



Agritourism: Evolving Issues

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Workshop Outline



1. Quick Overview - Legal Framework Governing Community Agriculture
2. Forster's Christmas Tree Farm v. Town of Henniker
3. Agritourism Legislation
4. Land Trust Perspective
5. Questions & Answers





Legal Framework Governing Community Agriculture

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RSA 432:32-35



Traditional “Right to Farm”

Immunity from nuisance lawsuit
in certain circumstances



RSA 431:34-35



Best Management Practices



RSA 674:32s



- For zoning purposes, allows all ag activities not specifically permitted in zoning ordinances
- Provides numerous supports for agriculture with respect to zoning



RSA 425:2-a



Granite State Farm to Plate

**State agencies and local
government to encourage and
support local food**





RSA 21:34-a (handout)

- I. “farm”
- II. “agriculture” and “farming”
 - a. all operations of a farm
 - b. Any practice on the farm incident to, or in conjunction with such farming operations, including, but not necessarily restricted to
- III. farm roadside stand
- IV. Best Management Practices
- V. “farmers’ market”
- VI. “agritourism”





Agritourism:



Forster's Christmas Tree Farm v. Town of Henniker





Take Home Message:

State definition of agriculture does not
include agritourism

(Agritourism is not agriculture)





Henniker:

“See New Hampshire Revised Statute
Annotated Chapter 21:34-a Farm,
Agriculture, Farming”





(Take a peek at definition in handout)

Hosting events is not agriculture
because it is not a practice “incident to”
the tree farm under 21:34-a, II(b)





Even if agritourism, agritourism is not agriculture



Hosting events not an accessory use





Does the State preempt municipalities?

Probably not.





Forster:

Whether the municipality's ordinance, which prohibited use of a tree farm for commercial events such as weddings, celebrations, and the like, was preempted by the state statute defining agritourism?





Forster's assertion:

“statutory definition of ‘agritourism’ mandates that the Town “cannot ... prohibit otherwise valid agritourism enterprises that meet the statutory definition.”





Court's rejection of Forster's Assertion:

- “RSA 21:34-a is a set of definitions, not a comprehensive statutory scheme aimed at superseding local regulation.”





- “RSA 21:34-a, VI merely defines
“agritourism.”





- “RSA 21:34-a, VI contains no mandate to municipalities. It does not require that municipalities adopt the same definition. Nor does it mandate that municipalities allow activities that meet the statutory definition of ‘agritourism.’”





“The other provisions in RSA 21:34-a likewise contain no mandate to municipalities.”





RSA's

674:17, I(i)

672:1, III-b

672:1, III-d

674:32-a

674:17, I(i)

do not “require municipalities to allow
‘agritourism’ within their borders”





Take Home Message:

If a municipality defines agriculture and/or agritourism differently than the state definition, whether more broadly or more narrowly, the municipality's definition will likely not be preempted by state law





Definition of Agriculture

Has limits





“Hosting such events also is not included in subpart (b) as a practice incidental to farming operations...[W]e construe the general words in that subpart (“any practice on the farm incident to, or in conjunction with such farming operations”) to embrace only practices similar to those included in the enumerated list. Hosting events such as the petitioner proposes is not similar in nature to the practices listed in subpart (b).”





Agritourism Legislation

- What do they say?
- What do they mean?
- Status





Both House and Senate passed bills in March in response to Forster





Both HB 1141 & SB 345 redefine agritourism as type of marketing



Agritourism means: (handout)



“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”



Comparison to current definition:



“attracting visitors to a ~~[working]~~ farm ~~[for the purpose of]~~ ***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 ~~[on]~~ ***about*** farm operations, or active involvement in the activity of the farm ~~[which is ancillary to the farm operation]~~”



Key Changes



Agritourism is marketing

“Working” farm requirement eliminated



Senate bill key additions



“agritourism...shall not be prohibited on any property where the primary use is for agriculture...”

HOWEVER





Any “new establishment” or “significant expansion” is subject 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.”



Senate Bill Goals



Dual objective to:

- (1) promote economic sustainability
by enabling farms to market
themselves, and
- (2) preserve local control of planning
decisions



Status of Legislation



Seems clear House will pass Senate bill –
no opposition at hearing this week

Effective immediately upon passage and
signing by Governor - maybe June



Looking Ahead



Expect further changes
and clarifications in the
future





Land Trust Perspective

- Defining agriculture in easements
- IRS considerations
- Forest Society's new approach



Defining Agriculture in Easements



Most conservation easements prohibit all commercial activities except agriculture and forestry





What activities are permitted as “agriculture” in conservation easements?

It depends...



Definitions



Some easements: explicitly incorporate state definition of agriculture

Oldest easements and deed restrictions: agriculture often not defined at all





1980's era easements: agriculture
“shall include *agriculture*, animal husbandry...; the production of plant and animal products for domestic and commercial purposes; the growing of food crops...”





Contemporary easements: agriculture “shall include *but not be limited to*: animal husbandry...; the production of plant and animal products for domestic or commercial purposes; the growing of food crops; and the *processing and sale of products produced on the Property (such as pick-your-own fruits and vegetables)*”



Questions Raised



What does “agriculture”
mean when not defined in
an easement?





In event of alleged violation or legal dispute, would Attorney General or judge use:

1. Dictionary definition (as of easement date or current date)?
2. Legal definition: state or municipal definition (as of easement date or current date)?
3. Interpretation of landowner or land trust?
4. Prior practices of parties?





For all easements, does the definition
(or lack thereof) of agriculture include
agritourism-type activities?

And if so, what specific activities are
allowed?





There is no clear answer

So uncertainty remains



IRS Considerations



Before discussing possible solutions for clarification, note two important IRS considerations



First Consideration



Purposes approved by IRS for qualified conservation easement tax deductions do not include agriculture

Closest related purpose is open space



Second Consideration



Land trusts, as not-for-profits, cannot convey private benefit (financial benefit)

Allowing a commercial activity prohibited by an easement would convey impermissible private benefit to a landowner





Example: Farm wants to build large scale
cross country ski trail network

Not agriculture or forestry, so requires
amendment to offset potential private
benefit concern





If land trust *reasonably* interprets commercial activity as permissible under easement, should eliminate private benefit concern

Example: Hay rides and pick your own reasonably considered agriculture



Land Trust Approaches



- Variety of approaches to the issue of agritourism in easements
- Maryland Environmental Trust has discretionary consent policy to permit agritourism and other commercial activities (similarities to Forest Society's proposed guidelines)
- Some land trusts prohibit agritourism activities like weddings
- Others have not yet addressed this question



Forest Society's New Approach



Guidance document being finalized to aid staff interpretation of agricultural and forestry uses that are not explicitly permitted by terms of existing easements



Goals



Improve consistency of staff decisions

Improve transparency of decision making process for landowners

Reduce risk of costly litigation and time-consuming amendments

Consistent with IRS considerations



Hypotheticals



Are these permissible agriculture under Forest Society easements?

1. Weddings on property with hay fields
2. Forester – Weddings on tree farm
3. Weddings on farm where catered reception uses food from farm



Requirements for Use



- **Direct tie** to agriculture or forestry; and
- No more than *de minimus* negative impact; and
- Not diminish long-term potential of property for agricultural or forestry uses; and
- Not inconsistent with intent of original grantor or any direct funders of purchased easement; and
- **Permitted by federal, state, and local laws, ordinances and regulations; and**
- Several more related requirements



Landowner Request Process



- Draft Use Plan that addresses requirements for use and includes scope, scale, size, location, timing and frequency of proposed use
- Sketch or annotated aerial photograph, map or survey
- Written evidence that use meets all federal, state, and local laws, ordinances and regulations



Recall the Hypotheticals



Are these permissible agriculture under Forest Society easements?

1. Weddings on property with hay fields
2. Forester – Weddings on tree farm
3. Weddings on farm where catered reception uses food from farm



Hypotheticals Answered



Are these agriculture under Forest Society easements applying the new guidance document?

1. Weddings on property with hay fields: **likely not permissible**
2. Forester – Weddings on tree farm: **uncertain**
3. Weddings on farm where catered reception uses food from farm: **likely permissible**

Key determining factor is “direct tie” to agriculture





Questions & Answers

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