COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

WORCESTER, ss.

MISCELLANEOUS CASE

VALLEY GREEN GROW, INC., CHARLTON ORCHARDS GROUP, LLC, NATHAN R. BENJAMIN, JR., and CATHERINE L. BENJAMIN, Plaintiffs, v. TOWN OF CHARLTON and JOHN P. McGRATH, DEBORAH B. NOBLE, KAREN A. SPIEWAK, DAVID M. SINGER, JOSEPH J. SZAFAROWICZ, as are Members of the Board of Selectmen of the Town of Charlton, Defendants, GERARD F. RUSSELL, Defendant-Intervenor.	NO. 18 MISC 000483 (RBF)
VALLEY GREEN GROW, LLC, Plaintiff, v. TOWN OF CHARLTON PLANNING BOARD, and PATRICIA RYDLAK, JEAN VINCENT, ALYCIA DZIK, ROSS LEMANAKY, DON CLAY, and JOHN SMITH, as Members of the Planning Board of the Town of Charlton, Defendants.	NO. 19 MISC 000226 (RBF)

MEMORANDUM AND ORDER ALLOWING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

On November 4, 2016, the voters of the Commonwealth voted YES to Question 4, authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of Massachusetts. Among those voting YES were a majority of the voters of the Town of Charlton (Town). After the ensuing enactment of G.L. c. 94G, regulating recreational marijuana in Massachusetts, the plaintiff Valley Green Grow, Inc. (VGG) entered an agreement with plaintiffs Charlton Orchard Groups, LLC (COG) and Nathan R. Benjamin, Jr. and Catherine Benjamin to purchase their farm in Charlton. VGG wants to build a 1,000,000 square foot indoor marijuana growing and processing facility on the property, consisting of 860,000 square feet of greenhouses, a 130,000 square foot post-harvest processing facility, and 10,000 square foot cogeneration facility. VGG approached the Town in the spring of 2018 and filed a preliminary subdivision plan that froze the zoning for the property. After reaching a development agreement and a host community agreement with the Board of Selectmen, VGG sought site plan review with the Town's Planning Board.[1]

This action was brought by VGG to challenge a general bylaw to ban all non-medical cannabis uses within the Town adopted by a special town meeting in August 2018. Intervenor Gerard F. Russell brought a cross-claim seeking a declaration that VGG's proposed use was not a greenhouse, a use that is allowed as of right under the Charlton Zoning Bylaw. In a previous summary judgment decision, this court held that the general bylaw was beyond the scope of the Town's power and authority and is invalid and of no force and effect. Now before the court are VGG's and Russell's cross-motions on the issue of whether VGG's proposal is a greenhouse use

[1] The site plan review application was filed in the name of Valley Green Grow, LLC, rather than Valley Green Grow, Inc. For the purposes of this Memorandum and Order, the difference is not relevant, and both Valley Green Grow, Inc. and Valley Green Grow, LLC are referred to as "VGG."

or a light manufacturing use under the Charlton Zoning Bylaw and whether the proposed processing activities are accessory uses. Also before the court is VGG's appeal of the Planning Board's decision on its site plan review application, which the Planning Board denied on the grounds that the project was not a greenhouse use.

Question 4's legalization of recreational cannabis means that, like any other plant, marijuana can be cultivated and processed as a commercial agricultural product. When grown in a greenhouse, as VGG proposes, it constitutes an "[i]ndoor commercial horticulture/floriculture establishment[] (e.g. greenhouse[])" allowed by right under the Charlton Zoning Bylaw. Further, because VGG proposes to process only the marijuana plants it grows on the property, its processing activities, like other sale or processing of onsite agricultural products, are accessory to the allowed greenhouse. VGG's motion for summary judgment will be allowed, and Russell's cross-motion denied.

Procedural History

On September 21, 2018, VGG filed its complaint, naming as defendants the Town and John P. McGrath, Deborah B. Noble, Karen A. Spiewak, David M. Singer, and Joseph J. Szafarowicz as Members of the Board of Selectmen of the Town of Charlton. On October 9, 2018, Gerard F. Russell filed his Motion to Intervene as a Defendant, and on October 15, 2018, his Amended Brief and Affidavit in support of his Motion to Intervene. On October 30, 2018, Russell filed his Amended Answer of Gerard F. Russell, and on October 31, 2018, the Town and the Board filed their Answer. On November 5, 2018, VGG filed its Opposition to Gerard Russell's Motion to Intervene.

The court held the case management conference on November 6, 2018, where it took the Motion to Intervene under advisement and advised VGG to amend its complaint to add necessary

plaintiffs. On November 8, 2018, the court issued its Order Allowing Motion of Gerard F. Russell to Intervene as a Defendant, and VGG filed its Assented-To Motion for Leave to File First Amended Complaint to add as plaintiffs COG and the Benjamins. The court allowed the motion that same day and deemed the First Amended Complaint (Complaint or Compl.) filed. On November 19, 2018, Russell filed his Answer to Plaintiffs' Amended Complaint and Cross-Complaint, bringing a cross-complaint against the Town (Russell Ans. & Cross-Complaint). On December 17, 2018, the Town filed its Answer to Intervenor's Cross-Claim. Plaintiffs' Motion for Leave to Intervene as Defendants in Intervenor Gerard Russell's Cross Claim Under G.L. c. 240 Sec. 14A Against the Town of Charlton was filed on February 1, 2019, and allowed without hearing on February 5, 2019.

On November 16, 2018, VGG, COG, and the Benjamins (plaintiffs) filed Plaintiffs' Motion for Summary Judgment, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, their Appendix of Exhibits in Support of Plaintiffs' Motion for Summary Judgment, and the Affidavit of Jeffrey Goldstein in Support of Plaintiffs' Motion for Summary Judgment.

On December 18, 2018, Russell filed (1) Defendant Gerard F. Russell's Opposition to Plaintiffs' Motion for Summary Judgment, (2) the Affidavit of Defendant Gerard F. Russell, (3), Notice to Attorney General Pursuant to G.L. c. 231A, § 8 and Mass.R.Civ.P. 24(d), (4) Russell's Document Appendix, (5) Defendant Russell's Response to Plaintiffs' Statement of Undisputed Material Facts in Support of His Opposition to Plaintiffs' Motion for Summary Judgment, and (6) Defendant Russell's Statement of Undisputed Material Facts In Support of His Opposition to Plaintiffs' Motion for Summary Judgment.

On December 10, 2018, Michael Pill's Motion for Leave to (1) File Amicus Curiae Brief and (2) Participate in Hearing on Plaintiffs' Summary Judgment was allowed in part and denied in part, allowing the filing of an amicus brief but denying leave to participate in the hearing, and attorney Pill's amicus brief was accepted for filing. On December 27, 2018, New Jersey attorney David G. Evans was admitted *pro hac vice* on the motion of attorney Pill, his motion to file an amicus brief was allowed, and his amicus brief on behalf of his clients was accepted for filing. The Motion of Benjamin E. Zehnder, Esq. for Leave to File an Amicus Curiae Brief in Support of Plaintiff's Motion for Summary Judgment was allowed on December 27, 2018, and his amicus brief on behalf of his clients was accepted for filing.

On January 2, 2019, the plaintiffs filed (1) Plaintiffs' Reply to Defendant Russell's Opposition to Plaintiffs' Motion for Summary Judgment, (2) Plaintiffs' Response to Defendant Russell's Statement of Material Facts, and (3) Plaintiffs' Response to Brief of Amicus Curiae Michael Pill. On January 4, 2019, the court heard the Summary Judgment Motion, and took it under advisement. The court issued its Memorandum and Order Allowing Plaintiffs' Motion for Summary Judgment on March 7, 2019 (Summary Judgment Order).

The Plaintiffs' Motion for Entry of Separate and Final Judgment Pursuant to Mass. R. Civ. P. 54(b) was filed on March 27, 2019. The Defendant-Intervenor Gerald F. Russell's Opposition to Plaintiff Valley Green Grow, Inc.'s Motion for Entry of Separate and Final Judgment was filed on April 8, 2019. The court denied the Plaintiffs' Motion for Entry of Separate and Final Judgment on April 17, 2019.

On May 8, 2019, Miscellaneous Case No. 19 MISC 000226, an appeal of the Planning Board's denial of VGG's application for site plan approval, was transferred to this court from the Worcester Superior Court. The Complaint and Defendants' Answer were also filed on May 8,

2019. At a telephone conference call on May 23, 2019, the court deemed the motions for summary judgment to be filed in Miscellaneous Case No. 18 MISC 000483 to be treated as a motion for partial summary judgment in Miscellaneous Case No. 19 MISC 000226.

The Plaintiffs' Motion for Summary Judgment on Cross-Claim Pursuant to G.L. c. 240, § 14A, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgement on Cross-Claim Pursuant to G.L. c. 240, § 14A, Plaintiffs' Statement of undisputed material Facts in Support of their Motion for Summary Judgment (Pls.' SOF), Affidavit of Nathan R. Benjamin, Jr. in Support of Plaintiffs' Motion for Summary Judgment, and Plaintiffs' Appendix and Affidavit of Counsel in Support of their Motion for Summary Judgment (Pls.' App.) were filed on May 8, 2019. Gerard F. Russell's Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment on his Cross-Claim under MRCP Rule 56, Gerard F. Russell's Brief in Support of his Opposition to Plaintiffs' Motion for Summary Judgment and his Cross Motion for Summary Judgment on his Cross-Claim, Gerard F. Russell's Statement of Undisputed Facts in Support of his Motion for Summary Judgment (Russell SOF), Russell's Response to Plaintiffs' Statement of Undisputed Material Facts in Support of their Opposition and Motion for Summary Judgment (Russell SOF Resp.), and Russell's Appendix and Affidavit of Counsel in Support of his Motion for Summary Judgement (Russell App.) were filed on June 13, 2019. The Plaintiffs' Reply in Support of their Motion for Summary Judgment on Cross-Claim Pursuant to G.L. c. 240, § 14A, Planning Board's Motion for Summary Judgment, Planning Board's Memorandum in Support of Motion for Summary Judgment (including Planning Board's Appendix or Planning Bd. App.), and Defendant Town of Charlton's Opposition to Gerald Russell's "Cross Motion for Summary Judgment on his Counter-Claim" were filed on June 17, 2019. The court heard the motions for summary judgment on June 19,

2019, and took the matter under advisement. The Plaintiff's Response to Charlton Planning Board's Memorandum of Law in Support of Motion for Summary Judgment filed under the Caption of the Plaintiff's' Site Plan Appeal C.A. No. 19 MISC 000226 (RBF) (Pls.' Resp. Mem.) was filed on July 9, 2019. This Memorandum and Order follows.

Summary Judgment Standard

Generally, summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, the court is to draw "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" *Regis College v. Town of Weston*, 462 Mass. 280, 284 (2012), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

Undisputed Facts

The following facts are undisputed.

1. VGG is a Massachusetts corporation with a principal place of business at 1600 Osgood Street, North Andover, Massachusetts. Summary Judgment Order at p. 5.

2. COG is a Massachusetts company and record owner in fee of property at 44 Old Worcester Road, Charlton (COG property). Summary Judgment Order at p. 6.

3. The Benjamins are individuals and record title owners in fee of property located at 7 L Turner Road, Charlton (Benjamin property). Summary Judgment Order at p. 6. The COG property and the Benjamin property are hereinafter referred to as the "site."

4. On November 4, 2016, the citizens of Charlton voted YES to Question 4, authorizing the legalization, regulation and taxation of recreational cannabis in the Commonwealth of Massachusetts. Summary Judgment Order at p. 6.

5. On or about March 9, 2018, VGG entered into an offer and subsequently a purchase and sale agreement with COG and the Benjamins for the acquisition and development of the site. The site was formerly operated by COG as a family-owned farm and winery. Summary Judgment Order at p. 6.

6. VGG proposes to develop the site to house a state of the art indoor cannabis cultivation facility, for the cultivation, manufacturing and processing of medical and recreational use cannabis (the project). VGG's Site Plan application for the project consists of three (3) major components totally approximately one million (1,000,000) square feet of new buildings:

a. 860,000 square foot Closed Greenhouse (6 "modules") and supporting functions;

b. 130,000 square foot Post-Harvest Processing Facility and supporting functions; and

c. 10,000 square foot Enclosed Cogeneration Facility (~18 MW) and supporting equipment.

Pls.' SOF ¶ 7; Russell SOF Resp. ¶ 7.

7. In March 2018, VGG sought an advisory determination from Curtis Meskus, the Town's zoning enforcement officer and building inspector (ZEO), addressing whether VGG's proposed project would be permitted as of right in the Town's agricultural zoning district under

the Charlton Zoning Bylaw (bylaw). Opponents to the Project have argued that cannabis uses cannot be approved as agricultural uses. Pls.' SOF ¶ 8; Russell SOF Resp. ¶ 8; Pls.' App. Exh. 1.

8. Mr. Meskus responded in a March 20, 2018, email which read:

> In respond [sic] to your inquiry as to whether a proposed medical marijuana dispensary and cultivation facility would be allowed under the Towns Zoning Bylaws on property that is partially within the Community Business District (CB) and partially within the Agricultural District (A). Based upon my review of your email, the opinion of your counsel and the Zoning Bylaws, it is my opinion that the proposal you describe would be allowed as of right. The retail (dispensary) component of the project would be allowed with site plan approval from the Planning Board in the CB portion of the property.
>
> Please be advised that this opinion is advisory only, does not constitute a decision or order for the purposes of G.L. c.40A, § 15, [sic] may not be relied on for any purpose. Please also be advised that this opinion is based on the current Zoning Bylaws of the Town. Charlton Town Meeting has not yet considered what if any zoning regulations to adopt with respect to medical or adult use marijuana establishments.

Pls.' App. Exh. 1.

9. On April 25, 2018, recognizing that the Town was contemplating adopting a zoning bylaw to authorize and regulate recreational cannabis uses within the Town, VGG engaged a civil engineer and filed a preliminary subdivision plan for approval. VGG's subdivision plan submission triggered a zoning freeze for the Property, pursuant to G.L. 40A, § 6. Pls.' SOF ¶ 12; Russell SOF Resp. ¶ 12.

10. At that time, § 200-3.2.B of the bylaw did not explicitly list "marijuana" as part of any principal use. It did provide that "[i]ndoor commercial horticulture/floriculture establishments (e.g., greenhouses)" are permitted as of right in every zoning district. Summary Judgment Order at p. 7.

11. During the spring of 2018, VGG negotiated with Robin Craver, Town Manager for the Town of Charlton, with respect to a Development Agreement and Host Community Agreement for the project and related activities. Pls.' SOF ¶ 13; Russell SOF Resp. ¶ 13.

12. At its May 15, 2018 public meeting, the Board of Selectmen voted to approve the proposed Development Agreement and Host Community Agreement with VGG. Pls.' SOF ¶ 14; Russell SOF Resp. ¶ 14.

13. After the VGG Development Agreement and Host Community Agreement were approved by the Board of Selectmen, a group of abutters objected to the manner in which the meeting agenda items were noticed, claiming that it was not clearly identified on the agenda for the hearing at which it was approved. Certain residents filed complaints challenging the zoning amendment process and actions of Town officials. Summary Judgment Order at p. 8.

14. As a result, the Board of Selectmen suspended any further action on the VGG Development and Host Community Agreements, rescheduled a public hearing, and asked VGG to attend the public meeting to describe the Project and answer questions of the public. VGG agreed to do so and attended a public meeting held on May 29, 2018, at which more than 400 residents and officials were in attendance. Summary Judgment Order at p. 9.

15. In a letter addressed to the Selectmen, Robert Carver, Town Administrator, and the Town of Charlton, dated June 13, 2018, the ZEO stated, in part, that:

> In a consultation Charlton's current zoning and the applicable marijuana regulations...it was clear that the prohibition of an indoor greenhouse of the sales in retail building, because of its product, would not be a defendable position. This is because:
> - The Town had not voted to impose a moratorium on marijuana establishments; and
> - The Town had the not followed the [] process to prohibit or limit the number of marijuana establishments.

Pls.' App. Exh. 6; Pls.' SOF ¶ 20; Russell SOF Resp. ¶ 20. Unlike the March 20, 2018, email, the June 13, 2018, letter does not contain language limiting the purposes for which the letter's contents may be relied. Pls.' App. Exh. 6; Pls.' SOF ¶ 22; Russell SOF Resp. ¶ 22.

16. At its June 19, 2018 public meeting, the Board of Selectmen voted to reaffirm and ratify its prior vote in favor the Development Agreement and Host Community Agreement. Pls.' SOF ¶ 19; Russell SOF Resp. ¶ 19; Pls.' App. Exh. 5.

17. Apart from his intervention in this action, Russell has taken no judicial action challenging the ZEO's statements in the June 13, 2018, letter. Pls.' SOF ¶ 25; Russell SOF Resp. ¶ 25.

18. VGG filed an application to the Charlton Planning Board for site plan review on August 14, 2018. Russell. App. Exh. 6.

19. VGG prepared a Site Plan Review-Narrative which provides in part:

> **What is Cannabis Cultivation?**
> ...The proposed cannabis facility uses indoor horticulture in closed greenhouse to grow cannabis hydroponically and without chemical pesticides. The VGG proposed facility uses a Dutch commercial horticultural growing system to achieve the highest growing efficiency, while deploying Best Management Practices to minimize environmental impacts and ensure a clean-room environment and carefully controlled growing conditions.
>
> **What is Post-Harvest Processing?**
> Post-Harvest Processing includes steps that separate marketable aspects of the Cannabis plant to be either dried and sold as "Flower" or extracted and sold as "Oil". This processing is completed in the Head House, a central facility with strict environmental controls. The entire facility is highly-secured with access card readers and state-regulated tracking of all Cannabis material from "seed-to-sale". From Post-Harvest processing, state licensed transporters deliver the finished product in discrete vans to retail locations across the Commonwealth.
>
> **What is a Closed Greenhouse?**
> A closed greenhouse is commonly used in the cultivation of Cannabis. Unlike a traditional greenhouse that utilizes natural ventilation through roof vents, a closed greenhouse maintains sealed glazing and carefully engineering mechanical systems to maintain environmental conditions, filter air contaminants, and mitigate odors.

Closed greenhouses are ideally suited for Cannabis cultivation because of the high level of environmental control and odor mitigation capabilities to ensure undesired odors are maintained within the facility.

What is Cogeneration?

Cogeneration, or "cogen" in this application is utilizing natural gas to produce electricity through reciprocating engines. The electricity powers the lighting and other electrical loads of the facility. A byproduct of combustion is heat, which is captured and utilized in processes that primarily cool and dehumidify the greenhouse air. Finally, combustion exhaust is scrubbed, and carbon dioxide is collected to feed to the greenhouse where it is absorbed by plants to boost photosynthesis. Co-locating cogen with commercial greenhouses is common and considered a best practice in terms of both economic and environmental sustainability…

What are the key Inputs/Outputs of the proposed facility?

Inputs:

- Water. At full capacity, the facility will use approximately 30,000 gallons of new water for irrigation every day. The water will be primarily supplied by rainwater collection tanks (up to 2 million gallons) that are designed to capture rainwater from the roof of the greenhouses. Since this is a hydroponic closed greenhouse system, over 85% of the water used in plant irrigation is recycled within the greenhouses.
- Natural Gas. The cogen plant will use liquid natural gas from the Tennessee Gas Pipeline located on the property through an interconnection and service agreement with the pipeline owners, Kinder Morgan.
- Electricity. The facilities entire electric requirement is produced by the cogen plan [sic], though there will be a National Grid service for back-up and power export, as the grid may need on occasion.
- Fertilizer. Inorganic plant nutrients are delivered by hydroponic system, much like water soluble fertilizers used by homeowners.
- Rockwool Grow Media. Rockwool cubes, about the size of a grapefruit, are the growing media that provide root stabilization, moisture retention, and aeration for plants. Rockwool is a safe and stable product produced from lava rocks.
- Packaging Materials. Plastic and glass packaging materials for the finished product that contain labeling and tracking as required by state regulations.

Outputs:

- Finished Product. "Flower", the dried/cured harvested product from the cannabis plant, and "Oil", the extracted liquid from the plan, are two primary products. Both forms of the product may be further manufactured by licensed operations to produce other forms of marijuana consumables. Flower is commonly measured in grams and Oil is measured in milliliters.

- Organic Waste. The non-consumable portions of the Cannabis plant include the stems and stalks. These parts of the plant must be disposed of under strict regulations. A Best Management Practice is to use Bokashi fermentation to anaerobically digest the plants in closed containers. Rockwool cubes may be shredded and blended with the organic waste.
- Municipal Waste. All other municipal waste streams are typical of a commercial operation. Aside from the organic waste (cannabis plants), there is no regulated industrial waste.
- Wastewater. Ordinary municipal wastewater from commercial activities will be discharged to the municipal sewer system. Wastewater produced within the greenhouse operation is mainly recovered and reused in the operation...

Utilities

The cultivation facility utilizes a cogeneration facility ("cogen") for the production of electricity, heating/cooling and dehumidification, and carbon dioxide generation. The fuel for the cogen facility is provided by a direct interconnection to the Tennessee Gas Pipeline (owned by Kinder Morgan) which is located on the Site. The cogen plant is designed to meet 100% of the onsite power and heating/cooling loads, however a back-up 25 MW interconnection to the public power grid (operated by national Grid) will be made. At times, the facility may export up to 5 MW of power to support the stabilization of the local power grid.

The cogen facility is located in a sound-proof steel building, staffed by 5 operators/technicians. Exhaust from the cogeneration facility is scrubbed to both meet air permitting requirements under a Department of Environmental Protection (DEP) license, as well as to capture carbon dioxide for re-use as fertilizer for plants. Combining indoor horticulture with cogeneration is commonly utilized by larger operations because of economic advantages and its lower environmental footprint.

The cogen facility is supported by a cooling tower that measures approximately 100-feet long by 50-feet wide and 35-feet tall. The cooling tower utilizes fans and closed-loop water heat exchangers to release excess heat.

The cogen facility also utilizes a back-up gas supply. Compressed natural gas or propane will be stored in three 27,000-gallon tanks with a combine footprint of 100-feet by 60-feet, standing 8-feet tall. The tanks are mounted on pads and are protected by bollards.

Planning Bd. App. Exh. 3.

20. In an advisory opinion dated September 28, 2018, the ZEO stated, in part:

In answer to the question, is it permissible to build an 18MW power generating system to support the principal use of a horticultural/floricultural facility in an

> agricultural zone; my answer is yes. If the 18MW power generation system was the principal use, this would not be an allowed use in an agricultural zone...
>
> *Please be advised that this opinion is advisory only, does not constitute a decision or order for the purposes of G.L. c.40A, § 15, may not be relied on for any purpose, nor shall any determination be final until such time as a building permit issued. Please also be advised that this opinion is based upon the current Zoning Bylaws of the Town. It is always the applicant's responsibility to ensure the proposed work, use or activity complies with all applicable laws, regulations, licensing and permit requirements and employ such professionals as needed to obtain any and all permits or approvals required.*

Pls.' App. Exh. 9; Pls.' SOF ¶ 30; Russell SOF Resp. ¶ 30 (emphasis in original). The opinions of the ZEO dated March 20, 2018, June 13, 2018, and September 28, 2018, are hereinafter referred to collectively as the "ZEO opinions."

21. In a decision filed with the Charlton Town Clerk on January 7, 2019, the Planning Board denied VGG's application for site plan approval because the "site plan does not comply with the Use Regulation Schedule of the Bylaw, in that the Project and the Proposed Use constitute Light Manufacturing, a prohibited use in the Agricultural and Community Business Districts." Russell App. Exh. 11.

22. The bylaw defines "accessory use" as "[a] land use which is subordinate and incidental to a predominant or main use. See Section 3.2 (Use Regulations), Sub-Section 3.2.2.8 (Accessory Uses) for accessory use listings per zoning districts." Planning Bd. App. Exh. 6.

23. The bylaw defines "light manufacturing" as "[w]arehousing, assembly, fabrication, processing and reprocessing of materials, and food products, excepting that meat packing, pet food plants, tanneries and slaughterhouses are prohibited. Also prohibited are establishments that treat and/or process hazardous waste or hazardous materials. Light manufacturing may include the production of medical devices and pharmaceuticals. Further provided that storage of goods or materials shall not be permitted on any lot except in an

appropriate enclosure and also in compliance with Section 4.1.5 hereof." Planning Bd. App. Exh. 6.

24. The bylaw does not define "agriculture." Planning Bd. App. Exh. 6.

25. Section 3.2.1 of the bylaw provides that "[b]uildings and other structures shall be erected or used and premises shall be used only as set forth in the 'Use Regulations' except as exempted by Section 3.4 or by statute." Planning Bd. App. Exh. 6.

26. Section 3.2.2.1 of the bylaw states that "[i]ndoor commercial horticulture/floriculture establishments (e.g. greenhouses)" are allowed in every zoning district. Planning Bd. App. Exh. 6.

27. Section 3.2.2.6 of the bylaw provides that "[e]lectric generating facilities with less than or equal to 50 megawatts of power output" as principal uses are allowed only in the community business and industrial-general zoning districts and only with site plan approval. Planning Bd. App. Exh. 6.

28. Section 3.2.2.7 of the bylaw states that "Light Manufacturing establishments" are allowed in the "Residential-Small Enterprise," "Industrial-General," and "Business Enterprise Park" zoning districts, subject to site plan approval. Planning Bd. App. Exh. 6; Pls.' App. Exh. 2.

29. Section 3.2.2.8 of the bylaw defines ten accessory uses and describes the zoning districts in which they are allowed. Planning Bd. App. Exh. 6.

30. The summary judgment record does not reflect that the zoning district or district in which the site is situated is an undisputed fact. The filings suggest that the site is located in the agricultural and community business districts. See Pls.' App. Exh. 1. This uncertainty does not limit the court's ability to consider the parties' motions because the indoor commercial horticulture/floriculture use asserted by VGG is allowed in all zoning districts and the parties do

not dispute that the project, if determined to be light manufacturing, would not be an allowed use in any district in which the site is located.

Discussion

Russell's Cross-Complaint against the Town seeks a determination under G.L. c. 240, § 14A, that the project is not an allowed use under the bylaw. The question of which of the bylaw's use classifications the projects fits into is central to the appeal of the Site Plan Decision in which the Planning Board determined that the project is a light manufacturing use. VGG argues that the project is an allowed indoor commercial horticultural/floricultural establishment. VGG further argues that the ZEO opinions are binding because they were not appealed. Russell and the Planning Board argue that the processing and manufacturing components of the project are the proposed primary use which is not allowed in the Agricultural or Community Business zoning districts, and, even if such components are determined to be accessory to the marijuana cultivation component, they are not permitted accessory uses under the bylaw. The court has jurisdiction under G.L. c. 240, § 14A, to determine "the validity of or extent to which a zoning code affected a proposed use of property." *Whitinsville Retirement Soc'y, Inc. v. Town of Northbridge*, 394 Mass. 757, 763 (1985).

The issues before the court on the motions for summary judgment are as follows: (1) What effect, if any, do the ZEO opinions have on the rights of VGG, Russell, or the Planning Board? (2) Is the cultivation of marijuana an agricultural use such that the project is permitted by right in the Town's Agricultural and Community Business zoning districts? (3) If the cultivation of marijuana is an allowed use under the bylaw, as applied to the project, is it a principal use? In other words, are the proposed processing and cogeneration components of the project accessory

to the cultivation use, or is the cultivation use accessory to the proposed processing and cogeneration components?

The ZEO Opinions

As an initial matter, VGG argues that the ZEO opinions were appealable under G.L. c. 40A, § 8, and that such appeals, pursuant to G.L. c. 40A, § 15, must have been be taken, if at all, within thirty days of the dates of the opinions. VGG further argues that Russell was required to exhaust his administrative remedies prior to seeking similar relief in this action, but that because Russell did not appeal the ZEO opinions within thirty days, he is now barred from challenging the ZEO's conclusions regarding the applicability of the bylaw to the project in an action under G.L. c. 240, § 14A.

General Laws chapter 40A, § 8, provides:

> An appeal to the permit granting authority as the zoning ordinance or by-law may provide, may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer under the provisions of this chapter, by the regional planning agency in whose area the city or town is situated, or by any person including an officer or board of the city or town, or of an abutting city or town aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision of this chapter or any ordinance or by-law adopted thereunder.

Id. VGG is correct that aggrieved parties are required to exhaust their available administrative remedies before filing an action under G.L. c. 40A, § 17, or G.L. c. 240, § 14A. *Clark & Clark Hotel Corp. v. Building Inspector of Falmouth*, 20 Mass. App. Ct. 206, 210-211 (1985). VGG is also correct that if the ZEO opinions were appealable and Russell had notice of them, he would have been required to appeal each of them, if at all, within 30 days. *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass. App. Ct. 850, 857 (2008) ("a party with adequate notice of an order or decision that violates a zoning provision must appeal that order or decision to the

appropriate permit granting authority within the thirty-day period allotted for such an appeal. See G.L. c. 40A, §§ 8, 15.").

For the exhaustion requirement to bar Russell from pursuing his cross-complaint, however, the ZEO opinions must have actually been appealable under G.L. c. 40A, § 8. Section 8 provides for appeals by anyone "aggrieved by an order or decision of the inspector of buildings." *Id.* Both the March letter and the September advisory opinion expressly stated that they were advisory only and were not orders or decisions for the purposes of appeal under G.L. c. 40A, §§ 8, 15. The June letter was addressed to town officials purportedly in response to their request for the ZEO's opinion on the application of the bylaw to the project. Even though it lacks the qualifying language of the March and September letters, the June letter, too, is an advisory opinion. It was not issued in response to an enforcement request or as part of a building permit application. While it articulates the ZEO's understanding of how the bylaw applies to the project, it does not qualify as "an order or decision of the inspector of buildings" which would have been appealable under G.L. c. 40A, §§ 8 and 15.

The ZEO opinions are not the variety of orders or decisions contemplated by G.L. c. 40A, § 8, but rather are advisory opinions which may not be appealed. See *Newport Materials, LLC v. Green*, 19 LCR 425, 429 n.15 (2011). As the ZEO opinions may not be appealed they can have no preclusive effect in this action on Russell's right under G.L. c. 240, § 14A, to argue that a different application of the bylaw is appropriate.

Use Classification of Commercial Indoor Marijuana Cultivation

In the ZEO opinions, the ZEO expressed the belief that the project would qualify as an allowed agricultural use, specifically indoor commercial horticulture/floriculture. The Planning Board denied VGG's application for site plan approval on the grounds that the project would be

a light industrial use which is not allowed in the zoning districts in which the site is located. Russell and the Planning Board argue that the project's proposed cultivation of marijuana is not an agricultural use under the bylaw, but rather, when considered with the related processing, is light manufacturing which is not allowed in these zoning districts under the bylaw.

The bylaw does not offer a general definition of agriculture. Instead, the use table in § 3.2.2 of the bylaw sets out four categories of allowed agricultural uses: (1) "[r]aising and keeping of livestock…on a parcel over five (5) acres;" (2) "[r]aising and keeping of livestock…on a parcel of five (5) or fewer acres;" (3) "[r]aising of crops, whether for sale or personal consumption, on a parcel of any size;" and (4) "[i]ndoor commercial horticulture/floriculture establishments (e.g. greenhouses)." Bylaw § 3.2.2.1.

Section 2.1 of the bylaw defines light manufacturing as:

> Warehousing, assembly, fabrication, processing and reprocessing of materials, and food products, excepting that meat packing, pet food plants, tanneries and slaughterhouses are prohibited. Also prohibited are establishments that treat and/or process hazardous waste or hazardous materials. Light manufacturing may include the production of medical devices and pharmaceuticals. Further provided that storage of goods or materials shall not be permitted on any lot except in an appropriate enclosure and also in compliance with Section 4.1.5 hereof.

Bylaw § 2.1.

Russell argues that the Town's restrictive bylaw, which provides that the only allowed uses are those enumerated in § 3.2.2, does not include any marijuana related uses as allowed uses in an agricultural zoning district, and therefore the production of marijuana is a prohibited use. The problem with this reading, is that the bylaw does not define crops, horticulture, or floriculture, and the same argument could not reasonably be made to prohibit the growth of corn, soybeans, tomatoes or any other variety of commonly accepted "agricultural" products. While subject to immeasurably higher scrutiny than the growth of tomatoes, marijuana is still a plant

and is cultivated in much the same manner as other less controversial products. The question is whether, within the legal framework for interpreting and applying zoning ordinances and bylaws in the Commonwealth, the production or cultivation of marijuana in a commercial greenhouse is an agricultural use or is it something else.[2]

Where a bylaw does not define its terms, "'ordinary principles of statutory construction' [are used] to determine the meaning of the [term]." *Eastern Point, LLC v. Zoning Bd. of Appeals of Gloucester*, 74 Mass. App. Ct. 481, 486 (2009), quoting *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981). "When construing a statute that does not define its words, '[the court gives] them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose.'" *Id.*, quoting *Commonwealth v. Zone Brook, Inc.*, 372 Mass. 366, 369 (1977). Further, courts "look also to the use and definition of the word 'agriculture' in other legislation because '[s]ound principles of statutory construction dictate that interpretation of provisions having identical language be uniform.'" *Building Inspector of Mansfield v. Curvin*, 22 Mass. App. Ct. 401, 403 (1986), quoting *Webster v. Board of Appeals of Reading*, 349 Mass. 17, 19 (1965).

The word "agriculture" is defined in Black's Law Dictionary as "[t]he science or art of cultivating soil, harvesting crops, and raising livestock." Black's Law Dictionary 69 (7th ed.

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[2] This question has been considered by courts in other jurisdictions to various ends. See *Briggs v. Town of York, Maine*, Me. Super. Ct., No. AP-14-028, 2015 WL 3525091 (May 15, 2015) ("as a preliminary matter, cultivating and packaging medical marijuana fits within the 'common dictionary definition' of 'manufacture.'"); *Diesel v. Jackson* County, 284 Or. App. 301, 306 (2017) ("the county's decision not to allow marijuana production on rural residential lands—just one type of agricultural use—would not violate that command, because requiring the county to encourage 'a *variety* of types of agriculture' is not the same as requiring the county to permit *all* types of agriculture." (emphasis in original)); *Carlson v. Zoning Bd. of Review of the Town of South Kingston*, R.I. Super. Ct., No. WC-2014-0557, 2016 WL 7035233 (Nov. 25, 2016) (in the context of marijuana cultivation finding that "[m]anufacturing entails more than simply drying out plants. If an individual grows some plants and then harvests those plants and dries them, that individual has not manufactured anything."); *Baird Properties, LLC v. Town of* Coventry, R.I. Super. Ct., No. KC-2015-0313, 2015 WL 5177710 (Aug. 31, 2015) ("This Court finds that growing medical marijuana was a horticulture exercise. . . ."); see also 4 Patricia E. Salkin, Am. Law. Zoning § 33A:5 (5th ed. 2019).

1999) (Black's). Further, "'agriculture' has a much broader meaning than just 'farming.' While agriculture includes farming activities such as preparing soil, planting seeds, and raising and harvesting crops, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, ranching, riding stables, firewood operations, and landscape operations." 3 Am. Jur. 2d *Agriculture* § 1 (2019). "Horticulture" is defined as "[t]he science or art of cultivating fruits, vegetables, flowers, and plants." American Heritage Dictionary 623 (2d College ed. 1985). "Floriculture" is defined as "[t]he cultivation of flowering plants." *Id.* at 515. "Crops" are defined as "[c]ultivated plants or agricultural produce, such as grain, vegetables, or fruit." *Id.* at 342. "Cannabis" is defined as "[t]he hemp plant" or "[t]he dried flowering tops of the hemp plant." *Id.* at 234. "Marijuana" is defined as "[h]emp" or "[t]he dried flower clusters and leaves of the hemp plant, especially when taken to induce euphoria." *Id.* at 766. Applying these dictionary definitions, the commercial growth of cannabis or marijuana for the purpose of harvesting the plant's flowers is the cultivation of a crop which is arguably a floricultural enterprise and is at the very least horticulture or agriculture within the accepted definition of those terms.

Looking to statutory guidance, G.L. c. 40A, § 3 (section 3 or § 3), upon which Russell relies, provides in relevant part:

> 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, 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…
>
> 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; provided, however, that the terms agriculture,

> aquaculture, floriculture and horticulture shall not include the growing, cultivation, distribution or dispensation of marijuana as defined in section 2 of chapter 369 of the acts of 2012, marihuana as defined in section 1 of chapter 94C or marijuana or marihuana as defined in section 1 of chapter 94G.

Id. The language excluding marijuana-related activities from the various agricultural enterprises detailed in § 3 was inserted by St. 2016, c. 351, § 1, following the passage of the referendum authorizing the legalization, regulation, and taxation of recreational marijuana in the Commonwealth of Massachusetts in November 2016. Russell argues that because § 3 excepts the growth, cultivation, or distribution and dispensation of marijuana from the definition of agriculture applicable to that section, the cultivation of marijuana is not an agricultural use for the purposes of zoning. General Laws c. 128, § 1A provides:

> "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.

Id. General Laws c. 61A, §§ 1-2, on the assessment and taxation of agricultural and horticultural land, provides:

> Section 1. Land shall be deemed to be in agricultural use when primarily and directly used in raising animals, including, but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals, for the purpose of selling such animals or a product derived from such animals in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market.
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> Section 2. Land shall be considered to be in horticultural use when primarily and directly used in raising fruits, vegetables, berries, nuts and other foods for human

> consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling these products in the regular course of business; or when primarily and directly used in raising forest products under a certified forest management plan, approved by and subject to procedures established by the state forester, designed to improve the quantity and quality of a continuous crop for the purpose of selling these products in the regular course of business; or when primarily and directly used in a related manner which is incidental to those uses and represents a customary and necessary use in raising these products and preparing them for market.

Id.

The parties discuss two cases, *Steege v. Board of Appeals of Stow*, 26 Mass. App. Ct. 970 (1988), and *Building Inspector of Mansfield*, *supra*, which interpret the definition of agriculture as it is applied to § 3. The Appeals Court in each case referred to the definitions of agriculture found in G.L. c. 61A, § 1, and G.L. c. 128, § 1A, to determine the scope of agricultural uses which receive the benefit of the zoning exemptions provided by § 3. See *Steege*, 26 Mass. App. Ct. at 971-972 (looking to definitions in G.L. c. 61A, § 1, and c. 128, § 1A, to find that boarding of horses is an agricultural use); *Building Inspector of Mansfield*, 22 Mass. App. Ct. at 403-404 (looking at those definitions to find that a piggery is an agricultural use).[3] The Appeals Court's reliance on the language of those statutes to inform its understanding of the definition of agriculture supports using those same statutes in interpreting the meaning of agriculture as used in the bylaw. Together, the lexical and statutory definitions of agriculture, horticulture, floriculture, crops, cannabis, and marijuana compel the conclusion that the commercial growth of marijuana for sale is the cultivation of a crop which is an agricultural, horticultural, or floricultural endeavor.

[3] At the time that these cases were decided § 3 had not yet been amended to adopt the definition of agriculture found in G.L. c. 128, § 1A. See St. 2007, c. 16, § 4 (inserting ". . . For the purposes of this section, the term "agriculture" shall be as defined in section 1A of chapter 128. . . .").

It is true that the 2016 amendment to § 3 expressly excepts activities relating to marijuana from the definition of agriculture applicable to that section. Russell argues that the amendment to § 3 serves to remove marijuana-related activities from the definition of agriculture for the purposes of the Zoning Act. This reading of the amendment goes too far. The portion of § 3 amended in 2016 begins with the phrase "[f]or the purposes of this section, the term 'agriculture' shall be as defined in section 1A of chapter 128," and the amendment appended the restrictive phrase "provided, however, that the terms agriculture, aquaculture, floriculture and horticulture shall not include the growing, cultivation, distribution or dispensation of marijuana. . . ." St. 2016, c. 351, § 1. The "obvious purpose of [G.L. c. 40A, § 3,]...is to promote agricultural use within all zoning districts in a municipality. Such use may not be prohibited or unduly restricted even in an area not specifically zoned for the purpose as long as the parcel being used is one of more than five acres." *Building Inspector of Mansfield*, 22 Mass. App. Ct. at 402-403. Section 3 does not say anything more about how a zoning bylaw may define or regulate agricultural uses. The 2016 amendment's language limiting the definition of agriculture applicable to § 3 does nothing more than ensure that marijuana uses do not receive the benefit of the zoning exemptions for agricultural uses. It says nothing about how marijuana uses are defined or treated in zoning bylaws. Were the Legislature concerned with ensuring that marijuana is not considered to be an agricultural use for other purposes, an amendment to G.L. c. 128, § 1A, or G.L. c. 61A, §§ 1-2, would have better served that end.[4] That § 3 was amended to except marijuana-related uses from

[4] While this has not been done, the issue has received some attention. General Laws c. 128, §§ 116-123, were inserted by St. 2017, c. 55, § 45, to regulate the growth of industrial hemp. Further, the Massachusetts Department of Revenue has advised the Massachusetts Department of Agricultural Resources and the Massachusetts Cannabis Control Commission that the "eligibility of land used to grow commercial hemp and marijuana for classification under G.L. c. 61A, Section 2 requires clarification by the Legislature." Massachusetts Cannabis Control Commission, *Legislative Report: Update on Farmers and Businesses of All Sizes*, 7 (Dec. 31, 2018), available at https://mass-cannabis-control.com/wp-content/uploads/2019/01/1218-Legislative-Report-Updated-Farmers-and-Businesses-of-All-Sizes-vFINAL.pdf; see Massachusetts Forest and Farmland Law § 9.2.2 (Mass. Cont. Legal Educ. 4th ed. 2016 & 2019 Supp.)

that section's application of the definition of agriculture found in G. L. c. 128, § 1A, is evidence of the Legislature's awareness that, in a general sense, the growth or cultivation of marijuana is likely an agricultural activity which, if not otherwise addressed, would be exempt from zoning under § 3.

Based on the accepted definitions and the language of G.L. c. 61A, §§ 1-2, and G.L. c. 128, § 1A, the growth or cultivation of marijuana is, within the plain meaning of the word, an agricultural use. Thus, where the bylaw does not offer a definition of agriculture, the growth or cultivation of marijuana fits into the bylaw's subset of agricultural uses of either the raising of crops or indoor commercial horticulture/floriculture, depending on the nature of the particular proposed use. In this case, the proposed use is the cultivation of marijuana in greenhouses. This use is properly classified as an indoor commercial horticultural/floricultural establishment within the meaning of § 3.2.2.1 of the bylaw.

Cultivation of Marijuana as a Principal or Accessory Use

Russell and the Planning Board further argue that even if the cultivation of marijuana is an allowed use at the site, VGG's proposed project is actually a light industrial use, to which the cultivation of marijuana is accessory or incidental. Russell and the Planning Board specifically argue that the processing and manufacturing activities proposed in connection with the project are a light industrial use which supplants the cultivation of marijuana as the principal use, and that light manufacturing is not an allowed use in the agricultural and community business zoning districts. VGG argues the converse: that its proposed processing and manufacturing activities are accessory uses to the primary commercial horticultural/floricultural use—the growing of marijuana—that is permitted as of right.

"In categorizing uses of land under the zoning act, courts have traditionally sought to determine the principal use of an establishment 'viewed in its totality.'" *Regis College*, 462 Mass. at 290, quoting *Foxborough v. Bay State Harness Horse Racing & Breeding Ass'n*, 5 Mass. App. Ct. 613, 617 (1977). "Once identified, that principal use rather than any subsidiary use generally controls the determinations of the property's consistency with zoning ordinances." *Id.*, citing *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 844 (1994).

"An incidental or accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use." *Town of Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95, 101 (1953). Whether a use is "incidental" involves a determination as to: (1) whether the use is subordinate and minor in significance to the primary use, though it is not required to be smaller than the principal use, see *Maselbas v. Zoning Bd. of Appeals of N. Attleborough*, 45 Mass. App. Ct. 54, 56-57 & n.5 (1998), and (2) whether there is a reasonable relationship between the use in question and the primary use of the property. *Henry*, 418 Mass. at 844-845; see *Town of Harvard v. Maxant*, 360 Mass. 432, 438 (1971) (it is not enough that accessory use be subordinate, "it must also be attendant or concomitant"); *Hume v. Building Inspector of Westford*, 355 Mass. 179, 182 (1969); *Parrish v. Board of Appeal of Sharon*, 351 Mass. 561, 567 (1967); *Building Inspector of Falmouth v. Gingrass*, 338 Mass. 274, 275-276 (1959); *Gallagher v. Board of Appeals of Acton*, 44 Mass. App. Ct. 906, 907 (1997); *Albee Industries, Inc. v. Inspector of Bldgs. of Waltham*, 10 Mass. App. Ct. 858, 858 (1980); *Town of Foxborough*, 5 Mass. App. Ct. at 618; see also Juergensmeyer and Roberts, Land Use Planning and Development Regulation Law § 4.4 (2d ed. 2007).

The proposed accessory use is scrutinized to determine whether it has commonly, habitually, and by long practice been established as reasonably associated with the primary use.

Town of Harvard, 360 Mass. at 438-439; compare *Henry*, 418 Mass. at 846-847 (proposed gravel removal was not accessory to agricultural or horticultural use of operating Christmas tree farm), *Gallagher*, 44 Mass. App. Ct. at 907 (addition three times as big as existing house was not accessory use of the property), and *Town of Foxborough*, 5 Mass. App. Ct. at 616-617 (operation of flea market on race track parking lots was not an accessory use to parking lot and race track), with *Miles-Matthiass v. Zoning Bd. of Appeals of Seekonk*, 84 Mass. App. Ct. 778, 789-790 (2014) (common driveway to access residential lots permissible accessory use to the main residential use), *Simmons v. Zoning Bd. of Appeals of Newburyport*, 60 Mass. App. Ct. 5, 9-10 (2003) (stabling of horses for personal, non-commercial use qualified as accessory to the residential use of the property), and *Cunha v. City of New Bedford*, 47 Mass. App. Ct. 407, 410-411 (1999) (use of home law office by employed attorneys was permissible accessory use to residential use by attorney). This "is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses." *Henry*, 418 Mass. at 844; see *Town of Harvard*, 360 Mass. at 438-439. The analysis of accessory and incidental uses may change with the passage of time and the progress of technology. See *Pratt v. Building Inspector of Gloucester*, 330 Mass. 344, 346-347 (1953) (stable for horses that may have been accessory use in 1900 was not customary and incidental in 1950). "Interpreting accessory use provisions to require both that an incidental use be minor relative to the principal use and that the incidental use have a reasonable relationship to the primary one is essential to preserve the power and intent of local zoning authorities." *Henry*, 418 Mass. at 846-847.

The facts about the project are largely undisputed. The project proposes the operation of a 1,000,000 square foot facility, of which 860,000 square feet are to be devoted to six indoor

greenhouses, 10,000 square feet will be devoted to cogeneration, and the remaining 130,000 square feet are to be devoted to post-harvest processing. The question raised by Russell and the Planning Board is whether the character of the post-harvest activities is such that they may not be regarded as accessory to the proposed greenhouses. Eighty-six percent of the proposed project will be dedicated to the allowed use of indoor commercial horticulture. Thus, in terms of area, the cultivation of marijuana is by far the majority of the proposed use of the site. It follows that the use of 13 percent of the site for post-harvest processing activities including the drying of "flower" and the extraction of "oil" in preparation for sale is subordinate and minor to the proposed principal use of cultivating marijuana.

This is not the end of the inquiry. A proposed accessory use must also be commonly, habitually, and by long practice established as reasonably associated with the primary use. The question therefore is whether this port-harvest processing is reasonably related to the principal use of cultivating marijuana. The majority of cases on this question originating in the Commonwealth discuss the onsite sale of farm or agricultural products in the context of exempt uses under § 3 or uses allowed by the local zoning bylaw. The general rule is that the sale of products on an agricultural site is an accessory use only if the agricultural products originated on that site. Thus, in *Town of Needham*, the court found that the "sale of Christmas trees and wreaths presents a different question. Neither the trees nor the materials for the wreaths are raised in the nursery. Their sale is not of living plants but of dead wood. Transactions in these articles are no part of the nursery or greenhouse business and are not incidental thereto." *Town of Needham*, 330 Mass. at 101-102. Similarly, in *Building Inspector of Peabody v. Northeast Nursery, Inc.*, 418 Mass. 401 (1994), the court stated that "we are aware of no case that suggests that the business of selling bushes and trees, planted and nurtured elsewhere and delivered to the

business premises ready for marketing, as here, qualified for exemption under G.L. c. 40A, § 3." *Id.* at 405.

Deutschmann v. Board of Appeals of Canton, 325 Mass. 297 (1950), is instructive. In *Deutschmann*, the plaintiff operated a dairy farm in Canton and sought to sell dairy products at a roadside stand pursuant to a bylaw which allowed for the sale "products raised on farms." *Id.* at 298-299. The plaintiff "proposed to sell from this stand milk in cartons and in paper cups, milk shakes, ice cream and cheese," and "the ice cream was to be made on the farm from milk and cream produced on the farm with the addition of sugar, flavoring and gelatin; and [] the ingredients of the milk shakes, except flavoring, and of the cheese would be raised on the farm." *Id.* at 299. Citing *Kimball v. Blanchard*, 90 N.H. 298 (1939), the Supreme Judicial Court found that the "fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them," and further opined that "[w]e do not believe that one who on his premises processes milk and cream from cows on his premises thereby ceases to be a farmer, selling on his farm products there raised." *Id.* at 300-301; see also *Parrish*, 351 Mass. at 563, 566 (where a bylaw allows the sale of farm products raised on the premises, the "sale of such products…is not proscribed by the Sharon zoning by-law, provided that the milk and cream used in the preparation come solely from the plaintiff's farm.").

Fewer Massachusetts cases address processing activities which are or may be accessory to agricultural uses. In *Modern Continental Const. Co., Inc. v. Building Inspector of Natick*, 42 Mass. App. Ct. 901 (1997) (*Modern*), the Appeals Court found that the "plaintiff's slaughtering of livestock raised on its premises was agriculture entitled to the protection afforded by G.L. c. 40A, § 3." *Id.* at 901. The court stated that "[w]e think it reasonable to regard the slaughter of animals as a normal and customary part of preparing them for market. It then follows from the

acceptably broad definitions of the word 'agriculture' that a slaughterhouse used for the butchery of animals *raised on the premises* is primarily agricultural in purpose." *Id.* at 902 (emphasis in original). The court further stated that the "fact that an activity, such as slaughtering, can become an industrial or business use when removed from an agricultural setting does not mean that activity cannot be primarily agricultural in purpose when it has a reasonable or necessary relation to agricultural activity being conducted on the locus." *Id.* In *Cotton Tree Service, Inc. v. Zoning Bd. of Appeals of Westhampton*, Mass. App. Ct., No. 2015-P-1441 (Aug. 5, 2016) (Rule 1:28 Decision) (*Cotton*), the Appeals Court considered whether the plaintiff's commercial wood chipping and storage activities were agricultural activities protected by § 3. *Id.* The court found that "[w]hile the mulch produced on the property may be a 'valuable agricultural product'...Cotton's production process is not agriculture. Cotton makes mulch from damaged trees and stumps brought to the property from other locations...This activity does not involve growing or harvesting any forest products. Furthermore, the record provides no basis for concluding that Cotton's mulching activity is incidental to any other agricultural or farming use." *Id.* (internal citation omitted).

Courts outside the Commonwealth have regularly applied the principal that the processing or sale of agricultural products is an accessory use only if the products originated on the site. See *Ziemer v. Peoria County*, 33 Ill. App. 3d 612, 618 (1975) (consistent with a bylaw allowing farm buildings for preparing livestock or poultry products for market, plaintiff's "poultry processing plant was used to prepare his own turkeys for market, and not those of others, and is thus a permitted use in an area zoned for agriculture."); *Kimball v. Blanchard*, 90 N.H. 298 (1939) (bylaw allowing the sale of farm produce on premises does not bar the sale of ice cream, cheese, butter, cider or maple syrup produced on site because, *inter alia*, "[i]f there

had been any intention to restrict the farmer's sales to farm produce in its natural state, the qualifying phrase could easily have been employed."); *Litchfield Twp. Bd. of Trustees v. Nimer*, 982 N.E. 2d 1282, 1287-1288 (Ohio 2012) (beef jerky facility in Ohio is not secondary to the care of livestock onsite where 39% of meat and 100% of beef hearts processed come from outside sources); *Appeal of Klein*, 395 Pa. 157, 161 (1959) (While the sale of flowers grown on site was agriculture, "[n]othing in this opinion is intended to permit Klein under the guise of a 'farm' use to engage in the admittedly commercial activity of buying plants for resale…The buying for resale can not be of such amount or proportion as to make the cultivation and sale of products grown on the land a mere accessory to Klein's commercial activity"). Moreover, varying related activities have also been found to be agricultural uses or accessory to agricultural uses. See *Sedman v. Rijdes*, 127 N.C. App. 700, 704 (1997) ("The use of large trucks to transport farm products, and the creation of facilities such as driveways and loading docks for such trucks, are both activities so essential to large-scale agricultural production that their exclusion from the exemption would render it meaningless. Similarly, the use of fans and heating devices is 'incidental' to the year-round raising of plants inside greenhouses."); *Gaspari v. Board of Adjustment of Muhlenberg Tp.*, 392 Pa. 7, 15-16 (1958) (production of synthetic compost for mushrooms where hay and corn cobs undergo chemical and biological changes when water is poured over them and they are mixed, turned, and moved to open air found to be "well within the ambit of 'farming and all its branches'").

The foregoing cases in large part analyze activities that are exempt from zoning under § 3 or an analogous provision in another state, or interpret local zoning bylaws and ordinances which have some provision for the sale of agricultural products at the locus of their production. This case stands in a somewhat different posture. Here, the bylaw does not define agriculture or

comment on any agricultural accessory uses and VGG does not, and could not, seek to maintain a marijuana related accessory use as exempt from the bylaw under § 3. These cases, however, are instructive on the nature and variety of uses which for one reason or another have been held to be appropriately related to an agricultural activity as to be allowed by the applicable zoning statutes or local bylaws or ordinances. The cited cases—both in Massachusetts and in other states—stand for the principal that for a processing use to be accessory to an agricultural use, the majority if not all of the raw materials employed in such processing must be the product of the agricultural activity on the locus in question.

The Appeals Court's opinion in *Modern* presents a particularly apt analog to the present case. Like the slaughterhouse in *Modern*, if VGG's processing of marijuana were to occur in a location other than that in which it is grown, it would strain reason to argue that it is, on its own, an agricultural activity. That VGG proposes to process its own crops on the same site on which the crops are grown, however, means that the processing is customary and reasonably related to the primary greenhouse use of cultivating the marijuana plants. For example, VGG's proposed activities relating to the drying of marijuana "flower" seem to be reasonably related to the preparation of the product for storage and transportation. See *Carlson v. Zoning Bd. of Review of the Town of South Kingston*, R.I. Super. Ct., No. WC-2014-0557, 2016 WL 7035233 (Nov. 25, 2016) ("[m]anufacturing entails more than simply drying out plants. If an individual grows some plants and then harvests those plants and dries them, that individual has not manufactured anything."). Further, any activities relating to the processing and disposal of the stems and stalks of the marijuana plants is reasonably related to, and in fact a necessary accessory activity to, the growth of the plants. A more difficult question is posed by the proposed extraction of "oil." The summary judgment record does not detail the process by which the "marketable aspects of the

Cannabis plant" are extracted. Planning Bd. App. Exh. 3. The record does make clear, however, that the only marijuana which is processed, and from which "oil" is extracted, is grown onsite. This distinction is meaningful. Applying the body of case law surveyed above, the proposed extraction activities would not be permitted as accessory to the cultivation of marijuana if VGG was proposing to process marijuana that was grown at a different location, but are accessory when processing marijuana grown on the site.

The Planning Board argues that the processing activities cannot be accessory to the agricultural use because their land use impacts will be principally those associated with light manufacturing and not horticulture. Certainly, VGG proposes a large, technically complex project. Nevertheless, it remains a commercial indoor horticulture/floriculture use allowed by the bylaw. That the project will be large and require the water, electricity, personnel, and transportation infrastructure attributable to any large-scale operation does not mean that the use becomes industrial rather than agricultural. See *Sedman*, 127 N.C. App. at 703, quoting *Baucom's Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, 399 (1983) ("the use of 'modern and efficient equipment and methods in growing, cultivating and harvesting agricultural products' by a greenhouse did not preclude the greenhouse from qualifying for the exemption from county zoning regulations under the pre-amended N.C. Gen. Stat. § 153A–340.").

An accessory use must be subordinate and minor in significance to the primary use, reasonably related to the primary use, and commonly, habitually, and by long practice reasonably associated with the primary use. There is no question that the municipalities of the Commonwealth have entered somewhat uncharted territory with respect to determining whether any activity is of the kind typically associated with a use as new as marijuana cultivation. In this case, given that the cultivation of marijuana is an agricultural use under the bylaw, it is

appropriate to consider the disputed component of the project—the post-harvest processing—under the lens of any other agricultural use. By drying the "flower" and extracting the "oil" from the harvested marijuana VGG is essentially preparing the agricultural product grown on the site for final sale, not unlike a farmer making cider, cheese, ice cream, butter, or maple syrup. On the facts specific to this proposal, the use of 130,000 square feet of the site to house all of the post-harvest activities is not unreasonable. Considering the size of the post-harvest processing area in comparison to the size of the entire site—only 13 percent—and the fact that VGG proposes to process only marijuana that is grown on the site, the court finds that the post-harvest processing is accessory to the 860,000 square feet of marijuana cultivation that is an allowed use, as it is an activity that is dependent on the principal use and is reasonably related to both that use and other more common forms of agricultural uses which require some amount of processing before they may be transported for final sale.

To the extent that Russell or the Planning Board has separately argued that the 10,000 square feet of cogeneration is not a proper accessory use, the record provides that the proposed 18 megawatt cogeneration system occupies one percent of the area of the site, will provide all of the electricity required by the project, and will be capable of feeding some power back into the grid for the purposes of grid stabilization when necessary. The proposed cogeneration system serves no purpose other than supporting the principal and other accessory uses of the site. VGG does not propose building a commercial power plant but rather proposes to use one percent of the area of the site to produce the electricity required by the project. Under § 3.2.2.6 of the bylaw "[e]lectric generating facilities with less than or equal to 50 megawatts of power output" are listed as principal uses allowed only in the community business and industrial-general zoning districts and only with site plan approval. Planning Bd. App. Exh. 6. The proposed cogeneration

system, however, is distinct from the use contemplated by § 3.2.2.6 of the bylaw in that its intended use is not to produce commercial power but rather to support the other activities occurring at the site. As such, the proposed cogeneration system is a permitted accessory use.

The Planning Board further argues that even if the post-harvest processing and cogeneration are accessory uses, they are not permitted because the bylaw defines permitted accessory uses and does not include the processing activity or cogeneration proposed by VGG. Accessory uses are allowed by common law whether specifically allowed in a local bylaw or ordinance or not. *Barrett v. Entergy Nuclear Generation Co.*, 25 LCR 199, 216, 217 (2017), citing *Town of Harvard*, 360 Mass. at 435. Thus, while a local bylaw or ordinance may list some allowed accessory uses, the enumerated list is not to be regarded as exhaustive. *Salah v. Board of Appeals of Canton*, 2 Mass. App. Ct. 488, 496 (1974) ("The four uses listed obviously could not have been intended to exhaust the multifarious possibilities inherent in the broad definition of 'accessory use.'"); *Pratt*, 330 Mass. at 346 ("Even though the ordinance does not expressly permit accessory uses, it must be construed in a reasonable manner, always with regard to the obvious intent of maintaining the character of the neighborhood as appropriate for one family detached houses. For example, we have no doubt that a part of a lot might be devoted to a garden for use in connection with the house"). Reasonably interpreting the accessory use provisions of the bylaw compels the conclusion that the narrow list of enumerated accessory uses in § 3.2.2.8 is not exhaustive and does not bar VGG's proposed accessory uses. The post-harvest processing and cogeneration are appropriate accessory uses to the principal use of the site for marijuana cultivation.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment on Cross-Claim Pursuant to G.L. c. 240, § 14A, is **ALLOWED**, and Gerard F. Russell's Motion for Summary Judgment and the Planning Board's Motion for Summary Judgment are **DENIED**. Judgment shall enter in Miscellaneous Case No. 18 MISC 000483. A telephone status conference is set down for September 3, 2019 at 12:00 noon in Miscellaneous Case No. 19 MISC 000226.

SO ORDERED

By the Court, (Foster, J.)

Attest:

Deborah J. Patterson, Recorder

Dated: August 14, 2019

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER