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An Agricultural Law Research Article

**Zoning Limitations and Opportunities for Farm  
Enterprise Diversification: Searching for  
New Meaning in Old Definitions**

by

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May, 2004

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## Zoning Limitations and Opportunities for Farm Enterprise Diversification: Searching for New Meaning in Old Definitions

Robert Andrew Branan\*

### I. INTRODUCTION

Advocates of small farm viability are increasingly proposing market-driven state and local policy initiatives to counter the loss of farms at the urban edge due to rising land and input prices, falling commodity prices, and an overall deterioration of the rural infrastructure that has until recent decades supported the agricultural economy of rural communities.<sup>1</sup> This is largely due to the low political priority in the agricultural sector of regulatory-based programs designed to stem farm loss.<sup>2</sup> At the core of these initiatives is the provision of legal, financial, technical, and moral support and protection to direct farm marketing and other production diversification efforts such as direct niche marketing (e.g. organic produce or grass-fed beef), farmers' markets, farm stands, and on-farm retail operations and recreational experiences. A common theme of these economic development efforts is the encouragement of local governments to exercise their zoning powers with increasing flexibility and restraint as they review a farm's – and in aggregate a farm community's – applications to diversify or otherwise change the nature of its traditional operation to take advantage of the economic opportunities offered by growing urban markets.<sup>3</sup> In the quest for new avenues to farm profitability, however, the ends may not justify the means when facing local zoning authorities.

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<sup>1</sup> See AMERICAN FARMLAND TRUST, FARMLAND INFORMATION CENTER FACT SHEET, AGRICULTURAL ECONOMIC DEVELOPMENT (September 1998).

<sup>2</sup> NELSON BILLS & MAUREEN MALONEY ROBB, CORNELL UNIVERSITY, FARMLAND PROTECTION PLANNING IN NEW YORK 1 (Apr. 2001), available at <http://www.cals.cornell.edu/aem/extension-outreach/extensionpub.html>.

<sup>3</sup> RALPH E. HEIMLICH & WILLIAM D. ANDERSON, USDA ERS, AGRICULTURAL ECONOMIC REPORT NO. 803, DEVELOPMENT AT THE URBAN FRINGE AND BEYOND: IMPACTS ON AGRICULTURE AND RURAL LAND 39 (June 2001), available at <http://www.ers.usda.gov/publications/aer803>.

As expanding urban boundaries bring non-farmers into agricultural areas, local governments are faced with serving this new constituency, sometimes at the expense of local farm operations.<sup>4</sup> As zoning ordinances are adopted or otherwise change, so do the operational freedoms farmers traditionally enjoyed before the advent of zoning jurisdiction over their fields and farmsteads. To be fair, a great number of local ordinances are drafted to specifically include many potential uses incident to farming and are thus exempt from regulation or specifically permitted, and urban planners are taking steps to be ever more mindful that the “farm as open space” is still a business.<sup>5</sup> However, the realities of farm operation or the economic realities of market adaptation may not be given due consideration.<sup>6</sup> As is seen from a number of cases, attempts at specificity can evidence an intent that unnamed uses not fall within a definition of farm or agriculture.<sup>7</sup>

Farm operations are given some protection in public and private nuisance actions under right-to-farm laws in almost all states,<sup>8</sup> and though a number of these right-to-farm laws offer farms some protection from local nuisance ordinances,<sup>9</sup> farmers still must seek approval for the variety of operational changes they will undertake should they make a decision to diversify their operation to take advantage of new market opportunities. If the state right-to-farm law does not offer local zoning protection, the courts have tended not to infer it.<sup>10</sup> These changes can include the requirement of new or remodeled structures, new marketing operations, new or expanded production processes, or necessary alterations to the landscape. Also, farms that desire to establish processing facilities or otherwise vertically integrate can face restrictions in doing so because they would be creating commercial enterprises where prohibited. Most state, municipal, and county zoning enabling statutes still do not prohibit municipalities or counties from enacting ordinances affecting or limiting agricultural uses of annexed land.<sup>11</sup> The assumption is that an uninhibited right to diversify is preferred, freeing the farm operator from neighbor politics. At the least, such freedom is certainly more cost-effective than undertaking the process to comply with regulations.

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<sup>4</sup> Margaret Rosso Grossman and Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97. (“Since the end of World War II, the increasingly rapid conversion of land from agricultural to nonagricultural uses has enticed many urban dwellers into rural areas, where these new neighbors may be surprised and offended by some common elements of farm life: odors from farm animals and fertilizers, dust, flies, noise from animals and machinery, pesticide and herbicide spraying, and slow-moving vehicles. Some new rural residents, perceiving these elements as undesirable, have attempted to eliminate them by initiating nuisance actions against farmers or by pressuring local governments to adopt ordinances that restrict agricultural activity.”) See also Christopher P. Markley, Note, *Agricultural Land Preservation: Can Pennsylvania Save the Family Farm?* 87 DICK. L. REV. 595, 601 (1983), suggesting that urban dwellers moving into agricultural areas eventually take control of local governments in those regions.

<sup>5</sup> See AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON AGRICULTURAL LAND PRESERVATION (1999), at <http://www.planning.org/policyguides/agricultural.htm>.

<sup>6</sup> See *Johnson v. Debaun*, 135 N.Y.S.2d 217, 220 (N.Y. Sup. Ct. 1954). (“It is, however, to be borne in mind that the zoning ordinances are not framed by farmers (though the court has sometimes felt inclined to agree with the comment with respect to a particular zoning ordinance that a farmer could have done a better job.”)).

<sup>7</sup> See *Bo Fancy Productions v. Rabun Cty. Bd.*, 478 S.E.2d 373 (Ga. 1996) (citing *Coastal Ga. Regional Devel.Ctr. v. Higdon*, 439 S.E.2d 902 (Ga. 1994)).

<sup>8</sup> See Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998).

<sup>9</sup> See ALA. CODE § 6-5-127(c) (1997): “Any and all ordinances now or hereafter adopted by any municipal corporation in which such plant is located, operating to make the operation of any such plant, establishment, or any farming operation facility, or its appurtenances a nuisance or providing for an abatement thereof as a nuisance in the circumstances set forth in this section are, and shall be, null and void.” See also ALASKA STAT. § 09.45.235 (Michie 2002); ARK. CODE ANN. § 2-4-105 (Michie 1996); COLO. REV. STAT. § 35-3.5-102(3) (1997),

Judicial efforts to define the scope of farm and agricultural activity exemptions from zoning -- and whether a particular use or activity falls under a statutory definition of "agriculture" or "farm" -- is not a new phenomenon: the issue has been litigated since the early 1930s. However, with the advent of creative agriculture, direct marketing activity, and the growing public concern over the loss of farmland by a broader cross-section of the voting public, the boundaries of agricultural use definitions are likely to be tested with new fact situations like never before. Public pressure may prompt a growing number of states to uniformly protect an expansive definition of farming and agriculture in the context of local zoning.

To aid agricultural zoning practitioners in understanding the theories and arguments under which a farmer's use of his or her land will pass muster with local zoning officials, this article will explore the development of the body of law defining commercial agricultural operations in relation to state and local zoning exemptions in an effort to provide a continuum of how courts have expanded the definition of farm and agriculture exemptions in zoning ordinances with the hope that we might predict how courts in the future will interpret new farm diversification efforts. To help accomplish this goal, the cases cited herein include generous recitations of their facts to better illustrate some of the dynamics that affect changes in farming operations and to give credence to the rules of construction in all of these types of cases that seek to define an often ambiguous term. Most of these decisions are based on the facts.<sup>12</sup>

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CONN. GEN. STAT. § 19A-341 (2003); IDAHO CODE § 22-4504 (1998); KY. REV. STAT. ANN. § 413.072(7) (Michie Supp. 1996); LA. REV. STAT. ANN. § 3:3607 (West 1987 & Supp. 1998); N.M. STAT. ANN. § 47-9-3(B) (Michie 1995); N.C. GEN. STAT. § 106-701 (1995) N.D. CENT. CODE § 42-04-04 (1983); OR. REV. STAT. § 30.935 (1997); 3 PA. CONS. STAT. ANN. § 953 (West 1995); S.C. CODE ANN. § 46-45-60 (Law. Co-op. Supp. 1997); VA. CODE ANN. § 3.1-22.28 (Michie 1994); TENN. CODE ANN. § 44-18-104 (Cum. Supp. 1982); TEX. AGRIC. CODE ANN. § 251.005 (Vernon 2002).

<sup>10</sup> See *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909, 912 (Fla. Dist. Ct. App. 1990) (right to farm statute does not prohibit local government from regulating changes that involve significant or substantial degradation to surrounding area); *City of Troy v. Papadelis*, 90572 N.W.2d 246, 250 (Mich. Ct. App. 1997) (right to farm statute does not bar application of zoning ordinance to residential parcel that had not established prior nonconforming use); *Jerome Township v. Melchi*, 457 N.W.2d 52, 55 (Mich. Ct. App. 1990) (finding that apiary was not protected from 1965 zoning ordinance where it was established after the date of the ordinance); *Village of Peck v. Hoist*, 396 N.W.2d 536, 538 (Mich. Ct. App. 1986) (right to farm statute is not a defense against ordinance requiring use of public sewer system); *Villari v. Board of Adjustment* 649 A.2d 98, 102 (N.J. Super. Ct. App. Div. 1994) (right to farm statute does not express legislative intent to deprive municipalities of authority to zone); *L & Z Realty Co. v. Borough of Ringwood*, 6 N.J. Tax 450, 453-54 (N.J. Tax Ct. 1984) (right-to-farm statute cannot be used to overcome local zoning prohibition on commercial logging); *Wellington Farms, Inc. v. Township of Silver Spring*, 679 A.2d 267, 267-68 (Pa. Commw. Ct. 1996) (right-to-farm statute does not protect poultry slaughterhouse from zoning). *But cf.* *Northville Township v. Coyne*, 429 N.W.2d 185, 187 (Mich. Ct. App. 1988) (finding that right to farm statute valid defense to nuisance suit arising out of zoning ordinance violation).

<sup>11</sup> Grossman and Fischer, *supra* note 4, at p. 160.

<sup>12</sup> See *Henry v. Board of Appeals of Dunstable*, 641 N.E.2d 1334 (Mass. 1994): "Determining whether an activity is an 'incidental' use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses." See *also* *Simmons v. Zoning Board of Appeals of Newburyport*, 798 N.E.2d 1025, (Mass. App. Ct. 2003).

A sizeable catalogue of case law under this subject has addressed confined animal feeding operations (CAFOs) for hogs, poultry, and cattle and whether local zoning authorities have jurisdiction over those operations<sup>13</sup> or are otherwise preempted by state statute.<sup>14</sup> At one end, supporters of such laws see protection against zealous county officials; at the other, they see an usurpation of the local democratic process.<sup>15</sup> Apart from some early cases instrumental in expanding the definition of farming and agriculture for zoning exemption purposes, that body of case law will not be discussed herein, as animal feeding operations, even when considered in the context of zoning use permits, invariably involve the elements of nuisance and right-to-farm that are outside the scope of this article.

This article will also explore how recent statutes and policy initiatives in selected states – designed to promote local agricultural economic development – relate to local governments’ traditional mandate to safeguard the “health, morals, safety and general welfare of the community”<sup>16</sup> through their powers of zoning and other regulations and how the courts have interpreted them. As with most surveys that are national in scope, and due to the dearth of cases dealing with newer diversification efforts, comprehensive coverage cannot be achieved. To deal with this latter deficiency, this article will explore the early cases of the 1930s and 1940s where courts sought to define the terms “agriculture” and “farming” to encompass or exclude uses now taken for granted as agricultural or farm-related. These courts’ explorations may provide some idea on the legal gymnastics necessary to bring creative commercial uses of farmland within the scope of agricultural exemptions. Hopefully, agricultural zoning practitioners will draw lessons to apply to situations in localities where broad state statutory definitions of agricultural uses and their exemption from local zoning regulation do not yet exist.

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<sup>13</sup> See *Kuehl v. Cass County*, 555 N.W. 2d 686 (Iowa 1996); *County of Knox v. Highlands, LLC*, 723 N.E.2d 256 (Ill. 1999); *Craig v. County of Chatham*, 545 S.E.2d 455 (N.C. Ct. App. 2001); *Premium Farms v. County of Holt*, 640 N.W.2d 633 (Neb. 2002).

<sup>14</sup> See, e.g., IOWA CODE § 335.2 (1995): “Except to the extent required to implement section 335.27, no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used. However, the ordinances may apply to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream.”

<sup>15</sup> Testimony of John M. Bailey, Director, *Rural Policy Program Center for Rural Affairs*, Nebraska Senate hearings on LB 1285 (“And now because some are upset with some of those democratic outcomes [affecting livestock operations], we are considering taking away rights from people – rights that allow people to decide how their community should look, what kind of agriculture and what kind of economy their community should have, and how their land should be used.”).

<sup>16</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926), *discussed in* Reinert, *supra* note 8, at 1704: “Euclidean zoning, named after the *Euclid* case, is the dominant form of zoning in the United States. Euclidean zoning ‘anticipates conflicts or choices, identifies them in the abstract, reduces them to a limited number of generic cases, and then proceeds to resolve them in a body of the ordinance.’ (citing Michael Kwartler, *Legislating Aesthetics: The Role of Zoning in Designing Cities*, in *ZONING AND THE AMERICAN DREAM* at p. 187 (Charles M. Haar & Jerold S. Kayden eds., 1989)).

## II. FARM ENTERPRISE DIVERSIFICATION

According to the American Farmland Trust, federal, state and local governments, and nonprofit organizations since the 1970's have been helping farmers and ranchers develop new products, processing facilities, services, and marketing strategies to increase farm profits.<sup>17</sup> The focus of this article is to illustrate potential roadblocks (and opportunities) to these efforts when the time comes to apply for a building or some other permit to undertake a new activity, even when that effort has been sanctioned (and possibly grant funded) by a state, federal, or local agricultural development initiative.<sup>18</sup> The following is a discussion of the types of activities to which more farmers are turning to increase the profitability – either through higher sales or lower costs – of their operation.

Agricultural direct marketing data collected for the 1997 Census of Agriculture showed that during the five-year period from 1992, the number of farms involved in direct marketing increased 7.8 percent to 93,140 farms.<sup>19</sup> It has been suggested that the farm crisis of the 1980s is in some measure a reason for this increase.<sup>20</sup> During that time, farms transitioned their operations and marketing in any number of forms to take advantage of growing urban markets that brought a combined demand for fresh food and the rural cultural experience to the dooryards of farming communities across the country. Farm market owners tend to increase the level of services and products that they provide based on the demands of the consuming public.<sup>21</sup> The economic reason for this growth is straightforward: as with all direct farm marketing, when agricultural producers come into direct contact with their end-user, they recapture that portion of the price they would otherwise lose to third-party processing and distribution, even more so if their market comes to them. Other benefits include immediate cash payment and more control over prices.<sup>22</sup>

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<sup>17</sup> See AMERICAN FARMLAND TRUST, *supra* note 1.

<sup>18</sup> Karen Watt, Small Farm Survival: Implications for the Next Bill, Paper Presented at the North American Farmer's Direct Marketing Agricultural Outlook Forum (Feb. 22, 2001), *available at* <http://www.usda.gov/oce/waob/oc2001/speeches/watt.PDF>. (“Although USDA sees the benefits of farms making their own pies, jellies, ice cream and school and/or bus groups for ‘edutainment’ or ‘agri-tourism’, many communities do not want this type of farm ‘commercialism.’ Farmers are denied permits to do anything beyond growing and selling their own produce in its natural form on land designated as agricultural land. Due to ‘home-rule’, each township reacts independently to a retail farm situation, and very often without apparent reason. The attempt of farmers to provide this stable financial footing backfires in their own back yard. With the percentage of farmers dwindling in any geographic area, so is their seat on zoning and town boards, making their position more difficult.”).

<sup>19</sup> UNITED STATES DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURAL STATISTICS SERVICE, 1997.

<sup>20</sup> KATHERINE ADAM, ET AL., APPROPRIATE TECHNOLOGY TRANSFER FOR RURAL AREAS, DIRECT MARKETING BUSINESS MANAGEMENT SERIES (1995), *available at* <http://attra.ncat.org/attra-pub/directmkt.html#altmkt>.

<sup>21</sup> ROBERTA HARRISON, CORNELL COOPERATIVE EXTENSION, ONONDOGA COUNTY (NY) MUNICIPAL REFERENCE FOR AGRICULTURAL LAND USE (Sept. 2002).

<sup>22</sup> DEBORAH YOUNG, UNIVERSITY OF ARIZONA, DIRECT FARM MARKETING AND TOURISM HANDBOOK, CHARACTERISTICS OF DIRECT MARKETING ALTERNATIVES (1995).

Though a relatively small fraction of overall United States agricultural production, the various forms of farm direct marketing have become well established in our regime of food distribution and consumption, particularly on the fringes of large and growing urban areas.<sup>23</sup> The states bordering the Great Lakes, the Pacific Coast, and Texas have the greatest concentration of direct farm marketers.<sup>24</sup> Yet while the numbers of alternative agricultural enterprises have grown, agricultural economists still study whether these alternative forms of agriculture are an answer to small farm viability.<sup>25</sup>

Agricultural direct marketing takes many forms. The oldest and most common is the roadside stand that has evolved in two ways. Farm stands first existed as drive-by locations where customers stopped at the farm stand based on its location between other destinations. This retailing has evolved to encompass a marketing strategy as a destination that may also include some form of entertainment such as hayrides, harvest festivals, and corn mazes, or education opportunities such as “how to” garden programs or farm tours. In other situations the entertainment aspect may serve as the marketing component of the business.<sup>26</sup> These activities increasingly fall under the general term “agritourism.”

Increasing in number are farmer’s markets, Pick-Your-Own (or U-Pick), and agritourism operations.<sup>27</sup> Also growing in number are open or enclosed retail facilities that offer value-added items processed on-site such as dried herbs or flowers, jams and jellies, homemade breads and pastries, wine, restaurants, corn mazes, hayrides, overnight farm-stays, weddings, harvest festivals and recreational uses such as fee hunting and fishing established on the farm property or in the immediate vicinity, all of which will normally be the land-use in contention with local zoning bylaws.<sup>28</sup>

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<sup>23</sup> See Heimlich and Anderson, *supra* note 3, at 40. (“Adaptive farms accounted for 13-14 percent of metro farms and 9-12 percent of metro farm acreage operated, but they controlled more than proportional shares of metro farm sales, assets, and net cash farm income.”) This USDA study defined “adaptive” farms as “farms that produce relatively high-value products, with sales of \$10,000 or more and having sales of more than \$500 per acre of land.” *Id.*

<sup>24</sup> Watt, *supra* note 18, at p. 1.

<sup>25</sup> See Mary C. Ahern, *Alternatives for Small Farm Survival: Government Policies Versus the Free Market: Discussion*, 28 J. AGRIC. & APPLIED ECON., 95-98 (July 1996).

<sup>26</sup> Harrison, *supra* note 21, at p. 31.

<sup>27</sup> Martha L. Noble, *Recreational Access to Agricultural Land: Insurance Issues*, Paper Presented at the American Agricultural Law Association Annual Conference (1990), *reprinted in* 2 IND. L. REV 1615 (1991). (“A survey of New York State Cooperative Extension county agents and regional specialists indicated that an estimated 700 farm families in the state had actually attempted to develop alternative rural enterprises. An estimated 1,700 farm families were considering starting alternative enterprises or diversifying their farms. Many alternatives involved recreational access to the land, including the addition of pick-your-own fruit and vegetable operations, petting zoos, bed and breakfast facilities, and the provision of campgrounds, ski trails, farm tours, and hay rides on farm property.”).

<sup>28</sup> For a seemingly exhaustive list of alternative on-farm activities, see USDA, NRCS INFORMATION SHEET, ALTERNATIVE ENTERPRISES – FOR HIGHER PROFITS, HEALTHIER LAND (June 2000).

If consumers demand products out of season or not otherwise available on the farm, farm market managers may see a need to offer products that have not been grown or processed on the farm to maintain their customer base and market viability.<sup>29</sup> Farm operators may also seek to change their production entirely, such as converting their dairy farm into a specialty breeding operation or converting to a horse breeding, boarding, and training operation. More intensive vertical integration uses can include alfalfa and feed dehydrators, commercial viners, fuel alcohol stills designed to serve a local area, nut hulling and drying, weighing, loading and grading stations, wholesale nurseries and landscape contracting conducted in connection with a nursery, agricultural machinery and implement sales and service, and cooperative crop storage and silage.<sup>30</sup>

Small farm viability advocates describe a cascading effect as farms go out of business in a defined area: as the local farm customer base dwindles, the businesses who depend on that base themselves go out of business or otherwise relocate, whereupon decrease in the input availability increases the cost to the remaining farms in the area. In response, another focus of agricultural enterprise development is the revitalization of the local farm support industry. These new facilities and activities, like those that occur on the farm, themselves face zoning concerns. As discussed *infra*, several states include some zoning protection for processing facilities in their right-to-farm statutes.

To illustrate these diversification efforts and the relationship to local zoning rules, consider the following hypotheticals.<sup>31</sup>

*Hypothetical A:* A farm family wants to open its rambling home for dinner three nights a week. The restaurant will feature the organic fruits, vegetables, and dairy products raised on their farm. While waiting to be seated, guests can browse through a small gift shop that offers plants and painted gourds from the farm, as well as other crafts from local artisans.

*Hypothetical B:* A farm family has diversified into producing grapes and has obtained a small winery license from the state. But breaking into the shelf space of liquor stores is not easy. The family decides to begin offering tours of their vineyard and winery. Visitors can then buy bottles of their wine and other wine-related items, such as wine glasses, specialty corks, imported crackers, and cheeses. This is successful and many people ask about wine-tasting parties and other festive affairs. Willing to try anything that might increase the market demand for their wines, the family sponsors a wine and cheese party. It is a great success, and the family decides to hold its next party under a tent in a field next to the winery and to have a band and hors d'oeuvres.

*Hypothetical C:* A farm family adds 10 acres of Christmas trees to their corn, soybeans, and cattle operation. The first harvest of Christmas trees is approaching. The oldest son has two draft horses that he has been showing, and he suggests adding a horse-drawn wagon ride as an option for families. The wife and daughter point out that selling hot cocoa, coffee, and cider with baked goods and sandwiches would give families something to do and could add profit to the season. Several neighbors who do crafts ask if they can set up a small gift shop to sell their crafts. The family thinks this is a good idea and decides to add tree decorations to the gift shop.

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<sup>29</sup> Harrison, *supra* note 21, at p. 33.

<sup>30</sup> LORI GARKOVICH & ALISSA MEYER, UNIVERSITY OF KENTUCKY, COMMERCIAL ACTIVITIES IN AGRICULTURAL ZONES: SETTING PARAMETERS OF OPPORTUNITY (Sept. 2002).

<sup>31</sup> Hypotheticals A through D are borrowed from Garkovich and Meyer, *supra* note 30, at p. 1.



*Hypothetical D:* A family buys almost 200 wooded acres in an agricultural zone. The timber is not of high commercial grade and once it is harvested, the value is gone. The family knows that a lot of people in the community love to ride ATVs but there is no good place in the area. The family has decided to sell access rights to their 200 acres to off-road vehicle riders.

*Hypothetical E:* A group of farmers receive a USDA grant to start an organic grass-fed cattle beef program. Part of their grant allows for development of a marketing cooperative and the establishment of certain supporting services to be owned by the cooperative. One such service includes a slaughterhouse, and an existing facility has been identified for purchase by the cooperative, but it is currently a dwindling operation located in a rural residential zone and will have to be expanded. The county has declined to issue a permit for the improvements.

### **III. LEGISLATIVE PREEMPTION OF LOCAL ZONING AND THE NEW RIGHT TO FARM**

Whether a particular use enjoys exemption from regulation under a zoning ordinance depends first on what immunities are afforded agricultural or farming operations by state statute, normally included in the zoning enabling statute, and then on what type of zoning district encompasses the particular tract of land upon which the new activity is to be undertaken, always with the view that “zoning ordinances are in derogation of the right of private property and should be liberally construed in the property owner's favor.”<sup>32</sup> Courts have looked to both the language of the state statute and its terms and itemized exempt uses and then to the language of the zoning ordinance to determine the legislative bodies' intent. However, in the case of ambiguity, the courts likewise follow their previous mandates to construe zoning ordinance ambiguity in favor of the landowner.<sup>33</sup> Where no ambiguity exists, courts normally will not substitute their judgment for that of the local zoning board and thus rewrite the ordinance to include a questionable use and will limit their review of the zoning board decision to determine whether it was either an abuse of discretion or an error of law.<sup>34</sup>

Local zoning schemes under which agricultural uses are scrutinized range along a spectrum from residential zoning districts that allow pre-existing agricultural exemptions as non-conforming uses, agricultural district programs enabled by state statute that allow agricultural uses on qualifying farms, and Agricultural Protection Zones that limit all land use in the zone to agricultural activities.

#### **A. Residential Districting and Pre-empting Local Regulation**

Most cases interpreting whether a certain activity qualifies as a farm or agricultural use arise when a farm is a non-conforming use in a newly established residential zone. For the farmer, there is no guarantee his or her operational changes will meet agricultural use exemptions or otherwise be approved by the body with that jurisdiction.<sup>35</sup> Even with statutory agricultural use protection from local zoning, courts will still allow “reasonable” regulation but not to the point that the non-conforming use

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<sup>32</sup> *Miami County v. Svoboda*, 955 P.2d 122 (Kan. 1998).

<sup>33</sup> See, e.g., *Zoning Hearing Board of Mahoning Township v. Zlomsowitch*, 486 A.2d 568, 569 (Pa. Commw. Ct. 1985); *Town of Sullivan v. Strauss*, 567 N.Y.S.2d 921, 923 (N.Y. App. Div. 1991); *Fayette County v. Seagraves*, 264 S.E.2d 13 (Ga. 1980).

<sup>34</sup> See, e.g., *Demarest v. Borough of Hillsdale*, 386 A.2d 875 (N.J. Super. Ct. App. Div. 1978); *Todd v. Kelly*, 837 P.2d 381 (Kan. 1992); *Gillespie v. Seymour*, 823 P.2d 782 (Kan. 1991); *Torsiello v. Zoning Board of Appeals*, 484 A.2d 483 (Conn. App. Ct. 1984); *Smith v. Town of St. Johnsbury*, 554 A.2d 233 (Vt. 1988).

<sup>35</sup> NEIL D. HAMILTON, DRAKE UNIVERSITY LAW CENTER, *THE LEGAL GUIDE FOR DIRECT FARM MARKETING* 103-4 (1999).

becomes economically infeasible.<sup>36</sup> Still, a farm that becomes a non-conforming use under a zoning change and cannot expand its current operation or diversify its production can be challenged when seeking a building permit for a new farm structure,<sup>37</sup> or worse, experience a disruption in production and not be allowed to resume operation.<sup>38</sup> Additionally, a state zoning enabling statute that allows zoning boards wide discretion in denying conditional uses based on “character of the area” and “other factors” can trump a vague description of “agriculture” in a local zoning ordinance.<sup>39</sup> Alternatively, agricultural exemptions can be strictly construed to prohibit a proposed use.<sup>40</sup> Ultimately, residential zoning ordinances contemplate the gradual elimination of nonconforming uses and may so regulate their expansion that the nonconforming uses “wither and die.”<sup>41</sup>

Since the advent of zoning in the first decades of the twentieth century,<sup>42</sup> farm diversification met with challenges from zoning officials. The earliest cases, several explored herein, dealt with a farmer changing his farm marketing to new products to capture increased profitability when his current

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<sup>36</sup> See *Town of Franklin v. Hollander*, 796 A.2d 874, 878 (N.J. 2002). See also *Watanabe v. City of Phoenix*, 683 P.2d 1177 (Ariz. 1984) (determining that series of roadside stands still required to provide “dust free” parking under local zoning ordinance) (citing *Orion v. Weber*, 269 N.W.2d 275 (Mich. Ct. App. 1978)).

<sup>37</sup> See, e.g., *De Benedetti v. River Vale TP.*, Bergen County, 91 A.2d 353 (N.J. Super. Ct. App. Div. 1952). In *De Benedetti*, a landowner sought to build additional chicken houses in an area with a new residential zoning designation that had the following exemption: “Nothing herein contained shall prevent or prohibit persons in this district engaged in farming of any type from re-constructing, enlarging or erecting additional buildings in the normal course of business, provided said buildings in all respects conform to setback, size and structural design hereby required.” The landowner had lost his full-time, off-farm job and sought to raise chickens full-time to earn a living. The town contended such an expansion of a hobby into a full-time venture was not “in the normal course of business” under the zoning exemption. The court held that an enlargement of time spent on the activity is not relevant; rather it is the use itself [here stipulated as “farming” by both parties], and overturned the denial of the building permit.).

<sup>38</sup> See *Iverson v. Marion County Oregon*, No. CV 00-867, 2001 WL 34041861 (D. Or. May 8, 2001) (unreported decision) (holding that landowners, who operated a farm market and restaurant in an exclusive farm use [EFU] zone, were without property rights to contest the denial of a variance to the prohibition of the restaurant in the EFU after previously withdrawing a renewal application voluntarily and ceasing operation.).

<sup>39</sup> See *Application of White*, 587 A.2d 928 (Vt. 1990) (finding that “agriculture” could not co-exist as a principal use on a 2.45-acre lot that also included two residences, and therefore a farm stand could not qualify as an accessory use to a principal use that had been precluded).

<sup>40</sup> See *DiPonio v. Cockrum*, 128 N.W.2d 544 (Mich. 1964) (upholding denial of permit for a farm stand to be stocked by produce from a farm owned by farmer in an adjacent county where a zoning ordinance permitted “production of products through the direct tilling of the soil, together with facilities for the sale of the products thus produced thereon”).

<sup>41</sup> 101A C.J.S. *Zoning and Land Planning* § 155 (1979). (“It is the public policy to interpret zoning ordinances with a view to the early terminations of nonconforming uses. Accordingly, provisions of a zoning regulation for the continuation of such uses should be strictly construed, and provisions limiting nonconforming uses should be liberally construed.”). See also *Columbus v. Union Cemetery*, 341 N.E.2d 298 (Ohio 1976); *Salem Tp. Zoning Com’n v. Kilburn Lodge, Inc.*, No. CA 90-11-081, 1991 WL 164585 (Ohio Ct. App. Aug. 26, 1991) (unreported decision) (citing *Petti v. Richmond Heights*, 449 N.E.2d 768 (Ohio 1983) and *Kettering v. Lamar Outdoor Advertising, Inc.*, 525 N.E.2d 836 (Ohio Ct. App. 1987)).

<sup>42</sup> See *Reinert*, *supra* note 4, at n60. (“In 1916, New York City became the first city in the United States to adopt a comprehensive zoning ordinance.”). *Reinert* also notes: “With [Euclid], zoning became firmly entrenched in the land use policies of urban areas. Suburbs did not widely adopt zoning as a means of regulating land use until the 1960s, and zoning did not appear in force in rural areas until the 1970s.”) *Id.* at 1704.

mode of operation or commodity was no longer profitable.<sup>43</sup> Even then, the courts struggled to determine whether the new production use was “agriculture,” even when it was something as “traditional” as converting a dairy into a horse farm.<sup>44</sup> Now, considering the increasingly creative uses to which farmland owners are putting their land for more profitability, town and county zoning officials and the courts who eventually review these uses are harder pressed to find the new use within the traditional meaning of agriculture or farming, absent explicit state legislation exempting the new use. Even in that instance, state statutes preempting local regulation cannot be specific to the point of capturing every use to which farmland owners will put their property to meet new marketing opportunities.

The early cases dealing with the definition of agriculture and farming uses in relation to zoning began in the 1920s and 1930s in the Northeastern United States as towns there began to adopt zoning ordinances following widespread judicial conclusions that annexation of agricultural land was a permissible exercise of home rule expansion.<sup>45</sup> In that era small farms were still the norm and the foundation of most economies outside the major cities such as Boston and New York. Thus, even as residential zoning codes were established in farming areas, agriculture or farming were uniformly listed as an exempted use in terms of building limitations in these early zoning codes.<sup>46</sup>

As farmers sought to expand their operations by constructing new buildings and diversifying their production, they began to meet resistance over the issuance of building permits from new non-farm neighbors who sought enforcement of local zoning restrictions or from towns themselves. In those early cases, the courts offered great flexibility to the term “farming” even as they struggled, often quixotically, to define it.

Early cases had to differentiate between the use of the terms “agriculture purposes” and “farm purposes” and what the drafters of the zoning ordinance in question intended by using one instead of the other.<sup>47</sup> Courts have tended to view the former as encompassing a broader range of activities and the latter as more restrictive.<sup>48</sup> Recognizing that to a certain extent, all agriculture conducted for profit is commercial,<sup>49</sup> courts have tended to interpret use of the term “farm” in a statute or ordinance, as describing the daily activities of farming rather than its upstream or downstream commerce, which is better represented by the term “agriculture,” and thus more encompassing a broader range land uses.<sup>50</sup> As stated in *Lake County v. Cushman*:<sup>51</sup>

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<sup>43</sup> See, e.g., *Borough of Demarest v. Heck*, 201 A.2d 75 (N.J. Super. Ct. App. Div. 1964), citing *Stout v. Mitschele*, 52 A.2d 422 (N.J. Sup. Ct. 1947) (“The problem [in *Stout*] posed was whether the farmer, when he found the dairying business unprofitable, could turn to the raising of horses and continue so doing because of his right to continue a nonconforming use.”). *Demarest*, 201 A.2d. at 78.

<sup>44</sup> *Demarest*, 201 A.2d at 78.

<sup>45</sup> See *Waco v. Higginson*, 243 S.W. 1078 (Tex. Comm’n, App. 1922) and *Susquehanna Twp. Appeal*, 17 Pa. C. C. 397 (Pa. Quar. Sess. 1896).

<sup>46</sup> See, e.g., *Winship v. Inspector of Buildings of Town of Wakefield*, 174 N.E. 476 (Mass. 1931). (Where § 1 of the Town of Wakefield zoning code, adopted on November 10, 1925 provided that in a “single residence district” that “no building or premises shall be erected, altered or used for any other purpose than 1, Single family detached dwelling; 2 Club ... ; 3, Church; 4. Educational use; 5. Farm, garden, nursery or greenhouse; 6. Municipal recreational use; 7. Railroad local passenger station; 8 Accessory use on the same lot with and customarily incident to any of the above permitted uses and not detrimental to a residential neighborhood.”).

<sup>47</sup> See, e.g., *Day v. Ryan*, 560 N.E.2d 77 (Ind. Ct. App. 1990).

<sup>48</sup> See *Tuftee v. County of Kane*, 394 N.E.2d 896 (Ill. App. Ct. 1979) and *County of Lake v. Cushman*, 353 N.E.2d 399 (Ill. App. Ct. 1976). *But see* *Zoning Hearing Bd. of Mahoning Tp. v. Zlomsowitch*, 486 A.2d 568 (Pa. Commw. Ct. 1983) (stating that “agricultural use” is synonymous with “farm use”).

'Agriculture' is defined as the 'art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use. In this broad use it includes farming, horticulture and forestry, together with such subjects as butter and cheese making, sugar making, etc.' Unless restricted by the context, the words 'agricultural purposes' have generally been given this comprehensive meaning by the courts of the country.<sup>52</sup>

The court in *Cushman* went on to state that "in modern usage ['agriculture'] is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning. . . . Indeed it can be assumed that the legislature deliberately chose to employ the broader term 'agriculture' because of the narrower connotation given the term 'farm' in cases such as *Chudnov*."<sup>53</sup>

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<sup>49</sup> *Cumberland Farms of Connecticut v. Zoning Bd. of App. of N. Attleborough*, 267 N.E.2d 906 (Mass. 1971).

<sup>50</sup> *Colasuonno v. Dassler*, 51 N.Y.S.2d 870, (N.Y. Sup. Ct. 1944). ("In the present proceeding, the Court cannot close its eyes to the avowed intention of the petitioner to engage in the sale of chickens and eggs on what would appear to be a comparatively large scale. The Court is not unmindful of the statement that petitioner intends to engage in tilling the soil for the purpose of raising feed for the chickens. Considering the small area available for the raising of feed, as against the quantity and nature of the feed which will necessarily be required, little attention need be given to this phase of the proposed venture. In my opinion, the contemplated undertaking violates the prohibition against commercial enterprises, and does not fall within the meaning and spirit of the word 'Farms' as used in the Ordinance. The Building Inspector was justified in denying petitioner's application for the issuance of a permit.").

<sup>51</sup> 353 N.E.2d 399 (Ill. App. Ct. 1976).

<sup>52</sup> *Id.* at 402 citing *People ex rel. Pletcher v. Joliet*, 152 N.E. 159, 160 (Ill. 1926), *affirming* *People ex rel. Pletcher v. Joliet*, 159 N.E. 206 (Ill. 1927). See also *Forsythe v. Village of Cooksville* 190 N.E. 421 (Ill. 1934); *County of Grundy v. Soil Enrichment Materials Corp.* 292 N.E.2d 755 (Ill. 1973); *Oak Woods Cemetery Association v. Murphy*, 50 N.E.2d 582 (Ill. 1943).

<sup>53</sup> *Lake County v. Cushman*, 353 N.E.2d 399, 402 (Ill. App. Ct. 1976).

As New England towns began to zone their land for residential growth,<sup>54</sup> courts began to wrestle with agricultural and farming use definitions under the zoning codes as written. The early issues were primarily concerned with whether the raising of animals qualified as agriculture. An early case, *Chudnov v. Board of Appeals of Town of Bloomfield*<sup>55</sup> provides us with an important history of the process of defining farming for zoning purposes and describes how courts wrestled with how to apply the term “farming” to broadening agricultural activities. Due to the dearth of opinions on the definition of agriculture or farming in the zoning context, the court inevitably had to look outside zoning case law to help craft a definition of farming in the zoning context, noting that “[m]ost of the judicial definitions have been evolved by the federal courts in the course of determination of the scope, and application to varying sets of facts, of the exemption, under the bankruptcy acts, from adjudication as an involuntary bankrupt, of ‘a person engaged chiefly in farming or the tillage of the soil.’”<sup>56</sup>

In doing so, the *Chudnov* court attempted to develop a test, albeit not a very instructive one, for determining whether a particular activity was “incidental” to farming and therefore acceptable.<sup>57</sup> The court stated:

“Doubtless a man might be a dairyman, and not be a farmer, as if he were to build a barn, buy a herd of cows, and buy from others the grain and other forage to feed them, and sell their milk or other produce; and if this was his principal business he would not be exempt from proceedings in bankruptcy because he was a farmer. But if, while farming, he established, as one of the departments of his industry, a dairy to utilize the products of his farm and convert them to profitable uses, he is none the less a farmer.”<sup>58</sup>

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<sup>54</sup> See *Averne Bay Const. Co. v. Thatcher*, 15 N.E.2d 587, 591 (N.Y. 1938) (stating that zoning restrictions are “the product of far-sighted planning calculated to promote the general welfare of the city at some future time.”).

<sup>55</sup> 154 A. 161 (Conn. 1931).

<sup>56</sup> *Id.* at 162 (citing 11 USCA § 22 [b]) (“It is apparent, upon examination of the available definitions of ‘farming,’ that the dominant and distinguishing characteristic of this occupation, in both the popular and the legal sense of the term is the cultivation of the soil for the production of crops therefrom. Corpus Juris defines it as ‘the business of cultivating land, or employing it for the purposes of husbandry; the cultivation and fertilization of the soil as well as caring for and harvesting the crops.’”).

<sup>57</sup> *Id.* at 164 (“[W]hether the proposed use is fairly to be considered as incidental to farming operations and therefore permissible, or, on the other hand, an independent or dominant enterprise, and as such excluded – may often present and depend upon questions of fact, or involve or be open to a legal exercise of discretion by the administrative officials and the board of appeals.”).

<sup>58</sup> *Id.* at 163 (citing *Gregg v. Mitchell* 166 F. 725, 727 (6<sup>th</sup> Cir. 1909)).

The *Chudnov* decision was important in two other respects: it interpreted zoning ordinance language as exclusive when identifying specific uses, and it tied the definition of a farm to the size of the tract of land upon which the disputed activity occurred. In the first instance, the court reasoned that chicken farming was not incidental to farming under the above definitions, relying ultimately on an interpretation that the specificity of the zoning ordinance, which allowed ‘truck gardening, nurseries or greenhouses,’ precluded any broader application of the term “farming,” certainly not to anything beyond actually tilling the soil. In the second, the court reasoned that the tract of land upon which the appellant sought to build his chicken house (2.9 acres) was “an area manifestly inadequate and unadapted to farming in any accepted sense of that term.”<sup>59</sup> Both exercises would become instrumental to defining agricultural uses to the present day. The court drew the conclusion that, under the tests above, animal husbandry alone, specifically the raising of poultry in houses, without some other form of soil tillage, was not farming but rather “a business and a means of livelihood.”<sup>60</sup>

In another case from the same year, *Winship v. Inspector of Buildings of Wakefield*,<sup>61</sup> the court adhered to the notion that tillage of the soil was a necessary part of farming in holding that “[i]n common speech a farm is understood to be one or more tracts of land devoted to agricultural purposes including the production of crops, and may include the raising of domestic and other animals.”<sup>62</sup> It did, however, adjust the size of the operation as relevant: “A tract of land of eighteen acres devoted to agriculture and the raising of crops and domestic animals is as properly designated and held to be a farm as a much larger tract carried on for the same purposes.”<sup>63</sup>

The definition of farming began to expand to include animals raised on the farm. However, when the zoning ordinance exempted “farm use,” the interpretation was narrowed to cover only animal raising activity where the growing of crops was also conducted. In *Town of Lincoln v. Murphy*,<sup>64</sup> what may be termed an early confined animal feeding operation case, the Massachusetts Supreme Court drew the judicial line on when an animal raising operation would qualify (or not qualify) under “farm use.” The court thus described the affect of the lack of crop production:

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<sup>59</sup> *Id.* stating that (“[a] farm has been held to denote a considerable tract of land devoted, at least in part, to cultivation of crops and produce, with suitable buildings”) (citing *Kendall v. Miller*, 47 How. Prac. 446, 448 (N.Y. Sup. 1874) and *In re Drake*, 114 F. 229, 231 (D.C. Cir. 1902)).

<sup>60</sup> *Id.* at 164. The dissenting judge wryly noted an entry from WEBSTER’S ELEMENTARY SCHOOL DICTIONARY defining a “farm” as “[a] tract of land devoted to agriculture; often qualified by a preceding noun; as, a chicken farm.” *Id.* at 165.

<sup>61</sup> 174 N.E. 476 (Mass. 1931).

<sup>62</sup> *Id.* at 477.

<sup>63</sup> *Id.*

<sup>64</sup> 49 N.E.2d 453 (Mass. 1943).

In the present case the amount of land that was cultivated and the quantity and value of the crop produced are negligible. The premises are devoted entirely to the raising of nearly twenty-one hundred hogs. All of them are (456) kept upon that part of the premises located in Lincoln. No other livestock are kept. Not a pound of the food furnished to the hogs is produced upon the premises. The property is not equipped with any implements of farming. There are no barns, sheds or buildings for the housing of livestock, other than the unfinished building which the town contends is being erected in violation of the building regulation. The hogs are confined in twenty-two pens, each pen enclosing three fourths of an acre of land. The premises are used as a piggery.”<sup>65</sup>

The Court in *Murphy* distinguished its fact situation from *Winship* and *Moulton*:

[In *Winship*] . . . a considerable portion of the tract was used for the production of crops and fruit, and, while the income from the vegetables and fruit was less than that from the sales of poultry and eggs, yet the tract of land was devoted to farming operation. In . . . [*Moulton*], the erection of a silo, which is a necessary and usual adjunct to a dairy farm that has any considerable number of livestock, was held to be a permissible use of land in a district in which premises occupied for agricultural purposes were exempt from certain restrictions of the zoning regulations.<sup>66</sup>

Sometimes a dearth of precedent took the court outside of legal contexts altogether. In *Keeney v. Beasman*,<sup>67</sup> the Court looked to antiquity to resolve the question of whether a dairy was connected to farming or agricultural definitions in the “farm labor” context:

“Meliboeus, himself a husbandman in the first of Virgil's Eclogues, speaks to Tityrus, another farmer, who is going into exile, driving his herds before him, of the pleasant ploughed fields, as though the cultivation of the fields and the management of herds were branches of the same business, and in the first book of the Georgics, which was written for the rehabilitation of agriculture in Italy, the care and management of cattle is treated as a branch of agriculture, and Anthon stated that Virgil's rules concerning the care of cattle were taken from the works of the ‘ancient agricultural writers of his own country.’”<sup>68</sup>

A number of states have passed statutes specifically exempting agricultural uses from local zoning authority. These statutes range from the general, where “agricultural uses” are not specifically defined, to the specific, where a seemingly exhaustive list of agricultural activities and products are defined as exempt from local regulation. These statutes act to preempt local zoning authority in passing laws to affect agricultural activity and are normally drafted as part of the state's zoning enabling statute. As noted above, these statutes are distinguished from those prohibiting local nuisance statutes.<sup>69</sup>

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<sup>65</sup> *Id.* at 456.

<sup>66</sup> *Id.*

<sup>67</sup> 182 A. 566 (Md. 1936).

<sup>68</sup> *Id.* at 584.

<sup>69</sup> See sources cited *supra* note 9.

The State of Kansas provides an example of a general treatment of the term “agricultural use” in its preemption statute:

Except for flood plain regulations in areas designated as a flood plain, regulations adopted pursuant to this act shall not apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings erected thereon are used for agricultural purposes and not otherwise.<sup>70</sup>

The Supreme Court of Kansas in *Vagundy v. Lyon County Zoning Board*<sup>71</sup> summarized how cases from various jurisdictions<sup>72</sup> have followed the “agriculture” and “farm” distinction line of reasoning have done so:

They first looked at the statute and, depending on . . . whether the term "agriculture" or "farming" was used, they attempted to see whether the proposed activity fell within the statutory definitions. If construction of a building or such was involved, they attempted to determine whether the purpose to which the building would be put fell within the definition of the activity allowed.<sup>73</sup>

The Kansas preemption statute was recently tested in *Miami County v. Svoboda*.<sup>74</sup> The Kansas Supreme Court interpreted “agricultural use” under the statute to allow a turf farmer to continue operation of a landing strip in support of his operation,<sup>75</sup> stating that “[t]he restriction placed upon cities and counties with regard to agricultural uses of rural residential property in Kansas was intended by the legislature to spare the farmer from governmental regulations.”<sup>76</sup>

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<sup>70</sup> KAN. STAT. ANN. § 19-2921 (1995).

<sup>71</sup> 699 P.2d 442 (Kan. 1982).

<sup>72</sup> See *Zoning Comm'n of Town of Sherman v. Lescynski*, 453 A.2d 1144 (Conn. 1982); *Commonwealth v. Proctor*, 246 N.E.2d 454 (Mass. 1969); *Jackson v. Building Inspector of Brockton*, 221 N.E.2d 736 (Mass. 1966); *Deutschmann v. Board of Appeals of Canton*, 90 N.E.2d 313 (Mass. 1950); *Southard v. Biddle*, 305 S.W.2d 762 (Ky.1957); *Matter of Johnson v. Debaun*, 135 N.Y.S.2d 217 (N.Y. Sup. Ct. 1954); and *Matter of Colasuonno v. Dassler*, 51 N.Y.S.2d 870 (N.Y. Sup. Ct. 1944).

<sup>73</sup> 699 P.2d 442, 446.

<sup>74</sup> 955 P.2d 122 (Kan. 1998).

<sup>75</sup> The Court in *Svoboda* recited the following uses: “to check cattle and to find lost cattle (during the times that he raised cattle on his various farms), to check fences, track down trespassers and poachers, check irrigation, check the condition of his crops, inspect seed stands, check fertilizer coverage on crops and pastures, check field conditions, check local sod supplies, pick up machinery and parts for farm equipment, attend farm equipment auctions and product information shows, attend meetings with farm tenants, attend meetings with Farm Service Administration personnel in Manhattan, Kansas, as well as the other counties where the defendant owns farmland, and to attend educational seminars on farming. The defendant also testified that he used his aircraft to check his competitor's supply of sod and to pick up farming supplies.” *Id.* at 124.

<sup>76</sup> *Id.* at 125 (citing *Vagundy*, 699 P.2d at 446 (“[T]he obvious purpose of K.S.A. 19-2921 in excluding the use of land from county zoning regulations was to favor agricultural uses and farmers. Since this state's economy is based largely on the family farm the legislature appeared to intend to spare the farmer from governmental regulations and not to discourage the development of this state's farm industry.”) See also *Blauvelt v. Board of Leavenworth County Comm'rs*, 605 P.2d 132 (Kan. 1980) (dwelling used by farmer as residence is an agricultural building). Compare *Weber v. Board of Franklin County Commissioners*, 884 P.2d 1169 (Kan. Ct. App. 1994) (raising of greyhounds is not an agricultural purpose under K.S.A § 19-2921.)



The state of New Jersey employs a more specific statute preempting local zoning regulations in favor of agricultural uses. In response to the New Jersey Appeals Court decision holding that New Jersey's right-to-farm statute<sup>77</sup> did not pre-empt municipal land use authority over commercial farms,<sup>78</sup> the New Jersey Legislature passed an amendment to the state's right to farm law granting such a pre-emption.<sup>79</sup>

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<sup>77</sup> N.J. STAT. ANN. §§ 4:1C-1 through 10 (West 1998).

<sup>78</sup> Villari v. Zoning Board of Adjustment, 649 A.2d 98 (N.J. Super. Ct. App. Div. 1994).

<sup>79</sup> N.J. STAT. ANN. § 4:1C-9 reads: "Notwithstanding the provisions of any municipal or county ordinance, resolution, or regulation to the contrary, the owner or operator of a commercial farm, located in an area in which . . . agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan, . . . and the operation of which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act" (citation omitted), or whose specific operation or practice has been determined by the appropriate county board, or in a county where no county board exists, the committee, to constitute a generally accepted agricultural operation or practice, and all relevant federal or State statutes or rules and regulations adopted pursuant thereto, and which does not pose a direct threat to public health and safety may:

- a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities . . . ;
- b. Process and package the agricultural output of the commercial farm;
- c. Provide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards;
- d. Replenish soil nutrients and improve soil tilth;
- e. Control pests, predators and diseases of plants and animals;
- f. Clear woodlands using open burning and other techniques, install and maintain vegetative and terrain alterations and other physical facilities for water and soil conservation and surface water control in wetland areas;
- g. Conduct on site disposal of organic agricultural wastes;
- h. Conduct agricultural-related educational and farm-based recreational activities provided that the activities are related to marketing the agricultural or horticultural output of the commercial farm; and
- i. Engage in any other agricultural activity as determined by the State Agriculture Development Committee and adopted by rule or regulation pursuant to the provisions of the Administrative Procedure Act.

The first case to interpret the amendment was *Township of Franklin v. Hollander*.<sup>80</sup> In that case the landowner owned 143 acres in Franklin Township, Hunterdon County, New Jersey, and, under an easement benefiting the local agricultural development board, operated an ornamental plant production facility in violation of numerous local codes.<sup>81</sup> The township argued that despite the amendment, the violations were severable as “pure zoning and land use issues” and thus not preempted.<sup>82</sup> The defendant nursery supported its argument that the municipal zoning application was restricted by arguing that the amendment “specifically requires buildings and parking areas associated with a farm market on commercial farm property to comply with municipal standards.”<sup>83</sup> The court, holding in favor of preemption, was partially persuaded by a study of the legislative intent behind the amendment, which was found to “expand the list of agricultural activities that would preempt county or municipal regulation if they are conducted in a manner that does not pose a direct threat to public health and safety.”<sup>84</sup> The court conferred jurisdiction on the County Agricultural Board (CAB), with whom the farm had an easement agreement to ensure that the farm’s operation constituted “a generally accepted agricultural operation or practice” per the recommendation of the State Agricultural Development Board.

However, the court did warn that the CAB’s jurisdiction over local farming operations could be in jeopardy where “a commercial farm operator may seek to extend what appears to be an accepted agricultural management practice to such an extent that it is so violative of local land use ordinances as to be beyond the ken of reasonable conduct despite falling within the scope of the Act. In such instances, the CAB or SADC cannot disregard such ordinances and the impact of agricultural management practices in such context.”<sup>85</sup> On the township’s complaint, the court recognized that the violations by the nursery may have put its operation outside the jurisdiction of the CAB and thus remanded the case to a de novo review by the CAB. In the opinion of its review of the lower court decision, the New Jersey Supreme Court summed up the sentiment of the New Jersey statute: “Agricultural activity is not always pastoral.”<sup>86</sup>

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<sup>80</sup> 769 A.2d 427 (N.J. Super. App. Div. 2001), *affirmed* 796 A.2d 874 (N.J. 2002).

<sup>81</sup> *See id.* at 429. The landowners’ violations included alteration of site plan, expansion of structures and impervious surfaces, employment of over 25 persons, all without town approval. The township zoning code provided that “site plan approval is required for the construction of farm structures in excess of 7% of the land area, or of any farm structure greater than 20,000 square feet.” *Id.* at 430. In all, impervious coverage of a lot in the AR-7.0 Agricultural Residential Zone was 10%.

<sup>82</sup> *Id.* at 433.

<sup>83</sup> N.J. STAT. ANN. § 4:1C-9(c) (West 1998).

<sup>84</sup> *Hollander*, 769 A.2d at 439.

<sup>85</sup> *Id.* (“While we recognize that the preemption doctrine may appear to give expansive and unlimited jurisdiction over agricultural practices to the CAB or SADC, we conclude that the legislative imperative requiring attention to public health and safety also imposes a limitation on such jurisdiction and requires the respective boards to consider the impact of municipal land use ordinances . . . . For example, while concrete walkways and gravel filled parking areas may fall within the statutory rubric of agricultural management practices, the CAB must consider the extent of their use and consider the limitations imposed on such uses by a municipality.”). The court cited *Garden State Farms, Inc. v. Bay*, 390 A.2d 613 (N.J. 1996), where an agricultural operation installed a heliport facility, as an example of going too far.

<sup>86</sup> *Hollander*, 769 A.2d at 878.

The Commonwealth of Massachusetts has another pre-emptive definition of agricultural use in relation to local zoning regulations.<sup>87</sup> The statute appears to have been drafted to directly address the loss of working farms<sup>88</sup> and has been interpreted to allow expansion of existing structures and construction of new structures under reasonable regulations when used for agricultural purposes<sup>89</sup> and has prohibited uses not supplied with production from the land upon which they are located.<sup>90</sup> This latter prohibition is known as the “fifty-percent rule,” whereby sales of all agricultural products are permitted as of right throughout the calendar year so long as more than fifty-percent of the sales during the main harvest season of June, July, August and September come from the farm owners’ land.<sup>91</sup> At least one court held specifically that the exemption must be interpreted broadly to promote the economic viability of agricultural enterprises in Massachusetts.<sup>92</sup> Interpretations of the statute have also been instructive in the realm direct marketing activities.<sup>93</sup>

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<sup>87</sup> MASS. GEN. LAWS ch. 40A, § 3 (“No zoning ordinance or bylaw shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year or during the harvest season of the primary crop raised on land of the owner or lessee, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture . . . . For the purpose of this section, the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.”).

<sup>88</sup> *Cumberland Farms*, *supra* note 49, notes that G.L. ch. 40A, § 3’s predecessor, G.L. ch. 40A, § 5, has the following history: “In the ten years prior to the 1966 [legislative] hearings, Massachusetts dairy farms had decreased from 9,642 to 4,894, and those remaining ‘in existence were obliged to increase the animal population to offset increasing overhead in their effort to survive.’ A bill to afford relief to agriculture was introduced by the [Massachusetts Farm Bureau] Federation (see 1961 House Bill No. 244). It was not enacted. A new bill (1962 Senate Bill No. 117, which the original petition shows to have been filed in behalf of the Federation) became St. 1962, c. 340 (the 1962 amendment). See also 1962 House Bills Nos. 3501 and 3557 (entitled ‘An Act to Preserve, Encourage and Promote Agriculture within the Delegation of Powers under the Zoning Enabling Act’). The legislative history is not decisive of this case. It does, however, indicate a general legislative intention to free agriculture from substantial impediments to farm expansion presented by some zoning by-laws. One contemporary interpretation of the 1962 amendment was that . . . ‘local [zoning] regulations can no longer affect the alteration, rebuilding or expansion of nonconforming buildings used for . . . [agricultural] purposes as long as setback requirements are met, and cannot limit the expansion of the amount of the land used for these purposes.’” 267 N.E.2d 906, 910 n8.

<sup>89</sup> *Kirker v. Board of Appeals of Raynham*, 596 N.E.2d 398 (Mass. App. Ct. 1992) (allowing construction of a cow barn to accommodate growing farming business in residential zone). The court in *Kirker* held, *inter alia*, that G.L. ch. 40A §3 operated to prohibit zoning boards from denying permits on the ground that they “would prefer another use of the land or no use.” *Id.*

<sup>90</sup> *Building Inspector of Peabody v. Northeast Nursery*, 636 N.E.2d 269 (Mass. 1994) (nursery operating in residential district prohibited from selling trees and shrubs not grown on property).

<sup>91</sup> See *Von Jess v. Board of Appeals of Littleton*, Land Court, Misc. Case No. 142973 (January 4, 1991) slip op. at 11-16.

<sup>92</sup> *Tisbury v. Martha’s Vinyard Commission*, 544 N.E.2d 230 (Mass. App. Ct. 1989).

<sup>93</sup> See *Prime v. Zoning Bd. of Appeals of Norwell*, 680 N.E.2d 118 (Mass. App. Ct.1997) (stating that G.L. ch. 40A § 3 did not exempt farm stand from regulation under local zoning ordinance); See also *Town of Eastham v.*

One such case is *Town of Natick v. Modern Continental Construction*<sup>94</sup> (*Natick II*) which provides a study of how Massachusetts G.L. c. 40A, § 3 is applied to several direct farm marketing activities. *Natick II* reviewed the activities of the Marino Lookout Farm and Market, a 110 acre, 300 hundred year-old farm that had been revamped and seemed to be doing it all in the realm of direct farm marketing: a farm stand; a pavilion; agricultural festivals featuring music, wood carving demonstrations, pony rides, hayrides, a horse show and gardening demonstrations; and a U-Pick operation. The farm also grew “over 60,000 apple trees, . . . 10,000 pear trees, many varieties of strawberry, raspberry, blackberry and blueberry plants, grape vines; and other fruits and vegetables [ . . . and] raise[d] chickens, goats, pigs, lamb, deer, ostrich, and buffalo, and harvest[ed] eggs.”<sup>95</sup>

The Town of Natick contended that under the above facts, the farm was operating a grocery store and restaurant in a residential district free of regulation. The court held that the agricultural production being conducted on the land qualified the farm for the “fifty-percent” rule, and therefore these activities could be undertaken as of right.<sup>96</sup> However, the court held that this does not exempt the farm from other town regulations and ordered that a “common victualers license” requirement was proper due to the fact that prepared foods were being served.<sup>97</sup>

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Clancy, 686 N.E.2d 1093 (Mass. App. Ct. 1997) (holding that farm stand and greenhouse prohibited on land not primarily used for agriculture).

<sup>94</sup> No. 96-03843-J, 1998 WL 517698 (unreported decision) (1998). *Natick II* is so referred as a follow-up case to *Natick I*, which limited its discussion to slaughterhouses and is discussed infra under “farm support services”).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

## B. Agricultural Protection Zoning

An informal 1995 survey by American Farmland Trust found that nearly 700 jurisdictions in 22 states had enacted some form of agricultural protection zoning.<sup>98</sup> Though sometimes confused with agricultural district programs, agricultural protection zoning ordinances regulate lot sizes (i.e., residential development density), protect agricultural uses in support of farming, and are designated generally on the basis of soil quality and other factors. Some tie agricultural use qualifications to minimum lot sizes.<sup>99</sup> The most restrictive agricultural protection ordinances limit land use strictly to agriculture.<sup>100</sup> Even under these farm-friendly ordinances, local zoning boards are still faced with interpreting new uses of farmland falling under direct marketing,<sup>101</sup> potential recreational uses,<sup>102</sup> or other commercial ventures established to support the local farming community.<sup>103</sup> The danger exists in these zoning schemes that needed support businesses will not be permitted to operate within these zones because they may be prohibited commercial uses.

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<sup>98</sup> See e.g., ARIZ. REV. STAT. ANN. § 9-462.01 (1996); CAL. GOV'T CODE § 66474.4 (West 1993); HAW. REV. STAT. §§ 205-1 –18 (1985); IND. CODE § 36-7-4-601; IOWA CODE §§ 414.1-.3 (2000); KY. REV. STAT. ANN. §§ 100.201-.203 (Michie 1998); MICH. COMP. LAWS § 125.201(West 1997); MINN. STAT. ANN. § 394.25 (West 1997); OR. REV. STAT. §§ 215.203-298 (1997); 53 PA. CONS. STAT. §§ 10601-10605 (West 1997); VT. STAT. ANN. tit. 24, §§ 4301-4495 (1992); VA. CODE ANN. §§ 15.2-2283 (Michie 2003); WIS. STAT. §§ 59.69-694 (2000) and WIS. STAT. §§ 91.01-.80 (2000). Oregon (in addition to Wisconsin) enables Exclusive Farm Use zones: (“215.203 Zoning ordinances establishing exclusive farm use zones; definitions. (1) Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.”).

<sup>99</sup> See *Molnar v. County of Carver Bd. Of Com'rs* 568 N.W.2d 177 (Minn. 1997) (holding that landowner's proposal to build a horse arena was not permitted use of his property for commercial agriculture of agricultural area within residential cluster district, where landowner's agricultural area was not 20 acres or more, as required to qualify for commercial agriculture as defined by county zoning ordinance [Carver County, Minn., Zoning Ordinance 32S §8.0301(B)]). See also *Chase v. Zoning Bd. Of Appeals of Town of Wilton*, 695 N.Y.S.2d 434, (1999) (holding that property owner could not keep farm animals on lot which did not meet minimum farm use lot size under local right-to-farm legislation.) *But see Lake County v. Cushman*, 353 N.E.2d 399, 40 (Ill. Ct. App. 1976) (Because state pre-emption statute did not grant counties authority to prescribe minimum lot size, court struck down county ordinance that prohibited agricultural uses on lots under five acres.).

<sup>100</sup> See AMERICAN FARMLAND TRUST, FARMLAND INFORMATION CENTER FACT SHEET, AGRICULTURAL PROTECTION ZONING (Sept. 1998).

<sup>101</sup> See *West Branch Conservation Association v. Town of Ramapo*, 726 N.Y.S.2d 137 (N.Y. App. Div. 2001) (Landowner, when challenged by a local conservation association, was denied approval to operate a 60,000 square foot farmer's market. The court noted that “[t]he development of the subject property was contrary to the trend in the subject area for approximately the past 40 years, which had been toward less dense rural designation and more open space.”) *Id.* at 139.

<sup>102</sup> See *Stevens v. Smolka*, 202 N.Y.S.2d 783 (N.Y. App. Div. 1960) (denying landowner denied operation of a trailer camp in an exclusive agricultural district).

<sup>103</sup> See *Winter v. Guenther*, 192 N.Y.S.2d 892 (N.Y. Gen. Term. 1959) (denying farmland owner denied permit in an agricultural zone to sell farm implements).

Oregon's zoning enabling statute provides an example of definitions and uses in an agricultural protection zone, known in Oregon as an Exclusive Farm Zone,<sup>104</sup> where farms enjoy an enhanced measure of immunity from local zoning authorities.<sup>105</sup> Only defined farm uses are allowed in these zones and they must be created according to a comprehensive plan.<sup>106</sup> Permissible activity, or "farm use," is defined as:

[t]he current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection.<sup>107</sup>

Oregon counties are designated according to their soil quality as "marginal lands" or "non-marginal lands counties."<sup>108</sup> The latter designation allows wineries as a permitted "farm use."<sup>109</sup> Section 215.213 outlines which direct farm marketing and on-farm processing activities may be undertaken. Farm stands are allowed according to the following guidelines:

(A) The structures are designed and used for the sale of farm crops and livestock grown on farms in the local agricultural area, including the sale of retail incidental items, if the sales of the incidental items made up no more than 25 percent of the total sales of the farm stand; and

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<sup>104</sup> OR. REV. STAT. § 215.203 (1997).

<sup>105</sup> OR. REV. STAT. § 215.253 (1) provides: No state agency, city, county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 or within an area designated as marginal land under ORS 197.247 (1991 Edition) in a manner that would restrict or regulate farm structures or that would restrict or regulate farming practices if conditions from such practices do not extend into an adopted urban growth boundary in such manner as to interfere with the lands within the urban growth boundary. "Farming Practice" as used in this subsection shall have the meaning set out in ORS 30.930. (2) Nothing in this section is intended to limit or restrict the lawful exercise by any state agency, city, county or political subdivision of its power to protect the health, safety and welfare of the citizens of this state.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at § 215.203(2)(a).

<sup>108</sup> *Id.* at § 197.247.

<sup>109</sup> *Id.* at § 215.283. See also *id.* at § 215.452 (describing "winery").

(B) The farm stand does not include structures designed for occupancy as a residence or for activities other than the sale of farm crops and livestock and does not include structures for banquets, public gatherings or public entertainment.<sup>110</sup>

Permissible processing facilities in the zone are described as facilities “for the processing of farm crops located on a farm operation that provides at least one-quarter of the farm crops processed at the facility.”<sup>111</sup> The building is subject to a maximum floor area and must comply with siting standards.<sup>112</sup>

One case interpreting permissible activities under the term “farm use” in relation to a winery is *Craven v. Jackson County*<sup>113</sup> that provides this analysis:

The phrase upon which the validity of [conditional use permit] turns is ‘in conjunction with farm use,’ which is not statutorily defined. We believe that to be ‘in conjunction with farm use,’ the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates. The agricultural and commercial activities must occur together in the local community to satisfy the statute. Wine production will provide a local market outlet for grapes of other growers in the area, assisting their agricultural efforts. Hopefully, it will also make [the applicant’s] efforts to transform a hayfield into a vineyard successful, thereby increasing both the intensity and value of agricultural products coming from the same acres. Both results fit into the policy of preserving farm land for farm use . . . [S]ales of souvenirs which advertise the winery may cause others to come to the area and buy the produce of the vineyards and farms roundabout. Such sales may reinforce the profitability of operations and the likelihood that agricultural use of the land will continue. At least [the zoning board, Land Use Board of Appeals] could reasonably so find as it did and interpret the incidental sales of souvenirs with logos as being “in conjunction with farm use.”<sup>114</sup>

### C. Agricultural Districting: New York’s Example

Sixteen states have enacted agricultural district enabling laws.<sup>115</sup> An agricultural district<sup>116</sup> is a geographic area where farming is made a priority land use and where steps are taken to promote the continuation of commercial farming.<sup>117</sup> Enrollment by a farmer in an agricultural district is voluntary, and doing so earns the farmer certain benefits according to the state statute, including limits on eminent domain, added nuisance protection, protection from municipal annexation, automatic eligibility for differential assessment, and property tax credits. Agricultural districts normally require a minimum acreage to be designated as such, from ten acres (Pennsylvania) to 500 acres (New York).<sup>118</sup>

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<sup>110</sup> *Id.* at § 215.213(o).

<sup>111</sup> *Id.* at § 215.213(y).

<sup>112</sup> *Id.*

<sup>113</sup> 779 P.2d 1011 (Or. 1989).

<sup>114</sup> *Id.* See also *Collins v. Klamath County*, 941 P.2d 559 (Or. Ct. App. 1997) (stating that “the legislature has chosen to differentiate between ‘farm use’ and ‘farm stands’ and ‘commercial activities that are in conjunction with farm use’ and place each of those uses in separate categories, subject to different levels of regulation.”).

<sup>115</sup> See DEL. CODE ANN. tit. 3, §§ 901 - 930 (1999); 505 ILL. COMP. STAT. 5/1-20.3 (West 2003); IOWA CODE § 335.27 (2001); KY. REV. STAT. ANN. § 262.850; MD. CODE ANN., AGRIC. §§ 2-501-516; MASS. GEN. LAWS CH. 40L, §§ 1 - 10; MINN. STAT. ANN. §§ 473H.01 - .18 (West 2001); N.J. STAT. ANN. §§ 4:1C-1 -55 (1998); N.Y.

New York State's agricultural districts law was enacted in 1971<sup>119</sup> and serves as the model for those subsequently developed across the United States. It is arguably the most well-developed law in promoting coordination of zoning and protection of farming practices. Among the key features of the agricultural districts law is a zoning preemption that states:

Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.<sup>120</sup>

Applications for special use permits, use variances, and site plans for projects in agricultural districts require the submission of an "agricultural data statement" for review by the zoning authority.<sup>121</sup> The apparent function of this section is to force a review of development activities on agricultural district land, though one could see how a proposed development of an agricultural support enterprise could put the issue back in play before the town or village zoning authority. Further, the statute sets out a framework on how localities can request a review of drafts of local laws and offer an opinion on how they will affect local agriculture.<sup>122</sup>

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AGRIC. & MKTS. LAW §§ 300 - 310; N.C. GEN. STAT. §§ 106-735 to -744 (2000); OHIO REV. CODE ANN. §§ 929.01 - .05 (Anderson 1998); 3 PA. CONS. STAT. §§ 901 - 915 (1995); TENN. CODE ANN. §§ 43-34-101 - 108; UTAH CODE ANN. §§ 17-41-401 - 406 (1999); VA. CODE ANN. §§ 15.2-4300 -4314.

<sup>116</sup> Agricultural Districts are known variously as agricultural preserves, agricultural security areas, agricultural preservation districts, agricultural areas, agricultural incentive areas, agricultural development areas, voluntary agricultural districts and agricultural protection areas.

<sup>117</sup> Bills and Robb, *supra* note 2, at p. 1.

<sup>118</sup> See AMERICAN FARMLAND TRUST, FARMLAND INFORMATION CENTER FACT SHEET, AGRICULTURAL DISTRICT PROGRAMS (Dec. 2001).

<sup>119</sup> N.Y. AGRIC. & MKTS. §§ 300-310 (McKinney 1991).

<sup>120</sup> *Id.* at § 305-a(1) See also *id.* at § 305-a(2) (empowering the Commissioner of Agriculture to enforce this provision upon a complaint from a farmland owner in an agricultural district).

<sup>121</sup> See *id.* at § 305-a(2).

<sup>122</sup> See *id.* at § 305-a(1).



Stemming from the agricultural districts program and worth noting in the context of this article is New York's farmland protection grant program. In 1992, the New York legislature passed § 312, which established the State Agricultural and Farmland Protection Program, whereby the Commissioner of Agriculture is directed to initiate and maintain a statewide program to provide financial and technical assistance to counties that establish local farmland protection plans.<sup>123</sup> Counties may apply for and receive grants of up to \$50,000 (or not more than 50% of the cost) to develop the plan, which "provides a forum for discussing proactive steps the industry and governments might take to protect the agricultural land base while increasing the vibrancy of local food and agricultural industries."<sup>124</sup> A key focus of these efforts is the promotion of direct marketing and other agricultural support business opportunities at the county level. A stated policy initiative of a number of these plans is the hope that local zoning laws will work in concert with the overall goal of the plan, and some plans have caused counties to enact local right-to-farm laws.

New York law also allows for – but does not require -- an additional town board member to be appointed if an agricultural district exists wholly or partly within the boundaries of the town, one or more members each of whom must earn a minimum \$10,000 annual gross from agricultural pursuits.<sup>125</sup> However, though agricultural districts are also considered as part of a comprehensive plan,<sup>126</sup> it is unclear how the existence of such a plan will relate to the local zoning preemption clause of the agricultural districts statute. New York courts have taken a generally deferential approach in reviewing zoning enactments challenged as not being in compliance with a comprehensive plan. Given the "historically nebulous nature" of what a comprehensive plan may consist of, these decisions also substantiate the ad hoc nature of the courts' inquiries. Reflective of the hesitancy of the courts to invalidate zoning enactments, the existence of even a minimum form of comprehensive planning prior to acting on a zoning amendment is likely to defeat a zoning challenge.<sup>127</sup>

#### **IV. LITIGATION INVOLVING SELECTED USES**

##### **A. Direct Marketing and Agritourism**

###### **1. Farm Stands and Value-Added Retail Sales**

As quoted by the Supreme Court of Michigan, "[f]armers from time immemorial have had the right to sell the produce from their farms."<sup>128</sup> Thus, a common thread in reported cases questioning the permissibility of farm stands is that the produce sold at a farm stand must be sold on-site.<sup>129</sup>

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<sup>123</sup> See *id.* at § 321-326.

<sup>124</sup> Bills and Maloney, *supra* note 2, at p. 7. Professors Bills and Maloney identified five common themes to the farmland protection plans: ag-based economic development, education/public awareness, government policy, and farmland protection (i.e., purchase of development rights programs). *Id.* at p. 10. As of October 2000 (the end of the Bills/Maloney survey) 40 of New York's 63 counties had received cost share grants. *Id.* at p. 1.

<sup>125</sup> N.Y. TOWN LAW § 721(11) (McKinney, 2004) (defining "agricultural pursuits" as "the production of crops, livestock and livestock products, aquacultural products, and woodland products as defined in section three hundred one of the agriculture and markets law"). *Id.*

<sup>126</sup> See *id.* at § 272(a)(8).

<sup>127</sup> See Terry Rice, McKinney's Consolidated Laws of New York, Annotated, Town Law § 272(a) Practice Commentaries (2004) (citing *Town of Bedford v. Village of Mount Kisco*, 306 N.E.2d 155 (N.Y. 1973), *reargument denied*, 311 N.E.2d 655 (N.Y. 1974), *Lazore v. Board of Trustees of Village of Massena*, 594 N.Y.S.2d 400 (N.Y. App. Div. 1993)).

<sup>128</sup> *DiPonio v. Cockrum*, 128 N.W.2d 544, 545 (Mich. 1964).

*Deutschmann v. Board of Appeals of Canton*,<sup>130</sup> an early Massachusetts case, expanded the list of items that could be sold at a farm stand as a matter of right. The definition of farming activities having been settled by *Town of Lincoln*, *Winship*, and *Moulton*, the court now had to interpret the status of processed products of these activities. The court looked to neighboring New Hampshire<sup>131</sup> to determine that products sold at a roadside farm stand from a dairy farm could be processed, specifically milkshakes and cheese, finding:

The fact that the products are not in their natural state does not mean that they cease to be products raised on the farm of their owner, who seeks there to sell them. We believe that the nature of the article to be sold is not the sole test, but where, by whom and in what fashion the article is produced are considerations of importance.<sup>132</sup>

The *Deutschmann* court was impressed with *Kimball's* ruling that “[i]f there had been any intention to restrict the farmer’s sales to farm produce in its natural state, the qualifying phrase could easily have been employed.”<sup>133</sup> It is important to note that, though the situs of the production and sale was key to the holding, the court opened the door for the inclusion of on-farm processing under a farming exemption: “[w]e do not believe that one who on his premises processes milk and cream from cows on his premises thereby ceases to be a farmer . . . .”<sup>134</sup> A later case, decided under M.G.L. c. 40A § 3’s agricultural protections, would distinguish the sale of ice cream where the product was manufactured elsewhere.<sup>135</sup>

A farm stand permit denial in an agricultural zone was upheld in the recent Wisconsin case of *Meyer v. Town of Milton*,<sup>136</sup> even where a farmland owner argued his sale of value-added farm products qualified under a zoning clause allowing “[s]upportive agri-business activities to include grain elevators; seed, fertilizer, and farm chemical sales; commercial feedlots; feed mills; and similar agricultural activities.”<sup>137</sup> The court stated that the itemized uses in the ordinance referred to “the sale of agricultural inputs, not retail sales of all items that have a connection with agriculture.”<sup>138</sup>

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<sup>129</sup> See *Ecker v. Dayton*, 651 N.Y.S.2d 207 (N.Y. App. Div. 1996).

<sup>130</sup> 90 N.E.2d 313 (Mass. 1950).

<sup>131</sup> *Kimball v. Blanchard*, 7 A.2d 394 (N.H. 1939) (“[W]e conclude that it could not have been the purpose of the provision in question to prohibit a farmer . . . from selling on his own land a commodity composed primarily of agricultural raw material there produced. The interpretation for which the [town zoning authorities] contend would place under the ban such common farm-‘manufactured’ products as cider, maple syrup, butter and cheese.” *Id.* at 396).

<sup>132</sup> *Deutschmann*, 90 N.E.2d at 315.

<sup>133</sup> *Id.* Cf. *Parrish v. Board of Appeal of Sharon*, 223 N.E.2d 81 (Mass. 1967) (prohibiting farmer from selling fruit punch not produced on farm at his farm stand). Note that *Parrish* was decided before the implementation of the “fifty-percent” rule under G.L. c. 40A § 3.

<sup>134</sup> *Id.*

<sup>135</sup> *Minty v. Arena*, No. Civ. A-96-3254-J, 1998 WL 282964 (Mass. May 15, 1998).

<sup>136</sup> 673 N.W.2d 411 (Wis. Ct. App. 2003) (unpublished decision).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

Where commercial activity is not permitted in an agricultural zone, courts will likely be prohibited from approving a spot zoning for farm support or direct marketing activity to occur. Such was the holding in *West Branch Conservation Association v. Town of Ramapo*.<sup>139</sup> In that case, farmland owners petitioned for a change in zoning within an agricultural zone to construct a 60,000 square foot farm stand but were blocked by a local conservation group concerned about allowing this “commercial use” in an open-space area, thus outlining the limitations agricultural zones may place on direct farm marketing activity.

An interpretation of a farm stand as a permitted use in an exclusive farm use zone can be found in *Eugene Sand & Gravel v. Lane County*,<sup>140</sup> where the Oregon Court of Appeals met the issue of whether a farm stand was a farm use by interpreting a local ordinance that required review of practices, in this case a proposed aggregate extraction site, that can potentially impact “farm uses.” In this case, the proposed mining activity was to take place in the vicinity of a “farm stand” in an area zoned for exclusive farm use, whereupon the county adjudged that, under standards set forth in the exclusive farm use zone enabling statute, the mining activity could be curtailed.<sup>141</sup> The gravel company argued that the farm stand was not an “agricultural practice” as defined in the statute because if it is listed as a permissible use, it is necessarily a permitted “non-farm” use.

The court concluded that “the text of [the statutes]<sup>142</sup> corroborates that those statutes do not pertain solely to ‘nonfarm’ uses – that is, that all uses listed in those provisions are not necessarily ‘nonfarm’ . . . ” in that they could be established in an area zoned exclusively for farming, noting that several of the activities listed in the statute are “ancillary” to farm use, including “‘buildings customarily provided in conjunction with farm use’,<sup>143</sup> wineries,<sup>144</sup> farm stands,<sup>145</sup> and certain facilities for the processing of farm crops.<sup>146</sup> The court stated: “In short, and contrary to [the petitioner’s] ‘farm use’/‘nonfarm use’ dichotomy, the inclusion of farm stands among uses permitted pursuant to [the statute] does not mean that the operation of farm stands cannot be an ‘agricultural practice’ for purposes of conflicts analysis prescribed by (the zoning authority).”<sup>147</sup> Note that this decision does not go so far as to hold that farm stands must be considered agricultural practices.

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<sup>139</sup> 726 N.Y.S.2d 137 (N.Y. App. Div. 2001).

<sup>140</sup> 74 P.3d 1085 (Or. Ct. App. 2003).

<sup>141</sup> OR. REV. STAT. § 215.296 which provides, in part, that certain uses may be approved only where the governing body finds that the uses will not “[f]orce a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or . . . [s]ignificantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.”

<sup>142</sup> *Id.* at §§ 215.213(1), 215.283(1).

<sup>143</sup> *Id.* at §§ 215.213(1)(f), 215.283(1)(f).

<sup>144</sup> *Id.* at §§ 215.213(1)(s), 215.283(1)(q).

<sup>145</sup> *Id.* at §§ 215.213(1)(u), 215.283(1)(r).

<sup>146</sup> *Id.* at §§ 215.213 (1)(x), 215.283 (1)(u).

<sup>147</sup> *Eugene Sand*, 74 P.3d at 1092.

## 2. Hayrides and Festivals

Several cases have considered whether recreational hayride activities qualify as agricultural under zoning exemptions. In *Columbia Twp. Bd. Of Zoning Appeals v. Otis*<sup>148</sup> the Court of Appeals of Ohio drew a line where hayrides become non-agricultural in purpose and thus fall outside the agricultural exemptions offered by the state pre-emption statute.<sup>149</sup> A landowner, who had for some time diversified her operation to include recreational pony rides and hayrides, added Halloween and Christmas themes to the hayrides to expand her market by installing accompanying light and sound systems along the ride route. While the court opined that normal hayrides are “agricultural activity,” the addition of the lights and sound disqualified them as such.<sup>150</sup>

A Pennsylvania court held that haunted hayrides were permissible when the complaining town zoning board failed to show that the hayrides were detrimental to the health, safety, or general welfare of the community.<sup>151</sup> It is interesting to note that the court gave weight to the fact that the hayrides allowed the farmland owner to pay his taxes, thus “enabl[ing] him to keep the farm rather than be forced to sell the land to developers.”<sup>152</sup> Because several members of the community testified to this concern, that seemed enough to suppress any inference that the hayrides were harming the community.

Other cases looking at recreational activities on a farm are in the context of whether such activities are allowed in an area zoned for agriculture. The argument that activities such as hayrides and corn mazes should qualify under agricultural zoning uses described as “parks and recreational areas” has failed.<sup>153</sup> One case, *In re Stagebrush Promotions, Inc.*,<sup>154</sup> looked at whether a number of uses conducted on a farm, including concerts, a campground, a pavilion, cabins, and a swimming pool, violated an agricultural zoning ordinance. The ordinance in question allowed public and private parks, and its stated purpose was to “protect and stabilize agriculture as an ongoing economic activity by permitting only those land uses which are agricultural in character or which act in direct support of such activity.”<sup>155</sup> Though the landowner argued its uses were “recreational,” the court refused to separate that word from the word “park,” stating that the nature of the landowner’s events made the farm more of a fairground in nature due to the existence of well-attended scheduled events. Nonetheless, the court would not impute this activity as supporting agricultural purposes as stated by the purpose of the ordinance, stating: “Beyond keeping the land in an open state, we are unable to discern how the various, concurrent activities proposed in the petition work ‘in direct support,’ or in stabilization of agricultural activities.”<sup>156</sup> The opinion does not report whether this was argued by the landowner. It is important to note that the facts of the case did not mention any form of agricultural production being conducted by the landowner.

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<sup>148</sup> 663 N.E.2d 377 (Ohio Ct. App 1995).

<sup>149</sup> OHIO REV CODE §§ 519.02 - 519.25.

<sup>150</sup> *Columbia Twp.*, 663 N.E.2d at 378.

<sup>151</sup> *In re Appeal of Gunser*, 22 Pa. D. & C.4<sup>th</sup> 193, 197 (Pa.Com.Pl. 1994).

<sup>152</sup> *Id.* at 195.

<sup>153</sup> See *Meyer v. Town of Milton*, 673 N.W.2d 411 (Wis. Ct. App. 2003) (unpublished opinion).

<sup>154</sup> 512 A.2d 776 (Pa. Commw. Ct. 1985), *appeal den’d*. *Stagebrush Promotions, Inc. v. Board of Supervisors for Twp. Of East Donegal*, 522 A.2d 1106 (Pa. 1986).

<sup>155</sup> *Stagebrush*, 512 A.2d at 781.

<sup>156</sup> *Id.*

A Georgia case, *Bo Fancy Productions v. Rabun City Board*,<sup>157</sup> found the opposite result by qualifying a public music festival event planned to be held in an agricultural zone as a “commercial” activity. Because the adjoining residential zone prohibited commercial activity and the agricultural zone language was silent, the court interpreted the ambiguity in favor of the promoter of the use. The agricultural zone language also employed the terms “[p]ublic and semi-public . . . land uses[,] . . . recreation facilities and grounds,” and the court included the festival activity as permitted under such language.<sup>158</sup>

### 3. Recreational Hunting and Fishing

The USDA’s Natural Resource Conservation Service (NRCS) has actively encouraged farmers to engage in practices that foster wildlife habitat production. These programs, including the Wildlife Habitat Enhancement Program (WHIP),<sup>159</sup> were reauthorized by the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill)<sup>160</sup> to provide cash incentives to landowners to retire land and encourage growth of natural habitat favored by certain species, including game. The NRCS has also encouraged recreational hunting, skeet shooting, and fishing as a means for farmers to increase the profitability of their farmland.<sup>161</sup> Even so, this alternative agricultural activity has met mixed results with local zoning officials and in turn the courts, fortunately with general guidelines as to whether the activity will be permissible.

Where wildlife is imported to the farm property, fee hunting has been held not to be an agricultural use permissible in an agricultural district. In *Town of Sullivan v. Strauss*,<sup>162</sup> the landowner imported and raised various exotic herd animals, including Russian boar, elk, antelope and Texas Dall sheep, as well as pheasants, wild turkeys, and grouse<sup>163</sup> that were loosed and hunted on the property by fee-paying hunters. The landowner argued that the animals were being bred for meat consumption and that hunting the animals was simply a form of harvesting or slaughtering the animals, a use generally permitted in an agricultural area. The court rejected the argument, stating that the operation was one of commercial sport rather than meat production.<sup>164</sup>

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<sup>157</sup> 478 S.E.2d 373 (Ga. 1996).

<sup>158</sup> *Id.* at 375.

<sup>159</sup> 16 U.S.C. 3839bb-1. WHIP was originally authorized under § 387 of the Federal Agricultural Improvement and Reform Act of 1996 [16 U.S.C. 3836(a)].

<sup>160</sup> Pub. L. No. 107-171, 116 Stat. 134 (to be codified in scattered sections of titles 7, 15, 16, and 21 of the U.S.C.).

<sup>161</sup> See USDA NRCS Brochure, ALTERNATIVE ENTERPRISES: FOR HIGHER PROFITS AND HEALTHIER LAND (June 2000).

<sup>162</sup> 567 N.Y.S.2d 921 (N.Y. App. Div. 1991).

<sup>163</sup> *Id.* at 922.

<sup>164</sup> *Id.* at 923.

A similar line of reasoning led the Court of Appeals of Wisconsin to a similar finding in *County of Adams v. Romeo*.<sup>165</sup> The landowners in that case operated a trout farm in a “shoreland protection” zone that authorized agricultural uses described as “[t]he cultivation of agricultural crops.”<sup>166</sup> The owners sold the trout they raised in ponds on the land through a “fish-for-a-fee” business that the court held to be prohibited on-site retail activity under a general ban of retail activity in such a district. Because the shoreland protection zone did not specifically allow fish-for-a-fee uses and further stated that any use not listed would be prohibited, the court did not approve the activity.

Though these types of recreational hunting activities appear to be encouraged by the USDA, no reported cases were found where participation in USDA conservation programs (i.e., programs administered by the federal agricultural department) had any bearing on whether these recreational hunting uses could be considered “agricultural.”<sup>167</sup>

Several cases do, however, use a state agency jurisdiction to pre-empt local regulation of recreational fee hunting and fishing, including *Romeo* above, where the court also rejected the argument that because they raised and sold fish under a permit issued by the Wisconsin’s Department of Natural Resources (DNR) that allowed the landowners to “plant, cultivate, nurture and harvest . . . fish for the purpose of selling the product for human consumption,” and because the DNR was the author of the shoreland zoning ordinance language, retail fish-for-fee harvesting was included in the term “selling” under the permit.<sup>168</sup> The court fell back on the specificity, or lack thereof, in the zoning language.<sup>169</sup>

This pre-emption argument was also attempted in *Willow Creek Ranch v. Town of Shelby*<sup>170</sup> where, though the landowner had been issued a permit by the Wisconsin DNR to operate a game bird farm, it was denied a permit to operate by the local zoning board. The court held that the town nonetheless still had the explicit authority to regulate the location in which the activity was located, and the purposes of each agency’s regulating power (the town’s and DNR’s) were mutually exclusive.<sup>171</sup> In other words, DNR’s purpose was related to protection of the state’s wildlife population, whereas the town’s zoning purpose related to the *Euclidean* protections of area resident’s health and welfare.

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<sup>165</sup> 510 N.W.2d 693 (Wis. Ct. App.), *review granted* 515 N.W.2d 714 (Wis. 1994), *aff’d in part, rev’d in part* 528 N.W.2d 418 (Wis. 1993).

<sup>166</sup> *Id.* at 695. (holding that this form of aquaculture fit the agricultural definition of “raising of crops.”).

<sup>167</sup> This argument has failed in zoning cases invoking regulation by the state agricultural agency as lending an agricultural nature to the disputed activity. See *Warner v. Jerusalem Twp. Bd. Of Zoning Appeals*, 629 N.E.2d 1137 (Ohio Com. Pleas 1993) (holding that fact that department of agriculture had jurisdiction over safety of commercial fish catches did not make drying of fish nets on residentially zoned property an “agricultural use”).

<sup>168</sup> *Romeo*, 510 N.W.2d at 696.

<sup>169</sup> *Id.*

<sup>170</sup> 611 N.W.2d 693 (Wis. 2000).

<sup>171</sup> *Id.* at 700.

*Willow Creek* also discusses whether recreational hunting is an agricultural use under specific agricultural zoning language. The farm was located in an “Agricultural A” zone that permitted “a wide range of agricultural activities, including [f]orest and game management.”<sup>172</sup> A down-zoned designation under the town code, “Agricultural B” allowed for riding and shooting clubs. In deferring to the town’s judgement, the court supported the town’s interpretation that the fee-hunting enterprise was more akin to that of “shooting” than that of “game management.”<sup>173</sup>

The State of Kansas offers a decision where fee-hunting is allowed as an agricultural use. In *Corbet v. Board of Shawnee County Com’rs*,<sup>174</sup> the Court of Appeals of Kansas looked to the state policy embodied in a state agricultural protection zoning statute<sup>175</sup> for promoting development of the farm industry, as well as the policy of construing zoning ordinances in favor of landowners, to find that operation of a recreational hunting enterprise was indeed an “agricultural purpose” so as not to require a special use permit.<sup>176</sup> The court stated, “the obvious purpose of the statute is to favor agricultural uses and farmers and not to “discourage the development of this state’s farm industry.”<sup>177</sup> Though the court did not go into any deeper analysis of the relationship between this type of alternative agricultural enterprise and the definition of farming, this decision provides an important statement on how a state pre-emption statute can expand the creative uses of farmland for profit.

## **B. Support Services, Vertical Integration, and Operational Change**

As noted above, an element of agricultural economic development is an encouragement for the establishment of farm service facilities in a given area to rehabilitate the local farm support infrastructure, thereby promoting input cost stability for local producers. Following are some categories of cases dealing with landowners’ attempts to diversify their land use in a way that either vertically integrates their own operation or seeks to serve other farming operations in a given community. How courts have decided whether these uses are permissible in their given zones as agricultural uses could offer agricultural zoning practitioners some useful tips.

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<sup>172</sup> *Id.* at 703.

<sup>173</sup> *Id.* (citing *Buhler v. Racine County*, 146 N.W.2d 403 (Wis. 1966)).

<sup>174</sup> 783 P.2d 1310 (Kan. Ct. App. 1989).

<sup>175</sup> KAN. STAT. ANN. § 19-2921 provides: “[N]o determination nor rule nor regulation shall be held to apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings erected thereon are used for agricultural purposes and not otherwise.”

<sup>176</sup> The Shawnee County zoning regulations for a “RA-1” agricultural district (at the time of *Corbet*) provided that the area would only be used for “1) agricultural uses including the raising of crops, livestock, poultry or animals for the production of food or any activity connected therewith normally found to be necessary and essential to this purpose. 2) Any activity deemed essential to the utilization and conservation of natural resources.” *Corbet*, 783 P.2d at 1312. Among the factors noted by the court was the landowner’s trial testimony that he had “planted crops such as milo and soybeans for the specific purpose of providing sources of food for wildlife,” though this was not cited as a reason for the final holding.

<sup>177</sup> *Corbet*, 783 P.2d at 1313.

*Farmington Township v. High Plains Coop.*<sup>178</sup> was the first Minnesota case to interpret the meaning of “agricultural” in the context of a zoning ordinance. The Minnesota Court of Appeals turned to *Farmegg Products v. Humboldt*<sup>179</sup> in nearby Iowa for a test to help in determining whether a 30,000 gallon tank used to supply liquid petroleum to cooperative members and customers was a permitted use in a zoning district that permitted general farming and “similar agricultural related uses” and accessory uses “customarily incidental to” general farming. The *High Plains* court thus described the test:

The [*Farmegg Products*] court held that the proposed operation was organized and carried on as an independent productive activity and not as part of an agricultural function. Though the activity involved an agricultural topic and an agricultural enterprise, the [*Farmegg Products*] court also recognized that the property would not be equipped with the implements of farms and that no part of the operation would be used for produce or crop production.<sup>180</sup>

The court then applied the *Farmegg Products* test:

First, the High Plains Cooperative is clearly not a general farmer. Its operations . . . do not involve an agricultural topic nor an agricultural enterprise. Second, a 30,000 gallon tank is not a normal component of a farm operation . . . . Third, the activity here, like the activity in *Farmegg*, involves the enterprise of furnishing supplies for agricultural businesses. It is in the nature of an agricultural supply business rather than agriculture itself. The business here serves many users other than the owner . . . .”<sup>181</sup>

This test and holding has since been held to disqualify other farm support enterprises from agricultural zones.<sup>182</sup> The text of the opinion does not record any argument by the cooperative as to how the tank relates to the costs of their agricultural operations in the sense that, by combining purchasing power, the farmers are lowering their costs and increasing profitability of their farming operations.

Another early court decision’s giving flexibility to the meaning of the term agricultural use when a town’s residential zoning ordinance allowed such use was *Moulton v. Building Inspector of Milton*.<sup>183</sup> The court held that if the town exempted agricultural uses from restriction in its residential designation, there was no assumption that any agricultural use would not be “permitted in the belief or upon any implication that they would not be injurious,” declaring that “[a]t all events we must take the by-law as written.” The court thus defined “agricultural use”:

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<sup>178</sup> 460 N.W.2d 56 (Minn. Ct. App. 1996).

<sup>179</sup> 190 N.W.2d 454 (Iowa 1971) (finding that use of property solely for the raising of chickens for transfer to off-site egg-laying houses would not qualify as “agricultural” in zoning context.).

<sup>180</sup> *Farmington*, 460 N.W.2d at 56.

<sup>181</sup> *Id.* But see *Town of Tisbury v. Martha’s Vineyard Commission*, 544 N.E.2d 230 (Mass. App. Ct. 1989) (holding that 4000 gallon fuel tank was permissible accessory use to a greenhouse where residential zoning code limited tank sizes to 500 gallons).

<sup>182</sup> *Stillwater Tp. v. Rivard*, 547 N.W.2d 906 (Minn. Ct. App. 1996) (holding that a retailer of horse tack and bedding not a permitted use in a “residential/agricultural” ordinance allowing “farming and other agricultural” purposes).

<sup>183</sup> 43 N.E.2d 662 (Mass. 1942).



There is no mystery about the words 'agricultural use.' They are everyday words and should be interpreted 'according to the common and approved usages of the languages ... without enlargement or restriction and without regard to [the court's] own conceptions of expediency.<sup>184</sup> We are not to seek for any peculiar, abstruse, or constricted signification. These words include all uses of land that in common speech and acceptance would be described as agricultural, no matter how injurious they may be to a neighborhood of homes. The test is whether the use is agricultural *and not whether it is detrimental.*<sup>185</sup>

The court held that it was hard to imagine a silo being used for anything but agriculture and therefore must be an agricultural use.<sup>186</sup> The court noted that confusion existed on the issue because the farm operators owned scattered tracts of land in the vicinity but held that they "are employed in a single enterprise, and that enterprise is an agricultural one . . . . The tilling of the soil, the raising and storing of forage crops, and the feeding of them to cattle to produce milk constitute essentially an agricultural operation."<sup>187</sup>

Two cases offer guidelines as to when a slaughterhouse will be considered a permissible agricultural use in an area allowing agricultural exemptions. In *Zoning Com'n of Town of Sherman v. Lescynski*,<sup>188</sup> the Supreme Court of Connecticut looked to an operation's connection to the farm property in determining whether a slaughterhouse fell under the state statutory definition of agriculture in the zoning context.<sup>189</sup> The court, citing *Chudnov's* common law definition of agriculture<sup>190</sup> and noting that the state statute had defined the term "agriculture" to include the "management of livestock," held that the state legislature did not "expressly countenance slaughtering of livestock on a commercial basis."<sup>191</sup> The court looked to the inclusiveness of the statute to reach its determination, noting that "shearing" and "training" were listed, but not "slaughtering,"<sup>192</sup> and where "packing, packaging, processing" were listed, the statute limited those activities as "incident to ordinary farming operations."<sup>193</sup> Crucial to its holding was the fact that the animals slaughtered were not raised on the premises.

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<sup>184</sup> *Id.* at 664 (citing *Commonwealth v. S. S. Kresge Co.*, 166 N.E. 558, 559 (Mass. 1929); *King v. Viscoloid Co.*, 106 N.E. 988 (Mass. 1914); *Martinelli v. Burke*, 10 N.E.2d 113 (Mass. 1937)).

<sup>185</sup> *Moulton*, 43 N.E.2d at 664.(emphasis in original).

<sup>186</sup> *Id.* ("A silo is a structure or vat for the storage of fodder harvested from the field and for its conversion into ensilage to be used as food for livestock. It is a part of the regular equipment of most farms that support any considerable amount of stock and is an important instrument in the ordinary process of husbandry.").

<sup>187</sup> *Moulton v. Building Inspector of Milton*, 43 N.E.2d at 664. The court in *Moulton* looked far afield into other jurisdictions and legal applications to support its definition, citing: *Dillard v. Webb* 55 Ala. 468, 474, 475 (Ala. 1876), *District of Columbia v. Oyster* 15 D.C. 285, 286 (D.C. D.C. 1885); *Keeney v. Beasman*, 182 A. 566 (Md. 1936), *De Fontenay v. Childs*, 19 P.2d 650 (Mont. 1936); *Rodgers v. Nebraska State Railway Commission*, 279 N.W. 800 (Neb. 1938); *Gordon v. Buster*, 257 S.W. 220 (Tex. 1923), *Davis v. Industrial Commission of Utah*, 206 P. 267 (Utah 1922) (holding sheepherders were agricultural labor), *Gregg v. Mitchell*, 166 F. 725 (6th Cir. 1937) (holding that raw sugar is agricultural product for tax purposes); and *Gaylord Guernsey Farms v. Jones*, D.C., 41 F.Supp. 367 (W.D. Okla. 1941) (agricultural labor defined for social security purposes).

<sup>188</sup> 453 A.2d 1144 (Conn. 1982).

<sup>189</sup> CONN. GEN. STAT. § 1-1(q) provides as follows:

(q) Except as otherwise specifically defined, the words 'agriculture' and 'farming' shall include cultivation of the soil, dairying, forestry, raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, including horses, bees, poultry, furbearing animals and wildlife, and the raising or

On the other hand, when slaughterhouse processing is considered in light of statutory protection as strong as Massachusetts G.L. c.40A § 3, the result is the opposite. In *Modern Continental Construction Co., Inc. v. Building Inspector of Natick*,<sup>194</sup> the Appeals Court of Massachusetts again looked to the intent of the legislature and the broad interpretations of the court in *Tisbury*,<sup>195</sup> as well as the seemingly ancient definitions of agriculture afforded by Black's Law and Webster's Third New International dictionaries, which included "the activity of preparing animals for market,"<sup>196</sup> to hold that "[t]he fact that an activity, such as slaughtering, can become an industrial or business use when removed from an agricultural setting does not mean that activity cannot be primarily agricultural in purpose when it has a reasonable or necessary relation to agricultural activity being conducted on the locus."<sup>197</sup> The court was careful to note that its decision "limits the permissible scope of that activity to livestock raised on the premises."<sup>198</sup>

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harvesting of oysters, clams, mussels, and, other molluscan shellfish; the operation, management, conservation, improvement or maintenance of a farm and its buildings, tools and equipment, or salvaging timber or cleared land of brush or other debris left by a storm, as an incident to such farming operations; the production or harvesting of maple syrup or maple sugar, or any agricultural commodity, including lumber, as an incident to ordinary farming operations or the harvesting of mushrooms, the hatching of poultry, or the construction, operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for farming purposes; handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market, or to a carrier for transportation to market, or for direct sale agricultural or horticultural commodity as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market or for direct sale. The term 'farm' includes farm buildings, and accessory buildings thereto, nurseries, orchards, ranges, greenhouses or other structures used primarily for the raising and, as an incident to ordinary farming operations, the sale of agricultural or horticultural commodities. The term 'aquaculture' means the farming of the waters of the state and tidal wetlands and the production of protein food, including oysters, clams, mussels and other molluscan shellfish, on leased, franchised and public underwater farm lands. Nothing herein shall restrict the power of a local zoning authority under chapter 124.

<sup>190</sup> See *Chudnov v. Board of Appeals of Town of Bloomfield*, 154 A. 161 (Conn. 1931).

<sup>191</sup> *Lecsynki*, 453 A.2d at 1148.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> 674 N.E.2d 247 (Mass. App. Ct. 1997) (discussed *supra* note 84 as *Natick II*).

<sup>195</sup> *Tisbury v. Martha's Vinyard Commission*, 544 N.E.2d 230 (Mass. App. Ct. 1989). See also *Building Inspector of Mansfield v. Curvin*, 494 N.E.2d 42 (Mass. App. Ct. 1986).

<sup>196</sup> See *Natick II*, 674 N.E.2d at 248.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 249.

Court decisions on whether the production of compost is an agricultural use under zoning exemptions serve as examples of what arguments may support expansion (or on-farm vertical integration) of input operations, or otherwise locating a processing facility important to local agricultural production in an area zoned for agriculture or where agriculture and farming is an exempted use in a residential district.

Several early cases held composting for the production of mushrooms to fall within the meaning of agriculture for zoning purposes. One such case is *Gaspari v. Board of Adjustment of Muhlenberg Tp.*<sup>199</sup> The court in *Gaspari* faced a zoning decision ordering landowners to cease and desist production of synthetic manure that was to be used as a growing medium for mushrooms. This case involved a mushroom growing operation on 17 acres of land, located in an “F” Farm District.<sup>200</sup> The operation had been in existence since 1929, and after four years the producers added a retail element offering “mushroom supplies,” including mushroom wire, baskets, washtubs, and insecticides. Later, they began selling mushroom spawn. A decrease in the availability of horse manure in the late 1940s,<sup>201</sup> the then-prime medium for mushroom growth, caused the landowners to switch to synthetic manure manufacture. The town building inspector ordered a halt to the production, deeming it to be manufacturing, which, because it was not mentioned specifically in the zoning bylaws, rendered it a non-conforming use. The town argued, and the lower court agreed, that because the component parts of the end product would not themselves serve as a medium for mushroom spawn, the fact that the end product, produced by human skill, would serve as a medium necessitated a finding that the production was manufacturing and not agriculture. The *Gaspari* court reasoned otherwise, relying on earlier decisions when it held that merely affecting the chemical change in a natural product was not manufacturing.<sup>202</sup> It found the testimony of an expert witness, testifying that manufacture of compost was an “agricultural enterprise,” to be persuasive in its determination:

You are preparing a material in which you expect to grow. The operation is just as much agricultural as the tilling of the farmer's field. He is attempting to prepare his fields in order to grow certain plants. The mushroom will not grow in a field but it does grow in compost. Therefore, it seems that the preparation of a compost is necessary; it is the medium in which you will grow your plant.<sup>203</sup>

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<sup>199</sup> 139 A.2d 544 (Pa. 1958).

<sup>200</sup> *Id.* at 546. (Articles 2 and 3 of the ordinance permitted: “3. Farming in all its branches, including the erection or alteration of the usual accessory farm buildings, incident to agriculture and animal husbandry. 4. Marketing and processing of farm products, where such use is accessory and incidental to the raising of said products.”).

<sup>201</sup> *See id.* at 545. (“With the advent of the motor age which brought in its train the disbanding of the cavalry by the United States Army, the abandonment in most cities of mounted police, the emancipation of brewery wagon Percherons, and the general substitution of gasoline as fuel for vehicles theretofore horse-drawn, it was only natural that considerably less horse manure was produced. As a consequence, the mushroom industry faced a crisis. Thus, do many seemingly unrelated subjects bear heavily upon the fate of one another.”).

<sup>202</sup> *See id.* at 547 (citing *Commonwealth v. Lowry-Rodgers Co.* 123 A. 855 (Pa. 1924) (holding that roasting coffee was not a manufacturing process) and *Rieck-McJunkin Dairy Co. v. Pittsburgh School District*, 66 A.2d 295 (Pa. 1945) (holding that pasteurization and homogenization of milk was not a manufacturing process)).

<sup>203</sup> *Id.*

The court further stated that “the production of compost parallels the case of an orchardist who plants and cultivates fruit trees and various kinds and, after they have attained a certain maturity, sells them to fruit growers; or the grower of tobacco plants, who sets out the seed in specially prepared beds and later removes the growing slips for planting in his own fields, or sells them to other farmers. No one would content that the individuals mentioned in the examples suggested are engaged in manufacturing . . . .”<sup>204</sup> The significance of this holding was the court’s refusal to separate the production of a growing medium from the actual growing of the agricultural product, here mushrooms. Such production was included in the meaning of “farming and all its branches,” the language of the zoning bylaw.<sup>205</sup> It was never mentioned, nor was it apparently relevant, that any of the ingredients involved in the synthetic compost manufacture, such as hay or corn cobs, were produced from the land owned by the Gasparis.

A later Pennsylvania case, when considering composting as an agricultural use under a zoning bylaw, came to an opposite result from *Gaspari* but with significant distinctions. The court in *Clout Inc. v. Clinton Zoning Bd.*<sup>206</sup> found that a composting facility was not a permitted use under an agricultural use exemption.<sup>207</sup> Where the composting operation in *Gaspari* was incidental to the production of mushrooms, the court in *Clout* stated that: “[n]one of the compost to be made by appellant would be a product of its land and none of the compost would be applied by appellant to fertilize and condition its land.”<sup>208</sup> The court also found significant that the compost was “processed in a totally encompassed facility located on a concrete pad having no connection or utilization of the land itself.”<sup>209</sup> Even though the end user of the product may be an agricultural user, the court drew a parallel between manufacturers of fertilizer and farm implements to compost producers.<sup>210</sup> Here, the court provided another interpretive lesson, in that because the zoning ordinance also specifically listed the sale of farm implements as a special exemption, they would have also specifically listed composting operations as well.

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<sup>204</sup> *Id.* at 548.

<sup>205</sup> *Id.*

<sup>206</sup> 657 A.2d 111 (Pa. Cmwlth. Ct. 1995) *appeal den.* 666 A.2d 1058 (Pa. 1995).

<sup>207</sup> The zoning ordinance in *Clout* permitted the following uses: “1. Agricultural uses related to the tilling of the land, the raising of farm products, the raising and keeping of horses, cattle and other livestock, and the raising of poultry products . . . 5. Sale of farm products. 6. Structures . . . c. Barns, silos, corncribs, poultry houses, and other similar structures necessary to the proper operation of agricultural activities.” *Clout*, 657 A.2d at 113-14.

<sup>208</sup> *Id.* 114.

<sup>209</sup> *Id.* at 115.

<sup>210</sup> *Id.* at 114 (“But it would be analogous to classify a factory of the Dupont Corporation engaged in the manufacture of a pesticide or a factory of International Harvester producing farm tractors as an agricultural rather than an industrial use under the terms of this ordinance.”).

*Jackson v. Building Inspector of Brockton*<sup>211</sup> is another important decision regarding both composting and vertical process integration. In that case, a farmland owner sought to build a structure to house a dehydrator for feed fodder and manure to be used as fertilizer on his various farms and to be sold in a cooperative enterprise with other area farmers. The farm where the dehydrator was to be housed was in a residential district that listed “farming, truck gardening, nurseries or greenhouses [and] accessory uses customarily incident to the above uses.”<sup>212</sup> It further defined “accessory use” as not to include “a business outside the building to which it is accessory . . . or which by reason of the appearance of the building or premises, or the emission of odor, smoke, dust or noise or in any other way is objectionable or detrimental to the residential character . . . [of] the neighborhood, or which involves features in design not customary in buildings for the above uses . . .”<sup>213</sup>

The *Jackson* court was careful to consider the significance of whether “[the dehydration] machine should be used for dehydration of fodder materials for use (a) on land unreasonably distant from the locus or (b) on nearby land not controlled and operated by [the machine owner],” and if so, “the dehydration would have some of the aspects of manufacturing rather than farming in its effect on the community.”<sup>214</sup> The court relied on its holding in *Moulton* finding the dehydrator, beneficial to several properties, to be analogous to a silo “used for the produce of a great many farms in the same enterprise,” and held that though the dehydrator was a “somewhat more complicated mechanism . . . it is only when dehydration has reasonably direct relation to farming operations of its owner that it can be regarded as in any sense ‘farming.’”<sup>215</sup> The court stated that if the dehydration of fodder and manure were done off the land of the producer or were not intended to be used on the land of the producer, it would then fall outside the term “farming” under the zoning ordinance, but because it was produced on the land, it could both continue the operation of the dehydrator and additionally sell the excess as “an unavoidable product of a permitted farming operation.”<sup>216</sup>

More recently, courts have disallowed composting production in agricultural districts. In *Moody Hill Farms v. Zoning Bd. of Appeals*,<sup>217</sup> a New York court disallowed a composting operation. The court based its holding on the fact that composting was not a listed use in the town’s definition of agriculture, described generally as “the production of crops or plans or vines and trees.”<sup>218</sup> The court found significant the fact that though the petitioner claimed the composting was incidental to its production of organic crops, the lower court record showed no evidence that such organic production in fact existed and therefore dismissed the contention without elaborating on the connection.<sup>219</sup>

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<sup>211</sup> 221 N.E.2d 736 (Mass. 1966).

<sup>212</sup> *Id.* at 737.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 739.

<sup>215</sup> *Id.* (citing *Town of Needham v. Winslow Nurseries, Inc.*, 111 N.E.2d 453 (Mass. 1953)).

<sup>216</sup> *Jackson*, 221 N.E.2d. at 740. (“[The dehydrated manure] has value and that value may be realized by sale. The raw manure could properly be sold as a farm product. Dehydrating it has not been shown to be more detrimental to the community than the storage and sale of the raw manure.”).

<sup>217</sup> 605 N.Y.S.2d 560 (N.Y. App. Div. 1993).

<sup>218</sup> *Id.* at 562 (citing *Incorporated Vil. of Old Westbury v. Alljay Farms*, 473 N.Y.S.2d 505 (N.Y. App. Div. 1984), *modified on other grounds*, 476 N.E.2d 315 (N.Y. 1985)).

<sup>219</sup> The court did cite by comparison *Gaspari*.

This “produced on the land” line of reasoning appears to support decisions elsewhere in the country as well. In *J & D Fertilizers, Ltd. v. Clackmas County*,<sup>220</sup> an Oregon court found that chicken manure not produced on the land where it was stored was not a farm use as exempted from local zoning under the state statute.<sup>221</sup> Similarly, an Ohio court in *Lawson v. Foster*<sup>222</sup> held that a mulching operation was not a permitted “agricultural service” in an agricultural zoning district.<sup>223</sup> Because the bark for the mulching operation was not produced on the same property, the petitioner would then have to prove that mulching was used by the farming community, and failing to do so, the town’s zoning permit denial was proper.<sup>224</sup>

Because zoning decisions have looked to other applications of law to define agriculture,<sup>225</sup> some courts have found a different result. In *Donovan v. Frezzo Bros.*,<sup>226</sup> an agricultural labor overtime-pay case under the Fair Labor Standards Act, the Third Circuit Court of Appeals held that composting for the production of mushrooms was not included in the “farming and all its branches” definitional exemption,<sup>227</sup> but was rather “a preliminary activity which manufactures a product that is then used in farming.”<sup>228</sup> Though “tillage of the soil” is a “branch” of farming under the federal overtime exemption, the court drew a clear distinction between mushroom compost and soil; basically, that the latter is dirt from which agricultural commodities are produced and that the former contains no dirt and therefore cannot be tilled for production. The court further held that the mushroom compost itself was not an agricultural commodity in that it was a preparatory operation to the growing of an agricultural commodity, not a product of the soil but rather a product of the “use of heat and moisture to biologically, physically and chemically alter the ingredients into a changed product – compost,” again emphasizing that none of the ingredients included “soil.”<sup>229</sup> Although the *Gaspari* result was cited by the compost producer, the Court of Appeals dismissed that decision as a zoning decision, one involving “different statutory language, purposes and policies.”<sup>230</sup>

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<sup>220</sup> 803 P.2d 280 (Or. Ct. App. 1990), *reh’g denied*, 808 P.2d 1015 (Or. 1991).

<sup>221</sup> OR. REV. STAT. § 215.203(2)(a) (providing that “[f]arm use includes the preparation and storage of the products raised on such land for man’s use and animal use and disposal by marketing or otherwise.”).

<sup>222</sup> 603 N.E.2d 370 (Ohio Ct. App. 1992).

<sup>223</sup> Section 803(K), Article 8 of the Miami Township zoning ordinance thus defined “agricultural services”: “Agricultural Services (commercial activity that primarily serves the farming community) including but not limited to, tractor and farm implement sales, welding shops, grain elevators, doctor and dentist offices, saw sharpening, farming machinery and repair including automobiles and trucks, and grocery stores . . . .” *Id.* at 370.

<sup>224</sup> *But see* *Clanton v. London Grove Tp. Zoning Hearing Board*, 743 A.2d 995 (Pa. Cmwlth. Ct. 1999) (Landowner’s legal non-conforming use did not become a “new use” where a topsoil production and sale business began to draw 75% of its material from a neighboring property rather than its own as it had under existing use status, in that the use was established and never abandoned thus running with the land.).

<sup>225</sup> See *Corbet v. Board of Shawnee County Com’rs*, 783 P.2d 1310 (Kan. Ct. App. 1989) (citing *Klitgaard v. Gaines*, 479 S.W.2d 765 (Tex. App. 1972) (holding that deer hunting constitutes agricultural use for tax purposes). See also the numerous cases cited by *County of Lake v. Cushman*, 353 N.E.2d 399 (Ill. App. Ct. 1976).

<sup>226</sup> 678 F.2d 1166 (3<sup>rd</sup> Cir. 1982).

<sup>227</sup> 29 U.S.C. § 203(f): “Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, and production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such

Several reported cases consider whether excavation for the purpose of diversifying a farm operation is a permitted use under the definition of agriculture under a particular zoning scheme. Interpreting Massachusetts G.L. Chapter 40A § 3, the Supreme Court has held that it does not. In *Henry v. Board of Appeals of Dunstable*<sup>231</sup> an owner of a 39-acre tract of wooded property in a rural residential district sought to grow and market Christmas trees for a “cut your own” operation after consulting with experts on that operation’s profitability versus a “saw log” operation.<sup>232</sup> However, to develop access for her customers, the landowner would have to excavate a sizeable amount of gravel to level the steep grade of the land. To help finance her tree farm, the landowner planned to sell the gravel off-farm. The court set out to determine if the excavation project was incidental to agriculture under the statute and thus permitted.

The court found that the excavation activity was not incidental. First stating that it must look to the “activity itself and not . . . such external considerations as the property owner’s intent or other business activities,”<sup>233</sup> the court defined incidental as not merely subordinate to the primary use but requiring a “reasonable relationship with the primary use.”<sup>234</sup> The court further stated that “to ignore this latter aspect of ‘incidental’ would be to permit any use which is not primary, no matter how unrelated it is to the primary use.”<sup>235</sup>

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farming operations, including preparation for market, delivery to storage or to market or to carrier for transportation to market.”

<sup>228</sup> *Donovan*, 678 F.2d at 1169.

<sup>229</sup> *Id.* at 1171.

<sup>230</sup> *Id.* at 1172.

<sup>231</sup> 641 N.E.2d 1334 (Mass. 1994).

<sup>232</sup> *Id.* at 1335.

<sup>233</sup> *Id.* at 1336 (citing *County of Kendall v. Aurora Nat’l Bank Trust No. 1107*, 524 N.E.2d 262 (Ill. App. Ct. 1988)).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* (citing *Harvard v. Maxant*, 275 N.E.2d 347 (Mass. 1971) (quoting *Lawrence v. Zoning Bd. of Appeals of N. Branford*, 264 A.2d 552 (Conn. 1969)). See also 2 E.C. Yokley, *Zoning Law and Practice* § 8-1 (4th ed. 1978) (“Uses which are ‘incidental’ to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law.”). See also 6 P.J. Rohan, *Zoning and Land Use Controls* § 40A.01, at 40 A-3 (1994) (“An accessory or ‘incidental’ use is permitted as ‘necessary, expected or convenient in conjunction with the principal use of the land.’”).

The court looked at the entire scope of the excavation project – the duration of the removal (three to four years), the volume (100,000 to 400,000 cubic yards), and the monies realized from the excavation (approximately \$1.00 per cubic yard or up to \$400,000) – and determined it sufficiently stood apart from the eventual use, claiming it to be a “de facto quarry operation.”<sup>236</sup> In conclusion, the court warned that to hold otherwise “would be to allow the statutory exemption to be manipulated and twisted into a protection for virtually any use of the land as long as some agricultural activity was maintained on the property.”<sup>237</sup>

When the excavation is for the purpose of constructing a pond or other irrigation, courts have found otherwise. In *Vangundy v. Lyon County Zoning Bd.*<sup>238</sup> the Kansas Supreme Court found that even though the activities of blasting and selling excavated materials were normal quarrying activities, when done to construct a pond on land used for agricultural purposes, this activity fell under the state zoning pre-emption statute.<sup>239</sup> Unlike the court in *Dunstable*, the court looked to the intent of the activity instead of the activity itself. The factors of time and amount were apparently not in the court’s record and thus not considered, but the court did not specifically state that the fact that the farmland owner was selling the rock made no difference: “[b]ecause he was able to sell the blasted rock as a by-product of creating a pond rather than stacking it in another area or hiring others to remove it, the quarrying did not under these facts alter the intended purpose.”<sup>240</sup>

Along similar lines, in *Atwater Twp. v. Demczk*<sup>241</sup> a landowner received an opinion from the town zoning official that a pond and track for training horses were exempt agricultural uses requiring no permit in a residential district, but the excavation for the pond was prohibited. The court cited several factors in holding that the excavation was incidental to the breeding and training of horses, exempted under the state code from local zoning,<sup>242</sup> notably that the excavated materials were not being removed from the property.<sup>243</sup>

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<sup>236</sup> *Henry v. Board of Appeals of Dunstable*, 641 N.E.2d at 1337. The court relied on *Old Colony Council – Boy Scouts of Am. V. Zoning Bd. of Appeals of Plymouth*, 574 N.E.2d 1014 (1991), where a boy scout troop was denied a permit to remove 460,000 cubic yards in a rural residential zone to construct a cranberry bog.

<sup>237</sup> *Henry*, 641 N.E.2d at 1337 (citing *County of Kendall*, 524 N.E.2d 262 (Ill. App. Ct. 1988)) . See also *Town of Uxbridge v. Tzimogiannis*, 2000 WL 1821456 (Conn. Super. Ct. 2000) (unreported decision) (prohibiting landowner from removing loam to construct a farm stand parking lot on land where no farming activity occurred).

<sup>238</sup> 699 P.2d 442 (Kan. 1984).

<sup>239</sup> KAN. STAT. ANN. § 19-2921.

<sup>240</sup> *Vangundy*, 699 P.2d at 446. See also *Town of North Kingstown v. Albert*, 767 A.2d 659 (R.I. 2001) (excavation of pond for turf farm permitted).

<sup>241</sup> 596 N.E.2d 498 (Ohio Ct. App. 1991).

<sup>242</sup> OHIO REV. CODE ANN. § 519.21. Section 519.21 provides that “(A) Except as otherwise provided in division (B) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure.”

<sup>243</sup> *Demczk*, 596 N.E.2d at 500. See also *Board of Franklin Township Trustees v. Armentrout*, No. 2000-P-0082, 2001 WL 1602669 (Ohio Ct. App., Dec. 14, 2001) (holding where the sale of topsoil, being a product, “much like timber or peat,” that has “existed on the property for a long time,” fell within an agricultural use exemption.).



In a test of North Carolina's zoning exemption statute, the North Carolina Court of Appeals upheld agricultural landowners' excavation of clay to convert their marginal land to a horse farm in *County of Durham v. Roberts*.<sup>244</sup> In the facts of that case, the landowners hired a contractor to excavate and remove soil consisting of jurassic clay so they could operate a horse farm. Because the original soil was of negligible nutritional value and the ponds were inadequate, the original landscape would not support a horse farm. Like the landowner in *Henry v. Board of Appeals of Dunstable*, the landowner sold the excavated clay to the excavation contractor. The landowners were cited for a prohibited resource extraction in violation of the county zoning ordinance and ultimately sought protection under North Carolina's agricultural exemption from zoning statute.<sup>245</sup> Where the county argued that horses were not livestock, the court found in numerous other statutory contexts that the horses were defined as livestock, thus qualifying the land as a farm under the statute. Turning to whether the excavation was incidental to that purpose, the court stated: "[The statute] provides that the activity need only be 'relating or incidental to' bona fide farm purposes, not 'necessary and customary.' It is clear that the activity undertaken by defendant was related and incidental to the farming activities of boarding, breeding, raising, pasturing and watering horses."<sup>246</sup>

## CONCLUSION

In order to implement the spirit of agricultural economic development initiatives designed to sustain a healthy small farm economy at the urban fringe, zoning authorities must be prepared to offer greater flexibility to agriculture and its economic diversification needs. If left alone, the question between protecting farming and protecting non-farm neighbors' expectations of country life becomes a political question. To meet farmers' need for relative free reign to make economic choices on what to produce and how to market it, the legislature must step in and offer some assistance in the form of pre-emption. However, care must be taken in that instance as well: a statute too broad can be interpreted in the spirit of older case law and rule out the most creative uses, particularly those where traditional crops are not produced. On the other hand, if a preemption statute is very specific on what uses are exempt from zoning regulation, that could evidence an intent to exclude those not listed. Also, sometimes an effort to protect agriculture in exclusive zones can have the same effect as excluding necessary commercial support activity. The key to protecting the rights of farmland owners to earn their living by working their land is a clear and encompassing statement of legislative intent that outlines the reasonable flexible needs of farmers to remain economically viable in a rapidly changing agricultural economy.

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<sup>244</sup> 551 S.E.2d 494 (N.C. Ct. App. 2001).

<sup>245</sup> N.C.GEN. STAT. §153(A)-340(b)(1) and (2) (2000). "(1) These regulations may affect property used for bona fide farm purposes only as provided in subdivision (3) of this subsection. This subsection does not limit regulation under this Part with respect to the use of farm property for nonfarm purposes. (2) Bona fide farm purposes include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market.")

<sup>246</sup> *Durham*, 551 S.E.2d at 498.