Balancing Agricultural Use with Growth and Development: An Overview of New Hampshire Law

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By David Connell

Throughout the 20th century, residential and commercial development extended into rural areas of New Hampshire, encountering preexisting agricultural uses that were often regarded as incompatible with the new subdivisions and shopping centers. Pesticides and fertilizers; farm equipment and animals; dwellings crowded with seasonal workers; retail roadside stands—all were seen by newcomers as detrimental to property values when conducted near residential developments. Zoning and planning regulations were employed to deal with the problem, typically by segregating agriculture from higher density residential uses.

Today, with renewed enthusiasm for small-scale, local agriculture in New Hampshire and elsewhere, it is reasonable to predict some intensified friction between residential land use and agricultural land uses. A search of Google News using the phrase "livestock and zoning" brought up many articles in the month of April 2010 about land use regulation disputes, ranging from keeping goats as pets in Pittston, Pennsylvania; to sheep on the loose in tony New Canaan, Connecticut; to urban fish farming in Chicago, Illinois; to chicken coops in downtown Saskatoon, Saskatchewan, and in North Hampton, New Hampshire. Attitudes vary from place to place. A North Hampton ZBA member stated that the town benefits from having homes with poultry. In Saskatoon, on the other hand, a city councilor was quoted as saying, "We've spent a hundred years getting livestock out of the city, and I just don't think it's the appropriate time to start thinking about bringing it back. If you start with chickens it's just going to keep going from there."

New Hampshire Legislation Promotes Agriculture

For decades, the New Hampshire legislature has been concerned with the decline of agriculture in the state and the loss of agricultural land to encroaching development. In response, statutes to preserve and protect agriculture have been enacted, including current use property taxation, RSA Chapter 79-A, and the "Right to Farm Law," RSA Chapter 432, which protects agricultural operations against claims of public nuisance or private nuisance when operations are conducted in compliance with state and local health and safety regulations. Several statutes afford advantageous property tax treatment to agriculture. (See below.) The legislature has also been encouraging agriculture through amendments to the zoning and planning enabling legislation.

Planning and Zoning Protective Legislation

In 1985, RSA 672:1, the declaration of the purpose of planning and zoning regulations, was amended to add Section III-b. It finds and declares that "[a]griculture makes vital and significant contributions to the food supply, the economy, the environment and the aesthetic features of the state," and "agricultural activities 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 was added in 1990 to stress that "a prohibition upon [agriculture] cannot necessarily be inferred from the failure of an ordinance or regulation to address [agriculture]." These sections express intent and prescribe principles for construing statutes, but are not a direct substantive mandate.

In 2000, the legislature enacted substantive provisions to implement the policy in favor of agriculture. RSA 674:17, the section listing the purposes of zoning ordinances, was amended to add subparagraph I (i): "To encourage the preservation of agricultural lands and buildings." At the same time, RSA 674:32-a through 32-c were added specifically to deal with agricultural uses of land.

RSA 674:32-a establishes a presumption that, when a zoning ordinance is silent, agricultural activities are deemed to be permitted either as a principal or accessory use. This reverses the general rule, which is that a zoning ordinance "prohibits uses for which it does not provide permission." See *Treisman v. Kamen*, 126 N.H. 372, 375 (1985).

RSA 674:32-b creates special protections for existing agricultural uses to expand or change to any other agricultural use, so long as they comply with the commissioner of agriculture's best management practices. Under ordinary zoning principles, nonconforming uses and most permitted uses do not enjoy such latitude. An important limitation is that establishment, re-establishment or significant expansion of an operation involving livestock, poultry or other animals or a retail farm stand may be made subject to a special exception or other land use board approval.

RSA 674:32-c, I establishes the highest protected status for certain agricultural activities: "The tilling of soil and the growing and harvesting of crops and horticultural commodities, as a primary or accessory use, shall not be prohibited in any district." Thus, while livestock and poultry may be regulated by special exception or prohibited where appropriate, crops and horticultural commodities are permitted in any district.

RSA 674:32-c, II creates a special process for land use boards to grant "waivers" of "generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, vibration restrictions or sign regulations." If such standards are "unreasonable," the board shall grant a waiver unless it "would have a demonstrated adverse effect on public health or safety, or the value of adjacent property."

RSA 674:32-c, III and IV provide that nothing in this set of statutes applies to any aspect of agriculture that is injurious to public health or safety under RSA 147, and nothing affects the regulation of sludge or septage or the authority of the department of environmental services under RSA 485 and 485-A or the commissioner of agriculture, markets and food under title XL (RSA 425 through RSA 439) of the statutes.

Finally, the definitions of "agriculture" and "farming" in RSA 21:34-a, which have been incrementally expanded over the years, cover a wide variety of activities related to the tillage of the soil; production of compost; the raising and sale of livestock, horses, birds, fish and insects; incidental transportation and housing of people; use, storage and transportation of

equipment, materials and supplies; marketing at wholesale and retail; etc. The definition should be consulted for the complete list.

New Hampshire Supreme Court Decisions on Agriculture and Zoning

Occasionally, disputes concerning the scope of agricultural-type accessory uses reached the New Hampshire Supreme Court prior to the effective date of RSA 674:32-a to :32-c. These cases serve to illustrate the advantages agricultural uses enjoy under the legislation now in place.

In the early case of *Kimball v. Blanchard,* 90 N.H. 298 (1939), the zoning ordinance allowed sale of "farm produce on the premises" as an accessory use. The ZBA ruled that Kimball's sale of ice cream at a farm stand was prohibited because it is not a natural farm product. But the Court held that the term "farm produce" must have been intended to include such common farm-"manufactured" products as cider, maple syrup, butter and cheese. Thus, ice cream, too, could be sold. This case would have been easier to win today. Under RSA 674:1, III-b, the Court's liberal interpretation would be statutorily encouraged, and RSA 21:34-a, III defines a farm stand as agricultural as long as 35 percent of the product sales in dollar volume comes from products of the farm.

In *Windham v. Alfond,* 129 N.H. 24 (1986), stabling of horses was held not to be a permitted accessory use to residential use because, at that time, it was not, as is required for an accessory use, "customarily subordinate and incidental" to residential use in the town. Today, in the absence of specific provisions in the zoning ordinance, stabling of horses would probably be regarded as "agriculture" or "farming" under RSA 21:34-a, and presumably permitted as an accessory use under RSA 674:32-a.

In *Salem v. Wickson,* 146 N.H. 328 (2001), as an accessory use to a pig farm, Wickson mixed stockpiled manure with sand and other materials and trucked it off the site to market. After the working farm ceased operation, Wickson continued the manure business on the site, trucking in manure from elsewhere, mixing, stockpiling and ultimately trucking it off to market. The Court held that, without the pig farm as a permitted principal use, the manure operation was not permitted by the zoning ordinance. Today the outcome might be different, depending on the precise nature of what Wickson was producing. In 2006, "compost" was inserted in the list of agricultural activities in the definition of "agriculture." RSA 21:34-a, II (11). "Compost" is defined in RSA 149-M:4, IV as "a stable, humus-like substance which is derived from a process involving the biological decomposition of any readily biodegradable material, such as animal manure, garbage, yard waste, septage, sludge, or other organic solid wastes, and which can be beneficially re-used for land application." Also, Wickson might be able to re-establish the pig farm under RSA 674:32-b.

Recommendations

If they have not already done so, municipalities should review their zoning ordinances to deal with the revival of agriculture in New Hampshire. The Office of Energy and Planning (OEP) has a chapter titled "Agricultural Incentive Zoning" in its *Innovative Land Use Planning Techniques: A Handbook for Sustainable Development,* together with a model

ordinance. These materials are available on the OEP website under "resource library" and "innovative land use planning." The focus is on promoting agricultural uses in areas well-suited for them and providing appropriate buffers in housing developments near agricultural uses.

Particular attention should also be paid to what sorts of agriculture are appropriate within areas of relatively high-density residential development, since that is where friction is most likely to occur. Crops and horticultural commodities are permitted uses everywhere, but municipalities have discretion concerning farm animals and farm stands and other typical "accessory uses."

Under the statutes summarized here, omission of reference to agriculture will be deemed to permit all sorts of agriculture. Vague or general references to agriculture will be interpreted liberally to permit agricultural activity. If a municipality wishes to draw lines in terms of which agricultural activities to permit and the scale of operations, the ordinance should be specific. For example, it should identify which animals are permitted and how many are permitted. Horses may be deemed appropriate in a district where pigs are not. Ten chickens on a small lot may be acceptable where 40, including roosters, would be a nuisance. A local definition of "agriculture" can be adopted if only some of the activities in RSA 21:34-a are deemed desirable. (In the case of preexisting agricultural uses, however, the broad definition of RSA 21:34-a controls under RSA 674:32-b). For special exceptions, of course, good zoning practice requires that all relevant criteria must be set forth in the ordinance. RSA 674:33.

New Hampshire law certainly encourages local agriculture and discourages unnecessary barriers in zoning and planning regulations. It is up to municipalities to do the hard work to achieve the proper balance for each community. As the U.S. Supreme Court famously observed in the seminal zoning decision, *Euclid v. Ambler Realty Co.*, "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 272 U.S. 365, 388 (1926). Or a chicken coop in Saskatoon.

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RSA 21:34-a Defines 'Agriculture' and 'Farming'

A wide variety of activities related to: the tillage of the soil; production of compost; the raising and sale of livestock, horses, birds, fish and insects; incidental transportation and housing of people; use, storage and transportation of equipment, materials and supplies; marketing at wholesale and retail; etc.

Note: The RSA should be consulted for a complete definition.

Agriculture-Friendly Property Tax Exemptions

The legislature has passed several measures encouraging agriculture through favorable property taxation treatment.

Current Use Taxation for Farm Land Tracts Smaller than Ten Acres

Most everyone is familiar with current use taxation under RSA 79-A. The criteria for eligibility for current use taxation are adopted through administrative regulations by the Current Use Board. The general rule is that a tract must be at least 10 acres in size to qualify. N.H. Admin. Code Cub 304.01 (b) (1). Less well known, however, is Cub 304.01 (b) (3), which allows current use taxation for "a tract of undeveloped land of any size, actively devoted to the growing of agricultural or horticultural crops with an annual gross income from the sale of crops normally produced thereon totaling at least $2,500 . . . ." The landowner must demonstrate to local assessors each year that at least $2,500 was earned during the previous year from crops grown on the land. Cub 304.16. The landowner's contiguous land also becomes entitled to favorable current use assessment. Cub 304.17.

Exemption for Demountable, Plastic-Covered Greenhouses

Under RSA 72:12-d demountable, plastic-covered greenhouses and certain appurtenances are exempt from property taxation, so long as they are designed and used for growing agricultural products and not the sale of non-agricultural products.

Discretionary Barn Preservation Easements

The owner of an historical barn or other agricultural structure may apply to the governing body to grant a preservation easement to the municipality under RSA 79-D. The governing body must determine whether the easement would meet the statutory test for a public benefit. The structure must either provide scenic enjoyment to the public; have historical importance; or contribute to the historic or cultural integrity of a property eligible for listing on the national or state registers of historic places or a locally designated historic district. RSA 79-D:3. The statute sets forth the application process, and the governing body's decision is subject to appeal to the superior court or board of tax and land appeals (BTLA). When a discretionary easement is accepted, the qualifying agricultural structure will be assessed during the duration of the easement (at least 10 years) at between 25 and 75 percent of full value. RSA 79-D:7.

Farm Structures and Land Under Farm Structures

When adopted by the legislative body of a municipality, RSA 79-F requires the assessing officials to appraise qualifying farm structures for no more than replacement cost less depreciation and the land under qualifying structures at no more than 10 percent of its market value. RSA 79-F:4. To qualify, a structure must be used for specified agricultural uses and be contiguous to a minimum of 10 acres of open space land. RSA 79-F:3, IX. The statute sets forth an application process, and the assessing officials' decision is appealable to the superior court or BTLA. Similar to current use taxation, upon change of use to a non-qualifying use, the farm structure and land is subject to a use change tax at the rate of 10 percent of the full value assessment. RSA 79-F:5.

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