STATE OF NEW HAMPSHIRE

MERRIMACK, ss SUPERIOR COURT

Case No.: 217-2016-CV-00534

Stephen E. Forster

v.

Town of Henniker Zoning Board of Adjustment

MEMORANDUM OF LAW OF THE TOWN OF HENNIKER ZONING BOARD OF ADJUSTMENT

I. FACTS

This is an appeal of a decision of the Zoning Board of Adjustment (hereinafter "ZBA" or "Board") wherein the Board overturned a decision of the Town of Henniker Planning Board, ruling "there was not a material change of circumstances [from the previous application of the plaintiff] and the finality doctrine should have precluded the Planning Board from accepting the case." Certified Record (hereinafter "CR"), p. 53. The ZBA did not consider the merits of the conditional use/minor site plan application, but rather focused upon the interpretation and the application of the definitions of "agritourism" contained in the Town's Zoning Ordinance. See, RSA 676:5, II(b) ("a 'decision of the administrative officer' includes any decision involving construction, interpretation or application of the terms of the ordinance.").

Previously, in May of 2012, the plaintiff was notified that his use of his property for "weddings, celebrations, and business and educational events" was a violation of the Zoning Ordinance. Foster v. Town of Henniker, 167 N.H. 745, 758 (2015). He appealed that decision to the ZBA, arguing his uses were "accessory uses to his primary agricultural use." Id. He also argued his uses were "agritourism." Id. at 749. The Supreme Court rejected both contentions.

In the spring of 2016, the plaintiff filed an application for a Conditional Use Permit under Section 133-20A of the Town of Henniker Zoning Ordinance, again to hold weddings and events under the rubric of "agritourism." CR, Appendix (hereinafter "App.") A (Zoning Ordinance) p. 12; see also, CR 125 (Planning Board minutes). Abutters protested, asserting that "the events Mr. Forster holds on his property are not ancillary to the primary farm use." CR 127. When the Planning Board granted the Use Permit, the abutters appealed, CR section 1, arguing, "the 2016 zoning amendments retained the requirement that agritourism uses be ancillary and accessory to a principal farming operation." CR p. 4. The ZBA agreed, ruling "that there was not a material change of circumstances and the finality doctrine should have precluded the Planning Board from accepting the case," relying upon the doctrine enunciated in Fisher v. City of Dover, 120 N.H. 187 (1980). CR p. 53.

In order to fully consider Mr. Forster's appeal in context, it needs to be recognized that the legislature amended the definition of agritourism, so that it has been incorporated in RSA 21:34-a, II, under the definition of "agriculture" and "farming," by adding the following new definition:

> 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, and enjoyment of the farm environment, education about farm operations, or active involvement in the activity of the farm.

RSA 21:34-a.II(b)(5). Also in 2016, the voters adopted the following two new definitions of agritourism:

> AGRITOURISM – attracting visitors to a working farm for one or more of the following purposes that are ancillary and Accessory to the principal Agriculture operation:
>
> a) Overnight stays in the principle [sic] dwelling on the farm or in a barn or

other building that is used in the operation of the farm, not to exceed a total of eight (8) guests per night;
b) Serving meals to overnight guests;
c) Active participation in the operations of the farm;
d) Education, tours, demonstrations, exhibits, and sales if such activities are directly related to the farm or its operations;
e) Recreational activities that make use of the farm's product, equipment, or animals such as hayrides, sleigh rides, or mazes, etc.; and
f) Gatherings, functions, celebrations, and meeting greater than 25 participants.

AGRITOURISM – 'agritourism' includes the definition set forth in N.H. RSA 21:34-a (VI), and shall specifically include, but not be limited to farm-to-table events, overnight-stays, corn mazes, agricultural-based educational activities, fairs, on-farm weddings and similar events, hayrides, petting zoos, pick-your-own produce operations, agriculture tours, nature walks, outdoor sporting activities, snowmobile, ATV trails, bike trails, hiking, snowshoeing, x-country skiing, horse trails, camping, bird watching, historical and agricultural exhibits and museums, as well as other commercial agricultural activities on farms that are intended or designed to attract visitors to a working farm.

CR App. A. pp. 2-3 (Definitions/Zoning Ordinance).

The Board concluded that in order for the plaintiff to undertake his agritourism activities, he was obliged to demonstrate that those activities were accessory to his principal use as a Christmas tree farm. This, the Board observed, was precisely the issue addressed in the previous litigation that ended in the Supreme Court. Thus, the common thread permeating both the previous and current applications was the accessory use question. The Board concluded that the

plaintiff failed to show that there were changed circumstances such that it could entertain a second application on this issue.

II. ISSUE PRESENTED

The ZBA ruled "that there was not a material change of circumstances and the finality doctrine should have precluded the Planning Board from accepting the case." CR, p. 53. Consequently, the Court must resolve whether there was a material change in circumstances and whether the plaintiff's proposed uses are materially different from that which was previously considered and rejected by this Court in 2013. See, Planning Board Certified Record, p, 184 (Stephen E. Forster v. Town of Henniker; Case No. 217-2013-CV-00204). In that case, this Court ruled:

> The record contains little information on the petitioner's Christmas tree farm. Instead, the petitioner generally asserts that commercial weddings and events are essential for the farm's viability and that such uses are not [sic] subordinate or incidental. This is not sufficient. "An aggregation of incidental uses, however, may result in the loss of 'accessory' status. If the scope and significance of the proposed use is at least equal to the permitted residential use, the proposed use may no longer be subordinate or incidental and thus not permitted as an accessory use." Marchand, 147 N.H. at 383.

PB CR, pp. 192-93. The Court further found that the petitioner "fail[ed] to establish a nexus between the wedding and events to the Christmas tree business. Indeed, the record indicates that wedding and event customers are attracted more to the view and less to the Christmas trees.... Consequently, the petitioner has not sustained his burden of showing that the ZBA's accessory use determination was unreasonable or unlawful." Id.

The plaintiff relies on Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553 (2011) to argue that there has been a material change of circumstances as a result of the new definitions enacted by the legislature and the Town. However, in this case all of the new definitions require

the same showing as in the previous case: that the agritourism use is "accessory" and "ancillary" to the principal use of the property. In Forster v. Town of Henniker, 167 N.H. 745, 748 (2015), the Court observed that "[c]onsistent with the common law, the Town's ordinance defines an accessory use as a 'use subordinate and customarily incidental to the main...use on the same lot.'" The Court continued "[h]ere, the petitioner failed to establish that the proposed uses have 'commonly, habitually and by long practice been established as reasonably associated with the primary...use.'" Id. at 759.

Under RSA 21:34-a, II(b)(5), agritourism "means attracting visitors to a farm to attend events and activities **that are accessory uses to the primary farm operation.**" (emphasis added). The definition of agritourism sponsored by petition incorporates by reference "NH RSA 21:34-a (VI)." The former statutory definition included the requirement that the enumerated uses must be "**ancillary to the farm operation.**"(emphasis added). Under the Zoning Ordinance definition sponsored by the Planning Board, the enumerated activities must be for "purposes that are **ancillary and Accessory to the principal Agriculture operation.**" (emphasis added). CR App. p. 2. In contrast, in Brandt, the applicant had unsuccessfully sought a variance in 1994. Because the Supreme Court had utterly abandoned the old test for hardship in 2001, see, Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001), Brandt was allowed to pursue his variance application, employing the entirely new two part test developed in Boccia v. City of Portsmouth, 151 N.H. 85 (2004). Brandt is inapposite.

III. STANDARD OF REVIEW

Whether a proposed use constitutes an accessory use is "a mixed question of fact and law." Forster v. Town of Henniker, supra at 759. "Judicial review in zoning cases is limited. Factual findings by the ZBA are deemed *prima facie*, lawful and reasonable, and the ZBA's

decision will not be set aside by the superior court absent errors of law unless it is persuaded by the balance of probabilities, on the evidence before it, that the ZBA decision is unlawful or unreasonable. See, RSA 677:6." Forster v. Town of Henniker, supra at 749. "[A] reviewing court defers to the Board's factual findings." Brandt Dev. Co. of New Hampshire, LLC v. City of Portsmouth, 162 N.H. at 557. However, "[t]he interpretation and application of a statute or ordinance is a question of law" which the court reviews *de novo*. Id. at 555. The party appealing the decision of the Zoning Board of Adjustment bears the burden of proof. RSA 677:6. There is no trial *de novo*. Glidden v. Town of Nottingham, 109 N.H. 134, 136 (1968).

IV. THE DEFINITIONS OF "AGRITOURISM" CONTAIN A REQUIREMENT THAT THOSE USES MUST BE "ANCILLARY" AND "ACCESSORY" TO THE "PRIMARY FARM OPERATION."

> *"While the planning board's definition of "agritourism" definition [sic] deems certain types of uses to be ancillary and accessory in nature, those uses must still be subordinate to the principal agricultural operation"*
>
> CR, p 141 (Plaintiff's Motion for Rehearing)

The plaintiff expends great energy attempting to argue that the definitions of agritourism do not require that those uses be "ancillary" or "accessory" to the "primary farm operation." See, e.g., Complaint, ¶¶ 37-38 and 50-67. Yet all of the definitions at issue in this case use those very words. As Attorney Puffer observed on behalf of the abutters:

> Mr. Forster claims that the Henniker Zoning Ordinance defines all agritourism uses to be ancillary and accessory to existing farm uses. If that had been the intent of the planning board, there would have been no need for the Board to include the terms ancillary and accessory when describing agritourism.

CR 62. The Board agreed. Chair Doreen Connor observed:

> The Chair stated the Motion for Reconsideration asserts the agritourism definition in the planning board ordinance expressly finds uses A through F to be deemed ancillary and accessory. If that had been the intent of the ordinance amendment, a period could have been placed after the word purposes.

CR 63. Board member Stamps asked, "if there wasn't a requirement [of accessory] why would the planning board ask about subordinate use?" CR 63. This is an excellent point, as the planning board drafted one of the definitions at issue. The planning board minutes reflect the fact that planning board member Taylor "asked how the wedding events are ancillary to the farm." CR 126. Similarly, alternate member Higginson "asked how the wedding events are ancillary to the farm; what is the connection?" CR 128.

Ultimately, even the plaintiff seems to have abandoned the pretense that agritourism does not have to be accessory to the principal agricultural operation. For example, Mr. Forster argued "the wedding events he hosts are subordinate to his farm." CR 58. The Chair pointed out that "Attorney Reimers asserts his client couldn't hold a Woodstock event, because that gathering though deemed accessory would be a use that is greater than the principal tree farming use." CR 63. She continued, "the ordinance limit on Section F's Woodstock event still requires a principle [sic] Agriculture use and the Event must still be Accessory and ancillary." Id.

Any remaining doubt about the import of the words of the ordinance is resolved by reference to the statement of purpose appearing on the ballot:

> Amendment purpose: This proposed amendment will allow agritourism activities as accessory uses on farms supporting the community's farm base and helping maintain the town's rural character. Provisions are included in the amendment to oversee potential impact to abutters.

CR, p 141.

The plaintiff incorrectly argues that the planning board's authority is intended to ensure the use is subordinate. CR, p 68(¶B). In fact, the regulations are only intended to mitigate "potential impacts to abutters." And, contrary to his previous position, the plaintiff concedes "[t]his authority is provided expressly for the purpose of mitigating potential increased impacts."

CR 121. Moreover, the plaintiff's reliance on section 133-20A.A.2.b, which allows the planning board to impose conditions on an approval "to meet the spirit and intent of this Ordinance," undermines his argument. In order for the board to impose a condition that the proposed use be subordinate, the "spirit, and intent of the ordinance" must in fact require it to be accessory. The requirement that the use be subordinate is a hallmark of the accessory use doctrine.

The ZBA focused on the planning board definition in the ordinance, believing it to be more restrictive. CR 63; see also, RSA 676:17. But it does not matter which definition is employed; either requires agritourism to be an accessory use. Either definition requires a "principal" or "primary" agricultural use. The planning board definition provides agritourism is:

> Attracting visitors to a working farm for one or more of the following purposes **that are ancillary and Accessory to the principal Agriculture operation.**

(emphasis added). CR App. A p.2. The definition of agritourism incorporated by petition "includes the definition set forth in RSA 21:34-a,VI." CR App. A P. 3. That definition, since repealed, provided:

> 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 operations**.

(emphasis added). Finally, there is the current statutory definition contained in RSA 21:34-a, II(5):

> Attracting visitors to a farm to attend events and activities **that are accessory uses to the primary farm operation**.

(emphasis added). The language of the statute is coordinate with the planning board definition ("that are...Accessory to the principal Agriculture operation"). The plaintiff has not argued that the new statute does not require agritourism activities to be accessory uses, nor can he. Since the

language of the statute and the ordinance are the same, it follows that the plaintiff is obliged to satisfy the accessory requirement. "[A]n interpretation that renders statutory language superfluous and irrelevant is not proper interpretation." State v. Duran, 155 N.H. 146, 166 (2008).

Senator Boutin, the prime sponsor of SB 345 which amended the statutory definition, pointed out in his testimony before the House Committee on Environment and Agriculture:

> Agritourism is also defined in the bill as an "accessory use" in the planning and zoning statutes.

(Copy attached). In his testimony before the Senate Public and Municipal Affairs Committee, Senator Watters observed: "the definitional word 'accessory' is an essential part of the bill." (Copy attached). A representative of the NH Municipal Association observed, "the bill does preserve the protections and it has to be an accessory use and it is only allowed where the primary use is for agriculture." Id. The plaintiff's argument that the same language used in both the town ordinance and statute does not require a demonstration that the agritourism activity is accessory to the primary farm operation is unsustainable.

V. THE PLAINTIFF HAS FAILED TO BEAR HIS BURDEN OF PROVING THAT HIS CURRENT APPLICATION MATERIALLY DIFFERS IN NATURE AND DEGREE FROM ITS PREDECESSOR.

The evidence before the Board included the entire record of the proceedings before the Planning Board. This evidence included not only the current application, but also all of the documents associated with the plaintiff's 2012 appeal to the Board. CR, App, B, Volumes I – IV. A comparison of the evidence in the two proceedings demonstrates the Board was correct when it concluded that there was no "material change in circumstances and the finality doctrine should have precluded the Planning Board from accepting the case." CR 53. Indeed, the evidence

shows the plaintiff seeks to expand the uses previously rejected as not being "accessory uses to the farm." CR App. B, p. 121 (ZBA 2013 Decision). Determining whether a subsequent application "materially differs from a prior application involving the same property is a fact-sensitive inquiry." CDBA Dev., LLC v. Town of Thornton, 168 N.H. 715, 722 (2016).

It has been long-established law that:

> When a material change of circumstances affecting the merits of the application has not occurred or the application is not for use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.

Fisher v. City of Dover, 120 N.H. 187, 190 (1980).

> Applying the Fisher doctrine in this context, an applicant before a planning board bears the burden of demonstrating that a subsequent application materially differs in nature and degree from its predecessor. The determination of whether changed circumstances exists is a question of fact. This determination must be made, in the first instance, by the board. On appeal, the board's factual findings are deemed *prima facie* lawful and reasonable.

(quotations and citations omitted). CBDA Dev., LLC, *supra* at 724.

The plaintiff cultivates Christmas trees on 10 acres of his property. CR App. B, p. 938 (transcript of ZBA hearing, 2/7/13, p. 156). He invites the public to cut their own trees, without any interference by the Town.

From May through October, plaintiff seeks to operate an events venue, and invites people to enjoy his entire 130 acre property, CR App. B, p. 619, for the purpose of holding "weddings, ceremonies, receptions and special events." He advertises a capacity of up to 150 people for "catered events." CR App. B, p. 619. Tents are delivered and erected. CR App. B p. 459. There is valet parking, flower service, professional bartending, cooking staff, wait staff, and an

on-site event coordinator. CR App. B, pp 649-655. These activities and music extend well into the night. CR App. B, p. 936 (ZBA transcript p. 149 (music until 10:00 pm.)). There is increased traffic, parking problems, and delivery truck traffic on the narrow dirt road serving the property. CR App. p 461-477. Signs are posted on the highway to direct event attendees to the property. CR App. B, p. 457.

Nothing has changed since the previous application was considered by the Board. The Court can still visit the plaintiff's website and find the same information as was available in 2013. The events still accommodate 150 guests in the tent and 35 more can be accommodated on the deck. CR 123. Approximately 162 parking spaces are available. CR 124. Signs are posted along the road, directing guests to the property. CR 124. There is still the valet parking service. CR 127. Residents along the road still "voice concerns with noise, road safety, adequate parking and sanitary facilities." CR 12.

Indeed, the plaintiff intends to expand his operations. At the September 3, 2013 hearing before this Court, the plaintiff represented "there were seven events in 2013 scheduled, five in 2012, and eight in 2011." CR App B, p 1040. Now, "Mr. Forster said weddings run from May to October, i.e. 26 weeks, but the most he has ever had are 18." CR 126. More importantly, the representation is "it is my intention to limit the number of planned events to not exceed in number the current 86 days ..." CR 99. Furthermore, he is not willing to make that commitment, as "[t]he dates of the **majority** of outdoor planned events will be from May 1st to October 31st." (emphasis added). Id.

Similarly, the plaintiff previously represented his events ended by 10:00 p.m. Although he continued to make that claim, CR 126, his only commitment was that he would comply with

the noise ordinance that applies after 11:00 p.m. CR 99. Thereby again expanding the use previously rejected as not being accessory.

As Board member Parker observed in the previous proceedings:

> I think the magnitude of the use and the activity that's been described here is substantially different than what the people that wrote this definition [of accessory use] probably had in mind because I think that the traditional use of the terminology that's in here would be that it would be something that would be of a lot less consequence than the main activity that it is an accessory use to.

CR App. B, p. 941 (ZBA hearing, pp. 166-167). Board members Laberge and Oliviera agreed. Id.; CR App. B p. 942 (ZBA hearing p. 171) (Board Chair Connor stated, "I don't believe that the evidence we have heard establishes, more probably than not, that the wedding use is subordinate to the tree operations."). The evidence was that the interaction of the plaintiff with the public and the sale of Christmas trees lasted only 30 days, CR App. B, p. 942 (ZBA hearing, p. 172), whereas the numerous events occurred over 5 ½ months from May to mid-October. CR App. B, p. 619.

The case of Narbonne v. Town of Rye, 130 N.H. 70 (1987) is instructive on this issue. In that case, the plaintiffs claimed their stained glass studio was an accessory use or customary home occupation. The Court rejected their claims for some of the very same reasons the ZBA rejected the plaintiff's claim here: "[T]he plaintiffs' business activity exceeds the level of activity that might reasonably be considered to result from a subordinate use of the premises.... [T]he evidence presented portrays a substantial commercial enterprise." Id. at 73. Comparing the Narbonne case to the ZBA record, the court pointed to increased traffic, parking problems, large truck deliveries, caterer, bartending, tents, signage, and advertising. In this case, the Board also

considered the loud music and additional staff support including chefs, bartender, wait staff, flower service, valets, and wedding coordinator. These are hardly the characteristics of an accessory use to a Christmas tree farm.

No doubt, plants live 365 days of the year. But the plaintiff's Christmas tree transactions with the public, which is the issue here, are concentrated in the month of December. As this Court previously observed:

> The record reflects that the petitioner held 8 events in 2011, and five events in 2012, and that he makes available commercial weddings and events between May and October with a maximum capacity of 150 people. In contrast, the Christmas tree season is limited in duration.

CR App B, p 1255(Order, p.8).

Section 133-26 of the Zoning Ordinance defines "accessory uses" as "[a] building or use subordinate and customarily incidental to the main building or use on the same lot." CR App A, p 2. "The definition of accessory use in the town ordinance ("Customarily incidental and subordinant [sic]") involves several distinct elements. 'Incidental and subordinate' incorporates the requirements that the use be minor in relation to the permitted use and that the accessory use bear a reasonable relationship to the primary use." Becker v. Town of Hampton Falls, 117 NH 437, 440 (1977) (citations omitted). The plaintiff failed to introduce any evidence to support his burden of proving his uses are incidental or subordinate to his agricultural use. CR App B, p 1256. ("The lack of record support for a finding of accessory use is reinforced by petitioner's failure to establish a nexus between the weddings and events to the Christmas tree business."). The plaintiff offered no evidence, but rather he relied upon conclusory statements of the magnitude of the principal and accessory uses. Cf. Harrington v. Town of Warner, 152 NH 74, 81 (2005) (In the context of a variance, "mere conclusory and lay opinion concerning the lack of reasonable return is not sufficient; there must be actual proof, often in the form of dollars and

cents evidence." (quotations, ellipses and citation omitted). Whether measured by time, effort, or income, the events venue is not subordinate to the primary use of the property as a Christmas tree farm.

VI. THE ZBA APPEAL ONLY CONSIDERED THE INTERPRETATION AND APPLICATION OF THE GENERALLY APPLICABLE DEFINITIONS OF AGRITOURISM CONTAINED IN THE ZONING ORDINANCE

The ZBA did not address the merits of the conditional use permit, as that matter is within the exclusive jurisdiction of the planning board under Article IV, Sec. 133-20-A. CR App. A 12 (ordinance enacted under RSA 674:21); see also RSA 676:5, III. It did not address the Fire Department's letter, the noise ordinance, parking, or buffering of the events from neighboring properties. CR 128. Rather, the ZBA focused on the definitions of agritourism contained in Article II of the Zoning Ordinance. These provisions are in entirely separate sections of the ordinance and the ZBA is responsible for interpreting generally applicable definitions. RSA 676:5, II(b) ("A 'decision of the administrative officer' includes any decision involving construction, interpretation or application of the terms of the ordinance."). Furthermore, as the plaintiff concedes, the planning board is concerned with mitigating impacts, not defining agritourism. In order for the planning board to issue a CUP under Sec. 133-20A, the proposed use must satisfy the definitions of agritourism contained elsewhere in the ordinance. And it is there the ZBA focused its attention.

VII. CONCLUSION

In summary, the ZBA rejected the plaintiff's contention that there was a material change in circumstances from his previous application. Then and now, the ordinance and the statute require a showing that the use be ancillary and accessory to the principal agricultural use of the property. Nor were his uses subordinate to the principal use to the property. Previously, the trial court

concluded that the proposed uses were not subordinate to the principal use to the property, but rather were independent, principal uses. Where, as here, the plaintiff only intends to expand and intensify those proposed uses, the Board properly concluded there was not a material change in circumstances, and the finality doctrine controls.

Respectfully submitted,
TOWN OF HENNIKER
ZONING BOARD OF ADJUSTMENT
By its attorneys
UPTON & HATFIELD, LLP

Dated: December 30, 2016 By: /s/ Barton L. Mayer

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Certificate of Service

I hereby certify that a copy of the foregoing has this day been forwarded to Amy Manzelli, Esquire and Mark H. Puffer, Esquire.

/s/ Barton L. Mayer
Barton L. Mayer

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HOUSE COMMITTEE ON ENVIRONMENT AND AGRICULTURE

PUBLIC HEARING ON SB 345

BILL TITLE: relative to the definition of agritourism.

DATE: April 5, 2016

LOB ROOM: 303 **Time Public Hearing Called to Order:** 10:30 a.m.

Time Adjourned: 12:05 p.m.

Committee Members: Reps. Haefner, O'Connor, Groen, R. Gordon, Sad, Bartlett, Bixby, R. Brown, Gardner, Saunderson, Simpson and Peckham

Bill Sponsors:

Sen. Boutin	Sen. Birdsell	Sen. Daniels
Sen. Feltes	Sen. Fuller Clark	Sen. Hosmer
Sen. Morse	Sen. Reagan	Sen. Sanborn
Sen. Soucy	Sen. Stiles	Sen. Watters
Sen. Woodburn	Rep. Cushing	Rep. Luneau
Rep. Moffett		

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Sen. David Boutin testified: The definition of agritourism was not in the definition section of the statute, so the NH Courts pushed the legislature to incorporate it in to the farm and marketing section of the statute. He passed out an amendment. The amendment clears up language of agritourism. This bill amends RSA 632 1. There is a clear connection between planning and zoning and agritourism. Local control over land use is allowed but the town cannot be unreasonable in interpreting what agritourism actually is. This bill helps to protect farmers and help them adapt to today's world. Agritourism helps make farming economically sustainable for farmers. Agritourism is also defined in the bill as an "accessory use" in the planning and zoning statutes.

Section 4 of the bill makes it clear that the legislature is not usurping a town's local control over land use issues.

Q. in section 3 of the bill, line 21, unreasonable interpretation is in quotes. Is that word defined somewhere else? A. Yes.

Q. Noise can be an issue with agritourism. Is noise something that can be regulated? A. Most towns have a section about noise in their regulations. When towns adopt this bill into their regulations they can adopt noise regs also. Further, they already have that authority in their regulations.

Q. If a town has a noise ordinance or lighting are those ordinances still going to be enforced when the town approves an agritourism event? A. Yes. However, for a town to require a farmer to come up with a full blown site plan as if they were a CVS is unreasonable. Towns should be encouraged to work with the farmer.

Q. If this bill were to pass could a town still regulate a farmer to the extent that he could not do an event that he wants to do? Such as a wedding? A. Weddings have been a staple event at many farms. Towns should be reasonable in their requirements and not use their ordinances to shut down activities that are favorable to farmers and agro tourism.

Q. Should we insert weddings into the definition of agritourism? A. Adding that into the definition may or may not change how a town feels about that particular event and town thump their noises at the legislature when they don't like something. Farmers do not want a list they just want the statute to be broad.

*Monique Towmey and Ryan Crawford: Supports agritourism so long as a town has local control over it. She had a bad experience with a wedding on a farm that was too loud, too much traffic and the like. They are happy to see a balance with local control in the bill. They handed out ordinances that were passed in Gilford. They are in favor of this bill as amended in that it preserves local control over land use issues.

Andrew Howe testified. He is a farmer in Gilford. He is happy with the town's ordinances. Ago tourism is what his visitors want on his farm. He has farm to table events. He cant make a living by just selling farm products. The next generation of farmers will need to have very broad events and activities on their farms in order to support themselves.

Q. Is agritourism a more significant source of income than selling your farm products? A. Yes.
Q. Do the agritourism events increase the sale of your farm products? A. Yes.

Commissioner Merrill testified. Is in favor of the bill and amendment. She likes the balancing of local control with a farmer's right to agritourism. Agritourism is not a new concept in NH for farmers. Many people want this kind of experience on a farm.

Q. Does the department intend on promoting agritourism and intend to work on education efforts? A. Yes. We will have workshops this spring.

*Nancy Johnson testified: NH Reginald Planning Commission. They support the bill.

*David Creece from Southern NH Planning Commission. Manchester is part of the commission. They see agritourism as an important tool for farmers and they support the bill.

Rob Johnson from NH Farm Bureau: Testified he is in support of the bill and the amendment. This bill takes effect right a way. He does not want to see a list of activities added to the bill.

Isic Howe. He is a young farmer. Across the board farmers are very happy with the bill. They want to bring people to the farm and sell their products. Agritourism helps to increase profits on the farm and aids the farmer in making ends meet. Regulations on farmers are ever increasing.

Respectfully submitted,

M. Peckham

Rep. Michelle Peckham
Clerk

Senate Public and Municipal Affairs Committee

Jennifer Horgan 271-3092

SB 345, relative to the definition of agritourism.

Hearing Date: March 2, 2016

Time Opened: 11:33 a.m. **Time Closed:** 12:48 a.m.

Members of the Committee Present: Senators Birdsell, Boutin, Stiles, Lasky and Kelly

Members of the Committee Absent: None

Bill Analysis: This bill defines agritourism and permits agritourism activities on any property where the primary use is agricultural.

Sponsors:

Sen. Boutin	Sen. Birdsell	Sen. Daniels
Sen. Feltes	Sen. Fuller Clark	Sen. Hosmer
Sen. Morse	Sen. Reagan	Sen. Sanborn
Sen. Soucy	Sen. Stiles	Sen. Watters
Sen. Woodburn	Rep. Cushing	Rep. Luneau
Rep. Moffett		

Who supports the bill: Senator Boutin; Senator Birdsell; Senator Woodburn; Senator Hosmer; Senator Watters; Senator Daniels; Senator Fuller Clark; Senator Feltes; Senator Stiles; Commissioner Merrill, Department of Agriculture; Ben Frost, NH Housing; Will Stewart, Greater Derry-Londonderry Chamber of Commerce; Robert Johnson, NH Farm Bureau; Jasen Stock, NH Timberland Association; Chuck Sooder; Bruce Crawford, Town of Boscawen; Carrie Dumas; Andrew Howe;

Who opposes the bill: Norman Silber, Gilford Planning Board; John Morgenstern, Gilford Planning Board

Who is neutral on the bill: Cordell Johnson, NH Municipal Association

Summary of testimony presented in support:
Senator Boutin (provided written testimony)

- This bill was crafted due to a Supreme Court ruling in June 2015 regarding a tree farmer in Henniker.

- This farmer and the town of Henniker were in disagreement about the use of the farmer's property for weddings
- RSA 21 a and b define farming and agriculture
- A few years back the legislature put a definition of the word agritourism outside of the definition language for agriculture and therefore, the Court decided that is not covered in the statute to be permissible
- The Court also said it does not qualify as an accessory use
- Has grave concerns about the economic survivability of our farms and their land use
- Formed a roundtable to look at this issue, which included planners, code enforcement officers, the Town Agriculture Commission, the NH Municipal Association, the Commissioner of the Department of Agriculture, conservation groups, several senators and more
- Made it clear at this roundtable that any language was not going to be about one particular land owner, but about farming across the state of NH
- This roundtable met several times over the summer and fall and produced this language
- The majority of the stakeholders agreed to the language in SB 345
- The objective of this bill is to promote the prospects of farming, promote agritourism, and preserve local control
- Did not want to create a backdoor around local zoning
- In 1910 the state of NH had 27,000 farms
- In 2013 there are only 4,400 farms
- There was a recommendation from the 2005 Farm Viability Taskforce formed by Governor Lynch to remove the rules and regulations that overburden farms
- There has been conflicts on the local level about this issue in places like Henniker and Gilford, which highlights the need to address this
- There is a farm in Hampton Falls, Applecrest Farm, that is very successful and had people parking on the road. The town asked the farmer what he could do about it and he bought adjacent land for parking. He also built a building to house produce, a café, and an ice cream stand. This farm also hosts weddings and has talked about moving to 'farm to table'. That is what we want to see in NH and SB345 will get us there while still recognizing the right of municipalities
- Provided the statute that the bill amends
- Acknowledged that the Farm Bureau has different language they will be proposing
- Outlined the structure of the bill
- NH has to recognize that time goes on and we need to adjust
- People complain about the farmers and neighbors want them go away

because they don't like the cows or the traffic

- Explained the definition of agritourism and the reason for not listing activities so to not limit farmers
- Section 2 has to do with RSA 672 on zoning and this makes it clear that towns have the right to regulate agriculture, just as you regulate any other use in the town, but you cannot be unreasonable
- Section 3 has to do with planning statutes and marries the two statutes. This has to do with unreasonable interpretation and adds the word agritourism and clarifies that this is an accessory use
- Section 4 adds agritourism to the current statute and language that addresses the ability of a municipality to deal with parking or safety concerns in relation to agritourism activities.
- Is aware that a constituent of Senator Hosmer wants to add language to Section 5: 'but may be limited by local land use boards and regulations in residential zones and districts.' Is concerned about that idea because Section 4 of SB345 already has this language and therefore it would be redundant and would permit towns to pick and choose which activities are permissible
- Farmers do not want a list in the statue because things change over time and the kinds of activities they do changes
- The public policy this bill is pursuing is the economic viability of these farms

Senator Hosmer

- Thinks about this as a business person and a customer
- Spoke to how businesses operated 25 years ago and how dramatically it has changed.
- Businesses need to evolve and grow to be successful
- These farms started out as straight farmers and they had to change in order to increase revenue and be viable for the long term
- Visited Timber Hill Farm in Gilford and had dinner there. There were about 50 people; it was not raucous and they had a lovely evening
- Supports the bill and encourages the Senate to support agritourism for farmers to continue to evolve and be viable
- This creates a balance between local communities being able to make decisions about the activities that take place and the farmers' need to evolve
- Local people need to make these decisions and this gives them the understanding that agritourism is very important to our local economy

Senator Watters

- Tuttles Farm is Americas oldest farm
- It is essential to keep these farms going
- There is hope in agritourism to keep farms viable
- It is important we add this economic viability
- The definitional word 'accessory' is an essential part of this bill

- Secondary is subordinate and for agritourism, it is doing something accessory to sustaining that farm

Jessica Bourque on behalf of Senator Feltes

- Spent a lot of time on this issue with the stakeholders and thinks this is a reasonable compromise

Will Stewart (Greater Derry Londonderry Chamber of Commerce) (provided written testimony)

- Our region includes a lot of orchards and sees this as a good economic development tool
- The Department of Agriculture put out a report that said in 2002 there were 16 farms engaged in agritourism with $265,000 in revenue and in 2012 there 190 farms engaged in agritourism with $3.8m in revenue
- If this bill passes that number could increase even more and set the stage to see a lot of growth in the economic viability of our farms

Commissioner Merrill (Department of Agriculture)

- Here to support the bill
- Supports the Farm Bureau's proposed amendment
- This is really going to address the problems uncovered by the Supreme Court case
- Agritourism is growing, but it is not a new thing
- Framers are the founders of NH tourism by their taking in of families visiting
- Has seen a real growth of activity in recent years around the state and this has been happening with very little dissention, with a few exceptions
- A lot of why agritourism is so popular is because they are allowing people to connect with farms
- Wants to encourage this for many reasons

Carrie Dumas (For One's Farm-Peterbourgh)

- Had a conditional use permit with the town to engage in agritourism
- Has been held up almost two years now due to conflicts with the town
- A sticking point was these weddings
- Worked with town to develop an agreement that covers the number of people, the volume of the music, hours, parking, amount of times a year, etc
- Many people choose to get married on farms and marriage is part of the farming operation

Andrew Howe (Beans and Greens Farm-Gilford)

- Has had difficulty with town and neighbors due to his farm
- Parents bought the farm in the 1940s
- In the effort to be diversified and sustainable, they have engaged in agritourism
- Has been running the farm for 40 years and it has changed drastically in that time

- The agritourism part of the farm is in response to what the customers want
- Customers want a farm experience and want to know where their food is coming from
- Had received site plan approval and the process was long and contentious
- Has significant restrictions placed on us by the town to lessen the impact on neighbors
- Not our intention to reduce their quality of life and is simply trying to sustain the farming operation
- Has had three family members married on the farm, including he and his wife
- It is a beautiful place and wants to be able share it with people while being respectful to the neighbors
- The connection between agriculture and weddings comes from the fact that the weddings have to primarily use food from the farm, but they have to use a vendor because they do not have a food service license
- Doing everything we can to abide by the challenging restrictions the town has enacted
- The town is in litigation on this and therefore they cannot invest in it anymore
- All we are trying to do is react to our markets

Bruce Crawford (Planning Board in Boscawan) (provided written testimony)

- In favor of the bill
- Supports local agriculture and agritourism
- Farmers are very innovative if we allow them to be
- Most of these activities do generate some meals and rooms taxes
- This also aids in the renovation of these barns
- Was a part of the roundtable

Rob Johnson (NH Farm Bureau) (provided written testimony)

- Agriculture is commercial and it is a business
- Money is not in the commodities, but in the experience provided.
- Brought forward proposed language that does two major things: plugs agritourism into the marketing part of the definition and changes 'permitted' to 'not prohibited'
- HB 1141 passed the House committee and this matches the language that is proposed in it. This change will meld the bills and hopefully avoid a committee of conference
- Senator Lasky asked if 'not prohibited' would make it easier to prohibit
    - Doesn't see it that way. The Farm Bureau members are more comfortable with it, because it is shifting the burden, so that they have to prohibit it.

Summary of testimony presented in opposition:
Norman Silber (Gilford Planning Board)

- We need to acknowledge single family resident property owners adjacent to the farming properties
- Appreciates the awareness that the local land use boards know best
- In opposition to this on behalf of those single family homes
- Farming is permitted in any zone
- On page 2, lines 4-5, it states that agritourism will be permitted any zone
- Does not have a problem with farm to table
- There are different ways to define agritourism
- If you are showing them how a farm operates or how crops are sown that is agritourism
- Holding a wedding reception where you bring in catering, alcohol, a portable generator, and lights all within several hundred feet of a single family home is not agritourism
- These events' only connection to farming is the pretty location
- Greens and Beans can have their receptions in their commercial areas, but customers prefer the residential zone and that is where they want to have their party
- Doesn't think that the first part of the definition is proper or an accessory use
- There is no connection between these events and farming and they should be held in non residential areas
- Have a petition article coming forward next Tuesday that will restrict agritourism
- Under this bill no one who owns a single family home will be safe from commercial activities right in their area
- Senator Stiles pointed out on page 2, lines 30-31 it says 'may be subject to applicable special exceptions', which puts it in local control and the reason that language was added was to allow the local community to make these decisions
    - Believes it does allow for local control if a municipality already has a definition for agritourism, but if a town does not have a definition it is going to degrade the quality of the residential areas. A person could plant some beans and then call themselves a farmer and could then host these events. If I was a residential developer and an area did not have their own definition of agritourism, I would put down a declaration of covenants and restrictions to protect these homeowners. This makes residential zones essentially meaningless.

Neutral Information Presented:
Cordell Johnston (NH Municipal Association) (provided written testimony)

- Did work on the roundtable
- Finds it difficult to advocate for legislation that restricts municipal authority, which this does to a minimal extent, believes this bill does a good job balancing the interests of farmers, the rights of their neighbors, and the need of municipalities to exercise reasonable land use controls
- The bill clearly says agritourism will be permitted where agriculture is permitted
- The bill does preserve the protections and it has to be an accessory use and it is only allowed where the primary use is for agriculture
- This will not allow for year round function halls
- The language does preserve the existing language on activities
- If you have a traditional farm and want to expand into agritourism, if the town has site plan review then you will need to go the Planning Board and potentially the ZBA

Ben Frost (NH Housing Finance Authority)

- Participated in the Roundtable
- No position on the bill
- Has been a professional planner for 30 years and municipal law in past 22 years
- Thinks SB 345 is a good law that balances competing interest
- It is important to have the distinction between primary and accessory use
- Under this bill you cannot purchase a parcel of land, plant a couple vegetables, and call yourself a farmer
- Farming has to be the primary use
- Some of the concerns are well founded, but they can be addressed by the local communities
- The Farm Bureau has a proposal to marry HB 41 with SB 345
- Suggested putting the definition of agritourism in RSA 21:34-A:2 under the definition of agriculture in the marketing section
- Also proposed changing the language from where 'permitted' and to where 'not prohibited'
- Both are fine, but that would create a conflict with page 2 lines 4-5 where it says shall

Fiscal Note: N/A

Future Action: Pending

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Date Hearing Report completed: March 8, 2016