COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss. 20 MISC 000395 (MDV)

CAROLINE ROSSEN, NEIL ROSSEN, LEO ASINOVSKI, INNA ASINOVSKI, WILLIAM SAGE, JANICE SAGE, and ANTOINETTE KELLEY,

Plaintiffs,

v.

CHRISTINE LONG, et al., as they are members of the City of Framingham Planning Board; COMMONWEALTH FARM 1761, INC.; and the CITY OF FRAMINGHAM,

Defendants.

DECISION

Plaintiffs in this case are seven persons who own properties abutting 1062 Edmands Road in Framingham, Massachusetts. Some folks call that property "Eastleigh Farm," but since one of the issues in this lawsuit is whether the property really is a farm, this decision will call the property, well, 1062 Edmands Road. The property's current owner is Dudley W. ("Doug") Stephan, trustee of the Stephan Family Realty Trust. The property comprises 112 acres. It lies in an R-4 Zoning District under the City of Framingham's Zoning By-Law (the "By-Law").

In late 2018, defendant City of Framingham amended the By-Law. That amendment allowed, in the R-4 Zoning District, the construction and operation of marijuana cultivation and product-manufacturing facilities, provided they received site-plan approval from the Framingham Planning Board. In August 2019, the defendant members of the Planning Board

approved one such site plan, filed by defendant Commonwealth Farm 1761, Inc. ("CF 1761"). The Board allowed construction and operation of a marijuana cultivation and product-manufacturing facility at 1062 Edmands Road (the "Facility").

Plaintiffs have sued the City (in Count Two of their Fourth Amended Complaint in this case) for a declaration that the 2018 amendment to the By-Law is illegal as an exercise of what's called "spot zoning."[1] Plaintiffs also have appealed to this Court under G.L. c. 40A, § 17, the Facility's site-plan approval. The Planning Board and CF 1761 are parties to that appeal, which is set forth in Count One of the Fourth Amended Complaint.

The parties have filed various motions and cross-motions pertaining to Plaintiffs' claims. For the reasons explained in this Decision, the Court DENIES Plaintiffs' motion for summary judgment, and GRANTS CF 1761 and the City's cross-motion for summary judgment, on Count Two of Plaintiffs' Fourth Amended Complaint. The Court further GRANTS CF 1761's motion to dismiss Count One of the Complaint, as Plaintiffs lack credible evidence that they have standing to challenge the Board's approval of the Facility's site plan. (Since the Court is dismissing Count One for lack of standing, the Court DENIES as moot CF 1761's separate motion for summary judgment on Count One.[2]) Judgment will enter accordingly.

Spot Zoning. The undisputed facts pertaining to Plaintiffs' spot-zoning challenge are these. According to § II.A.1 of the By-Law, the R-4 Zoning District "contains the least dense and largest lots within the Town." (Framingham was a "town" until 2018, when it became a "city.") The R-4 Zoning District is also the City's largest zoning district. The By-Law allows

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[1] Count Two doesn't identify a law that entitles Plaintiffs to judicial review of the 2018 amendment, but in opposing Plaintiffs' motion for leave to file their Fourth Amended Complaint, the Planning Board correctly identified G.L. c. 240, § 14A, as one such law. Plaintiffs haven't identified any other.

[2] CF 1761 also has filed ancillary motions to strike Plaintiffs' evidence and to deem certain facts admitted. This Decision rules on parts of those motions; as for the parts not decided, the Court DENIES them as moot.

single-family homes as of right in the District, provided they're on a lot that's at least one acre in size. Greenhouses, nurseries, horticulture, forestry, and floriculture are further as-of-right uses in the District. But prior to September 2018, the By-Law didn't allow in the District, as of right, any manufacturing or industrial uses.

In late September 2018, the Framingham City Council adopted an amendment to the By-Law that expanded the allowed uses of certain District properties. The Council's action followed the General Court's adoption of G.L. c. 94G, § 3(a), which allowed Massachusetts municipalities to permit and regulate recreational marijuana facilities. The Council voted to amend Use 6.C in By-Law's Table of Uses (By-Law, § II.B). Use 6.C appears under "Manufacturing and Industrial" as "Processing, assembly and manufacturing." The Council added to Use 6.C a footnote, Footnote 15. That footnote reads:

> Cultivation of marijuana by a duly licensed Marijuana Cultivator, which may be a sole licensee or co-located with a licensed Marijuana Product Manufacturer under the same ownership, shall be permitted within the R-4 Zoning District only on a parcel of land or one or more contiguous parcels of land in common ownership, consisting of 15 acres or more, and engaged in "farming" or "agriculture" as defined in M.G.L. c. 128, § 1A. Such use(s) shall require Site Plan review pursuant to Section VI.F [of the By-Law]. A Marijuana Product Manufacturer that is not co-located with a Marijuana Cultivator shall not be allowed in the R-4 district. A Marijuana Cultivation facility, or a Marijuana Cultivation facility co-located with a Marijuana Product Manufacturer, shall not be located any closer than 100' from any residential lot line and shall have 25' wide buffered screen no more than 60' from the edge of the structure to allow the facility to blend with its landscape.

Plaintiffs claim the City Council adopted Footnote 15 solely to benefit 1062 Edmands Road. Plaintiffs' sole evidence of this alleged scheme comes from the minutes of the Council's September 25, 2018, hearing on the proposed By-Law amendment. The minutes attribute the text of Footnote 15 to Councilor Adam Steiner, and assert this:

> Mr. Steiner stated that the purpose of [adding Footnote 15] is to expand the areas zoned for cultivation to active farming parcels of 15 acres or more, clarifying that this would be indoor cultivation only in a building of maximum size of 100,000

> square feet. It must be 100 feet from any property line, and the appearance/ exterior of the building must be consistent with the appearance of other buildings on that property in addition to other criteria. This gives farmers an opportunity to take on this industry to give them a financial boost to help keep their farms going. . . .

The minutes state that another councilor said that Mr. Steiner's amendment "solves issues with farming operations and maintaining their solvency." Another councilor asked if farm-based marijuana facilities would pay fewer taxes; the response was that the issue was "being researched." Contrary to the Plaintiffs' central contention, however, the minutes describe Footnote 15 as benefiting "farming" and "farmers," but no one farm in particular. The minutes also contain no mention of CF 1761, Mr. Stephan, or 1062 Edmands Road.

The City Council adopted Mr. Steiner's amendment, which the minutes describe as an "amendment on cultivation being extended to farmers," by a 10-1 vote. Following two other amendments, the Council adopted the marijuana By-Law changes unanimously.

> Spot zoning occurs when there is a "singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot." Selective zoning of that kind violates the uniformity requirements of c. 40A, § 4, and "constitutes a denial of equal protection under the law guaranteed by the State and Federal Constitutions." The test, however, is not whether the zoning change is beneficial to a landowner. "It is no objection to a legislative solution of a public problem that it will incidentally lead to private profit or advantage."

Van Renselaar v. *City of Springfield*, 58 Mass. App. Ct. 104, 108-109 (2003) (citations omitted), quoting *Board of Appeals of Hanover* v. *Housing Appeals Comm.*, 363 Mass. 339, 361-362 (1973); *Rando* v. *North Attleborough*, 44 Mass. App. Ct. 603, 606 (1998); and *Lanner v. Board of Appeal of Tewksbury*, 348 Mass. 220, 229-230 (1964).[3] A corollary to the principles stated

[3] See also *Gricus* v. *Superintendent & Insp. of Bldgs. of Cambridge*, 345 Mass. 687, 690 (1963) (applying former Zoning Act), quoting *Caputo* v. *Board of Appeals of Somerville*, 331 Mass. 547, 549 (1954) (illegal spot zoning occurs when there has been a "singling out of one small tract for different treatment from that accorded to similar surrounding land not shown to have been distinguishable from it in character, for no good reason unless it be to gratify . . . [the owner of] that tract") (brackets in *Gricus*).

above is this: when a lot hasn't been singled out for different treatment, spot zoning hasn't occurred. See, for example, *Co-Ray Realty Co.* v. *Board of Zoning Adjustment of Boston*, 328 Mass. 103 (1951); *Lanner*, 348 Mass. at 228; *Rousseau* v. *Building Insp. of Framingham*, 349 Mass. 31 (1965). Moreover,

> [i]n a claim of spot zoning, as in any challenge to the validity of an amendment to a local zoning provision, "'every presumption is to be made in favor of the amendment and its validity will be upheld unless it is shown beyond reasonable doubt that it conflicts with the enabling act.'" Notwithstanding the heavy burden borne by a party challenging a zoning amendment, characterizing "a challenger's burden as one of proof beyond reasonable doubt may not be instructive. A better characterization is that the challenger must prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare." Put another way, the party challenging the amendment has the burden of proving "facts which compel a conclusion that the question whether the amendment falls within the enabling statute is not even fairly debatable." "If the reasonableness of a zoning regulation is fairly debatable, the judgment of the local legislative body . . . should be sustained and the reviewing court should not substitute its own judgment."

Van Renselaar, 58 Mass. App. Ct. at 108 (citations omitted), quoting *Vagts* v. *Superintendent & Inspector of Bldgs. of Cambridge*, 355 Mass. 711, 713 (1969); *Johnson* v. *Edgartown*, 425 Mass. 117, 121 (1997); *Crall* v. *Leominster*, 362 Mass. 95, 103 (1972); and *National Amusements, Inc.* v. *Boston*, 29 Mass. App. Ct. 305, 309 (1990).

Plaintiffs contend that 1062 Edmands Road is the only place in the R-4 Zoning District that meets Footnote 15's requirements. The undisputed facts submitted by the parties on their motions and cross-motions for summary judgment prove that claim's incorrect. CF 1761 and the City identify four parcels other than 1062 Edmands Road that exceed fifteen acres.[4] The undisputed facts concerning those parcels are these:

- 20 Nixon Road: It's 23.19 acres. The City Assessor classifies the property as containing an agricultural use. Plaintiffs contend that one can't use 20 Nixon

[4] The City and CF 1761 further submit that there are numerous parcels in the District, smaller than fifteen acres, that could be combined with other parcels to meet Footnote 15's minimum-acreage requirement. Since it's undisputed that five District parcels exceed fifteen acres, the Court needn't consider this argument.

Road for the purposes Footnote 15 allows because in 1986, the property's owners accepted a restriction that prohibits "in perpetuity" the construction of any new building on the property. The restriction nevertheless reserves to the property's owners the right to "carry out regular agricultural practices," and allows "[t]he construction or placing of buildings or structures for agricultural purposes only, including buildings for related retail sales, structures for housing seasonal agricultural employees or other agriculturally related purposes, all subject to the prior written approval of the Grantee . . . ." While growing marijuana doesn't automatically qualify the grower for the agricultural exemption found in G.L. c. 40A, § 3, cultivating marijuana in the Commonwealth nevertheless is an "agricultural" pursuit. See *Valley Green Grow, Inc.* v. *Town of Charlton*, 99 Mass. App. Ct. 670, 680-681 (2021).

- 32 Nixon Road: It's 80.29 acres. The Assessor classifies the property as containing an agricultural use. Plaintiffs' challenge to 32 Nixon Road is like that for 20 Nixon Road: 32 Nixon Road is subject to a conservation restriction. But like the 20 Nixon restriction, the 32 Nixon restriction allows the property's owners "to conduct agricultural . . . operations. . . ." The 32 Nixon restriction also allows construction of agricultural buildings within two specified building envelopes.

- 842 Edmands Road: It's 18.6 acres. The Assessor classifies the property as containing an agricultural use. Plaintiffs challenge 842 Edmands Road on account of its conservation restriction, but like the 32 Nixon restriction, the 842 Edmands restriction allows the property's owners "to conduct agricultural . . . operations. . . ." The restriction also allows construction of agricultural buildings within a "Building Envelope for Residential and Agricultural Structures," subject to a limit on total building area.

- 1084 Grove Street: It's 26.6 acres. The Assessor classifies the property as containing an agricultural use. Plaintiffs contend that the property hosts a private residence and was "not actively engaged in farming or agricultural" between 2015 and 2019. Plaintiffs' support for this contention is the affidavit of their attorney, Robert G. Cohen (Plaintiffs' Appendix, Ex. 8). Attorney Cohen indeed asserts that 1084 Grove Street "is not actively engaged in farming or agricultural," but he doesn't assert anything about the property between 2015 and 2019 other than providing deeds recorded during that period. He also doesn't say he's made his statements on his personal knowledge. The Court thus may not consider attorney Cohen's affidavit for purposes of the parties' motions and cross-motions for summary judgment. See Rule 56(e), Mass. R. Civ. P. ("Supporting and opposing affidavits shall be made on personal knowledge. . . .").

Plaintiffs' spot-zoning challenge thus fails as a matter of fact and law. The Court will thus enter judgment in favor of the City and CF 1761, and against Plaintiffs, on Count Two of their Fourth Amended Complaint.

Standing. A party may challenge, via a motion to dismiss under Rule 12(b)(1), Mass. R. Civ. P., for lack of subject-matter jurisdiction, the standing of a plaintiff who seeks review under c. 40A, § 17, of a municipal board's zoning decision. See *Watros* v. *Greater Lynn Mental Health and Retardation Assoc., Inc.*, 421 Mass. 106, 108-109 (1995). If the moving party supports its Rule 12(b)(1) motion with affidavits, the burden shifts to the non-moving party "to prove jurisdictional facts." *Hiles* v. *Episcopal Dioceses of Mass.*, 437 Mass. 505, 515-516 (2002).

To challenge a local board's decision under § 17, persons such as Plaintiffs must show they have been "aggrieved" by the decision. Section 17 presumes that persons who are abutters to the property that's the subject of the challenged decision are "persons aggrieved." *Denneny* v. *Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 212 (2003). And even on a motion under Rule 12(b)(1) for dismissal of an abutter-plaintiff's claims for lack of standing, that plaintiff retains that presumption unless and until his or her opponent musters a suitable challenge to the plaintiff's standing. See, for example, *Sweenie* v. *A.L. Prime Energy Consultants*, 451 Mass. 539, 543 n. 11 (2008) (abutters who challenged special permit for a gas station "were entitled to a presumption of aggrievement" on gas station's motion to dismiss). CF 1761 concedes that each of the Plaintiffs qualifies for the presumption. The presumption thus places on CF 1761 the initial burden of rebutting each Plaintiff's claimed standing. See *81 Spooner Road, LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 703 (2012).

There are several ways a defendant may rebut a plaintiff's asserted standing under § 17. CF 1761 employs only three such methods here. It argues that (1) three of the ten harms Plaintiffs anticipate from the proposed Facility "are not interests that the Zoning Act is intended to protect," *81 Spooner Road*, 461 Mass. at 702; (2) several of the alleged harms aren't

sufficiently particular to Plaintiffs, see *Murchison* v. *Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209, 214 (2020) (standing under § 17 as a "person aggrieved" requires "evidence of an injury particular to the plaintiffs, as opposed to the neighborhood in general"); and (3) as a matter of fact, the Facility won't lead to the other harms Plaintiffs fear.[5] See *81 Spooner Road*, 461 Mass. at 702 (defendant may attack plaintiff's presumed standing by offering evidence that the expected harms won't occur). The Court examines CF 1761's arguments in that order.

Unprotected interests. Plaintiffs claim the Facility will reduce the value of their properties, introduce dangerous manufacturing processes into their neighborhood, and harm the environment. CF 1761 argues that the Zoning Act, c.40A § 1 et seq., and Framingham's By-Law don't protect these interests. CF 1761's correct as to Plaintiffs' first two claims, but not the third.

CF 1761 rightly points out that a reduction in the value of one's property, by itself, doesn't guarantee the owner standing under c. 40A, § 17: the owner must trace the asserted reduction to a "cognizable interest[] protected by the applicable zoning scheme." *Standerwick* v. *Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 31-32 (2006). Plaintiffs don't argue otherwise. CF 1761 also points out, correctly, that neither the Zoning Act nor the By-Law regulates the Facility's manufacturing processes. A § 17 plaintiff may not claim he or she's a "person aggrieved" on account of matters addressed by technical codes, such as building or fire-safety codes, unless the applicable *zoning* laws somehow incorporate those codes' standards. See *Rinaldi* v. *Board of Appeal of Boston*, 50 Mass. App. Ct. 657, 660 (2001). Again, Plaintiffs don't argue otherwise.

Preventing harm to environment, by contrast, is within the scope of the By-Law. According to § VI.F.1 of the By-Law, "[t]he purpose of Site Plan Review is to protect the health,

[5] CF 1761 also argues that, even if the three alleged harms are within the scope of protection of the Zoning Act or the By-Law, the undisputed facts show those harms won't occur.

safety, quality of life, and general welfare of the community." There are two types of site plan review under the By-Law: "major" and "minor." It's undisputed that the Facility underwent minor site-plan review; Plaintiffs argue the Facility required major review. One difference between the reviews is that major review requires submission of a "written Environmental Impact Report." See *id.* at § VI.F.4.a.(12).[6] While in both instances site-plan review "strive[s]," among other things, to identify projects that "create any significant emission of noise, dust, fumes, noxious gases, radiation, or water pollutants, or any other similar significant adverse environmental impact," *id.* at § VI.F.6.c(1), Plaintiffs argue that the Planning Board couldn't have discharged that duty in the absence of an Environmental Impact Report. It's undisputed that CF 1761 didn't file one.

CF 1761 argues Plaintiffs don't have sufficient proof that the Facility will cause them environmental harm.[7] The Court will address that issue in a moment, but the above discussion suffices to show that certain environmental interests are within the scope of the By-Law's protections.

Interests not "particular" to Plaintiffs. Plaintiffs also claim as a basis for their standing under § 17 that the Facility will damage an abutting state park, Callahan State Park. While not conceding that will happen, CF 1761 contends that Plaintiffs' interests in protecting the Park are no different from those of the public generally, and hence Plaintiffs may not assert standing under § 17 based on harms to the Park. See *Harvard Sq. Defense Fund, Inc.* v. *Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 492-493 (1989) (private individuals may not claim standing

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[6] While subsection (12) uses the capitalized term "Environmental Impact Report," the By-Law doesn't define that term.

[7] CF 1761 also challenges Plaintiffs' interpretation of the By-Law, and whether it requires major site-plan review of projects like the Facility. Because the Court concludes the Plaintiffs lack standing, the Court will not reach the issue of what level of review the By-Law requires for marijuana cultivation and production facilities that are housed in structures as big as those proposed for the Facility.

based solely on harmful effects to public spaces, even if they live close to those spaces); *Denneny*, 59 Mass. App. Ct. at 212-213 ("plaintiff's claims of danger to neighborhood children and danger to the health of the community reflect general concerns and are not sufficiently specific to her to confer standing"). Plaintiffs don't dispute the holding of *Harvard Sq. Defense Fund* or *Denneny*. Plaintiffs thus may not assert standing based upon the Facility's effects upon Callahan State Park.

Plaintiffs face a similar hurdle with respect to their claims of environmental harms (other than odors and noise, addressed below). Plaintiffs fail to show that their concerns that the "environment will be damaged" or cause the "destruct[ion of] the whole eco system" (CF 1761's Statement of Facts in Support of Commonwealth Farm 176, Inc.'s Rule 12(b)(1) Motion to Dismiss for Lack of Standing, ¶¶ 28, 32 (hereafter, "CF 1761's SOF") (deposition testimony of plaintiff Inna Asinovski)); their worries about the Facility's "wildlife impact" (*id.* at ¶¶ 29-30 (deposition testimony of plaintiff Janice Sage); *id.* at ¶ 36 (deposition testimony of plaintiff Antoinette Kelly)); the lack of environmental-impact studies (see *id.* at ¶ 33 (deposition testimony of plaintiff Leo Asinovksi); *id.* at ¶ 35 (deposition of Ms. Kelly)[8]); or whether the Facility will protect wetlands (see *id.* at ¶ 34 (deposition testimony of Ms. Sage)), are specific to Plaintiffs themselves, or their properties. See *id.* at ¶ 36 (deposition testimony of Ms. Asinovski, admitting her environmental concerns were "in general"); *id.* (deposition testimony of Ms. Sage (same)). Plaintiffs thus may not assert standing under § 17 based on harms to the environment generally.

<u>Lack of evidence of harm</u>. To force a plaintiff who benefits from a presumption of

[8] A person whom Plaintiffs offer as an expert, Steven N. Zieff, complains at page 5 of his expert disclosure ("Zieff Disclosure," attached as Exhibit 5 to Affidavit of Courtney M. Simmons, Esq.) that "[t]here has been no environmental impact study performed to gauge the impact of the project on a site which is 40 per cent wetlands and streams. . . ." Zieff doesn't suggest, however, that Plaintiffs will suffer environmental harms, or endure harms that are particular to Plaintiffs.

standing under c. 40A to prove his or her claims of aggrievement, a § 17 defendant first "must offer evidence 'warranting a finding contrary to the presumed fact.'" *Standerwick*, 447 Mass. at 34, quoting *Marinelli* v. *Board of Appeals of Stoughton*, 440 Mass. 255, 258 (2003). "Once the presumption is rebutted, the burden rests with the plaintiff to prove standing, which requires that the plaintiff 'establish – by direct facts and not by speculative personal opinion – that his injury is special and different from the concerns of the rest of the community.'" *Standerwick*, 447 Mass. at 33, quoting *Barvenik* v. *Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992).

By this point in the Decision, Plaintiffs have six claimed bases for standing left: that the Facility will (1) result in construction of objectionable solar- or wind-power facilities; (2) harm the area's water supply[9]; (3) produce odors; (4) cause noise pollution; (5) increase traffic; and (6) damage the character of the neighborhood.[10] The Court can dispose quickly of the first of these claims: it's undisputed that the version of the Facility that received site-plan approval does not include solar panels or wind turbines. A plaintiff may not claim standing under § 17 based on conjecture about what might occur at the site of a permitted development. See *Sweenie*, 451 Mass. at 545-546 & n. 14; see also *Butler* v. *City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005) (for standing evidence to be "credible," it "must be of a type on which a reasonable person could rely" in reaching a conclusion on the disputed issue; "Conjecture, personal opinion, and hypothesis are therefore insufficient.").

The Court now turns to Plaintiffs' other five harms. In each instance, the Court will

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[9] At page 7 of their Opposition to Commonwealth Farm 1761 Inc.'s Motion to Dismiss for Lack of Standing, (the "Opposition"), Plaintiffs reframe this issue as whether the Facility "will negatively impact water availability and water pressure to [Plaintiffs'] residences . . . ."

[10] The Court counts six remaining claims based on CF 1761's SOF and Plaintiffs' Response to Commonwealth Farm 1761[,] Inc.'s Statement of Fact in Support of Commonwealth Farm 1761, Inc.'s Rule 12(b)(1) Motion to Dismiss for Lack of Standing, docketed April 29, 2021 ("Plaintiffs' Response"). In that Response, Plaintiffs don't identify additional claims of injury. While the Opposition averts to additional injuries, Plaintiffs haven't identified in their Response facts pertaining to those injuries. The Court thus may not consider them in opposition to CF 1761's motion to dismiss.

summarize the admissible evidence CF 1761 presents in its SOF. If that evidence rebuts Plaintiffs' claim of an injury, the Court will examine whether Plaintiffs have provided (via Plaintiffs' Response) credible evidence of that claim. In no instance is the Court determining whether CF 1761 or Plaintiffs' evidence is true; instead, the Court is performing only a "gatekeeping" function, one requiring "consideration solely of the quantity and quality of evidence the plaintiffs have presented, [and] not the comparative weight of the plaintiffs' testimony and the defendants.'" *Michaels* v. *Zoning Bd. of Appeals of Wakefield*, 71 Mass. App. Ct. 449, 453 (2008).

Water infrastructure: CF 1761 presents the following facts concerning the Facility's effects upon the City's water-supply system. A major City water main bisects 1062 Edmands Road. In the opinion of Peter J. Ogren, a registered professional engineer, that main has adequate capacity to supply the Facility, and the Facility itself has been designed to minimize impacts to the public water-supply system. CF 1761 will extend water service to the Facility from the City's main and install a private septic system. CF 1761 intends to use various water-recapture methods and systems, and intends to draw irrigation water from the City's system only during evening hours (the Facility will have irrigation-storage tanks), to minimize the Facility's use of City water.

The preceding paragraph incorporates facts found in ¶¶ 213-215, 217, and 219-223 of CF 1761's SOF. As to each of these paragraphs, Plaintiffs' Response simply states, "Deny."[11] Land Court Rule 4, which applies to Rule 12(b)(1) motions, provides that "[a]ny response other than 'admitted' to a statement of fact made by the moving party . . . must include page or paragraph references to supporting pleadings, depositions, answers to interrogatories, admissions

[11] The preceding paragraph also relies on ¶¶ 216 and 218 of CF 1761's SOF, but Plaintiffs admit those statements.

and affidavits, or else the facts described by the moving party as undisputed shall be deemed to have been admitted." As Plaintiffs' Responses to ¶¶ 213-215, 217, and 219-223 don't provide such references, Rule 4 allows the Court to deem the facts set forth in those paragraphs as undisputed; together with CF 1761's other undisputed facts, they rebut Plaintiffs' claims of harm as they relate to water infrastructure.

CF 1761 wants the Court to take the analysis one step further. It argues that Rule 4 requires the Court to deem ¶¶ 213-215, 217, and 219-223 as *admitted*, and beyond question. The trouble with CF 1761's argument is that other parts of CF 1761's SOF (specifically, ¶¶ 103-111) summarize Plaintiffs' evidence on water-supply issues, and Plaintiffs have "admitted" those summaries in every instance. Moreover, in their responses to ¶ 103 and ¶ 111, Plaintiffs direct the Court to the Zieff Disclosure, and CF 1761 has tendered that disclosure to the Court.

Since CF 1761 has placed before the Court ¶¶ 103-111, and as Plaintiffs have responded to those paragraphs under Rule 4, the Court will review whatever admissible evidence those paragraphs, plus the Zieff Disclosure, present. Those materials fail to show that Plaintiffs have credible evidence of harm as it pertains to water-supply issues. At their depositions (as summarized in ¶¶ 103-111), Plaintiffs didn't provide admissible evidence of water-supply problems in their neighborhood. They also admitted they aren't experts on water supply,[12] and hence Plaintiffs (unlike a qualified expert witness, see Mass. G. Evid. § 703 (expert witness may be asked about evidence not yet in the record, but only if couched as a hypothetical question)) are not allowed to pass along hearsay evidence.

For his part, Mr. Zieff doesn't help Plaintiffs when it comes to water supply. His Disclosure addresses that issue twice. The first time, Zieff doesn't opine that Plaintiffs'

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[12] See *Barvenik*, 33 Mass. App. Ct. at 137 n. 13 (while "credible" evidence of standing needn't always be expert evidence, expert testimony is necessary where "the subject matter is beyond the scope of the common knowledge, experience and understanding of the trier of fact without expert assistance").

neighborhood already suffers from water-supply deficiencies, and he doesn't claim the Facility will create shortages where none exists today. Instead, he attributes those possibilities to unidentified others: "It has been opined that there are deficiencies with existing and proposed water uses." Disclosure at 3. But the second time the Disclosure mentions water issues, Zieff embraces those unsourced claims: "Again, we repeat, the water infrastructure has not been sufficiently studied and submitted for peer review to assure that, *in an area where insufficient water availability is a significant and glaring issue, pressure and volume will need to meet the extraordinary use requirements of the project and of the existing neighborhoods.*" *Id.* at 5 (emphasis added).

Without deciding whether there's a foundation for Mr. Zieff's italicized statements (or if they're correct),[13] they're nonetheless *expert* opinions, as they're beyond the scope of the common knowledge, experience and understanding of the trier of fact. See note 11 above; see also *Barvenik*, 33 Mass. App. Ct. at 137 (rejecting plaintiffs' claims of standing relating to water-pressure issues, where plaintiffs failed to rebut testimony of developer's experts on the issue). Plaintiffs haven't shown that Zieff qualifies as an expert on water-supply issues.[14] The sole information they present about Zieff lies in a three-page resume attached to his Disclosure. That resume reflects over 35 years of construction experience; identifies licenses as a construction supervisor and real-estate broker; notes education in economics, business administration, "construction technology," and real-estate development; and lists teaching responsibilities in the

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[13] Plaintiffs pretty much admit they can't furnish a foundation for Zieff's claims. See Opposition at 7 ("Whether the marijuana project will negatively impact water availability and water pressure to the residences is not actually known because no adequate water usage and infrastructure study was submitted to the Planning Board. But, where the project will draw its water from the same source, it is reasonable to infer that the residents will be harmed.").

[14] CF 1761's SOF expressly objects to Zieff's qualifications as a water-supply expert; Plaintiffs offer no response to those objections. Plaintiffs also didn't object to Engineer Ogren's qualifications to express his expert opinions on water-supply issues.

latter field. But it doesn't show any training, experience, or expertise pertinent to the water usage of marijuana cultivation and product-manufacturing facilities. The Court thus holds that it may not consider, in opposition to CF 1761's motion to dismiss, Zieff's water-supply opinions. See *Michaels*, 71 Mass. App. Ct. at 453 (§ 17 plaintiff fails to establish standing with respect to issue requiring expert testimony where plaintiff's proffered expert lacks proper qualifications and employs unscientific methods). As a result, Plaintiffs haven't shown they have credible evidence that the Facility will affect (let alone harm) their supply of water.

Odors. CF 1761 presents the following facts concerning odors from the Facility. Budding marijuana plants naturally create compounds that smell. Owners of indoor marijuana-cultivation facilities try to mitigate those odors by adapting the facilities' heating, ventilation and air-conditioning systems ("HVAC"). The Facility's HVAC system will employ four principal odor-mitigation strategies, all designed by Engineer Ogren's firm, Hayes Engineering, Inc. (Ogren and Hayes Engineering have overseen various phases of the design, planning, permitting and/or development of 129 marijuana-related projects in Massachusetts.) First, the rooms that contain growing plants ("Grow Rooms") and those that host flowering plants ("Flower Rooms") will be airtight and self-contained. That's largely because, if the Facility is going to be profitable, CF 1761 must carefully regulate the temperature, humidity, and carbon-dioxide levels of those rooms. Those rooms thus should exhaust air only when carbon dioxide levels exceed specified limits, perhaps once or twice a year. Second, when exhausts from the Grow and Flower Rooms do occur, they will pass through odor-absorbing carbon filters. Third, the Facility's interconnected buildings are designed to maintain negative airflow (that is, the pressure of the air inside the buildings is lower than that outside), and hence air inside the buildings should not leave the buildings naturally. Fourth, the Facility will use state-of-the-art

carbon-filtration systems for the various rooms (other than the Grow and Flower Rooms) used for the Facility's manufacturing processes, and will implement odor control at ventilation openings, exhausts, and exterior doors.

CF 1761 presents three other facts that bear on whether Plaintiffs will suffer from the Facility's odors. First, the closest Plaintiff to the Facility is 875 feet away; the others are between 1,211 and 1,925 feet away. Second, CF 1761 proposes to build the Facility behind an existing vegetated hill and below the elevation of the site's existing interior road. Those features serve to isolate the Facility's buildings and buffer odors. Third, the Planning Board conditioned its site-plan approval on the Facility being designed "to control and mitigate odor at the forefront using state-of-the-art technology" and "comply with the [Commonwealth's] Cannabis Control Commission's requirements regarding odor control and go beyond to ensure abutters are not impacted by any odors produced by the facility." Altogether, according to CF 1761's experts, these measures should prevent the Facility's odors from having adverse effects upon Plaintiffs.

The preceding two paragraphs incorporate facts found in ¶¶ 189-202 of CF 1761's SOF. In response to each, Plaintiffs' Response simply states again, "Deny." For the reasons explained earlier, the Court will deem the facts set forth in ¶¶ 189-202 as undisputed.[15] Together with CF 1761's other undisputed facts, they rebut Plaintiffs' claims of harm as they relate to the Facility's expected odors.

CF 1761 again argues that Land Court Rule 4 requires the Court to deem ¶¶ 189-202 as admitted and beyond question, but again CF 1761's SOF (specifically, ¶¶ 82-92) summarizes Plaintiffs' evidence on odor issues, and via their response to ¶ 92, Plaintiffs direct the Court again to the Zieff Disclosure. But as is the case with Plaintiffs' water-supply claims, Plaintiffs'

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[15] The preceding two paragraphs also rely on ¶¶ 144, 188 and 203 of CF 1761's SOF, but Plaintiffs admit the facts in those statements.

evidence fails to show they have credible evidence of harmful odors. None of the Plaintiffs is an expert on odors associated with marijuana cultivation and product-manufacturing facilities. None of their information about that subject comes from personal knowledge.[16] Ms. Asinovksi and the Sages trace their information about odors not only to the internet, but to "common sense" or "common knowledge." (SOF ¶¶ 85, 87-88.) The Court accepts as common knowledge that *burning* marijuana produces odors, but whether an indoor marijuana cultivation and product-manufacturing facility – a facility that couldn't lawfully exist in Massachusetts prior to December 2016, see St. 2016, c. 334, § 12 – necessarily makes odors (and if so, whether one can control them, and if controlled, at what distance one likely will smell the facility) is beyond current common knowledge. Under *Barvenik*, expert testimony is needed.

Mr. Zieff doesn't help Plaintiffs' case on odors. His Disclosure says only that he believes the Planning Board's site-plan review was deficient because "[t]here are insufficient assurances that . . . odors . . . are properly mitigated to have no impact on the abutters and the neighborhood." Disclosure at 4. Zieff doesn't say that the Facility can't control its odors, or that any of the Plaintiffs will smell them. But even if Zieff had said what Plaintiffs need him to say about odors in order to defeat CF 1761's motion to dismiss, Plaintiffs haven't provided evidence that would allow the Court to accept him as an expert on the subject: Zieff's resume shows no training or experience with marijuana cultivation and product-manufacturing facilities, the odors they generate, or whether persons such as Plaintiffs would smell those odors at their distant homes.[17] The Court thus holds that it may not consider, in opposition to the pending motion to

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[16] See SOF ¶ 83 (Ms. Rossen's views based on opinions of friends about "marijuana factories"); SOF ¶¶ 84, 86, 89 (Mr. Rossen, Mr. Asinovksi, and Ms. Kelley's views based on articles they've read; none could identify the articles or their sources).

[17] CF 1761's SOF expressly objects to Zieff's qualifications as an expert on odors; Plaintiffs again offer no response to those objections. Plaintiffs also didn't object to Engineer Ogren's qualifications to express expert opinions regarding the odors he expects the Facility to generate, and whether Plaintiffs will notice them.

dismiss, Zieff's opinions about the Facility's odors, if he's expressed any at all. See *Michaels*, 71 Mass. App. Ct. at 453. As a result, Plaintiffs haven't shown that they have credible evidence that the Facility will produce harmful odors.

Noise. CF 1761 presents the following facts concerning the Facility's anticipated noise. The Facility will have eighteen pieces of equipment (coolers, chillers, and air handlers) that will be outside of its buildings, and water-cooled chillers inside the buildings. A professional acoustical engineer hired by CF 1761, Peter Ouellette, predicts the Facility's equipment will generate 79.2 dBA of sound at their source.[18] CF 1761 proposes to add to the Facility, however, (1) a sound-attenuation barrier, which will surround the Facility's exterior mechanical area; (2) super low sound fans ("SLSF"); and (3) on the Facility's two closed-circuit coolers, water silencers. Ouellette predicts that the SLSF and water silencers will reduce the equipment's noise to 73.5 dBA (sometimes called "decibels"). Ouellette further estimates that, with the attenuation barrier, sound levels at the Rossen residence will be 20.1 dBA; sound levels at the Sage and Asinovksi residences will be 21.1 dBA; and sound levels at the Kelly residence will be 27.0 dBA. Ouellette opines that, even at 27.0 dBA, the Facility's predicted sound at Plaintiffs' properties will not be material. (He further notes that, in Framingham, sound levels are acceptable if they are below 45 dBA between the hours of 10:00 PM and 7:00 AM.) The Planning Board also imposed as a condition of its site-plan approval that CF 1761 buffer and screen all mechanical equipment, to limit noise.

The preceding paragraph incorporates facts found in ¶¶ 206-210 of CF 1761's SOF. As

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[18] Plaintiffs' Response to CF 1761's SOF ¶ 128 remarks that Mr. Ouellette's affidavit doesn't state that he's registered in Massachusetts as a professional engineer. Plaintiffs don't explain why Ouellette's lack of that qualification prevents the Court from treating him as an expert on the acoustics of machinery. Plaintiffs don't lodge any other objections to Ouellette's testimony.

to each of those SOF paragraphs, Plaintiffs' Response simply states again, "Deny."[19] For the reasons explained earlier, the Court will deem the facts set forth in ¶¶ 206-210 as undisputed.[20] Together with CF 1761's other undisputed facts, they rebut Plaintiffs' claims of harm as they relate to the Facility's expected noise.

Paragraphs 93-102 of CF 1761's SOF summarize Plaintiffs' evidence on noise issues, and via their response to ¶ 102, Plaintiffs direct the Court (again) to the Zieff Disclosure. But as with their water-supply and odor claims, Plaintiffs fail to show they have credible evidence of harmful noise. None of their information about the Facility's equipment and its noise comes from their personal knowledge. None of the Plaintiffs is an expert on noises generated by coolers, chillers, and air handlers, or how far that noise carries. Mr. Zieff doesn't help either: he believes only that CF 1761's submissions to the Planning Board didn't provide assurances that "noise [is] properly mitigated to have no impact on the abutters and the neighborhood," or "that noise levels generated by the HVAC equipment which will be in constant use at the site will be less than 65 decibels at the perimeter." Disclosure at 4, 5.[21] Zieff doesn't say that the Facility can't control its noise, or that the Facility's noise will meaningfully bother Plaintiffs. But more importantly, Plaintiffs haven't provided evidence that would allow the Court to accept Zieff's views as expert opinion: his resume shows no training or experience in the field of sound or

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[19] With one exception: ¶ 210. CF 1761 wrote ¶ 210 this way, citing ¶ 16 of Mr. Ouellette's affidavit: "There will be no adverse impact at the Plaintiffs' properties resulting from mechanical noise from the proposed Facility." Plaintiffs responded, "Deny. And further answering, the affiant is not competent to state a legal conclusion." Plaintiffs are correct in both respects, but not in a way that changes the result. Ouellette says this in ¶ 16: "In my professional experience, the predicted estimated sound level at the Plaintiffs' properties [shown in ¶¶ 14-15 of Ouellette's affidavit] is not a material impact. Sound levels below 45 dBA at night (10:00 P.M. to 7:00 A.M.) are within City of Framingham acceptable levels." The preceding paragraph of this Decision thus ascribes to Ouellette the conclusion, as an acoustic engineer, only that sound levels at Plaintiffs' properties won't have "a material impact."

[20] The preceding paragraph also relies on ¶¶ 204-205 and 211-212 of CF 1761's SOF, but Plaintiffs admit the facts in those statements.

[21] Zieff doesn't explain the origins of the 65-dBA-at-the-perimeter standard, but even if it's a pertinent measure of acceptable noise, his Disclosure presents no evidence the Facility will exceed it.

mechanical acoustics.[22] The Court thus holds that it may not consider in connection with CF 1761's motion to dismiss Zieff's opinions on noise. See *Michaels*, 71 Mass. App. Ct. at 453. As a result, Plaintiffs haven't shown they have credible evidence that the Facility will produce harmful noise.

Increased traffic. CF 1761 presents the following facts concerning the Facility's effects upon traffic. 1062 Edmands Road is accessible only from Edmands Road. The property has a driveway (the "Driveway"); the Facility's personnel will use the Driveway to get to and from Edmands Road. In 2019, in preparing CF 1761's application for site-plan review, Hayes Engineering prepared a traffic impact statement (the "TIS") using data from the Institute of Transportation Engineers. The TIS concludes that the number of vehicle trips ending at the Facility would be minor as compared to existing traffic on Edmands Road.

In 2021, Hayes studied the roadways and traffic patterns in the area around 1062 Edmands Road. Hayes examined existing conditions on Edmands Road as well as the Road's anticipated future condition were the Facility built. Hayes performed its study in accordance with the Massachusetts Department of Transportation's Traffic Impact Assessment Guidelines. Hayes's 2021 study reaches the same conclusion as the TIS: that the Facility's additional traffic will be minor.

The 2021 study also included a "level of service" analysis for the two roadway intersections closest to 1062 Edmands Road, as well as at the Driveway's intersection with Edmands Road. (One of the studied intersections, that of Parmenter Road and Pine Hill Road, lies in a neighboring town, Southborough. Edmands Road become Parmenter Road when it enters Southborough.) The 2021 study concludes that, at peak hours, the two roadway

[22] CF 1761's SOF expressly objects to Zieff's qualifications as a noise expert; again, Plaintiffs offer no response to those objections.

intersections currently operate at level of service "B," on a scale of A to F (with "A" being the best level -- that is, having the fewest delays -- and "F" being the worst). The study further concludes that, with construction of the Facility, there will be no change in 2028 in either intersection's peak-hour level of service, and that the greatest increase in delay at either intersection will be 0.2 seconds, for one peak hour (at an intersection where the existing peak-hour delay is 11.2 seconds).

Hayes's 2021 study also concludes that, at all times studied, the Driveway will have an "A" level of service. The section of Edmands Road that leads to and from the Driveway has approximately eighteen to twenty feet of payment. The Road has a double yellow centerline. The Road's posted speed limit is 20 miles per hour; observed speeds are less than 30 miles per hour in both directions. The Road's northbound approach to the Driveway slopes downward, while the Road's southern approach slopes upward. CF 1761 proposes to improve the Driveway; according to Engineer Ogren, once upgraded, the Driveway will provide ample site visibility and safe sight distances from both directions on Edmands Road. The upgraded Driveway also will exceed the American Association of State Highway and Transportation Officials' geometric design standards for the speeds proposed on the Driveway. Ogren also points out that the Facility won't be accessible to the public: CF 1761 will allow only the Facility's employees, law enforcement, contractors, and regulators to enter. The Planning Board also imposed on the Facility five requirements pertaining to traffic as conditions of the Facility's site-plan approval.

The preceding four paragraphs incorporate facts found in ¶¶ 156-157, 159-163, 165-169, 172-175, 178, 181-182, and 183-187 of CF 1761's SOF. As to each of those paragraphs, Plaintiffs' Response simply states, "Deny."[23] For the reasons explained earlier, the Court will

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[23] In response to ¶ 182, which describes the Facility's restricted access, Plaintiffs claim that the restriction is merely "aspirational." CF 1761's source for ¶ 182 is ¶ 58 of Engineer Ogren's affidavit. That paragraph contains

deem the facts in ¶¶ 156-157, 159-163, 165-169, 172-175, 178, 181-182, and 183-187 as undisputed.[24] Together with CF 1761's other undisputed facts, they rebut Plaintiffs' claims of harm as they relate to the Facility's expected traffic.

Paragraphs 59-81 of CF 1761's SOF summarize Plaintiffs' opposing evidence on traffic. Much of it comes from Plaintiffs themselves but, with rare exceptions not present here, to argue credibly that a development is going to generate traffic that will be harmful to a particular § 17 plaintiff, that plaintiff must provide expert testimony.[25] The Court thus turns to the only two things Plaintiffs have submitted in opposition to CF 1761's motion to dismiss that allegedly are expert opinions: the Zieff Disclosure and a 2015 document prepared by MDM Transportation Engineers, for the Town of Southborough's Department of Public Works (the "MDM Report," included in the Disclosure, as further supplemented by the Affidavit of Robert J. Michaud ("Michaud Affidavit," attached to Plaintiffs' Motion to Amend Record Appendix Item #8 (filed Apr. 16, 2021))).

The Zieff Disclosure says more about traffic than it does about odors and noise. See Disclosure at 2, 3-5. But its traffic comments focus on what the Planning Board reviewed (or, more precisely, what it didn't review). With one exception – the Disclosure attaches and briefly refers to the MDM Report – the Disclosure doesn't present any facts or opinions about current or projected traffic along Edmunds Road. Mr. Zieff also doesn't challenge (or even mention)

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no facts that suggest that the Facility only "aspires" to restrict access. Plaintiffs thus have not challenged ¶ 182 in accordance with Land Court Rule 4.

[24] The preceding four paragraphs also rely on ¶¶ 153-154, 158, 164, 170, 176-177, 179-180 and 185 of CF 1761's SOF, but Plaintiffs admit the facts in those statements.

[25] See *Nihtila* v. *City of Brockton Zoning Bd. of Appeals*, 19 LCR 395, 396 & n. 5 (2011) (Grossman, J.) (unless a development is "truly massive in scale," so that an increase in traffic "would be self-evident," § 17 plaintiff must provide expert traffic testimony to claim standing on that ground); *Kane* v. *Chan*, 17 LCR 107, 108 (2009) (Scheier, C.J.) (expert testimony needed to prove standing based on traffic impacts); *Martinonis* v. *Movalli*, 15 LCR 532, 534 (2007) (Piper, J.) (expert testimony required to show that development's predicted increase in traffic will have adverse effect on roadways generally, and on § 17 plaintiff in particular).

Hayes's 2021 study, described earlier in this Decision. An expert whom a § 17 plaintiff has retained to show that a development's traffic will aggrieve the plaintiff must offer more than generalized criticisms: using methods accepted in the field, he or she must opine that the development will harm the plaintiff. See *Cohen* v. *Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 622-623 (1993) (expert's general statements about increases in traffic, followed by "conclusory" assertion of adverse impact on plaintiff, aren't sufficient to establish plaintiff's aggrievement under § 17).

The Disclosure's comments about traffic also suffer from the problem that plagues every Zieff statement this Decision's reviewed so far: Plaintiffs fail to show he's an expert in the pertinent field. His resume shows no training or experience in the field of traffic engineering.[26] The Court thus holds that it may not consider, in opposition to CF 1761's motion to dismiss, Zieff's opinions on traffic, whatever they are. See *Michaels*, 71 Mass. App. Ct. at 453.

That leaves the MDM Report. It's a 2015 study of the safety and operations of the Parmenter Road/Pine Hill Road intersection, one of the two intersections Hayes Engineering studied in 2021. CF 1761 claims the MDM Report is hearsay; hearsay isn't admissible (at trial or in opposition to a motion to dismiss under Rule 12(b)(1)) unless case law, a statute, or "a rule prescribed by the Supreme Judicial Court" provides otherwise, Mass. G. Evid. § 802. As first filed by the parties, the MDM Report had a "totem pole" hearsay problem: Mr. Zieff attached the Report to his Disclosure, relying on it for its truth (hearsay problem #1); and the Report itself contains unsworn, out-of-court statements (hearsay problem #2). Plaintiffs' subsequent filing of the Michaud Affidavit fixed problem #1. Plaintiffs claim problem #2 isn't truly a problem, for three reasons. None of them is persuasive.

[26] CF 1761's SOF expressly objects to Zieff's qualifications as a traffic expert; again, Plaintiffs offer no response to those objections.

Plaintiffs first argue that the MDM Report is a public record of the Town of Southborough. That may be, but the hearsay exception for public records doesn't include every document filed with a government agency. See § 803(8)(A), Mass. G. Evid.; *Commonwealth* v. *Williams*, 63 Mass. App. Ct. 615, 619 (2005) (record must be prepared by a "public official," acting withing the scope of his or her duties, to qualify for public-record exception to hearsay rule).

Plaintiffs' second argument is that the Report qualifies as a "past recollection recorded" under § 803(5), Mass. G. Evid. Section 803(5)(A) allows admission of a "previously recorded statement" if

> (i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the recorded statement was truthful when made, and (iv) the witness made or adopted the recorded statement when the events were fresh in the witness's memory.

Plaintiffs haven't established any of § 803(5)(A)'s predicates. The Michaud Affidavit says nothing about Mr. Michaud's current memory, whether he had "firsthand knowledge" of the facts the Report relates (the Report has two authors), whether the Report was truthful when made, or that Michaud personally made or adopted the Report when his supposed knowledge of the events the Report describes were fresh in his memory. The Court thus can't accept the Report as anyone's past recollection recorded.

Plaintiffs' third argument is that the Report qualifies for the business-records exception to the hearsay rule. Under § 803(6)(A), Mass. G. Evid., a "business record" is admissible

> if the court finds that (i) the entry, writing, or record was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

Plaintiffs again haven't established the exception's predicates, other than the Report being authored before Plaintiffs filed this action. Plaintiffs thus have identified no exception to the hearsay rule that would allow the Court to consider the MDM Report in opposition to CF 1761's motion to dismiss.[27] As a result, Plaintiffs haven't shown they have credible evidence that construction and operation of the Facility will result in harmful increases in traffic.

Neighborhood character. Plaintiffs' final claimed harm is, broadly headed, the Facility's inconsistency with the character of their neighborhood.

The initial problem in evaluating the quality of the parties' "neighborhood" evidence is that the By-Law doesn't, in so many words, require the Planning Board to evaluate site plans based on their "consistency" with the neighborhood, or to gauge the overall effect of a proposed development upon a neighborhood. The By-Law's more nuanced than that. For example, several subsections focus on ta development's appearance, and how its "look" relates to that of the surrounding neighborhood.[28] Other provisions require visual screening or buffers.[29] While § VI.F.6 of the By-Law ("Site Plan Review Criteria") states that site-plan review "strive[s] to," among other things, "retain community character" (*id.* at § VI.F.6.a.), under the heading of retaining community character, the By-Law lists standards such as "[s]creens objectional features . . . from neighboring properties and roadways" (*id.* at § VI.F.6.a.(3)), "[b]lends and harmonizes

[27] Even if the Court could consider the Report, it offers no views on whether (a) any Plaintiff currently faces traffic problems on Edmands/Parmenter Road, or (b) construction of the Facility will cause Plaintiffs problems they don't face today. In fact, the Report appears to corroborate Hayes's 2021 conclusions regarding the Parmenter Road/Pine Hill Road intersection.

[28] See, for example, By-Law § VI.F.1.e ("The intent of Site Plan Review is to," among other things, "[p]romote designs that create visual cohesiveness with the surrounding neighborhood, while establishing a neighborhood community"); *id.* at § VI.F.5.b(2) (requiring site and building design to "relate harmoniously to the historical character, unique physical characteristics, and natural resources of the surrounding neighborhood"); *id.* at § VI.F.5.b(5) (requiring building's design to "provide visual interest and avoid monotony and repetition relative to adjacent or nearby structures").

[29] See, for example, *id.* at § VI.F.5.a(4) (requiring design to "minimize the visibility of visually degrading elements"); *id.* at § VI.F.5.e(2) (requiring minimum fifteen-foot "landscaped open space buffer" between a non-residential and a residential use). Footnote 15 of the By-Law creates, however, greater buffer and setback requirements for Marijuana Cultivation facilities.

with the architectural style of the . . . immediate neighborhood" (*id.* at § VI.F.6.a(4)), "promotes architectural consistency" in relation "to similar features of buildings and structures in the immediate neighborhood and surrounding area" (*id.* at § VI.F.6.a(6)), and "[d]emonstrates appropriateness relative to the size and shape of the buildings or structures . . . in relation . . . to the adjacent buildings and structures within the neighborhood" (*id.* at VI.F.6.a(7)). Section VI.F.8 of the By-Law, which sets forth the Planning Board's powers to impose conditions on approvals of site plans, gives the Board (with respect to protecting neighborhoods) only the right to impose screening requirements (see *id.* at § VI.F.8.h) and "[c]onditions to mitigate adverse impacts to the neighborhood and abutters, including but not limited to adverse impacts caused by noise, dust, fumes, odors, lighting, headlight glare, hours of operation, or snow storage" (*id.* at § VI.F.8.i.).

Viewed through the lens of how the By-Law actually protects neighborhoods, ¶¶ 131-151 of CF 1761's SOF rebut Plaintiffs' claims of harm as they relate to the Facility's expected effects on Plaintiffs' neighborhood. The Court won't summarize ¶¶ 131-151 here, but Plaintiffs legitimately dispute only three of those paragraphs.[30] Plaintiffs first assert that a statement by a licensed professional architect retained by CF 1761, Keith Bettencourt, that the Facility's design elements "are in harmony with the architectural style of the adjacent buildings and immediate neighborhood," *id.* at ¶ 135, is a "legal conclusion" Bettencourt's not competent to make. The Court disagrees: § VI.F.6.a(4) of the By-Law uses the term "harmonizes" in relation only to "architectural style." The Court reads the terms together; they call for a conclusion that a professional trained in "architectural style" is qualified to make.

Plaintiffs have slightly more traction with their second claim, that Engineer Ogren's

[30] With respect to three others, ¶¶ 141, 145, and 149, Plaintiffs merely say "Deny," and don't cite any contradictory evidence. For the reasons explained earlier, the Court treats the facts set forth in ¶¶ 141, 145, and 149 as admitted.

statement that "[t]he location and design of the Facility . . . minimize the impacts on the abutters and surrounding community," *id.* at ¶ 139, is an unqualified legal conclusion. But ¶ 139 refers to ¶ 17 of Ogren's affidavit; that paragraph sets forth a conclusion that's based on information Ogren relates in ¶¶ 16 and 18-28 of his affidavit. The Court thus accepts ¶ 17 not as a legal conclusion, but only as a summary of what ¶¶ 16 and 18-28 of his affidavit present. Those paragraphs show that, according to Ogren, several things will shield the Facility from Plaintiffs.

Finally, in response to ¶ 151 of CF 1761's SOF, where CF 1761 asserts that the footprints of the Facility's two two-story buildings are 36,300 and 19,500 square feet, respectively, Plaintiffs contend that CF 1761's "submission to the Planning Board requested approval of a 110,000 square foot structure." Plaintiffs' Response to ¶ 151. That hardly denies CF 1761's evidence: if the *footprints* of the Facility's buildings total just under 56,000 square feet, *two-story* buildings with those footprints easily could result in structures totaling 110,000 square feet. (Mr. Zieff was able to do that math. See Disclosure at 2.)

CF 1761 and the Board thus have shifted the burden to Plaintiffs to show what credible evidence they have of a particular harm to a protected "neighborhood" interest. Plaintiffs' evidence (summarized in ¶¶ 12-20 and 47-57 of CF 1761's SOF) doesn't meet *Butler*'s test of sufficiently credible evidence. Plaintiffs' evidence concerning the Facility's effect upon their neighborhood falls into two categories. One is the Facility's simple proximity to their homes, even though the closest Plaintiff is 875 feet from the Facility. This Decision previously concluded that Plaintiffs hadn't provided sufficient evidence of three harms that sometimes depend on proximity: odors, noise, and traffic. Plaintiffs' remaining "proximity" objection is merely to having a manufacturing facility in their neighborhood. See, for example, CF 1761's SOF at ¶¶ 12 19, 54-55, 57 (Rossens, Asinovskis, Sages and Ms. Kelly object to "factory in close

proximity"). But the By-Law no longer protects Plaintiffs' interest in excluding the Facility's particular manufacturing activities from their neighborhood: as of the adoption of the 2018 amendments, the By-Law allows the Facility's use in Plaintiffs' neighborhood, subject to a site-plan review process that uses setbacks, buffers, and screening to balance proximate different uses. It's undisputed that the Facility meets the By-Law's setback, buffer, and screening requirements.

The other category of Plaintiffs' "neighborhood" evidence is that relating to a change in the neighborhood's "character." See CF 1761's SOF ¶¶ 48-53, 56. But as noted earlier, the By-Law's notion of protecting the character of a neighborhood isn't as expansive as Plaintiffs think. Instead, the By-Law addresses only the design and size of buildings, and their architectural and spatial relationships to neighboring buildings. Plaintiffs haven't challenged those aspects of the Facility. What's left are, in essence, complaints about the City's rezoning decision, but as this Decision upholds the 2018 amendments to the By-Laws, Plaintiffs may not challenge the Planning Board's site-plan approval on that ground. See *Murchison*, 485 Mass. at 214 (plaintiffs may not claim standing based on features of a permitted development that comply with the municipality's zoning requirements).

The Court thus concludes that Plaintiffs lack standing to challenge the Facility on grounds of its alleged adverse effects upon Plaintiffs' neighborhood. Accordingly, the Court

HOLDS that Plaintiffs lack standing under c. 40A, § 17, to challenge the Facility's site-plan approval.

Judgment to enter accordingly.

/s/ Michael D. Vhay
Michael D. Vhay
Associate Justice

Dated: January 24, 2022