VALLEY GREEN GROW, INC., & OTHERS[1] VS. TOWN OF CHARLTON & OTHERS[2] (AND A COMPANION CASE[3])

Docket:	19-P-1784
Dates:	October 14, 2020 - June 9, 2021
Present:	Rubin, Desmond, & Englander, JJ.
County:	Suffolk
Keywords:	Marijuana. Zoning, Accessory building or use, Agriculture, Building inspector, By-law, Judicial review, Permitted use, Site plan approval. Agriculture. Real Property, Agricultural or horticultural use. Subdivision Control, Decision of planning board, Planning board, Regulations, Zoning requirements. Constitutional Law, Emergency law, Federal preemption, Supremacy of Federal law. Electricity. Environment, Noise. Statute, Federal preemption. Federal Preemption. Regulation. Practice, Civil, Subdivision control appeal.

Civil action commenced in the Land Court Department on September 21, 2018.

Civil action commenced in the Superior Court Department on January 23, 2019.

After transfer of the Superior Court action to the Land Court Department, the cases were heard by Robert B. Foster, J., on motions for summary judgment.

Francis B. Fennessey for the intervener.

Mark Bobrowski for the planning board of Charlton.

Michael D. Rosen & Bradley Croft for the plaintiffs.

Jonathan M. Silverstein, for town of Charlton, submitted a brief.

DESMOND, J. In these cases, paired for consideration and oral argument on appeal, we address local zoning regulations as they relate to the creation of a large marijuana establishment[4] in the town of Charlton (town). The town's planning board concluded that the plaintiffs'[5] proposed marijuana establishment constitutes "light manufacturing" as that term is used in the town's zoning bylaw (bylaw) and, therefore, is not a use allowed in the agricultural and commercial business districts in which the proposed development site is located. On summary judgment, a judge of the Land Court concluded and declared that the proposed use is "an indoor commercial horticulture/floriculture establishment (e.g. greenhouse) use allowed by right" in the two zoning districts. For the reasons that follow, we affirm the well-reasoned decision of the judge.

Background. The background facts are undisputed, and we draw them from the judge's findings,[6] supplemented by uncontested affidavits and other submissions of the parties.

1. The locus and the proposed use. The locus contains approximately 94.6 acres and, for decades, has been used as a commercial fruit orchard (locus). The orchard's operations traditionally have included cultivating apples for sale and processing apples to produce alcoholic and food products on the site. In addition to apple orchards, the locus housed production facilities, buildings, and equipment to juice, press, bake, process, ferment, and bottle the fruit for sale as wine, cider, juice, pies, jellies, and jam. Gerard F. Russell[7] asserts that his property was located directly across the street from the locus.[8]

VGG has entered into a purchase and sale agreement to purchase the locus from the existing owners, Charlton Orchards Group, LLC; Nathan R. Benjamin, Jr.; and Catherine L. Benjamin (collectively, owners). The owners[9] and VGG submitted a subdivision plan for the locus in April of 2018, which the parties all agreed effectively froze the zoning for the locus. VGG proposed to construct a facility for the cultivation, processing, and manufacturing of medical and recreational use cannabis.

The project would consist of a one million square foot indoor marijuana growing and processing facility, including 860,000 square feet of closed greenhouses; a 130,000 square foot postharvest processing facility; and a 10,000 square foot cogeneration facility. According to the site plan review application, in total, buildings would cover 22.95 acres of the 94.6 acre lot. The judge found that "[e]ighty-six percent of the proposed project will be dedicated to . . . indoor commercial horticulture."

The judge's findings included a detailed description of the project. We summarize the highlights. Cannabis would be grown hydroponically[10] without chemical pesticides in closed greenhouses that would carefully maintain environmental conditions, filter air contaminants, and mitigate odors. VGG plans to lease space for marijuana cultivation and processing to licensed cultivators.[11][12] Postharvest processing would include separating marketable aspects of the cannabis plant to be either dried and sold as "flower" or extracted and sold as "oil." The details of the extraction process, as the judge found, are not contained in the record.

Cogeneration utilizing natural gas to produce electricity would power the electrical needs of the facility and produce lighting, heat, and carbon dioxide for cultivation.[13] VGG's narrative for its site plan review application asserted that "[c]o-locating [cogeneration] with commercial greenhouses is common and considered a best practice in terms of both economic and environmental sustainability." Irrigation needs would require the use of 30,000 gallons of new water every day, supplied primarily by rainwater collection tanks (containing up to two million gallons).[14] Other inputs would include fertilizer, rockwool grow media, and packaging materials.

2. State and local regulation of marijuana establishments. Although the issue whether VGG qualifies for one or more licenses from the State's Cannabis Control Commission (commission) is not before us, the interplay between State regulation and local regulation of marijuana enterprises warrants our consideration. We accordingly review in some detail the Commonwealth's regulation of the cultivation, manufacturing, and sale of marijuana that is not medically prescribed.

"[I]n November of 2016, Massachusetts voters approved a ballot initiative that legalized the recreational possession and use of marijuana by persons at least twenty-one years of age, and allowed limited, regulated commercial sale" and cultivation. Commonwealth v. Long, 482 Mass. 804, 811 (2019). The initiative was codified in G. L. c. 94G, see Long, supra, which "created a comprehensive scheme for the licensing, operation, and regulation of marijuana-related businesses," Weiner v. Attorney Gen., 484 Mass. 687, 693 (2020). That statute creates a unique combination of State and local control of marijuana establishments.

The principal licensing authority for marijuana establishments is the commission. Under the statute, however, a city or town may impose reasonable local control over the time, place, and manner of marijuana establishment operations, and a proposed marijuana establishment must comply with local bylaws and ordinances.[15] See G. L. c. 94G, § 3 (a) (municipality "may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana

establishments, provided they are not unreasonably impracticable and are not in conflict with this chapter or with regulations made pursuant to this chapter").[16] See also 935 Code Mass. Regs. § 500.170(2) (2018).

That municipalities may control where marijuana is cultivated in the town is further evidenced by the Legislature's emergency amendment to G. L. c. 40A, § 3, enacted only two weeks after the Legislature enacted G. L. c. 94G. See St. 2016, c. 351, § 1. Prior to the 2016 amendment, c. 40A, § 3, prevented most zoning regulation of land used for agricultural purposes by providing that no bylaw shall "prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture . . . [or] horticulture." The 2016 amendment specified that the exemption from zoning regulation for commercial agriculture and horticulture does not apply to marijuana cultivation. As amended, c. 40A, § 3, now states in part:

"For the purposes of this section [c. 40A, § 3], 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 . . . 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."

The Legislature further amended c. 40A, § 3, in 2017 to provide that "nothing in this section shall preclude a municipality from establishing zoning by-laws . . . which allow commercial marijuana growing and cultivation on land used for commercial agriculture, aquaculture, floriculture, or horticulture." St. 2017 c. 55, § 7.

The town is a "yes" community, which means that it voted to approve the ballot initiative that was codified as G. L. c. 94G. By statute, while reasonable time, place, and manner restrictions may be imposed by the town by adopting ordinances and bylaws, if the town wanted to "prohibit the operation of [one] or more types of marijuana establishments within the . . . town," then it would have had to seek the voters' approval. G. L. c. 94G, § 3 (a) (2) (i).[17] The parties concede that the town did not adopt a bylaw specifically applicable to marijuana cultivation prior to the zoning freeze. An alternative to enacting new provisions specific to marijuana establishments, however, may well be to apply its existing bylaws to proposed marijuana establishments, as the town did here. See Cannabis Control Commission, Guidance For Municipalities, Local Control: Bylaws & Ordinances https://mass-cannabis-control.com/wp-content

/uploads/200825_Guidance_for_Municipalities.pdf [https://perma.cc/SK58-KVVD].

Applicants to the commission for a marijuana establishment license must include a "description of plans to ensure that the [m]arijuana [e]stablishment is or will be compliant with local codes, ordinances, and bylaws." 935 Code Mass. Regs. § 500.101(1)(a)(10) (2018). The commission forwards a copy of the application to the municipality, which, within sixty days, must respond whether the proposed marijuana establishment complies "with municipal bylaws or ordinances." 935 Code Mass. Regs. § 500.102(1)(d) (2018).

Chapter 94G also requires an applicant to enter into a host community agreement with the town, setting forth the conditions for a marijuana "establishment." See G. L. c. 94G, § 3 (d). Here, the board of selectmen of Charlton (board of selectmen) sought the opinion of the town's zoning enforcement officer (ZEO) who, after consultation with town counsel, advised that VGG's proposed use would be permitted as of right under the zoning existing at the time VGG filed its preliminary and then definitive subdivision plans. After the board of selectmen received the ZEO's opinion that the proposed use was permitted as of right, the board of selectmen and VGG executed a "development agreement" on July 17, 2018. It provided that "the [p]arties intend by [the] [a]greement to satisfy the provisions of G. L. c. 94G, Section 3 (d), applicable to the operation of . . . [m]arijuana [e]stablishments, . . . in accordance with the applicable [S]tate and local laws and regulations in the [t]own." It described VGG's project and provided for payments to the town for each cultivation license, but provided further that "[n]o additional fee shall be required for any license issued by the [commission] for testing, research and development, manufacturing and processing, to the extent that such license is for a use or process which is solely ancillary and incidental to a cultivation license." Importantly, although the planning board would not otherwise have had jurisdiction over the project, in the development agreement the parties agreed to submit the project to the planning board for site plan approval.

3. Allowed uses under the bylaw. We set forth the provisions of the bylaw in effect when VGG's subdivision plan was submitted and its zoning freeze took effect. Section 3.2.1 of the bylaw provided that "[b]uildings and other structures shall be erected or used and premises shall be used only as set forth in the 'Use Regulation Schedule.'" Section 3.2.2.1(3) and (4) of the bylaw state that uses allowed in the "[a]gricultural" district included "[a]gricultural, [f]loriculture and [h]oricultural [u]ses," specifically including, raising crops for sale or personal consumption and "[i]ndoor commercial horticulture/floriculture establishments (e.g. greenhouses)."

Allowed uses included accessory uses and accessory buildings. Section 2.1 of the bylaw defines an accessory use as a "land use which is subordinant and incidental to a predominant or

main use." Section 2.1 defines an accessory building as "one which is subordinate or incidental to the main use of a building on a lot; the "term 'accessory building' when used in connection with a farm shall include all structures customarily used for farm purposes and they shall not be limited in size."

Section 3.2.2.8 listed accessory uses in each zoning district, and in subsection 3, included in the agricultural district, "[a]ccessory building[s] such as a private garage, playhouse, greenhouse, tool shed and private swimming pool." The list of accessory uses allowed in the agricultural district with site plan review included an "[e]mergency power back up facility with less than or equal to [thirty] megawatts of power output."[18]

In March of 2018, the ZEO advised VGG that the proposed project would be permitted as of right in the town's agricultural district under the bylaw; the retail component would be allowed in the community business portion of the locus with site plan approval from the planning board. As noted above, on June 13, 2018, the ZEO advised the board of selectmen that VGG's proposed use would be permitted as of right in the town's agricultural district. In connection with this lawsuit, the ZEO submitted an affidavit stating that the proposed principal use is a commercial cultivation facility and fits "under Section 200-3.2.B(1)(C), [u]se [r]egulations [s]chedule, 'indoor commercial horticultural/floricultural establishments (e.g. greenhouses)'" uses that "are allowed by right in every zoning district in the [t]own." The ZEO further opined that the storage, processing, and other facilities on site, would be accessory to such use.[19]

4. Procedural posture. On August 14, 2018, VGG applied for site plan review, as contemplated by the development agreement. On January 2, 2019, the planning board denied the application, concluding that the use proposed constitutes light manufacturing and is not a use permitted in the agricultural or commercial business districts. "Light [m]anufacturing" is defined in § 2.1 of the bylaw 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." VGG filed an appeal in the Superior Court pursuant to G. L. c. 40A, § 17; the case was transferred to the Land Court.

In a separate Land Court action, Russell filed a cross claim against the town, seeking a declaration, pursuant to G. L. c. 240, § 14A, that the bylaw use regulations do not allow VGG's proposed use. The parties filed cross motions for summary judgment on Russell's cross claim, and the Land Court judge determined that the motions for summary judgment would be treated

as motions for partial summary judgment in the G. L. c. 40A, § 17, appeal from the planning board's site plan review decision as well.

Considering the two cases together, the judge concluded that "[b]ased 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[s], an agricultural use." He reasoned that "[t]his use is properly classified as an indoor commercial horticultural/floricultural establishment within the meaning of § 3.2.2.1 of the bylaw." The judge noted that just because the table of uses makes no mention of marijuana does not mean its cultivation is not allowed in the town, as the use table does not mention any particular crop. The judge also rejected Russell's argument that the 2016 amendment to G. L. c. 40A, § 3, prohibited the bylaw from including marijuana cultivation as "agriculture" or "horticulture." Finally, the judge concluded that where only thirteen percent of the site is "for [postharvest] processing activities including the drying of 'flower' and the extraction of 'oil' in preparation for sale[, those uses are] subordinate and minor to the proposed principal use of cultivating marijuana." The judge likened the postcultivation processing to "a farmer making cider, cheese, ice cream, butter, or maple syrup" from products grown on site. The judge concluded that the postharvest processing is accessory to the allowed use of marijuana cultivation.[20]

In VGG's G. L. c. 40A appeal, the judge annulled the planning board's decision and remanded the case to the planning board for proceedings consistent with the judge's memorandum and order. On Russell's cross claim for declaratory judgment, the judge declared that the use proposed by VGG is allowed as of right under the bylaw and the proposed postharvest processing activities and the proposed cogeneration facility are lawful accessory uses. Russell and the planning board appeal.

Discussion. We review de novo the allowance of both motions for summary judgment, viewing the facts in the light most favorable to the party against whom summary judgment entered. See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 376 (2019).

1. Impact of the 2016 amendment of G. L. c. 40A, § 3. With the regulatory background in mind, we address Russell's principal argument on appeal. He contends that when the Legislature amended c. 40A, § 3, in 2016, it defined the terms "agriculture, aquaculture, floriculture and horticulture" as excluding the growing, cultivation, or distribution of marijuana for all zoning purposes. St. 2016, c. 351, § 1. Accordingly, Russell asserts that the proposed project cannot be conducted in the town's agricultural district because the amendment to c. 40A, § 3, means that

the growing and cultivation of marijuana is not "agriculture" or "horticulture" under the town's preexisting bylaw.

We disagree. The definitions of "agriculture" and "horticulture" contained in c. 40A, § 3, are expressly stated to be for purposes of § 3 only.[21] Since at least 1975, c. 40A, § 3, has prohibited municipalities from adopting zoning regulations that bar or unreasonably regulate agricultural and horticultural uses in any zoning district. See St. 1975, c. 808, § 3. See also Bateman v. Board of Appeals of Georgetown, 56 Mass. App. Ct. 236, 242-243 (2002). The clear intent of the Legislature in amending c. 40A, § 3, in the wake of the enactment of G. L. c. 94G, was to ensure that marijuana establishments are not automatically exempt from local zoning regulations. As the judge said: "That § 3 was amended to except marijuana-related uses from 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." In the absence of the amendment to § 3, marijuana growing and cultivation would have been allowed as of right in all zoning districts in the town.

We agree with the Land Court judge that the 2016 amendment to c. 40A, § 3, provides only that growing and cultivating marijuana does not qualify for the zoning exemption contained in c. 40A, § 3, granted to other commercial agricultural and horticultural uses. The 2016 amendment does not bear on whether a town's existing bylaw allows the growing and cultivation of marijuana in a town's agricultural district.[22] By simply failing to amend its bylaw to specifically address marijuana cultivation, the town did not eliminate the possibility that its cultivation of marijuana and reasonably related accessory uses would be allowed in the agricultural district under the existing bylaw.

2. Does the proposed use qualify as indoor commercial horticulture? Because the town did not enact any ordinances placing reasonable time, place, or manner restrictions on marijuana establishments prior to the time that VGG and the owners submitted their preliminary subdivision plan and thereby froze the zoning, the judge reasonably looked to the zoning bylaw as it existed when the preliminary plan was submitted to determine whether VGG's proposed use was permitted as of right. The question for the judge (and the question addressed by the planning board), therefore, was whether the project met the definition of agriculture or horticulture in the town's bylaw.

Leaving aside for a moment the planning board's authority to determine whether the proposed use is permitted as of right, we note that it does not appear from the submissions that

even the planning board concluded that the growing of marijuana in enclosed greenhouses is not allowed in the agricultural district. Section 3.2.2.1 of the bylaw lists "[i]ndoor commercial horticulture/floriculture establishments (e.g. greenhouses)" as uses allowed as of right in the town's agricultural district. Neither party makes a reasoned argument that the growing of marijuana plants is not allowed in the agricultural district, however specialized the "greenhouses" might be.[23]

Russell and the planning board argue, however, that the rest of VGG's proposal -- the cogeneration facility, the process of drying and separating the plant parts and extracting oil from them, and the preparation of marijuana products -- are not allowed in the agricultural district and that those uses are in fact the principal uses proposed. We recognize that these aspects of the proposed project do not fit the common understanding of "agriculture" or "horticulture" -- words that conjure visions of open, tilled fields or glass greenhouses. The general definition of "agriculture" contained in G. L. c. 128, § 1A, however, includes activities on a farm performed "incident to or in conjunction with . . . farming operations, including preparations for market, [and] delivery to storage or to market or to carriers for transportation to market." Similarly, at least for tax purposes, "horticultural" use of land includes, in addition to directly raising greenhouse products, incidental uses that represent a "customary and necessary use in raising these products and preparing them for market." G. L. c. 61A, § 2. Viewing the project as a whole, the incidental processing and manufacturing of marijuana products that VGG proposes here easily fall into the incidental activities category.

Our courts have several times held that a particular, otherwise unauthorized, use qualifies as a permitted use due to its relationship to a larger project. Indeed,

"[t]here are numerous instances in which courts have looked at the whole project to determine the use for zoning purposes of a part of a project. For example, a structure used for dehydrating fodder material would ordinarily be viewed as a structure used for manufacturing. However, if the structure is 'of a character ordinarily and reasonably regarded as farming' and its use is directly related to the farming operations of the owner, it is regarded for zoning purposes as being used for farming. Jackson v. Building Inspector of Brockton, 351 Mass. [472,] 476–477 [(1966)]. Similarly, an electric generating and steam power plant, standing alone, would ordinarily constitute an industrial use for zoning purposes. However, when the power plant 'would be an integral part of the institutional activities of [an association of institutions engaged in medical, educational, and charitable functions],' it could be found to be 'an institutional facility,' and the Boston Redevelopment Authority could properly grant a zoning variance allowing it to be built. Boston Edison Co. v. Boston [Redev.] Auth., 374 Mass. 37, 65–70

(1977). In Salah v. Board of Appeals of Canton, 2 Mass. App. Ct. 488 (1974), this court held that a proposed complex which included warehouse space, a garage, and truck storage facilities and which was to be operated by a common carrier was not necessarily a trucking terminal for zoning purposes. Looking at the complex as a single entity, the court concluded that the use of the facility for the accumulation, storage and distribution of goods brought the complex 'within the common and approved usage of the phrase "distribution plant" and [was therefore] permitted by the [zoning] by-law . . . .' Id. at 494." Pellegrino v. City Council of Springfield, 22 Mass. App. Ct. 459, 464-465 (1986).

Here, consistent with the foregoing cases, it is not necessary for us to conclude that no processing or manufacturing will take place. Some undoubtedly will -- as an incidental or accessory use. Indeed, the development agreement's fee structure provides for manufacturing and processing only to the extent that such uses are incidental to a cultivation license. "The fact than an activity . . . 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." Modern Cont. Constr. Co. v. Building Inspector of Natick, 42 Mass. App. Ct. 901, 902 (1997). The proposed cogeneration facility, incidental processing, and incidental manufacturing, when viewed as components of the entire indoor commercial horticultural use, are allowed as of right in the agricultural district.[24]

A. Horticulture or light manufacturing. The planning board argues that its decision that VGG proposed a "light manufacturing" use was supported by several factors, "including the overall size of the facility, the proposed lease of grow space, the number of employees, the number of truck trips per day, the overall trip generation of the facility, the water consumption . . . , the potential for industrial-level noise, the need for sophisticated HVAC[25] and odor mitigation controls, and the large cogeneration facility." The board also points to the facts that VGG proposes to lease up to six spaces for marijuana cultivation to other licensed growers, that the processing/manufacturing components will occupy 130,000 square feet of the proposed one million square foot building, and that six loading docks will serve incoming and outgoing trucks.

While listing these factors, the planning board fails to explain how they render the principal use of the locus light manufacturing, rather than commercial horticulture.[26] In particular, the board essentially ignores that the overwhelming majority of the improved portion of the locus will be used for growing marijuana. There is no escaping that the project will constitute a large commercial operation and that the cogeneration facility that serves the specialized greenhouses, itself, is a large, enclosed, commercial-like structure. But, the bylaw expressly allows indoor

commercial horticultural uses and contains no limit on the size of an allowed commercial greenhouse or accessory structures. According to VGG, the cogeneration facility is a common and integral component to the cultivation of marijuana, providing needed electricity, light, heat, and carbon dioxide, and represents best practices. Furthermore, the bylaw does not limit the number of employees, the number of vehicle trips, the number of loading docks, the leasing of cultivation space, the size of buildings, or the amount of water a horticultural use may consume in the agricultural district. Nor does the bylaw focus on these factors in defining "light manufacturing," such that we could reasonably conclude that the proposed use is more akin to "light manufacturing." Moreover, even if no processing or manufacturing were done on site, trucks still would be required to move the fully grown marijuana plants to other venues -- if that could even be accomplished without harming the plants. The record is silent whether the incidental processing and manufacturing that would occur on site actually increases or decreases the number of truck trips necessary for the operation. Indeed, in its brief, the planning board admits that the record does not disclose how many employees or vehicle trips there will be for cultivation uses as compared to processing or manufacturing uses, yet posits, without support, that the latter uses will require more. The factors relied on by the planning board simply do not support the conclusion that the principal use of the locus would be the "processing" and "manufacturing" components of the proposed project, rather than the growing and cultivation of marijuana plants.[27] Contrast Harvard v. Maxant, 360 Mass. 432, 437-440 (1971) (private landing strip not customarily incidental to residential use); Burnham v. Hadley, 58 Mass. App. Ct. 479, 485 (2003) (home business employing several employees, occupying large portion of home, requiring separate vehicle, and serving sales outlets not incidental to residential use).

The planning board contends the relationship between growing marijuana, processing it, and manufacturing marijuana products must be reasonable. See Harvard, 360 Mass. at 438 (whether activity is "incidental" is fact-dependent inquiry comparing net effect of uses and evaluating reasonableness of relationship between primary and incidental uses). But here, that reasonable relationship exists. We note that when the commission licenses "[m]arijuana [c]ultivator[s]," it allows them to "cultivate, process[,] and package marijuana," 935 Code Mass. Regs. § 500.002 (2018), which is some indication that those activities go hand in hand and that processing and packaging are reasonable and incidental to the primary use of growing marijuana. Moreover, while referred to as "processing," the actual activity described by VGG as "processing," consists of "steps that separate marketable aspects of the [c]annabis plant to be either dried and sold as '[f]lower' or extracted and sold as '[o]il.'" We agree with the judge that these actions cannot be distinguished from the harvesting of apples or other fruits and vegetables that require separation from trees or stalks. Nor can these ancillary processing activities be readily distinguished from

the long-term use of the locus for cultivating apples and manufacturing cider and other apple products or from dairy farmers' processing cow's milk into ice cream and cheese, see Parrish v. Board of Appeal of Sharon, 351 Mass. 561, 562-563, 566 (1967) (sale of milk, ice cream, cheese, ice cream cones, milk shakes, frappes, and sundaes considered sale of products raised on dairy farm notwithstanding processing required to make products).

The planning board and Russell also argue that the proposed processing and manufacturing uses are not "accessory" uses as that term is used in the bylaw. The foregoing cases clarify, however, that even when a use might otherwise not constitute an "agricultural use," if the use is directly related to the farming operations of the owner, it is regarded for zoning purposes as being used for farming. Moreover, we agree with the judge that the list of accessory uses in the bylaw was not meant to be exhaustive. See Salah, 2 Mass. App. Ct. at 496-497. For example, § 2.1 of the bylaw provides that an "'accessory building' when used in connection with a farm[,] shall include all structures customarily used for farm purposes and they shall not be limited in size," yet no buildings fitting that description are on the list of accessory uses. Here, where the judge found that the cogeneration facility and the proposed processing and manufacturing are subordinate and incidental to the main horticultural use of cultivating marijuana, we discern no error in his conclusion that they constitute accessory uses allowed by right under the bylaw.

B. Deference to the planning board. We disagree with the contention that we should or must defer to the planning board's conclusion whether the proposed use is permitted under the bylaw. Here the ZEO opined on three occasions, including in an affidavit submitted in these cases, that the proposed use would be permitted as of right. That opinion, though not controlling, carries weight, as the bylaw charges the ZEO with enforcing the bylaw. The ZEO's affidavit specifically states that "[t]hese types of accessory uses," including the cogeneration facility, "are similar to other ancillary uses accessory to agricultural uses in [the town]." There was no contrary evidence.

It is true that the bylaw directs the planning board, in the ordinary course, to ensure compliance with the bylaw. However, it is clear that neither the town nor VGG, in executing the development agreement and agreeing to site plan approval by the planning board, intended to have the planning board revisit whether the proposed use was allowed as of right. That determination had been made by the board of selectmen with the advice of the ZEO and town counsel. The circumstances suggest that the project was referred to the planning board for site plan review of a use permitted as of right. Indeed, both parties to the development agreement, the town, as represented by the board of selectmen, and VGG, argue on appeal that the judge and the ZEO correctly concluded that the proposed use is permitted as of right. Site plan review of

uses that are permitted as of right involves "the regulation of a use and not its outright prohibition," and the "scope of review is . . . limited to imposing reasonable terms and conditions on the proposed use." Dufault v. Millennium Power Partners, L.P., 49 Mass. App. Ct. 137, 139 (2000).

We accordingly confront a situation where the town is speaking with two competing voices, one of which, the ZEO, is the party charged with enforcing the bylaw. In these unique circumstances it is difficult to see why we would defer to the planning board's contrary conclusion. We are quite comfortable concluding that we need not defer to the planning board's opinion, and we conclude that it exceeded its authority by denying site plan review on the ground that the proposed use was not permitted as of right.

C. Constitutionality of G. L. c. 94G. The judge noted that Russell and two amici curiae had challenged the constitutionality of G. L. c. 94G as "barred by [art.] VI of the United States Constitution, the Supremacy Clause, because [F]ederal regulation of marijuana as a controlled substance preempts [S]tate authority to enact c. 94G." The judge declined to reach the issue because it was not within the court's jurisdiction as Russell did not attack the constitutionality of G. L. c. 94G in his cross complaint under G. L. c. 240, § 14A, or as a cognizable issue under G. L. c. 40A, §§ 7 or 17. We discern no error.

Conclusion. For all of the foregoing reasons, we affirm the judgments of the Land Court. Specifically, in Appeals Court case number 19-P-1516, the judgment in Land Court case number 18-MISC-483 that entered on August 14, 2019, is affirmed. In Appeals Court case number 19-P-1784, the judgment that entered in Land Court case number 19-MISC-226 on September 27, 2019, and the order dated October 16, 2019, are affirmed.

So ordered.

RUBIN, J. (dissenting). 1. Introduction. The project that the court today holds is permissible, as a matter of law, as an agricultural use -- a use, depending on the crop, that is by statute allowed as of right in every municipal zoning district in every city and town throughout the Commonwealth -- is no mere cannabis farm. In addition to facilities and all that comes with them contained in the proposed use for the manufacture of cannabis products, the project includes an eighteen-megawatt electric power plant with four thirty-five-foot high cooling towers. It will generate enough electricity to provide the power for approximately 14,400 homes. See Warren, Hydropower: Time For A Small Makeover, 24 Ind. Int'l & Comp. L. Rev. 249, 251 (2014) ("a power generator with a capacity of one megawatt . . . is capable of powering

approximately 800 homes, based on the average household power consumption across the United States"). For a sense of scale, the town of Charlton (town or Charlton) itself had a total estimated population in 2019 of only 13,713. See United States Census Bureau, QuickFacts: Charlton Town, Worcester County, Massachusetts, https://www.census.gov/quickfacts/fact/table

/charltontownworcestercountymassachusetts/PST120219 [https://perma.cc/GW4Z-XFZA]. It will also generate eighty-nine decibels of noise, about as loud as if one were standing ten to twenty feet from a roadway on which 1,000 trucks per hour were passing. See Illinois Department of Transportation, Highway Traffic Noise, https://idot.illinois.gov/Assets/uploads/files

/Doing-Business/Manuals-Guides-&-Handbooks/Highways/Design-and-Environment/Environment/Highway%20Traffic%20Noise%20--%20Noise%20Fundamentals%20111215.pdf [https://perma.cc/KC3V-NS76]. Section 3.2.2.6 of the town's zoning bylaw (bylaw) prohibits all "[e]lectric generating facilities with less than or equal to 50 megawatts of power output" as a primary use in agricultural districts, allowing them only in community business and industrial-general districts. The planning board of Charlton (planning board), to whose jurisdiction the town; Valley Green Grow, Inc.; and the other plaintiffs voluntarily submitted themselves, found, quite reasonably, "that the Project and the Proposed Use does not qualify as an 'Indoor commercial horticulture/floriculture establishment[] (e.g. greenhouses)'" -- one of the "Agricultural, Floriculture, and Horticultural Uses" permitted in all zoning districts -- "as set forth at Section 3.2.2.1.4." The court today, however, holds that, as a matter of law, it is such an agricultural use.

This means that, despite the bylaw, a project like this, with its eighteen-megawatt electric power plant, must be permitted anywhere in Charlton, in any zoning district, including a residential one. Indeed, it means that an indoor growing project like this, even with an electric power plant attached, must be permitted anywhere in the Commonwealth, in any zoning district, if the crop is not cannabis -- this includes facilities for the hydroponic indoor growth of any and all other crops. See G. L. c. 40A, § 3 ("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 . . ."). And, although the Legislature did amend G. L. c. 40A, § 3, in 2016 to allow cities and towns to exclude the growing of cannabis from their definition of "agriculture, aquaculture, floriculture and horticulture," under today's decision, a cannabis-growing enterprise such as this, with an electric power plant just like the one here, must be permitted as of right somewhere in

every city or town (like Charlton) that has not amended its zoning bylaw to prohibit it -- a particularly arduous process in cities and towns (like Charlton) where the majority of citizens voted "yes" to question four authorizing the legalization, regulation, and taxation of marijuana, as they may amend their zoning bylaws to prohibit this use (rather than specify where it may be undertaken) only by referendum. See G. L. c. 94G, § 3 (a) (2), (e).

I would defer to the planning board's construction of the bylaw, even if the town's building inspector, the town's zoning enforcement officer, and the town's board of zoning appeals might not be required to. The planning board is charged with construing the bylaw, and it, not this court, is more familiar with local conditions in Charlton. But even if we ought not to defer to the planning board's reasonable construction of the town's own bylaw, we have no business imposing a regime on the town or the Commonwealth that allows electric power plants of this capacity as a matter of right wherever agricultural uses are permitted, and the court's decision that does so is in error. I respectfully dissent.

2. Discussion. The proposed use of the property in this case goes well beyond the mere cultivation of marijuana. Indeed, the site plan narrative submitted by the plaintiffs (VGG) describes it as a "cultivation and [electricity] cogen[eration] facility." And although the buildings in which the enormous amount of marijuana growing will take place -- including growing by sublessees -- are called greenhouses, the plan itself candidly reveals that the proposal is for "closed greenhouse[s]" that, "[u]nlike . . . traditional greenhouse[s] that utilize[] natural ventilation through roof vents," "maintain[] sealed glazing," and contain "carefully engineer[ed] mechanical systems to maintain environmental conditions, filter air contaminants, and mitigate odors." In attempting to bring these buildings within the bylaw definition of agriculture, even the majority concludes it must place the word "greenhouses" in quotation marks. Ante at .

Nor, of course, does the project rely on sunlight to grow its plants. Rather, it uses grow lights so powerful that it requires, and the project includes, a fossil fuel burning electric power plant, that will produce eighteen megawatts of electricity, enough to provide the electrical needs for approximately 14,400 homes.[1] The power plant will include four cooling towers that measure approximately one hundred feet long by fifty feet wide and thirty-five feet tall.

Nor will the project produce merely raw or even cured cannabis. It will include facilities for drying cannabis, producing what the plan refers to as "[f]lower," the "dried/cured harvested product," and for extracting oil from cannabis, another "primary" cannabis product. Then, as the plan also makes clear, there will also be facilities for "the product" to be "further manufactured . . . to produce other forms of marijuana consumables." Listed among the key inputs for the

facility are "[p]lastic and glass packaging materials for the finished product" and the plan also contemplates ten to twenty outbound deliveries per day of "finished product" by "[l]icensed [p]roduct [t]ransporters."

In order to develop this facility, the hill on the property would be lowered by excavating twenty-four vertical feet. The greenhouses and processing and support areas will require thirty-two exhaust fans located at roof level. The facility will have seventy sources of potential noise aside from traffic, including at least twelve sources that each independently produce seventy-two decibels of noise or more. The power plant will generate eighty-nine decibels of noise, as described above.

The facility would employ more than 300 employees on two separate shifts of 150 employees each day of the week. It would be served by six forty-eight-foot loading docks, two for arriving deliveries and four for outgoing trucks. The estimated truck traffic serving the facility would amount to a total of forty to sixty truck trips (in and out) per day. The planning board found based on VGG's traffic impact and access study that the daily trip generation for the facility would be between 664 and 868 trips.

The site plan was submitted for review to the planning board pursuant to the development agreement (agreement) between VGG and the town.[2] Specifically, the agreement between the town and VGG states that "[n]otwithstanding any provision of State law or local bylaws to the contrary, VGG and the Developer agree to be subject to Site Plan Review and approval by the Town's Planning Board, in accordance with the procedures and standards set forth in Section 7.1.4 of the Charlton Zoning Bylaws." Section 7.1.4.7(a)(1) of the bylaw provides that the planning board shall approve a site plan only if the "Site Plan complies with all applicable provisions of these Bylaws feasible to the site."

The planning board therefore was authorized to construe the town's bylaw in determining whether to grant approval as contemplated in the agreement between VGG and the town. In response to this dissent, the majority writes that the parties to the agreement did not intend "to have the planning board revisit whether the proposed use was allowed as of right." Ante at . That might make it easier to ignore the planning board's construction of its own bylaw, but the judge did not find that the parties' intent was so limited, and that appellate finding of fact is obviously incorrect, as the language of the agreement makes clear.

Nor is there a contrary construction of the bylaw by the zoning board of appeals (board of appeals) to which we owe deference. To be sure, the building inspector has authority in his

issuance of building permits to construe the town's bylaw, with recourse by any aggrieved party to the board of appeals for a definitive construction of the bylaw. But no building permit was sought, and so nothing but an avowedly "advisory opinion" was ever obtained from the building inspector, nor, given the agreement, has the bylaw been construed in this case by the board of appeals, to whom, unlike the building inspector, we would owe deference. The majority notes, in a footnote, that the building inspector's "opinions were not appealable final decisions and have no preclusive effect. VGG has not cross-appealed on this issue." Ante at . Yet, in response to this dissent, the majority inexplicably states, incorrectly in light of that ruling, and incorrectly as a matter of law, that the building inspector's informal opinion "carries weight, as the bylaw charges the [building inspector] with enforcing the bylaw." Ante at .

The planning board noted that much of what will take place at the proposed facility is the "manufacture" and processing of marijuana consumables as defined by the regulations of the Cannabis Control Commission, 935 Code Mass. Regs. § 500.002 (2018). The planning board concluded that "the processing and manufacturing components of the facility are principal uses within the facility," and that, "[t]he size of the facility, the proposed lease of grow space, the amount of excavation, the number of employees, the number of truck trips per day, the overall trip generation of the facility, the water consumption in gpd, the potential for industrial-level noise, the need for sophisticated HVAC and odor mitigation controls, and the large cogeneration facility, all lead to the conclusion" that this project was not properly classified as an "[i]ndoor commercial horticulture/floriculture establishment[] (e.g., greenhouse[s])" that is a subcategory of what the bylaw denominates "Agricultural, Floriculture, and Horticultural Uses" that are permitted as of right anywhere in the town, in any zoning district.

Specifically, the planning board concluded that "the dominant or principal use of the facility will be light manufacturing."[3] It is undisputed that light manufacturing is a prohibited use in the agricultural and commercial business district in which the site is located. But, significantly, the question before us is not whether this is "light manufacturing." It is whether it is an "agricultural use" that must be permitted in all zoning districts.

VGG argues that the planning board's conclusion that the proposed project is not an agricultural use was error, and that the project is indeed an agricultural use, permitted where it (VGG) seeks to put it, in an agricultural zoning district. In the absence of a competing construction of the bylaw by the board of appeals, I would defer to the planning board's reasonable construction of its bylaw, and hold that there was no error in the planning board's action. See Valcourt v. Zoning Bd. of Appeals of Swansea, 48 Mass. App. Ct. 124, 128 (1999) ("the construction placed on a local by-law by the board charged with its administration is

entitled to substantial deference"). Among other things, the bylaw at § 3.1(E)(1) specifies that the intent and purpose of an agricultural zoning district are "to provide for agricultural and lowest density residential sites while at the same time encouraging open space, preserving or enhancing views, protecting the character of the historic rural and agricultural environs, preserving or enhancing visual landscapes, recognizing site and area limitations for on-site wastewater disposal systems in terms of drainage, soil suitability, proximity to surface and aquifer and other subsurface water resources, and slope." It is reasonable to construe the project as something other than a mere agricultural use.

In order to reach its conclusion that, as a matter of law, the project is an agricultural use, the majority writes that the power plant that will be built under the proposal is an "accessory use" within the meaning of the bylaw. Ante at . But "accessory use" is a defined term in § 2.1 of the bylaw, meaning 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 listing per zoning districts." The listing it cites does not include power generation stations as an accessory use in an agricultural (or any other) district, even though it does include -- but only with planning board approval -- "Emergency power back up facility with less than or equal to [thirty] megawatts of power output."

If an emergency power back-up that will be used sporadically or not at all is allowed as an accessory use only with planning board approval, it is reasonable to conclude that if an eighteen-megawatt electric power station operating twenty-four hours per day, seven days per week were, as the majority concludes, a permitted accessory use not even requiring planning board approval, it would have been listed in the same section of the bylaw that includes accessory uses. That this more intensive type of electric power plant is not listed in the bylaw fatally undermines the majority's claim that this is an accessory use as that term is used in the bylaw.

But indeed, even if the list of accessory uses were thought not to preclude the conclusion that this unlisted use is also a permissible accessory use, § 2.1 of the bylaw states it is not "[subordinate] and incidental." "The word 'incidental' in zoning by-laws or ordinances . . . means that the use must . . . [be] one which is subordinate and minor in significance" (quotation and citation omitted; emphasis added). Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 845 (1994). In Charlton, "[e]lectric generating facilities with less than or equal to [fifty] megawatts of power output" -- commercial or otherwise -- are specifically prohibited by § 3.2.2.6 of the bylaw as a principal use in agricultural districts. They are permitted only in community business or industrial-general districts, and only with planning board approval. As described, there is thus

nothing "minor" about this power station. Henry, supra. It is no more an accessory use to the marijuana project than the power plants that power all the houses in Charlton are to those houses.

VGG cannot get around the zoning limitation on such a power station by describing it as an accessory use. The fact relied on by the majority that -- unsurprisingly -- "[a]ccording to VGG, the cogeneration facility is a common and integral component to the cultivation of marijuana, providing needed electricity, light, heat, and carbon dioxide, and represents best practices" does not change that. Ante at . The need for electricity does not allow one to put an otherwise prohibited power station on one's property.

Nor is the word "custom" relevant here. Although the majority mentions it, the bylaw does not. It is the definition of "[a]ccessory [b]uilding," not "[a]ccessory [u]se," in § 2.1 of the bylaw that says "[t]he term 'accessory building' when used in connection with a farm shall include all structures customarily used for farm purposes . . . ." And, even were it relevant, whatever the custom with respect to the lawful cultivation of marijuana -- and there likely is none since in Massachusetts such an enterprise has been lawful fewer than five years -- power stations are not "customarily used for farm purposes." Nor is "custom" mentioned in the definition of agriculture in G. L. c. 128, § 1A.

Apparently recognizing this, ante at , the majority nonetheless states that it is relevant to this case that the statute describing what may be taxed as "horticultural" land includes not only land "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," but also land "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." G. L. c. 61A, § 2.

But this is a limitation on what shall be taxed: Not land used for all incidental uses, but only for those incidental uses that represent a customary and necessary use. Even if the tax definition were relevant to the bylaw -- which obviously it is not -- it means only that some related, incidental uses may be customary. The statute does not define all related customary uses as incidental.

It is a reasonable construction of the bylaw that inclusion of an eighteen-megawatt electric power plant and an industrial facility for manufacturing marijuana consumables takes this project out of the category of "[i]ndoor commercial horticulture/floriculture establishments."

But even without deference to the planning board, I think it is error to hold that a project containing these features amounts as a matter of law to an agricultural use. By statute, agricultural uses must be allowed in all zoning districts within the Commonwealth -- literally everywhere. G. L. c. 40A, § 3. I do not believe the Legislature intended to allow the construction of farms with eighteen-megawatt electric power plants as of right literally everywhere within the Commonwealth so long as the case can be made that the crop requires massive indoor lighting in order to be produced commercially in our climate.

And although, under a recent amendment, cannabis cultivation need not be permitted everywhere, G. L. c. 40A, § 3, it may be prohibited only in those cities and towns that, unlike Charlton, have taken steps to alter their bylaws to exclude the formerly unlawful cultivation of marijuana from the definition of agriculture. G. L. c. 94G, § 3 (a) (2). The Legislature has at the same time made changing these bylaws to prohibit marijuana cultivation costly and difficult by specifying that cities and towns in which a majority of the voters supported the marijuana legalization referendum can only change zoning bylaws to prohibit such cultivation by referendum. See G. L. c. 94G, § 3 (a) (2), (e).

I respectfully dissent from the court's conclusion that this project is, as a matter of law, agricultural, and from its judgment requiring the planning board to permit this project to go forward in an agricultural district in Charlton. I note that nothing that I say would prevent the town and VGG from reaching an agreement that would eliminate the electrical generation, processing, and manufacturing components from the plan, and resubmitting it to the planning board.

footnotes

[1] Charlton Orchards Group, LLC; Nathan R. Benjamin, Jr.; and Catherine L. Benjamin.

[2] The board of selectmen of Charlton; Gerard F. Russell, intervener. In this action, under G. L. c. 240, c. 14A, Valley Green Grow, Inc., challenged a general bylaw adopted in August, 2018, that banned all nonmedical cannabis uses in the town of Charlton. Russell was allowed to intervene as a defendant, and he filed a cross claim against the town of Charlton seeking a declaration pursuant to G. L. c. 240, § 14A, that the use regulations contained in the zoning bylaw do not allow the use proposed by Valley Green Grow, Inc. As to this action, only Russell's cross claim is before us on appeal.

[3] Valley Green Grow, LLC vs. Planning Board of Charlton.

[4] A "marijuana establishment" is broadly defined by statute as "a marijuana cultivator, independent testing laboratory, marijuana product manufacturer, marijuana retailer or any other type of licensed marijuana-related business." G. L. c. 94G, § 1.

[5] Valley Green Grow, Inc., and Valley Green Grow, LLC, are together referred to as VGG.

[6] Russell adopts the facts as set forth by the judge. The planning board's statement of facts is consistent with the judge's findings, though it provides additional detail from the record.

[7] After Russell's appeal was docketed in this court, he transferred the property to Yvonne Raia and filed a motion to substitute Raia as a successor party in interest. We allowed that motion. For the sake of clarity, we continue to refer to Russell.

[8] VGG does not challenge Russell's standing on appeal.

[9] The site plan review application also includes the signature of Nathan R. Benjamin, Sr.

[10] Hydroponics is a type of horticulture where plants are grown in a liquid solution without soil. See Arias-Villano v. Chang & Sons Enters., Inc., 481 Mass. 625, 626 (2019).

[11] By regulation, each licensee may cultivate no more than 100,000 square feet. 935 Code Mass. Regs. § 500.050(1)(c) (2018). The host community agreement executed by VGG and the board of selectmen of Charlton envisions at least three cultivation licenses but agreed that if the Cannabis Control Commission or the Department of Public Health prohibits colocation of marijuana cultivators, the annual development fee would be reduced. Whether colocation is allowed under the regulations is not an issue before us and we do not address it.

[12] By regulation, a licensed "[m]arijuana [c]ultivator may cultivate, process and package marijuana, to transport marijuana to [m]arijuana [e]stablishments . . . but not to consumers." 935 Code Mass. Regs. § 500.050(2)(a) (2018).

[13] VGG submitted that "[t]he [cogeneration] facility [would be] located in a sound-proof steel building, staffed by [five] operators/technicians. Exhaust from the cogeneration facility [would be] 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." According to VGG, "[t]he [cogeneration] facility [would be] supported by a cooling tower that [would] measure[] approximately 100-feet long by 50-feet wide and 35-feet tall. The cooling tower [would] utilize[] fans and closed-loop water heat exchangers to release excess heat." Other evidence shows that there will be four enclosed or partially enclosed cooling

towers. Finally, VGG asserts that "[t]he cogeneration facility [would] also utilize[] a back-up gas supply. Compressed natural gas or propane [would] be stored in three 27,000-gallon tanks with a combined footprint of 100-feet by 60-feet, standing 8-feet tall. The tanks [would be] mounted on pads and [would be] protected by bollards."

[14] VGG's application materials describe the water use as "a fraction of the water drawn by [the] existing farm operation."

[15] "Marijuana Establishments . . . shall comply with all local rules, regulations, ordinances, and bylaws." 935 Code Mass. Regs. § 500.170(1) (2018). "Nothing in 935 [Code Mass. Regs. §]500.000 shall be construed so as to prohibit lawful local oversight and regulation, including fee requirements, that do[] not conflict or interfere with the operation of 935 [Code Mass. Regs. §]500.000." 935 Code Mass. Regs. § 500.170(2) (2018).

[16] Section 3 (a) (1) and (2) specify the topics that local authorities may regulate, including zoning.

[17] The dissent describes the prescribed process to prohibit marijuana establishments after a community voted "yes" on the ballot initiative as "arduous," "costly," and "difficult," post at , because it can be accomplished by referendum only. The town has not made any such complaint. Moreover, the town was free to define, without a referendum, where, within the town, marijuana establishments would be allowed and to impose reasonable time and manner regulations. See G. L. c. 94G, § 3 (a). Indeed, the statute, as amended in 2017, allowed for a delay before applicants could apply for licenses during which time municipalities could adopt reasonable time, place, and manner regulations -- without a referendum. G. L. c. 94G, amended by St. 2017, c. 55, §§ 54 & 55.

[18] The dissent makes much of the fact the proposed cogeneration facility would create enough electricity to power 14,400 homes, post at , and argues that the town cannot possibly be forced to allow such a use in an agricultural district as of right. However, according to the figures provided by the dissent, a thirty-megawatt emergency facility could power 24,000 homes and under the town's bylaw, is allowed as an accessory use with site plan approval in all zoning districts in the town. Post at . Moreover, the bylaw allows structures customarily used for farm purposes to be unlimited in size.

[19] The judge found that these opinions were not appealable final decisions and have no preclusive effect. VGG has not cross-appealed on this issue.

[20] The judge did not distinguish postharvest activities that constitute "processing" and those that constitute "manufacturing." The judge did note, however, that the process by which oil shall be extracted was not explained in the summary judgment record. The judge nonetheless concluded that where the oil will be extracted from marijuana grown on the site, it constitutes an accessory use.

[21] In his reply brief, Russell argues that the rules of grammar relating to the placement of semicolons contained in c. 40A, § 3, require the conclusion that the clause defining agriculture and horticulture as not including marijuana cultivation is not modified by the phrase "for purposes of this section." We disagree.

[22] To the extent Russell contends that it is precisely because c. 40A, § 3, prohibited zoning regulation of agricultural uses that the bylaw does not contain any regulations related to specific agricultural uses, we note it was open to the town to amend its bylaw after the ballot initiative passed. Reasonable regulations on the location of marijuana establishments would not have required a referendum. See note 15, supra.

[23] Moreover, our choice to occasionally refer to the facilities as "greenhouses" recognizes that they are not traditional glass greenhouses. Nonetheless, where the bylaw allows indoor commercial horticultural uses generally and specifies "greenhouses" as an example, it is irrelevant that the proposed facilities, while predominately used to cultivate marijuana indoors, are not traditional glass greenhouses.

[24] We disagree with the dissent's characterization of the far-reaching implications of our decision. We hold only that this project, including the integral cogeneration facility component, is allowed in the agricultural district of the town, which allows as of right, indoor commercial horticultural uses.

[25] Presumably, heating, ventilation, and air conditioning.

[26] Similarly, the dissent focuses on a plethora of details that certainly bear on the commercial nature of the proposed use, but do not transform the proposed use into something other than an indoor commercial horticultural use allowed as of right in the agricultural district. Indeed the dissent goes beyond the record to support its apparent distaste for the cogeneration facility and to assert that power stations are not "customarily" used for farm purposes. Post . Not even the planning board shared the dissent's view, however, as the planning board did not conclude that the proposed cogeneration facility cannot be a permissible accessory use in the agricultural district. Perhaps more importantly, the judge concluded that the

proposed cogeneration system, occupying one percent of the locus and the sole purpose of which is to supply the power required by the project, is a permitted accessory use.

[27] The planning board contends that the judge simply compared the size of the processing and manufacturing components and, determining that they comprised only thirteen percent of the proposed use of the site, deemed them to be "minor" and "subordinate," without examining the net effect of the uses. To the contrary, the judge noted that the size comparison does not end the inquiry and proceeded to conduct additional analysis over several pages, including an analysis of the impacts of the project.

footnotes for dissenting

[1]A megawatt is a large unit of electricity equal to 1,000 kilowatts or 1 million watts. See Webster's Third New International Dictionary 1405 (2002).

[2] No party has suggested that this voluntary utilization of the planning board to assess the site plan was not authorized by law.

[3] Light manufacturing is defined in the bylaw as follows: "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."