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Massachusetts Land Court.
Department of the Trial Court.
Brenda L. COGGIN, Plaintiff,
v.
CITY OF WESTFIELD and Donald York as the Superintendent of Buildings for the City of Westfield, Defendants.
Brenda L. Coggin, Plaintiff,
v.
City of Westfield, Donald York as the Superintendent of Buildings for the City of Westfield and William A. Murray, III, Sherrill Hathaway, William L. Burgoyne, and Walter C. Wolfe, as the City of Westfield Zoning Board of Appeals, and Dori-Ann Ference, Philip McEwan, William Onyski, Anthony Petrucelli, Randal Racine, Felix Otera, and Matthew Van Heynigen, as the City of Westfield Planning Board, Defendants.
Nos. 04 MISC 299903(AHS), 04 MISC 303152(AHS).

Sept. 25, 2009.

DECISION

ALEXANDER H. SANDS, III, Justice.

***1** Plaintiff Brenda L. Coggin filed an unverified Complaint with the Hampden County Housing Court (the "Housing Court Case") on July 15, 2003, pursuant to G.L. c. 40A, § 17, appealing a decision ("ZBA Decision 2") of Defendant Zoning Board of Appeals (the "ZBA") filed with the City of Westfield (the "City") Clerk on June 26, 2003, which affirmed an order issued by Defendant Superintendent of Buildings, Donald York ("York") (together with the ZBA, the "Housing Court Defendants"), to cease and desist excavation of earth materials at 1008 Granville Road, Westfield, MA ("Locus").[FN1] On October 20, 2004, the Hampden County Housing Court (Fein, J.) allowed Plaintiff's Application to Remove Action to Land Court Pursuant to G.L. Ch. 212 § 26A, and the Housing Court Case was transferred to this court as 04 MISC 303152 on October 27, 2004.

FN1. Plaintiff filed an Amended Complaint on April 27, 2006, to reflect an appeal of ZBA Decision 3, as hereinafter defined. Plaintiff and Denis P. Coggin filed a Second Amended Complaint on April 9, 2007, to reflect an appeal of the Planning Board Decision, as hereinafter defined.

On June 23, 2004, Plaintiff and Denis P. Coggin [FN2] filed an unverified Complaint in this court (04 MISC 299903, the "Land Court Case") pursuant to G.L. c. 231A, § 1 and G.L. c. 240, § 14A, seeking a declaratory judgment and challenging the validity of certain provisions of the Defendant City of Westfield's Zoning Ordinance (the "Ordinance") as applied to Locus. With respect to the Land Court Case, Plaintiff contends that the following sections of the Ordinance are illegal and null and void as applied to Locus: Article III, Section 3-40.4(9) ("Section 3-40.4(9)"); Article IV, Section 4-140 ("Section 4-140"); Article V, Section 5-10 ("Section 5-10"); Article V, Section 5-20 ("Section 5-20"); and Article VI, Section 6-10 ("Section 6-10").[FN3] Defendants in this case, the City and York (together, the "Land Court Defendants") (together with the Housing Court Defendants, "Defendants"), filed a Motion to Dismiss the Land Court Case due to the pendency of the Housing Court Case on August 2, 2004.

FN2. Brenda and Denis Coggin divorced sometime after filing the Complaint, after which, Plaintiff took title to Locus as the sole owner of record. On February 25, 2008, Plaintiff filed her Motion to Strike or Delete Denis P. Coggin as a Party Plaintiff, which this court allowed on February 26, 2009. As such, certain motions filed by the

parties reference two plaintiffs, while others indicate a single plaintiff.

FN3. The record includes numerous references to amendments to the Ordinance; however, it is unclear when the City first adopted the Ordinance. That said, it is agreed that the first version of the Ordinance relevant to the case at bar was the 1981 Amendment to the Ordinance (the "1981 Amendment").

> On September 18, 2003, between the time that Plaintiff filed the Housing Court Case and the Land Court Case, the Ordinance was amended and recodified. Such amendment made no substantive changes but renumbered the Ordinance's sections. *See e.g., infra* note 12. For the sake of clarity, unless otherwise provided in this decision, this court refers to sections of the Ordinance as they were numbered after the September 18, 2003 recodification.

On November 12, 2004, Plaintiffs submitted their Motion to Consolidate Cases for Hearing and Trial and Assign for Immediate Pre-Trial Conference. On November 18, 2004, Plaintiffs filed their Amended Motion to Consolidate Cases for Hearing and Trial or in the Alternative to Allow Plaintiff to Amend Her Complaint and Assign for Immediate Pre-Trial Conference. On December 17, 2004, Land Court Defendants submitted Defendants' Supplemental Memorandum of Law in Support of Motion to Dismiss and in Opposition to Plaintiffs' Amended Motion Dated November 17, 2004. On January 18, 2006, Plaintiff filed Plaintiffs' Opposition to Defendants' Motion to Dismiss. A hearing was held on the motions on January 25, 2006. On January 27, 2006, this court issued its Decision Denying [Land Court] Defendants' Motion to Dismiss, in which the Housing Court Case and the Land Court Case were consolidated.

On February 16, 2006, because of a change in the scope of Plaintiff's proposed excavation project, the parties filed a Joint Motion for Order of Remand (of ZBA Decision 2) to the ZBA, which was allowed on the same day. On March 22, 2006, the ZBA held a public hearing on Plaintiff's Redesigned Proposal (as hereinafter defined) for excavation. The ZBA voted to deny the Redesigned Proposal on April 5, 2006 ("ZBA Decision 3"). Plaintiff filed an Amended Complaint in the Housing Court Case on June 6, 2006, and Housing Court Defendants filed an Answer on June 27, 2006. The parties met for a pre-trial conference on November 13, 2006, at which point it was decided that Plaintiff would file a request for a riding academy special permit with the Planning Board. On March 6, 2007, the Planning Board of the City of Westfield (the "Planning Board") held a public hearing on Plaintiff's special permit request. On March 20, 2007, the Planning Board voted to deny the special permit request (the "Planning Board Decision"), which was filed with the Westfield City Clerk on March 21, 2007. As a result of the Planning Board Decision, on April 3, 2007, Plaintiff filed a Motion to Waive Notice Requirements and Schedule Hearing on Plaintiff's Motion to Further Amend Complaint and Add Additional Defendant. On April 9, 2007, such motion was allowed and the Second Amended Complaint in the Housing Court Case was submitted, adding the Planning Board as a Defendant and the appeal of the Planning Board Decision as a separate count; [FN4] the Housing Court Defendants filed an Answer on April 26, 2007. A status conference was held on June 19, 2007. The parties filed their Joint Stipulation of Facts on December 17, 2007, and attended a pre-trial conference on December 19, 2007. After a site view, the first day of trial was held in Westfield District Court on January 30, 2008. The second day of trial was held at the Land Court in Boston on January 31, 2008.

FN4. Plaintiff's Second Amended Complaint added a third count to the Housing Court Case which challenged the Planning Board Decision and demanded a refund of

> the $550 filing fee that Plaintiff paid as part of the Planning Board Application, as hereinafter defined.

***2** At the trial, testimony was given by Plaintiff's witnesses Brenda Lee Coggin (Plaintiff), David Deveno ("Deveno") (excavator), Scott Brian Perry (excavator), and Defendants' witnesses Barbara Webster James (neighbor), Karen Lynn Curran (neighbor), Lawrence Friedman (neighbor), Mark Cressotti (City Engineer), Mark Noonan (member of the Conservation Commission of Westfield and former City Planner), George Martin (abutter to Westfield conservation land which abuts Locus), and James Stuart Parker (abutter to Westfield conservation land which abuts Locus). There were forty-two exhibits submitted, some in multiple parts. On March 25, 2008, Plaintiff filed her Memorandum of Law and Defendants filed their Post-Trail Memorandum, at which time the matter was taken under advisement.

Based on the sworn pleadings and the evidence offered at trial, and the reasonable inferences drawn therefrom, I find the following material facts:

1. Plaintiff's predecessors in title, Richard G. and Judith A. Oleksak (the "Oleksaks"), owned an unimproved parcel of land on Granville Road in Westfield, which they proposed to divide into three parcels: Parcel 1, Parcel 2, and Parcel 3 (together the "Oleksak Parcel"), as shown on "Plan of Land in Westfield, Massachusetts, Prepared for Richard G. & Judith A. Oleksak," prepared by Bruce Coombs of Heritage Surveys and dated January 24, 1984 (the "Oleksak Plan"), and recorded in the Hampden County Registry of Deeds (the "Registry") at Book 217, Page 108. Parcel 1 consisted of 5.252 acres with 362.51 feet of frontage on Granville Road; Parcel 2 was a long, narrow strip containing 17,297 square feet with 30.48 feet of frontage on Granville Road; and Parcel 3 consisted of 24.704 acres to the rear of Parcels 1 and 2 with no frontage on Granville Road. As seen on the Oleksak Plan, Parcel 2 provides access to Granville Road for Parcel 3, and together, Parcels 2 and 3 comprise Locus.[FN5]

> FN5. The Oleksak Plan shows Parcel 2 as approximately thirty feet wide by 576 feet long.

2. From 1981 until September of 1987, the Oleksak Parcel was located in the **Agricultural** District, as defined in Section 14A of the 1981 Amendment. "**Agriculture**" and "riding academ[ies]" were allowed uses in an **Agricultural** District pursuant to Sections 14A(2) and (5) of the 1981 Amendment. Additionally, pursuant to Section 14A(1) of the 1981 Amendment, a single-family detached dwelling was a use allowed as of right in an **Agricultural** District provided that certain dimensional requirements were met, including a minimum lot frontage of 150 feet.[FN6] Subsection (3) of Section 10 (titled Frontage and Reduction of Area) of the 1981 Amendment provided that:

> FN6. Section 14A(1) of the 1981 Amendment allowed, in a **Agricultural** District: "[a]ny use or accessory use permitted in a Residence A District providing that such use shall conform to all dimensional and minimum requirements of **Agricultural** Districts." Section 14 of the 1981 Amendment (Residence A District), subsection (1), allowed a "[s]ingle family detached dwelling."

> [a] dwelling may be erected, with a special permit from the board of appeals after review by the planning board, on a lot which does not have the required frontage provided that it has access to an established way open to the public over a private drive at least twenty (20) feet wide which does not provide access to any other house lot.

3. On December 5, 1983, the Oleksaks filed a Notice of Appeal or Application for Variance or Special Permit Under the 1981 Amendment with the ZBA because they lacked the requisite frontage to allow a single-family dwelling to be erected on Parcel 3. On December 28, 1983, the ZBA held a public hearing on the Oleksaks' application, which Plaintiff attended and spoke in favor of the issuance

of the special permit.[FN7] On January 4, 1984, the ZBA granted the permit ("Special Permit 1") to build a single-family dwelling on Locus ("ZBA Decision 1"). ZBA Decision 1 referred to Plaintiff's expectation to also build a barn for her horses on Locus. ZBA Decision 1 was not appealed. On February 2, 1984, the Planning Board endorsed the Oleksak Plan, as "Approval Under Subdivision Control Law Not Required." ZBA Decision 1 and the Oleksak Plan were recorded in the Registry at Book 5649, Page 318, and Book of Plans 217, Page 108, respectively, on July 12, 1984.

FN7. Prior to when Plaintiff purchased Locus, the Oleksaks and Plaintiff entered into a Purchase and Sale Agreement contingent upon the Oleksaks obtaining the permits required to construct a house on Locus.

***3** 4. By warranty deed dated September 20, 1984, the Oleksaks conveyed Parcels 2 and 3 (Locus) to Denis P. Coggin and Brenda L. Perez (known today as Brenda L. Coggin, Plaintiff), recorded at the Registry in Book 5686, Page 333. [FN8]

FN8. Denis P. Coggin conveyed his interest in Locus to Plaintiff by quitclaim deed dated September 25, 2006, recorded in the Registry at Book 16213, Page 448.

5. Denis P. Coggin filed an Application for a Dwelling Permit on April 27, 1985, to build a single-family dwelling on Locus.[FN9] The application was approved on May 2, 1985, and a building permit was issued and construction was completed thereafter.[FN10]

FN9. Locus' structures are shown on Parcel 3 on the Redesigned Proposal, as hereinafter defined. Parcel 2 serves as Plaintiff's driveway from Granville Road.

FN10. Plaintiff kept two horses and two ponies at Locus for approximately one year prior to moving into the dwelling on Locus.

6. On January 5, 1987, Denis Coggin filed an Application for a Permit to Alter to build a 36 by 52 foot barn containing ten stalls (the "Small Barn") on Locus. This application was approved and a building permit was issued, and construction was completed thereafter. Around the time of the construction of the Small Barn, Plaintiff was boarding "a few" horses for friends and was breeding between three and five foals a year.

7. The 1981 Amendment was amended in September 1987 (the "1987 Amendment"). The 1987 Amendment removed **Agricultural** Districts from the City and rezoned Locus from **Agricultural** District to Rural Residential District. Pursuant to Article IV, Section 401(1) of the 1987 Amendment, "**agriculture**" was a permitted use within a Rural Residential District.[FN11] Article IV, Section 403(10) ("Section 403(10)") of the 1987 Amendment allows a "[r]iding academy or like activity provided that the stables are located not less than two hundred (200) feet from a dwelling" in a Rural Residential District with a special permit granted by the Planning Board. The same language found in Section 403(10) is found in Section 3-40.4(9).

FN11. Article III, Section 3-40.2(1) of the Ordinance continued to provide that "**agriculture**" was a permitted use. Like the 1987 Amendment, this section stated that "any new **agriculture** ... must be carried out on lots of at least five acres."

8. On November 4, 1991, Denis Coggin filed an Application for a Permit to Alter to build a 102 by 140 foot horse barn with an indoor arena and twenty stalls (the "Big Barn") on Locus. On November 6, 1991, the application was approved, a building permit was issued, and construction was completed thereafter.

9. After the building permit for the Big Barn was issued, Plaintiff hired Donald Swiatek ("Swiatek"), a self-employed excavation contractor, to remove

earth materials in order to level the ground for the Big Barn. During the course of Swiatek's excavations, Plaintiff was twice paid by Westfield Sand and Gravel (who purchased Plaintiff's earth material from Swiatek); one check was for $1,000 and the other for approximately $920.

10. In 1992, Plaintiff began a business that included providing horse-riding lessons to paying students and boarding horses for a fee. Plaintiff has been a licensed riding instructor and licensed to operate a riding school by the Commonwealth of Massachusetts since approximately 1992.

11. For approximately one to two months in 1995, Swiatek removed forty to fifty truckloads of earth materials from Locus each day to meet the need for earth materials for an offsite, nearby new development. The legal capacity of these trucks was eighteen to twenty cubic yards.

12. On May 10, 1996, Plaintiff submitted an Application for a Permit to Alter to add a 32 by 140 foot extension to the Big Barn (the "Big Barn Addition"). On May 13, 1996, the application was approved, a building permit was issued and construction was completed thereafter. The Big Barn and the Big Barn Addition have a total of forty stalls.

***4** 13. By administrative order dated July 18, 1996, the then-Superintendent of Building, Charles Kellogg, issued a cease and desist order (the "First Cease and Desist Order") to Plaintiff, which stated, "You are hereby ordered to cease and desist all gravel operation at the above address until the proper permits from the Planning Board have been obtained. You are in violation of Section 1513 of the City of Westfield Zoning ordinance." [FN12] As a result of the First Cease and Desist Order, earth removal activities at Locus ceased.

> FN12. Section 1513 ("Section 1513") of the 1987 Amendment required a special permit from the Planning Board for earth removal activities. This section of the Ordinance is not in the trial record. On October 7, 1999, the Westfield City Council ("City Council") amended the 1987 Amendment by replacing Section 1513 with Section 1513A, titled "Commercial Earth Removal." Section 1513A defined "commercial earth removal" as "the removal of earth materials for purposes other than, or exceeding that, which is necessary for, construction." Section 1513A is now codified as Section 5-20. Commercial earth removal, as defined in Section 5-20, is prohibited in the Rural Residential District.
>
> On January 20, 2000, the City Council amended the 1987 Amendment by inserting a revised Section 1513, titled "Movement or Removal of Earth Materials-Residential Dev." This section allowed earth removal related to residential development "up to 150% of the volume needed to complete the project infrastructure.... All other legal and permitted uses requiring earthremoval [sic] must obtain a Special Permit from the Planning Board." This revised Section 1513 is now codified as Section 5-10.

14. Plaintiff, through Swiatek, made contact with the United States Department of **Agriculture** (the "Department of **Agriculture**") after the First Cease and Desist Order because the City asked for a plan regarding her earth removal activities. In 1997, after a meeting with the Department of **Agriculture**, Plaintiff established a plan for Locus calling for two pastures, a riding rink, and a hayfield. The proposed hayfield abutted City and Commonwealth of Massachusetts conservation lands. Plaintiff explained that the expansion was needed for private turnout areas, a convenient outdoor arena and level ground for jump courses, and to move manure further away from the barns. In addition, Plaintiff wished to produce her own hay in the proposed hayfield.

15. Dorothy W. Bisbee, Assistant General Counsel of the Massachusetts Department of Food and **Ag-**

riculture, by letter dated August 12, 1998, to then City Planner, Mark Noonan, issued an opinion (the "Bisbee Opinion") that concluded, based upon her understanding that earth removal services would be exchanged for excavated material and that Plaintiff would receive no profit from the removal, that the proposed excavation at Locus (relative to Plaintiff's proposed outdoor riding arena, pasture land, and hayfield) was legitimately connected to **agriculture** and, therefore, could lawfully proceed under G.L. c. 40A, § 3 without a special permit. The Bisbee Opinion stated, in part:

> Where earth removal is legitimately connected to **agriculture**, as **agriculture** is defined under Massachusetts General Laws Chapter 128, Section 1A, this Department takes the position that the exemptions of Section 3 clearly apply.
>
> I understand that Ms. Coggin's farm has been used primarily as a stable since 1986. This would constitute the use of land for the primary purpose of **agriculture**, since M.G.L. c. 128, § 1A defines **agriculture** to include "the keeping of horses as a commercial enterprise." Ms. Coggin seeks to build an outdoor riding arena, pasture land and hayfield on about 15 acres of her land to expand her stable. These activities are required to reduce a significant loss of business due to lack of pasture land, grass, and an outdoor ring. Since the contractor will perform the removal services in exchange for the excavated material, Ms. Coggin has informed me that she will receive no profit from the removal. Hence, the proposed work is legitimately connected to **agriculture**, and Section 3 [of G.L. c. 40A] prohibits a special permit requirement.

***5** 16. By letter dated September 21, 1998, to Plaintiff, York found that "[Plaintiff's] operation falls under MGL Chapter 128 Section 1A and MGL Chapter 40A Section 3, **agricultural** uses and unreasonable restrictions," and declared Locus exempt from the special permit requirements of Section 1513 and removed the First Cease and Desist Order. Swiatek then resumed the earth removal operation at Locus.

17. Swiatek removed an estimated 60,000 to 80,000 cubic yards of earth materials from Locus between 1992 and March 2003.[FN13] Of that amount, 5,000 to 10,000 cubic yards was from the construction of the Big Barn and the Big Barn Addition, and 6,000 to 8,000 cubic yards was from the construction of the turnout area next to the Big Barn.

> FN13. Measurements performed of Locus in September 2006 by Holmberg & Howe Land Surveyors and Civil Engineers ("Holmberg & Howe") estimate that earth removal activities had taken place on 7.4 acres of Locus. Between 1997 and September 2006, between 40,834 cubic yards and 40,965 cubic yards of earth materials were removed from Locus.

18. By administrative order dated April 3, 2003, York reinstated the First Cease and Desist Order (the "Reinstatement Order"). Earth removal activities at Locus ceased. The Reinstatement Order stated, in part, that:

> [O]n September 21, 1998 this office removed a cease and desist order dated July 19, 1996 based on information we received from the [Bisbee Opinion]. This information referred ... in particular [to] *Henry v. Board of Appeals of Dunstable,* 418 MA 841 (1994). The case stated that if the earth removal was incidental or accessory to the **agricultural** use, it would be exempt from unreasonable local regulation.... They found that the duration of the operation and the amount of material have direct bearing on whether the operation is major or minor to the present **agricultural** use.
>
> The time period [proposed by Plaintiff] has long passed and the earth removal activities have become a significant use no longer sufficiently related to a primary **agricultural** use.
>
> By the determination of this operation to be major

in scope, this office finds that you are no longer protected under the exemptions of Section 3 of the MGL Chapter 40A.

Therefore, the operation must cease and desist forthwith.

19. Plaintiff filed an appeal of the Reinstatement Order on May 1, 2003 with the ZBA. The ZBA held a public hearing on the appeal on May 28, 2003, and voted to deny the appeal and uphold the Reinstatement Order (ZBA Decision 2) on June 4, 2003. The decision, dated and filed with the City Clerk on June 26, 2003, stated that "[t]he Board felt that the removal of gravel was not incidental to a riding stable which sought protection under the **agricultural** exception."

20. Plaintiff submitted a proposal to excavate earth materials from Locus to the Natural Heritage and Endangered Species Program ("NHESP") of Mass. Fish and Wildlife on June 8, 2005. Plaintiff received a letter in response dated July 22, 2005, stating that no work could be initiated until NHESP conducted further review because the project as designed would result in a "take" of a rare species of salamander (Jefferson's Salamander). As a result, Plaintiff redesigned the proposal (the "Redesigned Proposal") thereby reducing the volume of earth materials to be excavated. The Redesigned Proposal included two proposed pastures and a riding rink (the proposed hayfield was eliminated from Plaintiff's original plan), as shown on "Plan Showing Proposed **Agricultural** Development" for Coggin Creek Stables, prepared by David L. Bean of D.L.Bean, Inc. and dated April 1, 2005.

***6** 21. On February 16, 2006, this court allowed a Joint Motion for Order of Remand to the ZBA to allow the ZBA to reconsider Plaintiff's appeal of the Reinstatement Order in light of the Redesigned Proposal.

22. The ZBA held a public hearing on March 22, 2006, to determine whether the Redesigned Proposal was exempt pursuant to G.L. c. 40A, § 3. At the public hearing, Plaintiff contended that the Redesigned Proposal would require the removal of between 101,700 to 121,700 cubic yards of earth materials from Locus, which would require sixty-two round-trip truck trips per day over 124 work days for six months.[FN14] At the time of the public hearing, Plaintiff stabled sixty-six horses, of which twenty-two were her own.

FN14. At trial, the parties agreed that the volume of material proposed to be removed as part of the Redesigned Proposal was approximately 145,000 cubic yards, as estimated by a study performed by Holmberg & Howe. Deveno (Plaintiff's excavator) estimated that 500 cubic yards would have to be removed per day in order for the project to be economically feasible. This would require twenty truckloads per day (Monday through Friday), over more than one season (approximately April 1 to December 15), but less than two. Deveno testified that Plaintiff could expect to receive between $1.50 and $2.00 per cubic ton for material removed from Locus. As such, Plaintiff expects to gross between $217,500 and $290,000 relative to the Redesigned Proposal.

23. On April 14, 2006 (supplemented on April 26, 2006), the ZBA voted to deny the Redesigned Proposal (ZBA Decision 3), and Plaintiff filed her Amended Complaint in the Housing Court Case seeking review of such decision on April 27, 2006.

24. Plaintiff grosses at most $150,000 a year by boarding and breeding horses, and offering horse-riding lessons.[FN15]

FN15. At trial, Plaintiff testified that 90% of her business is related to the breeding and boarding of horses, and the remaining 10% is related to the riding academy use.

25. On December 15, 2006, Plaintiff filed a Request for Site Plan Approval Waiver with the Planning

Board. Plaintiff withdrew such application without prejudice after the request was considered during a February 6, 2007, Planning Board hearing.[FN16]

FN16. This application is not part of the trial record.

26. Under protest, on January 4, 2007, Plaintiff filed an Application Under Zoning for a Special Permit from the Planning Board (the "Planning Board Application"). Plaintiff sought a special permit pursuant to Section 3-40.4(9) to allow a "riding academy or like activity including teaching and instruction, riding of horses and related care" in a Rural Residential District ("Special Permit 2").[FN17] The Planning Board held a public hearing on the Planning Board Application on March 6, 2007, and voted to deny the Planning Board Application on March 20, 2007 (the Planning Board Decision),[FN18] making findings that the Planning Board Application failed to provide adequate information both as to the use and as to the site plan for Locus. The Planning Board Decision stated, in part, that:

FN17. The Current Use of Property was listed in the Planning Board Application as "riding stables, boarding of horses and related activities since 1986 including breeding of horses, raising of horses and sale of horses." There was no reference in the Planning Board Application of a change in existing use on Locus. In response to a section titled "Detailed Project Description" Plaintiff stated that:

> A special permit to grant a riding academy or like activity including teaching and instruction, riding horses and related care. The present barn is used to board both horses owned by the applicant and horses owned by others. Riding instruction is given to both persons who have their own horses and those who use horses owned by the applicant. The applicant's house is 140' from the stables. The dwellings of those persons abutting the Coggin real estate are more than 300' away from the stables. The barn in question has multiple uses.... There is an area 70' x 140' that is an indoor arena. The barn was built by building permit.... The riding instruction has taken place on a small scale since about 1991. Present riding instruction averages 5-10 hours per week (not every day) and averages 5-15 students per week. There exist[s] parking areas around all the buildings and no significant increase in motor vehicle traffic or persons using the facility is expected.

This language leads this court to conclude that the Planning Board Application was submitted by Plaintiff (under protest) to legitimize Locus' existing use. Plaintiff's post-trial brief does not argue against such a conclusion.

FN18. The Planning Board Application appears to be a general form provided by the City that allows an applicant to select the type of application (special permit, site plan approval, combined special permit/ site plan approval, variance, findings, or a "S.8" Appeal) to be reviewed by a particular town entity (planning board, zoning board, and city council). The Planning Board Application indicates that Plaintiff applied for a special permit from the planning board and not a combined special permit/site plan approval. Plaintiff attached a plan used for mortgage purposes (not a site plan). The Planning Board Application was accompanied by a completed "zoning permit" signed by the zoning enforcement officer. Such zoning permit includes the following handwritten "determination": "special permit planning board section 3-40.4-9 Westfield Zoning Ordinance."

The Planning Board Decision is titled

> "Special Permit/Site Plan Approval DISAPPROVAL" and includes separate findings with respect to both a special permit and a site plan approval. The Planning Board Decision also states that "[t]he Applicant requested that the Planning Board approves a Special Permit/ Site Plan Approval Application under Article 3, Section-40.4(9) and Article VI, Section 6-10 of the Westfield Zoning Ordinance to allow for: a riding academy." The Planning Board Decision included the following special permit finding: "While the requested use is permitted by Special Permit/Site Plan Approval in the Rural Residential District, the applicant failed to provide adequate information for the Planning Board to effectively evaluate whether this was an appropriate location for the requested use and associated improvements."

> The [site] plan submitted and presented lacked almost all of the elements required under the Ordinance. While the Planning Board has, in the past, shown some flexibility in the details submitted being commensurate with the scale of the project, what the applicant submitted was basically a hand sketch. It lacked the location, dimensions, area, height and setbacks of all existing and proposed buildings, signs, fences, walls, outdoor storage areas, lighting, refuse containers, utilities, landscaping and topography. It failed to identify which portions of the property were being used for which uses and activities taking place there.
>
> ....
>
> It appeared that the applicant wanted to avoid discussing or reviewing their proposed re-grading project....
>
> ....
>
> The Board felt that this was not a serious application and that the applicant was not making a serious or sincere attempt at obtaining the required Special Permit/Site Plan Approval. This appeared to be just a perfunctory procedural step that they needed to take in order to further their Appeal of the Zoning Board of Appeal's 2006 decision.

***7** 27. On April 3, 2007, York issued an order that Plaintiff cease and desist any use not authorized by ZBA Decision 1 (the "Second Cease and Desist Order").[FN19] Section 3 of the Second Cease and Desist Order states: "The use as a riding academy has been denied by the Westfield Planning Board and is therefore in violation of the Section 3-40.4-9." Plaintiff appealed the Second Cease and Desist Order to the ZBA.

> FN19. The Second Cease and Desist Order was organized into the following four sections, each of which referred to an alleged violation of the Ordinance: (1) the lack of certificates of occupancy for Plaintiff's single-family dwelling and Small Barn; (2) the absence of required certificates of occupancy and sprinkler systems and variance violations with respect to the Big Barn and Big Barn Addition; (3) the lack of a special permit for the riding academy ("Section 3"); and (4) unregistered trailers located on Locus.

28. By decision dated June 6, 2007, filed with the City Clerk on June 18, 2007, the ZBA overturned Section 3 of the Second Cease and Desist Order ("ZBA Decision 4"). ZBA Decision 4 "UPH[E]LD sections # 1, # 2, and # 4, and OVERTURN[ED] section # 3 [of the Second Cease and Desist Order]." The ZBA found that the "city cannot require the Coggins to obtain a special permit in order to operate their riding academy and horse boarding operation." ZBA Decision 4 reasoned that "local ordinances with regard to use, permits, and dimensional requirements did not apply to riding academies as a covered **agricultural** activity." ZBA Decision 4 was not appealed.

Pursuant to G.L. c. 240, § 14A, Plaintiff challenges the application of Sections 5-10, 5-20, 3-40.4(9), 4-140, and 6-10 of the Ordinance to Locus based on the **agricultural** exemption under G.L. c. 40A, § 3, and, through G.L. c. 40A, § 17, challenges ZBA Decision 2, ZBA Decision 3, and the Planning Board Decision on similar grounds. Defendants argue that these sections of the Ordinance are legal and valid, that Plaintiff's previous and proposed excavation activities and the riding academy use are not incidental to **agriculture** and, therefore, do not fall under the protection of G.L. 40A, § 3, and that reasonable conditions, as specified in the site plan approval, may be applied to **agricultural** activities as long as they do not prohibit such use. I shall examine each issue separately.

Before proceeding to the merits of this case, this court must first address a number of preliminary issues raised by the parties. Defendants first argue that ZBA Decision 4 is inadmissible, claiming that (1) it is not material or relevant to the case at bar; (2) there was no foundation; and (3) the document is misleading. "Evidence is relevant if 'it has a rational tendency to prove the issues made by the pleadings or other incidental material issues developed in the course of the trial.' " *Commonwealth v. Robinson*, 30 Mass.App.Ct. 62, 65 n. 3 (1991) (quoting *Commonwealth v. Booker*, 386 Mass. 466, 469 (1982)). "Relevance is a broad concept, ... and any information which tends to establish or at least shed light on an issue is relevant." *Adoption of Carla*, 416 Mass. 510, 513 (1993). In light of the fact that ZBA Decision 4 is directly related to the issues in the case at bar, I find ZBA Decision 4 is relevant to the discussion of whether Plaintiff's riding academy requires a special permit. With respect to Defendants' assertion that ZBA Decision 4 lacks adequate foundation and is misleading, this court is not persuaded. Moreover, such decision was not appealed. In light of the foregoing, I find ZBA Decision 4 admissible.

***8** Under the doctrine of res judicata, Plaintiff contends that the fact that ZBA Decision 4 was not appealed by the Planning Board (or any other party) supports a conclusion that Defendants are now precluded from arguing that Plaintiff's riding academy use requires a special permit.[FN20] Defendants' argue that, even if admissible, ZBA Decision 4 is not preclusive or binding to the case at bar.

> FN20. While Plaintiff does not argue that Defendants are bound by ZBA Decision 4 in her post-trial brief, the issue was argued at trial by both parties.

Res judicata consists of both claim preclusion and issue preclusion. *Kobrin v. Bd. of Registration in Medicine*, 444 Mass. 837, 843 (2005). "Claim preclusion 'makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been litigated in the action.' " *Petrillo v. Zoning Bd. of Appeals of Cohasset*, 65 Mass.App.Ct. 453, 457 (2006) (quoting *Jarosz v. Palmer*, 436 Mass. 526, 530-31 n. 3 (2002)). The theory behind claim preclusion is that "the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit." *Kobrin*, 444 Mass. at 843. Claim preclusion requires: "(1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." *Petrillo*, 65 Mass. at 457 (quoting *DaLuz v. Dep't of Corr.*, 434 Mass. 40, 45 (2001)).

Issue preclusion (also known as collateral estoppel) prevents the "relitigation of issues actually litigated in the prior action." *Kobrin*, 444 Mass. at 844. Collateral estoppel "provides that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' " *Pierce v. Morrison Mahoney LLP*, 452 Mass. 718, 729-30 (2008) (quoting *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 372 (1985)). It requires: "(1) a final judgment on the merits in the prior adjudication; (2) the party against whom

preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication." *Kobrin*, 444 Mass. at 843 (quoting *Tuper v. N. Adams Ambulance Serv., Inc.*, 428 Mass. 132, 134 (1998)).

As stated previously, but reiterated here for clarification, ZBA Decision 4 involves Plaintiff's appeal of the Second Cease and Desist Order, issued by the City's Superintendent of Buildings (York). The Second Cease and Desist Order relied, in part, on the Planning Board Decision, which Plaintiff appealed to this court. Pursuant to Section 3-40.4(9), the Planning Board is the Special Permit Granting Authority with respect to riding academy special permits. While the Planning Board Decision was not directly appealed to the ZBA, the specific issue of whether Plaintiff's use of Locus for a riding academy required a special permit was addressed by the ZBA as part of Plaintiff's appeal of the Second Cease and Desist Order.[FN21] Defendants' argument that the Planning Board Decision was denied on procedural grounds, and, thus, is not preclusive, overlooks the fact that ZBA Decision 4, the decision at issue, addressed the merits at the core of whether Plaintiff's riding academy required a special permit. ZBA Decision 4 includes a substantive review of Plaintiff's riding academy history on Locus in addition to references to relevant case law. Additionally, ZBA Decision 4 notes that both Plaintiff and York (in addition to the City Planner) were provided multiple opportunities to provide direct and rebuttal testimony on this issue. The ZBA's conclusion was clear: "the city cannot require the Coggins to obtain a special permit in order to operate their riding academy and horse boarding operation."

FN21. Neither party argues that the ZBA lacked jurisdiction to address this issue.

***9** Such conclusion is identical to the issue now raised by Defendants. As ZBA Decision 4 was not appealed, this court considers it as a final judgment on the merits.[FN22] *See Lopes v. Bd. of Appeals of Fairhaven*, 27 Mass.App.Ct. 754, 755 (1989). As York was a party to ZBA Decision 4, and the ZBA issued such decision, there is a strong argument that York and the ZBA are barred by issue preclusion from now arguing that Plaintiff's current riding academy requires a special permit under the Ordinance. However, as a practical matter, Plaintiff's res judicata argument is superfluous, as this court overturns the Planning Board Decision on its merits, *infra*, and, as such, no finding on the issue is necessary.

FN22. The ZBA clearly had jurisdiction to overturn the Second Cease and Desist Order and the action of York as the Building Inspector.

Riding Academy Special Permit

Current Use

In her appeal of the Planning Board Decision, Plaintiff looks to G.L. c. 40A, § 3 for protection from Section 3-40.4(9)'s special permit requirement with respect to Plaintiff's current riding academy use. Defendants assert that they do not seek to discontinue Plaintiff's present riding academy use, purportedly under G.L. c. 40A, § 6, but take the position that any expansion of Plaintiff's riding academy requires special permit approval.[FN23]

FN23. As an initial defense to Plaintiff's claims, Defendants assert that Plaintiff has failed to exhaust her administrative remedies and is required to seek modification of Special Permit 1 (which allowed Plaintiff to construct a single family house) to convert Plaintiff's single-family residential use to a riding academy use. However, Special Permit 1 did not involve use issues; rather, Plaintiff was required to seek Special Permit 1 because Locus lacked sufficient frontage under the 1981 Amendment to build a single-family dwelling. Special Permit 1 was not appealed, and Defendants

> cannot now seek to modify Special Permit 1 to require a special permit for Plaintiff's riding academy.

As effective June 24, 2006, the first paragraph of G.L. c. 40A, § 3 provided that

> [n]o zoning ordinance or by-law shall ... prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of **agriculture** ... nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of **agriculture**....

G.L. c. 40A, § 3 was amended in 2007 (effective February 22, 2007) to include the following modifying language:

> [n]o 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** ... nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction *or construction* of structures thereon for the primary purpose of *commercial* **agriculture**....

(emphasis added to indicate amended language). The 2007 amendment also added the following sentence to the first paragraph of G.L. c. 40A, § 3: "For the purposes of this section, the term ' **agriculture**' shall be as defined in section 1A of chapter 128...." G.L. c. 128, § 1A defines " **agriculture**" as

> includ[ing] farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any **agricultural**, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in **agriculture** or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

***10** When Plaintiff filed the Planning Board Application in January of 2007, G.L. c. 40A, § 3 had not been amended to include a cross-reference to G.L. c. 128, § 1A's definition of the term " **agriculture**." As such, with respect to the Planning Board Application, Plaintiff relied on *Steege v. Bd. of Appeals of Stow*, 26 Mass.App.Ct. 970 (1988), to support the proposition that her riding academy is a primary **agricultural** use.

In *Steege*, the Appeals Court investigated the meaning of the term " **agriculture**" absent such a definition in G.L. c. 40A, § 3. *Id.* at 971. The Appeals Court looked to the dictionary definition of the term in addition to the statutory definition of " **agriculture**" found in G.L. c. 61A and proceeded to uphold the trial court's ruling that the "purchase and raising of horses, their stabling, training through the operation of the riding school, and their participation in horse shows are all part of the one whole and constitute **agriculture** as that phrase is used in c. 40A, Section 3." *Id.* Based on such definition, Plaintiff asserts that her current riding academy use, and planned expanded use, is protected by the **agricultural** exemption under G.L. c. 40A, § 3. The Appeals Court revisited the issue in *Bateman v. Bd. of Appeals of Georgetown*, 56 Mass.App.Ct. 236, 243 (2002), where the court determined that a proposed use to "raise, train, and board [the applicant's] and others' horses," together with plans to coach riders and to offer lessons and horses to people who do not own their own horses, was an **agricultural** use protected under G.L. c. 40A, § 3. The applicant's proposed use at issue in *Bateman* was described by the Appeals Court, in part, as including a dressage facility, where horses and riders are trained alone, and where several fenced paddocks and an outdoor riding rink to exercise horses

were located. *Id.* at 238. This court does not distinguish Plaintiff's current riding academy from those uses at issue in *Steege* and *Bateman.* As such, I find that Plaintiff's current riding academy is a primary **agricultural** use protected from Section 3-40.4(9)'s special permit requirement by G.L. c. 40A, § 3. In light of the above, I find that the Planning Board Decision was arbitrary, capricious, and unreasonable in requiring Plaintiff to obtain a special permit for her current riding academy use pursuant to Section 3-40.4(9).[FN24]

> FN24. Plaintiff asks this court for a return of her filing fee (in the amount of $550) related to the Planning Board Application. Despite the fact that Plaintiff paid the filing fee under protest, given that she did so to exhaust her administrative remedies, this court refrains from ordering the return of such funds.

Having found Plaintiff's riding academy a protected **agricultural** use, there is no need to address whether such use is an incidental activity. That said, even if Plaintiff's current riding academy use were not a primary **agricultural** use, it could be considered an activity incidental to the breeding and boarding of horses, and still protected under G.L. c. 40A, § 3. *See Henry v. Bd. of Appeals of Dunstable,* 418 Mass. 841, 844 (1994) ("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."). Here, the operation of a riding academy is minor in significance and subordinate to the breeding and boarding of horses. Plaintiff spends only a minimal portion of her week giving riding lessons and only receives a small amount of revenue from the lessons in comparison to the other parts of the horse farm. The riding academy makes up approximately 10% of Plaintiff's business; the other 90% being related to the breeding and boarding of horses. Moreover, there is a close relationship between breeding and boarding horses and charging for horse-riding lessons. It is reasonable to expect that where one can board their horse, one can also acquire skills in equestrian technique, and the training of riders is closely related to the breeding, boarding, and training of horses. In light of the following, even if Plaintiff's current riding academy is not a primary **agricultural** use, I find that it is an incidental use to an **agricultural** use and, therefore, protected by the **agricultural** exemption in G.L. c. 40A, § 3.

Expanded Use

***11** As an initial matter, this court notes that it is unable to make a specific finding with respect to the validity of any expansion of the riding academy associated with the Redesigned Proposal, as any such expansion was not presented to the Planning Board for its review, and, thus, is not properly before this court on appeal.[FN25] However, the general issue of expanding Plaintiff's riding academy was argued at trial and briefed by both parties. As such, this court provides an abbreviated review of the relevant legal framework without making a finding as to a specific expansion plan.

> FN25. *See supra* note 17.

Plaintiff asserts that G.L. c. 40A, § 3, as amended in 2007, protects the expansion of her riding academy, including new construction, from Section 3-40.4(9)'s special permit requirement. Defendants contend that any new construction related to the expansion of Plaintiff's **agricultural** use is subject to *Prime v. Zoning Bd. of Appeals of Norwell,* 42 Mass.App.Ct. 796, 802 (1997), in which the Supreme Judicial Court determined that new **agricultural** structures can be subject to reasonable regulation through a special permit.

This court is not convinced by Defendants' argument that *Prime* allows Section 3-40.4(9) to require a special permit for any new construction related to Plaintiff's riding academy. As discussed, *supra,* Plaintiff's current riding academy is a protected primary **agricultural** use, pursuant to G.L. c. 40A,

§ 3. Under the plain language of the statute, as amended in 2007, Defendants cannot "prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial **agriculture**...." [FN26] As for what uses are considered primarily commercial **agriculture** under the 2007 amendment, G.L. c. 128, § 1A's definition of " **agriculture**" includes "the raising of livestock including horses [and] the keeping of horses as a commercial enterprise," which this court asserts, without finding, includes Plaintiff's expanded riding academy.

FN26. Defendants attempt to minimize the impact of the 2007 amendment to G.L. c. 40A, § 3 by arguing that: "the word ' **agriculture**' is modified by the word 'commercial' and the phrase 'or construction of structures thereon for the primary purpose of commercial **agriculture**' is added at the end." However, the 2007 amendment simply added the words "commercial" and "or construction." This court will honor the plain language of a statue if clear and unambiguous, "unless a literal construction would yield an absurd or unworkable result." *Commonwealth v. Millican*, 449 Mass. 298, 301 (2007).

Excavation Special Permit

Section 5-10 requires a special permit for the "Movement or Removal of Earth Materials ... Residential Dev." [FN27] This section excludes from special permit status the removal of earth material necessary for certain residential development including removal required to complete infrastructure (up to 150% of the volume needed), the transfer of material from one part of the lot to another, and various municipal excavation. Section 5-20 requires a special permit for "Commercial Earth Removal," which is defined as "the removal of earth materials for purposes other than, or exceeding that, which is necessary for, construction."

FN27. This section defines "earth materials" as "the soils, subsoil and rock that make up the topography of the land as it exists prior to movement or removal. Earth materials include, but are not limited to, sod, loam, sand, clay, gravel, stone, quarry stone, peat, hardpan, or mineral products."

As part of the Redesigned Proposal, Plaintiff seeks to remove approximately 145,000 cubic yards of new earth material, which she asserts is necessary to expand her horse farm. The first question this court must address is whether such excavation is a primary **agricultural** use that is protected under G.L. c. 40A, § 3. Because Plaintiff appealed ZBA Decisions 2 and 3 prior to the 2007 amendment to G.L. c. 40A, § 3, this court cannot look at G.L. c. 128, § 1's definition of **agriculture** for guidance. Rather, "we look to the plain meaning of [the term " **agriculture**"] in deciding whether the plaintiff's activity is **agricultural**." *Henry*, 418 Mass. at 843. This inquiry into whether Plaintiff's excavation, by itself, is primarily **agricultural** is quickly resolved as neither party asserts such a claim. Additionally, case law supports the conclusion that substantial earth removal is not primarily **agricultural**. *See id.* at 844. Although not protected as a primary use under G.L. c. 40A, § 3, the excavation in the Redesigned Proposal may still warrant such protection if it is found to be incidental to a protected **agricultural** use. *Id.*

***12** Plaintiff argues that in comparison with the continued existence of the horse farm, the excavation attendant to the Redesigned Proposal is incidental for it is limited to a finite period and the income generated by the excavation will be greatly exceeded by the income produced as part of the continued operation of the horse farm .[FN28] Defendants contend that the excavation is not incidental to **agriculture** because the intensity, duration, and profit of the excavation are substantial activities in comparison to the everyday operation of the horse farm. Thus, Defendants conclude, Plaintiff must obtain a special permit pursuant to Sections

5-10 and 5-20 prior to implementing her Redesigned Proposal.

> FN28. Plaintiff also argues that the Redesigned Proposal is necessary to increase her business. However, financial necessity and concomitance are not the same thing. In fact, "[t]he ordinary lexical meaning of 'incidental' ... connotes something minor or of lesser importance." *Old Colony Council-Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth*, 31 Mass.App.Ct. 46, 48 (1991). *See Harvard v. Maxant*, 360 Mass. 432, 437 (1971), (stating that "[a]n incidental or accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use") (quoting *Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95, 101 (1953)).

The central question before this court is whether the excavation proposed in the Redesigned Proposal is an activity incidental to a **agricultural** use or if it suggests "[a]ctivity of a certain magnitude [that] is no longer incidental." *Garabedian v. Westland*, 59 Mass.App.Ct. 427, 436 (2003). *See Old Colony*, 31 Mass.App.Ct. at 49.[FN29] As relied on by both parties, whether a use is incidental to an **agriculture** use is determined by the *Henry* test. *See Henry*, 418 Mass. at 844 ("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 bylaw."). Identifying an incidental use "is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible uses." *Id.* In zoning parlance, an incidental use

> FN29. In *Old Colony*, 31 Mass.App.Ct. at 50, the Appeals Court affirmed a trial court's determination that upheld a zoning board's denial of a special permit for the excavation and removal of fill. The excavation at issue (of a cranberry bog) proposed excavating 460,000 cubic yards of fill, to be removed via thirty truck trips per day, five days per week, for two and a half years and was expected to generate an additional $200,000. *Id.* at 46-47.

> means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance.... But "incidental," when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant.[FN30]
>
> > FN30. BLACK'S LAW DICTIONARY 124 (7th ed.) defines the term "attendant" as "[a]ccompanying; resulting." BLACK'S defines the term "concomitant" is defined as "[a]ccompanying; incidental." *Id.* at 284.

Id. at 845 (citing *Maxant*, 360 Mass. at 438).

In the case at bar, the Redesigned Proposal proposes excavating 145,000 cubic yards of material. The duration of the excavation project will operate for more than one but less than two seasons (a season running from April 1 to December 15), five days a week, twenty truck trips per day. With respect to income, the Redesigned Proposal is estimated to generate from $217,000 to $290,000, which represents approximately 1.45 to two times the average yearly income of the horse farm ($150,000).[FN31] Furthermore, there exists no reasonable relationship between excavation and a riding academy, for the excavation's only relation to the horse farm is to prepare an otherwise unacceptable site for **agricultural** use. *See Henry*, 418 Mass. at 845 (finding that quarrying does not bear a reasonable relationship to **agricultural** use). As such, I find that the excavation in the Redesigned Proposal is neither minor nor subordinate to the operation of the horse farm, and, thus, is not an incidental use to a protected **agricultural** use.

FN31. Plaintiff urges this court to consider the Redesigned Proposal's net gain (which is approximately $55,000 less than its gross gain) in relation to her operation's gross yearly income. However, Plaintiff does not provide any guidance or rationale behind such calculation. Furthermore, and more importantly, if this court were to accept the Redesigned Proposal's net gains as the pertinent value in its analysis, which it does not, it logically follows that Plaintiff's net yearly income would also be con- sidered.

At trial, Plaintiff testified as to the following average expenses: $2,500 per month for hay; $1,500 per month for grain; $400 to $1,000 per month for electricity; $11,000 to $12,000 per year for insurance; and the cost of one employee. This court observes that such expenses (absent the employee costs) equal at least $63,800, leaving a net income for Plaintiff's horse operation of at most $86,200.

***13** In light of the foregoing, I find that the ZBA acted within the scope of its authority in upholding ZBA Decision 2 and in rejecting Plaintiff's Redesigned Proposal (ZBA Decision 3), and their decisions are hereby affirmed. [FN32]

FN32. To the extent that Plaintiff's Second Amended Complaint requests the issuance of any required special permits with reasonable conditions, this court refrains from doing so for there is no such challenge currently before this court. Plaintiff also asks this court, if necessary, to determine a volume of excavated material that is incidental to her protected **agricultural** use. Given the fact-intensive nature of incidental uses, it is not appropriate for this court to make determinations on Plaintiff's behalf as to Locus' excavation.

Site Plan Review

Plaintiff argues that both her riding academy and the excavation portion of the Redesigned Proposal is protected from the Ordinance's **site plan review** requirement as they are protected by G.L. c. 40A, § 3. Defendants' claim that Plaintiff is subject to **site plan review** appears to be bound within their argument that Plaintiff is subject to both a riding academy special permit and a excavation special permit, as they do not squarely address the applicability of **site plan review**.

Section 4-140 states that

[t]his ordinance shall not ... prohibit the use of land for the primary purpose of **agriculture**.... Except as may be provided elsewhere in this ordinance, all such uses are subject to dimensional, density, signage and parking regulations that apply to the district within which such use is located, as well as to the General Regulations specified within Article IV. In addition, such uses which will exceed any of the following criteria shall be subject to Site Plan Approval under Article VI: 1) the use generates a flow of over 20 vehicle trips/per/day. 2) zoning requires 5 or more parking spaces, or 3) the use generates the need for 5 or more parking spaces.

Section 6-10 details site plan approval in the City. Section 6-10 .1 (Site Plan Approval Procedure-Applicability) states that "[s]ite plan approval is also required for any use in a residential district where the use in question is subject to the off-street parking requirements as set forth in Article VII, Section 7-10.2 unless, however, the proposed use is one enumerated in Article VII, Section 7-10.2(a)." Article VII, Section 7-10-2 ("Section 7-10-2") of the Ordinance presents the City's off-street parking space requirement.

This court's findings that Plaintiff's riding academy use is protected and that her proposed excavation in the Redesigned Proposal is not protected complicates the **site plan review** process as it involves two

different standards of review. With respect to Plaintiff's as-of-right use (her riding academy use), while this use is protected from special permit requirements, it may still be subject to "reasonable regulations" under the plain language of G.L. c. 40A, § 3. Contrastingly, with respect to the excavation **site plan review**, because it is not protected as a primary or incidental **agricultural** use as of right, Defendants may subject it to a more rigorous and discretionary special permit/site plan standard of review. *See e.g., Quincy v. Planning Bd. of Tewksbury,* 39 Mass.App.Ct. 17, 21-22 (1995) (bylaw allowing discretionary **site plan review**).

Neither party addresses the issue of whether the Ordinance accounts for a **site plan review** absent a special permit. However, Section 6-10.1 includes the caveat that "[t]he Planning Board shall not deny site plan approval based upon the proposed used [sic] of the property if that use is one which is allowed as a matter of right." That said, the record is ambiguous whether any expansion in Plaintiff's riding academy use would trigger such nondiscretionary **site plan review** under either Sections 4-140 or 6-10.[FN33] In light of the above, this court can only state without finding, that, as long as Plaintiff is protected by G.L. 40A, § 3, in the event that a proposed increase of Plaintiff's riding academy use triggers either Section 4-140 or Section 6-10, such increase could only be subject to nondiscretionary **site plan review**.

> FN33. Section 4-140 requires **site plan review** of exempted uses if the use generates a flow of more than twenty vehicle trips per day, requires five or more parking spaces, or generates the need for five or more parking spaces. Section 6-10 requires **site plan review** in a residential district where the use is subject to the off-street parking requirements in Section 7-10-2, "unless, however, the proposed use is one enumerated in Article VII, Section 7-10.2(a)." While there is no "Section 7-10.2(a)" in the Ordinance, there is a "Section 7-10-2(1)(a)," which requires, in part, three parking spaces per dwelling unit in the Rural Residence District. Given that the record before this court does not include evidence related to Locus' vehicle trips or parking requirements, this court cannot determine the applicability of either Section 4-140 or Section 6-10, with respect to Plaintiff's riding academy use.

***14** With respect to **site plan review** in context of Plaintiff's proposed earth excavation, such use is not protected as an **agricultural** use. Thus, I find that the excavation portion of the Redesigned Proposal is not protected from special permit **site plan review**.

Application of the Ordinance

Plaintiff's Second Amended Complaint asserts that Sections 5-10, 5-20, 3-40.4(9), 4-140, and 6-10 are illegal and null and void as applied to Locus. [FN34] Consistent with this court's discussion regarding Sections 5-10 and 5-20, *supra*, I find that Section 5-10 and Section 5-20 are valid as applied to the Redesigned Proposal. As Plaintiff is not required to obtain a special permit pursuant to Section 3-40.4(9) with respect to her present riding academy use, this section cannot be currently applied to Locus. Finally, Section 4-140 and Section 6-10 may apply to Plaintiff's proposed riding academy expansion use and earth excavation consistent with this decision.

> FN34. Counts I and III of Plaintiff's Second Amended Complaint request that this court declare these sections of the Ordinance "illegal and null and void as applied to [Locus]." However, Plaintiff's Memorandum of Law argues that Sections 3-40.4(9), 4-140, and 6-10 are "illegal and unconstitutional." It is unclear whether Plaintiff intends a facial challenge with respect to Sections 3-40.4(9), 4-140, and 6-10. This court need not consider

> Plaintiff's apparent facial challenge given that she failed to plead such claims in her Second Amended Complaint.

Judgment to enter accordingly.

Mass.Land Ct.,2009.
Coggin v. City of Westfield
Not Reported in N.E.2d, 2009 WL 3065053 (Mass.Land Ct.)

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