[Plan-link] NH Supreme Court Weighs In on Agritourism

Fri 6/12/2015 6:34 PM

> On Jun 12, 2015, at 5:10 PM, Slack, Susan <Susan.Slack@nh.gov> wrote:
>
> Today, the NH Supreme Court released its ruling in a zoning case involving the definition of "agritourism" and whether weddings and other events are permitted on property used as a Christmas tree farm – Forster v. Town of Henniker:
> http://www.courts.state.nh.us/supreme/opinions/2015/2015048forster.pdf
>
> The Court's opinion is about 20 pages long, but will make for some interesting weekend reading about how state statutes are interpreted and whether municipal zoning regulations are invalid because they conflict with the purposes of a state statute and are therefore preempted. The Court's ruling also includes a good discussion of the law of accessory uses.

I'd like to second everything Susan said about this opinion. It's almost a tutorial on statutory construction and has a wonderful overview of the last 50 years of NH case law on accessory uses (and a rather depressing discussion, in the dissent, of just how amorphous and ill-defined the term "customary" is in the accessory use standard). Although the vote was 4-1, both the decision and the dissent are well-written, thorough, and persuasive.

And for the bottom line, we now have a clear rule: if your zoning ordinance incorporates (explicitly or implicitly) the RSA 21:34–a definition of agriculture, then it *does not* include agritourism.

Regards,

Neil Faiman, Chairperson
Wilton ZBA

Fri 6/12/2015 9:13 PM

And so how do you explain Roman V In RSA 21:34-A??: Did someone forget to read this?

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.

Isn't "enjoyment of the farm environment" one of the reasons people want to have a wedding "on a farm"?

Erick Sawtelle
Lee Agricultural Commission

Fri 6/12/2015 10:12 PM

This decision in the spirit of Souter puts another nail in the coffin of the states farms, gutting a law that was designed to make it possible for farms to continue existing. We can expect to see continued development of our farms into housing developments.

John Segedy

Sat 6/13/2015 9:09 AM

> On Jun 12, 2015, at 9:13 PM, erick sawtelle <esawtelles@aol.com> wrote:
>
> And so how do you explain Roman V In RSA 21:34-A??: Did someone forget to read this?
>
> 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.
>
> Isn't "enjoyment of the farm environment" one of the reasons people want to have a wedding "on a farm"?

The primary discussion of that question is on pages 4–7 of the decision, with additional discussion continuing through page 10. If you really want to know the answer, you should read the decision.

That said, however, the core of the argument is that 21:34-a is basically a collection of definitions. Section I defines "farm," section II defines "agriculture' and "farming." section III says that farm roadside stands are also agricultural, section IV prescribes particular practices on a farm, section V defines "farmers markets," and section VI defines "agritourism." Nothing in there says that the definition of "agriculture" includes "agritourism" — they are simply two independent definitions.

Regards,
Neil Faiman, Wilton ZBA

Sat 6/13/2015 9:40 AM

And if I may, can provide a farm with an additional form of income.

Robyn L Payson
Planning Director
Town of Hillsborough

Sat 6/13/2015 11:39 AM

Simply means if you WANT to encourage your farmers to also become event venues, you need to enable it in your local ordinance.

Sally Wilkins

Sat 6/13/2015 12:46 PM

One reason that the Court said that the definition did not make agritourism agriculture was the legislative history (see decision pg. 9-10).

At one point, such language was included in the definition, but voted down:

The legislative history of HB 56 reveals that the legislature considered, but ultimately rejected, the notion that "agritourism," as defined by RSA 21:34-a, VI, constitutes "agriculture" within the meaning of RSA 21:34-a, II. See Singer & Singer, supra § 48:4, at 563-64 ("[W]here the language under question was rejected by the legislature and thus not contained in the statute it provides an indication that the legislature did not want the issue considered."). Thus, the legislative history demonstrates that the plain language of the statute is in accord with the legislature's intent.

Honey Hastings
Temple ZBA

Mon 6/15/2015 9:47 AM

Neil,

I was being more than a little sarcastic about the majority ruling...

I agree with you that the downfall of the "attempt" to include "agritourism" in the Definition of Agriculture, Farms , and Farming in 21:34-a falls short because it is not clearly expressed as a "permissible" use and is only a definition (subject to interpretation and , well now we have two ... a majority ruling and a minority dissenting opinion). I do agree completely with the rationale put forth by Justice Hicks that the majority rule missed the mark in the "legislative intent" area (I was involved) and, quite frankly , my observation would be that since they threw out a carrot that the legislature might consider a fix , admit to this problem. The immediate question would be: What do we do in the meantime?. Are existing operations grandfathered? Is this an area where "reasonable" selective enforcement (define that one) could be a possibility based on the "character" of a town... or might be reflective of a town's Master Plan?

Seems like a similar gray area (i.e, black hole) to the issue and their discussion of defining "customary and habitual accessory use that occurs at a frequency that rises above rarity" (Town of Windham vs. Alfond). Imagine where we would be today if this rationale revolved around Bill Gates or Steve Jobs wanting to make these things called computers in their parent's garage? In short, basing decisions on "historic or customary uses" leads to stagnation, not innovation.

Secondly, I only agree in part with your assessment that : "And for the bottom line, we now have a clear rule: if your zoning ordinance incorporates (explicitly or implicitly) the RSA 21:34–a definition of agriculture, then it *does not* include agritourism." That is not necessarily true if it incorporates 21:34-a but in fact expands upon it.(Sage Sally's comment.)

Example below (which was written and put in place before the NH Farm Viability Task Force recommendations which were the genesis of a statewide inclusion of agritourism in 21:34-a.). It addresses several arguments that the majority decision pointed out as sticking points in the Henniker decision definiton of "accessory use":

Below is excerpted from the 2014 Lee Zoning Ordinances (Pgs 13-15 under Article III General Provisions, section D. Agriculture, go to Leenh.org and go to Code Enforcement/Building Dept) which incorporates RSA 21:34-a with some additions and a couple of changes, particularly in the percentage below of gross sale (upped to %50 from the state %35) in section 1.-L.-7. below:

Amended March 14, 2006

A roadside farm stand or farm market, as defined below, shall be considered part of an agriculture or farming operation and not considered commercial, provided that at least 50% of the average gross sales yearly dollar value is attributable to products produced on the farm or farming operation by the stand or market operator.

2. Temporary structures for seasonal farm stands must be removed upon conclusion of the season activity. The roadside farm stand is required to be registered with the Town of Lee.

Farm Market
The purpose of the farm market is to provide opportunities for agricultural producers to retail their products directly to consumers and enhance income through value -added products, services and activities. Permitted activities include but are not limited to; the marketing of agricultural products, products that are agriculture-related, including specialty foods, gift items, mass produced items that reflect the history and culture of agriculture and rural America; crafts; agricultural tourism, pick-your-own operations; community supported agriculture; farm vacations. If the Farm Market includes any permanent structures/buildings, they are subject to the current Zoning Regulations in the Town of Lee and subject to site review by the Town of Lee's Planning Board.

Roadside Farm Stand
The purpose of a temporary roadside farm stand is to allow farmers, who are actively farming, low cost entrance into direct marketing their farm products. It is characterized as a direct marketing operation is seasonal in nature and features on-farm produce as well as locally produced agricultural products, enhanced agricultural products and handmade crafts. Permitted activities include: but are not limited to; the marketing of agricultural products, products that are agriculture-related, including specialty foods, gift items, mass produced items that reflect the history and culture of agriculture and rural America; crafts,pick-your-own fruits, vegetable and nuts; community supported agriculture (CSA),agricultural tourism. The roadside farm stand is required to be registered with the Town of Lee. Any temporary buildings/structures are exempt from the definition of building/structures as defined in Article V, Residential Zone of the 2006 Town of Lee Zoning Ordinance as amended-(example if future changes are done to the Articles it may change the numbering) and Article XV, Wet soils Conservation Zone and they are exempt from the Setback provisions from Article V, Residential Zone and Article XV, Wet Soils Conservation Zone

Agricultural Tourism
The purpose of Agricultural Tourism is to attract people to farms, promote the sale of agricultural products using agriculture related tours, events and activities, as well as non-agricultural related activities. These tours, events, and other activities are to supplement farm income. Activities include, but are not limited to petting farms, farm animal attraction, school tours, outdoor trails, crop mazes, hayrides, pony rides, livestock and or equine events, group

> picnics, on-and-off site food catering services, craft shows, outdoor recreation, and educational activities. If a fee is charged, in order to be a permitted use, the farm must be actively producing agricultural products for sale. Farms where the seller is not actively producing agricultural products for sale will require a Special Exception.

This works for us.
Change is hard....
Respectfully,
Erick Sawtelle, Chair, Lee Agricultural Commission

Mon 6/15/2015 10:41 AM

I for one agree wholeheartedly with the dissenting opinion. I believe the statute meant that agritourism was an allowed customary, ancillary and incidental accessory use to a farm principal use (agriculture). "agritourism'' means attracting visitors to a working farm for the purpose of …enjoyment of the farm environment.
…has to mean something. Bad decision. By the way, local jurisdictions can and should address any impacts from said agritourism by some regulatory means such as requiring a CO with appropriate conditions or by a temporary use permit with appropriate conditions or by site plan review approval with conditions IF there is some physical change to the farm like parking, building, etc.

Sometimes Court decisions ignore common sense.

Bruce W. Woodruff
Town Planner
Town of Moultonborough

Mon 6/15/2015 12:46 PM

Bruce:

I agree with both your analysis and support of the dissenting opinion written by Justice Hicks. The kicker for me was the point raised in the 4th paragraph on Page 19 of the decision … if agritourism activities have in fact come to represent “about a third” of agriculture’s total annual contribution of $935 million to NH’s economy, clearly the variety of activities broadly referred to under that term must be properly viewed as an **integral** component of modern agriculture. I believe the majority of the Court overlooked that reality and instead focused on the much narrower question of what may or may not constitute an accessory use. In my view, the annual revenue numbers cited by Justice Hicks strongly support the notion that agritourism is an integral component of the principal use of land for agricultural purposes rather than an activity accessory to that use.

Hopefully this decision will prompt legislature to revisit RSA 21:34-a and companion statutes. For a state having an economy whose vitality is tied so closely with tourism in general, putting any element of that industry at risk is in my opinion foolish.

Steven B. Keach, P.E.
Keach-Nordstrom Associates, Inc.

Fri 6/19/2015 2:40 PM

All:

Just getting back to my computer here in Henniker and have had a chance to read everyone's thoughts on last week's Supreme Court decision. Since we here in Henniker have been at the epicenter of this case over the last 2 and half years, I believe I should share my thoughts on this matter.

First, I believe the impact from this decision is being overblown. No town is going to object to pony rides, corn mazes, cart rides, apple picking or a maple shack (my neighbor just built one near me, on 5 acres). These and similar type uses are and have been historic uses on farms and many farmers currently take advantage of them. I have spoken to a number of farmers who believe that hosting weddings is not "agritourism" but more of a commercial operation. In fact, last year the lawyer who represented the local farmer here tried to amend the state statute to significantly expand the definition of agritourism, including moving it into the definition of agriculture. The state's Farm Bureau strongly opposed this amendment and felt it would negatively impact its members noting concerns about the loss of local control (see outline below). Hosting weddings and such, with 150 people or more, with traffic, wedding music noise from the band "please welcome the new Mr. & Mrs." creates a whole different impact on abutters and opens a whole host of questions. As you know, any community is free to amend its local ordinance to allow whatever it sees fit and are welcome to do so, just don't "impose" matters such as this upon every community in the state. As detailed in the decision, the legislators specifically removed the term of agritourism out of 21:34-a (Farm, Agriculture, Farming) during the hearing process so local control would not be removed. If a community feels that it is vital to allow farms to host weddings and other such events, the local ordinance can be easily amended by town vote. There are numerous provisions in state law that protect farming operations and I am sure additional protections could be added if deemed necessary by the farming community. Henniker is very pro-farming and allows farming in every zoning district; but it was felt here in town that this case crossed the line.

Mark Fougere, AICP
Town Planner
Henniker

This was the Farm Bureau's thoughts on the proposed amendment to the Agritourism law:

The position we are taking boils down to that we simply do not support the core of what the bill is trying to accomplish - removing local control. The existing definition allows for local discretion and provides flexibility towards recognizing some activities are not appropriate in all locations. It is in line with state law which clearly recognizes planning, zoning and related regulations as the responsibility of municipal government. We are concerned the bill has strong potential to foster an adversarial relationship towards agriculture in some communities.

Even if we were to reach agreement on other parts of the bill, such as the addition of language calling for agritourism activities to be ancillary or proportional in some fashion as a secondary enterprise to the farm operation and on a list of examples – which we do not support, we would agree to it only if existing local authority were maintained.

With this being said, we question the real need to make changes to the existing definition, particularly to the extent proposed. As I mentioned at our meeting, the Department of Agriculture is developing a guidance document relative to the definition of agritourism that we believe to be the right first approach to help clarify any existing or future confusion or interpretation by both farmers and municipalities. We have concerns with legislation that may fix a single problem, but could also create other problems which we will then have to address.

Based on everything mentioned and more we do not believe further meetings will change anything. I have been directed to oppose the bill and to ask Senator Odell and the Committee to recommend ITL. My understanding is that the Department of Agriculture will be taking the same position.