to identify the source of the improper handling and has reason to believe such handling is a nuisance caused by failure to use best management practices, the commissioner shall:

(a) Determine who is responsible for such handling.

(b) Determine the changes needed in handling to comply with best management practices.

(c) Notify, in writing, the person responsible of the findings and changes necessary to conform to best management practices.

(d) Require a plan for compliance if the corrections, under RSA 431:35, I(c), have not been made within 10 days after notification.

II. If the person responsible fails to implement the recommended changes, the commissioner shall notify the health officer of the municipality and the commissioner of environmental services, who shall take such action as their authority permits.

The commissioner's manual on best management practices can be found online at http://agriculture.nh.gov/publications-forms/documents/bmp-manual.pdf.

3. State law. "Nothing contained in this subdivision shall be construed to modify or limit the duties and authority conferred upon the department of environmental services under RSA 485 or RSA 485-A or the commissioner of agriculture, markets, and food under any of the chapters in this title." RSA 432:35. The state has created extensive regulation in the area of agriculture, and the "right to farm" does not supercede state requirements, such as labeling and advertising of farm products under RSA Chapter 426.

You may be asking yourself—what about local zoning or other regulations? Let's talk about that now.

II. Agriculture and Land Use

The primary statues regarding agriculture and land use are RSA 674:32-a, -b, and -c. Although they are relatively short at first glance, understanding their practical application is easier said than done.

To understand the framework of these statutes, we must view them with RSA 672:1, III-b as a backdrop:

> 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 and shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers.

Therefore, these statutes seek to strike a balance between the importance of supporting agricultural operations and the important health, safety, and aesthetic goals furthered by local zoning ordinances and enforcement.

When are Agricultural Uses Permitted?

The goal of RSA 672:1, III-b is reinforced in RSA 674:32-a, which creates a presumption that, if zoning ordinance is silent on the subject of agricultural uses, such uses are deemed to be permitted either as a principal or accessory use:

> 674:32-a Presumption. – In accordance with RSA 672:1, III-d, whenever agricultural activities are not explicitly addressed with respect to any zoning district or location, they shall be deemed to be permitted there, as either a primary or accessory use, so long as conducted in accordance with best management practices adopted by the commissioner of agriculture, markets, and food and with federal and state laws, regulations, and rules.

Remember that the general rule is that a zoning ordinance "prohibits uses for which it does not provide permission." See Treisman v . Kamen, 126 N.H. 372, 375 (1985). So RSA 674:32-a reverses that general rule for the purposes of agriculture. In addition, note that the last half of the section—"conducted in accordance with best management practices adopted by the commissioner of agriculture, markets, and food and with federal and state laws, regulations, and rules"—mimics the language seen RSA 432:34, previously. RSA 674:32-a applies to both new and preexisting agricultural uses. Remember, though, that this presumption that agricultural activities are permitted arises only if your zoning ordinance does not "explicitly" address agricultural uses. Therefore, the answer to the often-asked question—can a zoning ordinance prohibit agriculture?—is yes, with one very important exception. Under 674:32-c, I, a municipality cannot prohibit the tilling of soil or growing of crops: "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." Therefore, local zoning cannot attempt to relegate growing of crops to a particular district or prohibit it outright. In addition, keep RSA 674:17, the stated "purposes of zoning," in mind:

> 674:17 Purposes of Zoning Ordinances. –
>
> I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. Zoning ordinances shall be designed:
>
> . . .
>
> (i) To encourage the preservation of agricultural lands and buildings and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings; . . . .

What Regulatory Power Does the Municipality Have?

When a new agricultural use is established or when an existing use is expanded, questions often arise with regard to the municipality's authority to require things like site plan review. RSA 674:32-b deals with changes and expansions to agricultural uses. Although it is titled "Existing Agricultural Uses," this section pertains to both existing and new uses, setting forth different standards for regulation/restriction depending on two factors: (1) the agricultural operation's status (i.e., existing, new, or re-established) and (2) the type of change or expansion that is occurring.

674:32-b Existing Agricultural Uses. – Any agricultural use which exists pursuant to RSA 674:32-a may without restriction be expanded, altered to meet changing technology or markets, or changed to another agricultural use, as set forth in RSA 21:34-a, so long as any such expansion, alteration, or change complies with all federal and state laws, regulations, and rules, including best management practices adopted by the commissioner of agriculture, markets, and food; subject, however, to the following limitations:

> I. Any new establishment, re-establishment after disuse, or significant expansion of an operation involving the keeping of livestock, poultry, or other animals may be made subject to special exception, building permit, or other local land use board approval.
> 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, 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.

We often overlook the first few words of this section, but they are quite important. The existing agricultural operations that are permitted to expand or change "without restriction" are technically only those that "exist[] pursuant to RSA 674:32-a." Remember that the operations that "exist pursuant to RSA 674:32-a" are operations "not explicitly addressed with respect to any zoning district or location." Therefore, an agricultural operation that exists because it is permitted by zoning does not enjoy the "without restriction" exemption of RSA 674:32-b. On the other hand, an operation that exists because zoning does not prohibit it or because it preexisted zoning is subject to expand or change "without restriction, subject to subsections I and II."
In addition, under RSA 674:32-c, II new, re-established, or expanded agricultural uses are still subject to "generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations." We might think of this as a "limited site plan review" authority, but precisely what this statute provides for remains somewhat unclear.

Therefore, we might chart out these statutes as follows*:

Status of Operation	Type of Change	Manner of Regulation/Restriction
Existing Use pursuant to RSA 674:32-a	Expansion/alteration to meet changing technology/markets or change to another agricultural use under RSA 21:34-a	Permitted "without restriction," but still subject to 1. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations 2. Federal laws, state laws and regulations (including BMPs)
Existing Use pursuant to RSA 674:32-a	Significant expansion involving livestock, poultry, or animals	1. Special exception, building permit, or other land use board approval 2. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations
Existing Use	Significant expansion of farm stand, retail operation, or other on-site transactions with public	1. Special exception, building permit, land use board approval, traffic regulation 2. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations
New Establishment	Involving livestock, poultry, or animals	1. Special exception, building permit, or other land use board approval 2. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations
New Establishment	Farm stand, retail operation, or other on-site transactions with public	1. Special exception, building permit, land use board approval, traffic regulation 2. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations
Re-establishment	Significant expansion involving livestock, poultry, or animals	1. Special exception, building permit, or other land use board approval 2. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations

Re-establishment	Farm stand, retail operation, or other on-site transactions with public	1. Special exception, building permit, or other land use board approval 2. Generally applicable building and site requirements such as dimensional standards, setbacks, driveway and traffic regulations, parking requirements, noise, odor, or vibration restrictions or sign regulations

***However, under RSA 674:32-c, III, all agricultural activities are also limited as follows:**

1. Nothing in this subdivision shall apply to any aspect of an agricultural operation determined to be injurious to public health or safety under RSA 147.
2. Nothing in this subdivision shall be deemed to modify or limit the duties and authority of the department of environmental services under RSA 485 or RSA 485-A or the commissioner of the department of agriculture, markets, and food under title XL.
3. Nothing in this subdivision shall be deemed to affect the regulation of sludge or septage.

Note: The following section is a reprint of an article written by Susan Slack for the New Hampshire Planners Association (NHPA) newsletter. It is reprinted with permission from the NHPA.

Forster v.Town of Henniker

In June, the NH Supreme Court issued its ruling in *Forster v.Town of Henniker*, a much anticipated zoning case involving the definition of "agritourism" and whether commercial activities such as business retreats, weddings and other events are permitted on property used as a Christmas tree farm.

The Christmas tree farm is located in Henniker's rural residential district, which includes "a mixture of agriculture and low-density rural living," according to the town's zoning ordinance. Permitted uses in the district are agriculture and uses accessory to a permitted use. The farm is 110 acres in size, and about 10 acres is devoted to growing Christmas trees. The owner began to hold weddings, celebrations, and business and educational events on the property. The case began as an enforcement action by the town, and the ZBA eventually ruled that such uses were not permitted in the rural residential district and were not accessory uses to the principal use of the property as a Christmas tree farm. The trial court upheld the ZBA's ruling, and the Petitioner appealed.

The Supreme Court's opinion, which found in favor of the town, is instructive on several legal issues: 1) statutory construction–how courts interpret the meaning of laws; 2) implied preemption–whether state laws on a particular topic are so comprehensive that they preempt conflicting local ordinances; and 3) accessory uses–whether a use is subordinate and incidental to the principal use of the property and, therefore, permitted.

1) Is "Agritourism" included within the definition of "Agriculture"?

At the Supreme Court, the property owner argued that retreats, weddings and other events were permitted because they constitute agritourism under RSA 21:34-a,VI.He argued that agritourism is included within the definition of agriculture found in RSA 21:34-a, which the town's zoning ordinance incorporated by reference.

The Supreme Court disagreed with the property owner's assertion that agritourism is included in the statute's definition of agriculture. The Court said the statute is a list of definitions. Paragraph I defines "farm," paragraph II defines "agriculture" and "farming." Paragraph VI defines "agritourism." The Court said that growing Christmas trees as part of a commercial Christmas tree operation is a "farming" operation as defined in paragraph II, but that "hosting events such as those the petitioner proposes is not."

The Court also said such events are not practices "incidental to farming operations," which are considered "agricultural uses" under RSA 2134-a,II(b). Although the statute says the list is not all inclusive, the Court construed the list to include "only practices similar to those included in the enumerated list." The Court concluded that hosting weddings and other events is not similar in nature to the practices listed in RSA 21:34-a,II(b).

In addition, the Court said that nothing in the definition of agritourism in paragraph VI "provides that activities that constitute agritourism also constitute agriculture. Accordingly, even if we assume that the petitioner's proposed uses constitute 'agritourism,' the plain meaning of RSA 21:34-a does not provide that they also constitute agriculture."

The Court noted that the plain meaning of the statute is clear enough to conclude that the legislature intended to structure RSA 21:34-a as it did. Nevertheless, it consulted the legislative history of House Bill 56, the 2007 bill that amended the statute to add the definition of "agritourism." The Court said the legislative history supports its conclusion that "agritourism" is not part of the definition of "agriculture." According to the Court, "The legislative history...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."

In particular, the Court pointed out that the house-passed version of HB 56 defined agritourism and included the phrase "and as such shall be considered an agricultural use." In the Senate, however, there was testimony warning against including that phrase in the definition of "agritourism" because of its significant impact on municipalities with agricultural zoning districts. One legislator testified that it would mean that restaurants, motels and hotels are agricultural uses. The Senate version of HB 56 did not include this phrase and the House later concurred. The result, the Court concluded, is that the definition of "agritourism" does not equate such uses to agricultural uses.

2) Is the town ordinance preempted?

The Court's opinion also includes an informative discussion of the doctrine of preemp-

tion and whether the town's zoning ordinance was preempted by RSA 21:34-a. Generally speaking, municipal legislation is invalid if it is inconsistent with state law. A local ordinance is preempted when the comprehensiveness and detail of the state statutory scheme shows legislative intent to supersede local regulation, or when there is an actual conflict between state and local law, or when a municipal ordinance permits that which a state statute prohibits or vice versa.

The petitioner argued that the purpose of RSA 21:34-a is to create a uniform application of the term agritourism across the state to enhance the economic viability of New Hampshire farms. On that basis, he argued that the agritourism statute mandates that Henniker cannot prohibit activities that meet the statutory definition of "agritourism".

The Court said that 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; it contains no mandate to municipalities. The Court said the statute does not require that municipalities adopt the same definition in their local ordinances. "Nor does it mandate that municipalities allow activities that meet the statutory definition of agritourism. Because RSA 21:34-a contains no mandate, the town's ordinance necessarily does not conflict either with its language or its purpose."

Although other statutes relating to agriculture contain mandates to municipalities, the Court pointed out that none use the word "agritourism."

The Court reviewed the relevant statutes (RSA 674:17,I(i); RSA 672:1,III-b; RSA 672:1,III-d; and RSA 674:32-a) and commented that, "[n]one [of these] support the petitioner's contention that the legislature intended to require municipalities to allow agritourism within their borders. Moreover, they demonstrate legislative intent to allow reasonable local regulation, not to preempt the entire field." According to the Court, "should town voters want to allow the petitioner's proposed uses in the rural residential district, they are free to amend the town's ordinance as they see fit."

1) Are the petitioner's proposed uses Accessory Uses?

The petitioner asserted that even if weddings and other proposed events are not agritourism under the statute, they were accessory uses and therefore permitted. The Court discussed the definition of accessory uses established under prior case law. Specifically, that accessory uses are " 'not the principal use of the property, but rather a use occasioned by the principal use and subordinate to it'," and they " 'must be minor in relation to the primary use'."

The Court also looked at Henniker's zoning ordinance which provides that accessory uses must be "customarily incidental" to the primary use. The Court said " 'customarily' imposes an additional requirement that the accessory use 'has commonly, habitually and by long practice been established as reasonably associated with the primary use in the local area'." The Court said the petitioner failed to prove that his proposed uses are commonly associated with the operation of Christmas tree farms in the local area.

Note on the dissent:

One of the five justices dissented from the majority opinion, arguing that weddings on

farms are customary. He criticized the majority for limiting its inquiry into customary uses to only "the local area," rather than a broader geographic area. He also said it seemed unlikely that the legislature would include the definition of agritourism in RSA 21:34-a without intending it to be part of farming or agriculture.

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