H 704 and Act 143

A Case Study

1. When a business whether a farm or not wants to start a business or build houses, there are often two parallel regulatory tracks it travels down, state and local. The state path may include Act 250 review and the local path may include municipal review.
2. Act 143 dislodged the municipal path and headed it in a direction where the farmer's proposed business would eventually collide with the state track's review. The point of impact is criteria 10 Conformance with the Town or Regional Plans in Act 250.
3. This collision has occurred with Peacefield Farm.
4. On May 9, 2018 the determination was made that Act 250 jurisdiction attached to the proposed restaurant. This determination was not appealed. The determination is ignored by Peacefield and the interior of the barn and grounds are converted to a magnificent restaurant.
5. On October 27, 2020 the Town of Woodstock DRB opens a hearing to determine if the proposed restaurant meets the definition of an Accessory On Farm Business (AOFB) and if so, conduct site plan review.
6. On May 17, 2021, Peacefield applied for an Act 250 permit to use a newly built barn as an 80 seat restaurant. This came after a visit from the enforcement division of the NRB. Hearings were held on June 15 and September 9, 2021.
7. On May 23, 2021 Peacefield received a determination from the Vermont Agency of Food and Markets that its activities are within the definition of a "farm" and therefore are subject to "Required Agricultural Practices"(RAPS). In the review the Agency determined a structure, "described as: 36x72 for storage and preparation of pigs and crops plus eventually use to store and prepare proteins/fibers of other local farms and to host events/serve meals (the Accessory On Farm Business structure), **does not meet the definition of a farm structure as its intended use is for hosting events/serving meals, which are activities falling beyond the RAP Section 2.16 definition of farming, and therefore do not fall under the jurisdiction of the Agency.**

8. On November 17, 2021 after two hearings and 2 site visits to the already built restaurant, the District 3 Environmental Commission in a unanimous decision, determined that the project does not comply with criterion 10 Conformance with the Town Plan i.e. Town Plan of Woodstock. The Commission held that the Town had used mandatory language indicating that "retail" must not be in this area and a review of the Town's Zoning By Law reveals that "Restaurants" are neither a permitted nor a conditional use in the "Residential 5 Acre" zone.

9. Several weeks after the Act 250 decision the Town of Woodstock announced its decision. In a 3-2 vote the DRB determined that as proposed the restaurant did not meet the definition of an AOFB. They concluded that "the proposed restaurant operation is not a secondary use of the property based upon its findings" and therefore the project could be denied. However, they went on to decide that they had the authority to"constrain" the size and scope of the restaurant so that it would meet the definition of an AOFB.

10. The dissent noted that the applicant had failed to provide sufficient evidence that over 50% of it sales would be from principally produced on farm products. They point out that extrinsic evidence from the Agency of Agriculture Food and Markets (AAFM) publication explains that an AOFB "includes on farm dinners of qualifying products at a scale smaller than a restaurant".

11. My understanding is that both the District 3 decision and the DRB decision have been appealed to the Environmental Division of the Superior Court.

The Response

The response to this collision between Act 250 review and limited Municipal review is H 704. H 704 mostly exempts Act 250 review of AOFBs.

AS PROPOSED H 704 READS:

Sec. 1. 10 V.S.A. § 6001(3)(D) is amended to read:

(D) The word "development" does not include:

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(ix) The construction of improvements for an accessory on-farm

business located on a tract of land primarily devoted to farming, provided that:

(I) the proposed improvements are for an accessory on-farm business as defined by 24 V.S.A. § 4412(11);

(II) the farming operation is subject to the Required Agricultural Practices; and

(III) the improvements constructed for the accessory on-farm business do not physically alter more than one acre of land.

Sec. 2. 24 V.S.A. § 4412(11) is amended to read:

(11) Accessory on-farm businesses. No regional plan, municipal plan, or municipal bylaw shall have the effect of prohibiting an accessory on-farm business at the same location as a farm.

The bill continues. . .

THE CONSEQUENCES IF ACT 250 REVIEW IS ELIMINATED.

1. It is unclear whether AOFBs will receive any review in 1 acre towns. The determination as to whether a proposed farm business is accessory is made by the local municipalities usually a Development Review Board (DRB). If about 45 % of towns do not have zoning and subdivision regulations, then who makes the decision?
2. Farming by definition can include as little as $2,000 in annual sales. These small farms scattered throughout towns are entitled to AOFBs. Without Act 250 review, who will check impacts to natural resources, roads, noise? Will the 1 acre towns? Additionally, do we potentially want large commercial businesses in remote areas of towns.
3. The caveat that the exemption will not apply if more than 1 acre is physically altered may be a difficult determination to make. District Environmental Coordinators may require the farmer/applicant to present an engineering study and survey to demonstrate that no more than 1 acres is disturbed. This could require time and money on the part of the farmer/applicant which could be better spent having the Act 250 process go forward. However, one could argue the reverse. 1 acre is so

large a piece of land that virtually all farmer/applicants will be easily exempted.

4. Permitting the municipalities to determine what constitutes an AOFB does not "increase the consistency across the State of municipal regulation . . . Quite to the contrary the law permits "E) Less restrictive. A municipality may adopt a bylaw concerning accessory on-farm businesses that is less restrictive than the requirement of this subdivision (11)." Basically, a town can let an AOFB do whatever it wants as long as it doesn't physically alter more than an acre. **IT'S THE WILD WEST FOR AOFBS!!!**

SOLUTIONS

1. The determination as to what type and size of a business constitutes an Accessory On Farm Business **should be removed** from the municipalities and placed with a state agency such as the Agency of Agriculture Food and Markets (AAFM) division. As I noted in my testimony it is very difficult for municipal DRBs to make this determination. A quite sophisticated DRB decided that an 80 seat restaurant with conditions is an AOFB. I do not think that was the legislative intent "to promote and facilitate the economic viability of Vermont's farms". The AAFM in its own publications describes an AOFB to include, "on-farm dinners featuring qualifying products at a smaller scale than a restaurant."
2. The authority for the DRB to exercise site plan review and condition performance should remain.
3. The determination as to what constitutes an AOFB should be better defined and limited. **Using the 50% of sales principally produced on the farm is a very difficult finding and should be eliminated**. I would replace it with easier to understand and specific standards such as: an AOFB store may be no larger than (1,000) sq ft., or the AOFB may have (4-6)farm dinners or tastings during the calendar year, or the host 3-4 weddings per calendar year. I would not worry if a single item was produced on farm. The point of the law is to help farms' viability in a small but significant way.
4. If a farm desires a business larger than what is defined as an AOFB, then it should seek commercial review under local and state law such as Act 250 like any other commercial business.
5. Most likely there will need to be an appeal process from the AAFM determination.

I do not pretend to have all the answers to this difficult situation. However, exempting Act 250 review for what might be large commercial business in rural areas is not one of them.