



# **Agritourism: Evolving Issues**

Amy Manzelli, Esq., Managing Member, BCM Environmental & Land Law, PLLC

Reagan Bissonnette, Esq., Director of Easement Stewardship, Society for the Protection of NH Forests

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com

#### **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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.





# Legal Framework Governing Community Agriculture

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq







## Traditional "Right to Farm"

## Immunity from nuisance lawsuit in certain circumstances

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.

# RSA 431:34-35





# **Best Management Practices**

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq







 For zoning purposes, allows all ag activities not specifically permitted in zoning ordinances

 Provides numerous supports for agriculture with respect to zoning

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com







#### **Granite State Farm to Plate**

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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.

## RSA 21:34-a (handout)





- . "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"

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





#### Agritourism:



#### Forster's Christmas Tree Farm v. Town of Henniker

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.



#### Take Home Message:

# State definition of agriculture does not include agritourism

#### (Agritourism is not agriculture)

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.





#### Henniker:

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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





#### (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)

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq





# Even if agritourism, agritourism is not agriculture

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



& Land Law, PLLC





Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





#### Does the State preempt municipalities?

#### Probably not.

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



#### 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?

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





#### Forster's assertion:

"statutory definition of 'agritourism' mandates that the Town "cannot ... prohibit otherwise valid agritourism enterprises that meet the statutory definition."

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com



#### 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."

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





#### "RSA 21:34-a, VI merely defines "agritourism."



Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com



 "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.'"

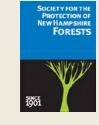
Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq





674:17, I(i) 672:1, III-b 672:1, III-d 674:32-a 674:17, I(i)

**RSAs** 

#### do not "require municipalities to allow 'agritourism' within their borders"

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com



#### 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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





#### **Definition of Agriculture**

#### Has limits

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.



"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)."

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





# **Agritourism Legislation**

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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com





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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



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



Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com

#### 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"

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com

# 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]" Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.







## Agritourism is marketing

## "Working" farm requirement eliminated

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



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

## HOWEVER

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.



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."

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq. 3 Maple Street, Concord, NH 03301-4202 • Tel: 603-225-2585 • Fax: 603-225-2401 • www.nhlandlaw.com







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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.





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

## Effective immediately upon passage and signing by Governor - maybe June

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.



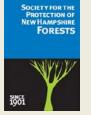




# Expect further changes and clarifications in the future

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq







### Land Trust Perspective

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

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq

### Defining Agriculture in Easements





# Most conservation easements prohibit all commercial activities except <u>agriculture</u> and <u>forestry</u>









### What activities are permitted as "agriculture" in conservation easements?

### It depends...

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.







# <u>Some easements</u>: explicitly incorporate state definition of agriculture

### <u>Oldest easements and deed</u> <u>restrictions</u>: 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..."

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



**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)"







### What does "agriculture" mean when not defined in an easement?

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



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

- 1. Dictionary definition (as of easement date or current date)?
- 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?

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq.





### There is no clear answer

### So uncertainty remains

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



### **IRS Considerations**





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





# Purposes approved by IRS for qualified conservation easement tax deductions do <u>not</u> include agriculture

### Closest related purpose is open space

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq



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

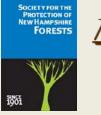
### Allowing a commercial activity prohibited by an easement would convey impermissible private benefit to a landowner





# 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 <u>not explicitly</u> permitted by terms of existing easements

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq







Improve consistency of staff decisions

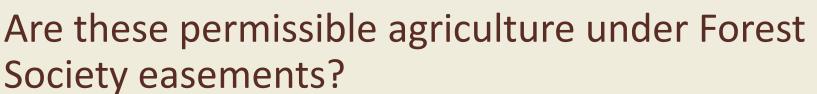
#### Improve transparency of decision making process for landowners

Reduce risk of costly litigation and timeconsuming amendments

#### **Consistent with IRS considerations**

#### Hypotheticals





- 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

• <u>Written evidence</u> 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**

Carolyn W. Baldwin, Esq., of Counsel • Jed Z. Callen, Esq. • Amy Manzelli, Esq. • Jason D. Reimers, Esq