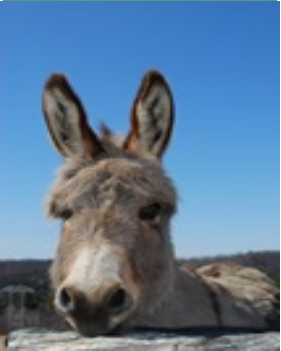




NEW HAMPSHIRE MUNICIPAL ASSOCIATION



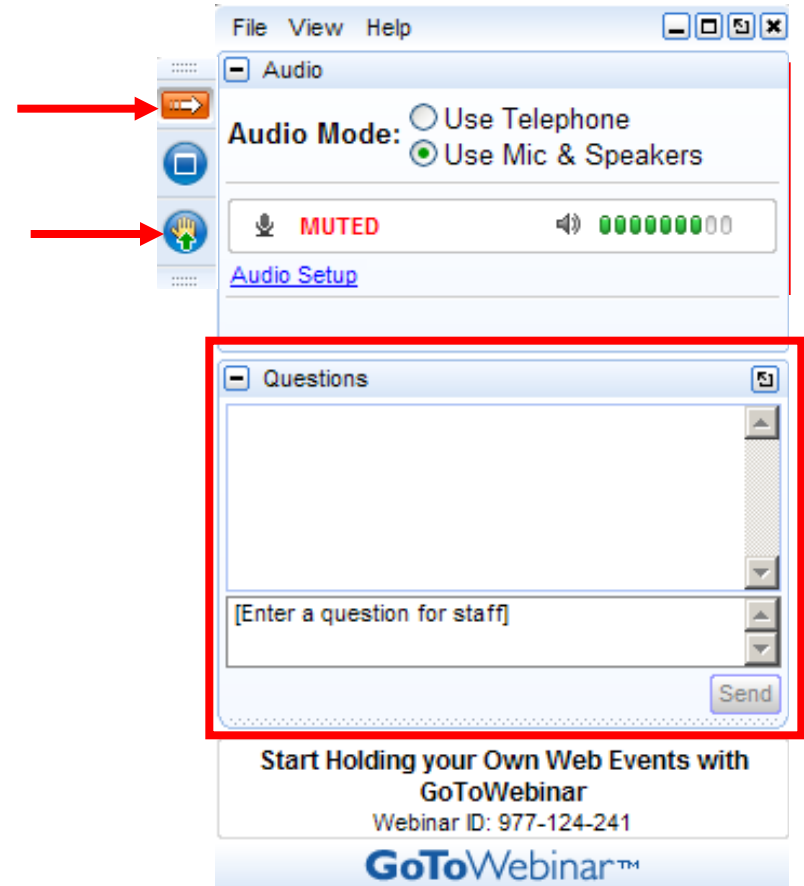
Local Regulation of Agriculture

Stephen C. Buckley, Esq.

Margaret M. L. Byrnes, Esq.

How to Participate Today

- Open and close your Panel
- Submit text questions
- Q&A addressed at the end of today's session
- One poll question today and some hypotheticals

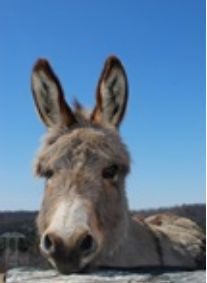


Agenda

- Statutory Definitions Related to Farming
- Right to Farm Laws
- Planning & Zoning Protective Legislation for Agriculture and Horticulture
- Real Estate Assessment, Current Use and Exemption
- Case Law
- Hypotheticals!

Snapshot of NH Agriculture

- Over 4,000 farms in New Hampshire
- Fewer than 1,500 make \$10,000 or more in annual revenue
- No. 1 in the nation for direct marketing sales as a percentage of all farm sales
- No. 1 in the nation for farms with women as principal operators as a percentage of total operators



Snapshot of NH Agriculture Cont'd

- Even though a there was a 4% decrease in farm numbers nationwide in 2012, NH farms increased 5%!
- No. 2 in the nation for percentage of all farms that have direct sales
- No. 1 in the nation for organic sales as a percentage of all farms sales

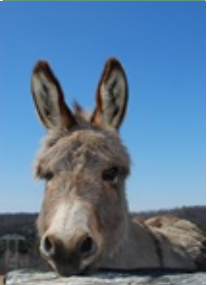
What is a “farm”?

- *Any* **land, buildings, or structures** where agriculture and farming activities are carried out.
 - Residence of owners or employees located on such land.
 - All farm outbuildings used in the care of livestock or in production/storage of fruit, vegetables or nursery stock, maple syrup, and greenhouses for plant production.

What are “Farming Activities”?

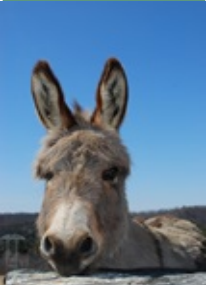
RSA 21:43-a

- The cultivation, conservation, and tillage of the soil.
- Using fertilizer and agricultural chemicals.
- Raising and sale of livestock.
- Horse breeding, selling, boarding, raising, training, riding instruction.
- Raising, harvesting, and sale of fresh water fish or other aquaculture products.



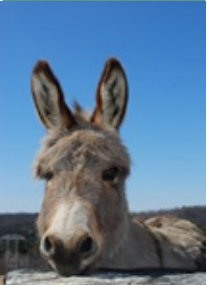
Farming Activities Cont'd

- Raising and sale of poultry or game birds.
- Beekeeping.
- Raising/breeding of domesticated strains of fur-bearing animals.
- Production of greenhouse crops.
- Production, cultivation harvesting, and sale of any agricultural, floricultural, viticultural, forestry, or horticultural crops



“Right to Farm” Laws

- “Right to Farm” laws protect farmers from nuisance lawsuits filed by individuals who move into a rural area where normal farming operations exist, and who later attempt to use nuisance legal actions to stop those ongoing operations.
- National Agriculture Law Center:
<http://nationalaglawcenter.org/state-compilations/right-to-farm/>

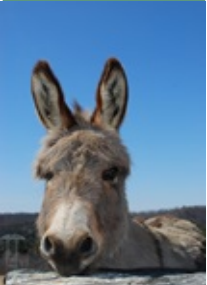


NH Right To Farm Law

- RSA 432:33 – No farm shall be found a nuisance due to changed conditions near the farm if it has been in operation for one year or more and if it was not a nuisance at the time it began operation (except for activities injurious to public health or safety under RSA 147:1 or RSA 147:2).

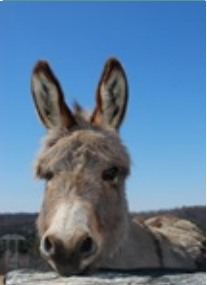
Zoning in Relation to Farming

- RSA 672:1 (III-b) provides that agriculture shall not be unreasonably limited by municipal planning and zoning powers or by the unreasonable interpretation of such powers.
- Not a mandate.
- Establishes general principles for interpreting statutes.



What can Zoning Ordinances Regulate?

- RSA 674:32-c, I establishes that: “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.”
- The raising of livestock and poultry may be regulated by special exception or prohibited where appropriate.

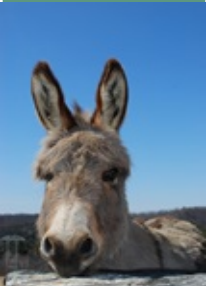


When are Agricultural Uses Presumed Permitted?

- RSA 674:32-a creates presumption that, if zoning ordinance is silent on subject of agricultural, it is deemed to be permitted either as a principal or accessory use.
- Reverses general rule zoning ordinance “prohibits uses for which it does not provide permission.” See Treisman v . Kamen, 126 N.H. 372, 375 (1985).

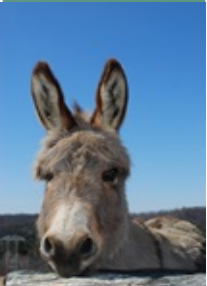
Farms Granted Protection for Expansion/Change of Use

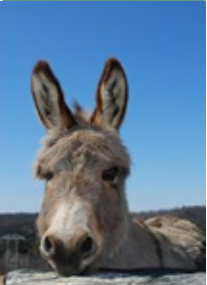
- RSA 674:32-b existing agricultural uses may expand or change to any other agricultural use, so long as they comply with the commissioner of agriculture's best management practices (BMP's).
 - BMP's can be found on Dept. of Agriculture website.
- Ordinarily, nonconforming uses and most permitted uses do not enjoy such latitude.



Some Limitations for Farming Change or Expansion of Use

- Under 67:32-b, some farming expansions/changes of use may be made subject to special exception, building permit, or site plan approval:
 - Livestock, poultry, or other animals or a retail farm stand
 - Farm stand/retail operation, to prevent traffic and parking from adversely impacting adjacent property, streets and sidewalks, or public safety.





TAKE A



POLL!

Poll Question

In which New Hampshire municipality was the first potato planted?

- A. Keene
- B. Boscawen
- C. Easton
- D. Derry

Land Use Regulation Waivers

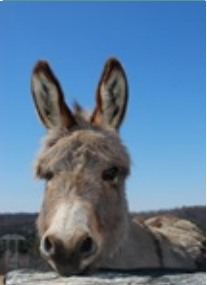
- RSA 674:32-c, II requires land use boards to grant “waivers” from generally applicable building and site requirements that are unreasonable as applied to agricultural use.
- Applies to ZBA, Building Code Board of Appeals, Planning Board, or other land use board.

Waivers Cont'd

- Waiver provision does not apply to any aspect of agriculture that is injurious to public health or safety under RSA 147.
- Waiver provision does not affect the regulation of sludge or septage or the authority of the NHDES RSA Chapter 485 and RSA Chapter 485-A or the Commissioner of the Department of Agriculture, Markets and Food under RSA Chapter 425 through RSA Chapter 439.

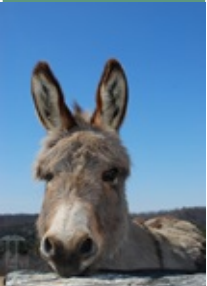
Tax Exemptions

- 10 acres of open space devoted to farm purposes is entitled to current use taxation under RSA Chapter 79-A.
- A tract of land of any size devoted to the growing of agricultural or horticultural crops with an annual gross income from the sale of those crops totaling \$2,500 is also entitled to current use taxation treatment. NH Admin Code Cub 304.01.



Discretionary Easement Protection for Farm Buildings

- Under 79-D, **Discretionary Preservation Easements** encourage the preservation of historic New Hampshire barns and other agricultural buildings.
- Municipalities may grant property tax relief to barn owners who
 - Can demonstrate the public benefit of preserving their barns or other historic farm buildings and
 - Agree to maintain their structures throughout a minimum 10-year preservation easement.
- Tax relief is a 25% to 75% reduction of the structure's full assessed value.
- Maintaining and repairing the building will not result in an increase to its assessed value for property tax purposes.

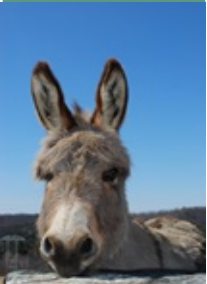


RSA Chapter 79-F: Taxation of Farm Land and Structures

- After municipality adopts 79-F, assessors must appraise qualifying farm structures for no more than their replacement costs less depreciation.
- Land underlying qualifying farm structure can be assessed at no more than 10 percent of its market value.

Case Law

- *Kimball v. Blanchard*, 90 N.H. 298 (1939): Ice cream is farm produce. RSA 674:1, III-b; RSA 21:34-a, III's "35 percent" rule.
- *Windham v. Alford*, 129 N.H. 24 (1986): Stabling of horses would probably now be permitted agricultural accessory use under 674:32-a in the absence of specific provisions in the zoning ordinance.
- *Salem v. Wickson*, 146 N.H. 328 (2001): Farmer could not continue operating accessory manure-mixing operation after ceasing principal pig farm; result might be different today if farmer were producing "compost." RSA 21:34-a, II (11) (2006 amend.); 149-M:4, IV (defines "compost").



Hypothetical # 1

In 1940, the MacDonald family established a pig farm in the Town of Rockingshire. They expanded their operation in 1947 to include haying the fields and boarding horses. In 2001, Young MacDonald passed away, leaving only Widow MacDonald on the farm. She ceased the pig and horse-boarding operation, but she continued haying the fields every year.

Hypo #1

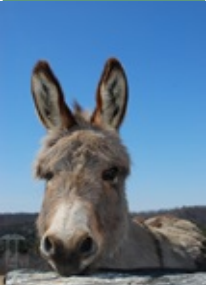
Question A

- Cletus Spuckler wants to purchase the Old MacDonald Farm, stop haying, and raise chickens and pigs. The planning board wants to know if it can require site plan review.
 - Chickens are new establishment; Pigs are re-establishment after disuse.
 - 674:32-b(a): Site plan review can be required.

Hypo #1

Question B

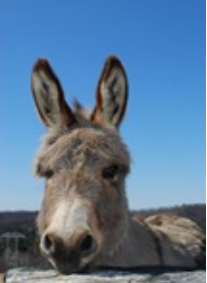
- Assume instead the Widow MacDonald did continue both the haying and the pig and horse operation after Young MacDonald died. In 2015, she decides to build two more barns so that she can board 10 – 15 more horses. Does she need a building permit or other land use approval?
 - Although this does involve expansion of keeping of animals, it is probably not a “significant expansion.” 674:32-b(a).



Hypo #1

Question C

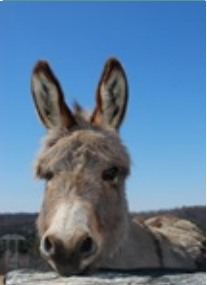
- What if Widow MacDonald wants to build a chicken coop and starting raising chickens?
 - This is a new establishment involving livestock under 674:32-b(a).



Hypo #1

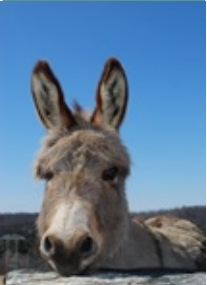
Question D

- The MacDonalds have always sold hay on the farm. Widow MacDonald recently created a FaceBook page for the MacDonald Farm, on which she is promoting her hay stand, and it's working! Her clientele has doubled at least, but now neighbors are complaining about the increase in traffic and parked cars on this small country road. Can anything be done?
 - Increased advertising is not a “significant expansion” of the hay-selling operating, so traffic/parking impact cannot be regulated. 674:32-b(b).



Hypothetical #2

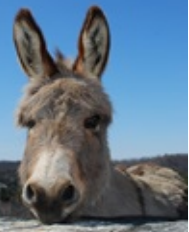
- You are the town planner. A real estate agent calls you: Her client wants to buy a large parcel of land, located in a residential/business district in town, but she will purchase the property only if she can board horses. Your zoning ordinance does not list animals or farm animals under permitted uses or through special exception. You conclude that the only way the buyer could keep horses is if she obtained a variance. Are you correct?
 - No, where zoning is silent, agricultural uses are presumptively permitted. 674:32-a.



Hypothetical #3

You are the chair of the select board. There is a large commercial business in town that also operates a crop farm on the property.

Neighbors are complaining that the farmhands are frequently operating their equipment until 2 AM, causing residents to lose sleep. Your town has a noise ordinance.



Hypo #3

Question A

- Can you enforce the noise ordinance against the farm operation?
 - Probably not. Recall RSA 432:33; See Also 674:32-c.

Hypo #3

Question B

- Assume instead that this farm operation was set up on a farm that had been taken by tax deed and sat empty for two years until the town was able to sell it to the current owners. Now can the town enforce the noise ordinance?
 - Yes. But watch out for 674:32-c, III: waiver of compliance with ordinances is possible!

Conclusion

- **NHMA:** The Service and Action Arm of New Hampshire Municipalities
- **Our Mission:** The New Hampshire Municipal Association is a non-profit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

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