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OFFICE OF ENERGY AND PLANNING SEMINAR

LOCAL REGULATION OF AGRITOURISM AND AGRICULTURE

Barton L. Mayer, Esquire

INTRODUCTION

The debate over "agritourism" has aroused a considerable amount of passion. What is agritourism? Where is it permitted? Is it subject to any regulation? Agritourism can provide a real benefit to our local farms. At the same time, agritourism can have a very real impact on abutters and towns. Each town and city must chart its own course. Clearly, a balance is required.

Statutory Definition

NEW – RSA 21:34-a, II(b)(5)

The marketing or selling at wholesale or retail, *of* any products from the farm, *on-site and off-site, where not prohibited by local regulations. Marketing includes agritourism, which means attracting visitors to a farm to attend events and activities that are accessory uses to the primary farm operation, including, but not limited to, eating a meal, making overnight stays, enjoyment of the farm environment, education about farm operations, or active involvement in the activity of the farm.*

OLD – RSA 21:34-a, 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.

SIGNIFICANT CHANGES

1. Agritourism is now incorporated in the definition of “agriculture and farming.” In Forster v. Town of Henniker, 166 N.H. 745 (2015), the Supreme Court concluded under the old definition, “even if we assume that the petitioner’s proposed use constitutes ‘agritourism’ the plain meaning of RSA 21:34-a does not provide that they also constitute ‘agriculture’”.
2. “Agritourism” is now a species of “marketing or selling.” (“Marketing includes agritourism...”).
3. The previous definition referred to agritourism activities as being “ancillary to the farm operation.” Now, agritourism activities are “accessory uses to the primary farm operation.” “Accessory use” is a concept that is familiar to local land use boards, and there is an extensive body of law that can inform decision-makers. (See below).
4. The new definition expressly vests in towns and cities the discretion to prohibit agritourism. (“...where not prohibited by local regulations...”); but see RSA 674:32-d (see below).

REGULATORY REGIME

ACCESSORY USE AND ZONING

Although the case of Forster v. Henniker received a good deal of publicity, it really did not address the central question: what is agritourism? Rather, it focused on whether the plaintiff’s proposed uses were “accessory uses” under the terms of the Town of Henniker Zoning Ordinance. Since the legislature has clarified the definition, Forster provides excellent guidance to local officials.

“An ‘accessory use’ has been defined as ‘one which is dependent on or pertaining to the permitted principal use,’ i.e. a subordinate use of the property ‘occasioned by the main use, and incident to it, rather than a principal use of itself.’” Gratton v. Pellegrino, 115 N.H. 619, 621

(1975) (citations omitted). As the Supreme Court observed in Forster, above at 758, “an accessory use is not the principal use of the property, but rather a use occasioned by the principal use and subordinate to it.” Fox v. Town of Greenland, 151 N.H. 600, 606 (2004). “Because a zoning ordinance cannot specifically provide for every lawful use, the rule of accessory use recognizes that owners may employ land in some ways the ordinance does not expressly permit.... A zoning ordinance itself sometimes defines ‘accessory use,’ but where the ordinance is silent, courts apply the common law definition.” Treisman v. Town of Bedford, 132 N.H. 54, 59 (1989). The common element of all accessory uses is that they must be a subordinate, rather than a principal use of the property. *Id.* A local ordinance may provide for accessory uses and supply its own standards. The common law provides for accessory uses when an ordinance is silent on the subject. Under the common law, an accessory use must be occasioned by the principal use but be subordinate to it. It may not be the principal use of the property. In addition, it must also be customarily associated with the principal use; i.e., “habitually...established as reasonably associated with the principal use.” Becker v. Hampton Falls, 117 N.H. 437 (1977).

“The definition of accessory use in the [town] ordinance involves several distinct elements. See, Becker v. Town of Hampton Falls, 117 N.H. 437, 440 (1977) (discussing an ordinance that defined accessory use as those that are ‘customarily incidental and subordina[te]’ (quotation omitted)). ‘[I]ncidental’ and ‘subordinate’ incorporate the requirement that the accessory use be minor in relation to the primary use and that it bear a reasonable relationship to that use. ...‘[C]ustomarily’ imposes an additional requirement that the accessory use ‘has commonly, habitually and by long practice been established as reasonably associated with the primary...use’ in the local area. Becker, 117 N.H. at 441 (referring to ‘local custom’); see Town of Windham v. Alford, 129 N.H. 24, 29 (1986). ‘While the strength or degree of the customary or habitual association does not lend itself to definition by formula, and while the combination need not occur in a majority of instances of the principal use, the uses must be associated with a frequency that is substantial enough to rise above rarity.’ Alford, 129 N.H. at 29 (citation omitted). Forster v. Town of Henniker, 167 N.H. at 758.

RSA 21:34-a, II(b)(5) provides a helpful list of examples of agritourism, including, “attracting visitors to a farm to attend events and activities that are accessory uses to the primary

farm operation, including but not limited to: eating meals, making overnight stays, enjoyment of the farm environment, education of farm operations, or active involvement in the activity of the farm.” This list of practices is not all-inclusive, but the courts will construe the general words in that subpart “to embrace only practices similar to those included in the enumerated list.” Forster v. Town of Henniker, 167 N.H. at 752. One commentator has observed:

And farm opportunities, in particular, are enticing, making the link to experiencing heritage and local culture. The ability of the farm operator to offer activities **such as corn mazes, haunted hayrides, farm stays and meals, barn tours, petting farms, harvest your own apples or Christmas trees, and so on – the list goes on**, is important to many, not only to draw people to the farms so they can ultimately purchase local products, but the income generated directly from these activities themselves are important in the operation of the farm business. People willingly pay to get lost in the corn fields these days.

This commentator went on to note:

At the time the Bill was discussed, there was concern expressed about activities going “too far” and business becoming too focused on the event or activity and less on the farm – concern that some might use this as a back door around local zoning to start something that had little to do with the farm. The definition states that agritourism activities are ancillary to the farm. In other words, the farm business is the main enterprise and agritourism is secondary. Examples of current agritourism activities include corn mazes, farm animal petting areas, pony rides, wagon/sleigh rides (some with seasonal themes like Halloween, Christmas, etc.), even pick your own berries, apples, etc. can be agritourism. Income from agritourism has become vital to many operations.

In determining whether an agritourism activity is an accessory one, local land use boards may wish to consider the following:

1. The duration of the agritourism activity;
2. The extent of the agritourism activity in terms of space, time and size, in comparison to the principal agricultural use;
3. Whether the agritourism activity is a principal use in itself;
4. Increase in traffic, parking problems, truck deliveries;
5. Signage and advertising;
6. Impacts on abutting properties.

It would appear that there should be a “causal *nexus*” between the agricultural activity and the agritourism activity. In determining whether an agritourism activity is customarily associated with the principal agricultural use, local land use boards should consider whether the use has commonly, habitually, and by long practice been established as reasonably associated with the primary use **in the local area**. The local area would appear to extend beyond the boundaries of the Town.

STATUTORY AUTHORITY

In Forster v. Town of Henniker, the plaintiff argued the definition of agritourism impliedly pre-empted local ordinances and regulations. Implied pre-emption may be found when the comprehensiveness and detail of the state statutory scheme evinces legislative intent to supersede local regulation. The court rejected this proposition, noting that the statutes cited by the plaintiff, including RSA 672:1, III-b, RSA 672:1, III-d, RSA 674:32-b and RSA 674:32-c do not support the conclusion that the regulatory authority of local government had been superseded. As the court observed:

RSA 672:1, III-b precludes municipalities from unreasonably limiting “[a]gricultural activities” and from unreasonably interpreting their municipal powers. RSA 672:1, III-d explains that a municipality unreasonably interprets its regulatory powers when it fails “to recognize that agriculture...when practiced in accordance with applicable laws and regulations, [is a] traditional, fundamental, and accessory use [] of land throughout New Hampshire, and that a prohibition upon [that] use [] cannot necessarily be inferred from the failure of an ordinance...to address [it].” Consistent with the notion that one cannot necessarily infer that an ordinance prohibits agricultural uses when the ordinance fails to address them, RSA 674:32-a provides that when “agricultural activities are not explicitly addressed with respect to any zoning district or location, they shall be deemed to be permitted there, as either a primary or accessory use, so long as conducted in accordance with federal and state laws, regulations, and rules.”

Forster v. Town of Henniker, 167 N.H. at 757-58. As “agritourism” is now considered an agricultural use, each of these statutes must be considered.

RSA 672:1, 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 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. *Agritourism, as defined in RSA 21:34-a, is undertaken by farmers to contribute to both the economic viability and the long-term sustainability of the primary agricultural activities of New Hampshire farms. Agricultural activities and agritourism [and] shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers.*

RSA 672:1, 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 and agritourism as defined in RSA 21:34-a, 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.**

Note that a "prohibition upon these uses cannot necessarily be inferred from the failure of an ordinance or regulation to address them." This means that the town must identify with specificity where agritourism, and agriculture are permitted **and prohibited**.

This provision is similar to the provisions of RSA 674:16, V which establishes that aircraft takeoffs and landings are a valid and permitted use, "[u]nless specifically proscribed by local land use regulation." This is a deviation from the general rule that the common variety of zoning ordinance is "permissive" in nature and that it "prohibits uses for which it does not provide permission." Treisman v. Kamen, 126 N.H. at 375. "[T]he statute clearly states that aircraft takeoffs and landings on private land are valid and permitted accessory uses unless specifically proscribed by local ordinance. Spengler v. Porter, 144 N.H. 163, 165 (1999). Thus,

even if a zoning is permissive, it will not be deemed to prohibit the use of land for aircraft landings and takeoffs merely because it fails to list this use as a permitted use. Rather, if a municipality wishes to prohibit the use of land for this purpose, the statute provides that it must specifically proscribe the use of land for this purpose.

Now, all of this is equally true with respect to the uses of property for agriculture and agritourism. Consequently, each town must decide where these uses are appropriate and where they are not, and specifically prohibit them in the areas where they are not. See RSA 674:32-a (“Presumption. In accordance with RSA 672:1, III-d whenever agricultural activities are not explicitly addressed with respect to any zoning district or location, they shall be deemed to be permitted there, as either a primary or accessory use, so long as conducted in accordance with best management practices adopted by the Commissioner of Agriculture, Markets and Food and with Federal and State laws, regulations, and rules.”)

RSA 674:32-b

Existing agricultural uses. Any agricultural use which exists pursuant to RSA 674:32-a may, without restriction, be expanded, altered to meet changing technology or markets, or change to another agricultural use, as set forth in RSA 21:34-a, so long as any such expansion, alteration, or change complies with all federal and state laws, regulations, and rules, including best management practices adopted by the Commissioner of Agriculture, Markets, and Foods; subject, however, to the following limitations:

- i. Any new establishment, re-establishment after disuse, or a significant expansion of the an operation involving the keeping of livestock, poultry, or other animals, may be made subject to a special exception, building permit, or other land use board approval.
- ii. Any new establishment, re-establishment after disuse, or significant expansion of a farm stand, retail operation, or other use involving on-site transactions with the public, **including agritourism as defined in RSA 21:34-a, may be made subject to applicable to special exception, building permit, or other local land use board approval and may be regulated to prevent traffic and parking from adversely impacting adjacent property, streets and sidewalks, or public safety.**

Again, the Tonnesen case provides guidance. In that case, the plaintiff asserted that RSA 674:16, VI required the Town either to prohibit use of land for aircraft landings and takeoffs outright or to permit it as a matter of right. The court rejected this thesis. “[A] town need *not* completely prohibit use of land for aircraft landings and takeoffs *or* permit this use as of right, but *may* ‘regulate and control’ use of land for this purpose.” Tonnesen v. Town of Gilmanton, 156 N.H. at 816. Thus, where appropriate, a town may permit agritourism by special exception, and subject to the requirement that the applicant demonstrate that various operating standards can be satisfied.

Note the statute addresses the establishment, re-establishment or significant expansion of an agritourism activity. Besides a special exception, “other local land use board approval[s]” may be required.” For example, a planning board could define a change in use as converting an open field to an activity involving on-site transactions with the public. See RSA 674:43 (a planning board may be authorized to “review and approve or disapprove site plans for the development or change or expansion of use of tracts for non-residential uses”).

RSA 674:32-d

Agritourism permitted. Agritourism, as defined in RSA 21:34-a, shall not be prohibited on any property where the primary use is for agriculture, subject to RSA 674:32-b, II.

This is a new statute. Depending on how one reads its provisions, it presents an obvious conflict with other statutes previously referenced. The definition of agritourism specifically states “where not **prohibited** by local regulations.” Similarly, RSA 672:1, II-d states “that a **prohibition** upon these uses cannot necessarily be inferred from the failure of an ordinance of regulation to address them.” The clear import of these clauses is that agricultural uses and agritourism may be prohibited.

Another way to interpret the language is to understand that agritourism is an accessory use to agriculture. As such, if the primary use is agriculture, agritourism permitted by right, since it is an accessory use. That would suggest that municipalities will need to consider carefully where agriculture is appropriate and where it is to be prohibited; keeping in mind the potential use for agritourism.

Somehow, this analysis seems inadequate, and that means the Supreme Court will inevitably be required to resolve the question.

RSA 674:44-e – Agricultural Commissions

This statute allows for the creation of an agricultural commission. A commission may be a useful tool in assisting the planning board in developing zoning ordinances and regulations defining permitted locations for agriculture and the scope of local regulations.

SB 345 - VERSION ADOPTED BY BOTH BODIES

03/17/2016 0962s
20Apr2016... 1286h
06/01/2016 2029EBA

2016 SESSION

16-2697
08/09

SENATE BILL **345**

AN ACT relative to the definition of agritourism.

SPONSORS: Sen. Boutin, Dist 16; Sen. Birdsell, Dist 19; Sen. Daniels, Dist 11; Sen. Feltes, Dist 15; Sen. Fuller Clark, Dist 21; Sen. Hosmer, Dist 7; Sen. Morse, Dist 22; Sen. Reagan, Dist 17; Sen. Sanborn, Dist 9; Sen. Soucy, Dist 18; Sen. Stiles, Dist 24; Sen. Watters, Dist 4; Sen. Woodburn, Dist 1; Rep. Cushing, Rock. 21; Rep. Luneau, Merr. 10; Rep. Moffett, Merr. 9

COMMITTEE: Public And Municipal Affairs

ANALYSIS

This bill defines agritourism and permits agritourism activities on any property where the primary use is agricultural.

.....

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 345 - VERSION ADOPTED BY BOTH BODIES

03/17/2016 0962s
20Apr2016... 1286h
06/01/2016 2029EBA

16-2697
08/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Sixteen

AN ACT relative to the definition of agritourism.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Agritourism; Definition. Amend RSA 21:34-a, II(b)(5) to read as follows:

2 (5) The marketing or selling at wholesale or retail, [~~on-site and off-site, where~~
3 ~~permitted by local regulations,~~] **of** any products from the farm, **on-site and off-site, where not**
4 **prohibited by local regulations. Marketing includes agritourism, which means attracting**
5 **visitors to a farm to attend events and activities that are accessory uses to the primary**
6 **farm operation, including, but not limited to, eating a meal, making overnight stays,**
7 **enjoyment of the farm environment, education about farm operations, or active**
8 **involvement in the activity of the farm.**

9 2 Agritourism; Purposes of Zoning Laws. Amend RSA 672:1, III-b to read as follows:

10 III-b. Agriculture makes vital and significant contributions to the food supply, the economy,
11 the environment and the aesthetic features of the state of New Hampshire, and the tradition of
12 using the land resource for agricultural production is an essential factor in providing for the
13 favorable quality of life in the state. Natural features, terrain and the pattern of geography of the
14 state frequently place agricultural land in close proximity to other forms of development and
15 commonly in small parcels. Agricultural activities are a beneficial and worthwhile feature of the
16 New Hampshire landscape. **Agritourism, as defined in RSA 21:34-a, is undertaken by**
17 **farmers to contribute to both the economic viability and the long-term sustainability of the**
18 **primary agricultural activities of New Hampshire farms. Agricultural activities and**
19 **agritourism** [~~and~~] shall not be unreasonably limited by use of municipal planning and zoning
20 powers or by the unreasonable interpretation of such powers;

21 3 Agritourism. Amend RSA 672:1, III-d to read as follows:

22 III-d. For purposes of paragraphs III-a, III-b, III-c, and III-e, "unreasonable interpretation"
23 includes the failure of local land use authorities to recognize that agriculture **and agritourism as**
24 **defined in RSA 21:34-a**, forestry, renewable energy systems, and commercial and recreational
25 fisheries, when practiced in accordance with applicable laws and regulations, are traditional,
26 fundamental and accessory uses of land throughout New Hampshire, and that a prohibition upon
27 these uses cannot necessarily be inferred from the failure of an ordinance or regulation to address
28 them;

29 4 Agritourism; Existing Agricultural Uses. Amend RSA 674:32-b, II to read as follows:

30 II. Any new establishment, re-establishment after disuse, or significant expansion of a farm

SB 345 - VERSION ADOPTED BY BOTH BODIES

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1 stand, retail operation, or other use involving on-site transactions with the public, *including*
2 *agritourism as defined in RSA 21:34-a*, may be made subject to applicable special exception,
3 building permit, or other local land use board approval and may be regulated to prevent traffic and
4 parking from adversely impacting adjacent property, streets and sidewalks, or public safety.

5 5 New Section; Agritourism Permitted. Amend RSA 674 by inserting after section 32-c the
6 following new section:

7 674:32-d Agritourism Permitted. Agritourism, as defined in RSA 21:34-a, shall not be
8 prohibited on any property where the primary use is for agriculture, subject to RSA 674:32-b, II.

9 6 Repeal. RSA 21:34-a, VI, relative to the definition of agritourism, is repealed.

10 7 Existing Agricultural Uses. RSA 674:32-b, II is repealed and reenacted to read as follows:

11 II. Any new establishment, re-establishment after abandonment, or significant expansion of
12 a farm stand, retail operation, or other use involving on-site transactions with the public, including
13 agritourism as defined in RSA 21:34-a, may be made subject to applicable special exception, building
14 permit, or other local land use board approval and may be regulated to prevent traffic and parking
15 from adversely impacting adjacent property, streets and sidewalks, or public safety.

16 8 Effective Date.

17 I. Section 7 of this act shall take effect July 18, 2016, at 12:01 a.m.

18 II. The remainder of this act shall take effect upon its passage.