VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re: Scott Farm, Inc. Declaratory Ruling #413

Findings of Fact, Conclusions of Law, and Order

This proceeding involves a Petition for a Declaratory Ruling filed by Scott Farm, Inc. (Scott Farm) to the Environmental Board (Board) from a Jurisdictional Opinion asserting jurisdiction pursuant to 10 V.S.A. Ch. 151 (Act 250) over certain construction activities on a farm in the Town of Dummerston, Vermont. Specifically, this case asks whether Scott Farm's proposal to operate a culinary school at its farm property is exempt from Act 250 under the farming provisions of 10 V.S.A. §§6001(3) and (22).

Because of the limited nature of Scott Farm's proposal and its integral relationship with Scott Farm's agricultural activities, the Board finds that the farming exemption applies, and the proposal is not subject to Act 250 jurisdiction.

I. Procedural History

On April 19, 2002, the District #2 Environmental Commission Assistant Coordinator (Coordinator) issued a Jurisdictional Opinion (JO) in the form of a Project Review Sheet, in which she determined that an Act 250 permit is required for the conversion, to a culinary school, of part of an existing apple packing barn and farm owned by Scott Farm in Dummerston, Vermont (Project). On July 24, 2002, the Coordinator reaffirmed this determination in response to a reconsideration request.

On August 23, 2002, Scott Farm filed a Petition for Declaratory Ruling, appealing the reconsidered JO. *See* 10 V.S.A. §6007 and Environmental Board Rule (EBR) 3.

On September 19, 2002, Board Chair Marcy Harding held a Prehearing Conference. Only Scott Farm, represented by David Tansey, attended.

At the Prehearing Conference, the Chair noted, *inter alia*, that this matter might be impacted by the Vermont Supreme Court decision in the case *In re Vermont Verde Antique International, Inc.*, No. 2001-116 (Vt. Sup. Ct., Sept. 6, 2002), as it appears that the Coordinator may have issued the JO *sua sponte.* The Chair asked Mr. Tansey whether Scott Farm wished the Board to vacate the JO on the grounds that it was unauthorized or whether Scott Farm wished to proceed with its Declaratory Ruling Petition. The Chair noted that, if Scott Farm decided to proceed with the present Petition, the Board would require that Scott Farm sign a waiver of any claims that it could raise based on the *Vermont Verde* decision. Mr. Tansey requested one week to consider Scott Farm’s options.

On September 20, 2002, following the Prehearing Conference, Chair Harding issued a Prehearing Conference Report and Order.

On September 25, 2002, Scott Farm filed a letter with the Board which stated: "Scott Farm is aware of the *Vermont Verde* Decision by the Vermont Supreme Court, and we waive any claims that we might have under that decision."

On October 23, 2002, a panel of Board members convened a hearing in this matter in the Dummerston Town Offices, with David Tansey from Scott Farm, Paul Normandeau and Jack Manix from the Town of Dummerston Selectboard, and Stephan Mindel from the Dummerston Planning Commission, participating.

Following the hearing, the Panel deliberated on November 6 and 20, 2002, and December 4, 2002.

Based upon a thorough review of the record and related argument, the Panel issued a proposed decision on December 6, 2000, which was sent to the parties. The parties were allowed to file written objections and request oral argument before the Board on or before December 27, 2002. No party filed written objections or requested oral argument.

On January 15, 2003, the Board convened a deliberation concerning this matter. Following a review of the proposed decision and the evidence and arguments presented, the Board declared the record complete and adjourned. This matter is now ready for final decision.

II. Issue

Whether the Project is subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

III. Findings of Fact

A. Scott Farm

1. Scott Farm, a 571-acre farm and orchard located entirely in the Town of Dummerston, Vermont, has been in existence since the Eighteenth Century.

2. The Town of Dummerston has zoning bylaws, but it has no subdivision bylaws.

3. Scott Farm is a for-profit corporation which is owned by Landmark Trust USA, a tax-exempt, nonprofit corporation.

4. Scott Farm's elevation is below 2,500 feet.

5. Presently, Scott Farm grows, packs and sells apples in the local and regional market, and it has recently changed the focus of its orchard to include 60 types of specialty apples and other fruits, in order to develop its own value-added products and revitalize its mail-order fruit program.

6. Located on the Scott Farm property, the apple packing barn was constructed in 1916 and has been in active commercial agricultural use as an apple storage, packing, and sales facility since at least 1922.

B. The Scott Farm – Monadnock Culinary School initiative

7. In looking at alternative ways to increase its revenues, and because education is part of its mission, Scott Farm intends to involve Monadnock Culinary School (Monadnock), a New Hampshire nonprofit corporation, in its farm operations.

8. As a part of its school, Monadnock presently operates a restaurant in downtown Brattleboro, Vermont.

9. With Monadnock, Scott Farm intends to incorporate a nonprofit subsidiary corporation to run a culinary school (the Monadnock - Scott Farm Culinary School, or MSFCS) on the Scott Farm property.

1. construction of MSFCS facilities

10. MSFCS will construct cooking school facilities (stoves, sinks, refrigerators, counters, restrooms, etc.) in approximately 1000 square feet of Scott Farm's apple packing barn, which will be walled off from the remainder of the barn. There will be no exterior changes to the apple packing barn; all interior changes will match the historical character of the barn and will be fully reversible.

11. Existing parking space will suffice for MSFCS's needs.

12. The cost of the construction of the cooking school facilities in the apple packing barn will be borne by MSFCS.

13. The space in the apple packing barn occupied by MSFCS will be heated by wood harvested at Scott Farm, and cooking will be done over charcoal that will utilize waste apple wood prunings.

14. The remainder of the apple packing barn will be used for its traditional uses.

2. operation of MSFCS

15. Scott Farm will enter into a lease with MSFCS for the use of the cooking facility space in the apple packing barn. The terms of such lease have yet to be determined.

16. Monadnock will relocate its operations to MSFCS space in the apple packing barn and will no longer have a presence in New Hampshire. It is expected that Monadnock will continue to operate its Brattleboro restaurant.

17. There will be no classrooms at Scott Farm; all teaching at MSFCS will occur in the kitchen facilities in the apple packing barn.

18. The MSFCS program will be a year-round, two-year program.

19. MSFCS teachers will be employees of the school and Scott Farm.

20. There will be no cafeteria at Scott Farm, and prepared food or meals will not be served to the public at Scott Farm.

3. MSFCS students

21. Scott Farm anticipates that five to fifteen students will be part of the MSFCS program.

22. MSFCS's students will help raise organic vegetables on Scott Farm for use in the kitchen, and they will work on the farm and develop finished goods from Scott Farm fruit and other farm-raised products for sale.

23. MSFCS students will not live at Scott Farm; there will be no dormitory building or rooms at Scott Farm.

24. Students will pay tuition to MSFCS; they will pay to learn how to make prepared foods from orchard and other Scott Farm products.

4. use of Scott Farm produce at MSFCS

25. MSFCS will use the produce grown on Scott Farm; indeed, the main reason for establishing the school is to provide a market for Scott Farm produce.

26. MSFCS will produce jams, jellies, and butters from Scott Farm produce and possibly other products. Scott Farm is not precisely certain how its finished products will be marketed; it is not clear whether there will be on-site sale of the products. Nor is the range of products to be produced certain at this time.

27. MSFCS students will prepare orchard and other farm-raised products at Scott Farm and prepare meals from other foods at Monadnock's Brattleboro restaurant.

28. On an annual basis, Scott Farm intends that at least 51% of the agricultural products used by MSFCS will be grown on Scott Farm.

29. Scott Farm intends that most of the ingredients used by MSFCS will be grown on Scott Farm, but some will come from elsewhere.

30. Scott Farm would be willing to put limitations in its lease with MSFCS that fruit used at the school must come principally from Scott Farm.

C. MSFCS as "farming"

31. The Vermont Department of Agriculture, Food and Markets (VDAG), through Assistant Attorney General Michael Duane, has submitted a letter relative to Scott Farm's culinary school proposal, which states, in pertinent part:

> 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 it is not "development" and is therefore exempt from Act 250 jurisdiction. 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.

IV. Conclusions of Law

A. Law: "development" and "farming"

Act 250 requires that a Land Use Permit be obtained prior to the commencement of construction on a development or prior to commencement of development. 10 V.S.A. §6081(a). "Development" is defined in relevant part as:

> the construction of improvements for commercial or industrial purposes on more than one acre of land within a municipality that has not adopted permanent zoning and subdivision bylaws...

10 V.S.A. §6001(3)(A)(i).

Without the farming exemption in play, it is clear that the Project is a commercial "development." There will be construction of improvements, namely the school and its facilities within the apple packing barn. A school is a "commercial" establishment. Dummerston does not have both permanent zoning and subdivision regulations; even if Dummerston had those regulations, the Project would be built on Scott Farm property, which is greater than 10 acres.

Because the proposed culinary school meets the general definition of a "commercial development," the question is whether the Scott Farm Project qualifies for the exemption from "development" found in 10 V.S.A. §6001(3)(D)(i): "The construction of improvements for farming … purposes below the elevation of 2500 feet."

To qualify for the farming exemption, MSFCS must meet the definition of "farming" in 10 V.S.A. §6001(22):

> (A) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; or
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> (B) the raising, feeding or management of livestock, poultry, equines, fish or bees; or
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> (C) the operation of greenhouses; or
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> (D) the production of maple syrup; or
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> (E) the on-site storage, preparation and sale of agricultural products principally produced on the farm; or

(F) the on-site production of fuel or power from agricultural products or wastes produced on the farm.

B. Analysis

1. Scott Farm's position

Scott Farm argues its proposed Project - MSCFS - is "farming" and thus exempt from Act 250. Scott Farm contends that the Project encourages further agricultural diversification of the farm, which is necessary for survival in the Twenty-first Century. Further, it argues that the Project has more connections to farming and land stewardship than other projects. Overall, Scott Farm argues that the chief purposes of the Project are to 1) provide a market for their orchard products, 2) provide labor for the orchard, 3) produce vegetables for use in the school kitchen, 4) develop products to sell on the market, 5) result in a tax reduction, 6) provide agricultural diversification, and (7) provide education in the production, preparation and marketing of locally grown produce.

2. "Agricultural products principally produced on the farm"

Scott Farm's claim that its Project fits within Act 250's "farming" exemption finds support from VDAG. As noted in Finding 31, VDAG has taken the position that, if certain standards are met, Scott Farm's proposed Project is exempt from Act 250 jurisdiction as "farming" as defined in 10 V.S.A. §6001(22). The basis of VDAG's position is a standard, apparently based on the term "principally" in §6001(22)(E), that would require, as stated in VDAG's letter, that "at least 51% of the agricultural products used by the school to be made into value-added food products will come directly from [Scott Farm]."

However, while the Board considers VDAG's interpretation as evidence, ultimately, the Board must decide, based upon the language of the statute and prior Board precedent, whether the Project fits within the "farming" exemption.

In *Re: Richard and Marion D. Josselyn,* Declaratory Ruling #333, Findings of Fact, Conclusions of Law and Order (Feb. 28, 1997), the Board examined whether the renovation and conversion of a residential garage to a retail florist shop on 26-acres of land fell within the "farming purposes" exemption. *Id* at 6. In finding the project to be exempt under §6001(22), the Board noted that the Josselyns had "commenced construction of improvements with the aim of growing, preparing and selling various horticulture products principally produced at their premises." *Id.* at 5. Further, the Board determined that the on-site preparation and sale of horticulture products on the premises also constituted "farming." *Id.* While the Board struggled with a determination of whether the growing of seedlings under lights in the garage

constituted "farming," the Board determined that the processing of an agriculture product may occur within the confines of a building and still constitute "farming" as the term is used in Act 250. *Id.* at 6.

One part of the *Josselyn* decision approaches the question raised in the instant case. As part of their project, the Josselyns intended to sell books, cut flowers, and gift items *not* produced at their Ludlow property. The Board concluded that, because the renovation and conversion of the garage was "intended to facilitate the retail sale of horticultural products, and these horticultural products will be *primarily produced*"[1] on the premises, the Josselyns' project constituted construction for farming. *Id.* at 6. However, the Board cautioned that an Act 250 permit would be required if the retail items for sale in the Josselyns' shop "are not principally agricultural products produced on the premises."

VDAG's position thus finds some support in the *Josselyn* case. However, while it might be simple to evaluate sales from a roadside farmstand in terms of the 51% standard, its application to a culinary school becomes somewhat more difficult. VDAG does not state how this 51% standard is to be calculated for Scott Farm's proposed Project. VDAG does not state whether the figure is to be calculated based on a count of the number of ingredients, or the weight, volume, or value of the agricultural products used by the culinary school; and, if value, VDAG does not specify whether the calculation is to be based on retail or wholesale cost.

Nor does VDAG define the term "agricultural products." If, for example, 51% of the apples used in an apple pie are produced on Scott Farm, will this meet VDAG's understanding of the term "farming?" Or must 51% of *all* the ingredients in an apple pie (and how is this percentage measured?) come from Scott Farm for the culinary school to be considered "farming?" [2]

Regardless of the words used by VDAG in setting its test, it is for the Board to decide what the words "principally produced" means. Applying that phrase to the proposed Project is not an easy task, but we believe that the "principally produced" requirement can be satisfied *if the majority of the weight or volume of the ingredients in the finished product comes from Scott Farm*. Thus, even if the

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[1] The *Josselyn* decision appears to have used the words "principally produced" and "primarily produced" interchangeably.

[2] At the hearing, Scott Farm provided a further interpretation of VDAG's position: that if 51% of all of the apples in a "value-added food product" are produced on Scott Farm, then the "principally produced" test is met. The Board believes that this would be an absurd result; under this reading, the "farming" exemption would overwhelm the statute.

primary ingredient in the finished product does not come from Scott Farm, as long as most of the ingredients do, the product, and, more importantly for purposes of this case, *the process by which it is made*, fits the "farming" exemption of the statute. Thus, if an apple-pear jelly is comprised of 40% sugar, 30% Scott Farm apples, and 30% Scott Farm pears (by weight or volume) this product falls within the statutory exemption, because 60% the finished product is produced by Scott Farm.

3. The Monadnock – Scott Farm Culinary School

While there is no direct Board precedent that gives a dispositive, black and white answer to the question of whether a culinary school such as the one proposed by Scott Farm is "farming," prior cases which discuss the farming exemption do provide some guidance.

The case of *Re: Sterling College,* Declaratory Ruling #259, Findings of Fact, Conclusions of Law, and Order (Mar. 27, 1992), addressed the application of farming exemption language to Sterling College's construction of a farm equipment storage building.

The facts of the case make it clear that Sterling College, although an educational institution, also had the attributes of a farm. The College kept five or six steers and raised two litters of piglets each year, which were sold or raised for pork used in the College kitchen. Twenty ewes on the farm provided lambs which were sold or used in the College dining hall and also used for wool that was sold in the College bookstore. Three draft horses were used for logging operations, and the College had 20 to 60 laying hens that were sold or provided eggs and meat. Goats were raised and sold, their milk fed to the pigs and calves, and about ten turkeys were raised for Thanksgiving. The students ran the farm and gardening operations; moreover, the farming operation was essential to the College's educational mission and helped it meet expenses. *Id.* at 3.

The petitioner, who sought to assert Act 250 jurisdiction over the equipment storage building, argued that the College's activities did not amount to "farming" as defined in the Act. *Id.* at 4. Specifically, he claimed that the College is an educational institution devoted to the housing and teaching of students, and the principal purpose of the College is to receive tuition payments, not to cultivate land to produce food for forage crops. *Id.* at 4. Moreover, those advocating for jurisdiction argued that the Legislature's intent in enacting the farming exemption in Act 250 was to exempt "ordinary Vermont farms." *Id.* at 4. Thus, they argued that the College's "farming" operation amounted to a commercial operation and that the construction of the proposed storage shed was therefore for a commercial purpose. *Id.* at 4.

The Board disagreed. It found that the College's activities were part of a farming operation and that the construction of a building to store equipment used in the conduct of such an operation was for "farming purposes" and therefore exempt from the definition of "development" under Chapter 151. *Id.* at 5. The fact that Sterling College taught students in return for tuition payments did not change the nature of the College's farming activities. *Id.*

Here, Scott Farm has devised a very creative way to bring its produce to market. Rather than hire farmhands and other workers to cultivate its produce 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. [3]

We thus find that the *Sterling College* decision supports Scott Farm's present proposal, as that case indicates that a school's farming activities can be exempt from Act 250 jurisdiction, as long as its students are principally engaged in activities which fall within the exemptions listed in 10 V.S.A. §6001(22), in this case those found in subsection (E), "the on-site storage, preparation and sale of agricultural products principally produced on the farm."

It is also significant to our decision today that the scope of Scott Farm's Project is narrow and confined only to restricted facts presented here. The number of students who will attend the school will not exceed fifteen. There will be only limited construction - cooking facilities - at the farm to serve the school; there will be no classrooms, dormitories, administration buildings, or additional parking lots. The school's activities will also involve only the preparation and sale of Scott Farm's agricultural products and will not expand into other activities normally associated with a culinary school, such as restaurant management, marketing, etc. There will be no cafeteria at Scott Farm, and prepared food or meals will not be served to the public at Scott Farm. Most importantly, Scott Farm intends that the majority of the agricultural products used at the culinary school will come from its own plants and trees.[4]

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[3] The Board has previously held that the provisions of the "farming purposes" exemption and the definition of "farming" are clear and unambiguous and should be enforced according to their express terms. *Josselyn* at 5; *Vermont Egg Farms, Inc.,* Declaratory Ruling #317, Findings of Fact, Conclusions of Law, and Order at 7 – 8 (Jun. 14, 1996). Our conclusion today follows this precedent.

[4] Of course, should the Project change from that described in this decision, Scott Farm may well need to obtain a permit.

While the culinary school is an educational endeavor, Scott Farm's primary purpose behind the school is to market the products grown on Scott Farm, not to operate a school. [5]

A final comment is appropriate. We believe that our decision to find Scott Farm's proposed Project exempt from Act 250 jurisdiction 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 the 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. While we recognize that our decision today may lessen the incentive for the legislature to examine this question, we urge the legislature to review the definition of "farming" in §6001(22).

V. Order

Scott Farm's Project is exempt pursuant to 10 V.S.A. §§6001(3)(D)(i) and (22), and is not subject to the jurisdiction of 10 V.S.A. Ch. 151 (Act 250).

Dated at Montpelier, Vermont this 16th day of January 2003.

ENVIRONMENTAL BOARD

__/s/Marcy Harding_____
Marcy Harding, Chair
* Bernie Henault
George Holland
* Samuel Lloyd
W. William Martinez
Alice Olenick
Jean Richardson
Donald Sargent

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[5] We note that the dissent distinguishes the present case from the activities found to be exempt in the *Josselyn* case – whereas, in *Josselyn*, the farm presumably paid its workers to prepare its farm produce for sale, the MSFCS students will pay tuition to the culinary school "for the privilege of preparing Scott Farm's products for sale." *Infra,* at 14. We note, however, the Sterling College students similarly paid tuition, and this fact was clearly no consequence to the Board's decision in that matter. *Sterling College, supra,* at 5.

* Dissenting opinion of Members Lloyd and Henault:

We must dissent.

Even if the Board could apply, with a modicum of confidence, the "principally produced" test suggested by the majority, the question of whether MSFCS is exempt under Act 250's "farming" definition remains unresolved because of one attribute that distinguishes Scott Farm's proposed Project from the *Josselyn* case: regardless of its good intentions and the fact that one purpose of MSFCS is to produce value-added products from Scott Farm's produce, stripped to its bare essentials, Scott Farm proposes to run a culinary school in its apple packing barn.

The question, therefore, is whether MSFCS, as a *school*, is a "farming purpose." We must conclude that the culinary school, as proposed by Scott Farm, is not a farming purpose and therefore does not fall within the language of the farming exemption in 10 V.S.A. §§6001(3) and (22).

We agree that the *Sterling College* case is helpful to the analysis of the present matter, even though the two cases present diametrically opposite scenarios, and even though we read the import of that decision differently from the majority. We believe that the main point of the *Sterling College* decision can be summed up in the Board's conclusion that, "Act 250 regulates land use *regardless of the identity of the person or institution conducting the use*." *Sterling College, supra,* at 4 – 5., (emphasis added), *citing, In re Baptist Fellowship of Randolph,* 144 Vt. 636, 639 (1984).

In *Sterling College*, the College was engaged in farming activities, and, as a part of those activities, the College wished to construct a farm equipment storage building. Clearly, *the building* was constructed in furtherance of the College's agricultural endeavors; it did not matter to the decision that the College is primarily an educational institution which receives tuition from its students, because the question at issue in the Declaratory Ruling was whether *the building* was constructed to serve farming purposes. [6]

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[6] The Board's decision makes it clear that the focus of its analysis was on the particular construction at issue before it: "*Construction of a shed to store equipment used in the conduct of its farming operation is therefore for 'farming purposes'* and is exempt from the definition of development in Act 250." *Sterling College, supra,* at 5 (emphasis added).

Conversely, in the present case, it does not matter that Scott Farm is the institution that wishes to construct culinary school facilities inside its apple packing barn; what matters is *the construction and land use* (the culinary school) that might be subject to regulation and whether such use can be considered to be "farming" and thus within the provisions of the farming exemption. Scott Farm's identity as a *farm* is not relevant to a consideration of what it wishes to build on its land; the fact that Scott Farm is a farm does not mean that anything that Scott Farm does on its farmland is intrinsically "farming." [7]

Second, as the majority notes, the provisions of the "farming purposes" exemption and the definition of "farming" are clear and unambiguous and should be enforced according to their express terms. *Josselyn* at 5; *Vermont Egg Farms, Inc.,* at 7 – 8.

Third, "[t]he 'farming' exemption, like all exemptions, is to be read narrowly and only found to apply when the facts clearly support the exemption's application." *Josselyn,* at 6; *and see, WAJA, Inc.,* Declaratory Ruling #162, Findings of Fact, Conclusions of Law, and Order at 3 (Oct. 10, 1984). Thus, every claim to the exemption must be justified. *Compare, Commercial Airfield, Cornwall, Vermont*, Declaratory Ruling #368, Findings of Fact, Conclusions of Law, and Order (Jan. 28, 1999) (construction of improvements for the provision of commercial crop dusting and aircraft maintenance services is not exempt from the definition of development as farming, logging or forestry). [8]

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[7] As noted, the *Sterling College* case addressed only the construction of a barn to store farm equipment. Nevertheless, we agree that *Sterling College* could be read to hold that, as the majority states, "a school's farming activities can be exempt from Act 250 jurisdiction, as long as its students are principally engaged in activities which fall within the exemptions listed in 10 V.S.A. §6001(22)…." *Supra* at 10. But the majority decision reverses this concept: it holds that *a farm's schooling activities* are likewise exempt if its students engage in exempt activities. We cannot agree with this holding, and therein lies the difference between the majority's opinion and our own.

[8] There are other cases which defined the term "farming," but they either precede the 1985 adoption of the §6001(22) definition by the Legislature and are therefore of limited value, e.g. *WAJA, Inc., supra,* or they are so inapposite to the present question as to be of no value to the analysis. *E.g., Town of Windsor*, Declaratory Ruling #255, Findings of Fact, Conclusions of Law, and Order at 5 (July 30, 1992) (spreading of sludge is not exempt "farming," because "the farming exemption requires that there be construction for farming purposes and no construction for such purposes is presented by the facts of this case.")

As noted by VDAG's letter, the statutory exemption that most closely applies to Scott Farm's culinary school proposal appears in the language of 10 V.S.A. §6001(22)(E): "the on-site storage, preparation and sale of agricultural products principally produced on the farm." Certainly, MSFCS students will be engaged in the storage, preparation and sale of Scott Farm's produce, and one could therefore argue that Scott Farm's proposal is similar to that approved by the Board in the *Josselyn* decision.

But there is an important difference that distinguishes *Josselyn* from the present matter. In *Josselyn,* the owners of the farm either prepared their farm goods for sale or, presumably, hired employees to do so – in other words, the farm *paid* to have its products prepared for sale; such costs for its products' preparation was a cost of doing business as a farm.

Conversely, in the case of the Scott Farm proposal, the culinary school students will be paying Scott Farm for the privilege of preparing Scott Farm's products for sale.

The Board must consider whether subsection (E) was intended by the legislature to apply to a culinary school. Did the legislature, by this language, mean to limit "farming" to the scenario where an apple orchard would produce applesauce, cider and juice from apples grown at the orchard? Or did the legislature intend that the farm could earn income by hosting a school where students would come to learn about the preparation of apple products?

We find no "express term" in the definition of "farming" that mentions educational purposes or a school, even if that school is a part of, or an extension of, a farming operation. We further conclude that the Board must read the "on-site storage, preparation and sale of agricultural products principally produced on the farm" exemption narrowly.

We have little doubt that, in 1970, the legislature was well aware that many farms traditionally earned income from preparing and selling their homegrown produce on the open market at road-side stands; it was this activity that the legislature sought to cover by the language in §6001(22)(E), not the running of inns, camps or schools. In the case of Scott Farm's proposed Project, while Scott Farm might be selling its agricultural products prepared by the students who attend MSFCS, Scott Farm is also, in conjunction with Monadnock, selling a service - education - to those same students. And, keeping in mind the Board's admonition on page 6 of the *Josselyn* decision that "[t]he 'farming' exemption … is to be read narrowly" and applied only "when the facts clearly support" its application, We are am simply unable to find any language in §6001(22) that can be read to include the

sale of such cooking classes within the definition of "farming," even if the classes are being sold by a farm.[9]

We also have serious concerns that the majority's decision opens a door which should be opened only upon careful consideration. The farming exemption is like a light switch which is either "on" or "off:" a project is either farming and exempt, or it is not farming and not exempt. There is no "in between;" the Board cannot decide that the Scott Farm project, even though it is a school, is exempt because it is a "small" school, with only a limited number of students with only a limited amount of construction or space devoted to instruction. If the Scott Farm school is exempt as farming, then a larger school must also be exempt; indeed, the only limitation on the size of the school is amount of produce that the farm can grow. But a large farm might support a school with not five but fifty students, especially if it were to be operated for only a few months each year. [10] And if cooking facilities are necessary for the school, why then would not classrooms, dormitories, and a dining hall not also be necessary to the operation of the school? We have concerns that the Board would not, under the precedent set today, be able to assert jurisdiction were such facilities proposed as a part of a school on a farm. [11]

Our concern is not merely speculative, and our light switch analogy is entirely appropriate, as evidenced by the Board's decision in *Vermont Egg Farms, Inc., supra.* There, the Board was constrained to find that because coops which house seven chickens fall within the definition of "farming," coops which house 700,000

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[9] Because of the limited scope of Scott Farm's proposal, the process of obtaining a permit for the proposed Project should be simple and straightforward. We also note that Scott Farm is free to request the District Commission to limit the scope of Act 250 jurisdiction over its farm to only that portion of the farm (most notably the apple packing barn and parking lot) implicated by the culinary school; not all of Scott Farm's property need be subject to the law's reach or control. *See, Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 - 18 (May 18, 2001).

[10] One might also envision a scenario in which several farms join together to support a single culinary school with many more students than the fifteen contemplated by Scott Farm.

[11] We cannot agree that, because the Scott Farm proposal includes only facilities for the preparation of food, it is exempt, but that a more expansive operation might not, as the majority implies, be exempt. If, as the majority concludes, a culinary school is exempt as "farming," then we believe that all parts of such a school – like all parts of a farm (e.g. the Vermont Egg Farm's waste water disposal systems) – must also be exempt. To paraphrase Gertrude Stein's well-known aphorism, "A school is a school is a school."

chickens must also fall within the definition. It did not matter that there would be numerous environmental impacts as a result of the large project contemplated by Vermont Egg Farms - the construction of five laying barns, two pullet barns, an egg washing and grading station, a feed mill, a manager's residence, and two waste water disposal systems - the project was nonetheless "farming" and exempt from the definition of "development." It is clear that the Board was troubled by the fact that the language of Act 250 gave it no choice but to conclude that Vermont Egg Farms had proposed a project that met the exemption; indeed, the Board concluded its decision by noting that "the impacts of such farms should be subject to regulatory review," *Vermont Egg Farms, Inc., supra,* at 8, a suggestion taken by the legislature in its enactment of the so-called "large farm" statute, 6 V.S.A. §§4849 - 4855.

We recognize Scott Farm's desire to maintain its farming activities and applaud its imaginative approach to generating income in that pursuit and its innovative approach to marketing its products. Agriculture in Vermont is continually evolving, and the Board cannot always address such evolution; the Board is constrained by the language of the law, which only the legislature can change. We fear that, while the majority may suggest that the legislature review the farming exemption in light of changing times, as a result of the majority's decision in this case, there is little incentive for such review to occur.