

AGRICULTURAL EXCEPTIIONALISM IN VERMONT LAND USE LAW

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“In a very few hours the brown earth had become ruddy, the brick had changed to granite, and red cows grazed in well-hedged fields where the lush grasses and more luxuriant vegetation spoke of a richer, if a damper climate.”¹

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I. INTRODUCTION

An increasing challenge facing land use planners in Vermont and throughout the United States is how to provide farmers with flexibility to diversify their operations while respecting local government's interest in comprehensively regulating land use.² Determining the appropriate level of land use regulation to apply to changing farming practices is particularly critical in Vermont given the role of value-added agriculture³ in providing an important income stream to support the farming sector.⁴ Vermont's agricultural economy is known for its

2. See, e.g., Kristen Mae Rodgers, Comment, *Trying to Find a Balance: Agricultural Land Conservation vs. Development in the Green Mountain State*, GEO. ENVTL. L. REV. ONLINE 1, 1 (framing these challenges within the Act 250 context). This, of course, is not just a Vermont phenomenon. See generally Wendie L. Kellington, *Agricultural Law Decisions Update*, 49 URB. LAW. 611 (2017) (discussing recent agricultural land use decisions). For an overview of farm diversification generally, see STEPHEN VOGEL, U.S. DEP'T OF AGRIC., ECON. RES. SERV., MULTI-ENTERPRISING FARM HOUSEHOLDS: THE IMPORTANCE OF THEIR ALTERNATIVE BUSINESS VENTURES IN THE RURAL ECONOMY 4–10 (2012) (exploring the extent and types of farm income diversification across the economic spectrum).

3. For an explanation of value-added agriculture, see Ruoxi Lu & Rebekka Dudensing, *What Do We Mean By Value-Added Agriculture?*, CHOICES (2015), <http://www.choicesmagazine.org/choices-magazine/submitted-articles/what-do-we-mean-by-value-added-agriculture>.

4. See generally Elisabeth M. Hamin & Daniel J. Marcucci, *Ad Hoc Rural Regionalism*, 24 J. RURAL STUD. 467 (explaining how value-added agriculture in Vermont helps to create an identity-based economy in the state). For a summary of the economic impact of the state's agricultural sector, see generally JAMES M. JEFFORDS, VT. LEGIS. RESEARCH SERV., ECONOMIC IMPACT OF AGRICULTURE IN VERMONT (2010), <https://www.uvm.edu/~vlrs/Agriculture/agric%20econ%20impact.pdf>.

Vermont brand.⁵ At its best, this brand connotes localism, quality, a more livable scale, and care for the needs of workers and the environment.⁶ The Vermont brand often allows Vermont farms to capitalize on the state's agricultural identity to capture additional market premiums and to increase farm income.⁷

In a state like Vermont, with its reliance on value-added

5. *The Vermont Brand*, VT. AGENCY OF COMM. & CMTY. DEV., <https://accd.vermont.gov/tourism/promote-your-business/tourism-marketing/brand> (last visited Nov. 24, 2019); see also *A Shifting Landscape: The Future of Vermont Farms*, VPR, <http://digital.vpr.net/term/shifting-landscape-future-vermont-farms#stream/0> (last visited Nov. 24, 2019) (noting that “the Vermont brand is as strong as ever, spurring products ranging from goat milk caramels to farm-to-bottle vodka”); VT. COUNCIL ON RURAL DEV., VERMONT AGRICULTURAL VIABILITY COUNCIL: FINAL REPORT 14 (2003) [hereinafter VAVC FINAL REPORT], https://www.vtrural.org/sites/default/files/vavc_final_report.pdf (discussing the market impacts of the Vermont brand and the competitive advantage this offers state producers).

6. See Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 840 n.106 (highlighting the state's creation of a B-Corp statute as a race to beat Maryland to be the first to create such a corporate form as being related to the state's overall brand and identity). In the food arena, the rules for claiming Vermont status are complex, but recent studies indicate the markup for Vermont status of a product is anywhere from 10–40%. See Troy Shaheen, *Vermont Brand Adds Value, but Rules for Claiming Connection are Complex*, VT DIGGER (Feb. 22, 2015), <https://vtdigger.org/2015/02/22/vermont-brand-adds-value-rules-claiming-connection-complex> (discussing the Vermont brand and Made in Vermont label in connection with the controversy over VerMints's substantial fine for misusing this label). See generally H. David Gold, *Legal Strategies to Address the Misrepresentation of Vermont Maple Syrup*, 59 FOOD & DRUG L.J. 93 (2004) (discussing issues addressing labeling of maple syrup from the state). The Vermont brand, not surprisingly, is also critically important within the state. The state has set aggressive goals for the amount of food and food product that Vermonters purchase annually from Vermont farmers. As of 2018, Vermonters purchased 12.9% of their food from Vermont farmers, meeting the state's goal of purchasing 10% by 2020. Elizabeth Gribkoff, *Local Food Increases to 12.9 Percent of Vermont Food Sales*, VT DIGGER (Nov. 11, 2018), <https://vtdigger.org/2018/11/11/local-food-increases-12-9-percent-vermont-food-sales>.

7. See Josey Hastings, *Food and Agriculture: The ‘Value-Added’ Buzz: Our Farms, Our Food*, VT. COUNCIL ON RURAL DEV. (May 3, 2012), <https://www.vtrural.org/programs/working-lands/press/120503> (emphasizing the role that value added agriculture plays in Vermont farming); VAVC FINAL REPORT, *supra* note 5, at 4–7 (discussing the challenges and opportunities facing Vermont agriculture); see also Franny Bastian & Ric Cengari, *Startups Connect Vermont's Farmers to Urban Markets*, NPR (Sept. 21, 2015), <https://www.npr.org/sections/thesalt/2015/09/21/441531252/startups-connect-vermonts-farmers-to-urban-markets> (reporting on recent efforts to promote the connections to proximate urban markets). Perhaps the most striking example of the shift from commodity production to value-added production is the 2018 sale of Nordic Farms (one of the state's most iconic dairies) to Peterson Quality Malt, which supplies the booming craft beer industry with locally grown malt. See Hannah Palmer Egan, *Peterson Quality Malt Purchases Nordic Farms*, SEVEN DAYS (Dec. 4, 2018), <https://www.sevendaysvt.com/BiteClub/archives/2018/12/04/peterson-quality-malt-purchases-nordic-farms> (profiling the acquisition of this dairy). For a survey of some of the economic issues and the history of evolution in the Vermont dairy sector, see Bob Parsons, *Vermont's Dairy Sector: Is There a Sustainable Future for the 800 lb. Gorilla?* 2 (Opportunities for Agric., Working Paper Series Vol. 1, No. 4, 2010).

agriculture over commodity agriculture,⁸ the need for land use regulation that addresses on-farm entrepreneurship is particularly pressing.⁹ On-farm entrepreneurship is a strand of value-added agriculture associated with farm-based, direct-to-consumer marketing. It may involve selling products from farm stands or more experiential-based activities such as pick-your-own operations,¹⁰ farm stays,¹¹ and wedding venues, to name just a few examples.¹² These businesses, which are related to the State's overall agricultural operations but not directly tied to production, are referred to under Vermont law as "accessory on-farm businesses."¹³ Accessory on-farm businesses come in two primary forms: (1) direct-to-consumer sales of farming products,¹⁴ and (2) experiential activities that relate directly to the

8. According to the results of the United States Department of Agriculture's 2015 Local Food Marketing Practice Survey, Vermont ranked seventh in direct-to-consumer sales of agricultural products, ahead of Massachusetts, Virginia, and conventional agriculture powerhouse, Iowa. See U.S. DEP'T OF AGRIC., ACH12-35, 2012 CENSUS OF AGRICULTURE HIGHLIGHTS: DIRECT FARM SALES OF FOOD 1 (2016), https://www.nass.usda.gov/Publications/Highlights/2016/LocalFoodsMarketingPractices_Highlights.pdf (listing the top ten states with the greatest direct sales in 2015).

9. See, e.g., Michele C. Schmidt et al., *Increasing Farm Income and Local Food Access: A Case Study of a Collaborative Aggregation, Marketing, and Distribution Strategy that Links Farmers to Markets*, 1 J. AGRIC., FOOD SYSTEMS & COMMUNITY DEV., Spring-Summer 2011, at 157, 157-58 (describing market forces driving Vermont agriculture's entrepreneurship); see also Ellen L. Rilla, *Tourism and Agricultural Viability: Case Studies from the United States and England*, in TOURISM AND AGRICULTURE: NEW GEOGRAPHIES OF CONSUMPTION, PRODUCTION AND RURAL RESTRUCTURING, at 173, 175 (Rebecca M. Torres & Janet H. Momsen eds., 2011) (describing motivations for Vermont farmers to implement agritourism-related practices).

10. See, e.g., *Farm Stands*, NOFA-VT, <https://nofavt.org/programs/farm-consumer-0/farm-stands> (last visited Nov. 24, 2019) (providing a directory of farm stands).

11. See Sara Tucker, *Vacation on a Vermont Farm, a Uniquely American Tradition*, WALL ST. J. (July 30, 2015), <https://www.wsj.com/articles/vacation-on-a-vermont-farm-a-uniquely-american-tradition-1438281931> (profiling farm stay opportunities, including Rochester's Liberty Hill Farm).

12. Kathleen Conti, *Marrying Love and Preservation?*, BOSTON GLOBE (Apr. 14, 2018), <https://www0.bostonglobe.com/business/2018/04/13/marrying-love-and-preservation/Q3aulU19aVgw5oOLzk0ZN/story.html> (outlining the wedding barn trend and its preservation-related impacts for large estates, such as the Gardens Estate in Saxon's River); see also *How to Host Weddings on Your Farm: Agritourism Best Practices*, UNIV. OF VT. (Dec. 2014), <https://www.uvm.edu/vtagritourism/files/agritourism-guide/howto-host-weddings.pdf> (describing the challenges and opportunities of hosting farm-based weddings).

13. VT. STAT. ANN. tit. 24, § 4412(11) (2018); see also Matthew J. Walker, *Exploring Regionalization of United States Agriculture: A Glance at Vermont Initiatives*, 12 VT. J. ENVTL. L. 353, 380 (2011) (describing different kinds of businesses on agricultural operations in Vermont).

14. See, e.g., ADAMS BERRY FARM, <http://www.adamsberryfarm.com/> (last visited Nov. 24, 2019). For a list of Vermont farm stands, see *Farm Stand, CSA & Farmers Market Directory*, VT. AGENCY OF AGRIC., FOOD & MKTS., <https://agriculture.vermont.gov/experience/farm-stand-csa-farmers-market-directory> (last visited Nov. 24, 2019). For a listing of organic Vermont farm stands

farm's production.¹⁵ Generally, Vermont and its municipalities have been more supportive of encouraging on-farm businesses through land use regulation where the commercial activity is closely related to the primary farming activity.¹⁶

Not surprisingly, the rise of accessory on-farm businesses has pushed the boundaries between agricultural, commercial, and industrial uses,¹⁷ as these lines continue to blur.¹⁸ For instance, is a farm stand that sells crops raised on the farm considered a commercial or an agricultural use?¹⁹ What if all or some of the crops being sold at the farm stand come from off-farm? What if the farm is selling products, such as pies, that include ingredients sourced both on- and off-farm? In the regulatory arena, this line-drawing is especially complex because

see *Farm Stands*, NOFA-VT, <https://nofavt.org/find-organic-local-food/farm-stands> (last visited Nov. 24, 2019).

15. See, e.g., *Shelburne Orchards*, <https://www.shelburneorchards.com/> (last visited Nov. 24, 2019) (discussing sixty-acre family owned orchard which includes on-farm activities during harvest season).

16. See VT. LAW SCH. LAND USE CLINIC, FACILITATING INNOVATIVE AGRICULTURAL ENTERPRISES: CONSIDERATIONS AND EXAMPLE LANGUAGE FOR VERMONT MUNICIPALITIES 7 (2012), <http://www.nvda.net/files/VT-Ag-Guide.pdf> (describing some challenges facing agricultural enterprises and the difficulty of formulating land use regulations to govern many of these businesses).

17. See, e.g., NOFA-VT, RURAL ENTERPRISE CASE STUDY: FAT TOAD FARM 1 (Feb. 2016) https://nofavt.org/sites/default/files/files/resources/fat_toad_farm_case_study.pdf (summarizing this Brookfield farm's transition from an on-farm creamery to a food processing company, including the applicable site plan review and corresponding conditional use permit approval that followed this conversion).

18. See NOFA-VT, UNDERSTANDING LAND USE REGULATIONS FOR FARM BUSINESSES 1 (Feb. 2016), https://nofavt.org/sites/default/files/files/resources/understanding_land_use_regulations_for_farm_businesses.pdf (summarizing the complicated legal framework applicable to "rural enterprises that support . . . farm operations but aren't considered agriculture . . .") (internal citations omitted). This tension does not only happen in the farm context but also applies to land use regulations applicable to homeowners. See, e.g., Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 231 (2012) ("[C]onflict has emerged between the locavores' desires to use their private property to produce food—for personal use and for sale—and municipal zoning ordinances that seek to separate agriculture from residential uses.").

19. UVM's Lisa Chase and other policy specialists working on these issues have developed a policy matrix for trying to define agritourism, consisting of two core activities (direct farm sales of agricultural products sold on the farm and education, entertainment, hospitality and outdoor recreation on the farm with activities directly connected with farming, e.g. farm stays, farm to table meals, etc.), and two peripheral activities (direct farm sales of products sold off the farm, and education, entertainment, hospitality, and outdoor recreation on the farm, e.g., weddings, concerts, hiking). The closer these activities are to the core activities, rather than peripheral activities, the more likely or less controversial the proposed land use activity will be. See Lisa C. Chase et al., *Agritourism: Toward a Conceptual Framework for Industry Analysis*, 8 J. AGRIC., FOOD SYSTEMS & CMTY. DEV., Spring 2018, at 13, 17 (outlining a two-tiered conceptual framework for understanding agritourism, with suggested "core" and "peripheral" tiers).

certain farming activities or sales may be viewed by most as being non-objectionable on the working landscape,²⁰ while other more-intensive uses,²¹ may not. For instance, a large-scale egg production facility²² or timber operation²³ may be more consistent with a classic view of farming (as a production-based activity). This more intensive use, however, may not be viewed as being compatible for the area, particularly by its neighbors.²⁴

This definitional ambiguity matters in the direct application of significant exemptions to land use regulation that apply to farming as compared to commercial or industrial uses.²⁵ In Vermont, farming has been exempted from state land use regulation through Act 250²⁶ and from local land use regulations (provided that the activities meet the statutory definitions for the exemptions).²⁷ This separate status arises from the idea of “agricultural exceptionalism,” or the view that farming should be treated differently based upon the unique characteristics of

20. See, e.g., NOFA-VT, RURAL ENTERPRISE CASE STUDY: BREAD AND BUTTER FARM 1–2 (Feb. 2016), https://nofavt.org/sites/default/files/files/resources/bread_butter_case_study.pdf (explaining the permitting required to obtain approval for on-farm events and a bakery on this South Burlington/Shelburne-based farm, which was found to be generally compatible with adjacent land uses).

21. While scale alone is not determinative for environmental impacts, as a small farm can produce on a per unit of output scale equal or worse than a larger farm, but from a land use perspective, larger more concentrated farms seem to be the issue of greater concern. See J. B. Ruhl, *Agriculture and the Environment: Three Myths, Three Themes, Three Directions*, 25 ENVIRONS ENVTL. L. & POL'Y J. 101, 105 (2002) (discussing size of agricultural operations in the agri-environmental context).

22. See Vt. Egg Farms, Inc., Declaratory Ruling #317 (Vt. Env'tl. Bd. June 14, 1996), <https://nrb.vermont.gov/sites/nrb/files/documents/dr317-fco.txt> (applying the farming exemption under Act 250 to a 700,000 head chicken facility in Highgate).

23. See *In re Moore Accessory Structure Permit and Use*, 75 A.3d 625 (Vt. 2013) (applying the farming exemption under Act 250 to a lumber operation).

24. Neighbor conflicts obviously come in numerous forms and can also focus on farming practices. See Terri Hallenbeck, *Conflict Brews Between Charlotte Hops Farm and Its Neighbors*, SEVEN DAYS (Aug. 2, 2017), <https://www.sevendaysvt.com/vermont/conflict-brews-between-charlotte-hops-farm-and-its-neighbors/Content?oid=7105291> (reporting neighborhood concerns about chemical use on a proposed hops farm).

25. For example, take how to treat the production of rye whiskey as a farming or as an industrial use. Even if the rye used in the product of the whiskey is grown on the farm, it might be treated as a commercial use because of the amount of water utilized in producing the product. See Nina Keck, *WhistlePig Cases Challenge Definition of Farm*, VPR (Apr. 15, 2013), <http://digital.vpr.net/post/whistlepig-cases-challenge-definition-farm#stream/0> (requiring whiskey producer to obtain state land use permit, despite agricultural exemption, on this basis).

26. VT. STAT. ANN. tit. 10, §§ 6001(3), 6081 (2018); see also CINDY CORLETT ARGENTINE, VERMONT ACT 250 HANDBOOK 17 (3d ed. 1998) (discussing the agriculture exemption from Act 250 jurisdiction).

27. VT. STAT. ANN. tit. 24, § 4413 (2018).

this economic sector.²⁸

In the land use arena, this exceptionalism cuts in two very different directions. First, as farming has intensified, some advocates question the ongoing durability or desirability of the existing exemptions for farming generally.²⁹ In Vermont, this is particularly true with controversies over large dairying operations and their impacts on Lake Champlain's water quality.³⁰ Second, both large-scale commercial agriculture and local on-farm based operations, such as farm stands, are pressuring current definitions of farming and agriculture.³¹ On one end of the spectrum, there is a trend toward larger and larger commodity farms, which may more closely resemble industrial facilities, particularly in the arena of animal agriculture.³² On the other end of this divide, many smaller farms are operating quite differently than in the past by selling directly to consumers and offering a wider array of on-farm experiences.³³ Confining the regulatory definitions of

28. See Laurie Ristino, *Chez Pere Lachaise*, NAT. RESOURCES & ENV'T, Fall 2013, at 2 (defining agricultural exceptionalism). Agricultural exceptionalism exists in several contexts. See e.g., Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming and Sustainability*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 935, 938 (2010) (showcasing labor laws); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L. Q. 263, 293–316 (2000) (discussing environmental laws).

29. See Mike Polhamus, *Panel Questions Agriculture Act 250 Exemption*, VT DIGGER (Nov. 17, 2017), <https://vtdigger.org/2017/11/17/panel-questions-agriculture-act-250-exemption> (explaining state review panel's concerns over the farming exemption from Act 250); see also Garrett Chrostek, Note, *A Critique of Vermont's Right-to-Farm Law and Proposals for Better Protecting the State's Agricultural Future*, 36 VT. L. REV. 233, 257 (2011) (discussing the state's exemptions applicable to farm structures as potentially being overbroad and providing too much deference to agricultural economic uses).

30. Molly Walsh, *Lake Carmi Pollution Triggers Call for Stricter Regulation of Dairy Farms*, SEVEN DAYS (Nov. 8, 2017), <https://www.sevendaysvt.com/vermont/lake-carmi-pollution-triggers-call-for-stricter-regulation-of-dairy-farms/Content?oid=9963346>; Matt Chapman & Jen Duggan, *The Transition Towards the 2016 Lake Champlain TMDL: A Survey of Select Water Quality Litigation in Vermont from 2003–2015*, 17 VT. J. ENVTL. L. 629, 643–46 (2016) (reviewing agricultural water quality issues in Missisquoi Bay).

31. LISA CHASE & VERN GRUBINGER, *FARMS, FOOD, AND COMMUNITY: EXPLORING FOOD SYSTEMS* 33 (2014) (exploring the evolution of the New England food system). Some Vermont communities are working to make their zoning regulations more supportive and flexible to address the hybridity of some farming operations. See *Zoning for Agricultural Enterprises – Shelburne*, VT. NAT. RES. COUNCIL, <https://vnrc.org/community-planning-toolbox/case-studies/zoning-for-agricultural-enterprises-shelburne/> (last visited Nov. 24, 2019) (explaining Shelburne's integrated agriculture conditional use within its agricultural zone).

32. See generally Williams S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213 (2009) (critiquing the farm bill and the policy priorities contained therein).

33. See generally Anders Van Sandt & Dawn Thilmany McFadden, *Diversification through Agritourism in a Changing U.S. Farmscape*, 15 W. ECON. F. 52 (2016) (describing trends in the growing agritourism farmscape).

farming to include certain agricultural activities, while excluding others without additional permitting or approvals, is becoming an increasingly complex task given this increasing diversity in types of “farming.”³⁴ Farming, in short, retains its exceptionalism under Vermont land use law, and defining what activities and what actions qualify for this exemption has critical importance for the state’s land use and, perhaps, for the continuation of these exemptions.

Given the expanding commercial orientation of accessory on-farm businesses and, in light of the traditional view of agriculture as being apart from other similar uses, who should make determinations about where these businesses can occur and in what manner? The Vermont legislature has recently taken additional steps to try to strike this balance at the state level, to remove some of this authority from local governments, and to attempt to normalize the treatment of accessory on-farm businesses statewide.³⁵ Act 143, effective July 1, 2018, which will be explored in much more detail, created a state land use category for accessory on-farm businesses, eliminating local ability to object to these businesses as forms of land use, while continuing communities’ authority to shape and condition these operations through site plan review.³⁶

The purpose of this Article is to provide an overview of the land use regulations that apply to accessory on-farm enterprises and to consider recommendations on how to implement these laws to better

34. See, e.g., Jess Phelps, *Defining the Role of Agriculture in Agricultural Conservation Easements*, 44 *ECOLOGY L.Q.*, 647, 663–69 (2018) (discussing this issue within the context of drafting agricultural conservation easements designed to advance multiple objectives).

35. See, e.g., SUPPORTING AND MANAGING RURAL ENTERPRISES IN YOUR COMMUNITY, NOFA-VT (Feb. 2016), https://nofavt.org/sites/default/files/files/resources/supporting_and_managing_rural_enterprises_in_your_community.pdf (providing overview of some of the challenges and opportunities rural enterprises pose for Vermont communities). Some organizations, such as the Vermont League of Cities and Towns and the Vermont Natural Resources Council, have objected to efforts to single out farms for differential land use treatment as other categories of users. See Letter from Kate McCarthy, Sustainable Cmty. Program Dir., Vt. Nat. Res. Council, and Gwynn Zakov, Mun. Policy Advocate, Vt. League of Cities & Towns, to the House Comm. on Agric. & Forest Prods. (Jan. 25, 2018), <https://legislature.vermont.gov/Documents/2018/WorkGroups/House%20Agriculture/Bills/H.663/Testimony/H.663~Kate%20McCarthy~summary%20of%20VLCT%20and%20VNRC%20~1-23-2018.pdf> (explaining these organizations’ objections to the on-farm accessory business legislation recently enacted by the Vermont legislature).

36. Q+A, ACT 143, ACCESSORY ON-FARM BUSINESSES, VT. AGENCY OF AGRIC., FOOD & MKTS. 1 (2018), https://agriculture.vermont.gov/sites/agriculture/files/documents/land_use/FAQ%20Act%20143_20181003.pdf (“The passage of Act 143 allows operators to diversify operations and revenue streams and increase their ability to market agricultural products and the agricultural experience by welcoming the public to their farms, despite local land use regulations that may prohibit these businesses in rural areas.”).

balance the state's interest in accommodating the changing nature of the agricultural economy against local control. To this end, Section II examines the state's changing agricultural economy over its history. Section III explores local land use regulation and state efforts to preempt local regulation of farm enterprises and farm structures, including farming exemptions and the recent on-farm accessory business legislation (Act 143). Section IV considers Act 250, the state's land use regulation, and its treatment of agricultural land use. Last, Section V provides some recommendations on how to further improve, in particular, the implementation of local regulation of agricultural activities to further facilitate the growth and expansion of on-farm accessory businesses.

To summarize, the exceptionalism or disparate treatment that farming enjoys under Vermont law is not uncommon; farmers have been able to obtain disparate regulatory treatment across the country.³⁷ However, Vermont's importance is magnified because "Vermont's relevance to American history has flowed from its perceived exceptionalism" and, in large part, "from the state's essential ruralness."³⁸ While the state certainly is different, and has a comparatively unique agricultural economy, exploring how this state addresses the interplay between commercial and agricultural uses makes this topic of comparative importance and has relevance outside of the Green Mountains. Ultimately, it will be critical to strike the appropriate balance between land use regulation and considerations of farm enterprise to ensure that Vermont is able to maintain its leadership role in value-added agriculture, while also protecting the correlated natural resource, land use, and environmental characteristics that are so integral to the success of these businesses.

II. BACKGROUND

The nature of Vermont's agricultural economy is now changing by

37. See, e.g., Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195, 1203 (2016) (noting the idea of agricultural exceptionalism behind drinking water regulation); Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 186 (2017) (discussing how American laws and regulations insulate the agricultural industry).

38. See Paul Searls, *America and the State that "Stayed Behind": An Argument for the National Relevance of Vermont History*, 71 VT. HIST. 75, 76 (2003) (exploring this argument in the context of arguing for greater appreciation and understanding of the impact of Vermont in and on national historic trends rather than as an outlier); see also *Data Sets: State Fact Sheets: Vermont*, U.S. DEP'T OF AGRIC. ECON. RES. SERV. (updated Oct. 31, 2019), <https://data.ers.usda.gov/reports.aspx?ID=17854> (explaining that nearly two-thirds of Vermont's population is still rural).

necessity—but change has always been a part of this dynamic sector’s growth and adjustment to economic signals.³⁹ This section provides a cursory overview of the state’s rich agricultural history to demonstrate this continuum of change and to provide necessary context for the role that on-farm agricultural enterprises can play in keeping this sector vibrant.⁴⁰

A. *Early Subsistence Farming*

The first primary shift in Vermont’s agricultural sector involved moving from a largely subsistence-based focus to a market-based economy.⁴¹ Early farming largely centered on simply creating a life in the state’s rocky soil, but this view is perhaps incomplete as the state has never been wholly immune from the larger economy.⁴² For example, consider the experience of Jericho, a hamlet within the towns of Norwich and Hartford. “Farmers settled Jericho around 1781, cleared the land, and burned the felled timber to produce potash, their original cash crop” as part of a transitioning economy.⁴³ These

39. See VT. SUSTAINABLE JOBS FUND, VERMONT FARM TO PLATE STRATEGIC PLAN: EXECUTIVE SUMMARY 4 (2013), <https://www.vtfarmtoplate.com/uploads/F2P%20Executive%20Summary.pdf> (quoting former Secretary of the Vermont Agency of Agriculture, Food, and Markets Roger Allbee as stating that “[i]t is important to understand that agricultural production in Vermont has never been insulated from larger regional, national, and international economic forces”).

40. See CHRISTOPHER M. KLYZA & STEPHEN C. TROMBULAK, *THE STORY OF VERMONT: A NATURAL AND CULTURAL HISTORY* 79 (2d ed. 2015) (describing the three periods of nineteenth century change in Vermont’s agricultural production). It is important to also note pre-European settlement. “Vermont has a remarkably rich and diverse Native American archeological heritage that spans nearly 13,000 years of human history. Native American sites range from campsites used by Paleo-Indians (the early Vermonters) to 12th century farming sites (the earliest known in northern New England).” See *State Recognized Tribes*, VT. COMM’N ON NATIVE AM. AFF., <https://vcnaa.vermont.gov/recognition/recognized-tribes> (last visited Nov. 1, 2019); see also CHARLES W. JOHNSON, *THE NATURE OF VERMONT: INTRODUCTION AND GUIDE TO A NEW ENGLAND ENVIRONMENT* 50–51 (1998); Michael J. Heckenberger et al., *Early Evidence of Maize Agriculture in the Connecticut River Valley of Vermont*, 20 *ARCHAEOLOGY E.N. AM.* 125, 125–44 (1992) (describing an archaeological site showing maize cultivation in New England in 1100 A.D.); David M. Lacy, *Prehistoric Land-Use in the Green Mountains: A View from the National Forest*, 1 *J. VT. ARCHAEOLOGY* 92, 92 (1994) (explaining that “[t]he venerable myth of an under-occupied prehistoric Vermont, for example, shaped the way New Englanders looked at this state’s early land-use and land-tenure for generations”).

41. MARK BUSHNELL, *HIDDEN HISTORY OF VERMONT* 58 (2017).

42. See Richard Lyman Bushman, *Markets and Composite Farms in Early America*, 55 *WM. & MARY Q.* 351, 351–53 (1998) (discussing the market components of pre-revolutionary farms).

43. *Jericho Rural Historic District: Historic Tour No. 5 in the Town of Hartford*, TOWN OF HARTFORD, <https://www.hartford-vt.org/DocumentCenter/View/270/HDBrochureJericho> (last visited Nov. 24, 2019). Potash often provided important working capital for new settlers. See ALAN TAYLOR, *MR. COOPER’S TOWN* 36 (1995) (discussing the critical role of potash in establishing market farms in Cooperstown, New York by allowing farmers to use the value of the

subsistence farmers primarily produced “beef, pork, and mutton; butter and cheese; bread made from Indian cornmeal and rye; fruits (especially apples for cider) and vegetables (especially beans, squash, and turnips); and maple sugar and honey.”⁴⁴ While a great deal of effort was undoubtedly spent in maintaining an existence on the land, the state’s early agriculture was already shaped by larger cultural and market forces, which, in turn, impacted the productive and consumptive decisions of the state’s first European settlers.⁴⁵

B. Transition to a Market Economy/The Merino Sheep Boom

By the early nineteenth century, Vermont farmers were making strides to more fully enter the market economy.⁴⁶ Vermont historian Jan Albers describes this transformation:

Vermont [in the early nineteenth century] was experiencing the changeover from self-sufficiency, where families grew or manufactured almost everything they needed on their own farms and bartered for most of the other goods, to a commercial economy, where they grew or manufactured more than they needed and sold the surplus to buy ready-made goods. Trade and access to outside markets became increasingly important, money and forms of credit were more widely used, and everywhere there was evidence of rising expectations. New ‘wants’ created markets, as peoples strove to acquire whatever would pull them above subsistence.⁴⁷

The transformation away from self-sufficiency to more commercial agriculture “was fueled by many improvements in transportation, education and information, and tools and machines.”⁴⁸ The growth of population and industry in the Northeast and the related increase in demand for goods allowed New England producers of perishable and bulk goods to compete with western farmers who were able to offer some staples at lower prices.⁴⁹ Vermont’s agricultural economy focused on a surprising number of crops, with the state playing an important role in a number of industries, including early

existing tree crop, by converting it to potash, to pay for these lands).

44. KLYZA & TROMBULAK, *supra* note 40, at 80–81.

45. See, e.g., Peter B. Mires, *The Importance of Aspect to Historic Farmstead Site Location in the Green Mountains of Vermont*, 27 HIST. ARCHAEOLOGY 82, 82–91, Dec. 1993 (discussing the site selection of early Vermont homesteads).

46. Samuel A. McReynolds, *Frontiers, to Farms, to Factories: The Economic and Social Development of Vermont from 1791 to 1991*, 71 VT. HIST. 88, 92–94 (2003) (exploring the impacts of globalization on Vermont life, dating back to its origins).

47. JAN ALBERS, *HANDS ON THE LAND: A HISTORY OF THE VERMONT LANDSCAPE* 132 (2000).

48. KLYZA & TROMBULAK, *supra* note 40, at 81.

49. *Id.*

hops production.⁵⁰

The most dramatic evidence of this transformation was the Merino sheep boom and subsequent bust in the early/middle nineteenth century.⁵¹ The successful introduction of Merino sheep to Vermont during the Napoleonic Wars, “and the growing demand for wool by the textile industry of New England led to a change in farming practices. Because sheep required large grazing areas, small family farms had to be consolidated into larger farms. Also, many farms became dependent on one product – wool.”⁵² As a result, the state’s forested landscape was quickly denuded to accommodate shockingly large herd numbers.⁵³ By benefit of the sheep boom and its proximity to eastern markets, the middle of the nineteenth century was a comparatively prosperous period for the state’s agricultural sector, but as noted in the following section, this prosperity did not last.⁵⁴

50. See Adam Krakowski, *A Bitter Past: Hop Farming in Nineteenth-Century Vermont*, 82 VT. HIST. 91, 93–95 (2014) (outlining the rise and fall of Vermont’s nationally predominant role in hops production).

51. See Robert F. Balivet, *The Vermont Sheep Industry: 1811–1880*, 33 VT. HIST. 243, 243 (1965) (charting the explosion of Merino sheep production after the War of 1812); Carroll W. Pursell, Jr., *E.I. du Pont, Don Pedro, and the Introduction of Merino Sheep Into the United States, 1801: A Document*, 33 AGRIC. HIST. 86, 86 (1959) (same); see also PAUL S. GILLES, UNCOMMON LAW, ANCIENT ROADS AND OTHER RUMINATIONS ON VERMONT LEGAL HISTORY 90–102 (2013) (discussing this production boom and bust and its impact on the development of Vermont law).

52. *William Jarvis & The Merino Sheep Craze*, VT. HISTORICAL SOC’Y, <https://vermonthistory.org/william-jarvis-and-the-merino-sheep-craze> (last visited Nov. 24, 2019) (describing the introduction of Spanish merino sheep into Vermont and the correlated economic and cultural impacts); see also Louis Arthur Norton, *Of a Snuffbox, a Ship, and Sheep: A Tale of William Jarvis*, 82 VT. HIST., 1, 1–2 (2014) (same).

53. See KLYZA & TROMBULAK, *supra* note 40, at 85 (noting that Addison County “raised a greater number of sheep and produced more wool [nearly 373 sheep per square mile], in proportion to either territory or population, than any other county in the United States”); see also STEVEN STOLL, *LARDING THE LEAN EARTH: SOIL AND SOCIETY IN NINETEENTH CENTURY AMERICA* 112–15 (2002) (examining the environmental impacts of this concentration on the early Vermont landscape); Mike Winslow, *A Natural and Human History of Lake Champlain*, 17 VT. J. ENVTL. L. 482, 492 (2016) (exploring the impacts on Lake Champlain of this boom and subsequent bust); Brian Donahue, *Another Look from Sanderson’s Farm: A Perspective on New England Environmental History and Conservation*, 12 ENVTL. HIST. 9, 9 (2007) (placing this period in its greater regional context). For a profile of the eventual recovery or “regreening” of the state, see Bill McKibbin, *An Explosion of Green*, ATLANTIC MONTHLY (Apr. 1995), <https://www.theatlantic.com/magazine/archive/1995/04/an-explosion-of-green/305864/> (quoting Steve Trombulak, a Middlebury College biologist, that “Vermont recovered because the destruction was a one-shot destruction . . . It was cleared, pastured for maybe twenty or thirty years, and then everyone discovered Ohio. I don’t believe for a moment that Vermont would look like this if it weren’t for the Louisiana Purchase—if we hadn’t found places where you didn’t break your plough on the stones.”).

54. See generally PAUL SEARLS, *TWO VERMONTS: GEOGRAPHY AND IDENTITY, 1865–1910* (2006) (exploring the economic rise and fall of Vermont’s agricultural economy during this

C. Agricultural Decline Amidst Increased Competition

In the second half of the nineteenth century, with better transportation and refrigeration options, western and international production entered into direct competition with eastern markets, and Vermont farmers lost their prime market position.⁵⁵ For example, the sharp decline, or ‘bust’⁵⁶ of the Vermont Merino sheep industry had profound economic and landscape impacts; specifically, “Vermont experienced a decrease in the amount of improved land, a drop in farm values, and the desertion of economically untenable hillside farms.”⁵⁷ While historians debate the extent of decline during this period, as some communities were able to better weather this transition, there was sectoral change.⁵⁸ This population loss was so dramatic that “[b]y the 1870s, state boards of agriculture were anxiously explaining to readers of their annual reports ‘What is Wrong with New England Farming,’ or ‘How to Keep Your Boys and Girls on the Farm.’”⁵⁹ A major reason for this economic contraction was that “[w]hile even the poorest land was capable of supporting a flock of sheep, many mountain farms, even when fully exploited, were unable to furnish the feed or pasture-land to support even a small commercial dairy herd,”

period); THOMAS HUBKA, *BIG HOUSE, LITTLE HOUSE, BACK HOUSE, BARN: THE CONNECTED FARM BUILDINGS OF NEW ENGLAND* (1984) (exploring building history and material culture during this period of comparative prosperity). For a sense of how this impacted Vermont during the period before the Civil War as far as continuity and change, see generally JOSEPH S. WOOD, *THE NEW ENGLAND VILLAGE* (2002).

55. Ric Cengeri & Sam Gale Rosen, *How Sheep Reshaped the State*, VPR (Dec. 23, 2015), <http://digital.vpr.net/post/how-sheep-reshaped-state#stream/0>.

56. Mitch Wurlieb & Sam Gale Rosen, *In the 19th Century, Vermont Merino Sheep Bred Controversy in Australia*, VPR (Sept. 21, 2015), <http://digital.vpr.net/post/19th-century-vermont-merino-sheep-bred-controversy-australia#stream/0> (quoting historian Rebecca Woods on the fact that “there was a kind of ‘Merino bubble’ at this time. Everyone wanted to invest in them as a way to establish American manufacturing that could compete with, and break, America’s dependence on Britain for manufactured goods”).

57. Andrea Rebek, *The Selling of Vermont: From Agriculture to Tourism, 1860–1910*, 44 VT. HIST. 14, 16 (1976). See generally Hal Seth Barton, *The Impact of Rural Depopulation on the Local Economy: Chelsea, Vermont, 1840–1900*, 54 AGRIC. HIST. 318 (1980) (exploring these impacts on the local level); Michael M. Bell, *Did New England Go Downhill?*, 79 GEOGRAPHICAL REV. 450 (1989) (recounting the demise of New England hill farms).

58. See generally HAROLD F. WILSON, *THE HILL COUNTRY OF NORTHERN NEW ENGLAND: ITS SOCIAL AND ECONOMIC HISTORY* (1936) (describing this period as the ‘winter’ of New England agricultural history). But see HAL BARTON, *THOSE WHO STAYED BEHIND: RURAL SOCIETY IN NINETEENTH CENTURY NEW ENGLAND* (1984) (arguing against, at least in extent and degree, the prevailing rural decline narrative as not capturing the complexities of rural society and economic change during this period).

59. Dona Brown, *The Northeast*, in *THE ROUTLEDGE HISTORY OF RURAL AMERICA* 20, 36–40 (Pamela Riney-Kehrberg ed., 2016).

leaving some farmers with little alternative to abandonment.⁶⁰ The environmental impacts of this concentrated period of production may have also contributed to the sentiment that “[t]he Vermonters [had] used up Vermont.”⁶¹

D. Twentieth Century Trends

Five distinct themes or events defined twentieth-century Vermont’s agricultural economy: (1) the shift to dairy production as a predominant strand of agricultural output; (2) the rise of rural-based tourism; (3) the development of the land conservation and environmental movements; (4) the Great Depression and the shift to the administrative state; and (5) the back-to-the-land movement.

1. The Rise of Dairy Production

Vermont’s next phase of agricultural development focused on producing local milk and crops for local and regional urban markets.⁶² Dairy, unlike other agricultural pursuits, did comparatively well in the late nineteenth and early twentieth century. Vermont farmers were able to capitalize on their proximity to major eastern cities and develop this market.⁶³ Dairy emerged as the product of least comparative disadvantage because, for example, “the state does not have the deep well drained soils to compete with the Midwest on corn and soybeans. Vermont’s short growing season limits grain production and definitely forbids cotton. Winter also limits Vermont’s use for beef as so much feed is needed for maintaining animal condition.”⁶⁴ From the middle of the nineteenth century on, the shift toward dairy exemplified Vermont agriculture’s transformation and attempt to remain viable in the larger

60. Sara M. Gregg, *Can We “Trust Uncle Sam”? Vermont and the Submarginal Lands Projects, 1934–1936*, 69 VT. HIST. 201, 205 (2001); see also HAROLD MEEKS, *TIME AND CHANGE IN VERMONT: A HUMAN GEOGRAPHY* 161 (1986) (exploring the challenges hill communities faced in the context of agricultural change).

61. Lewis D. Stilwell, *Migration from Vermont (1776–1860)*, in 5 PROCEEDINGS OF THE VERMONT HISTORICAL SOCIETY 70–71 (1937). But see generally Christopher Harris, *The Road Less Traveled By: Analyzing Vermont Using a Cross Disciplinary Perspective*, in *WORLD HISTORY: GLOBAL AND LOCAL INTERACTIONS* 174 (Patrick Manning ed., 2005) (reevaluating Vermont’s social history across the nineteenth century and rejecting some of this narrative of decline).

62. Rebecca J. H. Woods, *Green Mountain Merinos: From New England to New South Wales in the Nineteenth Century*, 85 VT. HIST. 1, 16 (2017) (explaining that “[a]s the number of sheep in Vermont plummeted, the number of dairy cows rose by 85 percent during the last half of the nineteenth century”).

63. KLYZA & TROMBULAK, *supra* note 40, at 106.

64. Parsons, *supra* note 7, at 2.

agricultural marketplace.⁶⁵ By 1945, “[d]airy farms made up a quarter of all farms in Maine and Massachusetts; over a third of farms in New Hampshire, Rhode Island, and Connecticut; and 63 percent of those in Vermont.”⁶⁶ As road systems and refrigeration improved, Vermont dairy farmers were able to ship their products greater distances to meet urban demand.⁶⁷ On the landscape, “[t]he Vermont that seems most familiar to us, with its tree-fringed, clovered pastures and green hayfields, is actually a dairying landscape.”⁶⁸

2. Rural-Based Tourism

During the early twentieth century, Vermont became the focus on an increasingly urban population looking to reconnect to the land.⁶⁹ For farmers, vacationers became an unexpected and increasingly important revenue stream,⁷⁰ as did second home ownership.⁷¹ Other efforts seeking to bring in recreational visitors became an important part of state policy and of popularizing agricultural-based tourism as an important income stream.⁷² Expansion of the state’s tourism efforts had an impact on the character of the rural countryside and on the overall farm economy in catering to and responding to this new influx

65. See NANCY CAPACE, *ENCYCLOPEDIA OF VERMONT* 39–42 (2000) (charting this trend).

66. Brown, *supra* note 59, at 32. The dairy industry was not immune to the challenges of the Great Depression. See generally Nicholas Clifford, *The Dairy Farmers’ Union in Vermont, 1939–1942*, 79 VT. HIST. 58 (2011) (describing this organization and the move to unionize dairy production).

67. R. DOUGLAS HURT, *AMERICAN AGRICULTURE: A BRIEF HISTORY* 334 (1994).

68. ALBERS, *supra* note 47, at 274; see also Winslow, *supra* note 53, at 493 (charting the environmental impacts of this shift including increased animal waste and runoff from fields shifting from grazing to crop production to feed livestock). This pastoral landscape is valued, and in a comparatively post-production dairy economy, will be difficult to maintain. See Cheryl E. Morse et al., *Performing a New England Landscape: Viewing, Engaging, and Belonging*, 36 J. RURAL STUD. 226, 231 (2014) (surveying Vermont rural landowners on the idealized Vermont landscape and sense of place).

69. See Jason Kaufman & Matthew E. Kaliner, *The Re-Accomplishment of Place in Twentieth Century Vermont and New Hampshire: History Repeats Itself Until it Doesn’t*, 40 THEORY & SOC’Y 119, 136–37 (2011) (discussing the history of Vermont as a tourist destination).

70. See BLAKE A. HARRISON, *THE VIEW FROM VERMONT: TOURISM AND THE MAKING OF AN AMERICAN RURAL LANDSCAPE* 60 (2006) (exploring this trend). This was, however, not just a Vermont movement as other New England states during this period tried to attract tourist revenue in the burgeoning marketplace

71. See generally DONA BROWN, *INVENTING NEW ENGLAND: REGIONAL TOURISM IN THE NINETEENTH CENTURY* (1995) (exploring these trends throughout New England in the White Mountains, Martha’s Vineyard, Nantucket and coastal Maine).

72. HARRISON, *supra* note 70, at 65 (charting the state’s efforts to promote rural tourism). For an example of this marketing activity, see generally Ida H. Washington, *Dorothy Canfield Fisher’s Tourists Accommodated and Her Other Promotions of Vermont*, 65 VT. HIST. 153 (1997) (describing the impact of Fisher’s play about inviting tourism into Vermont).

of seasonal tourists.⁷³ Although we often think of agritourism as being a relatively recent phenomenon, it has now been part of the Vermont farm economy for nearly a century, with important economic and landscape impacts.⁷⁴

3. The Land Conservation Movement

Vermont's land conservation movement began in earnest in the late nineteenth century as reformers began to recognize the need to protect the landscape and to blunt environmental ills.⁷⁵ With respect to land use, the movement has two major objectives: (1) creating the Green Mountain National Forest, and (2) utilizing the conservation easement as a tool for landscape level conservation.⁷⁶

a. The Green Mountain National Forest

The Green Mountain National Forest ("GMNF") was created "out of cut-over lands that were initially cleared for timber then settled

73. See generally Blake Harrison, *Tourism, Farm Abandonment, and the 'Typical' Vermonter: 1880–1930*, 31 J. HIST. GEOGRAPHY 478 (2005) (chronicling this period in the state's economic development). Tourism remains a significant part of the state's economy as "[v]isitors spent \$1.57 billion dollars in Vermont in 2005 . . . and provided the basis for approximately 12% of or just over 36,000 jobs in the state and nearly \$200 million in tax and fee revenues." See Todd W. Daloz, *Farmland Preservation: A Vermont Land-Use Perspective*, 12 VT. J. ENVTL. L. 427, 430 n.13 (2012) (citing ECON. & POLICY RES. & PORTLAND RESEARCH GROUP, *THE TRAVEL AND TOURISM INDUSTRY IN VERMONT: A BENCHMARK STUDY OF THE ECONOMIC IMPACT OF VISITOR SPENDING ON THE VERMONT ECONOMY—2005*, at 9 (2007), https://www.uvm.edu/sites/default/files/Rubenstein-School-of-Environment-and-Natural-Resources/TT_Benchmark_Report_2005_FINAL.pdf). As tourism remains a strong component of the state's economy, there is constant concern about the balance between economic growth and impacts on the state's brand and rural identity, which defines the state as distinctive and unique. See generally Thomas D. Visser, *Vermont's Changing Rural Landscape: Paradise Lost?*, 70 VT. HIST. 40 (2002) (exploring the state's identity/sense of place and the continuing threats the state faces in this context).

74. See HARRISON, *supra* note 70, at 50–58 (2006) (charting this trend). The iconic example of this shift is perhaps Shelburne Farms. See GLENN SUOKKO, *SHELBURNE FARMS: HOUSE, GARDENS, FARM AND BARNS* 128 (2017) (explaining the farm's evolution from private estate to agri-environmental education-based nonprofit organization).

75. See RICHARD W. JUDD, *COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND* 1–11 (1997) (placing the creation of this movement in the hands of the rural communities closest to the environmental impacts). Vermonters were also at the forefront of creating an environmental ethic. See *Learn About 150 Years of Environmental Conservation*, NAT'L PARK SERV. (Feb. 7, 2017), <https://www.nps.gov/experiences/150-years-of-environmental-conservation.htm> (profiling the environmental legacy of the Marsh – Billings – Rockefeller Estate, in Woodstock, and once home to George Perkins Marsh, whose seminal *Man and Nature* (1864) is one of the most important and foundational works of environmental ecology).

76. KLYZA & TROMBULAK, *supra* note 40, at 114–17 (describing the rise of the conservation easement and land acquisition as a matter of federal, state and local policy).

as farms [and] came into being in 1932 during the Great Depression, when the federal government was able to purchase some acreage for as little as two cents apiece.”⁷⁷ The Green Mountain National Forest currently consists of over 400,000 acres of forest land.⁷⁸ The federal purchase of much of this land, authorized by the Weeks Act, allowed submarginal land and hill farms to transition back to forest cover and represented a permanent shift for much of this early farmland, some of which probably should not have been converted into agricultural use.⁷⁹

b. Conservation Easements

In the 1960s, as Vermont began to play a role in the larger environmental movement, land trusts working in the state began to explore how to protect the working landscape.⁸⁰ Founded in 1977 as the Ottaquechee Land Trust, the Vermont Land Trust played and continues to play an important role in defining the state’s agricultural character.⁸¹ Other land trusts, both national and local, have played a

77. Mark B. Lapping & Sandra L. Guay, *Changing Times: Shifting Rural Landscapes*, 15 VT. J. ENVTL. L. 103, 115 (2013) (exploring the acquisition history of the GMNF); see also Stephen D. Blackmer, *Of Wilderness and Commerce: A Historical View of the Northern Forest*, 19 VT. L. REV. 263, 267 (1995) (placing the creation and expansion of the GMNF within the larger context of the emergence of the environmental movement). For an overview of the development of the eastern national forests, see WILLIAM E. SHANDS, *The Lands Nobody Wanted: The Legacy of the Eastern National Forests*, in *THE ORIGINS OF THE NATIONAL FORESTS* 19 (Harold K. Steen ed., 1992).

78. U.S. Forest Serv., *Green Mountain National Forest: Land & Resources Management*, U.S. DEP’T OF AGRIC., <https://www.fs.usda.gov/land/gmfl/landmanagement> (last visited Oct. 25, 2019); see also Robert Manning et al., *Values, Ethics, and Attitudes Toward National Forest Management: An Empirical Study*, 12 SOC. & NAT. RESOURCES 421, 421 (1999) (surveying Vermonters regarding their attitudes and priorities towards forest management).

79. David Foster et al., *New England’s Forest Landscape: Ecological Legacies and Conservation Patterns Shaped By Agrarian History*, in *AGRARIAN LANDSCAPES IN TRANSITION: COMPARISONS OF LONG-TERM ECOLOGICAL AND CULTURAL CHANGE* 44, 44–46 (2008) (placing this change in its large continuum).

80. ELIZABETH COURTNEY & ERIC ZANCEY, *GREENING VERMONT: THE SEARCH FOR A SUSTAINABLE STATE* 35 (2012) (discussing the opening of the first Nature Conservancy chapter in Vermont). Working land purchases include the protection of forest tracts, but also working forests. See KARIN M. PONTE & ELIZABETH BYERS, *THE CONSERVATION EASEMENT HANDBOOK* 198–209 (2d ed. 2005) (providing overview of working land easements generally and exploring some the unique characteristics of this subset of conservation easement).

81. See Karin Marchetti & Jerry Cosgrove, *Conservation Easements in the First and Second Federal Circuits*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE* 96 (Julie A. Gustanski & Roderick H. Squires eds., 2000) (noting that “Vermont has an extraordinarily effective farmland preservation program. Much of its success is due to conservation-friendly state policies The Vermont Land Trust (VLT), the state’s most prominent land trust, accepted its first easement in 1978. Since then, the VLT has worked effectively with partner agencies, communities, and more than twenty-five local land trusts to make the conservation easement a well-known and successful tool for conservation”); see also

role in protecting the state's land base from intensive development or conversion away from a forest or agricultural use.⁸² Vermont also enacted policies in the 1960s to protect and respond to farm and farmland utilization losses. One such policy was the creation of the Vermont Housing and Conservation Board ("VHCB"), which provided matching funds for many of the easement acquisition efforts in the state.⁸³ To date, roughly 10% of the state's land base is protected through conservation easements, which play an important role in securing the state's future land use and agricultural economy.⁸⁴ In the agricultural context, this involves over 700 farms and 160,000 acres of farmland across the state, with the vast majority being dairy farms.⁸⁵ More recently, the Vermont Land Trust has been using its tools to promote the transfer of working lands to new farmers and has been leveraging its real estate holdings/protected lands to move beyond its traditional preservation goals to have a larger impact on the health of the rural economy.⁸⁶ To summarize, Vermont's conservation legacy directly relates to the working landscape—arguably in a much more significant way than in other regions.⁸⁷

Janet E. Milne, *Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. 883, 887–89 (2010) (discussing VLT's work with tax incentivized conservation easements).

82. See, e.g., John A. McVickar, *Land Trusts: A Growing Conservation Institution*, VT. B.J. & L. DIG., Oct. 1995, at 33 (discussing the land trust movement in Vermont generally); see also Todd W. Daloz, Note, *Farmland Preservation in Vermont and the Creative Use of Land Trusts*, 11 VT. L. REV. 427, 437–39 (1986) (same).

83. Chuck Ross & Marli Rupe, *Agricultural Sources of Water Pollution: How Our History Informs Current Debate*, 17 VT. J. ENVTL. L. 811, 823–24 (2016) (outlining the history of Vermont's farmland preservation efforts).

84. Anne Galloway, *In Perpetuity, or Not?*, VT DIGGER (Mar. 9, 2014) <https://vtdigger.org/2014/03/09/conservation-groups-push-new-law-allow-changes-land-protections>.

85. Lara D. Guerico, *The Struggle Between Man and Nature: Agriculture, Nonpoint Source Pollution, and Clean Water: How to Implement the State of Vermont's Phosphorus TMDL Within the Lake Champlain Basin*, 12 VT. J. ENVTL. L. 455, 505 (2011).

86. See, e.g., Katie H. Michel, *Landless: Legal & Policy Tools for Transferring Vermont Farmland to the Next Generation of Stewards and Food Producers*, 39 VT. L. REV. 461, 475–83 (2014) (contextualizing the issue of land access for beginning farmers and examining the current trends in Vermont land and agricultural land use while offering suggestions to help transition Vermont farmland); Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 825–26 (2016) (providing recommendations for making conservation easements more effective in securing sustainable agriculture objectives). See generally Alexis Peters, *The New Crop Growing on the Hillsides: Retaining Land in Agricultural Use through the OPAV*, 18 VT. J. ENVTL. L. 485 (2017) (discussing the impact of OPAVs in Vermont and how to improve and export the idea to other states).

87. See generally Elizabeth A. O'Brien, *A Question of Value: What Do Trees and Forests Mean to People in Vermont*, 31 LANDSCAPE RES. 257 (2006) (exploring the meaning of these landscapes to the state).

4. The Great Depression

As in most regions, the Great Depression had a profound impact on Vermont's agricultural economy.⁸⁸ Some historians, however, have argued that the state's farm economy, with its continued reliance on self-sufficiency, fared comparatively well during this period of widespread economic hardship.⁸⁹ Historian Richard Judd argues that "[b]y 1930, subsistence farming was no longer taken seriously by census takers, agricultural experts, or bureaucratic takers of the economic pulse, but its techniques and habits were ingrained in most Vermonters with a hill country background," which arguably obviated some of the harm from this economic catastrophe.⁹⁰ More recently, historians have reevaluated this working assumption and have concluded that Vermont's agricultural economy took a substantial blow during the Depression along with its urban counterparts.⁹¹ According to Hannah Silverstein, a historian focused on this period, "[i]f Vermont seemed to be doing all right in the 1930s, it was because the state had always been poor; Vermont 'was falling from a lower rung in the economic ladder.'"⁹² Despite strong resistance to more sweeping land retirement or resettlement amongst both conservatives and many communities that were slated for resettlement, the Green Mountain National Forest would expand during this period, as would the overall role of the federal government in land use planning and in shaping the agricultural economy.⁹³ Despite earlier precedent, the New Deal began to change

88. See ERIC RAUCHWAY, *WINTER WAR: HOOVER, ROOSEVELT, AND THE FIRST CLASH OVER THE NEW DEAL* 79–83 (2018) (charting the history of the national agricultural economy in and before the Great Depression). Although many portrayed Vermont agriculture as being so woefully behind the times that it was not impacted by the Great Depression, more recent scholarship challenges this narrative. See Mark Bushnell, *Then Again: Great Depression Changed Vermonters' View of Federal Aid, To A Degree*, VT DIGGER (Aug. 25, 2019), <https://vtdigger.org/2019/08/25/then-again-great-depression-changed-vermonters-view-of-federal-aid-to-a-degree>.

89. *Id.*

90. RICHARD JUDD, *NEW DEAL IN VERMONT: ITS IMPACT AND AFTERMATH* 7 (1979).

91. *Id.* at 44. One way that Vermonters fought the Great Depression is through enrollment in the Civilian Conservation Corps ("CCC"). Vermont ultimately was able to utilize 30 CCC camps across the state, employing over 40,000 individuals with around a quarter of those enrolled from Vermont. See generally Fredrick W. Stetson, *The Civilian Conservation Corps in Vermont*, 46 VT. HIST. 24 (1978) (outlining the creation of the CCC in the state and its environmental and economic impacts).

92. See Hannah Silverstein, *No Parking: Vermont Rejects the Green Mountain Parkway*, 63 VT. HIST. 132, 139 (1995) (exploring the response to the the New Deal in Vermont); Hal Goldman, *James Taylor's Progressive Vision: The Green Mountain Parkway*, 63 VT. HIST. 158, 165–68 (1995) (same).

93. See Gregg, *supra* note 60, at 201 (discussing the state's resistance to the more radical of New Deal proposals). See generally John Aubrey Douglass, *The Forest Service, the Depression*,

the relationship between Vermont farmers and the federal government, including within the land use context.⁹⁴

5. The Back-to-the-Land Movement

Last, the state had an influx of new residents focused on going “back to the land” chiefly during the 1960s and 1970s.⁹⁵ Some argue that Vermont’s role in organic and sustainable agriculture is directly, at least in part, shaped by this period in time.⁹⁶ Although the number of people involved in the back to the land movement was not large (and was not enduring, as many did not remain in state), “their influence on rural life in New England during the last decades of the twentieth century proved to be substantial”⁹⁷ Specifically, “they established grassroots organizations like the Northeast Organic Farming Association . . . , which provided support for new farmers, links to the states’ agricultural extension and university resources, and common meeting ground for generations of country people.”⁹⁸ In many ways, this movement provided infrastructure for the current local food movement and the shift to diversify the nature of our agricultural production and food system within Vermont and as part of the regional and national food economy.⁹⁹

and Vermont Political Culture: Implementing the New Deal Conservation and Relief Policy, 34 FOREST & CONSERVATION HIST. 164 (1990) (charting the environmental impacts of this period and the reorientation of federal land management priorities).

94. See, e.g., TIM LEHMAN, PUBLIC LAND, PRIVATE VALUES: FARMLAND PRESERVATION POLICY, 1933-1985, at 17–20 (1995) (discussing this shift).

95. DONA BROWN, BACK TO THE LAND: THE ENDURING DREAM OF SELF-SUFFICIENCY IN MODERN AMERICA (2011) (same). Vermont played a leadership role in the back-to-the-land movement and, in many ways, its intellectual leaders were Vermonters Scott and Helen Nearing, whose work in their Winhall farm extolled the virtues of simple living. See Richard Oliver Brooks, *The Gulf Oil Spill: The Road Not Taken*, 74 ALB. L. REV. 489, 492–93 (2011) (highlighting the impact of the Nearings’ book, *Living the Good Life*, on the environmental movement).

96. See, e.g., Erica Houskeeper, *How the Back-to-the-Land Movement Helped Propel Demand for Organic Food*, UVM FOOD FEED (Sept. 2, 2016) (highlighting the effect of the back-to-the-land farmers of the 1970s on the market for organic food), <https://learn.uvm.edu/foodsystemsblog/2016/09/02/kate-daloz-back-to-the-land>; see also YVONNE DALEY, GOING UP THE COUNTRY 103–24 (2018) (charting the impact of this movement on the Vermont food landscape).

97. Brown, *supra* note 59, at 19.

98. *Id.* See generally Dan Chodorkoff et al., *Colleges, Communes & Coops in the 1970s: Their Contribution to Vermont’s Organic Food Movement*, 82 VT. HIST. 106 (2014) (discussing the various influencers that shaped the current status of Vermont’s food economy).

99. Kevin J. Kelley, *Historical Society Explores Impact of Back-to-the-Landers on Vermont*, SEVEN DAYS (Aug. 31, 2016), <https://www.sevendaysvt.com/vermont/historical-society-explores-impact-of-back-to-the-landers-on-vermont/Content?oid=3632371> (charting the movement’s impacts in Vermont); see also Laurie Ristino, *Back to the New: Millennials and the Sustainable Food Movement*, 15 VT. J. ENVTL. L. 1, 2 (2013) (exploring and charting the more recent

E. Adapting to Continuing Change

Most recently, Vermont agriculture has entered a sort of transitional fifth phase with producers trying to determine how to adjust to changing market conditions. This includes working through what many view as an existential challenge to larger-scale Vermont dairy operations, the iconic operational form of at least the last century, and shifting consumer preferences.¹⁰⁰ Many larger operations have tried to increase their scale and production to remain competitive, which has, in turn, further depressed prices—as has decreasing demand for milk compared to other milk substitutes.¹⁰¹ This increase in production has perhaps backfired with producers now trying to determine if they can develop mechanisms for controlling supply to restore demand and reorder the pricing structure while milk prices remain stagnant.¹⁰²

On the other end of the spectrum, small farmers are continuing to diversify and come up with strategies to increase their market share and command a market premium.¹⁰³ These strategies range from increasing reliance on value-added agriculture to expanding the mix of activities available through experience-based and farm-based agritourism at scale.¹⁰⁴ Farmers also try to promote their products as

millennial back-to-the-land trends). *See generally* KATE DALOZ, *WE ARE AS GODS: BACK TO THE LAND IN THE 1970S ON THE QUEST FOR A NEW AMERICA* (2016) (describing the back-to-the-land movement).

100. *See* Mitch Wertlieb & Melody Bodette, *As Wave of Closures Continue, Iconic Charlotte Dairy Farm Auctions Cattle and Machinery*, VPR (Mar. 28, 2018), <https://www.vpr.org/post/wave-closures-continue-iconic-charlotte-dairy-farm-auctions-cattle-and-machinery#stream/0> (profiling the financial struggles of Nordic Farms due to low milk prices); Daloz, *supra* note 73, at 428 n.1 (“In 1947, Vermont had 11,206 dairy farms. By 2002, that number had fallen to 1,512.”); *see also* Dan D’Ambrosio, *Vermont Dairy is in Crisis; 4 Years of Bad Prices Take a Toll Even on Industry Leaders*, BURLINGTON FREE PRESS (May 29, 2018), <https://www.burlingtonfreepress.com/story/money/2018/05/29/vermont-dairy-crisis-nordic-farms-folds-can-any-farms-survive/486456002/> (same).

101. *See* Art Woolf, *With Fewer Cows, Vermont Milk Output Increases*, BURLINGTON FREE PRESS (Aug. 23, 2016), <https://www.burlingtonfreepress.com/story/money/2016/06/09/dairy-farm-production-increases-in-vermont/85597744/> (explaining this market dynamic).

102. John Dillon, *As Crisis Rocks Dairy Industry, Farmers Focus on How to Manage Milk Supply*, VPR (Aug. 9, 2018), <http://digital.vpr.net/post/crisis-rocks-dairy-industry-farmers-focus-how-manage-milk-supply#stream/0>.

103. *See generally* Heather Paxson, *Locating Value in Artisan Cheese: Reverse Engineering Terroir for New-World Landscapes*, 112 AM. ANTHROPOLOGIST 444 (2010) (explaining this phenomenon within the small-scale cheesemaking context). This activity also potentially spills over into the surrounding communities. *See also* Kathryn A. Olson, *The Town that Food Saved?: Investigating the Promise of a Local Food Economy in Vermont*, 24 LOC. ENV’T 18, 27–32 (2019) (describing the challenges and realities of the local food movement in and around Hardwick).

104. *See generally* Sharon Zukin, *Reconstructing the Authenticity of Place*, 40 THEORY & SOC’Y 161 (2011) (discussing how Vermont producers attempt to leverage the state’s authenticity

distinctively Vermont-products. This type of promotion dates “back to attempts to distinguish Vermont maple syrup and Ben and Jerry’s ice cream from their out-of-state competitors, [but] their efforts gained momentum in the early twenty-first century. This approach allowed Vermont producers to distinguish their products . . . based on positive and idealized perceptions of Vermont.”¹⁰⁵ In short, “[s]pecialty foods and livestock have been the means of survival for many Vermont farmers, especially those with fewer than 100 acres” and, in the view of many, this may be the solution for future growth and health of the rural countryside.¹⁰⁶

To summarize, Vermont farmers have historically been creative and successful in finding new ways to use their land base to keep their farms viable.¹⁰⁷ In recent years countless barns have been converted to wedding venues,¹⁰⁸ and a number of prominent farms now offer burger nights (allowing more urban residents the opportunity to spend an afternoon or evening on the farm enjoying local beef)¹⁰⁹ or have opened on-farm markets¹¹⁰—just to name a few examples of this

of place as a marketing tool); see also Jane Kolodinsky & Abby Smith, *Place-Based Marketing Opportunities for Vermont* 1 (2 OPPORTUNITIES FOR AGRIC. WORKING PAPER SERIES NO. 3, 2011), <https://scholarworks.uvm.edu/cgi/viewcontent.cgi?article=1004&context=fsagriculture> (discussing the price premium and reasons for Vermont’s ability to market based on place-based connections).

105. KLYZA & TROMBULAK, *supra* note 40, at 189.

106. See, e.g., Mamie Marcus, FED. RESERVE BANK OF BOSTON, *Made in Vermont: Protecting the Rural Working Landscape*, CMTYS. & BANKING, Spring 2015, at 10, 14 (“As global competition drives down prices for standard agricultural commodities, some believe specialty and gourmet farm products are the key to preserving Vermont’s farms.”). Vermont has created substantial infrastructure to support new and beginning farmers, including providing business advising services to evaluate cash flow and to navigate the regulatory process. See, e.g., Vermont New Farmer Project, UNIV. OF VT. EXTENSION, <http://www.uvm.edu/newfarmer/> (last visited Oct. 26, 2019) (providing resources and tools for those entering this sector).

107. See, e.g., Carley Stein, *Small Farm a Perfect Fit for Many Vermont Producers*, VT. NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/newsroom/stories/?cid=stelprdb1251436> (last visited Nov. 24, 2019); see also Olivia Saucier & Bob Parsons, *Refusing to “Push the Cows”: The Rise of Organic Dairying in the Northeast and Midwest in the 1970s and 1980s*, 88 AGRIC. HIST. 237 (2014) (charting the development of this market segment).

108. See, e.g., THE BARN AT BOYDEN FARM, <https://www.boydenbarn.com> (last visited Oct. 26, 2019).

109. *The Story of Burger Night*, BREAD & BUTTER FARM, <https://breadandbutterfarm.com/burger-night> (last visited Oct. 26, 2019) (explaining the development of this popular on-farm activity). Shelburne/South Burlington-based Bread and Farm’s operations continue to expand, and are also home to music classes, and now a popular PBS children’s show, amongst other community programming. See *Music for Sprouts*, BREAD & BUTTER FARM, <https://breadandbutterfarm.com/music-for-sprouts> (last visited Nov. 24, 2019).

110. See, e.g., PHILO RIDGE FARM, <http://www.philoridgefarm.com/market/> (last visited Nov. 24, 2019); Melissa Pasanen, *At Philo Ridge, A Couple Invests in Vermont’s Farming Future*, SEVEN DAYS (Sept. 5, 2018), <https://www.sevendaysvt.com/vermont/at-philo-ridge-a-couple-invests-in->

market trend.¹¹¹ Regardless of the mechanism selected, the primary motivation is to allow the farmer the opportunity to retain a greater share of the consumer dollars spent to purchase their product than they would receive by selling their products in the commodity market.¹¹² These types of uses are limited only by the market, the farmers' imaginations, and as discussed in the following section, potentially state and local land use laws.¹¹³ In the context of this dynamic of change, land use laws struggle to accommodate farms of all types and configurations and to provide flexible treatment that avoids creating regulatory (perceived or actual) barriers while still providing some degree of oversight, which will be explored in the following section.

III. LOCAL AND STATE LAND USE REGULATION OF VERMONT AGRICULTURE

Vermont's working landscape has long been an important part of the state's iconic brand.¹¹⁴ To protect this vital resource, Vermont has enacted legislation protecting its agricultural land base through Act 250, which pertains to state land use permitting, and authorizing municipal zoning of land uses.¹¹⁵ The state, however, has traditionally exempted agriculture from these regulatory constructs.¹¹⁶ The farming

vermonts-farming-future/Content?oid=20061282 (profiling Philo Ridge Farm's market and business model to experiment with new agri-environmental production and retail models).

111. Vermont farmers have also made substantial investments in their shift to organic production. See Patricia Robert, *The Aftermath of Irene: Organic Farming, Consumer Protection and Revising Federal Policies*, 14 VT. J. ENVTL. L. 303, 307 (2012) (noting that Vermont's organic sector now includes over 100,000 acres of certified organic cropland and the number of certified farmers has gone from seventy-eight in 1993 to nearly 600).

112. See, e.g., ALBERS, *supra* note 47, at 280–81.

113. This shift toward the "new" agriculture is potentially having an impact. See Rachel Carter, *State Leadership Reacts to Preliminary AG Census Data: New Numbers Paint Positive Picture of Vermont Agriculture*, VT. FARM TO PLATE (Feb. 25, 2014), <https://www.vtfarmtoplate.com/announcements/state-leadership-reacts-to-preliminary-ag-census-data-new-numbers-paint-positive-picture-of-vermont-agriculture#.XYgbAiV7nOQ> (indicating a rise in number of farmers and Vermont's agricultural land base as of the most recent agricultural census data from 2012).

114. David D. Dutcher & David J. Blythe, *Water Pollution in the Green Mountain State: A Case Study of Law, Science, and Culture in the Management of Public Water Resources*, 13 VT. J. ENVTL. L. 705, 706 (2012) (discussing Vermont's environmental identity); see SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY*, 1780–2004, at 174–76 (2005) (noting that land trusts have "long recognized that Americans have a deep cultural connection to farms and ranches, the Holstein in Vermont and the cowboy in Wyoming are effective symbols to deploy in promoting land conservation").

115. Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L. Q. 401, 433–38 (1987) (charting the motivations behind Vermont's adoption of state land use regulation).

116. For an overview of land use laws in Vermont impacting agriculture and the

exemptions are now coming under scrutiny for being, at times, both under and over inclusive—exempting large-scale operations with significant environmental impacts,¹¹⁷ while also raising definitional questions about the permissibility of on-farm retail and other non-traditional agriculture-related uses.¹¹⁸

As profiled, a continuing challenge to state and local zoning has been how to best accommodate farming activities that fall within new agricultural forms.¹¹⁹ This has been a particular issue in the face of the changing agricultural economy.¹²⁰ While thirty years ago, an on-farm market may have been ignored by land use regulation, given recent changes in size and scale, this is changing, and land use regulations nationally have struggled to adapt and adjust.¹²¹ In Vermont, there are a few ways that local zoning regulations could come into conflict with these new agricultural uses. This section explores: (1) Vermont's Right-to-Farm Law; (2) state enumerated agricultural practices; (3) Vermont's Act 143 (accessory on-farm business legislation); and (4) Act 250 and the various cases which have addressed the scope and breadth of the farming exemption to statewide zoning.

A. Vermont's Right-to-Farm Law and Nuisance Protection

Vermont, like most states, has enacted protective right-to-farm legislation¹²² with the idea of insulating farming operations from

corresponding exemptions, see *Vermont New Farmer Project, Land Access and Tenure Toolshed: Land Use Regulations*, UNIV. OF VT., http://www.uvm.edu/newfarmer/?Page=land/land_use_regs.html&SM=land/sub-menu.html (last visited Oct. 26, 2019); NOFA-VT, *supra* note 18.

117. Mike Polhamus, *Panel Questions Agriculture Act 250 Exemption*, VT DIGGER (Nov. 17, 2017), <https://vtdigger.org/2017/11/17/panel-questions-agriculture-act-250-exemption/> (describing concerns about the environmental impacts of this exemption). Outside of the land use regulation arena, Vermont does require that certain farming operations obtain permits and implement land management practices to prevent or limit discharge of phosphorus and nitrogen into waterways. These permits include a requirement to comply with the states required agricultural practices. See, e.g., *Regulations for Large Farm Operations (LFO's)*, VT. AGENCY OF AGRIC., FOOD & MKTS., <https://agriculture.vermont.gov/lfo> (last visited Oct. 26, 2019).

118. See VT. LAW SCH. LAND USE CLINIC, *supra* note 16, at 4–5 (exploring the pre-2018 state of regulation).

119. *2018 End of Legislative Session Recap*, RURAL VT. (May 24, 2018), <https://www.ruralvermont.org/news/2018-end-of-legislative-recap>.

120. Kellington, *supra* note 2, at 611–13 (summarizing recent agricultural land use decisions dealing with this divide). See generally Neil D. Hamilton, *Farms, Food, and the Future: Legal Issues and Fifteen Years of the New Agriculture*, 26 J. ENVTL. L. & LITIG. 1 (2011) (charting the growth and motivations shaping the “new” agriculture).

121. Elizabeth Dooley, *Watch Where You're Steppin' Out Here: Why States Should Adopt Legislation to Promote the Diversified Farming Practice of Agritourism*, 15 DRAKE J. AGRIC. L. 455, 455–57 (2010) (discussing these challenges in the agritourism context).

122. VT. STAT. ANN. tit. 12, §§ 5751–53 (2018); see also *Trickett v. Ochs*, 838 A.2d 66, 73 (Vt.

nuisance suits by neighbors who build or move close to a preexisting farming operation and challenge its use under traditional common law nuisance principles.¹²³ A farm seeking right-to-farm protection must “comply with the law, operate consistent with ‘good agricultural practices,’ be established prior to surrounding residences or other non-agricultural activities, and refrain from ‘significantly’ expanding or changing its operations after surrounding residences or other non-agricultural activities are established.”¹²⁴ Right-to-farm laws, however, often face challenges similar to those discussed above; there are still issues determining what constitutes farming and what activities are entitled to protection under these acts.¹²⁵ Right-to-Farm laws may also only provide protection to existing operations and expansion of even an existing operation may present issues.¹²⁶ Overall, right-to-farm laws in the state can provide some protection to farmers, but only if the statutory requirements are met, and these laws apply to both traditional farms as well as those engaged in new agriculture.¹²⁷

2003) (“There is little doubt as to the purpose behind Vermont’s right-to-farm law. Indeed, virtually all states have enacted right-to-farm laws to deal with the conflict that develops ‘[a]s the population of the nation grows and is dispersed into traditionally rural areas.’”). For information about right-to-farm laws generally, see JOHN J. DELANEY ET AL., *LAND USE LAW* § 16:1 (3d ed. 2018). See also Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WISC. L. REV. 95, 152 (1983) (providing overview of these legislative protections); Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 128 (2000) (describing various distinctions and types of state right-to-farm laws). But see Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Reduce Agricultural Nuisances May be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 103–06 (1998) (discussing the challenges these laws face in implementation on the ground).

123. Chrostek, *supra* note 29, at 245. State legislation preempting nuisance litigation differs from allowing agricultural use as of right under zoning, which many communities have implemented to further insulate farmers against legal challenges. For a discussion of the issues that have led to state right-to-farm laws, see JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE AND SUSTAINABLE DEVELOPMENT* 598 (8th ed. 2012) and Jonathan Morris, Note, “*One Ought Not Have So Delicate a Nose*”: *CAFOs, Agricultural Nuisance, and the Rise of the Right to Farm*, 47 ENVTL. L. 261, 276–80 (2016).

124. Chrostek, *supra* note 29, at 247.

125. See Ross H. Pifer, *Right-to-Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 712–20 (2013) (discussing the application of right-to-farm laws to agritourism operations and the challenges of this use form).

126. See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 102–11 (2006) (discussing the issues of expansion and adaptation of agricultural operations).

127. VT. STAT. ANN. tit. 12, § 5753(a)(1) (2018) (“Agricultural activities shall be entitled to a rebuttable presumption that the activity does not constitute a nuisance if the agricultural activity meets all of the following conditions: (A) it is conducted in conformity with federal, State, and local laws and regulation (including required agricultural practices); (B) it is consistent with good agricultural practices; (C) it is established prior to surrounding nonagricultural activities; and (D)

B. *The Required Agricultural Practices*

Under 24 V.S.A. § 4413, local governments are preempted from regulating “required agricultural practices” that might otherwise require municipal oversight, including the construction of farm structures, as promulgated by the Agency of Agriculture, Food & Markets (“AAFM”).¹²⁸ These defined agricultural practices have two areas of initial focus: (1) protection of water quality (by requiring certain practices to be implemented on the landscape);¹²⁹ and (2) insulation of farming activities from nuisance and state and local land use regulation.¹³⁰ The majority of the attention on state defined agricultural practices has centered on the water quality concerns.¹³¹ The legislature “charged the Agency of Agriculture, Food and Markets with creating a comprehensive Nonpoint Source Pollution Program and Best Management Practices.”¹³² In turn, AAFM promulgated “regulatory standards [that] required farmers to change how they farmed and, in many circumstances, to make substantial investments in order to comply, such as building manure storage pits and improving barnyard areas and silage storage systems.”¹³³ Although the land use aspects have been less explored, this issue is increasingly important given its relevance to the permitting of farm structures and the correlated impacts on on-farm businesses.

The state’s first defined agricultural practices were the accepted agricultural practices (“AAPs”), which go back nearly thirty years.¹³⁴

it is has not significantly changed since the commencement of the prior surrounding non-agricultural activity.”); see also Terence J. Centner, *Agricultural Nuisances: Qualifying Legislative ‘Right-to-Farm’ Protection through Qualifying Management Practices*, 19 LAND USE POL’Y 259, 264–65 (2002) (discussing the interplay between state established management practices and right-to-farm laws).

128. VT. STAT. ANN. tit. 24, § 4413 (2018).

129. VT. STAT. ANN. tit. 10, § 1259(i); VT. STAT. ANN. tit. 6, § 4810 (2018).

130. VT. STAT. ANN. tit. 24, § 4413 (2018).

131. See, e.g., Gail Osherenko, *Understanding the Failure to Reduce Phosphorus Loading in Lake Champlain: Lessons for Governance*, 15 VT. J. ENVTL. L. 323, 340 (2014) (discussing these issues); see also Laura Murphy, *Story of a De-Delegation Petition: Nuts, Bolts & Happy Endings in Vermont*, 15 VT. J. ENVTL. L. 565, 575–77 (2014) (critiquing issues with CAFO regulations in the state); Kari Dolan, *The Importance of Inter-Agency Collaboration in the Development of the Implementation Plan for the Nonpoint Source-Focused Vermont Lake Champlain Phosphorus TMDL*, 17 VT. J. ENVTL. L. 663, 682–83 (2016) (discussing the implementation plans proposed revisions to the RAPs to address practices).

132. Ross & Rupe, *supra* note 83, at 827.

133. *Id.* at 828.

134. See VT. AGENCY OF AGRIC., FOOD & MKTS., REQUIRED AGRICULTURAL PRACTICES RULE FOR THE AGRICULTURAL NONPOINT SOURCE POLLUTION CONTROL PROGRAM § 1.1 (2018) [hereinafter VT. RAPs], <https://agriculture.vermont.gov/sites/agriculture/files/>

As noted, Vermont bars communities from regulating [AAPs] which include “the on-site storage, preparation and sale of agricultural products principally produced on the farm.”¹³⁵ This definition “also includes activities related to the sale of farm products, such as selling from a farm stand, provided the products being sold were principally produced on the farm.”¹³⁶ The AAFM “takes the position that on-farm sales or on-farm processing and sale are within the zoning exemption if at least 51 percent of the agricultural products sold or used to make the product come from the farm.”¹³⁷

Recently, in 2016, the AAFM promulgated the Required Agricultural Practices (“RAPs”) rule, which replaced the AAPs.¹³⁸ The RAPs cover a wide range of farming practices, including confining, feeding, and fencing livestock; hauling and managing livestock waste; collecting and managing maple syrup; and preparing, tilling, fertilizing, planting, protecting, irrigating, and harvesting crops.¹³⁹ By current regulation, farm structures are defined to mean “a building, enclosure or fence for housing livestock, raising horticultural or agronomic plants, or carrying out other practices associated with accepted agricultural or farming practices, including a ‘silo,’ as farming is defined in 10 V.S.A. § 6001(22)”¹⁴⁰ Farming includes, “[t]he on-site storage, preparation and sale of agricultural products principally produced on the farm”¹⁴¹ and agricultural products are defined as, “any raw agricultural commodity, as defined in 6 V.S.A. § 21(6)¹⁴² that is principally produced on the farm and includes products prepared from the raw agricultural commodities principally produced on the farm.”¹⁴³ The definition of “principally produced” in turn, requires “that more

documents/RAPFINALRULE12-21-2018_WEB.pdf (providing overview of the AAPs history).

135. UNIV. OF VT. COOP. EXTENSION, A LEGAL GUIDE TO THE BUSINESS OF FARMING IN VERMONT 86–87 (2006).

136. *Id.* at 87.

137. *Id.*

138. *See generally* VT. RAPs, *supra* note 134. This rule change was almost entirely focused on water quality objectives.

139. *A Summary of the Required Agricultural Practices*, VT. AGENCY OF AGRIC., FOOD & MKTS. (Dec. 5, 2016), https://agriculture.vermont.gov/sites/agriculture/files/documents/Water_Quality/RAPsummaryPDF.pdf (providing summary of the various practices regulated by the state).

140. VT. RAPs, *supra* note 134, at § 2.15.

141. *Id.* at § 2.16.

142. 6 Vt. Stat. Ann. § 21(a)(6) defines raw agricultural commodity as “any food in its raw or natural state, including all fruits or vegetables that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.”

143. VT. RAPs, *supra* note 134, at § 2.02.

than 50% (either by weight or volume) of raw agricultural products that are stored, prepared, or sold at the farm are also grown or produced on the farm.”¹⁴⁴

Again, 24 V.S.A. § 4413 exempts farmers from local zoning for the construction and use of farm structures, if more than 50% of the materials (by either weight or volume) used in its agricultural products are raw agricultural products grown or produced on the farm.¹⁴⁵ For an apple pie, for example, if the flour and the apples (which, together, comprise more than 50% of the total ingredients) are grown on the farm, the pie would qualify as an agricultural product.¹⁴⁶ Obviously, the 50% threshold will vary by product and will require a close examination to see if the standard can be met, which may impose a substantial reporting burden on farmers.

If a building qualifies as a farm structure under 24 V.S.A. § 4413, it is exempt from local zoning regulations, but this is not the end of the process.¹⁴⁷ The farmer will need to notify the town of her or his intent to build the farm building and will have to abide by approved setbacks.¹⁴⁸ Depending on the location of the property in proximity to rivers or floodplains, the farmer may also need to obtain approval from the Secretary of Agriculture, Food and Markets in order to construct the farm structure, or else obtain a variance.¹⁴⁹ If the building does not qualify as a farm structure under 24 V.S.A. § 4413, however, the structure will be subject to generally applicable land uses laws as required by the municipality.¹⁵⁰

Given the potential tension between municipalities and farmers over the interpretation of the rules regarding initial jurisdiction, there has been surprisingly little litigation on this issue. The only published decision in this area is *In re Moore Accessory Structure Permit and Use*, in which the Vermont Supreme Court faced the issue of how to address

144. *Id.* at § 2.29.

145. VT. STAT. ANN. tit. 24, § 4413 (2018).

146. *Id.*

147. *See, e.g., In re The Intervale Ctr., Inc.*, No. 89-5-08, at 2–5 (Vt. Sup. Ct., Envtl. Div., 2009) (exploring the permitting history of a proposed hoophouse in Burlington’s Intervale and how the state/municipality addressed or examined this project).

148. VT. STAT. ANN. tit. 24, § 4413(3). This notification must include a sketch plan of the proposed structure, including setbacks from rights-of-ways, property lines, and surface waters. *Id.* If the farmer is not able to comply with the setback requirements imposed by the municipality, the farmer can go the Secretary of Agriculture, Food and Markets to request a waiver. *Id.*

149. *See* VT. RAPS, *supra* note 134, at § 9(b) (setting out setback requirements near wetlands and river corridors).

150. VT. STAT. ANN. tit. 24, § 4413.

the changing nature of agriculture under this exemption.¹⁵¹ In *Moore*, landowners in Pomfret built a sawmill for logging operations on the property and another building for drying cut lumber.¹⁵² The landowners subsequently applied for a zoning permit to construct a third building for planing the cut timber before preparing to market their wood products.¹⁵³ Pomfret's Zoning Board of Adjustment ("ZBA") granted a construction permit for the planing building, a decision which their neighbors appealed, along with the ZBA's decision to not pursue zoning violations against the landowner for the other two pre-existing structures.¹⁵⁴

The trial court (Superior Court, Environmental Division) determined that all of the buildings were farm structures as defined under 24 V.S.A. § 4413, a determination which the neighbors appealed.¹⁵⁵ On appeal, the Supreme Court reaffirmed the trial court's findings that the activities being conducted on the farm were, in fact, activities associated with farming.¹⁵⁶ The Court found the farmer's expert witnesses persuasive on this point—finding that "[t]he expert testimony adduced by appellees reflects in many ways a larger movement toward a more sustainable agricultural economy Vermont farms must enjoy the freedom to 'diversify' and engage in reasonable agriculture activities."¹⁵⁷ In rejecting the neighbor's appeal, the Court acknowledged the state's strong interest in expanding the definition of agriculture to accommodate new economic and business models, gave support to the farmers in their effort to diversify their operations into new areas, and rejected a more narrow interpretation of these activities.¹⁵⁸ In the face of a changing agriculture, compliance with the RAPs provides a possible path for farmers looking to diversify their operations, and these efforts will be exempt from local zoning provided the applicable standards can be met.

C. Accessory On-Farm Businesses (Act 143)

Beyond the statewide exemptions for regulated practices, farming structures have substantial interplay with local zoning. Current

151. *In re Moore Accessory Structure Permit and Use*, 75 A.3d 625 (Vt. 2013).

152. *Id.* at 626.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 627.

157. *Id.*

158. *Id.* at 628.

Vermont law allows for regional plans and local zoning bylaws to determine where development can occur. Municipalities are given the authority and freedom to implement these plans via their own zoning bylaws. As such, municipalities “can create . . . development.”¹⁵⁹ “Landowners are prohibited from developing their land without complying with these municipal zoning laws; therefore, these ag zones serve as . . . example[s] of Vermont legislation easing farmers’ ability to build or expand farming infrastructure on their land.”¹⁶⁰ At the state level, however, the legislature has tried to make the treatment of this land use form more uniform statewide through Act 143, or the accessory on-farm legislation.

1. Threshold Definitions and Legislative Intent

In this vein, Vermont passed legislation in 2018 to expressly address the interaction between on-farm accessory businesses and municipal zoning, which is commonly known as Act 143 (“the Act”).¹⁶¹ Act 143 prevents localities from enacting zoning bylaws that prohibit accessory on-farm businesses which are defined to include:

the storage, preparation, processing, and sale of qualifying products, provided that more than 50% of the total annual sales are from qualifying products that are principally produced on the farm at which the business is located; and (2) educational, recreational, or social events that feature agricultural practices that feature agricultural practices or qualifying products, or both.¹⁶²

Qualifying products are, in turn, defined as:

Product[s] that [are] wholly: (I) an agricultural, horticultural, viticultural, or dairy commodity or maple syrup; (II) livestock or cultured fish or a product thereof; (III) a product of poultry, bees, and orchard, or fiber crops; (IV) a commodity otherwise grown or raised on a farm; or (V) a product manufactured on one or more farms from commodities wholly grown or raised on one or more

159. Peters, *supra* note 86, at 494 (explaining legislative efforts to remove potential barriers to farming in the Act 250 and local zoning contexts).

160. *Id.*

161. The stated goals of the legislation were to: “(1) promote and facilitate the economic viability of Vermont’s farms; and (2) increase the consistency across the State of municipal regulation and permitting of accessory activity that supports those farms.” H. 663, 2018 Leg. (Vt. 2018). Beyond addressing this type of use, Act 143 also addressed the regulation of industrial hemp in the state. *See, e.g.*, VT. AGENCY OF AGRIC. FOOD & MKTS., HEMP PROGRAM REGISTRATION, <https://agriculture.vermont.gov/public-health-agricultural-resource-management-division/hemp-program/hemp-program-registration> (last visited Nov. 24, 2019) (requiring registration for hemp growing in the state).

162. VT. STAT. ANN. tit. 24, § 4412(11)(A)(i)(I) (2018).

farms.¹⁶³

Farms are defined to include parcels owned, leased or managed by a farmer that are devoted primarily to farming, and are subject to the state's RAPs.¹⁶⁴ This matters as it ties into the qualifying products definition so that only Vermont farms are eligible for the exemption (as only Vermont farms are subject to the state's RAPs), which limits the types of "manufactured" products that can be sold on the farm.¹⁶⁵ This also factors into the overall product mix that a farm will be able to offer to meet the requirement of 50% or more of annual sales from qualifying products in order to successfully operate under this exemption.¹⁶⁶

What Act 143 provides is an expanded preemption against local zoning for on-farm businesses engaged in commercial activity—whether through direct on-farm marketing or by offering on-farm events.

2. Direct Farm Marketing/Sales

For the direct marketing or on-farm sale of manufactured products, there are some interpretational challenges. First, a farm can only sell qualifying products. This allowance is broad for agricultural commodities (which are not limited to those grown on Vermont farms), but is more restricted for value-added products, which are limited to only those products manufactured from commodities wholly raised or grown on Vermont farms, provided that more than 50% of the total value of the qualifying products being sold is principally produced on the farm itself.¹⁶⁷ This potentially allows for expanded marketing of on-farm manufactured products within farm markets with substantial limitations, however, on what can be sold as qualifying products. Specifically, Act 143 is limiting because it does not expressly allow for the sale of related off-farm products which might supplement the farm's sales, such as cookbooks, or other agricultural-related items. This may prove burdensome to operations trying to maximize revenue from these ancillary businesses.

163. *Id.* § 4412(11)(A)(iv).

164. *Id.* § 4412(11)(A)(ii).

165. *Id.* § 4412(11)(A)(iv)(V).

166. *Id.*

167. The term "principally produced" is not defined in Act 143. The RAPs define this term to mean "more than 50% (either by weight or volume) of raw agricultural products that are stored, prepared, or sold at the farm are also grown or produced on the farm." VT. RAPs, *supra* note 134, at § 2.29.

3. On-Farm Events

Under Act 143, in addition to the storage, preparation, processing, and packaging of qualifying products, “educational, recreational, or social events that feature agricultural practices or qualifying products” are also exempt.¹⁶⁸ The statute defines these to include “tours of the farm, farm stays, tastings and meals featuring qualifying products, and classes or exhibits in the preparation, processing, or harvesting of qualifying products.”¹⁶⁹ The most common and often contentious on-farm event involves on-farm weddings, the use of which have become increasingly popular throughout Vermont.¹⁷⁰ For on-farm events, this definition is relatively clear and sweeping; on-farm events (including farm stays) are generally authorized. Interpreting and applying this standard, including determining how extensively agricultural products have to be featured, may be substantially more difficult.¹⁷¹

4. The Municipal Approval Process

To date, there is ongoing discussion regarding how the Act will apply, how the responsibility will be allocated between the state and the municipalities, how the Act impacts existing zoning regulations, and how to work with farmers who are grandfathered in (or have had an accessory on-farm business in operation for a substantial period of time). The AAFM has issued guidance on the process for relying on Act 143’s preemption, which still gives local communities substantial discretion in determining whether the exemption applies and whether to impose site plan review upon the proposed accessory on-farm business.¹⁷²

168. VT. STAT. ANN. tit. 24, § 4412 (2018).

169. *Id.*

170. Wedding venues have been a particularly controversial land use. In Vermont, although not an agricultural exemption case, there was extensive litigation over the appropriateness of Shelburne’s Old Lantern, a long-standing wedding venue, in the face of neighbor opposition. *See In re Old Lantern Non-Conforming Use*, No. 154-12-15 (Vt. Super Ct. Apr. 2, 2018) (order on pre-trial motions) (rejecting neighbor challenge to preexisting non-conforming use of adjacent wedding venue). There have also been a number of cases nationally that discuss whether a wedding venue qualifies as agriculture under a state’s right-to-farm law, with courts generally concluding that this is not an agriculture use. *See Gerald P. Zarella Trust v. Town of Exeter*, 176 A.3d 467, 471 (R.I. 2018) (rejecting the farm’s argument).

171. *See* Alex Weinhagen, Town of Hinesburg, Act 143 – Accessory On-Farm Businesses: The Municipal Perspective (Oct. 17, 2018) (unpublished comments) (on file with author) (discussing the complexities presented by the events prong of Act 143).

172. *See* VT. AGENCY OF AGRIC. FOOD & MKTS., Q & A, ACT 143, ACCESSORY ON-FARM BUSINESSES, 1–2 (2018) [hereinafter Vt. AAFM, *Q&A*], https://agriculture.vermont.gov/sites/agriculture/files/documents/land_use/FAQ%20Act%20143_20181003.pdf (answering questions about which entity makes certain decisions under Act 143).

First, the state will determine whether the farm and farm business meet the statutory definition of farm under the state's RAPs.¹⁷³ As noted above, this requires that the farms where products are produced be either owned, leased, or operated by a farmer, be primarily devoted to farming, and that the farmer have a gross income from farming in excess of \$2,000 annually.¹⁷⁴ These factors may not be difficult to meet, although AAFM, in some instances, may be asked to clarify whether the farm, in fact, qualifies as a farm under the RAPs.¹⁷⁵

Second, the local community will determine whether the farm-based business qualifies as accessory to the agricultural business—this dictates whether the municipality regulates it under its normal zoning processes or under the more limited site plan review provided for under Act 143.¹⁷⁶ This will require examination of a few factors, but one of the more difficult interpretive questions will be determining whether the business is accessory to the farming operation or whether it is the primary business engine of the operation.¹⁷⁷ This determination will get most complex in the farm stand context, where the farm is actually selling its own products, as the primary and accessory operative aspects of the business will necessarily be intertwined. At some point, however, it will be clear that the business, despite potentially meeting the Act 143 thresholds, is no longer secondary in aspect, and this regulation may not protect that use from conditional use review by the municipality.

Third, the local community will also be tasked with determining whether or not the sales of the accessory on-farm business meet the definition of qualifying product by statute.¹⁷⁸ This will require the town to examine whether the product mix meets the 50% threshold, and whether “educational, recreational, or social events . . . feature agricultural practices or qualifying products,” or both.¹⁷⁹ The requirement under Act 143 is that the sales of qualifying products

173. *Id.* at 1.

174. *Id.*

175. *Id.* at 2.

176. VT. STAT. ANN. tit. 24, § 4412(11).

177. Weinhagen, *supra* note 171 (explaining that “[a]n accessory on-farm business must be accessory to the farm operation. Act 143 didn’t define ‘accessory,’ but the concept of principal uses and accessory uses should be familiar to most [Zoning Administrators] Act 143 didn’t include a specific test (e.g. income, acreage use, building use, etc.) so applying a ‘straight-face’ test is advisable to ensure the tail (accessory on-farm business) is not wagging the dog (farm).”).

178. Vt. AAFM, *Q&A*, *supra* note 172, at 1.

179. VT. STAT. ANN. tit. 24, § 4412(11)(A)(i)(II).

exceed this lower bound on an annual basis.¹⁸⁰ A community's expectations for validating and auditing compliance may, however, vary, and consideration should be given to minimize the regulatory burden of this requirement on farmers to avoid unnecessary reporting requirements. Additionally, farming, by its very nature, is often seasonal, and examining the sales data in a limited sense without consideration of the farming cycles may produce skewed or otherwise incomplete data. In determining how to request this information, considering an annual report, in March or April after the calendar year, may make sense to ensure that the community is getting an accurate sense of the farm's economic activity and that it is treating the farm business fairly.

5. The Impact of Act 143

In applying Act 143, the state and local communities have shared responsibilities that will likely result in some growing pains to learn how to apply this exemption. The biggest benefit of Act 143 to farmers is that a local community is preempted from rejecting the accessory on-farm business as an approved use, but the community will still potentially have several avenues to make sure that the proposed business meets the community's expectations and fits within its planning goals and objectives, potentially including site plan review.¹⁸¹

Additionally, it is important to remember that Act 143 only sets a limit on a community's authority to regulate accessory on-farm businesses. Some communities may elect to be even more permissive for these businesses depending on the size, scale, duration, or intensity of the business,¹⁸² recognizing that even site plan review with its associated costs (engineering and potentially legal) can be a financial burden to some smaller operations.

Lastly, it is also important to note that compliance with Act 143 alone does not ensure that an accessory on-farm business can operate in the manner intended by the farmer or farm business. A variety of other state regulations and statutes may serve as a practical bar or barrier to expanded commercial activity on the farm—at least without additional permitting work.¹⁸³ These regulatory thresholds include

180. *Id.* § 4412(11)(A)(i)(I).

181. See Vt. AAFM, *Q&A*, *supra* note 172, at 1 (“A municipality may review the accessory business under site plan review and adopted performance standards; however, a municipality cannot prohibit an accessory on-farm businesses in the same location as a farm.”).

182. Weinhagen, *supra* note 171.

183. See *Permit Handbook*, VT. DEP'T OF ENVTL. CONSERVATION,

state wastewater and potable water permits governing septic systems, (which will be an issue with weddings in particular), fire safety inspections for buildings open to the public, health department permitting for food service, and Act 250, which will be explored in more detail in the following section.

To quickly recap, if a farmer's use of farm buildings can qualify under the farm structure exemption under 24 V.S.A. § 4413, it is exempt from local zoning review.¹⁸⁴ If the operation does not qualify under the RAPs as an exempt farming practice, the accessory on-farm business rules under Act 143 potentially may apply, which gives a municipality the opportunity to approve the site plan for the property, but prohibits rejecting the business as approved land use.¹⁸⁵ If, however, the farmer's business does not qualify under the RAPs or Act 143, the municipality's generally applicable zoning bylaws will apply.

D. Act 250

In addition to local zoning, Vermont has a state land use regulation, commonly known as Act 250.¹⁸⁶ Enacted in 1970, Act 250 was “designed to achieve a balance between economic development and the legitimate interests of citizens, municipalities, and state agencies in protecting the environment.”¹⁸⁷ The motivation behind this

<https://dec.vermont.gov/environmental-assistance/permits/handbook> (last visited Nov. 21, 2019) (providing list of permit information and regulatory programs that may be required for certain activities and businesses).

184. VT. STAT. ANN. tit. 24, § 4412(11) (2018).

185. *Id.*

186. VT. STAT. ANN. tit. 10, §§ 6001–6111 (2018); *see also* FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 54–56 (1971) (discussing the origins of Act 250); THOMAS R. MELLONI & ROBERT I. GOETZ, *STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS GROWTH MANAGEMENT* 159–60 (Peter A. Buchsbaum & Larry J. Smith eds., 1993) (discussing the advent of Act 250 in Vermont); John S. Banta, *The Adirondack Park Land Use and Development Plan and Vermont's Act 250 After Forty Years*, 45 J. MARSHALL L. REV. 417, 418–21 (2012) (providing an overview of Act 250).

187. HISTORY OF ACT 250, <https://nrb.vermont.gov/act250-program/history> (last visited Nov. 24, 2019); *see also* VT. NAT. RES. BD., *ACT 250: A GUIDE TO VERMONT'S LAND USE LAW* (2006) (providing overview of the function of Act 250 and the motivations behind its passage); Richard O'Brooks, *Legal Realism, Norman Williams, and Vermont's Act 250*, 20 VT. L. REV. 699, 708 (1996) (“The view of Vermont underlying Act 250 was that of a state possessing an unprotected nature, assaulted by major outside development, resulting in a variety of environmental and social abuses. Such a crude realism failed to recognize the extent to which Vermont's ‘nature’ was a landscape shaped by a declining natural resource and farming economy . . .”). The effectiveness of this Act in protecting farmland has long been questioned. *See* Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Planning Programs for the Preservation of Farmland*, 14 *ECOLOGY L. Q.* 401, 436–46 (1987) (evaluating the Act from a farmland preservation perspective).

regulation was that, during this period, “[w]hen interstate highways 89 and 91 effectively linked Vermont to Boston and New York City in the 1960s, Vermont’s natural scenic beauty became a major attraction for tourists and a prime source of real estate for nearby metropolitan residents and second home buyers.”¹⁸⁸ To accomplish these land use planning goals, “Act 250’s land use plan was to emerge in three stages: first, the creation of a temporary plan to guide early regulatory activity; second, a land development and capacity plan; and third, a statewide land use planning law.”¹⁸⁹ The first and second phases proceeded, but the third (the statewide land use planning law) still has not been adopted.¹⁹⁰ The second phase of the Act, however, created the Act 250 criteria that continue to guide development in the state and the authority of the district commissions to review projects under the Act.¹⁹¹ In the view of many, Act 250 has been a successful deterrent against insensitive development and has helped preserve the state’s rural character and landscape.¹⁹²

188. Jessica E. Jay, Note, *The “Malling of Vermont”: Can the “Growth Center” Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929, 931 (1997); see also VT. NAT. RES. COUNCIL, Interview, *The Origins of Act 250: A Talk with Former Governor Deane C. Davis*, VT. ENVTL. REP. 17 (1989) (exploring the politics behind this legislative action).

189. Jay, *supra* note 188, at 948; see James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 489 (1994) (analyzing Vermont’s statute seeking to govern local land use regulation at the state level).

190. JOHN M. DEGROVE, *THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES* 68 (1992); see also Robert Sanford & Hurbert B. Stround, *Vermont’s Act 250 Legislation: A Citizen-Based Response to Rapid Growth and Development*, 14 LAND USE POL’Y 239, 239–56 (1997) (charting the legislative history of this land use regulation); Interview, *Beyond the Gibb Commission: An Interview with Arthur Gibb*, VT. ENVTL. REP. 20 (1989) (quoting Arthur Gibb, one of the forces behind Vermont’s state land use law, “I never could see any reason why people had to be so concerned about a land use plan, because all it needs to be is a general framework. For instance, if you say the Champlain Valley sections of Addison and Franklin County are primarily suitable for agricultural use, that’s there and there’s no argument about it. So you don’t put a steel mill in the middle of it, and I don’t see what’s so complicated about that”).

191. DEGROVE, *supra* note 190, at 68.

192. See generally Paul S. Gilles, *The Evolution of Act 250: From Birth to Middle Age*, 35 VT. B. J. 12 (2009) (exploring the evolution and impact of Act 250 over the course of its development); William E. Roper & Elizabeth Humstone, *Walmart in Vermont: The Case Against Sprawl*, 22 VT. L. REV. 755 (1998) (same). But see Thomas L. Daniels & Mark B. Lapping, *Has Vermont’s Land Use Control Program Failed? Evaluating Act 250*, 50 APA J. AM. PLAN. ASS’N 502, 502–08 (2004) (noting the challenges and limitations of the Act); Robert L. McCullough, *Historic Preservation and Land Use Control at the State Level – Vermont’s Act 250*, 14 B.C. ENVTL. AFF. L. REV. 1, 28 (1986) (exploring the limitations to the Act for protecting historic resources). As of the fall/winter of 2018, the state has tasked a commission with work to modernize the Act as it nears its fiftieth anniversary. *Commission on Act 250 Begins Public Forums Across Vermont*, VT. NAT. RES. COUNCIL (June 21, 2018), http://vnrc.org/our_featured_work/commission-on-act-250-begins-

Under Act 250, before commencing “development,” a landowner has to obtain a state land use permit.¹⁹³ Development is defined under Act 250 as “[t]he construction of improvements . . . involving more than 10 acres of land . . . for commercial or industrial purposes”¹⁹⁴ A landowner can first request a jurisdictional opinion to determine whether the project is covered under Act 250 and whether a permit is required.¹⁹⁵ A jurisdictional opinion can be appealed to the Superior Court, Environmental Division, if the landowner disagrees with the district commission’s determination.¹⁹⁶ The state’s Agency of Natural Resources will issue a Project Review Sheet (including the district commission’s jurisdiction opinion) and will provide a summary of the applicability or non-applicability of other state permits to a proposed project, which gives a farmer an overall roadmap of the regulatory process.¹⁹⁷

If a state land use permit is required, the proposed land use will be evaluated by a district commission under ten statutory criteria, which include a consideration of whether the project will have impacts on air or water quality, cause traffic congestion, burden a community’s educational resources, and have aesthetic impacts.¹⁹⁸ Applicants are required to submit an application to one of the nine district commissions for review, and “[b]efore granting a permit, the district commissioner must determine that the finding will comply with these

public-forums-across-vermont). See generally Janet E. Milne, *Symposium 2005 Foreword: The Big Box Challenge*, 6 VT. J. ENVTL. L. 6 (2005) (exploring the tensions over how to regulate large-scale development in the state).

193. Daloz, *supra* note 73, at 444.

194. VT. STAT. ANN. tit. 10, § 6001(3)(A)(i) (2018).

195. *Id.* § 6007(c). A farmer could also request a project review sheet from the district environmental commission, which will include whether the project is subject to other state permitting regimes. See generally *Jurisdictional Opinions & Project Review Sheets*, NAT. RES. BD. https://nrb.vermont.gov/decisions/JOs_and_PRSs (last visited Nov. 24, 2019) (laying out Jurisdictional Opinions and Project Review Sheets by which a development is subject to Act 250 or not).

196. VT. STAT. ANN. tit. 10, § 6007(c) (2018); STATE OF VT. NAT. RES. BD., ACT 250 RULES, Rule 3 (2015), <https://nrb.vermont.gov/sites/nrb/files/documents/2015%20Adopted%20Rules.pdf>.

197. See JURISDICTIONAL OPINIONS, *supra* note 195 (“A Jurisdictional Opinion (JO) is a ruling that determines whether a proposed development or subdivision is subject to Act 250 and whether an Act 250 permit is required A Project Review Sheet (PRS) is issued by the Agency of Natural Resources Permit Specialist and includes the Act 250 JO issued by the District Coordinator.”).

198. VT. STAT. ANN. tit. 10, § 6086 (2018); see also WHAT ARE THE 10 CRITERIA?, <http://nrb.vermont.gov/act250-permit/criteria> (last visited Nov. 24, 2019) (summarizing the criteria for Act 250 development and subdivision applications).

criteria.”¹⁹⁹ One criterion, 9(B), under the Act, specifically relates to the protection of primary agricultural soils.²⁰⁰ A permit will only be granted under this criterion where the development will not result in any reduction in the agricultural potential of the primary agricultural soils, or if the project meets sub-criteria, including mitigation of the impacts (which is defined statutorily to require on-site mitigation or at least a 1:2 offset ratio).²⁰¹

Importantly for farmers, Act 250 contains an express agricultural exemption.²⁰² Specifically, Act 250 excludes the “construction of improvements for farming” from the definition of development.²⁰³ The definition of farming, like the RAP exemption and Act 143 definitions, includes “the on-site storage, preparation, and sale of agricultural products principally produced on the farm”²⁰⁴

The Environmental Board, and its successor, the Superior Court, Environmental Division, have addressed the farming exemption in several rulings and jurisdictional orders, which are worth reviewing to get a sense of the ways that state land use regulations are triggered (or not) in this context. The following sections explore the principal declaratory rulings or court decisions that have helped to clarify the scope of the state’s farming exemption, in chronological order.²⁰⁵

199. NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, 7 AM. LAND PLANNING LAW § 171.30, THE VERMONT LAW (2019) (arguing that “the statutory criteria established in the Vermont environmental law are so vague as to practically provide no serious guidance for an administrative agency making decisions thereunder; but the required findings do give some notion of the concerns which prompted the law”).

200. VT. STAT. ANN. tit. 10, § 6086(a)(9)(B) (2018). Primary agricultural soils are defined or tiered to the Natural Resources Conservation Service’s Farmland Classification Systems for Vermont. *Id.* at § 6001(15)(A) (2018); *see also* ARGENTINE, *supra* note 26, at 168–76 (providing overview of this criterion, agricultural soils “make up the backbone of Vermont’s agricultural economy”).

201. VT. STAT. ANN. tit. 10, § 6001(15). *See generally* Stephanie J. Kaplan, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467 (1981) (discussing this goal); Joshua Safran, *Zero Sum Game: The Debate Over Off-Site Agricultural Mitigation Measures*, 6 VT. J. ENVTL. L. 15 (2004) (discussing effective mitigation of the loss of prime agricultural soils under Act 250).

202. *See* VT. STAT. ANN. tit. 10, § 6001(3) (listing what does and does not qualify as “development”); *id.* § 6081 (2018); *see also* ARGENTINE, *supra* note 26, at 168–76 (citing this exemption for forestry, logging, and farming).

203. VT. STAT. ANN. tit. 10, § 6001(3)(D)(i) (2018).

204. *Id.* at § 6001(22)(E). Under the Act 250 rules, “principally produced” is defined as “that more than 50% (either by volume or weight) of the ingredients or materials contributing to a final agricultural product which results from the activities stated in 10 V.S.A. § 6001(22)(A)–(D), and which is stored, prepared or sold at the farm, is grown or produced on the farm.” ACT 250 RULES, *supra* note 196 at Rule 2.2(c)(19).

205. There are also a number of cases decided before the 1985 adoption of the definition for “Farming” provided in 10 VT. STAT. ANN. § 6001(22), which this section does not address or examine. *See* VT. NAT. RES. BD., ANNOTATIONS OF VERMONT SUPREME COURT,

1. *In re Vermont Egg Farms, Inc.*²⁰⁶

In *Vermont Egg Farms, Inc.*, the Environmental Board concluded that Vermont Egg Farm, Inc.'s proposed egg producing facility, located in Highgate, was exempt from Act 250 under the farming exemption.²⁰⁷ This proposed facility included “five laying barns, two pullet barns, an egg washing and grading station, a feed mill, a manager’s residence, and two wastewater disposal systems.”²⁰⁸ This facility was intended to keep a total of 700,000 chickens on site.²⁰⁹ In concluding that this project was exempt, “the Board conclude[d] that Act 250’s definition of ‘farming’ is plain on its face” and that this activity, despite its intensity of use, qualifies as farming.²¹⁰ The Board, in concluding this project is exempt, noted that:

[e]ven though this project does not require an Act 250 permit, its size and scope are such that it will cause numerous environmental impacts. Because the trend in agriculture is toward larger and more concentrated farms, the Board believes that the impacts of such farms should be subject to regulatory review.²¹¹

Vermont Egg demonstrates that the size of an agricultural operation and its appearance, do not matter for purposes of the exemption, as long as the farming definition can be met.²¹²

2. *In re Richard and Marion Josselyn*²¹³

In *Josselyn*, Richard and Marion Josselyn sought a jurisdictional order from the District #2 Commissioner before converting a residential garage on their twenty-six acres in Ludlow into a retail flower shop.²¹⁴ The district coordinator determined that the project qualified as development—requiring a state land use permit—and the

ENVIRONMENTAL BOARD, ENVIRONMENTAL COURT, AND ENVIRONMENTAL DIVISION ACT 250 DECISIONS 138–141 (2019) (providing summaries of these decisions).

206. *In re* Vt. Egg Farms, Inc., Declaratory Ruling #317 (findings of fact and conclusions of law and order) (Vt. Env'tl. Bd. June 14, 1996).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* Rural Vermont and a number of private individuals filed a motion to alter the declaratory ruling made by the Environmental Board on behalf of Vermont Egg, which was denied on the same grounds expressed in the opinion (that the exemption’s meaning was clear from the plain language of the statute). *Id.*

212. This was not the end of regulatory issues faced by Vermont Egg as the facility subsequently needed to obtain LFO permits from the state. *See In re* Vt. Egg Farms, Inc., No. 155-8-90 (decision and order on pending motions) (Vt. Env'tl. Ct. Oct. 25, 2000).

213. *In re* Josselyn, Declaratory Ruling #332 (Vt. Env'tl. Bd. Feb. 28, 1997).

214. *Id.* at 1.

Josselyns appealed.²¹⁵ On appeal, the Environmental Board made several important factual findings. First, “[m]ost of the items for sale in the Josselyn’s proposed shop will be plants and plant products produced . . . at their Ludlow premises.”²¹⁶ Second, the Environmental Board noted that “[a]ncillary to the sale of items produced on the premises, the Josselyns plan to sell some books, cards, and other horticulturally-related gift items.”²¹⁷

In the Environmental Board’s view, this limited additional activity was not sufficient to invalidate the exemption—concluding that:

[a]lthough they intended to sell some books, cut flowers, and gift items not produced on premises, most of the items for sale – potted flowering plants, herbs, house plants, Christmas trees, wreaths and flower arrangements – will be grown from seed or otherwise propagated and prepared on-site for retail sale. Because the renovation and conversion of the garage by the [Josselyns] is intended to facilitate the retail sale of horticultural products, and these horticultural products will be primarily produced on the Josselyn premises, this Project constitutes ‘construction for farming’ Therefore, the Project does not require an Act 250 permit.²¹⁸

This decision constitutes an attempt to balance the expansion of agricultural activities to accommodate retail use and, perhaps, recognizes that not all the products sold by a retail facility may be prepared on site. In the Environmental Board’s view, in the specific facts presented by *Josselyn*, as long as the sale of related products is designed to facilitate the overall operation, and the sale of the farm products being sold from the facility are principally produced from the farm, this use remains exempt under the farming exemption.²¹⁹

3. *In re Commercial Airfield*²²⁰

In *Commercial Airfield*, a Cornwall landowner appealed from a jurisdictional order that determined that the construction of improvements for an airfield were not exempt under the farming

215. *Id.*

216. *Id.* at 3.

217. *Id.* at 4.

218. *Id.* at 6.

219. *See id.* (“Because the [activities are] intended to facilitate the retail sale of horticultural products, and these horticultural products will be primarily produced on the Josselyn premises, this Project constitutes [a] ‘construction for farming’ exemption). The board, however, “cautions . . . that an Act 250 permit will be required if the facts should change in the future such that the retail items for sale in their shop [the horticultural products] are not principally agricultural products produced on premises.” *Id.*

220. *In re Commercial Airfield*, Declaratory Ruling #368 (Vt. Env’tl. Bd. Jan. 28, 1999).

exemption.²²¹ The airfield was located on the landowner's farm and was used for crop-dusting his crops as well as for some commercial flights servicing neighboring farms.²²² The Environmental Board determined that these commercial activities did not qualify under the farming exemption, as the airfield's function was not limited to the landowner's farm in scope.²²³ This decision conforms with later decisions, particularly *In re Ochs*, that limit the scope of the farming exemption to a specific farm's operational needs, rather than commercial processing/functions for other farms.

4. *In re Scott Farm, Inc.*²²⁴

In *Scott Farm*, Scott Farm, Inc. filed a petition for a declaratory ruling with the Environmental Board regarding a jurisdictional opinion asserting that Act 250 jurisdiction attached to its proposal to operate a culinary school on its working farm.²²⁵ Scott Farm, owned and operated by the non-profit Landmark Trust USA, operates a number of working farms and holiday rentals, such as Rudyard Kipling's Naulakha, in Dummerston, Vermont.²²⁶ The Scott Farm, consists of 571 acres of farmland, and focuses on the production of heirloom apples.²²⁷ In 2002, the Landmark Trust sought to expand its operations on the Scott Farm to include a culinary school and applied for a jurisdictional opinion to see if Act 250 review would be required.²²⁸ The District 2 Environmental Commission determined that the culinary school did not qualify as farming under Act 250, a determination which the Landmark Trust appealed.²²⁹

The appeal hinged upon the definition of farming and whether the culinary school should be considered farming.²³⁰ The AAFM submitted a letter to Scott Farm concluding that:

It is the Department's position that your proposal constitutes 'farming' as defined in Act 250 at 10 V.S.A. § 6001(22) and therefore is not 'development' and is exempt from Act 250 jurisdiction.

221. *Id.* at 1.

222. *Id.* at 4-5.

223. *Id.* at 15.

224. *In re Scott Farm, Inc.*, Declaratory Ruling #413 (Vt. Env'tl. Bd. Jan. 16, 2003).

225. *Id.*

226. ABOUT US: OVERVIEW, <https://landmarktrustusa.org/about-us/overview> (last visited Nov. 24, 2019).

227. *Id.*

228. *In re Scott Farm, Inc.*, Declaratory Ruling #413, at 1-2.

229. *Id.* at 1.

230. *Id.* at 2.

Farming under Act 250 is defined to include, among other things, ‘(E) the on-site storage, preparation, and sale of agricultural products principally produced on the farm,’ . . . The fundamental activities of Scott Farm are clearly ‘farming’ in that those activities essentially involve the cultivation of land for growing orchard crops along with the on-site storage and sale of those crops. If you are proposing to conduct a culinary school inside the confines of your existing farm barn, and if, as you represent, that [sic] at least 51% of the agricultural products used by the school to be made into value-added food products will come directly from your farm the Department takes the position that the operation of such a culinary school constitutes ‘the preparation and sale of agricultural products principally produced on the farm,’ and is thus ‘farming’ as set forth above.²³¹

The Environmental Board examined the meaning of “principally produced” in more depth and determined “*if the majority of the weight or volume of the ingredients in the finished product*” comes from the farm, it can meet this standard.²³² In the Board’s view,

[h]ere, Scott Farm has devised a very creative way to bring its produce to market. Rather than hire farmhands and other workers to cultivate its product and turn such produce into a finished product, Scott Farm will use students from the culinary school for these endeavors. It does not matter that a *school* is the means by which the exempt activities are accomplished; we choose to look beyond the process to the end result: that the students will cultivate horticultural and orchard crops, and ‘agricultural products principally produced’ on Scott Farm will be cultivated, stored, prepared and sold.²³³

Overall, the Environmental Board’s decision in *Scott Farm* supports an expansive view of farming and the types of farming operations that can qualify under Act 250’s farming exemption, provided that the principally produced standard can also be met.

231. *Id.* at 5.

232. *Id.* at 8. The Environmental Board found that “even if the *primary* ingredient in the finished product does not come from the Scott Farm, as long as most of the ingredients do, the product, and more importantly for the purposes of this case, *the process by which it is made*, fits the ‘farming’ exemption of the statute.” *Id.* at 8–9.

233. *Id.* at 10. The Environmental Board, however, provided this cautionary note:

We believe that our decision to find Scott Farm’s proposed project exempt from Act 250 is correct, given the small scale of the operation, the fact that the construction will be confined to the apple packing barn, and the nature of the activity that students will be engaged in. We also foresee that there will be further efforts by agricultural operations to increase their revenues. Such other proposals may include more amenities than those proposed in the instant case and thus may well cross the line that triggers jurisdiction.

Id. at 11.

5. *In re Sterling College*²³⁴

In *Sterling College*, Sterling College sought a jurisdictional order stating that its proposal to construct a new shed for storing its farming equipment on its Craftsbury Commons campus was exempt from Act 250.²³⁵ The district coordinator issued a project review sheet concluding that the structure was exempt under the farming exemption, but a neighbor, an interested party, filed a petition with the Environmental Board challenging this conclusion.²³⁶

On appeal, the only issue was whether Sterling's activities actually qualified as farming.²³⁷ The petitioner argued against the exemption, noting that Sterling is a college "with almost all of its land holdings and structures devoted to the housing and teaching of students, and the principal purpose of the College is to receive tuition payments and not to cultivate the land to produce food or forage crops."²³⁸ The petitioner argued that the legislative intent behind the farm exemption to Act 250 was "to [only] exempt 'ordinary Vermont farms.'"²³⁹ In petitioner's view "the storage shed built by [Sterling] is removed from the College's farming operations and does not fit into any Vermont farm landscape, and is a commercial operation" and should not be exempted²⁴⁰

The Environmental Board rejected this narrow reading. In its view, "[t]he definition of farming lists a number of activities that constitute farming; there is no reference to the nature of the person conducting the activity. Act 250 regulates land use regardless of the identity of the person or institution conducting the use."²⁴¹ This determination once again fits into the larger trend of the Environmental Board and now the superior court rejecting attempts to narrow the definition of farming to limit the exemption's scope and reach in the face of this dynamically changing economic sector.

6. *In re Eustance*²⁴²

In *Eustance*, the Eustances bought a forty-seven acre farm in

234. *In re Sterling Coll.*, Declaratory Ruling #259 (Vt. Env'tl. Bd. Mar. 27, 1992).

235. *Id.* at 1.

236. *Id.* at 1.

237. *Id.* at 2.

238. *Id.* at 4.

239. *Id.*

240. *Id.*

241. *Id.* at 5 (citing *In re Baptist Fellowship of Randolph, Inc.*, 481 A.2d 1274, 1276 (Vt. 1984)).

242. *In re Eustance Act 250 Jurisdiction Op.*, 970 A.2d 1285 (Vt. 2009).

Bondville with the idea of raising alpacas.²⁴³ The seller, however, had been involved in an earlier development plan and had obtained an Act 250 permit for the property, which included the lands subsequently purchased by the Eustances.²⁴⁴ The Eustance lot was subdivided (by a prior owner) without a state land use permit, and in 2005, the Eustances filed an application for a permit to approve their subdivided lot and, in turn, their alpaca operation.²⁴⁵ The hearing on this permit was recessed for additional information regarding possible exemption, but a concerned neighbor requested a jurisdictional opinion in order to address this issue.²⁴⁶ The district commissioner determined that the state did have jurisdiction, including over the alpaca operation, concluding that “although farming is not development under Act 250, jurisdiction can attach to farming activity if the activity otherwise requires an amendment to an existing Act 250 permit.”²⁴⁷

The Eustances appealed to the Superior Court, Environmental Division. On the farming exemption question, the court concluded that “once Act 250 jurisdiction has attached to a project, subsequent changes to a permit’s terms or conditions, or material or substantial changes in a planned project, require a permit amendment.”²⁴⁸ This determination was affirmed by the Vermont Supreme Court.²⁴⁹ *In re Eustance* shows that once jurisdiction attaches to a property, even to agricultural land, the landowner or farmer will need to comply with permitting requirements, including seeking amendment of a preexisting permit.

7. *In re Whistlepig, LLC*²⁵⁰

Whistlepig Whiskey, a Shoreham-based distillery, sought a determination that a new still would be exempt from Act 250 jurisdiction. The still was intended to be used to distill rye whiskey from rye grown solely on farms it either owned or leased.²⁵¹ The project was described as “conversion of an existing dairy barn into a farm-based distillery. Phase I consist[ed] of importing, processing, bottling,

243. *Id.* at 1286.

244. *Id.*

245. *Id.* at 1288.

246. *Id.*

247. *Id.*

248. *Id.* at 1289.

249. *Id.*

250. *In re Whistlepig, L.L.C. Act 250 Jurisdictional Op.*, No. 9-070 (Vt. Super. Ct. Envtl. Div. Nov. 19, 2015) (order regarding motion).

251. *Id.* at 3.

warehousing and shipping [distilled whiskey].”²⁵² The district coordinator, however, determined that this new still was not exempt and would require an Act 250 permit, a determination which Whistlepig appealed.²⁵³ Whistlepig argued that the district coordinator had erred in concluding that the farm-based still was subject to Act 250 jurisdiction as it was a farming activity.²⁵⁴ The parties agreed that the dispute hinged upon whether the whiskey is “principally produced on the farm” and qualifies as an agricultural product under Act 250’s definition of farming.²⁵⁵

For Whistlepig’s rye whiskey, this required considering how this product, including the amount and the source of the water, fit within the principally produced standard.²⁵⁶ In the Superior Court’s view, the ingredients must be evaluated by weight and volume and “[i]f more than half of those ingredients are identified as products from farming . . . then the final product may be defined as an ‘agricultural product principally produced on the farm’ and potentially exempt from Act 250.”²⁵⁷ The Superior Court then concluded that water counts as an ingredient in the production of rye whiskey, but that the source (on or off-farm) is immaterial in meeting the on-farm product status because it is not an agricultural product.²⁵⁸ The Superior Court concluded that “the water that contributes to the creation of Whistlepig’s rye whiskey must be compared to the other ingredients used in the creation of its whiskey, and does not count towards the percentage of ingredients grown or produced on the farm.”²⁵⁹

Whistlepig filed a motion to reconsider.²⁶⁰ Whistlepig argued that the definition of “‘principally produced on the farm’ was an improper substantive change in the regulatory definition of the farming

252. *Id.* at 10.

253. *Id.* at 1–3.

254. *Id.* at 2.

255. *Id.* at 10–11.

256. *Id.* at 11.

257. *Id.* at 14–15.

258. The court’s rationale in this is the legislature’s intent in keeping the definition of the farming exemption narrow, noting that “[y]ears ago, some Vermont farms included sand and gravel extraction operations to help supplement farming revenue. Such operations, while once common on Vermont farms, did not convince the legislature to include in its list of agricultural items that are exempt from Act 250 review.” *Id.* at 18.

259. *Id.* at 18–19.

260. Whistlepig, L.L.C. Act 250 Jurisdictional Op., No. 9-070 (Vt. Super. Ct. Envtl. Div. Sept. 2, 2015) (decision on Whistlepig’s Motion to Reconsider and the Natural Resources Board’s Motion to Dismiss).

exemption.”²⁶¹ Whistlepig also argued that a change to the Act 250 rule in 2013 by the Natural Resources Board had altered the legal standards applicable to the farm exemption and reversed the Environmental Board’s precedent under *Scott Farm*.²⁶² In summary, Whistlepig argued that the former rules and the *Scott Farm* decision had placed the focus only on the final product’s composition, not the actual (or initial) ingredients used to make the product.²⁶³ The court rejected this argument concluding that to adopt Whistlepig’s argument would require a complex chemical analysis of the finished product in order to determine whether or not that product is ‘agricultural’ and held that the initial product mix or inputs is the appropriate analysis.²⁶⁴ Subsequently, the parties filed stipulated facts with the Superior Court defining the ratios of ingredients utilized in the production of Whistlepig whiskey.²⁶⁵ The evidence submitted by both parties demonstrates that “the milled rye grown on [Whistlepig’s] agricultural fields represents less than 50%, either by weight or volume, of all the ingredients used to produce the Whistlepig whiskey” rendering the construction and production proposed at the Shoreham location subject to Act 250 jurisdiction as the farming exemption was inapplicable based upon the amount of water used to produce the rye whiskey.²⁶⁶

Beyond this clarification on how to define the product mix, *Whistlepig* also examined how to define the scope of an operation that becomes subject to Act 250 jurisdiction.²⁶⁷ Whistlepig’s operational core, or the actual facility at which the whiskey was being distilled, involved roughly eight acres of a 467 acre operation, a small fraction of the total acreage.²⁶⁸ A neighbor challenged Whistlepig’s activities on the farm and argued that, as Act 250 jurisdiction had attached to the eight acre distillery, it had attached to the entire acreage as involved lands.²⁶⁹ The superior court rejected this larger analysis, concluding that Act 250 jurisdiction only applied to those acres used for the

261. *Id.* at 2–3.

262. *Id.* at 3.

263. *Id.* at 3–4.

264. *Id.* at 5.

265. Whistlepig, L.L.C. Act 250 Jurisdictional Op., No. 9-070 (Vt. Super. Ct. Envtl. Div. Oct. 26, 2015) (entry regarding motion).

266. *Id.* at 4.

267. Whistlepig, L.L.C. Act 250 Jurisdictional Op., No. 9-070, at 22 (Vt. Super. Ct. Envtl. Div. Nov. 19, 2015) (order regarding motion).

268. *Id.*

269. *Id.* at 22.

development, and not to the lands still being utilized for agricultural purposes.²⁷⁰

Whistlepig is an important decision in understanding how courts and communities will examine the product mix to determine the scope and applicability of the farming exemption under Act 250. *Whistlepig* also indicates, based on water not qualifying as an agricultural product, that under current law, on-farm brewing and distilling operations that are heavily dependent on water (chiefly, beer and distilled spirits) will have difficulty qualifying as exempt and will likely be subject to Act 250 jurisdiction.

8. *In re Ochs*²⁷¹

Most recently, in *Ochs*, neighbors to Ochs's Orwell-based Crescent Orchards challenged the orchard's exemption under Act 250's farming exemption.²⁷² Crescent Orchards is an approximately 300-acre apple orchard, which includes "a packing house, loading dock, and a mechanical line upon which the apples are moved and loaded on trucks for transport."²⁷³ The apples come from both the immediate orchard as well as other lands that the Ochs own or rent in the area.²⁷⁴ Initially, a jurisdictional opinion was issued by the district coordinator concluding that the orchard's activities "were more like a commercial processing, distribution, and warehouse plant than a farm"—and concluding that Crescent Orchards did not qualify for the farming exemption.²⁷⁵ The Ochs appealed this decision to the superior court, which reversed.²⁷⁶ In the superior court's view, which the Vermont Supreme Court subsequently affirmed, the cultivation of apples met the definition of farming as did the "storing, washing, waxing, wrapping, and packing apples for shipping, marketing, and sale."²⁷⁷ The

270. *Id.* at 27–28. For more information about involved lands, see ARGENTINE, *supra* note 26, at 17–18.

271. *In re Ochs*, 915 A.2d 780 (Vt. 2006).

272. *Id.* at 780. This was not the neighbors' first challenge to this operation. See *Trickett v. Ochs*, 838 A.2d 66, 66, 78 (Vt. 2003) (challenging the Ochs' operations under a nuisance theory). In *Trickett*, the state supreme court determined that the state's right-to-farm law did not bar this challenge in the most prominent test of Vermont's right-to-farm law's application. *Id.* The state amended the right-to-farm act after this decision to build a safe harbor for generally accepted agricultural practices. See Chrostek, *supra* note 29, at 246–49 (discussing the motivations and legislative action to the *Trickett* decision).

273. *In re Ochs*, at 781.

274. *Id.* at 781–82.

275. *Id.* at 782.

276. *Id.*

277. *Id.* at 783.

fact that the Ochs leased several other orchards did not change the court's analysis as, under these agreements, the Ochs were in fact in charge of the farming operations on these lands—the leases were not a workaround to Act 250 as a scheme for consolidating various distinct orchard's processing operations.²⁷⁸ The state supreme court, in affirming the Environmental Board's determination noted that,

[o]perating a farm, whether it is a dairy farm, a beef ranch, or an apple orchard, is not and cannot be a pristine pastoral activity. Modern machinery and practices in every type of farming can be noisy. Farming is, by its nature, a commercial activity. As the [Environmental] Board wrote: "A farm is still a farm – and exempt from Act 250 – whether it uses two or twenty trucks, or whether it has seven or 700,000 chickens."²⁷⁹

To summarize, there is an Act 250 exemption for farming activities, which Vermont courts have gradually, but continually, expanded to adjust to changing agricultural practices over time. To date, this exemption applies regardless of the farm's size, scope, or intensity of use. Act 250 is a state determination, as is compliance with RAPs, while communities, though now somewhat more limited through Act 143, can regulate on-farm accessory businesses through site plan review. The interplay and interconnectivity of these determinations, although all focused on the production of agricultural products from farms, can be complex. The next section of this Article will provide some initial thoughts on how to ease the regulatory burden and complexity relating to the regulation of these businesses as value-added agriculture continues to become more important to the state's agricultural economy.

IV. BALANCING LAND USE REGULATION OF ACCESSORY ON-FARM BUSINESSES

Although Vermont has taken several important steps in addressing the balance between providing flexibility to farmers and local discretion to regulate accessory on-farm businesses, more can be done to promote these businesses. This section will make recommendations for each of the respective players and provide some initial thoughts on further steps that each could take in improving the quality, clarity, ease, and transparency of the regulatory processes applicable to on-farm business operations.

278. *Id.*

279. *Id.* at 784.

A. Agency of Agriculture, Food & Markets

To aid farm businesses and municipalities wrestling with interpretation issues, the AAFM could take the following steps.

First, the AAFM could work to facilitate dialogue amongst the various interests involved in this process and could develop best practices for applying Act 143.²⁸⁰ It is going to take time and effort to sort out the application of this Act and to set general guideposts. A series of public workshops or the commissioning of a study similar to that prepared by the Vermont Law School Land Use Clinic for Agricultural Enterprises to provide guidance to communities could help in this regard.²⁸¹ Additionally, as more case studies become available, the AAFM could distribute these through the Vermont Planners Association, VHCB's Farm Viability Network, Rural Vermont, and other organizations to give guidance and to help standardize treatment of accessory on-farm businesses statewide—one of the express goals of the legislation. On several points, such as reporting requirements, AAFM could also establish best practices for reporting, including what data should be reported and on what reporting cycle. Overall, the AAFM could play an important clearinghouse role, and given its unique position, this would help farmers seeking to operate their businesses move these projects forward in an appropriate and considered manner.

Second, while the nature of line drawing will always lead to some subjectivity and tension, providing regulatory clarity to farmers when one process applies, and not the other, will help to expedite approvals, provide more certainty, and help to facilitate the ability of these businesses to operate on the landscape. If the state continues its willingness to issue letters indicating that a farm qualifies as a farm under the RAPs, and that farming practices meet the RAPs, this may help to avoid confusion between the potentially parallel regulatory structures. There will still be the potential for some issues where an accessory on-farm business meets the RAPs standards (by selling agricultural products) but this regulatory overlap should be minimized and can be with AAFM taking a proactive role.

Third, it is already clear that the events category is particularly

280. Notification and training on Act 143 is specifically a part of the legislative mandate. VT. STAT. ANN. tit. 24, § 4412(11)(F) (2018).

281. See generally VT. LAW SCH. LAND USE CLINIC, *supra* note 16 (providing guidance to Vermont municipalities seeking to develop and incentivize agripreneurism in their jurisdictions by presenting examples of alternative zoning and language for regulations).

problematic and will be difficult to enforce, apply, and monitor.²⁸² As a result, working with the Vermont League of Cities and Towns, the Vermont Planners Association, and other similar organizations to develop best practices and guidance for town planners and planning boards dealing with on-farm events would be extremely helpful to farmers seeking to operate this type of use. There will be significant threshold questions, such as how extensively the on-farm event must feature agricultural products and how different use classes qualify or do not qualify under this exemption, which could be resolved to avoid disputes down the line.²⁸³ The application of the events-based accessory on-farm businesses will necessarily be case and fact-specific, but having more-developed parameters on how to draw lines might minimize conflict and potential enforcement issues over the longer-term horizon.

Fourth, a more clearly established *de minimis* standard for correlated and complimentary agricultural products to be sold on site would be helpful. It is unlikely that a community or the AAFM (under the RAPs) would reject the use for selling a limited degree of non-agricultural or qualifying agricultural product. For many, if not most businesses, some degree of related products (such as farming-focused books, clothing, etc.), in addition to their farm-products, are often sold. A safe harbor, either through AAFM guidance, local regulation, or statutory intervention, to clarify that these sales of “farm-related” products from an accessory on-farm business do not defeat the RAP exemption or the accessory on-farm business requirements under Act 143 would be valuable to farmers engaged in this form of business.

Overall, the role of AAFM and municipalities are necessarily intertwined—given the close interplay between Act 143 and the RAPs.²⁸⁴ Working to align these regulatory standards and helping communities to regulate these accessory on-farm businesses in a defensible and sensible manner, as intended by the legislative action, will help to further support this important strand of Vermont’s

282. See Weinhagen, *supra* note 171 (noting that “the events category has the potential to be a legal slippery slope for accessory on-farm businesses that seek a permit even though they only tangentially feature agricultural practices or products).

283. See *id.* (providing thoughts on what is covered/not covered in the events category: “A business focused on tasting or meal events is covered, a restaurant is not. A business focused on farm stays is covered, an inn or bed and breakfast for general tourist use is not. A business involving agricultural classes or exhibits is covered, a private school is not. A business that hosts wedding receptions that utilize agricultural products is covered, a function hall or concert hall is not”).

284. See generally Vt. AAFM, *Q&A*, *supra* note 172 (explaining the process to get an accessory on-farm business approved by the municipality and explaining the role of the AAFM in relation to the RAPs).

agricultural economy.

B. Municipalities

Given the role of towns in this process, municipalities can also improve the experience for farmers by streamlining the regulatory approval process.²⁸⁵

1. Establish Clear Local Guidance

Towns can develop clarity, either individually or through the collective action of the Vermont Planners Association, and best practices for applying both Act 143 and other regulatory processes to these businesses. There will necessarily be growing pains in learning how to apply this new land use category and site plan review, but being proactive and working with the farm community to establish the rules of the road, so to speak, will minimize conflict and tension.

2. Consider Lowering Review Requirements

Beyond clarifying procedures, municipalities can also elect to make these processes less intensive and less burdensome by providing a more streamlined Act 143 process. It could either focus on the applicable performance standards or limit or modify the requirements that the site plan process requires—i.e., avoiding, to the extent possible, engineering or legal costs—or completely exempting on-farm accessory businesses from this review, since the state provides the ceiling, not the floor, for local community control. Exempting on-farm businesses, perhaps as constrained by an outer size, volume, or value bound or by operational forms, would eliminate some potentially unnecessary costs for a smaller-scale accessory on-farm business. This exemption would also allow for more flexibility and for the exemption of certain operations in situations where site plan review, or a less formal version of site plan review, might be sufficient to address the community concerns.

C. Vermont Farmers

1. Develop a Business and Regulatory Strategy

Farmers may also want to consider whether to err on the side of obtaining community approval as a backstop and to provide regulatory

285. See VT. STAT. ANN. tit. 24, § 4412(11)(E) (indicating that a community can adopt a bylaw less restrictive than Act 143).

certainty going forward. Going through the site plan review process provided under Act 143 prevents a community from objecting or blocking the operation of the business as a matter of state land use law down the line. This approval could also provide some certainty and prevent long-term issues if, for example, the farm, for production reasons, fails to meet its sales targets in a given year. Act 143, however, does give the community the ability to apply site plan review to the use and to potentially condition the use to address community concerns through its performance standards (which address issues such as light, noise, parking, and traffic). Even if a farmer believes that their operation is not subject to Act 143 and is fully exempt under the RAPS, electing to go through the review process can provide a level of insulation over the longer-term and may make sense for some operations.

2. Communicate Business and Land Use Plans with Neighbors

Last, farmers should also talk to their neighbors before moving forward with a new proposed accessory on-farm business.²⁸⁶ Having a dialogue can be very helpful over the longer-term, if neighbors understand the farmer's intended use, rather than responding to community rumors and fear. Sometimes this outreach will be appreciated. Neighbors also may be able to provide relatively inexpensive or cost neutral suggestions to minimize impact on their land, which if identified at the outset, can be more readily implemented. In a rural community, a farmer is likely going to have to deal with neighbors at some point and in some fashion, so being proactive is more effective than ducking the issue in the short-term.

V. CONCLUSION

At the end of the day, the ongoing struggle is striking a balance between municipal desire to control local land uses against a farmer's operational need, with minimal intrusion or cost, to be able to expand the array of commercial activities to increase operational revenue and to keep the farm viable. It is generally undisputed that farming is changing due to numerous factors, including, evolving consumer preferences.²⁸⁷ Farming today looks much different than it did thirty

286. NOFA-VT, *supra* note 18, at 6.

287. See generally Mary J. Angelo, *Small, Slow and Local*, 12 VT. J. ENVTL. L. 354 (2011); Marne Coit, *Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement*, 4 J. FOOD L. & POL'Y 45 (2008); Jason J. Czarnezki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH

years ago, and different than what the agricultural economy will look like even ten years from now, as the economic demands for the future of the food supply are debated in the consumer marketplace and in the public policy arena. Vermont agriculture, with its increasingly heavy reliance on value-added agriculture and the strength of the Vermont brand to command a market premium, needs to focus on areas where the state has a strong competitive advantage.

Expanding the type and array of economic activity streams from a farm is an important mechanism for capitalizing on this advantage, but efforts to expand accessory on-farm business also must account for the desires of those living in these communities and must ensure that the working landscape is not adversely impacted by this expansion. Establishing clear and binding guidance in this area is essential to allow farmers to plan and base their future operational plans on these regulatory foundations with the assurance that their operations will be able to expand and grow in the manner that best accomplishes their productive vision. Balancing these needs will not be easy, but doing this well is critical to ensuring the future viability of the state's working agricultural landscape and economy.