COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, ss

MISCELLANEOUS CASE
NO. 22 MISC 000681 (RBF)

J.D. RAYMOND TRANSPORT, INC.,

Plaintiff,

v.

FARM AVENUE TWO LOTS, LLC, as Trustee of FARM AVENUE REALTY TRUST, THE RESIDENCES AT FARM AVENUE, LLC, ATTORNEY JASON PANOS, And Members of the CITY OF PEABODY ZONING BOARD OF APPEALS: FRANCES BISAZZA GALLUGI, STEPHEN M. ZOLOTAS, KEITH SLATTERY, BARRY OSBORNE and CHRIS GILBERT, as they are members and not individually,

Defendants.

MISCELLANEOUS CASE
NO. 23 MISC 000115 (RBF)

J.D. RAYMOND TRANSPORT, INC.,

Plaintiff,

v.

Members of the CITY OF PEABODY ZONING BOARD OF APPEALS: FRANCES BISAZZA GALLUGI, STEPHEN M. ZOLOTAS, KEITH SLATTERY, BARRY OSBORNE and CHRIS GILBERT, as they are members and not individually,

Defendants.

J U D G M E N T

J.D. Raymond Transport, Inc. (J.D. Raymond) filed its complaint in Case No. 22 MISC 000681 (681 Complaint) on December 29, 2022 (681 action). The 681 Complaint has two counts. Count I is an appeal pursuant to G.L. c. 40A, § 17, of the City of Peabody Zoning Board of Appeals' (ZBA) decision on the appeal of Farm Avenue Two Lots, LLC, as Trustee of Farm Avenue Realty Trust, and The Residences at Farm Avenue, LLC (Defendants) of an enforcement decision of the City of Peabody Building Commissioner (Commissioner) (first ZBA decision), and seeks an annulment and remand of the decision. Count II seeks a declaratory judgment pursuant to G.L. c. 231A that J.D. Raymond's use of its property is a lawful nonconforming use or is exempted from the City of Peabody Zoning Ordinance as a horticultural use, or both. On January 30, 2023, the Defendants filed the Answer, Affirmative Defense and Counterclaim of Defendants (681 Counterclaim).

J.D. Raymond filed its complaint in Case No. 23 MISC 000115 (115 Complaint) on March 20, 2023 (115 action), alleging a single count: an appeal pursuant to G.L. c. 40A, § 17, of the ZBA's decision on J.D. Raymond's appeal of the Commissioner's enforcement of the first ZBA decision (second ZBA Decision). On June 28, 2023, the court, with the agreement of all parties, consolidated the 681 action and the 115 action.

Defendants filed the Defendants Farm Avenue Two Lots, LLC's and the Residences at Farm Avenue, LLC's Motion for Summary Judgment (Motion for Summary Judgment) on March 4, 2024. J.D. Raymond filed the Memorandum of Law in Opposition to Private Defendants' Motion for Summary Judgment and Cross-Motion by Plaintiff (Cross-Motion for Summary Judgment) on April 1, 2024.

The cross-motions for summary judgment came on to be heard on April 26, 2024, and were taken under advisement. In a memorandum and order of even date, the court (Foster, J.) has allowed the Defendants' Motion for Summary Judgment and denied the Plaintiff's Cross-Motion for Summary Judgment.

In accordance with the court's memorandum and order issued today, it is

ORDERED, ADJUDGED and DECLARED on the 681 Complaint and the 681 Counterclaim that the first ZBA Decision was legally valid, had a substantial basis in fact, and was not arbitrary or capricious, and is AFFIRMED. It is further

ORDERED, ADJUDGED and DECLARED on the 115 Complaint that the second ZBA decision was legally valid, had a substantial basis in fact, and was not arbitrary or capricious, and is AFFIRMED. It is further

ORDERED AND ADJUDGED that the 681 Complaint is DISMISSED with prejudice. It is further

ORDERED AND ADJUDGED that the 115 Complaint is DISMISSED with prejudice.

By the Court. (Foster, J). */s/ Robert B. Foster*

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson, Recorder

Dated: September 30, 2024

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, ss

MISCELLANEOUS CASE
NO. 22 MISC 000681 (RBF)

J.D. RAYMOND TRANSPORT, INC.,

Plaintiff,

v.

FARM AVENUE TWO LOTS, LLC, as Trustee of FARM AVENUE REALTY TRUST, THE RESIDENCES AT FARM AVENUE, LLC, ATTORNEY JASON PANOS, And Members of the CITY OF PEABODY ZONING BOARD OF APPEALS: FRANCES BISAZZA GALLUGI, STEPHEN M. ZOLOTAS, KEITH SLATTERY, BARRY OSBORNE and CHRIS GILBERT, as they are members and not individually,

Defendants.

MISCELLANEOUS CASE
NO. 23 MISC 000115 (RBF)

J.D. RAYMOND TRANSPORT, INC.,

Plaintiff,

v.

Members of the CITY OF PEABODY ZONING BOARD OF APPEALS: FRANCES BISAZZA GALLUGI, STEPHEN M. ZOLOTAS, KEITH SLATTERY, BARRY OSBORNE and CHRIS GILBERT, as they are members and not individually,

Defendants.

MEMORANDUM AND ORDER
ALLOWING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Introduction

J.D. Raymond Transport, Inc. (J.D. Raymond) owns property in Peabody. Since 2003, it has operated a mulch business on the property. It transports various wood products onto its property, turns it into mulch, and sells it to nurseries and other businesses. Before 2013, the Peabody Zoning Ordinance was silent as to mulching as a use. That year, it amended the ordinance to require a special permit for mulching. In 2021, J.D. Raymond's neighbors, Farm Avenue Two Lots, LLC, as Trustee of Farm Avenue Realty Trust (Farm Ave), and The Residences at Farm Avenue, LLC (the Residences), made an enforcement request to the City of Peabody Building Commissioner (Commissioner) that J.D. Raymond should be required to cease its operations until it obtained a special permit. This led to a cease and desist order in which the Commissioner stayed enforcement while J.D. Raymond sought an order of conditions from the Peabody Conservation Commission. Farm Avenue and the Residences appealed to the Peabody Zoning Board of Appeals (the ZBA), which overturned the stay. J.D. Raymond appealed that decision in case no. 22 MISC 000681. J.D. Raymond went back to the ZBA, which again ordered J.D. Raymond to cease and desist, and J.D. Raymond appealed that decision in case no. 23 MISC 000115. The two cases have been consolidated.

The parties are now before the court on cross-motions for summary judgment. J.D. Raymond argues that it is exempt from the special permit requirement because its mulching operation is either an exempt horticultural use or a lawful nonconforming use. The court finds that based on the undisputed facts that mulch manufacturing is not horticultural and the mulch operation was not the kind of manufacturing allowed as of right before the 2013 amendment, and

therefore both ZBA decisions will be affirmed. Before doing so, however, the court addresses whether the recent amendment to G.L. c. 40A, § 17, eliminating the presumption of standing for abutters, which went into effect after these cross-motions were taken under advisement, applies here so that Farm Avenue and the Residences cannot rely on the presumption. The court finds that, in these circumstances, the presumption remains in place.

Procedural History

In case no. 22 MISC 000681 (681 action), J.D. Raymond filed the Verified Complaint (681 Complaint) on December 29, 2022, naming as defendants Farm Ave, the Residences, Attorney Jason Panos, and Frances Bisazza Gallugi, Stephen M. Zolotas, Keith Slattery, Barry Osborne, and Chris Gilbert, in their capacity as members of the ZBA and not individually. The 681 Complaint has two counts. Count I is an appeal pursuant to G.L. c. 40A, § 17, of the ZBA's decision on the appeal of Farm Ave and the Residences of an enforcement decision of the Commissioner, and seeks an annulment and remand of the decision. Count II seeks a declaratory judgment pursuant to G.L. c. 231A that J.D. Raymond's use of its property is a lawful nonconforming use or is exempted from the City of Peabody Zoning Ordinance as a horticultural use, or both. On January 30, 2023, Farm Ave and the Residences (collectively, Defendants) filed the Answer, Affirmative Defense and Counterclaim of Defendants (681 Counterclaim). On January 31, 2023, the court held a case management conference, at which Jason Panos was dismissed as a party defendant. On March 17, 2023, J.D. Raymond filed the Answer to the Counterclaim.

On February 21, 2023, Defendants filed the Motion of Defendants Farm Avenue Two Lots, LLC and the Residences at Farm Avenue, LLC to Dismiss for Lack of Subject Matter Jurisdiction (Motion to Dismiss) and supporting memorandum. On March 24, 2023, J.D.

Raymond filed Plaintiff's Memorandum of Law Opposing the Motion to Dismiss by Farm Avenue Two Lots, LLC, as Trustee of Farm Avenue Realty Trust, and The Residences at Farm Avenue, LLC. On March 30, 2023, Defendants filed the Defendants' Reply to the Plaintiff's opposition to the Motion to Dismiss. The same day, J.D. Raymond filed the Complaint in case no. 23 MISC 000115 (115 action), naming as defendants the ZBA and alleging a single count: an appeal pursuant to G.L. c. 40A, § 17, of the ZBA's decision on J.D. Raymond's appeal of the Commissioner's enforcement of the first ZBA decision (115 Complaint). On March 31, 2023, the court heard the Motion to Dismiss, and took it under advisement. On June 21, 2023, the court issued its Memorandum and Order Denying Defendants' Motion to Dismiss, *J.D. Raymond Transport, LLC* v. *Farm Avenue Two Lots, LLC*, 31 LCR 388 (2023) (Misc. Case No. 22 MISC 000681) (Foster, J.). On June 28, 2023, the court, with the agreement of all parties, consolidated the 681 action and the 115 action.

On March 1, 2024, Defendants filed the Appendix of Exhibits in Support of Defendants Farm Avenue Two Lots, LLC's and the Residences at Farm Avenue, LLC's Motion for Summary Judgment (Def. App. Exh.) and the Affidavit of Michael Weiss (Weiss Aff.). Defendants filed the Defendants Farm Avenue Two Lots, LLC's and the Residences at Farm Avenue, LLC's Motion for Summary Judgment (Motion for Summary Judgment), the Memorandum of Law in Support of Defendants Farm Avenue Two Lots, LLC's and the Residences at Farm Avenue, LLC's Motion for Summary Judgment, and the Concise Statement of Undisputed Material Facts (Def. SOF) on March 4, 2024. On April 1, 2024, J.D. Raymond filed the Memorandum of Law in Opposition to Private Defendants' Motion for Summary Judgment and Cross-Motion by Plaintiff (Cross-Motion for Summary Judgment), the Plaintiff's Motion to Strike, the Plaintiff's Consolidated Statement of Facts Private Defendants' Concise

Statement of Undisputed Material Facts with Plaintiff's Response and Additional Facts (Pl. SOF Resp.), and the Appendix of Exhibits (Pl. App. Exh.). On April 22, 2024, Defendants filed the Defendants' Reply to J.D. Raymond's Cross-Motion for Summary Judgment, the Defendants' Opposition to J.D. Raymond's Motion to Strike, and the Defendants' Responses to J.D. Raymond's Statement of Additional Facts (Def. Resp. to Pl.'s Add. Facts). On April 26, 2024, the court heard the cross-motions for summary judgment and took them under advisement. 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 a 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 makes 'all logically permissible inferences' in favor of a nonmoving party." *Carroll v. Select Bd. of Norwell*, 493 Mass. 178, 192 (2024), quoting *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). Where the non-moving party bears the burden of proof, the "burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); see *Carroll*, 493 Mass. at 187-188; *Regis College*, 462 Mass. at 291-292.

"Rule 56 (e) provides that once a motion is made and supported by affidavits and other supplementary material, the opposing party may not simply rest on his pleadings or general denials; he must 'set forth *specific facts*' showing that there is a genuine, triable issue" (emphasis added). *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 554 (1976). "A fact is not disputed merely because it has been denied by a nonmoving party." *Carroll*, 493 Mass. at 191. Thus, "mere assertions of disputed facts" are insufficient to defeat a motion for summary judgment. *LaLonde v. Eissner,* 405 Mass. 207, 209 (1989). A response supported by specific facts is necessary to create a genuine issue of material fact. *Carroll*, 493 Mass. at 191.

Undisputed Facts

The following facts are undisputed or deemed admitted.

The Properties and J.D. Raymond's Use

1. Farm Ave purchased the property known as 27-Rear Farm Avenue, Peabody, Massachusetts 01960 (27R property) and executed a deed conveying title to the 27R property to The Residences. 681 Complaint ¶¶ 11, 16, 21; 681 Counterclaim ¶¶ 11, 16, 21; Def. SOF ¶¶ 20-23, 26; Pl. SOF Resp. ¶¶ 20-23, 26; Weiss Aff. ¶¶ 1, 29-31, 34.
2. Farm Ave and the Residences are pursuing development of an apartment complex at the 27R property. 681 Complaint ¶ 12; 681 Counterclaim ¶ 12; Def. SOF ¶¶ 23, 25-29; Pl SOF Resp. ¶¶ 23, 25-29; Weiss Aff. ¶¶ 31, 33-38.
3. J.D. Raymond operates what it refers to as a "bark mulch business" on the adjacent property at 25 Farm Avenue / 0 Forest Street, Peabody, Massachusetts 01960, on two parcels of land, Tax Parcel No. 069-006 and Tax Parcel No. 069-007 (the property).

681 Complaint ¶ 10; 681 Counterclaim ¶ 10; Def. SOF ¶ 2; Pl. SOF Resp. ¶ 2; Weiss Aff. ¶¶ 9-10.

4. J.D. Raymond began operating a bark mulch business in Peabody in approximately 2003 to 2005. Def. SOF ¶ 63; Pl. SOF Resp. ¶ 63; Def. App. Exh. 18.
5. This bark mulch business can more specifically be described as a mulch manufacturing, processing, storage and distribution operation. Def. SOF ¶ 74; Pl. SOF Resp. ¶ 74; Def. App. Exh. 18.
6. J.D. Raymond and third parties import logs and raw wood bark to the property, which J.D. Raymond then processes, dyes, and stores as finished mulch. Def. SOF ¶ 67; Pl. SOF Resp. ¶ 67.
7. J.D. Raymond uses trucks to pull trailers that carry mulch, wood chips, and bark to and from the property. Def. SOF ¶¶ 69, 72; Pl. SOF Resp. ¶¶ 69, 72; Def. App. Exh. 18.
8. J.D. Raymond uses a grinder on the property to grind wood into smaller pieces and a stacker—a conveyor belt—which piles material into piles. Def. SOF ¶¶ 82-83; Pl. SOF Resp. ¶¶ 82-83. Def. App. Exh. 18.
9. The only thing that J.D. Raymond propagates on its land is mulch and nothing else. In his deposition, John D. Raymond, Jr., the principal of J.D. Raymond, testified that this has always been the case. Def. SOF ¶ 75; Pl. SOF Resp. ¶ 75; Def. App. Exh. 18.
10. J.D. Raymond does not grow trees on its property. Whatever trees that grow on its property grow naturally and are not cut down to make mulch or any other product. Def. SOF ¶¶ 76, 127; Pl. SOF Resp. ¶¶ 76, 127; Def. App. Exh. 18.

11. J.D. Raymond does not grow any plants on its property. Def. SOF ¶¶ 77, 128-129; Pl. SOF Resp. ¶¶ 77, 128-129; Def. App. Exh. 18.

12. The only "wood products" J.D. Raymond produces on the property is mulch. Def. SOF ¶ 78; Pl. SOF Resp. ¶ 78; Def. App. Exh. 18.

13. J.D. Raymond primarily produces mulch, although it sometimes sells wood chips, logs, and related products for lumber or fuel. Def. SOF ¶¶ 106, 113-116; Pl. SOF Resp. ¶¶ 78, 106, 113-116; Def. App. Exh. 18.

14. J.D. Raymond's operation on the property, including the piles of mulch and all other materials, including wood chips, tree bark and logs, are in the open and are not covered or enclosed in any buildings. Def. SOF ¶ 81; Pl. SOF Resp. ¶ 81.

15. J.D. Raymond distributes mulch from the property to nursery and landscaping companies who provide mulch directly to their customers for landscaping and ornamental purposes. Def. SOF ¶¶ 80-81, 100; Pl. SOF Resp. ¶¶ 80-81, 100; Def. App. Exh. 18.

City of Peabody Zoning Ordinance

16. The property and 27R property have been located in the Designated Development District (DDD) zoning district under the City of Peabody Zoning Ordinance (the ordinance) since at least 2001. Def. SOF ¶¶ 8-9; Pl. SOF Resp. ¶¶ 8-9; Def. App. Exh. 2.

17. Section 1.6, Exemptions, of the ordinance provides:

> In accordance with Massachusetts General Laws, Chapter 40A, . . . [t]his ordinance shall not prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture or floriculture and shall not prohibit or unreasonably regulate the expansion or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture or floriculture except that all such

activities may be limited to parcels of more than five (5) acres which are not zoned for agriculture, horticulture or floriculture.

Def. App. Exh. 4.

18. Section 1.4, Applicability, of the ordinance provides: "No building, structure or land shall be used for any purpose or in any manner other than is expressly permitted within the district in which such building, structure or land is located. Any use not specifically or generically enumerated in a district herein shall be deemed prohibited." Def. App. Exhs. 1, 3-4.
19. Section 2.1, Words and terms defined, of the ordinance defines "accessory building or use" as "[a] use incidental and subordinate to and customarily associated with a specific principal use, located on the same lot." Def. App. Exh. 4.
20. Section 2.1 of the ordinance defines "Designated development district (DDD)" as "[a] special industrial zoning district which facilitates creative and integrated physical designs which are compatible with the natural environment and which promotes the overall improvement of the urban environment for the welfare of the city." Def. App. Exhs. 1, 3-4.
21. Section 2.1 of the ordinance does not define "mulching operation," "mulch processing," "horticulture" or "horticultural." Def. App. Exhs. 1, 3-4.
22. From 1978 to 2011, § 4.1, General Requirements, of the ordinance provided that: "[N]o premises shall be used for any purpose or in any manner other than as set forth in § 4.2 schedule of use regulations in this ordinance and in accordance with the following notation: x=permitted use, a=allowed use under special permit by the city council, and blank=prohibited use." Def. App. Exh. 1.

23. From 2011 onward, § 4.1 of the ordinance provides the same, in addition to changing the notation symbols and adding: "Any use not specifically listed in the Schedule of Use Regulations shall be deemed to be prohibited." Def. App. Exhs. 3-4.

24. Prior to 2013, § 4.2, Schedule of use regulations, and § 4.6, Designated development district (DDD), of the ordinance did not list "mulching/composting and/or outdoor storage," "mulch processing," "mulch manufacturing," or "mulch distributing" in the DDD or anywhere else in the Schedule of Use Regulations. Def. App. Exhs. 1, 3.

25. Prior to 2011, § 4.2.2, Agricultural and others, of the ordinance allowed as-of-right: "Farms for cultivating and harvesting of general crops and for the raising of cattle, horses or poultry on property of more than five (5) acres" in the DDD. Def. App. Exh. 1.

26. Prior to 2011, § 4.2.6, Industrial, of the ordinance allowed as of right:

    "Manufacture of corrugated cardboard, paper and cardboard boxes and liner paper;" and

    "Manufacture of carbide-tipped drills, saws and tools; aluminum windows, doors, shutters, awnings and sidings; machinery and engine parts; shoe machinery; stamps, nails, decals and mailing devices; mica parts and devices and similar types of products" in the DDD.

    Def. App. Exh. 1.

27. When asked at his deposition to compare the farming use listed in § 4.2.2 of the ordinance to J.D. Raymond's operation prior to 2011, John D. Raymond, Jr. testified that J.D. Raymond's operation is nothing like the Farm Use. Def. SOF ¶¶ 169-170; Pl. SOF Resp. ¶¶ 169-170; Def. App. Exh. 24.

28. When asked at his deposition to compare the manufacturing use listed in § 4.2.6 of the ordinance to J.D. Raymond's operation prior to 2011, John D. Raymond, Jr.

testified that J.D. Raymond does not make anything similar to what is listed in that definition and does not know if anyone ever made anything listed in that definition on J.D. Raymond's footprint. Def. SOF ¶¶ 175-176; Pl. SOF Resp. ¶¶ 175-176 Def. App. Exh. 24.

29. In 2011, the city amended the ordinance, removing the "[m]anufacture of corrugated cardboard, paper and cardboard boxes and liner paper" and "[m]anufacture of carbide tips . . ." uses from § 4.2, Schedule of use regulations, and adding as a use "manufacturing, light," which is allowed in the DDD as of right. Def. App. Exh. 4.
30. Section 2.1 of the ordinance defines "[m]anufacturing, light" as: "The processing, fabrication, or assembly of materials or products provided all manufacturing activities are contained entirely within a building and noise, odor, smoke, heat, glare, and vibration resulting from the manufacturing activity are confined entirely within the building." Def. App. Exh. 4.
31. Section 6.6.4, Designated development district (DDD), of the ordinance states: "All uses [including permitted light manufacturing, processing and assembly] shall be completely enclosed in buildings. No merchandise materials, supplies or equipment shall be permitted to remain outside any building." Def. App. Exhs. 3-4.
32. In or about 2013, § 4.2.2 of the ordinance was amended to require a special permit for the use of "[m]ulching/composting operation, and/or outdoor storage" in the DDD. Def. SOF Resp. ¶¶ 58-59; Pl. SOF Resp. ¶¶ 58-59; Def. App. Exh. 4.
33. When asked at his deposition if he ever spoke to anyone about obtaining a permit, John D. Raymond, Jr. testified that he had a conversation with the mayor of Peabody, who said something to the effect of: "Don't worry. We want you here," and, "You

don't need a permit." As a result of this conversation, John D. Raymond, Jr. did not think to ask the building department or anyone else about obtaining a permit. Def. App. Exh. 18.

34. J.D. Raymond provided state and federal regulatory authorities' definitions of agricultural and mulch. Pl. SOF Resp. ¶ 223; Def. Resp. to Pl. Add. Facts ¶ 224; Pl. App. Exhs. 44-47.

Defendants' Zoning Enforcement Requests and Mandamus Action

35. On October 7, 2021, Defendants made a written request to the Commissioner to enforce the ordinance against J.D. Raymond pursuant to G.L. c. 40A, § 7, and § 15.1 of the ordinance. Def. SOF ¶¶ 144-145; Pl SOF Resp. ¶¶ 144-145; Def. App. Exh. 6.

36. On November 15, 2021, Defendants sent a follow-up letter to the Commissioner. Def. SOF ¶¶ 146; Pl SOF Resp. ¶¶ 146; Def. App. Exh. 7.

37. Defendants filed a mandamus action against the Commissioner in the Essex Superior Court, case no. 2277CV00330, on or about April 11, 2022. This action sought to compel a written response from the Commissioner regarding the enforcement requests. Defendants also filed a motion for preliminary injunction at this time. Def. SOF ¶ 147; Pl. SOF Resp. ¶ 147; Def. App. Exh. 34.

38. By decision dated May 2, 2022, the Superior Court ordered the Commissioner to respond in writing to Defendants but denied their request to take any further action against J.D. Raymond. Def. SOF ¶¶ 149-150; Pl. SOF Resp. ¶¶ 149-150; Def. App. Exh. 8.

39. On May 2, 2022, the Commissioner responded to Defendants' enforcement request (Commissioner's response). In his response, the Commissioner found that a violation

did exist, but further found that he would not take enforcement action against J.D. Raymond because J.D. Raymond was pursuing approvals through the City of Peabody Conservation Commission (ConCom) and intended to subsequently pursue a special permit with the city council. Def. SOF ¶ 151-152, 154-155; Pl. SOF Resp. ¶¶ 151-152, 154-155 Def. App. Exh. 9.

Defendants' Administrative Appeal and ZBA's First Decision

40. Defendants filed an administrative appeal of the Commissioner's response with the ZBA on or about May 31, 2022. In their appeal, Defendants claimed to be aggrieved by the Commissioner's response and requested that the ZBA set compliance deadlines and issue a cease-and-desist order against J.D. Raymond. Def. SOF ¶ 156; Pl. SOF Resp. ¶ 156; Def. App. Exh. 10.
41. The ZBA held public hearings on Defendants' appeal, which closed on December 19, 2022. Def. SOF ¶ 163; Def. App. Exh. 14.
42. On December 19, 2022, the ZBA voted to overturn the Commissioner's response and issued a written decision on December 20, 2022 (first ZBA decision). The ZBA "found that J.D. Raymond was operating illegally under § 4.2 Schedule of Uses of the Peabody Zoning Ordinance and is required to cease and desist all illegal orations until they gain approval from Conservation and obtain a Special permit through City Council." Def. SOF ¶¶ 164-165; Pl. SOF Resp. ¶¶ 164-165; Def. App. Exh. 14.
43. By the 681 action, J.D. Raymond timely appealed the first ZBA decision to this court pursuant to G.L. c. 40A, § 17, filing the 681 Complaint on December 29, 2022. Defendants stated a prima facie case of standing, alleging aggrievement as abutters

based on dust, debris, odor, noise, and fire and safety violations. Docket for 22 MISC 000681; 681 Counterclaim ¶¶ 77-86.

44. J.D. Raymond "has not rebutted the presumption" and "has not contested [Defendants'] standing." J.D. Raymond's Motion to Strike; Pl. SOF Resp. ¶¶ 179-182, 184-187, 191-198, 200-207.

J.D. Raymond's Administrative Appeal and ZBA's Second Decision

45. On December 21, 2022, the new or interim Commissioner enforced the first ZBA decision by issuing a cease-and-desist letter to J.D. Raymond until it obtains approvals from ConCom and a special permit from the city council (cease-and-desist letter). Def. SOF ¶ 166; Pl. SOF Resp. ¶ 166; Def. App. Exh. 15.

46. By letter dated January 13, 2023, J.D. Raymond administratively appealed the cease-and-desist letter to the ZBA. Def. SOF ¶ 167; Pl. SOF Resp. ¶ 167; Def. App. Exh. 16.

47. On March 2, 2023, the ZBA issued a decision upholding the cease-and-desist letter, stating: "Petitioner's appeal was denied and the Commission[er]'s decision was upheld" (second ZBA decision). Def. SOF ¶ 177; Pl. SOF Resp. ¶ 177; Def. App. Exh. 17.

48. By the 115 action, J.D. Raymond timely appealed the second ZBA decision to this court on March 20, 2023, pursuant to G.L. c. 40A, § 17, naming as defendants the ZBA. Both of J.D. Raymond's actions were consolidated.

J.D. Raymond's Notice of Intent

49. On or about April 24, 2022, J.D. Raymond filed a Notice of Intent with the ConCom for the proposed construction of two stormwater management basins, identified as DEP File No. 055-0907, which was amended after several hearings. Pl. App. Exh. 42.
50. On May 17, 2023, the ConCom approved J.D. Raymond's Notice of Intent, subject to an Order of Conditions. Pl. SOF Resp. ¶¶ 221-222; Def. Resp. to Pl. Add. Facts ¶¶ 221-222; Pl. App. Exh. 42.
51. Defendants appealed the Order of Conditions to the Essex Superior Court, case no. 2377CV00660A, in July 2023. That appeal was dismissed without prejudice on May 17, 2024. Defendants filed an amended complaint on June 14, 2024. Pl. SOF Resp. ¶¶ 221-222; Def. Resp. to Pl. Add. Facts ¶¶ 221-222; Pl. App. Exh. 42; Docket for case no. 2377CV00660A.
52. Defendants also appealed the approval to the Massachusetts Department of Environmental Protection (DEP), which issued a Superseding Order of Conditions affirming the Order of Conditions on or about June 12, 2024. The Superseding Order of Conditions was appealed to DEP's Office of Appeals and Dispute Resolution on June 27, 2024. Pl. SOF Resp. ¶ 222; Def. Resp. to Pl. Add. Facts ¶ 222; Docket for case no. 2377CV00660A.

Discussion

The issues before the court on the cross-motions for summary judgment are as follows: (1) whether J.D. Raymond's use of the property as a bark mulch business (mulching operation) is a horticultural use exempt from local zoning bylaws under § 1.6 of the ordinance; and (2) whether the mulching operation is a lawful nonconforming use under G.L. c. 40A, § 6.

Before those issues are addressed, the court turns to Defendants' standing to bring their appeal to the ZBA.

Standing

The court addresses Defendants' standing in light of recent amendments to the Zoning Act, G.L. c. 40A. On August 6, 2024, Governor Maura Healy signed into law Chapter 150 of the Acts of 2024, "An Act Relative to the Affordable Homes Act" (the Act) which, in part, amended G.L. c. 40A, § 17, to eliminate an abutter's presumption of standing. J.D. Raymond commenced the 681 action on December 29, 2022. Defendants are required to establish their standing to have appealed the Commissioner's decision to the ZBA. See *Green v. Board of Appeals of Provincetown*, 404 Mass. 571 (1989) (holding that only persons aggrieved by building inspector's decision could appeal determination to zoning board of appeals); *Warrington v. Zoning Bd. of Appeals of Rutland*, 78 Mass. App. Ct. 903 (2010). The Defendants are abutters to the property, and, at the time of their appeal, were entitled to a presumption of standing. See *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012). Prior to the Act's effective date on August 6, 2024, Defendants appealed to the ZBA, J.D. Raymond filed the 681 action, the Defendants articulated grounds for aggrievement in the Motion for Summary Judgment, J.D. Raymond stated in the Cross-Motion for Summary Judgment that it would not rebut the presumption, and the court took these cross-motions under advisement. The question is whether the amendment to G.L. c. 40A, § 17, eliminates the Defendants' presumption of standing in this case. That question turns on (a) whether the amendment is substantive or procedural; and (b) if procedural, whether the amendment applies retroactively to this action.

"[T]he distinction between legislation concerning substantive rights, and legislation concerning only procedures and remedies is easy to enunciate, but often difficult to draw"

(quotations and citations omitted). *Smith v. Massachusetts Bay Transp. Auth.*, 462 Mass. 370, 374 (2012) (*Smith*). Statutory amendments "'regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights … commonly are treated as operating retroactively, and as applying to pending actions or causes of action.'" *Sliney v. Previte*, 473 Mass. 283, 288 (2015) (*Sliney*), quoting *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 626 (1974) (*Vinciullo*). "What such statutes have in common is that they do not 'in reality materially affect[ ] substantive rights previously acquired.' " *Smith*, 462 Mass. at 374, quoting *Wynn v. Assessors of Boston*, 281 Mass. 245, 249 (1932); see *Cranberry Realty & Mortg. Co. v. Ackerley Communications, Inc.*, 17 Mass. App. Ct. 255, 258 n.3 (1983) (comparing cases where statutes were found to be remedial or affecting substantive rights). Here, the amendment to G.L. c. 40A, § 17, which effectively eliminated the presumption of standing, is procedural. The amendment does not affect or change the substantive rights of abutters to bring an appeal of local zoning boards of appeals' decisions to the courts. See *Wetherell v. Boston Mutual Life Insurance Co.*, 18 Mass. App. Ct. 614, 617 (1984) (statutory revision enabling parties to bring tort claims against the Commonwealth in additional jurisdictions "did not, in any respect, affect or change those substantive rights already available to parties filing contract actions against the Commonwealth."); *Goodwin Bros. Leasing v. Nousis*, 373 Mass. 169, 173 (1977) ("The statute in question does not extinguish what is otherwise a valid cause of action; it merely requires filing of certificate as a condition precedent to seeking relief in the courts."). Here, the statutory amendment does not materially affect a preexisting right to bring a zoning appeal; as before the amendment, an abutter must be a "person aggrieved" by the decision. G.L. c. 40A, § 17. The amendment only changes the procedure for enforcing that right and determining standing.

Next, the court must determine whether the amendment applies retroactively. "Whether a [statutory amendment] applies to events occurring prior to the date on which it takes effect is in the first instance a question of legislative intent." *Sliney*, 473 Mass. at 288, quoting *Smith,* 462 Mass. at 372. A statutory amendment will be applied retroactively if "it appears by necessary implication from the words, context or objects of [the amendments] that the Legislature intended [them] to be retroactive in operation" and the retroactive intention is "unequivocally clear" (citation omitted). *Smith*, 462 Mass. at 376–377; see *Sliney*, 473 Mass. at 289 (Legislature "expressly stated" that statutory amendment is to apply "regardless of when any such action or claim shall have accrued or been filed."); *Boston Edison Co. v. Massachusetts Water Resources Auth.*, 459 Mass. 724, 743 (2011) (Legislature plainly intended that statutory amendment "shall apply to those pending cases in which no final judgment has entered as of the effective date of this act"). Additionally, the Legislature's designation of an amendment as emergency legislation does not unequivocally indicate its intent for an amendment to apply retroactively. See *Smith*, 462 Mass. at 377 ("The inclusion of an emergency preamble demonstrates only that the Legislature intended the statute to take effect without regard for the ninety-day waiting period otherwise provided by art. 48 of the Amendments to the Massachusetts Constitution."). Here, nothing in the plain language of the Act or the legislative history manifests an intent that the amendment to G.L. c. 40A, § 17, be given retroactive effect. The only relevant legislative history is the inclusion of an emergency preamble, which declared the act an "emergency law" and provided that the "deferred operation of this act would tend to defeat its purpose, which is to authorize forthwith the financing of the production and preservation of housing for low and moderate income citizens of the commonwealth and to make related changes in certain laws . . . necessary for the immediate preservation of the public convenience." Such emergency

designation does not clearly signify the Legislature's intent for the amendment to apply retroactively. *Id.*

Where the Legislature has not expressly indicated whether the statutory amendment is to be applied retroactively, courts have recognized the principle that procedural or remedial statutory amendments commonly operate retroactively and apply to pending actions or causes of actions. *Sliney*, 473 Mass. at 288. The doctrine of retroactive application of procedural or remedial statutes is not, however, without limitations. "At the extreme no retroactive procedural statute could apply to a case which has been closed, i.e., has gone to judgment and either been affirmed on appeal or not been appealed within the time allowed for appeal. *But even as to cases which are still pending in courts, there will be some point at which it becomes inappropriate to apply newly enacted procedural changes*" (emphasis added). *Vinciullo*, 364 Mass. at 627. Further, courts "look to the stage of the proceedings affected by the change and determine whether that stage has been completed on the effective date of the amendment. If the point in the proceedings to which the statutory change is applicable has already passed, the proceedings are not subject to that change. If, on the other hand, that point has not yet been reached, the new provisions apply. This rule gives the broadest application to legislatively mandated changes without subjecting each completed step in the litigation to the uncertainty of possible future legislative change." *Porter v. Clerk of the Superior Court,* 368 Mass. 116, 119 (1975), citing *Vinciullo*, 364 Mass. at 628. In *Vinciullo*, the Court held that a city's council's appeal should not have been dismissed for lack of standing. *Vinciullo*, 364 Mass. at 629. The court reasoned that a procedural amendment to a statute, which removed municipal boards from those who might appeal a decision of the zoning board of appeals, did not have retroactive application to deprive the city council of standing to maintain its appeal where both the zoning board of appeal's

decision and city council's appeal were filed prior to the effective date of the amendment. *Id*. at 628-629. The court's conclusion was "buttressed by considerations of fairness," noting that the retroactive application of the amendment would be "particularly harsh" under the circumstances. *Id*. at 629.

Here, the Legislature has not unequivocally indicated whether the amendment to G.L. c. 40A, § 17, applies retroactively. Because the Defendants' presumption of standing was addressed in the Motion for Summary Judgment and J.D. Raymond chose not to rebut the presumption, the stage of the proceedings affected by the change has already passed. Considering fairness to the parties, the court determines that the amendment to G.L. c. 40A, § 17, eliminating the presumption of standing does not apply retroactively to this action. The Defendants have a presumption of standing which has not been rebutted.

Horticultural Use

In or about 2013, § 4.2.2 of the ordinance was amended to require a special permit for the use of a "[m]ulching/composting operation, and/or outdoor storage" in the Designated Development District (DDD) zoning district where J.D. Raymond's property is located. J.D. Raymond first argues that it is not required to obtain a special permit under § 4.2.2 because its mulching operation is a horticultural use. Section 1.6, Exemptions, of the ordinance provides in relevant part: "This ordinance shall not prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture or floriculture." The question, then, is whether J.D. Raymond's mulching operation is a horticultural use exempt from the special permit requirement under § 1.6 of the ordinance. In other words, does making mulch constitute "horticulture" within the meaning of the ordinance?

The ordinance does not define "horticulture." Where a bylaw does not define its terms, courts use " 'ordinary principles of statutory construction' 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). The court derives the words' "usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." *Id.*

Turning first to the lexical definitions, 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 (12th ed. 2024). "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 (2024). "Horticulture" is defined as "[t]he science or art of cultivating fruits, vegetables, flowers, and plants." American Heritage Dictionary (5th ed. 2022).

Courts "look also to the use and definition of the word [horticulture] 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) (*Curvin*), quoting *Webster v. Board of Appeals of Reading*, 349 Mass.

17, 19 (1965). Section 1.6 of the ordinance references G.L. c. 40A, § 3, which 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 . . . [or] horticulture . . . 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 . . . Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

The definitions of "agriculture" and "horticulture," as used in G.L. c. 40A, § 3, are further informed by definitions of those terms in G.L. c. 128, § 1A, and in G.L. c. 61A, §§ 1 and 2. See *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 843-844 (1994) (*Henry*); *Valley Green Grow, Inc. v. Town of Charlton*, 99 Mass. App. Ct. 670, 681 (2021) (*Valley Green Grow, Inc. II*); *Modern Const. Constr. Co. v. Building Inspector of Natick*, 42 Mass. App. Ct. 901, 902 (1997) (*Modern*); *Steege v. Board of Appeals of Stow*, 26 Mass. App. Ct. 970, 971 (1988); *Curvin*, 22 Mass. App. Ct. at 403-404. General Laws c. 128, § 1A, defines "agriculture" to include the "production, cultivation, growing and harvesting of any agricultural . . . or horticultural commodities." Similarly, at least for tax purposes, "horticultural" use of land includes directly raising nursery or greenhouse products and ornamental plants and shrubs; in addition to incidental uses that represent a "customary and necessary use in raising these products and preparing them for market." G. L. c. 61A, § 2. A nursery is "a place where trees, shrubs, plants, and so forth, are propagated from seed or otherwise for transplanting, for use as stock for grafting, and for sale." *Town of Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95, 100 (1953) (*Needham*) (collecting cases). Additionally, courts construe "greenhouse products" to mean "plants, flowers, and sometimes vegetables" raised within a "building principally constructed of glass" for the purposes of sale. *Id*.

Interpreting these lexical and statutory definitions, courts have determined that a primary agricultural or horticultural use has as its "central and primary component" the "raising or propagation of plant or animal life" on the premises itself, and an incidental agricultural or horticultural activity is one that is related to the "raising or propagation of plant or animal life *on the premises*" (emphasis added). *Building Inspector of Peabody v. Northeast Nursery, Inc.*, 418 Mass. 401, 405 (1994) (*Northeast Nursery, Inc.*) (selling nursery products neither planted nor cultivated on premises is not agriculture or horticulture use); *Henry*, 418 Mass. at 843 (planting evergreen trees on premises for Christmas tree farm is agricultural or horticultural use); *Valley Green Grow, Inc. v. Town of Charlton*, 27 LCR 409, 418-419 (2019) (Misc. Case No. 18 MISC 000483) (Foster, J.), *aff'd*, 99 Mass. App. Ct. 670 (2021) (*Valley Green Grow, Inc. I*) (cultivating marijuana on premises is agricultural or horticultural use, and proposed cogeneration facility and processing and manufacturing of cultivated marijuana products are allowed incidental uses) (collecting cases).

Defendants argue that J.D. Raymond's operation is neither a primary horticultural use nor incidental to a horticultural use because the mulch-making materials are brought to the property from off-site, and the mulch is not used to grow, raise, or cultivate anything on the property itself. J.D. Raymond claims its mulching operation is incidental to or customarily and necessarily used for horticultural purposes, including preparing nursery products, greenhouse products, and ornamental plants and shrubs for market. The court first addresses Defendants' contention that J.D. Raymond's mulching operation is not a primary horticultural use.

Primary Horticultural Use

"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 v. Town*

of Weston, 462 Mass. 280, 290 (2012), 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*, 418 Mass. at 844.

The court finds that J.D. Raymond's mulching operation is not a primary horticultural use. Section 2.1 of the ordinance does not define "mulch," "mulching operation," or "mulch processing," nor do the terms appear anywhere else in the ordinance apart from § 4.2.2, Schedule of use regulations. Looking first to the lexical definition, "mulch" is a "protective covering, as of bark chips, straw, or plastic sheeting, placed on the ground around plants to suppress weed growth, retain soil moisture, or prevent freezing of roots." American Heritage Dictionary (5th ed. 2022). Bark chips, straw, and plastic sheeting do not squarely fit into the kinds of commonly and statutorily accepted horticultural products, such as "fruits, vegetables, and other foods for human consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs," that are directly grown, raised, or cultivated on the land. G.L. c. 61A, § 2; see *Needham*, 330 Mass. at 99. Additionally, mulch is placed around plants as a protective covering; it is not seeded or rooted in the property's soil itself.

Caselaw further supports the conclusion that a mulching operation is not a primary horticultural use. A primary agricultural or horticultural use has as its "central and primary component" the "raising or propagation of plant or animal life" on the premises itself. *Building Inspector of Peabody*, 418 Mass. at 405. The court finds *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*) instructive. In *Cotton*, the Appeals Court determined that a mulching operation, which makes mulch from off-locus materials and does not use the mulch to grow

anything on the locus itself, is not a primary agricultural use protected by G.L. c. 40A, § 3. The property owner primarily used the locus to operate a mulch-creating business by grinding and chipping stumps, trees, and wood waste into compostable mulch for landscaping and enhancing plant growth. *Id*. After receiving judgments that Cotton's mulching activities were prohibited by the local bylaws without a special permit, Cotton appealed, contending that Cotton's mulch production is an exempt agricultural activity. Interpreting the definitions provided by G.L. c. 40A, § 3, and G.L. c. 128, § 1A, the Appeals Court affirmed that Cotton's primary use "does not amount to agriculture" and requires a special permit. *Id*. The court reasoned that, "[w]hile the mulch produced on the property may be a 'valuable agriculture product,' in that it 'can be used as a soil enhancer for growing horticultural products,' Cotton's production process itself is not agriculture. Cotton makes mulch from damaged trees and stumps brought to the property from other locations in connection with its tree service business." *Id*. The Appeals Court concluded that "this activity does not involve growing or harvesting any forest products." *Id*. See *Tinicum Twp. v. Nowicki*, 99 A.3d 586 (Pa. Commw. Ct. 2014) (holding that mulching operation was not agricultural use because vast majority of mulch-making materials originated offsite and were not used for production of agricultural commodities on property); *Oakwood Property Management, LLC v. Town of Brunswick*, 103 A.D.3d 1067 (N.Y. App. Div. 2013) (holding that mulching operation was not agricultural use); *Lawson v. Foster*, 76 Ohio App. 3d 784, 603 N.E.2d 370 (1992) (upholding board's determination that mulching business was not "agricultural" or "agricultural service" and thus was not permitted conditionally or as of right in agricultural district).

Similarly, J.D. Raymond's operation does not use any materials grown on the property to make mulch, and the mulch is not used to grow, raise, or cultivate anything on the property itself.

The facts about J.D. Raymond's mulch manufacturing, processing, storage, and distribution operation are largely undisputed. J.D. Raymond and third parties bring logs, wood chips, and bark from other locations to the property to be processed, dyed, and stored as finished mulch. J.D. Raymond only propagates mulch on its land. J.D. Raymond does not propagate plants or trees on its property, and the trees that do grow naturally on the property are not cut down to make mulch or any other product. Just as in *Cotton*, J.D. Raymond's operation does not involve growing or harvesting any "horticultural" products on the property. Based on the accepted definitions of "agriculture," "horticulture," and "mulch" and the language of § 1.6 of the ordinance, G.L. c. 40A, § 3, G.L. c. 128, § 1A, and G.L. c. 61A, § 2, the court finds that J.D. Raymond's mulching operation is not a primary horticultural use exempt from the ordinance.

Incidental Use

The next question is whether the mulching operation is incidental to a primary horticultural use. An accessory or incidental use must be subordinate and minor in significance to the primary use, and commonly, habitually, and by long practice reasonably associated with the primary use. See *Henry*, 418 Mass. at 846 ("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."); *Town of Harvard v. Maxant*, 360 Mass. 432, 438-439 (1971); *Needham*, 330 Mass. at 101.

Defendants assert that there is no primary horticultural use of the property to which the mulching operation can be incidental. J.D. Raymond argues that its operation is an incidental horticultural use, since mulch production is a normal and customary part of preparing nursery products, greenhouse products, and ornamental plants and shrubs for market. Citing various state

and federal regulatory authorities, J.D. Raymond asserts that mulching is used to "improve the efficiency of moisture management, reduce irrigation energy used in farming/ranching practices and field operations, and improve plant productivity." Both the plain intent of the ordinance and cases in Massachusetts compel the finding that J.D. Raymond's mulching operation is not an incidental horticultural use.

First, § 2.1 of the ordinance defines "accessory use" as "[a] use incidental and subordinate to and customarily associated with a specific principal use, located *on the same lot*" (emphasis added). "Uses which are 'incidental' to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law." *Henry*, 418 Mass. at 844. Here, the drafters of the ordinance specified that the accessory use must be related to a primary use located "on the same lot." As discussed, J.D. Raymond's mulching operation on the property is not a primary horticultural use. It follows that J.D. Raymond's mulching operation cannot be an incidental horticultural use if the primary use of the property is not itself horticultural. To find otherwise would "undercut the plaint intent" of the ordinance. *Id.*

Caselaw supports this conclusion. "[A]ctivities that are only ancillary or incidental to the raising or propagation of plant or animal life *on the premises* would themselves be deemed to come within the definition of agriculture [or] horticulture" (emphasis added). *Northeast Nursery, Inc.,* 418 Mass. at 405. The court has previously reviewed cases, both in Massachusetts and in other states, which "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." *Valley Green Grow, Inc. I*, 27 LCR at 419; see *Needham*, 330 Mass. at 101-102 ("Neither the [Christmas] 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."); *Modern*, 42 Mass. App. Ct. at 902.

In *Modern*, the Appeals Court concluded that the "plaintiff's slaughtering of livestock raised on its premises was agriculture entitled to the protection afforded by G.L. c. 40A, § 3." *Modern*, 42 Mass. App. Ct. at 901. The court "[thought] 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. "The fact that an activity, such as slaughtering, can become an industrial [ ] 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.* Compare *Jackson v. Building Inspector of Brockton*, 351 Mass. 472, 478 (1966) (dehydration of fodder or manure, which is neither raised upon locus nor intended for on-locus use, has no necessary relation to farming on locus and is thus not allowed use).

Here, the mulch produced by J.D. Raymond was not created from materials grown, raised, or cultivated on the property, nor was the mulch used to grow, raise, or cultivate any horticultural products on the property itself. Construing the facts in J.D. Raymond's favor, mulch could be a normal and customary part of preparing horticultural commodities for market. As applied, however, the fact remains that J.D. Raymond's mulching operation does not have a "reasonable or necessary relation to [horticultural] activity being conducted *on the locus*" (emphasis added). *Modern*, 42 Mass. App. Ct. at 902. Here, J.D. Raymond does not grow plants or trees on its property on which to use the mulch. Instead, the finished mulch is picked up by

customers on-site or shipped to nursery and landscaping companies that sell the mulch directly to their customers for landscaping and ornamental purposes. While these customers may use the mulch to "improve the efficiency of moisture management, reduce irrigation energy used in farming/ranching practices and field operations, and improve plant productivity" for acceptable horticultural purposes, J.D. Raymond does not control or operate these businesses. Merely selling to customers who may use the mulch on *their* land does not change the fact that J.D. Raymond neither uses materials grown on its property to make mulch, nor does it use the mulch to help cultivate plants or trees on its own property. See *Jackson*, 351 Mass. at 476 (suggesting machinery that dehydrates manure and fodder for use on nearby land that is not controlled and operated by owner would be more manufacturing than farming in its effect). J.D. Raymond's mulch processing is not a use incidental and customarily associated with a primary horticultural use located on the same property.

Finally, J.D. Raymond argues that the ordinance should be interpreted more broadly than the state exemption, since the definitions of "agriculture" and "horticulture" contained in G.L. c. 40A, § 3, are expressly stated to be for purposes of § 3 only. *Valley Green Grow, Inc. II*, 99 Mass. App. Ct. at 679. J.D. Raymond argues that the court should instead apply the definitions from G.L. c. 128, § 1A, and G.L. c. 61A, § 2, to find that the legislature intended to exempt all incidental horticultural activities, regardless of whether the products are raised on-site. J.D. Raymond then states that a "line of cases" supports this argument. Caselaw suggests no such interpretation. See *Valley Green Grow, Inc. I* at 418-419 (collecting cases). Even when "broadly" interpreting the agricultural use exemption under G.L. c. 128, § 1A, and G.L. c. 61A, § 2, courts consistently hold that any incidental, customary, or necessary use must be related to raising products that were grown *on the premises*. See *Modern,* 42 Mass. App. Ct. at 902; *Henry*, 418

Mass. at 844. "[T]o hold otherwise would be to allow the statutory exemption to be manipulated and twisted into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property. The [city's] zoning power would thus be rendered meaningless. The Legislature cannot have intended such a result when it created a protected status for agricultural purposes" (citation omitted). *Henry*, 418 Mass. at 847. J.D. Raymond's mulching operation is not a horticultural use that is exempt from § 4.2 of the ordinance.

Nonconforming Use

J.D. Raymond also argues that it is exempt from § 4.2 of the ordinance because its mulching operation is a lawful nonconforming use. The first paragraph of G.L. c. 40A, § 6, provides: "[a]n amendment to a zoning bylaw does not apply to a use lawfully in existence when the bylaw was amended." "[A] use achieves the status of nonconformity for statutory purposes if it [lawfully] precedes the coming into being of the zoning regulation which prohibits it" (citation omitted). *Leonard v. Zoning Bd. of Appeals of Hanover*, 96 Mass. App. Ct. 490, 494 (2019). "Preexisting nonconformities become protected when zoning laws change, as a result of the long-standing recognition that 'rights already acquired by existing use or construction of buildings in general ought not to be interfered with.' " *Id*. at 494-495, quoting *Opinion of the Justices*, 234 Mass. 597, 606 (1920). "The protections from enforcement of amended bylaws in G.L. c. 40A, § 6, do not apply to uses that were not lawful when the amendment was enacted." *Id*. at 496.

J.D. Raymond's bark mulch business has been operating continuously on the property in the DDD zoning district since approximately 2003. In 2013, the city amended § 4.2, Schedule of uses, to require a special permit for the use of "[m]ulching/composting operation, and/or outdoor storage" in the DDD. J.D. Raymond's use of the property is nonconforming because its mulching operation predates the requirement of a special permit for that use. See *Shrewsbury Edgemere*

Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317, 321 (1991). The question, therefore, is whether J.D. Raymond's mulching operation is a *lawful* nonconforming use under G. L. c. 40A, § 6; that is, whether it was an allowed use before the 2013 amendment. If it was, it is protected from the 2013 amendment requiring a special permit for the use of a mulching operation in the DDD. J.D. Raymond argues that its use of the property since 2003 is a lawful nonconformity, analogizing its use to farm or manufacturing uses, which are allowed as of right in the DDD. Defendants argue that J.D. Raymond's operation is an unlawful nonconforming use for two reasons. First, they argue, prior to the amendment, the ordinance never listed a mulching operation as an allowed use (either as of right or by special permit), and was thus prohibited. Second, Defendants argue that J.D. Raymond's operation never constituted an as-of-right farm or manufacturing use in the DDD. For the following reasons, the court finds that J.D. Raymond's mulching operation is not a lawful nonconforming use.

In interpreting a local zoning ordinance, the court is primarily tasked with determining the local legislative body's intent "ascertained from all of [the ordinance's] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of the framers may be effectuated." *Grady v. Zoning Bd. of Appeals of Peabody*, 465 Mass. 725, 729 (2013). If the language of the ordinance is unambiguous, its plain meaning will be applied unless doing so will lead to "an absurd or unworkable result" (citation omitted). *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 477 (2012) (*Shirley*). A zoning ordinance should be interpreted in a way that gives effect to all of its provisions and avoids rendering any provisions meaningless or superfluous. *Id*. Further, no words or provisions are read in isolation; their meanings are to be derived from their context,

including any related statement of legislative purpose. *In re Custody of Victoria*, 473 Mass. 64, 73 (2015) ("[W]e consider the specific language of a statute in connection with the statute as a whole and in consideration of the surrounding text, structure, and purpose of the [act].")

In general, a use in a district is a prohibited use unless it is identified in the by-law as a permitted use, or is permitted by special permit, or is otherwise exempt under a particular section of the by-law. See *Town of Harvard v. Maxant,* 360 Mass. 432, 436 (1971) (private landing strip, which was neither listed as prohibited use nor listed as a permitted use in agricultural-residential zone, was unlawful use); *Building Inspector of Chelmsford v. Belleville*, 342 Mass. 216, 217-218 (1961) ("The enumeration of permitted uses in a Single Residence A-1 District which does not include the storing or garaging of heavy equipment suffices to show that such use is not authorized in a Single Residence A-1 District in Chelmsford.").

The ordinance prohibits all uses of property that are not expressly permitted within the DDD and prohibits any use not specifically listed in the schedule of use regulations. Section 1.4 of the ordinance provides: "No building, structure or land shall be used for any purpose or in any manner other than is expressly permitted within the district in which such building, structure or land is located. Any use not specifically or generically enumerated in a district herein shall be deemed prohibited." The ordinance did not expressly list "mulching operation" as a permitted use by special permit in the DDD until the 2013 amendment, almost ten years after J.D. Raymond commenced its operation. Section 4.1 of the ordinance also prohibits any use not specifically listed in the schedule of use regulations. From 1978 to 2011, § 4.1 of the ordinance provided that: "[N]o premises shall be used for any purpose or in any manner other than as set forth in § 4.2 schedule of use regulations in this ordinance and in accordance with the following notation: x=permitted use, a=allowed use under special permit by the city council, and

blank=prohibited use." From 2011 onward, § 4.1 of the ordinance provides the same, changing the notation symbols and adding: "[a]ny use not specifically listed in the Schedule of Use Regulations shall be deemed to be prohibited." It was not until 2013 that "[m]ulching operation" was specifically listed in the schedule of use regulations. Because "mulching operation" was neither expressly allowed in the DDD nor specifically listed in the schedule of use regulations when J.D. Raymond began its operation, J.D. Raymond's mulching operation was a prohibited use in the DDD from 2003 until 2013, when the amendment allowed its use by special permit. Because J.D. Raymond did not obtain, and still does not have, a special permit for its mulching operation after 2013, J.D. Raymond's use was, and remains, an unlawful nonconforming use.

J.D. Raymond insists that its use of the property is a lawful nonconformity by analogizing its use to a farm use or manufacturing use, both of which are allowed as of right in the DDD. When J.D. Raymond started its operation in approximately 2003, § 4.2.2 of the ordinance allowed as of right in the DDD: "Farms for cultivating and harvesting of general crops and for the raising of cattle, horses or poultry on property of more than five acres." As discussed, J.D. Raymond's mulching operation is not a farm use. The court also finds it noteworthy that, when asked at his deposition to compare the farm use listed in § 4.2.2 of the ordinance to J.D. Raymond's operation prior to 2011, John D. Raymond, Jr., the principal of J.D. Raymond, testified that J.D. Raymond's operation is nothing like the farm use.

J.D. Raymond also points to § 4.2.6 of the ordinance, which at the time allowed as of right in the DDD:

> Manufacture of corrugated cardboard, paper and cardboard boxes and liner paper; and
>
> Manufacture of carbide-tipped drills, saws and tools; aluminum windows, doors, shutters, awnings and sidings; machinery and engine parts; shoe machinery;

> stamps, nails, decals and mailing devices; mica parts and devices and similar types of products.

J.D. Raymond argues that its mulching operation is an allowed manufacturing use. J.D. Raymond uses machinery to process raw materials (logs, tree bark, and wood chips) into a product (mulch), which is then stored and distributed to off-site customers. Adopting a broad definition of the word "manufacturing," as J.D. Raymond suggests, it is reasonable that a mulch processing operation could fall under such a use. An ordinance's meaning, however, is derived from its context, in accordance with the city's intent, to give effect to all provisions of the ordinance. *Shirley*, 461 Mass. at 477; *In re Custody of Victoria*, 473 Mass. 64, 73 (2015). If the language of the ordinance is unambiguous, its plain meaning will be applied unless doing so will lead to "an absurd or unworkable result." *Shirley*, 461 Mass. at 477.

Here, § 4.2.6 of the ordinance at the time differentiated manufacturing uses by the items produced. The first manufacturing category allowed the manufacture of the following products as of right in the DDD: corrugated cardboard, paper and cardboard boxes and linen paper. Notwithstanding that mulch and paper products both derive from wood, the court fails to see how mulch would fall into the plain meaning of these products. The court turns next to the manufacture of "carbide-tipped drills, saws and tools; aluminum windows, doors, shutters, awnings and sidings; machinery and engine parts . . . and similar types of products." The phrase "and similar types of products" is evidence that the list of products is not exhaustive. However, any unlisted products should be similar in scope and function, i.e., products made from carbon and tungsten, aluminum, or steel that is used for tools, structural additions, machinery or parts. Mulch manufactured from bark and wood chips to be used as a protective covering for plants does not fall within the scope and function of the manufacturing uses allowed in the DDD by the ordinance. The court again notes that, when asked to compare the manufacturing uses listed in

§ 4.2.6 of the ordinance to J.D. Raymond's operation, J.D. Raymond stated that he does not make anything similar to what is listed and does not know if J.D. Raymond ever made anything listed in that definition.

Subsequent amendments to the ordinance support the conclusion that J.D. Raymond's mulch operation is not a lawful nonconforming manufacturing use. In 2011, the city amended the ordinance, removing the "[m]anufacture of carbide tips . . ." from § 4.2, schedule of use regulations, and adding "[m]anufacturing, light," which is allowed in the DDD as of right. Section 2.1 of the ordinance defines "[m]anufacturing, light" as: "The processing, fabrication, or assembly of materials or products provided *all manufacturing activities are contained entirely within a building* and noise, odor, smoke, heat, glare, and vibration resulting from the manufacturing activity are *confined entirely within the building*" (emphasis added). Furthermore, § 6.6.4, Designated development district, states: "All uses [including permitted light manufacturing, processing and assembly] *shall be completely enclosed in buildings*. *No merchandise materials, supplies or equipment shall be permitted to remain outside any building*" (emphasis added). The drafters expressly intended for any processing or assembly of materials or products to be completely enclosed inside a building, with no materials or equipment remaining outside. It is undisputed that J.D. Raymond's mulch processing operation occurs in the open, and its equipment and piles of mulch and other materials, including wood chips, tree bark and logs, are neither covered nor enclosed in any buildings. In effectuating the city's clear intent, the court finds that J.D. Raymond's mulching operation is not an allowed "light manufacturing" use under the amended 2011 ordinance and remains an unlawful nonconforming use by lack of special permit.

In 2013, the city amended § 4.2.2, schedule of uses, to require a special permit for the use of a "[m]ulching/composting operation, and/or outdoor storage" in the DDD. On May 17, 2023, ConCom approved J.D. Raymond's Notice of Intent, subject to an Order of Conditions, which Defendants appealed. However, J.D. Raymond still does not have a special permit, so its mulching operation remains an unlawful nonconforming use.

Finally, J.D. Raymond argues that justice and equity require the court to reverse the ZBA's determination, since the city was aware of J.D. Raymond's operation and did not take any zoning action for approximately twenty years.[1] Any inaction by the city or misapprehension that J.D. Raymond's mulching operation was allowed, or at least did not need a permit, does not transform a prohibited use into an allowed use. See *Leonard*, 96 Mass. App. Ct. at 495. In *Leonard*, the Appeals Court concluded that the business owner's outdoor displays were not prior nonconforming uses entitled to protection under G.L. c. 40A, § 6. *Id*. at 496. The owners openly displayed goods outdoors from the inception of their operation and continued for over twenty years without complaint from the town. *Id*. at 495. While the town's inaction "might well suggest that all were acting under the impression that outdoor displays . . . were an allowed use," the Appeals Court noted that "any misapprehension that outdoor displays were allowed in the commercial district does not transform a prohibited use into an allowed use." *Id*. "Even when the

[1] General Laws c. 40A, § 7, contains two limitation periods for actions brought to redress *structural* zoning violations either ostensibly authorized by a building permit or not sanctioned by a building permit; however, the *use* of land is not a structure subject to the statute of limitations under G.L. c. 40A, § 7. See *Lord v. Zoning Board of Appeals of Somerset*, 30 Mass.App.Ct. 226 (1991); *Garabedian v. Westland*, 59 Mass.App.Ct. 427 (2003) (airstrip on landowner's land not a "structure" and therefore ten-year statute of limitations contained in G.L. c. 40A, § 7, did not apply to neighbors' protest that airstrip did not comply with building permits).

outdoor displays began in 1993, … the 1993 bylaw provided that such displays were prohibited unless 'specifically permitted' elsewhere in the bylaw." *Id.*

Here, J.D. Raymond openly operated its bark mulch business from 2003 and continued for over twenty years. The city was aware of its operation and dropped off mulch-making materials to the property itself. John D. Raymond, Jr. testified in his deposition that the mayor implied that J.D. Raymond's operation did not need a permit when John D. Raymond, Jr. asked. As a result, J.D. Raymond did not follow up on a permit requirement. Despite the city's inaction and any misapprehension that no permit was required, the fact remains that, at the time J.D. Raymond started its operation, §§ 1.4 and 4.1 of the ordinance prohibited such a mulching operation, just as in *Leonard*. J.D. Raymond's mulching operation is not a lawful nonconforming use.

"The protections from enforcement of amended bylaws in G.L. c. 40A, § 6, do not apply to uses that were not lawful when the amendment was enacted." *Id.* at 496. Because J.D. Raymond's use of the property was not a lawful use when the ordinance was amended in 2013, J.D. Raymond does not have protection as a lawful nonconforming use under G.L. c. 40A, § 6, and must obtain a special permit for its mulching operation in accordance with the ordinance and Peabody City Council rules.

The ZBA's determinations that J.D. Raymond is in violation of § 4.2 of the ordinance are proper. Judicial review of a zoning board's decision pursuant to G.L. c. 40A, § 17, "involves a 'peculiar' combination of de novo and deferential analyses" (citation omitted). *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 381 (2009) (*Wendy's*). The judge reviews the facts de novo without giving evidentiary weight to the board's findings, and "must give substantial deference to a board's interpretation of its bylaws and

ordinances" and uphold a reasonable construction of the board, due to its "special knowledge" of the history and purpose of the bylaws (citations omitted). *Id*. A board's decision "cannot be disturbed unless it is based on a legally untenable ground," or is "unreasonable, whimsical, capricious or arbitrary." *Id*. at 381–382, quoting *Roberts v. Southwestern Bell Sys., Inc*., 429 Mass. 478, 487 (1999). "Where the board's interpretation is reasonable ..., the court should not substitute its own judgment" (citation omitted). *Perry v. Zoning Bd. of Appeals of Hull*, 100 Mass. App. Ct. 19, 21 (2021). J.D. Raymond's mulching operation falls squarely within § 4.2.2 of the ordinance, which requires a special permit for a "[m]ulching/composting operation and/or outdoor storage" use within the DDD. J.D. Raymond's use of its property is neither exempted from the ordinance as a horticultural use, nor is its use of the property a lawful nonconforming use. The first ZBA decision found that J.D. Raymond was operating illegally under § 4.2 of the ordinance and ordered J.D. Raymond to cease and desist operations until it gains approval from ConCom and obtains a special permit from the city council. The second ZBA decision upheld the Commissioner's enforcement letter stating the same. These decisions were not based on legally untenable grounds, nor were they unreasonable, arbitrary, or capricious. The court affirms the ZBA's two decisions.

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is ALLOWED and Plaintiff's Cross-Motion for Summary Judgment is DENIED. Judgment shall enter in the 681 action and the 115 action affirming both ZBA decisions.

SO ORDERED

By the Court (Foster, J.) */s/ Robert B. Foster*

Attest: */s/ Deborah J. Patterson*
Deborah J. Patterson, Recorder

Dated: September 30, 2024