

Saving Special Places 2017
Agritourism: Evolving Issues
Amy Manzelli, Esq., & Reagan Bissonnette, Esq.

Current Law:

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 all beef and dairy cattle, steer, oxen, goats, sheep, swine, horses, mules or other equidae, as well as domesticated strains of buffalo, bison, llamas, alpacas, emus, ostriches, poultry, rabbits, yaks, elk (*Cervus 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, 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.**
 - (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. [Repealed.]

Senate Bill:

CHAPTER 267 SB 345 - FINAL VERSION

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 struck through.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
03/17/2016 0962s
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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:

267:1 Agritourism; Definition. Amend RSA 21:34-a, II(b)(5) to read as follows:
(5) The marketing or selling at wholesale or retail, [~~on-site and off-site, where permitted by local regulations,~~] ***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.

267:2 Agritourism; Purposes of Zoning Laws. Amend RSA 672:1, III-b to read as follows:

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;

267:3 Agritourism. Amend RSA 672:1, III-d to read as follows:

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;

267:4 Agritourism; Existing Agricultural Uses. Amend RSA 674:32-b, II to read as follows:

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 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.

267:5 New Section; Agritourism Permitted. Amend RSA 674 by inserting after section 32-c the following new section:

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.

267:6 Repeal. RSA 21:34-a, VI, relative to the definition of agritourism, is repealed.

267:7 Existing Agricultural Uses. RSA 674:32-b, II is repealed and reenacted to read as follows:

II. Any new establishment, re-establishment after abandonment, 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 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.

267:8 Effective Date.

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

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

Approved: June 16, 2016

Effective Date: I. Section 7 shall take effect July 18, 2016 at 12:01 a.m.

II. Remainder shall take effect June 16, 2016

Society for the Protection of New Hampshire Forests

Easement Stewardship Guidance Document

For determining permissible commercial agricultural and forestry uses that are not explicitly permitted by the terms of our existing easements*

Endorsed by Board of Trustees June 1, 2016

Summary: The intention of this document is to give the Forest Society easement stewardship staff guidance on how to interpret whether a given commercial use is allowed in the name of permissible “agriculture” or “forestry” within an existing conservation easement (CE) when the CE is not sufficiently clear for making this determination. This problem typically occurs because the use in question was not anticipated at the time the CE was created.

This document lays out standards and a process by which the Forest Society can determine that an existing or proposed use is “agriculture” or “forestry,” so long as such use: (1) is consistent with the Requirements for Use specified below; (2) is consistent with a written Use Plan approved in advance by the Forest Society; and (3) has been authorized by a Letter of Interpretation issued by the Forest Society. This guidance will enable Forest Society staff to give landowners assurance that certain agricultural and forestry activities are in compliance with the CE.

Requirements for Use: Any commercial agricultural or forestry use must comply with each of the following requirements, as determined by the Forest Society in its sole discretion. For examples elucidating some of the following requirements, see the attached **Appendix A**.

1. The proposed commercial use must have a ***direct tie to agriculture or forestry***. To the extent the CE’s description of what is meant by “agriculture” and “forestry” is unclear, the Forest Society will base its understanding on the definitions of these terms in its current model easement, as may be updated over time.

One difficult type of interpretation arises with uses or activities that are not obviously “agriculture” or “forestry” but still may have some relevance to agriculture or forestry on the CE land, perhaps because they are part of a larger event or function that does include more obvious and direct agricultural or forestry activities. This might be, for example, a fair, festival, competition, or some other event bringing visitors to the CE property.

Key Principles:

- a) There must be a ***predominant and direct focus***, whether of the isolated use/event or of the larger event/function of which it’s a part, on ***promoting or enhancing*** agriculture or forestry on the CE land, including attracting visitors to the CE land for the purpose of selling to them agricultural or forestry products grown there.
- b) Agricultural or forestry products used in any “processing, storing, or selling” activities ***must substantially come from the CE land***, i.e. not be imported from other locations.
- c) It will not be sufficient for some use or activity to qualify as “agriculture” or “forestry” simply because it derives benefit from certain by-products of agriculture or

forestry, such as sweeping views and other scenic features associated with fields, or woods roads providing opportunities for various unrelated outdoor recreational activities.

- d) Also insufficient is the generation of income from some non-agricultural or non-forestry use or activity that may be economically helpful to the Landowner trying to maintain agricultural and/or forestry uses of the CE land.

If there is an event or function whose overall purpose does meet the above criteria for being part of “agriculture” or “forestry,” but which has a component activity that is clearly not an agricultural or forestry activity, then that non-confirming use or activity will be permitted only so long as it:

- i. is incidental and minor relative to the overall agricultural/forestry event;
- ii. is not detrimental to the purposes of the CE; and
- iii. does not impair the conservation attributes sought to be protected by the CE.

2. ***Structures and improvements*** stated in the CE as being “necessary” in the accomplishment of agriculture or forestry are acceptable if they ***assist*** in the accomplishment of agriculture or forestry. Where there are multiple uses of any given structure or improvement, each different use must be evaluated separately with respect to permissibility by the CE.

Regarding ***energy production facilities, and associated lines and structures*** (e.g. utility poles), the Landowner would be permitted to sell to a utility company any electricity generated on the CE land that is minor, surplus, and incidental relative to the amount of electricity that is generated by the same facility and used for agriculture or forestry on the CE land, under a “net metering” or other similar scheme; however, routine provision of the power needed by the adjacent, unrestricted residence of the Landowner would be disqualifying.

3. The use in question will have no more than a ***de minimus negative impact*** on the conservation purposes of the CE or the significant conservation attributes which the CE seeks to protect. Scope, scale, size, location, timing, and frequency of the use or activity are likely to be key factors considered.
4. The use ***will not diminish the long-term potential of the property to be used for agricultural or forestry uses***, e.g. will not erode or permanently compact soils, or reduce long-term soil productivity. Incidental impacts such as minor rutting would need to be anticipated first and foremost by avoidance, but also by a restoration or remediation plan that is then implemented in case actual rutting does occur.
5. The use in question shall not be inconsistent with: (a) the documented intent of the ***original grantor***; (b) the documented intent or requirements of any ***direct funders*** of any purchased easement; or (c) the fiduciary obligation of the Forest Society to protect the property for the benefit of the public in perpetuity.
6. The use in question is ***permitted by federal, state, and local laws, ordinances, and regulations***.

Landowner Request for Approval: Requests for agricultural or forestry uses of the property that are not clearly permitted by the terms of the easement must be made by the Landowner in writing: (a) at least 60 days prior to the planned use or activity or any related improvement, or (b) at any time that Forest Society staff advise a Landowner that a proposed or ongoing use requires approval under this guidance document. The written request shall include:

- A **draft Use Plan** that addresses the Requirements for Use listed above, and that includes the **scope, scale, size, location, timing, and frequency** of any activity or event, including the estimated number of participants and vehicles, described in enough detail for the Forest Society to assess the use relative to the standards in this guidance document;
- A **sketch or annotated aerial photograph, map or survey** of the proposed locations and extent of the activity or use;
- Landowner certification that the proposed commercial activity meets all **federal and state** laws and regulations;
- Written evidence that the proposed commercial activity meets all **local laws, ordinances, and regulations**; and
- The **signature** and date of all of the Landowner(s).

If all of the above considerations are met and the Forest Society determines, in its sole discretion, that the use in question is part of permitted “agriculture” or “forestry,” the Director of Easement Stewardship will send the Landowner a Letter of Interpretation outlining conditions of the approval. Said Letter must also include the signature and approval of any Executory Interest Holder, and so the Forest Society will need to maintain timely communications with the “backup” group upon initial receipt of a Landowner’s Request for Approval. In case of denial, said Director will send a timely letter to the Landowner identifying the reasons for denial. The activity in question cannot begin until a Letter of Interpretation is issued. Actual activities on the ground must be in conformance with the approved Use Plan and Letter of Interpretation. Any approval of uses under this guidance document applies to the CE regardless of a change of ownership of the property.

Termination of Approval: The agricultural or forestry uses approved under this guidance document will be monitored as frequently as needed, often annually, to confirm conformance with the approved Use Plan and Letter of Interpretation. If the activities are proposed to be changed, the Landowner must submit an updated Use Plan for review and approval by the Forest Society. In the event the Forest Society determines, in its sole discretion, that such use does not comply with the approved Use Plan and Letter of Interpretation, then the Forest Society may terminate its approval and will notify the Landowner in writing. After such termination, any continued use activity may be a violation under the CE.

Limitations & Exclusions: The Forest Society is not obligated to permit any such use under this guidance document and may require the Landowner to submit a request for discretionary consent or a CE amendment consistent with the Forest Society’s policies or procedures then in effect.

**Document also applies to Deed Restrictions.*

Appendix A — Selected Examples for Requirements for Use

1. “Direct tie to agriculture or forestry”

A sawmill, cheese making facility, or sap house processing saw logs, milk, or maple sap all of which is brought in from sources other than the CE land, would not constitute forestry or agriculture. Having just a token amount from the CE land would also not qualify.

Consider a Landowner who does not have a “working farm” but rather a single hayfield with a hilltop from which one gains sweeping, distant, highly scenic views. A proposed rental of that site for a wedding would not qualify as “agriculture” even though the Landowner could well use the income to maintain his haying equipment and pay his property taxes. On the other hand, if that Landowner has more of a “working farm,” perhaps with a farm stand, rental of that site for the wedding may qualify if, as part of the event, the Landowner makes substantial effort, as part of the event, to promote the sale of his locally grown produce whether at the farm stand or as part of the prepared food at the wedding reception, collects information so that wedding guests can be put on the Landowner’s mailing list for purposes of marketing other farm products, etc. Similarly, if visitors pay to go on a sleigh ride or to walk through a corn maze, each of these activities, in isolation, does not qualify as “agriculture.” However, if part of a promotional event for selling cut-your-own Christmas trees, or a Fall Harvest Festival at a pick-your-own apple orchard and farm stand, respectively, they may be permissible.

Non-qualifying uses/activities would include: a flea market, shooting range, gun or automotive show, motorized recreational event, and circus.

2. “Structures and Improvements”

These could include but would not be limited to: buildings, for example barns, maple sugar houses, farm stands, and sheds for storing agricultural or forestry equipment used on the CE land; roadways, culverts, and landings for agricultural or forestry activities on the CE land; signs and fences in support of any permitted use of the CE land.

If a Landowner has a pole barn used for storing farm equipment, with winter storage of a boat in one of its bays, the boat storage is not agricultural even though apparently incidental and minor relative to the overall, continuing, agricultural use of the rest of the structure. If part of a barn is used as an office for farm operations, or for serving farm-to-table dinners making ***substantial use of produce grown on the premises*** and with a strong promotional component for sales of other farm products grown there, these would be considered agricultural uses. A farm stand selling fresh produce or processed foods ***substantially originating from the CE land*** (or CE land under common ownership or use) would also pass the test, whereas a roadside stand whose signage and inventory are clearly dominated by fireworks, or gardening products from elsewhere, would not. An indoor arena for boarding, training, and/or showing horses, may qualify. Non-qualifying uses of a barn would include: a sporting goods store or shop renting outdoor recreational equipment for use on the CE land, a home occupation without direct tie to agriculture or forestry, extra guest bedroom or apartment ancillary to the adjacent, excluded residence of the Landowner.

Farmworker housing on the CE land would not be considered part of “agriculture” due to its potentially negative impacts on the CE land and the difficulty of such structures evolving to non-

agricultural uses. (In any case, most of the Forest Society's existing CE's explicitly prohibit all residential use on the CE land.)

Wastewater disposal facilities, with related lines and structures, serving agricultural or forestry uses, are more likely to be permitted through the use of self-contained, aboveground, wastewater disposal facilities. Examples include portable toilets or composting toilets, especially for events or other activities accommodating visitors to the CE land.

Roads, access ways, and/or parking areas, serving agricultural or forestry uses, are more likely to be permitted for periodic events bringing visitors to the CE land if they are screened from public roads, avoid location over productive soils, include a backup plan and location in case of wet ground conditions, and consist of pervious surfaces.

3. ***“de Minimus Negative Impact”***

A 40,000 square-foot, metal-sided, enclosed, equestrian arena covering prime agricultural soils and located in the middle of the CE land's roadside hayfield may be disqualified for its negative impact on other CE purposes and conservation attributes involving the protection of scenic values and soil productivity. Also disqualified on the same bases would be the expansion of a farm-to-table dinner accommodating eight guests every Saturday night just in summer into a year-round restaurant serving 30 customers every night, and whose state-mandated, expanded septic system and municipally-mandated, expanded, paved parking area would cover prime agricultural soils and have to be located in the roadside hayfield.