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To: Rep. Carolyn W. Partridge, Chair, House Agriculture Committee

From: Peter F. Young, Jr., Chair, Natural Resources Board
John Hasen, General Counsel, Natural Resources Board

Date: June 19, 2009

Re: Response to May 8, 2009 Memorandum

We have received the May 8 Memorandum from the House Agriculture Committee which asks a series of questions about Act 250 and "farming." Unfortunately, we did not receive it until June 4, but we hope that, as the Legislature is not presently in session, this reply will be nonetheless timely.

The Memorandum asks a series of questions. We will respond to each in order.

Question 1(a)

1) It is our understanding that "principally produced" means that more than 50%, by weight or volume, of agricultural products sold from the farm are grown or produced on the farm.

a) Please verify that this means that more than 50% of all the agricultural products offered for sale must be agricultural products grown or produced on the farm whether or not an individual product is grown or produced on the farm. In other words, does this mean that a farmstand can sell unique products, not grown on the farm but from another farm, without falling under Act 250 jurisdiction as long as 50% of the agricultural products sold are from the farm? Generally, at what point does the Board get involved?

Response

Act 250 Rule 2(C)(19) reads:

(19) "*Principally produced*" For purposes of 10 V.S.A. §6001(22)(E), "*principally produced*" means that more than 50% (by volume or weight) of the agricultural products, which result from the activities stated in 10 V.S.A. §6001(22)(A) - (D) and which are stored, prepared or sold at the farm, are grown or produced on the farm.

We read this rule to mean that if a farmstand sells agricultural products, and at least 50% of those products are grown or produced on *that* farm, such sales fall within the definition of "farming" and are exempt from Act 250 jurisdiction. We look at all of the produce (from whatever source) sold at the farmstand, and if more than 50% of such produce is grown on *that* farm, then the farmstand sale of other agricultural products grown or produced on other farms would not trigger Act 250 review.

Please note that the statute specifically exempts only "agricultural products." We do not consider t-shirts or key chains to fall within the exemption. While a decision from the former Environmental Board allowed a nursery that sold plants and trees to sell some goods (books, cards, and other horticulturally-related gift items), the Findings indicate that the Board considered those goods to be "ancillary to the sale of items produced on premises." *Re: Richard and Marion D. Josselyn*, Declaratory Ruling #333, Findings of Fact, Conclusions of Law and Order (Feb. 28, 1997). The Board also wrote:

> The Board cautions the Petitioners 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 are not principally agricultural products produced on premises. The "farming" exemption, like all exemptions, is to be read narrowly and only found to apply when the facts clearly support the exemption's application.

Id., at 6. Thus, while there may be a little latitude in the Board's reading of the exemption, it is very limited.

Question 1(b)

> *b) The definition of farming includes the on-site storage, preparation and sale of agricultural products principally produced on the farm. Is it assumed that "preparation" includes value added processing that results in products such as salsa, jams, cheese, and baked goods produced on the farm with 50% of the ingredients from the farm? Does the definition of "principally produced" allow for value added products "prepared" on the farm to be considered "produced on the farm" if they are made with a majority of agricultural products from the farm on which they are sold?*

Response

We do not breakdown an individual item and ask if 50% of that item is grown on the farm. Thus, to use the (now famous) blueberry muffin example: if the blueberry farm grows the blueberries, the fact that the flour and sugar that go into the muffin may be a greater percentage of the muffin than the farm's blueberries is not important. The question is whether the total weight or volume of blueberries (including those that are not put into muffins) sold at the farmstand exceeds the total volume or weight of the flour, sugar and other ingredients that are not produced on the farm.

Question 2(a)

2) Board rules define "tract of land" by using the words "owned or controlled." Does this include property leased by a farmer?

Response

1. Property leased by a farmer for growing produce may be considered to be a part of the "farm" for purposes of the "principally produced" test.

There is a specific Act 250 Rule that allows lands that are leased by a farmer to be considered a part of the farmer's "farm." Rule 2(C)(18 reads:

> (18) "*The farm*" For purposes of 10 V.S.A. §6001(22)(E), "*the farm*" means lands which are used for any purpose stated in 10 V.S.A. §6001(22), which are owned or leased by a person engaged in the activities stated in 10 V.S.A. §6001(22), if the lessee controls the leased lands to the extent that they would be considered to be the lessee's own farm. Indicia of such control include whether the lessee makes the day-to-day decisions concerning the cultivation of the leased lands, subject to incidental conditions of the lessor, and whether the lessee works the leased lands during the lease period.

The rule is derived from the Environmental Board decision in *Re: Peter and Carla Ochs*, Declaratory Ruling #437, Findings of Fact, Conclusions of Law, and Order (Jul. 22, 2005), aff'd, *In re Peter and Carla Ochs*, 2006 VT 122. In the *Ochs* case, the owners of an apple orchard packed, shipped and sold apples that they produced at their own orchard; they also leased other orchards, cultivated and harvested the apples on those orchards, and then brought those apples to their home orchard where they were packed, shipped and sold. The question in the case before the Board was whether the apples from the leased lands were considered to have been "principally produced on the farm" so that they would not count against the apples grown on the home farm for purposes of the 50% rule. The Board held that lands that are leased – as long as the lease is a true "arm's length" lease

and not a sham to get around the statute – would be considered to be a part of "the farm" for purposes of 10 V.S.A. §6001(22)(E).

On appeal, the Vermont Supreme Court agreed, specifically noting the control that the Ochs exercised over the leased land:

> Most of the leases that the Ochses have entered into with the landowners of other orchards are year to year leases. Under the terms of these lease agreements, the Ochses do all of the work on the lands at the orchards which they lease, including mouse baiting, pruning, spraying and preparing the apple trees in the spring, and picking the apples in the fall. During the lease period, neither lessors nor anyone, other than the Ochses and their employees, work on the leased orchards lands. The Ochses use their own machinery when working on the leased orchard lands. They make all the day to day decisions concerning the cultivation of the apples at the leased orchards. The lessors have no control over the conduct of the Ochses' operations except for decisions about which trees may be felled.

In re Peter and Carla Ochs, 2006 VT 122, ¶7

And the Court repeated the Board's admonition that the lease should not be merely a device by which to avoid Act 250 jurisdiction:

> As long as the Ochses exercise sufficient control over the leased lands, and as long as a lease is not simply a ruse to bring lands into "the farm" which are, in actuality, still under the control of the lessor or landowner, there is no justifiable basis for distinguishing between owned lands and leased lands in determining what constitutes "farming" for purposes of the exemption found in § 6001(22)(E).

In re Peter and Carla Ochs, 2006 VT 122, ¶17

Thus, the existing case law and rule allow a farmer to lease other lands for the production of agricultural products, as long as the farmer controls and works the leased land as if it were his own.

Question 2(b)

> *If a farmer rents a small area for a farmstand that is not contiguous with the farm's barn and growing area, will the Board treat that farmstand lot as part of the farm?*

Response

Leasing property for a farmstand does not make that property a part of the "farm" for purposes of obtaining an exemption from Act 250 jurisdiction.

The Act 250 Rule 2(C)(18) codifies the reasoning behind the Board's *Ochs* decision that leased lands may be considered to be a part of the "home farm" for purposes of the "principally produced" test. Your question proposes a scenario in which a farmer leases other lands on which to place a farmstand; you ask whether the Board would consider such land to be a part of the farmer's farm, thereby making it exempt from Act 250 jurisdiction.

It is important to recognize that Act 250 exempts "farming purposes" not "farms." See 10 V.S.A. §6001(3)(D)(i): "The word 'development' does not include ... [t]he construction of improvements for farming, logging or forestry purposes below the elevation of 2,500 feet." "Farming" is then defined in 10 V.S.A. §6001(22) in terms of *activities, e.g.,* cultivating lands for growing food, raising livestock, bee keeping, operating greenhouses, producing maple syrup. While it is true that if an activity (for instance, farming or logging below 2500' in elevation) is exempt, this means that Act 250 does not regulate the lands on which the activity occurs, it is the *activity* that is exempt, not the *land* on which it sits.

The leasing of land which is not used for "farming" purposes (as defined in §6001(22)) is not "farming." Thus, if the land which is leased is used to sell produce, such land is being used for a commercial purpose, and that commercial purpose may be subject to Act 250 jurisdiction, depending on the size of the parcel and the extent of local regulation. The *Ochs* decision provides no relief; in that case, the lands that were leased were used for a "farming purpose" - - "growing ... orchard crops." 10 V.S.A. § 6001(22)(A). Nor can 10 V.S.A. §6001(22)(E) act to exempt such lands from Act 250, as subsection (E) speaks in terms of "the *on-site* storage, preparation and sale of agricultural products," and an off-site farmstand therefore does not qualify for the farming exemption.

Question 2(c)

Conversely, if someone leases land from a farmer to operate a farmstand, is this land considered an extension of the farm?

Response

Leasing property on another person's farm for purposes of operating a farmstand that sells produce not produced on that person's farm does not make that farmstand a part of the "farm" for purposes of obtaining an exemption from Act 250 jurisdiction.

Again, since Act 250 looks to activities and not to the land when determining exemptions, if Farmer A leases land on Farmer B's farm in order to construct a farmstand at which to sell Farmer A's produce, the mere fact that the farmstand is built on a farm does not make it exempt from Act 250 jurisdiction. This situation is no different from a scenario in which Farmer B builds the farmstand on his own land and then invites Farmer A to sell his produce at the farmstand. Since the agricultural products sold at such farmstand are not "principally produced" on Farmer B's farm, the activity is not "farming." It does not matter who builds the farmstand.

Question 3

3) Does the Board consistently consult with the Agency of Agriculture, Food and Markets prior to establishing jurisdiction or enforcing an alleged violation against a person claiming the farm exemption? Why or why not? If there is consultation, what weight is the Agency given in potentially conflicting opinions on jurisdiction?

We should note, first, that the Land Use Panel does not issue Jurisdictional Opinions. Jurisdictional Opinions are issued by the District Commission Coordinators. See 10 V.S.A. §6007(c). The Coordinators do not consult as a matter of course with the Agency of Agriculture, Food and Markets prior to issuing Jurisdictional Opinions. This is because the Coordinators are applying definitions that appear in the Act 250 statute, 10 V.S.A. Ch. 151. Those definitions differ from the definitions or the usages of the terms that relate to farming or agriculture that appear in Title 6, V.S.A. in much the same way as the definitions that pertain to agriculture in the "current use" provisions of the tax code, 32 V.S.A. §3752, or the zoning statute, 24 V.S.A. §4413(d), differ from similar definitions in Act 250.

Likewise, if there has been a violation of Act 250, the Land Use Panel, which enforces such violations, also does not consult with AAFM. The Panel is authorized and encouraged to enforce violations of Act 250; the Panel cannot see how consultation with AAFM would serve any legitimate purpose.

Question 4

4) It is the Committee's understanding that the Board is collaborating with the Agency of Agriculture to define a scope of cooperative farm venturing, in the form of Community Supported Agriculture (CSA), that would meet the intent of the farm definition. Often, several farmers assemble their agricultural products to be distributed as part of a single community supported agriculture operation. The specific farm from which the CSA is operated may not contribute more than 50% of the CSA products. For instance, farmers A,

B, C, and D all contribute equally to a CSA operation run from farmer A's land. In addition, CSAs benefit from the convenience of a single drop-off location, which allow customers to pick up their shares and prevent the farmers from driving many miles to deliver shares. If a shelter were constructed at a drop-off location, would the Board assert jurisdiction? Would the answer to this question change if the CSA products were exclusively from one farm or were assembled from several different farms? What if the shelter were built on land that is not owned or leased by the CSA farmer?

The Board understands the efficiencies that may be realized from CSA operations, but the definition of "farming," as it presently appears in 10 V.S.A. §6001(22), does not provide an exemption for CSA operations as described in the question or under any of the scenarios that appear in the question immediately above.

The Board has had some discussions with AAFM staff to draft legislation that would meet the needs of the CSAs without causing undue burdens on the rest of the public. We are looking at factors such as the size of the "CSA central" building to be constructed, the amount of produce that would be handled in such building over the course of the season or at any one point in time, and the distance from the farms to the central site. We hope to have some draft language for the Committee's review by the fall.

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