the plaintiff Ohio Department of Agriculture, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215

Darrell Enfinger and Kara Enfinger, defendants appearing pro se, 2217 Donald Road, Bethel, Ohio 45106

This cause is before the court for consideration of the plaintiff Ohio Department of Agriculture's motion filed on July 20, 2017 seeking a preliminary injunction. The court held a hearing on the motion on August 11, 2017, and at the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of the parties, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The present case involves a dispute over the right of the plaintiff Ohio Department of Agriculture (hereinafter referred to as "ODA") to cut down and chip trees infested with the Asian longhorned beetle ("ALB") which are located on property owned by the defendants Darrell Enfinger and Kara Enfinger.

The ALB is an invasive insect that was brought to Ohio from Asia and which attacks and destroys 13 types of Ohio hardwood deciduous trees, including maple, birch, poplar, and willow trees, among others. The ALB is a large beetle of .75 to 1.5 inches in length. Due to its large size, the ALB cannot fly long distances. As such, the primary way in which it spreads is by flying a short distance to a nearby tree or from human activity moving infested tree material to new locations.

The ALB harms trees during all of its life cycles, including the egg, larvae, and adult stages. It begins when an adult female chews tree bark and deposits eggs into the bark. The eggs then hatch and the larvae eat the heartwood of the tree. After the larvae become an adult, they eat their way out of the tree, leaving round holes in the tree measuring approximately .75 inches. In time, the ALB will kill the host tree. The ALB has no natural predators in Ohio, and if left to its own devices, all of Ohio's hardwood deciduous trees could be at risk of death.

The ALB was discovered in Ohio in the summer of 2011, and the ODA has been trying to eradicate it from Ohio since then. To eradicate the ALB in Ohio and to prevent it from spreading further, the ODA works with the United States Department of Agriculture ("USDA"). Specifically, the ODA works with the Animal and Plant Health

Inspection Service within the USDA. The ODA follows the ALB Cooperative Eradication Program (the "Program"), designed by the USDA, to eliminate the presence and threat of the ALB in Ohio.

When the ALB was discovered in Ohio, the governor immediately signed an order putting a quarantine in place. The ODA then immediately asked the USDA to come in and assist with the ALB infestation. Since the Program was put in place, there has been a significant reduction in the ALB population. However, the ongoing battle against the ALB still requires significant resources, and in the 2017 to 2018 fiscal year the state of Ohio and the USDA will spend more than \$72 million on eradicating the ALB in Ohio.

Under Ohio statutory authority, the ODA quarantines certain areas and certain properties in the state. When the ODA puts a quarantine in place, it prohibits property owners from moving certain regulated articles, such as trees infested with the ALB, which are on the premises. When the ODA places a property under quarantine, the ODA prohibits the property owners from moving any tree, plants, or firewood from the property.

Under the Program, the ODA works with a state surveying contractor, The Davey Tree Export Company ("Davey"), to inspect quarantined areas and identify trees infested with the ALB. To identify an infested tree, a Davey surveyor climbs the tree and looks for signs of the ALB. Signs include oval shaped egg sites in the bark, open wounds, and perfectly round exit holes. When the Davey surveyor positively confirms that a tree is infested, the surveyor marks the tree, records the GPS coordinates of the tree, measures the tree, and enters the information into an ODA database. If a Davey

surveyor finds a tree that is suspected to be infested, but the surveyor cannot confirm it, then a plant health inspector from ODA comes to investigate the suspicious tree and to determine whether it is infested.

When trees are identified as being infested with ALB, then Beach's Trees Selective Harvesting, LLC cut and remove the infested trees pursuant to a contract it has with the USDA. The only way to completely destroy the ALB at all life stages in an infested host tree is to chip the tree so that none of its wood measures larger than one inch in any dimension. The ODA prefers to chip the trees on site the same day that they are cut down so as to reduce the risk that the ALB may infest new trees. Sometimes, however, the infested tree is too large for an onsite chipper and must be driven to a chipping yard. In such a case, the tree is covered in a tarp to prevent an ALB from escaping and is chipped offsite within 24 hours. The property owner is permitted to keep the chips and do with the chips as the owner pleases. Once all of the infested trees are removed, the property owner can use any of the remaining trees for his or her own purposes.

In order for the Program to be determined to be a success in Ohio, infested areas must be ALB-free for five years. That means that follow-up surveys conducted in ALB infested areas must not show any new evidence of infestation.

The ALB cannot be completely eradicated from infested trees by use of chemical pesticides as they are not 100% effective at killing the ALB in all of its life cycles. In fact, no pesticide is labeled as effective for eradicating every ALB in an infested tree. Under the Program that the USDA developed, the only time pesticides are used is at the very end of the eradication process, after all infested trees have been destroyed and no

new infested trees have been found for years. The pesticides are used to protect against any ALB infested trees that the ODA was not able to identify and destroy. In other words, it acts as a preventative measure against further infestations. Similarly, the USDA has not approved kiln drying infested trees in order to completely eradicate the ALB. Other states that have implemented the Program, which use the chipping method, have successfully eradicated the ALB.

When a specific property is placed under quarantine, then the ODA sends the property owner a letter that provides notice of the quarantine and its strictures. It is the ODA's policy to contact the owner, explain the Program, and gain the owner's cooperation. When an owner does not consent, then the ODA withdraws from the property and pursues legal options.

The ODA began surveying the trees on the defendants' property in May of 2017. The defendants own property at 2217 Donald Road in Bethel, Ohio. On May 31st, the ODA sent a legal notice to the defendants informing them that there were ALB- infested trees on their property.¹ It further advised that the ODA was quarantining their property.² The letter also informed the defendants that tree removal contractors would develop a site-specific work plan prior to any tree removal on the property.³ The defendants were informed that they were legally required to prevent the further spread of the ALB.⁴ The letter advised the defendants that they were required to adhere to the following:

"(1) Do not cut, move, or remove any infested trees, firewood, or other regulated articles from your property;

¹ Pls. Ex. 1.

² Pls. Ex. 1.

³ Pls. Ex. 1.

⁴ Pls. Ex. 1.

(2) Regulated trees include all species of the following genera: Acer (maple), Aesculus (buckeye), Albizia (mimosa), Betula (birch), Celtis (hackberry), Cercidiphyllum (katsura), Fraxinus (ash), Koelreuteria (golden raintree), Platanus (sycamore), Populus (polar), Salix (willow), Sorbus (mountain ash), and Ulmus (elm). Movement or removal of these trees, firewood, or other parts of the regulated trees on your property is a violation of this quarantine."⁵

Brian Zaborski, ODA Plant Health Inspector, met with the defendant Darrell Enfinger two times in early June. Zaborski informed Darrell Enfinger that the ODA had identified several infested trees on his property. As the ODA continued to survey the defendants' trees, they discovered more trees that were heavily infested.

After finding a live ALB near the end of June, which is a rarity, Mr. Zaborski walked with the defendants through their property to show them some of their findings along the edge of the property. Mr. Zaborski showed the defendants the beetle, as well as other evidence of damage from the ALB. Mr. Enfinger was visibly upset about the ALB infestation.

In late June, Mr. Zaborski received a phone call from a surveyor on the defendants' property reporting that one of the marked trees was cut. All that remained was a stump.⁶ The next day, another marked tree on the property was inexplicably cut down. That particular tree was left where it fell.⁷

Mr. Zaborski received a voicemail from Mr. Enfinger desiring a meeting. Although Mr. Zaborski tried to call Mr. Enfinger back several times, Mr. Enfinger did not answer Zaborski's calls and his voicemail box was full.

⁵ Pls. Ex. 1.

⁶ Pls. Ex. 5.

⁷ Pls. Ex. 8.

On July 10th, Ken Reed, Inspection Manager for the Program at ODA, met with the defendants to explain the Program. Mr. Reed went to the property with a deputy because he had learned from other ODA employees' prior contact with Mr. Enfinger that Mr. Enfinger openly carried a firearm. When Mr. Reed spoke to Mrs. Enfinger, she confirmed she received the legal notice from the ODA and that she understood the property was under quarantine.

When Mr. Enfinger arrived, he told Mr. Reed that the ODA could not take his trees, that the Program was not an option, and that Mr. Reed needed to leave the Enfingers' property. Mr. Reed then directly left the property. Because the defendants would not give the ODA permission to move forward with the Program on their property, the ODA halted survey work on the property and considered legal options.

The defendants are amenable to having the infested trees cut down. However, they oppose having the trees then chipped. Instead, the defendants wish to kill the ALB by using a chemical pesticide on the infested trees, or alternatively, by placing the trees in a kiln to dry. The defendants want to use the treated logs to build a log cabin for themselves and seven other people living on the property with them.

Matthew Beal, the Chief of Plant Health Division at ODA, testified that without the injunction he fears that the ODA workers on the Property will be interfered with. Moreover, if the defendants cut the infested trees and use them as lumber, Mr. Beal believes that the infestation will spread. He is concerned about the location of the infestation on the defendants' property because it is near the edge of the quarantine zone. That means that if the ALB spreads past the defendants' property, the quarantine zone will need to be enlarged and more trees will be in danger.

As of the time of the August 11th preliminary injunction hearing, the ODA had found 46 trees that were confirmed positive for ALB infestation. Two of those trees were the ones that the defendants cut down previously. There were approximately 2,200 trees surveyed on the defendants' property. The infested trees represented approximately 1% of the trees overall. However, many of the infested trees are the largest trees on the property and the best suited for use in constructing a log cabin.

On July 20, 2017, the ODA filed a complaint against the defendants asking for relief in the form of a temporary restraining order and preliminary and permanent injunctions. That same day, the ODA filed a motion for a temporary restraining order and a preliminary injunction against the defendants. At no point did the defendants file a written response in opposition.

The court held a hearing on the ODA's motion for a temporary restraining order on July 21st. That same day, the court granted the temporary restraining order prohibiting the defendants from violating the provisions of R.C. 927.69, R.C. 927.70, and R.C. 927.71.⁸

On July 26th the ODA moved to have the preliminary injunction hearing consolidated with the trial. The ODA later withdrew that motion.

The court held a hearing on the preliminary injunction motion on August 8, 2017. The ODA presented testimony from several ODA employees, including Matthew Beal, Brian Zaborski, Brandon Winterbrod, and Ken Reed. The ODA also submitted several exhibits. Both defendants, acting *pro se*, testified. They otherwise did not present additional testimony or evidence.

⁸ The court filed a *nunc pro tunc* entry on July 31, 2017, correcting a clerical error in the temporary restraining order.

LEGAL STANDARD

A preliminary injunction enjoins the opposing party from “performing certain acts.”⁹ It “* * * applies to maintain the *status quo* until final hearing, unless altered by further court order.”¹⁰ A preliminary injunction does not decide the merits of the case; it merely balances “the respective equities of the parties, [and] concludes that, pending a trial on the merits defendant should, or that he should not, be restrained from exercising the rights claimed by him.”¹¹

To grant a preliminary injunction the trial court must find:

“(1) the moving party has shown a substantial likelihood that he or she will prevail on the merits of their underlying substantive claim; (2) the moving party will suffer irreparable harm if the injunction is not granted; (3) issuance of the injunction will not harm third parties; and (4) the public interest would be served by issuing the preliminary injunction.”¹²

⁹ *Sea Lakes, Inc. v. Sea Lakes Camping Inc.*, 78 Ohio App.3d 472, 477, 605 N.E.2d 422 (11th Dist. 1992).

¹⁰ 1970 Staff Note, Civ.R. 65.

¹¹ *Ohio Association of Public Schools Employees v. Mayfield*, 8th Dist. Cuyahoga Nos. 44932, 45118, 1983 WL 5498, *3 (June 23, 1983), quoting *Gessler v. Madigan*, 41 Ohio App.2d 76, 322 N.E.2d 127 (3rd Dist. 1974).

¹² *AK Steel Corp. v. ArcelorMittal USA, L.L.C.*, 55 N.E.3d 1152, 2016-Ohio-3285, ¶ 9 (12th Dist.), citing *DK Prods., Inc. v. Miller*, 12th Dist. Warren No. CA2008-05-060, 2009-Ohio-436, ¶ 6.

To receive a preliminary injunction, the movant must prove each of the above elements by clear and convincing evidence.¹³ The decision to grant injunctive relief is within the trial court's sound discretion.¹⁴ The Twelfth District Court of Appeals has cautioned that "[c]ourts should exercise caution in granting injunctions where the court is asked to * * * control the action of another department of government."¹⁵

LEGAL ANALYSIS

Pursuant to R.C. 927.71, the director of agriculture is empowered to quarantine any portion of the state "when the director determines that such action is necessary to prevent or retard the spread of a pest into, within, or from this state * * *."¹⁶ Furthermore, once a quarantine is established, R.C. 927.71 mandates that "no person shall move any regulated article described in the quarantine, or move the pest against which the quarantine is established, within, from, into, or through this state contrary to rules adopted by the director without prior permission or order of the director."¹⁷

Similarly, under R.C. 927.70, "[n]o person shall knowingly permit any plant pest that has been determined to be destructive or dangerously harmful by the director of agriculture * * * to exist in or on the person's premises."¹⁸

¹³ *AK Steel Corp.*, 2016-Ohio-3285 at ¶ 10, citing *Planck v. Cinergy Power Generation Servs. L.L.C.*, 12th Dist. Clermont No. CA2002-12-104, 2003-Ohio-104, ¶ 17.

¹⁴ *DK Prods., Inc.*, 2009-Ohio-436 at ¶ 7, citing *Danis Clarkco Landfull Co., v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604, 653, N.E.2d 646 (1995).

¹⁵ *Trifton Servs., Inc. v. Talawands City School Dist. Bd. of Edn.*, 12th Dist. Butler No. CA2010-05-112, 2011-Ohio-667, ¶ 5, citing *DK Prods., Inc.*, 2009-Ohio-436 at ¶ 6.

¹⁶ R.C. 927.71(A)(1).

¹⁷ R.C. 927.71(C).

¹⁸ R.C. 927.70(A).

A "pest" is defined in R.C. 927.51(K) as "any insect, mite, nematode, bacteria, fungus, virus, parasitic plant, or any other organism or any stage of any such organism that causes, or is capable of causing, injury, disease, or damage to any plant, plant part, or plant product." Under R.C. 927.52, the director of agriculture is enabled to "adopt and enforce rules that are necessary to carry out sections 927.51 to 927.73 of the Revised Code."¹⁹ In turn, the ODA has specially adopted a definition of "pest" to include "the destructive insect known as Asian longhorned beetle (*Anoplophora glabripennis*) in any living stage of development."²⁰

Under R.C. 927.69, authorized representatives of the director of agriculture are empowered to effectuate R.C. 927.51 to 927.73 by making a " * * * reasonable inspection of any premises in this state and any property therein or thereon."²¹

Moreover, when an ODA representative finds

"any article or commodity to be infested or has reason to believe it to be infested, or finds that a host or pest exists on any premises * * * the director may: (1) Upon giving notice to the owner or the owner's agent in possession thereof, seize, quarantine, treat, or otherwise dispose of the pest, host, article, or commodity in such a manner as the director determines necessary to suppress, control, eradicate, or to prevent or retard the spread of a pest * * *."²²

To summarize the above provisions, the ODA has various powers under R.C. Chapter 927 that allow it to facilitate the eradication of plant pests, which specifically include the ALB. The ODA may inspect premises, quarantine parts of the state or specific premises, restrict the movement of quarantined items, and dispose of pests or infected host plants.

¹⁹ R.C. 927.51(A).

²⁰ Ohio Adm.Code 901:5-57-01(D).

²¹ R.C. 927.69(A).

²² R.C. 927.70(B)(1).

The defendants presented no arguments or legal support, either oral or written, arguing that the above provisions are unconstitutional or inapplicable as applied to them. The court notes, however, that the law has long recognized that the state holds the police power to destroy private property in order to abate a public nuisance.²³ Permissible examples of this power include the state's destruction of private cedar trees to prevent the spread of the fungus cedar rust from destroying apple orchards,²⁴ and the destruction of private wheat crops in order to prevent the spread of the insect known as the corn borer.²⁵

In turning to whether the court should grant the ODA's motion for a preliminary injunction, the court must first determine whether the ODA has shown a substantial likelihood that it will prevail on the merits of its underlying substantive claim.²⁶ The court finds that the ODA has. Under R.C. Chapter 927, the ODA has the power to quarantine the defendant's property due to the infestation of the ALB on it,²⁷ to inspect, e.g. survey, the property for the ALB,²⁸ and to destroy the ALB and its infected host trees.²⁹ As mentioned, the defendants have not challenged the applicability of these statutory provisions. Instead, the defendants have merely taken issue with the method with which the OBA has undertaken to destroy the ALB. The defendants have offered no legal support, nor can the court find any, suggesting that the defendants have the

²³ *Mugler v. Kansas*, 123 U.S. 623, 658, 8 S.Ct. 273, 31 L.Ed. 205 (1887).

²⁴ *Miller v. Schoene*, 276 U.S. 272, 279, 48 S.Ct. 246, 72 L.Ed. 568 (1928).

²⁵ *Van Gunten v. Worthley*, 25 Ohio App. 496, 504, 159 N.E. 326, 5 Ohio Law Abs. 518 (6th Dist. 1927).

²⁶ *AK Steel Corp.*, 2016-Ohio-3285 at ¶ 9, citing *DK Prods., Inc.*, 2009-Ohio-436 at ¶ 6.

²⁷ R.C. 927.71(A)(1).

²⁸ R.C. 927.69(A).

²⁹ R.C. 927.70(B)(1).

right to have the infested trees on their property treated by pesticide or kiln drying instead of chipping.

Moreover, the defendants are prohibited from moving any "regulated article described in the quarantine" and from moving "the pest against which the quarantine is established, within, from, into, or through this state * * *."³⁰ However, the ODA adduced credible testimony and documentary evidence that the defendants did cut down two quarantined and infested trees and did remove one from the property. Additionally, the defendants are prohibited from knowingly permitting the ALB to be on their property.³¹ However, they have prevented the ODA from executing the Program on their property to eradicate the ALB by telling ODA representatives that they could not take the trees, they would not cooperate with the Program, and that the ODA representatives needed to leave. In doing so, the defendants are permitting the ALB to remain on their property. Accordingly, the court finds that OBA has shown a substantial likelihood that, under the controlling statutory law, it will prevail on the merits against the defendants.

Next, the court must determine whether the ODA will suffer irreparable harm if the injunction is not granted.³² The ODA presented clear and convincing evidence that the success of the Program will be greatly impaired if it is unable to aggressively combat the ALB infestation on the defendants' property. The defendants' property is on the fringe of the larger quarantine. If the ALB population is able to thrive in the defendants' trees, which they will if left untreated, then this will inevitably result in the enlargement of the quarantine area.

³⁰ R.C. 927.71(C).

³¹ R.C. 927.70(A).

³² *AK Steel Corp.*, 2016-Ohio-3285 at ¶ 9, citing *DK Prods., Inc.*, 2009-Ohio-436 at ¶ 6.

Furthermore, because the defendants have already cut quarantined trees and moved parts of them, it is possible that the defendants may spread the ALB beyond the confines of their property unless enjoined from doing so. As discussed, the ALB is dangerous to transport offsite because the beetles can leave a felled tree and infest new ones along the route. The defendants had received a legal notice informing them that their trees were quarantined, they understood it, they had the Program and the ALB problem explained to them in person, and yet they still cut down infested trees in contravention of the notice. Their actions indicate that they have a certain disregard for the Program and its seriousness, which could lead to the spread of the ALB if they are not stopped from cutting and moving the trees themselves.

In sum, the Program has been in operation for more than six years, and if the ODA is unable to eradicate the ALB on the defendants' property, the success of the Program is jeopardized, and the Program could fail. If the Program fails, then 13 types of hardwood deciduous trees in Ohio are endangered. This could damage the environment as well as trees on other homeowners' properties and could threaten nursery stocks.

Third, the court must decide if the issuance of the injunction will harm third parties.³³ Allowing the Program to move forward on the defendants' property will not hurt third parties. To the contrary, all of the defendants' neighbors will be in a better position if the Program is allowed to continue on the defendants' property. As discussed, without an injunction the spread of the ALB from the defendants' property would pose a serious threat to Ohio's hardwood deciduous forests, homeowners' hardwood trees, and nursery stock.

³³ *AK Steel Corp.*, 2016-Ohio-3285 at ¶ 9, citing *DK Prods., Inc.*, 2009-Ohio-436 at ¶ 6.

Finally, the court must decide whether the public interest would be served by issuing the preliminary injunction.³⁴ The court finds that the public interest would overwhelmingly be served by the issuance of an injunction, for all of the reasons discussed above. The public interest will benefit by the eradication of the ALB. As such, the court concludes that the ODA has shown by clear and convincing evidence that it is entitled to a preliminary injunction against the defendants.

CONCLUSION

For the foregoing reasons the court finds that the ODA's motion for a preliminary injunction is well-taken and is hereby granted.

The defendants, and any of their agents and employees, are immediately restrained from any violation of the provisions of R.C. 927.69, R.C. 927.70, and R.C. 927.71. The defendants, and any of their agents and employees, shall not interfere with, hinder, or delay the ODA's agents, the USDA's agents, the Davey Tree Expert Company, or Beach's Tree Selective Harvesting, LLC from implementing the ALB Program.

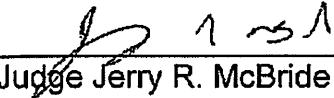
This order is immediately effective and shall remain in effect until a decision is rendered on the ODA's motion for a permanent injunction or such other time as the court designates pursuant to Civ.R. 65.

Bond is hereby waived pursuant to R.C. 109.19.

³⁴ Id.

IT IS SO ORDERED.

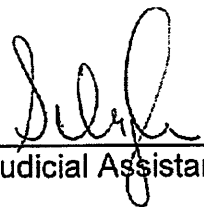
DATED: 8-29-17



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Entry were sent on this 29th day of August by e-mail to James Patterson at james.patterson@ohioattorneygeneral.gov, Angela Sullivan at angela.sullivan@ohioattorneygeneral.gov and Lydia Arko Zigler at Lydia.zigler@ohioattorneygeneral.gov, Assistant Attorneys General and counsel for the Plaintiff, and by regular U.S. Mail to Darrell Enfinger, Defendant, 2217 Donald Road, Bethel, Ohio 45106, and Kara Enfinger, Defendant, 2217 Donald Road, Bethel, Ohio 45106.



Judicial Assistant to Judge McBride