

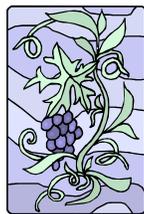


NEW HAMPSHIRE OFFICE OF ENERGY & PLANNING
2014 Spring Conference
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NEW HAMPSHIRE MUNICIPAL LAWYERS ASSOCIATION
CREAN LEGAL EDUCATION

Agriculture, “Agritourism” & Local Land Use Controls Developments & Guidance

- ❖ ***Statutory Language & Legislative Policy***
- ❖ ***“Agritourism” & Determining Whether Activities Are Ancillary to Farm Operations***
- ❖ ***Selected Urban & Suburban Activities:
“Backyard Chickens,” “Front Yard Gardens,”
& “Pot Bellied Pigs”***
- ❖ ***Large-Scale Agricultural Uses and Land Use Controls***



***Agriculture, “Agritourism” & Local Land Use Controls
Topics & Speakers***

***Session 1. Statutory Language & Legislative Policy
Attorney Daniel Crean***

***Session 2. Agritourism: Statutes and Ordinance Language Applied
Attorney Michael Donovan***

***Session 3. Urban & Suburban Agriculture: Selected Issues
Front Yard Gardens, Back Yard Chickens & Pot Bellied Pigs
Attorney Daniel Crean***

***Session 4. Large-Scale Agriculture and Land Use Controls
Attorney Daniel Crean***

Presenter Biographies

Daniel D. Crean, Crean Law Office, Pembroke, New Hampshire

Dan Crean has practiced municipal law for more than thirty-five years and has been on the adjunct faculty of the University of New Hampshire Law School and graduate school. He was multi-term officer of the N.H. Bar Association’s Municipal & Governmental Law Section, and founded the N.H. Municipal Lawyers Association, of which he is now Executive Director. He is N.H. State Chair for the International Municipal Lawyers Association (IMLA) and chairs its Personnel Section. He is an IMLA Fellow and received IMLA’s 2012 William Thornton Faculty Award. Dan has written for legal publications including *Municipal Lawyer* and the *New Hampshire Bar Journal*, wrote *Responding to Changes in Building and Zoning Codes*, in the 2009 publication [Municipal Building and Zoning Code Enforcement Best Practices](#), and contributed two chapters to the new ABA publication, [Town and Gown: Legal Strategies for Effective Collaboration](#). Dan is a veteran CLE panelist and regularly presents local government seminars. He has served as a Selectman and Regional Planning Commission Chair, and on Planning Boards, along with sundry other committees. He graduated from Yale University and the University of Wisconsin Law School.

Michael L. Donovan, Donovan Law Office, Concord, New Hampshire

Mike Donovan has practiced municipal law and planning and zoning law since 1986, and serves as counsel to several municipalities. He is a frequent litigator in superior courts and before the New Hampshire Supreme Court. His clients include municipalities, watershed associations and citizen groups. Mike is a member of the Municipal Law and Environmental Law sections of NH Bar Association and the NH Municipal Lawyers Association. He frequently Lectures on planning and zoning law at NH OSP Conferences and the UNH School of Continuing Education. Prior to opening his law practice, Mike was a planning consultant, a service which he continues to provide to municipalities and other attorneys. Mike was community development director and then mayor of Berlin, NH, and also served as mayor of Concord, NH. He supervised the planning assistance program for the Montgomery (PA) County Planning Commission.

Session 1: Statutory Language & Legislative Policy
Attorney Daniel D. Crean

A. Police Power v. Zoning Power. In reviewing local government authority to regulate agricultural uses in New Hampshire, the starting point – as with all delegated police powers – is statutory language. As the issues associated with agriculture primarily involve land use, this seminar focuses on NH RSA Title LXIV (chapters 672-677). To the extent, however, that local governments may seek to regulate very specific, non-general aspects of agriculture, it is possible that the general police power enabling statute may provide some authority.

Thus, the following provisions of RSA 31:39, I, might be deemed to provide that authority:

- (a) The care, protection, preservation and use of the public cemeteries, parks, commons, libraries and other public institutions of the town;
- (b) The prevention of the going at large of horses and other domestic animals in any public place in the town;
- ...
- (e) The kindling, guarding and safekeeping of fires, and for removing all combustible materials from any building or place, as the safety of property in the town may require;
- (f) The collection, removal and destruction of garbage, snow and other waste materials;
- ...
- (j) Regulating the sanitary conditions of restaurants within town limits in accordance with the provisions of RSA 147:1;
- (k) Issuing a license for the operation of a restaurant and other food serving establishments within the town limits and charging a reasonable fee for same;
- ...
- (n) Regulating noise.

While these laws might be viewed as permitting municipal regulation of agricultural activities, there are rules of statutory interpretation and construction that limit the adoption of ordinances that broadly affect activities that come within the scope of agriculture, particularly as defined in the land use title (RSA 672:1, described below).

Among these principles are the following:

- A specific statute usually takes preferences over a more general statute;
- Statutes pertaining to a general subject are read so as to give effect to their purpose when possible.

Thus, RSA 31:39, I (b) allows adoption of an ordinance to regulate the time, place, and manner in which horses can travel on the town common, but it cannot authorize adoption of an ordinance defining areas in the municipality where horses may be kept, as RSA 21:34-a, II (a) (5) includes various equine-related activities under the broad umbrella of agriculture, and RSA 672:1, III-b's policy statements imply that agriculture, if regulated, should be regulated as a land use.

Similarly, a municipality might seek to use the general municipal police power statute to adopt a noise control ordinance that seeks to bar the keeping of any livestock or poultry. At some point, however, it is likely that any broad application of that ordinance would interfere with the policy set forth in RSA 672 to the effect that local governments may not use land use authority to unreasonably interfere with activities deemed by the legislature to be important interests.

In addition to these “canons” of statutory construction, case law has stated that municipalities (a) may not use the general police power to comprehensively regulate land uses, but must use the zoning enabling law;¹ and (b) may not do indirectly that which they cannot do directly.²

B. Legislative Policy & Preemptive Effect. The legislature, of course, has the right to preempt local control, including control of land use. On occasion, the legislature chooses to do so directly in the law.³ On other occasions, it has been the courts which have looked at statutes and statutory schemes and have determined that the legislature intended to limit or even prohibit local government action within a particular sphere of regulation.

Preemption exists in many areas and can be imposed by both state and federal action.⁴

Of note in New Hampshire is the fairly recent practice of the legislature to insert “policy” statements into statutes. A cynic might suggest that the legislature utilizes this practice to inhibit local regulation without expressly stating it intends to preempt local regulatory authority, as it may be politically dangerous for legislators to be seen as limiting local government. Examples of these policy statements can be found in RSA 672:1 with respect to matters such as renewable energy, commercial and recreational fisheries, and day care. The full extent of the meaning of these policy statements and the exhortation that local land use powers should not be used or interpreted unreasonably so as to interfere with recognition of these valued activities have yet to fully be evaluated and determined by the New Hampshire court system.

These purpose statements, along with the statutory definition of agritourism (as discussed by Attorney Donovan) are as follows:

NH RSA 672:1. Declaration of Purpose. The general court hereby finds and declares that:

III-b. Agriculture makes vital and significant contributions to the food supply, the economy, the environment and the aesthetic features of the state of New Hampshire, and the tradition of using

¹ See, e.g., *Bisson v. Milford*, 109 N.H. 287 (1969) and *Beck v. Raymond*, 118 N.H. 793 (1978).

² See, e.g., *Beck v. Raymond*, *Ibid.*, and *Casperson v. Lyme*, 139 N.H. 637 (1995).

³ See, generally, Loughlin, 15 *New Hampshire Practice*, *Land Use Planning and Zoning*, Chapter 12.

⁴ Mention should be made that the federal government also may seek to limit local government regulatory power. Notable examples include the Telecommunications Act and Religious Land Use and Institutionalized Persons Act (RLUIPA). In the agricultural context, federal and state laws may affect local government authority in areas such as pesticide use and bio-solid land application. However, these subjects are beyond the scope of this seminar, other than to note that the preemption doctrine has application here.

the land resource for agricultural production is an essential factor in providing for the favorable quality of life in the state. Natural features, terrain and the pattern of geography of the state frequently place agricultural land in close proximity to other forms of development and commonly in small parcels. Agricultural activities are a beneficial and worthwhile feature of the New Hampshire landscape and shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers.

III-c. Forestry, when practiced in accordance with accepted silvicultural principles, constitutes a beneficial and desirable use of New Hampshire's forest resource. Forestry contributes greatly to the economy of the state through a vital forest products industry; and to the health of the state's forest and wildlife resources through sustained forest productivity, and through improvement of wildlife habitats. New Hampshire's forests are an essential component of the landscape and add immeasurably to the quality of life for the state's citizens. Because New Hampshire is a heavily forested state, forestry activities, including the harvest and transport of forest products, are often carried out in close proximity to populated areas. Further, the harvesting of timber often represents the only income that can be derived from property without resorting to development of the property for more intensive uses, and, pursuant to RSA 79-A:1, the state of New Hampshire has declared that it is in the public interest to encourage preservation of open space by conserving forest and other natural resources. Therefore, forestry activities, including the harvest and transport of forest products, shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers;

III-d. For purposes of paragraphs III-a, III-b, III-c, and III-e, "unreasonable interpretation" includes the failure of local land use authorities to recognize that agriculture, forestry, renewable energy systems, and commercial and recreational fisheries, when practiced in accordance with applicable laws and regulations, are traditional, fundamental and accessory uses of land throughout New Hampshire, and that a prohibition upon these uses cannot necessarily be inferred from the failure of an ordinance or regulation to address them; . . .

NH RSA 21:34-a. Farm, Agriculture, Farming.

I. The word "farm" means any land, buildings, or structures on or in which agriculture and farming activities are carried out or conducted and shall include the residence or residences of owners, occupants, or employees located on such land. Structures shall include all farm outbuildings used in the care of livestock, and in the production and storage of fruit, vegetables, or nursery stock; in the production of maple syrup; greenhouses for the production of annual or perennial plants; and any other structures used in operations named in paragraph II of this section.

II. The words "agriculture" and "farming" mean all operations of a farm, including:

- (a) (1) The cultivation, conservation, and tillage of the soil.
- (2) The storage, use of, and spreading of commercial fertilizer, lime, wood ash, sawdust, compost, animal manure, septage, and, where permitted by municipal and state rules and regulations, other lawful soil amendments.
- (3) The use of and application of agricultural chemicals.
- (4) The raising and sale of livestock, which shall include, but not be limited to, dairy cows and the production of milk, beef animals, swine, sheep, goats, as well as domesticated strains of buffalo or bison, llamas, alpacas, emus, ostriches, yaks, elk (*Cervus elephus canadensis*), fallow deer (*Dama dama*), red deer (*Cervus elephus*), and reindeer (*Rangifer tarandus*).
- (5) The breeding, boarding, raising, training, riding instruction, and selling of equines.
- (6) The commercial raising, harvesting, and sale of fresh water fish or other aquaculture

products.

- (7) The raising, breeding, or sale of poultry or game birds.
- (8) The raising of bees.
- (9) The raising, breeding, or sale of domesticated strains of fur-bearing animals.
- (10) The production of greenhouse crops.
- (11) The production, cultivation, growing, harvesting, and sale of any agricultural,

floricultural, viticultural, forestry, or horticultural crops including, but not limited to, berries, herbs, honey, maple syrup, fruit, vegetables, tree fruit, grapes, flowers, seeds, grasses, nursery stock, sod, trees and tree products, Christmas trees grown as part of a commercial Christmas tree operation, trees grown for short rotation tree fiber, compost, or any other plant that can be legally grown and harvested extensively for profit or subsistence.

(b) Any practice on the farm incident to, or in conjunction with such farming operations, including, but not necessarily restricted to:

- (1) Preparation for market, delivery to storage or to market, or to carriers for transportation to market of any products or materials from the farm.
- (2) The transportation to the farm of supplies and materials.
- (3) The transportation of farm workers.
- (4) Forestry or lumbering operations.
- (5) The marketing or selling at wholesale or retail, on-site and off-site, where permitted by local regulations, any products from the farm.
- (6) Irrigation of growing crops from private water supplies or public water supplies where not prohibited by state or local rule or regulation.
- (7) The use of dogs for herding, working, or guarding livestock, as defined in RSA 21:34-a, II(a)(4).
- (8) The production and storage of compost and the materials necessary to produce compost, whether such materials originate, in whole or in part, from operations of the farm.

III. A farm roadside stand shall remain an agricultural operation and not be considered commercial, provided that at least 35 percent of the product sales in dollar volume is attributable to products produced on the farm or farms of the stand owner.

IV. Practices on the farm shall include technologies recommended from time to time by the university of New Hampshire cooperative extension, the New Hampshire department of agriculture, markets, and food, and appropriate agencies of the United States Department of Agriculture.

V. The term "farmers' market" means an event or series of events at which 2 or more vendors of agricultural commodities gather for purposes of offering for sale such commodities to the public. Commodities offered for sale must include, but are not limited to, products of agriculture, as defined in paragraphs I-IV. "Farmers' market" shall not include any event held upon any premises owned, leased, or otherwise controlled by any individual vendor selling therein.

VI. The term "agritourism" means attracting visitors to a working farm for the purpose of eating a meal, making overnight stays, enjoyment of the farm environment, education on farm operations, or active involvement in the activity of the farm which is ancillary to the farm operation.

And the Legislature Is “At It” Again – Or Is It?

2013 SB 141 (see Appendix 1 for full text as of 4/7/14) has the purpose of “establishing the Granite State farm to plate program.” As of the date of the writing of this paper, the bill had passed the

Senate in amended form and is now pending in the House. It creates a new section in RSA chapter 425, which contains laws pertaining to the Department of Agriculture, Markets and Food. Unlike some of the other policy statutes mentioned in this paper, it is not located in the land use title, as are other statutes stating policy with respect to local government land use powers. Bill sponsors and supporters have appeared to state it “merely” sets forth a policy statement seeking to encourage New Hampshire’s local farm economy and environment, as follows:

I. It is the policy of the state of New Hampshire through the department of agriculture, markets, and food and in conjunction with other state agencies to encourage and support local food producers, farming, and fisheries including businesses engaged in agriculture, the raising and care of livestock, dairy, fishing, foraging, and aquaculture, agritourism, and the associated local and regional businesses that process, purchase, distribute, and sell such food throughout the state.

The bill continues by adding paragraph II to state that state agencies “shall strive for inter-agency cooperation as well as cooperation with public and private entities to foster local, state, and regional food systems that adhere to the Granite State farm to plate principles below.” The legislation then lists those principles in eleven separate subparagraphs, including this language:

(g) Economic development opportunities among New Hampshire’s cities and towns are facilitated by **harmonizing local and state law and removing obstacles and excessive financial burdens** to farms and associated businesses, including farmers’ markets, cooperatives, food hubs, fisheries, and processing centers (emphasis added).

The bill concludes with the following, which is the only other direct mention of local government and land use controls:

III. To the extent possible, local governments shall consider the policy and principles of this section when adopting local law, or when enforcing existing law and regulation.

This is neither a direct preemption nor a specific limitation on local government land use controls as they apply to local government. Nor is it “just another” listing of favored actions or conduct listed in RSA 672:1 which “shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers.”

The exact meaning of this language, if enacted into law, truly is not clear. On one hand, all that the legislation states is the local governments shall **consider** the state policy and principles in adopting and enforcing laws and regulations. Policy statements, though, have led courts, including the New Hampshire Supreme Court, to imply certain consequences that have resulted in limiting or preempting local government land use controls even when specific language does not so state.⁵ Whether such a conclusion would result here, of course, has yet to be determined.

⁵ Examples are not hard to find: *Region 10 Client Mgt., Inc. v. Hampstead*, 120 N.H. 885 (1980); *Stablex Corp. v. Hooksett*, 122 N.H. 983 (1982); *Beck v. Raymond*, 118 N.H. 793 (1978).

Trying to predict the future is always risky – particularly when trying to predict how a court will view legislative policy statements. As mentioned above, lawyers and others seek to “read the tea leaves” by applying canons of statutory construction. Several may apply here:

- The legislature is presumed not to enact meaningless laws.
- When the legislature uses language different from that contained in similar laws, it may be reasonable to believe it intends a different meaning or result.
- The legislature is presumed to be aware of laws “on the books” when it enacts new laws, so enacting a new law that is merely repetitive of existing laws is not a favored interpretation.

Thus, any attempt to ascribe specific intent and meaning to SB 141 may be difficult at best – at least until we receive some judicial guidance or the legislature speaks with greater clarity.