the landscaping business is often the more intense use because it may have a business office, employees and landscaping vehicles and equipment coming and going, as well as a storage yard where landscaping equipment and materials are stored and equipment is maintained. A nursery, on the other hand, may be limited to an area where plants are stored and watered until they can be used in the landscaping work.

- *Number of employees and work hours*: The number of employees assigned to a use may be a relevant consideration. Although in most cases one may expect that the accessory use will have fewer employees than the primary use, that is not always the case. For example, a primary equipment storage yard use may have a single employee assigned to work on storage-related activities. However, the maintenance of the stored equipment could be considered to be a permitted subordinate use, even though there are more employees performing equipment maintenance work.

- *Whether the use is truly subordinate to the primary use or whether it is a different, alternative, additional use*: The use must truly be subordinate to the primary use and not simply be a different, alternative or additional use. For example, in *Orion Sporting Group, LLC, supra*, the circuit court found that a proposed sporting clays facility was not subordinate to a hunting preserve because the evidence showed that the sporting clays facility was a different and alternative use for those who did not wish to participate in hunting. The court found that the sporting clays facility was a separate primary use of the property. In *McLane v. Wiseman*, 84 Va. Cir. 10 (2011), the court affirmed the decision of the BZA that the storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel was an alternative use to the residence, not a subordinate use, because of the landowner's purpose in having the vehicles and the area occupied or extent of the vehicles.

As part of this analysis, recognize that multiple uses on a parcel may each be classified as primary uses – some of which may be permitted in the zoning district, some of which may not be.

17-322 The use must be customarily incidental to the primary use

A landowner claiming that a use is accessory must next demonstrate that the use is *customarily incidental* to the primary use. Although the Virginia courts have not examined the meaning of this commonly used term, the courts from other states have considered it on numerous occasions. In general, a use that is *customarily incidental* to a primary use implies that the use flows from, naturally derives or follows as a logical consequence of, or is a normal and expected offshoot from the primary use. *Town of Alta v. Ben Hame Corporation*, 836 P.2d 797 (Utah Ct. App. 1992) (boarding houses, lodging houses, hotels are not accessory to permitted primary use in agricultural-residential zoning district). Some courts have said that the terms *customarily* and *incidental*, though often linked in definitions of *accessory use*, impose distinct requirements that warrant separate analysis.

17-323 The meaning of the word *customarily*

A *customarily* incidental use is one that has "commonly, habitually, and by long practice been established as reasonably associated with the primary . . . use." *Becker v. Town of Hampton Falls*, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977) (holding that a barn constructed to house heavy construction equipment on residentially zoned land was not accessory to primary residential use); *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn. 509, 264 A.2d 552 (1969); *Carmel v. City of Old Town*, 2001 Me. Super. LEXIS 24, 2001 WL 1719191 (2001); *McKinney v. Kent County Board of Adjustment*, 1995 Del. Super. LEXIS 83, 1995 WL 109032 (1995).

Although a rare association of uses cannot qualify as customary, the uses need not be joined in a majority of the instances of the primary use. *Town of Salem v. Durrett*, 125 N.H. 29, 480 A.2d 9 (1984); *Southco, Inc. v. Concord Township*, 552 Pa. 66, 713 A.2d 607 (1998) (a use may be customarily incidental to a primary use even where there is no evidence that a majority, or even a substantial number, of similar properties are engaged in a similar accessory use). However, the lawful occurrence of the use must be more than unique or rare. *Lawrence, supra.* The use must be "common enough so that it can be said to be a known and accepted incidental use." *County of Lake v. La Salle National Bank*, 76 Ill. App. 3d 179, 182, 395 N.E.2d 392, 394 (1979) (determining whether a trailer for a groundskeeper's sleeping quarters was accessory to the operation of a golf course). In other words, a use is *customarily* incidental "when it is so necessary or so commonly to be expected in connection with the main use that it cannot be

supposed that the ordinance was intended to prevent it." *Grandview Baptist Church v. Zoning Board of Adjustment*, 301 N.W.2d 704, 708-709 (1981) (holding that 32 by 42 foot steel storage building was not accessory to a church in a residential zoning district; of 50 churches examined, it was the only one with a steel storage building).

Common Factors to Consider in Determining Whether a Use is Customary
• The size of the parcel.
• The nature of the primary use of the parcel.
• The use made of the adjacent parcels.
• The economic structure of the area.
• Whether the proposed use is customary within the locality and the region.

Some of the factors that are relevant to determining *custom* are the size of the parcel in question, the nature of the primary use of the parcel, the use made of the adjacent parcels and the economic structure of the area. *Lawrence, supra.* The zoning administrator and the BZA need to determine whether the proposed use is customary within the locality and the region. For example, the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with a residential use include garages, swimming pools, decks, gazebos, small sheds and small-scale gardening; the kinds of uses that are commonly, habitually and by long practice established as uses that are reasonably associated with an agricultural use include barns, sheds, silos, the storage of farm equipment and machinery, and the raising of crops and livestock.

17-324 The meaning of the word *incidental*

The term *incidental* incorporates "the concept of [a] reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use." *Lawrence v. Zoning Board of Appeals of the Town of North Branford*, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969); *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 641 N.E.2d 1334 (1994) (gravel removal for commercial purposes was not accessory to a permitted agricultural use, even though the removal of the gravel would allow creation of a Christmas tree farm).

Survey of Uses Found to be and not to be Customarily Incidental	
Customarily Incidental	**Not Customarily Incidental**
Pigeon house customarily incidental to a family dwelling. *Wiley v. County of Hanover*, 209 Va. 153, 163 S.E.2d 160 (1968). Storage of decommissioned trucks as sources of parts customarily incidental to a milk trucking. *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 587 A.2d 1205 (1991). Crematorium customarily incidental to a cemetery. *McCormick v. City of Alexandria Bd. of Zoning Appeals*, 5 Va. Cir. 313 (1986); *Laurel Lawn Cemetery Association v. Zoning Board of Adjustment of Township of Upper Deerfield*, 226 N.J. Super. 649, 545 A.2d 253 (1988). Stone crushing customarily incidental to a quarry. *James H. Maloy, Inc. v. Town Board of Guilderland*, 92 A.D. 2d 1056, 461 N.Y.S.2d 529 (1983).	Sporting clays facility not customarily incidental to a hunting preserve. *Orion Sporting Group, LLC v. Board of Supervisors of Nelson County*, 68 Va. Cir. 195 (2005). Storage and maintenance of inoperable or junk vehicles on a residentially-zoned parcel not customarily incidental to residential use given the purpose for the vehicles and the area occupied by the vehicles. *McLane v. Wiseman*, 84 Va. Cir. 10 (2011). Outside storage of goods, materials, and equipment composed of appliances, pieces of wood, pipes, and other miscellaneous items, on property zoned Retail Commercial was not customarily incidental to a primary use because it was not stock or inventory of the business. *Vaughn v. City of Newport News*, 20 Va. App. 530, 531-532, 458 S.E.2d 591, 591-592 (1995) Proposed garage and storage facilities that would be 41% the floor spaces of the four apartments they would purportedly serve were not accessory where the average in the city for storage space was less than 10% of the floor space and, therefore, the proposed garage and storage facilities were not a customary or incidental use. *Gavis v. Board of Zoning Appeals of the City of Winchester*, 1985 WL 306753 (1985). Parking 18-wheel truck overnight and on weekends at owner's home on residentially-zoned land not customarily incidental to a residential use. *Whaley v.*

Survey of Uses Found to be and not to be Customarily Incidental	
Customarily Incidental	**Not Customarily Incidental**
Heliport customarily incidental to a construction business. *State v. P.T. & L. Construction Co., Inc.*, 77 N.J. 20, 389 A.2d 448 (1978). Toilet customarily incidental to a campground. *Hardy v. Zoning Board of Review of Town of Coventry*, 119 R.I. 533, 382 A.2d 520 (1977). Restaurant customarily incidental to a bowling alley. *Gross v. Zoning Board of Adjustment of City of Philadelphia*, 424 Pa. 603, 227 A.2d 824 (1967). Day care center operated "for the instruction and education of the children who attend," and which was "viewed by the pastor, by the employees, and presumably by those who have chosen for their children to attend, as in fact an extension of the ministry" of the church, was customarily incidental to the church use. *Harvest Christian Center v. King George County Board of Zoning Appeals*, 55 Va. Cir. 279 (2001).	*Dorchester County Zoning Board of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1994). Boarding houses, lodging houses, hotels not customarily incidental to a permitted primary use in agricultural-residential zoning district. *Town of Alta v. Ben Hame Corporation*, 836 P.2d 797 (Utah Ct. App. 1992). Barn constructed to house heavy construction equipment on residentially zoned land not customarily incidental to a residential use. *Becker v. Town of Hampton Falls*, 117 N.H. 437, 441, 374 A.2d 653, 655 (1977). 32 by 42 foot steel storage building not customarily incidental to a church in a residential zoning district. *Grandview Baptist Church v. Zoning Board of Adjustment*, 301 N.W.2d 704 (1981). Sleeping quarters for employees not customarily incidental to a restaurant. *Charlie Brown of Chatham, Inc. v. Board of Adjustment for Chatham Township*, 202 N.J. Super. 312, 495 A.2d 119 (App. Div. 1985). Shredding and storage of aluminum not customarily incidental to a beer business. *Wegner Auto Co., Inc. v. Ballard*, 353 N.W.2d 57 (S.D. 1984). Used car lot not customarily incidental to an auto repair shop. *Fleury v. Town of Essex Zoning Board of Adjustment*, 141 Vt. 411, 449 A.2d 958 (1982). Pharmacy not customarily incidental to a doctor's office. *In re Porter Medical Associates Use Change Permit*, 139 Vt. 132, 423 A.2d 491 (1980). Restaurant serving alcohol not customarily incidental to an office use. *Tollway North Office Center Central National Bank in Chicago v. Streicher*, 83 Ill. App. 3d 239, 403 N.E.2d 1246 (2d Dist. 1980). Tire storage not customarily incidental to a retail tire store. *Hopewell Township v. Wilson*, 46 Pa. Commw. 442, 406 A.2d 612 (1979).

17-330 An accessory use may not become a lawful nonconforming primary use

An accessory use may not become a lawful nonconforming primary use. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979). *See chapter 18 for a discussion of nonconforming uses.*

In *Knowlton*, the owners had operated a hog farm, and garbage was hauled onto the property to feed the hogs. In 1959, Fairfax County enacted a zoning ordinance that permitted hog farming, but did not permit the general trucking business, which therefore became a nonconforming use. Eventually, the hog farm use terminated, but a waste hauling operation continued and expanded over the years. One of the questions the Virginia Supreme Court considered was whether the waste hauling operation was a nonconforming primary use, since it had begun as an accessory function of the hog farm. The Court stated: "It is true that trash collection . . . was related to the hog raising operation permitted by the ordinance. But a use accessory or incidental to a permitted use 'cannot be made the basis for a nonconforming principal use.'" *Knowlton*, 220 Va. at 575-576, 260 S.E.2d at 236.

In *Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County*, 7 Va. Cir. 201 (1983), the circuit court concluded that a crusher that was accessory to a nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use.