LEGAL AND POLICY ISSUES FOR A GROWING AGRITOURISM INDUSTRY

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ABSTRACT

Agritourism activity has increased dramatically over the past 10 years, both in number of operations and income. The types of agritourism activity have also expanded rapidly in recent years. The law, on the other hand, moves slowly. The disconnect between the pace of change in the industry and the legal regime creates uncertainty for operators, regulators, and policy makers. The difficulty in defining the rapidly changing industry lies at the center of much of the uncertainty. This Article provides an overview of the agritourism industry and recent changes in agritourism activities. The authors discuss different definitions of agritourism in a variety of contexts. Four primary current issues for agritourism in need of further resolution are examined: liability, land use and zoning, real property taxation, and federal income taxation. The Article concludes that attention to the definition and scale of agritourism is necessary to remove uncertainty and ambiguities in this area of law.

I. INTRODUCTION

A midwestern farm with historical roots as a commercial grain operation now earns more revenue from "agritourism" than from grain production.[1] Visitors pay to go on hayrides, feed farm animals, purchase pumpkins and ready-to-eat foods, and play on combine slides, zip lines, straw barn forts and more. The farm

1. Based on comments from an existing farm operator in a private conversation with one of the Article authors.

also charges fees for school tours and wedding rentals. Like many other farms across the United States, the farm is riding an agritourism wave that yielded a tripling of on-farm agritourism revenues from 2002 to 2017.[2] The farm demonstrates why diversifying with agritourism activities is an increasingly common and successful financial strategy for agricultural operations.[3]

But while agritourism is typically an offshoot of agriculture, the historic body of agricultural law often falls short in solving the legal issues agritourism raises.[4] As a result, states have enacted new laws unique to agritourism or adapted existing agricultural laws to accommodate agritourism issues.[5] Even so, legal issues remain as agritourism continues to evolve across the United States.[6] Research reveals that many of the issues stem from insufficient definitions of agritourism and a failure to recognize and adapt to agritourism's dynamic nature. Related and also of concern are the issues of scale and displacement, and how laws should apply when agritourism activities overtake and perhaps displace agricultural production activities.

This Article provides an overview of agritourism in the United States today and assesses both agritourism's legal history and its current legal and policy issues. Part II examines challenges with defining agritourism, trends in agritourism activities, and the current agritourism economy in the United States. Part III explains initial legal concerns for agritourism and policy responses by state and federal governments. Part IV presents four primary current issues for agritourism in need of further resolution: liability, land use and zoning, real property taxation, and federal income taxation. The Article concludes that attention to the definition and scale of agritourism is necessary to remove uncertainty and ambiguities in this area of law.

2. Christine Whitt et al., *Agritourism Allows Farms to Diversify and Has Potential Benefits for Rural Communities*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC.: AMBER WAVES (Nov. 4, 2019), https://www.ers.usda.gov/amber-waves/2019/november/agritourism-allows-farms-to-diversify-and-has-potential-benefits-for-rural-communities/ [https://perma.cc/9Y4Z-68F5].

3. *See id.*

4. *See generally States' Agritourism Statutes*, NAT'L AGRIC. L. Ctr. (July 5, 2024), https://nationalaglawcenter.org/state-compilations/agritourism/ [https://perma.cc/9FEG-KKAM].

5. *Id*.

6. *See generally* Peggy Kirk Hall et al., *The Evolution of Agritourism: Current Legal Issues & Future Trends*, NAT'L AGRIC. L. Ctr., at 49:50 (Aug. 19, 2020), https://nationalaglawcenter.org/webinars/agritourism2020/ [https://perma.cc/YE2X-P6QK].

II. AGRITOURISM IN THE UNITED STATES TODAY

A close look at the agritourism sector in the United States today can be helpful in understanding the legal and policy issues facing agritourism. We begin this section with the challenge of defining what we mean by "agritourism," a question that echoes through other sections of this Article. The economic growth of the agritourism sector is also relevant in analyzing agritourism's legal and policy needs, thus this section presents a snapshot of recent economic trends for agritourism.

A. Defining Agritourism

There is not a simple or agreed-upon definition of agritourism. Explanations of the term range in detail from "the crossroads of tourism and agriculture,"[7] to "any activity incidental to the operation of a farm that brings members of the public to the farm for educational, recreational, or retail purposes."[8] The agritourism industry itself defines agritourism as "an agricultural enterprise attracting visitors to a farm or ranch to experience a connection with agriculture production and/or processing through entertainment, education, and/or the purchase of farm products."[9] The lack of a singular definition for agritourism is arguably at the root of many legal issues addressed in this Article. But the challenge of defining agritourism is not solely a legal challenge. Economists and social scientists have long highlighted the need for a consistent definition of agritourism for many reasons, including policy, regulatory, market strategy, and academic research purposes.[10]

One frequently cited conceptual framework for defining agritourism is the Core and Peripheral Tiers of Activities model (core and peripheral activities model) which proposes five categories of agritourism activities: "direct sales, education, hospitality, outdoor recreation, and entertainment."[11] Each of these

7. *Agritourism - An Overview*, NAT'L AGRIC. L. CTR. (July 5, 2024, 6:23 PM), https://nationalaglawcenter.org/overview/agritourism/ [https://perma.cc/B5RN-RPSF].

8. *Agritourism*, AM. PLAN. ASS'N (July 5, 2024, 6:29 PM), https://planning.org/knowledgebase/agritourism/ [https://perma.cc/NQ6T-ZEDZ].

9. *Agritourism*, NAFDMA INT'L AGRITOURISM ASS'N (July 5, 2024, 6:31 PM), https://www.nafdma.com/ [https://perma.cc/GM3X-HLED].

10. Claudia Gil Arroyo et al., *Defining Agritourism: A Comparative Study of Stakeholders' Perceptions in Missouri and North Carolina,* 37 TOURISM MGMT. 39, 40 (2013).

11. Lisa Chase et al., *Agritourism: Toward a Conceptual Framework for Industry Analysis*, J. OF AGRIC., FOOD SYS., & CMTY. DEV., Spring 2018 at 13, 17–18

categories contains both "core" and "peripheral" activities, based upon the location of the activity and how connected it is to agriculture.[12] This categorization implies that agritourism activity should support and be secondary to agricultural activity.[13]

Core activities are those that occur on a farm or ranch and are strongly connected to agriculture, such as farm stays, classes, tours, u-pick opportunities, corn mazes, hayrides, festivals, farmstands, horseback riding, and farm-to-table dinners, while peripheral activities may or may not occur on a farm and are less connected to agriculture, such as hiking, art and photography, weddings, concerts, fishing and hunting, concerts, and farmers markets.[14] The model's authors contend that core activities are generally accepted as agritourism while peripheral activities may be controversial.[15]

Statutory law also plays a role in defining agritourism. The states with agritourism laws use a range of legal definitions for agritourism, also referred to as agricultural tourism or agritourism activities.[16] While the definitions share some commonalities, many variations exist.[17] Two identifiable themes in statutory definitions center on whether an agritourism activity must have a direct connection to agriculture and whether a participant must pay to engage in the activity.[18]

At the federal level, the United States Census of Agriculture has referred to agritourism in its Census of Agriculture questionnaire, albeit inconsistently. The 2012 Census of Agriculture directed producers to report income from "agri-tourism and recreational services, such as farm or winery tours, hay rides, corn maze fees, hunting, fishing, etc."[19] The 2017 Census of Agriculture changed its

(presenting a visual diagram of the model with the primary categories on a circle, core activities on the inner part of the circle, peripheral activities on the outer part, and activities sometimes overlapping between multiple categories).

12. *Id.*

13. *See generally id.*

14. *Id.*

15. *Id.* at 17.

16. ESTHER AKWII & SOPHIA KRUSZEWSKI, VT. L. SCH. CTR. FOR AGRIC. & FOOD SYS., DEFINING AND REGULATING AGRITOURISM 4 (2020), https://www.vermontlaw.edu/sites/default/files/2021-04/Defining-and-Regulating-Agritourism.pdf [https://perma.cc/6T7G-R3T6] (article includes examples of state definitions for agritourism); *see also States' Agritourism Statutes, supra* note 4 (compilation of all state agritourism statutes).

17. AKWII & KRUSZEWSKI, *supra* note 16, at 4.

18. *Id.* at 4–5.

19. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE REPORT FORM GUIDE 42 (2012), https://agcensus.library.cornell.edu/wp-content/uploads/2012_RFG_Final.pdf [https://perma.cc/6GQR-LU4L].

reference to agri-tourism slightly, to "hunting, fishing, farm or wine tours, hay rides, etc."[20] and the 2022 Census of Agriculture's reference to "agri-tourism and recreational services" differs somewhat, explained as "farm or winery tours, hay rides, corn maze fees, hunting, fishing, etc."[21]

The evolving nature of agritourism likely contributes to the definitional challenges. New types of agritourism activities frequently emerge and expand agritourism beyond the traditional activities noted in the Census of Agriculture—farm or winery tours, hayrides, corn mazes, hunting, and fishing.[22] Agritourism operations today include, in addition to those more traditional agritourism activities, offerings such as bounce houses, zip lines, playground activities, cooking classes, gourd golfing, pumpkin bowling and slinging, haunted house and barn tours, and more.[23] Newer trends are adding weddings and private events, overnight stays, porch and board games, "u-pick" crops including flowers, and photography stations to the operation.[24] Beer, wine, spirits and food are currently gaining in popularity, along with extending the typical agritourism season to holidays like Christmas and Easter and providing "authentic" farm experiences.[25] Agritourism, a diversification of agriculture, continues to diversify itself. But central to this Article is the concern that many of these newer activities would arguably constitute "peripheral activities" that create a debate over whether the activity should or should not fall within the definition of agritourism.[26]

B. The Agritourism Economy

Occurring in tandem with the expansion of activities within agritourism operations is the growth of the agritourism economy. The 2017 Census of Agriculture revealed that the nation's 153,961 farms with agritourism activities

20. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., 2017 CENSUS OF AGRICULTURE, GENERAL EXPLANATION AND CENSUS OF AGRICULTURE REPORT FORM B-24 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usappxb.pdf [https://perma.cc/7ASD-AP79].

21. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., 2022 CENSUS OF AGRICULTURE REPORT FORM GUIDE 62 (2022), https://www.nass.usda.gov/AgCensus/Report_Form_and_Instructions/2022_Report_Form/2022_Census_of_Agriculture_Report_Form_Guide.pdf [https://perma.cc/URC9-ACLX].

22. *See id.*

23. *See generally* Kirk Hall et al., *supra* note 6.

24. *Id.* at 08:05.

25. Telephone Interview with Rob Leeds, Agric. & Nat. Res. Educator for Ohio State Univ. Extension and member of the Int'l Agritourism Ass'n (June 21, 2024) (notes on file with Ohio State Univ. Agric. & Res. L. Program).

26. *See Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 17.

and direct product sales saw a three-fold increase in agritourism and recreational services revenue from 2012 to 2017, from $704 million in 2012 to nearly $950 million in 2017.[27] The distribution of agritourism income reported was uneven, however, with 32.4% of farms with agritourism and direct sales making less than $10,000 annually, 12.3% making between $100,000 and $249,999, and 1.8% yielding between $1,000,000 and $2,500,000 dollars.[28]

Early analysis from the recently released 2022 Census of Agriculture data shows continued growth in total agritourism and recreational services receipts from 2017 to 2022.[29] Although some states experienced decreases, 32 states had growth in agritourism receipts and the average receipts per farm increased.[30] While the number of agritourism operations across the nation stayed relatively the same, many states more than doubled in their number of agritourism operations.[31] Private market analysts forecast accelerated future growth in the United States agritourism market, with an expected compound annual growth rate of 11.4% from 2022 to 2030.[32]

III. POLICY RESPONSES TO LEGAL ISSUES FOR AGRITOURISM

The legal issues arising from agritourism have also evolved alongside the industry's ongoing diversification and economic growth. Policy responses have addressed some of these legal issues for agritourism. One issue identified early in agritourism's history was liability for injuries suffered by agritourism activity

27. Whitt et al., *supra* note 2 (noting that the increase could be even higher, as the 2017 data did not include wineries, but the 2012 data did include wineries); PENN ST. COLL. OF AGRIC. SCIS. ET AL., AGRITOURISM IN THE UNITED STATES 1 (2023), https://aese.psu.edu/outreach/agritourism/projects/nifa-agritourism/state-factsheets/2023-us-at-ds.pdf [https://perma.cc/6CCP-DE7D].

28. PENN ST. COLL. OF AGRIC. SCIS. ET AL., *supra* note 27, at 4.

29. JASON S. ENTSMINGER & CLAUDIA SCHMIDT, NE REG'L CTR. FOR RURAL DEV., AGRITOURISM AND RECREATIONAL SERVICES ON US FARMS 1 (2024), https://nercrd.psu.edu/pubs/agritourism-data-2022-census-of-agriculture/ [https://perma.cc/7DWA-7SJW].

30. *Id.* at 10.

31. *Id.* at 14.

32. *See, e.g.*, *Agritourism Market Outlook from 2024 to 2034*, FUTURE MARKET INSIGHTS INC., (June 2024), https://www.futuremarketinsights.com/reports/agritourism-market [https://perma.cc/PW7A-XATJ]; GRAND VIEW RSCH., AGRITOURISM MARKET SIZE, SHARE & TRENDS ANALYSIS REPORT BY ACTIVITY (ON-FARM SALES, OUTDOOR RECREATION, ENTERTAINMENT, EDUCATIONAL TOURISM, ACCOMMODATIONS), BY SALES CHANNEL (TRAVEL AGENTS, DIRECT SALES), BY REGION, AND SEGMENT FORECASTS, 2022 – 2030 (2024), https://www.grandviewresearch.com/industry-analysis/agritourism-market [https://perma.cc/4MVT-P2G5].

participants, given the potentially risky nature of visiting a farm and engaging in agritourism activities. Survey research highlights this concern, with liability being one of the top legal challenges reported by agritourism operators.[33] The first state agritourism statute, the Kansas Agritourism Promotion Act,[34] bears out this long-standing apprehension with liability risk.[35] The statute forms the first example of responding to the liability issue by providing liability protection for agritourism operators.[36]

Other states have followed Kansas with agritourism legislation, and over 40 states now have statutory provisions that focus on agritourism issues in the state.[37] While the statutes differ in breadth and type of issues addressed, the provisions commonly include a civil liability component that reduces liability risk for agritourism operators.[38] Additional legal needs targeted in state agritourism laws include food production regulations, real property taxation, building and fire code compliance, and land use and zoning regulation.[39] While only some states direct attention to land use and zoning regulation for agritourism, litigation trends suggest this issue needs attention.[40] Land use litigation outpaced personal injury litigation for agritourism from 2013 to 2020.[41]

33. LISA CHASE ET AL., U. OF VT. EXTENSION, AGRITOURISM AND ON-FARM DIRECT SALES SURVEY: RESULTS FOR THE U.S. 26 (2021) [hereinafter AGRITOURISM AND ON-FARM DIRECT SALES SURVEY], https://www.uvm.edu/sites/default/files/Vermont-Tourism-Research-Center/survey/US-Agritourism-Survey-Report-012021.pdf [https://perma.cc/TYA3-SB85] (noting that 81% of respondents reported liability as their third highest challenge, behind time management (90%) and labor (89%). The cost and availability of insurance came in as the fifth highest challenge, with 80%).

34. KAN. STAT. ANN. §§ 32-1430 to -1438 (2024).

35. PEGGY KIRK HALL & EVIN BACHELOR, NAT'L. AGRIC. L. CTR., AGRITOURISM IMMUNITY LAWS IN THE UNITED STATES 2 (2019), https://nationalaglawcenter.org/wp-content/uploads/assets/articles/Agritourism-series-Immunity-laws.pdf [https://perma.cc/5B7A-KTWA].

36. KAN. STAT. ANN. § 32-1435.

37. *States' Agritourism Statutes, supra* note 4.

38. AGRITOURISM IMMUNITY LAWS IN THE UNITED STATES, *supra* note 35, at 1.

39. *Agritourism - An Overview*, *supra* note 7.

40. PEGGY KIRK HALL & ELLEN ESSMAN, NAT'L AGRIC. L. CTR., RECENT AGRITOURISM LITIGATION IN THE UNITED STATES 1 (2024), https://nalcpro.wpenginepowered.com/wp-content/uploads/assets/articles/AgritourismLitigationHallFinal.pdf [https://perma.cc/N9D3-EXW2].

41. *Id.*

At the federal level, attention to agritourism has focused on economic needs and impacts rather than legal issues.[42] A bill recently introduced in Congress for the second time underscores the federal interest in the agritourism economy. The "Accelerating the Growth of Rural Innovation and Tourism Opportunities to Uphold Rural Industries and Sustainable Marketplaces Act" (AGRITOURISM Act) aims to "encourage and promote . . . agritourism activities and businesses."[43] The bill would establish an Office of Agritourism in the USDA to facilitate interagency program coordination, conduct outreach, coordinate programs, tools, and networks, and improve financial literacy, business planning, and marketing for agritourism.[44] Notably, the bill fails to include a definition of agritourism, but refers to "(1) educational experiences; (2) outdoor recreation; (3) entertainment and special events; (4) direct sales; (5) accommodations; and (6) any other activity or business relating to agritourism, as determined by the Secretary," under its reference to agritourism activities and agritourism businesses.[45]

IV. CONTINUING AND EMERGING LEGAL ISSUES FOR AGRITOURISM

Do state and federal laws and policies meet the needs of a growing agritourism industry? While a legal history and body of law for agritourism now exists, what challenges remain? This section proposes four unresolved legal issues for agritourism: liability for harm on agritourism operations, land use and zoning regulation, real property taxation, and federal income taxation. It explains the legal quandaries raised in each area to highlight the need for further legal and policy responses.

42. *See, e.g.*, Whitt et al., *supra* note 2; *Benefits and Challenges of Agritourism*, U.S. DEP'T OF AGRIC., at 1:10 (Oct. 24, 2023), https://www.usda.gov/media/radio/weekly-features/2023-10-24/benefits-and-challenges-agritourism [https://perma.cc/L5PJ-9PTB]; DENNIS M. BROWN & RICHARD J. REEDER, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., FARM-BASED RECREATION: A STATISTICAL PROFILE 5 (2007), https://www.ers.usda.gov/webdocs/publications/45941/12871_err53.pdf?v=0 [https://perma.cc/BX5E-H754].

43. H.R. 5203, 118th Cong. (2023). Introduced August 11, 2023, the bill was referred to the House Agriculture Committee's Subcommittee on Commodity Markets, Digital Assets, and Rural Development, but as of August 28, 2024, there have not been any hearings on the bill. *H.R.5203 – AGRITOURISM Act*, CONGRESS.GOV (Aug. 28, 2024, 4:39 PM), https://www.congress.gov/bill/118th-congress/house-bill/5203/all-actions [https://perma.cc/K3VC-749R]. A similar bill in the 117th Congress, H.R. 6408, did not receive a hearing before the House Agriculture Committee. *H.R.6408 – AGRITOURISM Act*, CONGRESS.GOV (Aug. 28, 2024, 4:42 PM), https://www.congress.gov/bill/117th-congress/house-bill/6408/all-actions?s=1&r=3 [https://perma.cc/NPX7-UFHH].

44. H.R. 5203.

45. *Id.*

A. Liability for Harm on Agritourism Operations

To date, civil liability protection forms the most common policy response to the legal needs of agritourism.[46] Dozens of state laws now specifically address agritourism activities in statutes that offer immunity from civil liability for injuries sustained in an agritourism setting.[47] Additionally, many immunity laws that pre-date agritourism laws expressly include or indirectly encompass agritourism activities, such as recreational use statutes that grant immunity to landowners who open their properties for recreational activities,[48] "u-pick" laws that limit liability for injuries from self-harvest of agricultural products on another's land,[49] and equine activity immunity laws that provide immunity for those who offer activities involving horses and other equine.[50]

Agritourism immunity laws have already been the target of criticism and doubt about their effectiveness in protecting agritourism operators.[51] A notable challenge exists in the "inherent risks" approach, the common model used for agritourism immunity laws.[52] In many of the state laws, liability protection extends to injuries that are due to the "inherent risks" of an "agritourism activity," a recognition that farms and activities that occur on farms pose inherent dangers that

46. Terence J. Centner, *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities,* 9 BUFF. ENVTL. L. J. 1, 2 (2001) [hereinafter *Revising State Recreational Use Statutes*].

47. *Id.*; JESSE J. RICHARDSON JR., VA. COOP. EXTENSION, MANAGING LIABILITY: LEGAL LIABILITY IN AGRITOURISM AND DIRECT MARKETING OPERATIONS 1 (2012), https://vtechworks.lib.vt.edu/bitstream/handle/10919/47470/CV-25-PDF.pdf?sequence=1 [https://perma.cc/623B-Y2F9]; *see also States' Agritourism Statutes, supra* note 4 (compilation of all state agritourism statutes).

48. AGRITOURISM IMMUNITY LAWS IN THE UNITED STATES, *supra* note 35, at 7. *But see Revising State Recreational Use Statutes*, *supra* note 46, at 3 (over half of the statutes preclude coverage of landowners who charge an entry fee); Ashley Griffin, *Fields of Opportunity: Agritourism as a Growing Industry and Impetus for Legislation Protecting Farmers and Landowners*, 28 DRAKE J. AGRIC. L. 81, 85 (2023) (discussing instances where the liability protection will not apply).

49. AGRITOURISM IMMUNITY LAWS IN THE UNITED STATES, *supra* note 35, at 8–9; *see* 42 PA. CONS. STAT. § 8339 (2024); OHIO REV. CODE ANN. § 901.52 (West 2024) (two examples of state "u-pick" immunity laws).

50. Brigit Rollins & Elizabeth Rumley, *Equine Activity Statutes,* NAT'L AGRIC. L. CTR. (Mar. 5, 2022), https://nationalaglawcenter.org/state-compilations/equineactivity/ [https://perma.cc/R5QU-VY9D] (compilation of laws in 48 states that provide equine activity immunity).

51. RICHARDSON, *supra* note 47, at 5; Terence J. Centner, *Liability Concerns: Agritourism Operators Seek a Defense Against Damages Resulting from Inherent Risks,* 19 KAN. J. L. & PUB. POL'Y 102, 102 (2009).

52. *See* RICHARDSON, *supra* note 47, at 4.

are not completely controllable or avoidable.[53] Agritourism immunity statutes utilize the assumption of risk theory and shift the risk to the participant who chooses to engage in agritourism activities.[54]

But with the continued diversification of agritourism and growing debates over which activities and land uses should and should not constitute agritourism, the inherent risk approach might not encompass all potential injury and liability situations on agritourism operations. The customary inherent risk approach in agritourism immunity statutes requires two proofs in an injury situation: first, that the activity that produced the harm is an agritourism activity, and second, that the harm resulted from an inherent risk of that activity.[55] Both elements usually tie directly to definitions within the statute. For example, the nation's first immunity law, the Kansas Agritourism Promotion Act,[56] defines the two terms as follows:

> (a) "Agritourism activity" means any activity which allows members of the general public, for recreational, entertainment or educational purposes, to view or enjoy rural activities, including, but not limited to, farming activities, ranching activities or historic, cultural or natural attractions. An activity may be an agritourism activity whether or not the participant pays to participate in the activity. An activity is not an agritourism activity if the participant is paid to participate in the activity.
>
> (b) "Inherent risks of a registered agritourism activity" means those dangers or conditions which are an integral part of such agritourism activity including, but not limited to, certain hazards such as surface and subsurface conditions; natural conditions of land, vegetation, and waters; the behavior of wild or domestic animals;[57] and ordinary dangers of structures or equipment ordinarily used in farming or ranching operations. "Inherent risks of a

53. *Id.*

54. *Id.*

55. *Id.*

56. KAN. STAT. ANN. §§ 32-1430 to -1438 (2024).

57. Animal situations on the farm, both wild and domestic, have generated unique risk issues for the authors. One instance sought a gopher expert who could identify whether a hole stepped into by a guest was a gopher hole, and therefore an inherent risk, or a fence post hole, and not an inherent risk. Another client asked for assistance with clarifying the inherent risks of offering "porcupine encounters" to guests. And "cow cuddling," the opportunity to hug and lounge around with cows, carries no risks according to one farmer, because cows are "pretty relaxed." However, the Centers for Disease Control (CDC) has warned that salmonella outbreaks have occurred from cuddling or kissing chickens. Media Alert, CDC Newsroom, CDC Warns of Salmonella Outbreaks Linked to Backyard Poultry Flocks (May 23, 2024), https://www.cdc.gov/media/releases/2024/s0523-salmonella-poultry-flocks.html [https://perma.cc/XLW6-VE9F].

> registered agritourism activity" also includes the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to follow instructions given by the registered agritourism operator or failing to exercise reasonable caution while engaging in the registered agritourism activity.[58]

Imagine the application of this statutory approach in two scenarios: a more traditional "core" activity on a farm and an activity that is "peripheral," or less connected to agriculture.[59] A farm facing an injury resulting from a child running through a corn maze and tripping and falling over a corn stalk[60] would likely qualify for immunity under the inherent risk approach. A corn maze appears both as a core activity in the core and peripheral activities model[61] and in the Census of Agriculture references to agri-tourism.[62] Under the Kansas definition of "agritourism activity," the operator could argue that a corn maze is a recreational activity that allows members of the general public to enjoy a rural or farming activity—the production of corn crops.[63] An inherent risk of enjoying a corn field is the presence of corn stalks and uneven surface conditions, both of which are an integral part of a corn maze and make it difficult if not impossible for a landowner to make safe. In this case, the farm is in a strong position to satisfy both required proofs.[64]

Consider now a scenario that is less connected to agriculture: an injury that occurs to a wedding guest on a farm that hosts a wedding event center. While riding on a golf cart the farm uses to shuttle guests between the parking area and event space and holding onto a wedding gift, the guest falls off the cart and suffers an injury. The core and peripheral activities model suggests that a wedding on a farm

58. KAN. STAT. ANN. § 32-1432(a)–(b). Note that Kansas requires agritourism operations to register with the state as an additional prerequisite to qualifying for immunity from civil liability. *Id.* §§ 32-1433, -1436.

59. *See Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 17.

60. Based on a similar fact pattern in *Spinella v. Fink's Country Farm, Inc.*, No. 1548/2015, slip op. at 1 (N.Y. Sup. Ct. May 24, 2017), which pre-dated New York's agritourism immunity law. N.Y. GEN. OBLIG. LAW § 18-303 (McKinney 2024) (effective October 23, 2017).

61. *Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 18.

62. 2022 CENSUS OF AGRICULTURE REPORT FORM GUIDE, *supra* note 21, at 62.

63. *See* KAN. STAT. ANN. § 32-1432(a).

64. Although the case did not involve an agritourism immunity state, in *Spinella*, the court found that the corn stalk was "open and obvious" and that "a fallen corn stalk in the middle of a corn maze is inherent in or incidental to the maze, and could be reasonably anticipated." *Spinella*, slip op at 4.

is not a core activity with strong connections to agriculture, but instead is a peripheral activity.[65] As introduced above, under the Kansas statutory definition of agritourism, the operator must argue that the wedding is an agritourism activity "which allows members of the general public, for recreational, entertainment or educational purposes, to view or enjoy rural activities . . . [such as] farming activities, ranching activities or historic, cultural or natural attractions."[66] The success of the operator's argument may depend on whether and to what extent wedding guests take part in any farm activities or enjoy historic, cultural, or natural attractions on the farm.[67] Lacking a clear relationship between the farm and the wedding's connection to the farm, the agritourism operator may have a weak argument that the wedding is an agritourism activity. At least one agritourism operator has been unsuccessful in arguing that weddings and other celebratory events on a farm are agritourism activities according to the state definition of agritourism, as applied to a zoning issue.[68]

Equally challenging for the farm is the second requirement, the task of proving that the guest's injury resulted from an inherent risk of the agritourism activity, i.e., "dangers or conditions which are an integral part of [the] agritourism activity."[69] Assuming a wedding is deemed to be an agritourism activity, is riding on a golf cart to the wedding location a danger that is an integral part of the wedding activity? Is it possible for the farm to reduce or remove the dangers for this activity?[70]

The scenarios illustrate the uncertainty of whether agritourism immunity statutes will effectively protect agritourism operations that continue to diversify and add peripheral activities that have weak connections to the traditional activities that comprise farming and agricultural production. The current trends in agritourism contain many potentially peripheral activities: offering beer, wine, spirits, and food, and activities such as overnight stays, porch and board games, bounce houses, playground activities, and photography stations.[71] If accidents arising from any of those activities are not covered by agritourism immunity laws,

65. *Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 18.

66. KAN. STAT. ANN. § 32-1432(a).

67. *See id.*

68. Lusardi v. Caesarscreek Twp. Bd. of Zoning Appeals, No. 2020-CA-8, 2020 WL 5498940, at *1 (Ohio Ct. App. Sept. 11, 2020).

69. KAN. STAT. ANN. § 32-1432(b).

70. The authors acknowledge that legal conclusions for these questions would depend upon the facts surrounding the cause of the injury.

71. *See Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 14–18.

liability will hinge on other legal grounds, such as premises liability, operator negligence, whether the danger is an open and obvious danger, or whether a waiver or release applies.[72]

Without clear liability protection for an activity in an agritourism immunity statute, insurance coverage plays a critical role in reducing an agritourism operator's risk. But will an operator obtain adequate liability coverage if the operator has been "lulled into a false sense of security" because there is an immunity statute?[73] Insurance costs and availability consistently concern agritourism operators.[74] Ironically, although agritourism immunity statutes often aim to reduce the economic impacts of agritourism liability risk, the statutes may instead heighten the risk of non-coverage for a liability incident.[75]

B. Land Use and Zoning Regulation

Land use planners, local governments, and courts struggle to fit agritourism into the existing zoning regulatory regime. As in other regulatory contexts, the law of zoning as applied to agritourism continues to evolve in a nascent stage. This section first introduces essential zoning terminology. Next, it applies zoning concepts to agritourism. Finally, a review of case law addressing agritourism illustrates emerging issues and existing struggles to apply zoning to the unique concept of agritourism.

1. Some Zoning Terminology

Zoning ordinances divide the subject jurisdiction into different districts and designate permitted and prohibited uses in each district.[76] Provisions provide for conditional and special uses, or uses that may be allowed with conditions, and for allowed protection of uses already in existence at the time of the adoption of the ordinances, or nonconforming ("grandfathered") uses.[77] Zoning seeks to prevent nuisances from occurring by separating incompatible uses.[78]

72. RICHARDSON, supra note 47, at 1, 3, 5.

73. *Id.* at 5.

74. AGRITOURISM AND ON-FARM DIRECT SALES SURVEY, *supra* note 33, at 26.

75. *See, e.g.*, Madison Iszler, *Liability Bill Will Help Protect New York's Agritourism Industry*, TIMES UNION (Oct. 24, 2017, 3:20 PM), https://www.timesunion.com/business/article/Liability-bill-will-help-protect-agritourism-12302269.php [https://perma.cc/2FVT-PQSU].

76. 8 MCQUILLIN THE LAW OF MUNICIPAL CORPORATIONS § 25:85 (3d ed. 2024).

77. *Id*.

78. 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:2 (4th ed. 2024).

Zoning further distinguishes between principal uses and accessory uses. The term "principal use" connotes the primary or predominant use to which a property may be devoted.[79] Accessory use refers to a use (1) located on the same lot as the principal use, (2) subordinate to the principal use, (3) incidental to the principal use, and (4) "customarily found in connection with the principal use to which it is related."[80]

A use is incidental when it is reasonably related, "dependent on or pertains to the principal or main use."[81] "Courts frequently require some relationship or connection between an accessory use and a principal use to establish the use as incidental."[82] The subordinate prong of the test requires that the accessory use "be proportionally smaller than the principal use."[83] Finally, an accessory use is customary where the use "commonly, habitually, and by long practice has been reasonably associated with the principal use."[84]

2. Agritourism in the Context of Zoning

A commonly used definition of agritourism describes the term as "a form of commercial enterprise that links agricultural production and/or processing with tourism to attract visitors onto a farm, ranch, or other agricultural business for the purposes of entertaining and/or educating the visitors while generating income for the farm, ranch, or business owner."[85] Under this definition, agritourism is an accessory use to the "farm, ranch, or other agricultural business," which is the principal activity.[86] The linking of agricultural and tourism activities implies that tourism is commonly associated with agricultural activities, and that the activity is subordinate and incidental to the principal agricultural use.[87] This definition of agritourism, and the concept of accessory use, is consistent with the core and peripheral activities model of agritourism discussed above.[88]

79. RESTATEMENT (FOURTH) OF PROP. § 2.3 (AM. L. INST., Tentative Draft No. 3, 2022).

80. 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 33:1 (4th ed. 2024).

81. *Id.* § 33:3.

82. 7 PATRICK J. ROHAN & ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS § 40A.06[2] (2006).

83. JOHN R. NOLON ET AL., LAND USE AND SUSTAINABLE DEVELOPMENT LAW CASES AND MATERIALS 215 (9th ed. 2017).

84. *Id*. at 216.

85. *Agritourism - An Overview*, *supra* note 7.

86. *Id.*; 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING, *supra* note 80, § 33:1.

87. *See Agritourism - An Overview*, *supra* note 7; 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING, *supra* note 80, § 33:1.

88. *See* discussion *supra* Section II.A.

Activities considered as core under that model, occurring on the farm site and related to production activities, qualify as agritourism and valid accessory uses.[89] Peripheral activities fail to qualify as agritourism or a valid accessory use under this agritourism definition.[90] However, the core and peripheral activities model fails to address the scale of the respective activities.[91] In the zoning context, and under the commonly used definition of agritourism, the "farm, ranch or agricultural business" dominates and constitutes the primary use, with agritourism playing a secondary role.[92] Land use regulation attempts to balance the ability of a landowner to generate income to supplement the agricultural business with attempts by landowners to conduct an agritourism business that dominates, rather than supplements, the agricultural use of the parcel.[93]

In most states, each local government can define agritourism for zoning purposes as it sees fit.[94] However, most definitions classify agritourism as an accessory use.[95] Agritourism as a principal use presents a distinct set of land use concerns. Note that the cases, and thus each situation, depend greatly on the language of the applicable definitions.

"Not everything under the sun that can be grown, raised, sold or built will be held to be an accessory use to farming."[96] "[W]here the accessory use attains such proportions that the [principal] use of the premises becomes subordinate to the [accessory use], the claimed accessory use is no longer permitted."[97] Similarly, "[w]hen an accessory use attains such magnitude as to no longer be incidental to the principal use, it loses its status as an accessory use."[98]

89. *See Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 17.

90. *See id.*; *Agritourism - An Overview*, *supra* note 7.

91. *See Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 17.

92. *See Agritourism - An Overview*, *supra* note 7.

93. *See* NOLON ET AL., *supra* note 83, at 115–16.

94. *See* PEGGY KIRK HALL & EVIN BACHELOR, NAT'L AGRIC. L. CTR., AGRITOURISM ACTIVITIES AND ZONING 1–2 (2019), https://nationalaglawcenter.org/wp-content/uploads/assets/articles/Agritourism-series-Zoning.pdf [https://perma.cc/U9XV-W955].

95. *See, e.g.*, *supra* notes 8–9 and accompanying text (the American Planning Association definition explicitly states that the agritourism activity is "incidental" to the operation of a farm, mirroring accessory use terminology).

96. 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING, *supra* note 80, § 33.28.

97. *Id.* § 33:3.

98. *Id.*

3. What is Agritourism?

A number of cases across the country address the thorny issue of defining agritourism in various contexts. The cases generally focus on the specific language of the state statute and base the holdings on specific facts. The consequences can be dramatic, considering the number of states which exempt agriculture and agritourism from local zoning rules. Given the divergence of the court opinions, themes or principles are difficult to glean.

i. Tennessee

A prominent case considers whether concerts with amplified sound qualify as agriculture or agritourism.[99] The Tennessee Supreme Court found in *Shore v. Maple Lane Farms*, that the definition of "agriculture" for the purpose of zoning laws did not include concerts.[100] However, Tennessee law appears to consider concerts and other forms of entertainment as agritourism.[101] The dispute arose in the context of the Tennessee Right to Farm Act.[102]

Neighbors filed suit against the producer for nuisance with respect to concerts and other public attractions held on the site.[103] The producer claimed that the Right to Farm Act shielded the events, which constituted approximately 75% of the total revenue of the farm, from a nuisance action and exempted the events from the county zoning ordinance.[104] The trial court dismissed the case, finding that the Right to Farm Act exempted the concerts from nuisance actions, and that the concerts were exempted from zoning as "agriculture."[105]

On appeal, the Tennessee Supreme Court opined that the lower courts "seemingly overlooked" the question of whether the Right to Farm Act applied to the concerts.[106] Instead, the two courts appeared to assume that the activities were covered "as long as some threshold amount of agricultural activity was occurring somewhere on the farm."[107] However, the Tennessee Right to Farm Act protects only "farm operations" occurring on a farm.[108] Farm operations include all

99. Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405 (Tenn. 2013).
100. *Id.* at 409.
101. *Id*. at 428.
102. *Id.* at 409; *see also* TENN. CODE ANN. §§ 43-26-101 to -104 (West 2024).
103. *Shore*, 411 S.W.3d at 409.
104. *Id.*
105. *Id.* at 413.
106. *Id.* at 419–20.
107. *Id.*
108. *Id.* at 421.

activities concerned "with the commercial production of farm products or nursery stock."[109] The statute specifically lists noise as a protected effect of farm operations.[110]

However, at the time of this case, the Right to Farm Act referred only to production activities, and not marketing activities, as farm operations.[111] Even so, the Act could cover marketing activities directly connected with farm production.[112] The court determined that the concerts had no relation to agricultural production, and so were not exempted from nuisance actions by the Right to Farm Act.[113]

Turning to the issue of whether the concerts qualified as agriculture, and were therefore exempt from local zoning, the court noted that the trial court found in the affirmative.[114] Namely, the trial court reasoned that music concerts amounted to "recreational activity on land used for the commercial production of farm products" under the Tennessee Code.[115] Since the zoning ordinance exempted agriculture uses of land, the concerts were exempt from zoning.[116]

The Tennessee Supreme Court, in reviewing the lower court decision, noted that state law in Tennessee limits the ability of local governments to regulate agricultural land.[117] Consistent with state law constraints, the county exempted agricultural uses of land from the zoning ordinance.[118]

Most closely related to this case, state law defines "agriculture" as, among other things, "[r]ecreational and educational activities on land used for the commercial production of farm products and nursery stock."[119] Parsing the language of the statutes restricting local regulation of agricultural activities and the statute defining "agritourism activities" for limiting liability,[120] the court found that the inclusion of the term "entertainment" in the latter, and not the former, indicated that the definition of agriculture for zoning purposes does not include concerts.[121]

109. *Id.*; *see also* TENN. CODE ANN. § 43-26-102(2) (West 2024).
110. *Shore*, 411 S.W.3d at 421; *see also* TENN. CODE ANN. § 43-26-102(2).
111. *Shore*, 411 S.W.3d at 421.
112. *Id.* at 422.
113. *Id.* at 424.
114. *Id.* at 425.
115. *Id.*
116. *Id.*
117. *Id.* at 426; *see also* TENN. CODE ANN. § 5-1-122 (West 2024).
118. *Shore*, 411 S.W.3d at 426–27.
119. TENN. CODE ANN. § 1-3-105(a)(2)(A)(iii).
120. *Id.* §§ 1-3-105(a)(2)(A)(iii), 43-39-101(1).
121. *Shore*, 411 S.W.3d at 429–30.

However, agritourism likely includes concerts.[122] Therefore, the court reversed the holdings of the lower courts and remanded the case for further proceedings.[123]

Note that the Tennessee legislature amended the pertinent statutes in 2014.[124] The amendments include "[e]ntertainment activities conducted in conjunction with, but secondary to, commercial production of farm products and nursery stock, when such activities occur on land used for the commercial production of farm products" as "agriculture."[125] Therefore the concerts at issue in *Shore* appear to constitute farm operations after the effective date of those amendments, essentially overturning *Shore*.

This new definition was tested in 2021.[126] A landowner used their property as a wedding venue and engaged in agricultural production.[127] The first question involved whether the activities on the property amounted to "commercial production of farm products and nursery stock."[128] The court of appeals affirmed the finding of the trial court that selling and bartering hay produced on the property, installing fencing and watering systems, selling cattle for profit, and having 18 to 22 hens for egg production, qualified as commercial production.[129] The court rejected the county's argument that the landowner failed to meet a threshold level of commercial production to qualify under the statute.[130]

Second, the court considered whether the weddings fell within the definition of an "entertainment activity conducted in conjunction with, but secondary to, the commercial production of farm products and nursery stock."[131] The court summarily found that the farm weddings, reliant on the "aesthetic appearance of the farm" was "necessarily conducted in conjunction with" the agricultural production on the property.[132]

As to whether the wedding events were "secondary to" the agricultural production, the farming income totaled $6,250 in 2019, while rental income for the

122. *Id.* at 430.
123. *Id.* at 431.
124. 2014 Tenn. Pub. Acts 581 (S. 1614).
125. *Id.*; TENN. CODE ANN. § 1-3-105(a)(2)(A)(iv).
126. *See* Jefferson Cnty. v. Wilmoth Family Props., LLC, No. E2019-02283, 2021 WL 321219, at *13 (Tenn. Ct. App. Feb. 1, 2021).
127. *Id.* at *2–3.
128. *Id.* at *9–10.
129. *Id.*
130. *Id.*
131. *Id.* at *10.
132. *Id.* at *14.

farm amounted to $47,247, including $28,375 for weddings and other events.[133] Nonetheless, the fact that the landowner spent more time operating the farm and only "minimal time" facilitating event venue business proved determinative.[134] The activities on the property are consistent "with the legislature's obvious intent to allow the necessary supplementation of farming income."[135] Therefore, the activities qualified as agritourism exempt from zoning.[136]

ii. Pennsylvania

Similarly, a Pennsylvania court found that a vineyard constituted the principal use of the property, even though the winery operation seemed to be the predominate use on the parcel.[137] The decision relied heavily on the specific definition of "Winery, Type B" under the zoning ordinance.[138] The definition required only two of 10 acres to be planted with wine-producing crops.[139] The landowner planned to plant two acres in vineyards, while the remainder of the undeveloped parcel would "remain available for agriculture and [would] continue to be farmed by tenant farmers."[140]

"[T]he fact that permissible winery functions and activities do not seem overtly agricultural or vineyard-oriented" is rendered irrelevant.[141] Again, the language of the zoning ordinance permitted retail, banquet, and event uses that did not necessarily relate directly to agricultural production on the property.[142]

The objectors also argued that the events to be held on the property did not meet the definition of agritourism meant to support agricultural uses of the property.[143] The court rejected this argument, noting that the ordinance allowed "'party-type' events" in addition to more traditional agritourism events.[144]

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at *15.
137. Geiselman v. Hellam Twp. Bd. of Supervisors, 266 A.3d 1212, at *3 (Pa. Commw. Ct. 2021) (unpublished table decision).
138. *Id.* at *3.
139. *Id.*
140. *Id.* at *3 (citations omitted).
141. *Id.*
142. *Id.*
143. *Id.* at *4.
144. *Id.*

iii. Ohio

An Ohio court examined the connection between certain "celebratory events, like agriculturally-themed weddings and receptions" and the agricultural production on the property under a zoning ordinance.[145] The zoning ordinance required applicants to show the "relationship of the agritourism operation to the existing agricultural use of the property and the surrounding agricultural community in general."[146] The zoning requirement stemmed from the definition of agritourism in a state statute limiting local zoning authority over agritourism.[147]

The Board of Zoning Appeals (BZA) approved the application as to hayrides and corn mazes, but denied the application as to the celebratory events, finding that the events were not agriculturally related.[148] The BZA reasoned that not every activity done on agricultural property constitutes "agriculturally related" agritourism.[149] The trial court affirmed the decision as reasonable.[150] On appeal, the Ohio Court of Appeals affirmed, finding no abuse of discretion.[151]

iv. New Hampshire

Another case considers whether wedding events on a Christmas tree farm qualified as agriculture or agritourism.[152] Forster owns 110 acres within a zoning district that allows, among other things, agricultural uses and uses accessory to agriculture.[153] Ten acres of the parcel grows Christmas trees.[154] Forster also uses his property to host weddings, celebrations, and other events.[155] State law defines agriculture to include Christmas tree operations.[156]

The town issued a notice of violation to Forster, stating that wedding and event facilities are not allowed in that zoning district.[157] Forster argued that weddings and events constitute agritourism and that agriculture includes

145. Lusardi v. Caesarscreek Twp. Bd. of Zoning Appeals, No. 2020-CA-8, 2020 WL 5498940, at *1 (Ohio Ct. App. Sept. 11, 2020).

146. *Id.* (citations omitted).

147. *Id.*

148. *Id.* at *2.

149. *Id.* at *5.

150. *Id.* at *2.

151. *Id.* at *5.

152. Forster v. Town of Henniker, 118 A.3d 1016, 1018 (N.H. 2015).

153. *Id.*

154. *Id.*

155. *Id.* at 1018–19.

156. *Id.* at 1018 (citing N.H. REV. STAT. ANN. § 21:34-a(II)(a)(11) (2024)).

157. *Id.* at 1019.

agritourism under state statute, therefore the facility should be allowed in the district.[158] State law defines agritourism as:

> attracting visitors to a farm to attend events or activities that are accessory uses to the primary farm operation, including, but not limited to, being provided a meal, making overnight stays, enjoyment of the farm environment, education which shall be instruction or learning about the farm's operations, or active involvement in the activities of the farm.[159]

Reviewing the statutory definitions of farm, the court determined that hosting weddings and events are not included in the definition.[160] The court also found that the statutory definition of agriculture does not include agritourism generally.[161]

The dissenting justice accused his four colleagues of not "hav[ing] spent a summer in . . . an area where weddings on farms are customary."[162] The dissenter would hold that agriculture includes agritourism under the statute, and that the weddings and events qualify as accessory uses to agriculture.[163] The dissent utilizes a treatise to support the accessory use argument.[164]

Pertinent to this Article, the court also found that a wedding and event center fails to meet the requirements of an accessory use to agriculture or Christmas tree farming in the zoning district.[165] Although Forster presented evidence of other farms in northern New England that hold weddings and events, out of the approximately 4,200 farms in New Hampshire, only nine or 10 host weddings and other commercial events.[166] This failed to establish that weddings and events are "commonly, habitually and by long practice . . . established as reasonably associated" with agriculture in the community.[167]

158. *Id.*
159. N.H. REV. STAT. ANN. § 21:34-a(II)(b)(5) (2024).
160. *Forster*, 118 A.3d at 1021.
161. *Id.* at 1022; N.H. REV. STAT. ANN. § 21:34-a.
162. *Forster*, 118 A.3d at 1027 (Hicks, J., dissenting).
163. *Id.*
164. *Id.* at 1031–32.
165. *Id.* at 1027 (majority opinion).
166. *Id.*
167. *Id.*

v. Indiana

Blind Hunting Club, LLC v. Martini presented a novel issue involving the use of an easement meant for farming and residential uses.[168] The easement limited uses to ingress and egress for up to two residences and for farm uses.[169] A fee-based hunting club used the easement to transport members of the club across a neighbor's property.[170] The owners of the dominant estate argued this use violated the terms of the easement because hunting is not a farming or residential purpose.[171] The hunting club argued the use by the hunting club amounted to agritourism and was consistent with the easement limitations.[172] The court affirmed the trial court's summary judgment decision in favor of the owner of the dominant estate, finding that the hunting club was not a "farm" and use of the easement for the hunting club was inconsistent with the terms of the easement.[173]

vi. Oregon

1000 Friends of Oregon v. Clackamas County involved an application for a home occupation permit in an exclusive farming use zone.[174] The proposal included minor renovations of one barn and major renovations on another, all to accommodate the hosting of events, like weddings, on the property.[175] The court essentially found that the renovations to both barns changed the character of the barns from agricultural structures to event structures, therefore disqualifying the property for a home occupation.[176] In other words, the home occupation, an accessory use, was not incidental or subordinate to the principal use of agriculture.[177]

vii. Ohio

The Ohio Court of Appeals provides the most complete analysis of agritourism as an accessory use.[178] The landowner built a barn on the property and claimed an agricultural exemption, stating that "the barn would be used for

168. Blind Hunting Club, LLC v. Martini, 169 N.E.3d 1121, 1122 (Ind. Ct. App. 2021).
169. *Id.* at 1123.
170. *Id.*
171. *Id.*
172. *Id.* at 1123–24.
173. *Id.* at 1127.
174. 1000 Friends of Or. v. Clackamas Cnty., 483 P.3d 706, 708 (Or. Ct. App. 2021).
175. *Id.* at 709.
176. *Id.* at 714–15.
177. *See id.*
178. *See* Miami Twp. Bd. of Trs. v. Powlette, 197 N.E.3d 998 (Ohio Ct. App. 2022).

viticulture and storage of agricultural products."[179] A few months later, the township learned that the property was being used to host events, like weddings, and issued a notice of violation.[180] The landowner responded by amending his agricultural exemption form to declare that the barn would be used for several things including agriculture and agritourism.[181] The township eventually obtained a permanent injunction enjoining the property owner from using the barn for weddings and other events.[182]

On appeal, the court focused on the statutory definition of "agritourism" as "an agriculturally related educational, entertainment, historical, cultural, or recreational activity . . . conducted on a farm that allows or invites members of the general public to observe, participate in, or enjoy that activity."[183] The landowner claimed that the use of the barn for weddings and other events meets that definition.[184] Namely, the landowner educates the guests about animals and products on the farm, as well as the history of the farm and farm structures.[185] Guests are also entertained by interacting with the animals on the farm, taking hayrides, and by participating in a wedding on a family farm.[186]

The court disagreed, finding that "a wedding is not, in itself, an agriculturally related activity."[187] No connection exists between the agricultural activity on the property and the weddings.[188] To experience the agricultural activity, guests need to leave the barn.[189] "Simply put, there is no evidence that this use of the barn is incident to any agricultural use of the property. Instead, the barn was built in order to serve as an event venue in a rural, agricultural setting."[190]

viii. North Carolina

The North Carolina Court of Appeals decided a case that considered whether activities conducted by a recreational hunting and shooting company constituted

179. *Id.* at 1000.
180. *Id.*
181. *Id.*
182. *Id.* at 1001.
183. *Id.* at 1002 (quoting OHIO. REV. CODE ANN. § 901.80(A)(2) (West 2024)).
184. *Id.* at 1003.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 1003–04.
190. *Id*. at 1004.

agritourism exempt from county zoning regulations.[191] The principals of the company owned a commercial crop farm and a recreational shooting and hunting operation.[192] The commercial farm produces several products including tobacco, soybeans, and sorghum.[193] Approximately 240 acres of the 2,000-acre farm consists of a licensed controlled hunting preserve devoted to domestic production of fowl such as pheasants and chukars for use in controlled hunts.[194] The shooting operation uses the farm property for the hunting preserve but only about 100 to 120 acres of the farm for other shooting activities.[195]

The case involved a lengthy series of rulings from the County Board of Adjustment (Board) and appeals to the superior court, resulting in remands to the Board.[196] Most pertinent to this Article, the Board decided in 2016 that:

> controlled hunting preserves for domestically raised game birds, like those at Drake Landing and Andrews Farms, are exempt from any and all Harnett County zoning ordinances[ ] . . . because hunting preserves like those at Drake Landing and Andrews Farms are operated on a bona fide farm, constitute a bona fide farm purpose under both N.C. Gen. Stat. § 153A–340(b)(2) and N.C. Gen. Stat. § 106–581.1, and are considered agritourism under N.C. Gen. Stat. § 99E–30.[197]

North Carolina law defines "agritourism," in part, as "[a]ny activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, hunting, fishing, equestrian activities, or natural activities and attractions."[198]

First, the superior court affirmed the 2016 decision of the Board on procedural grounds.[199] On appeal, the neighboring landowners argued that a controlled hunting preserve is not agritourism but instead a "nonfarm purpose," and that the Board's determination that this particular operation constituted agritourism was not supported by the record.[200]

191. Jeffries v. Cnty. of Harnett, 817 S.E.2d 36, 38 (N.C. Ct. App. 2018).
192. *Id*.
193. *Id*. at 40.
194. *Id*.
195. *Id.*
196. *Id*. at 41–42.
197. *Id*. at 42.
198. N.C. GEN. STAT. ANN. § 99E-30(1) (West 2024).
199. *Jeffries*, 817 S.E.2d at 42.
200. *Id*. at 43.

Second, the court of appeals considered a 2014 order of the superior court.[201] That order reversed a 2013 Board decision that determined that "continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits" qualified as agritourism under the state statute and thus were exempt from zoning.[202] Interpreting a recently enacted definition of agritourism, the court compared the examples in the statute to the shooting activities at issue.[203] The court concluded that, while the shooting activities require the land area provided in rural areas, the shooting activities "are not purposefully performed on a farm for the aesthetic value of the farm or its rural setting."[204]

In addition, the shooting activities do not qualify as "natural."[205] "[S]hooting activities that require the construction and use of artificial structures and the alteration of natural land, such as clearing farm property to operate gun ranges, share little resemblance to the listed rural agritourism activity examples or the same spirit of preservation or traditionalism."[206] Therefore, the court concluded that the shooting activities do not constitute agritourism under the state statute as a matter of law.[207]

The final issue involved whether a nexus was required between the shooting activities and the farming activities to qualify for the exemption from zoning.[208] However, the court did not address this issue given, among other things, the earlier ruling that the shooting activities do not constitute agritourism.[209]

ix. Michigan

The Michigan Court of Appeals considered a case that centered in part on whether a motocross park on a 95-acre agriculturally zoned parcel qualified as an accessory use to agriculture.[210] The landowner argued the recreational use of farming off-road vehicles, and creating dirt paths for such use, met the "customary and incidental" requirement for an accessory use to agriculture.[211] The argument

201. *Id.* at 46.
202. *Id.*
203. *Id.* at 49–50.
204. *Id.* at 50.
205. *Id.* at 51.
206. *Id.*
207. *Id.*
208. *Id.* at 51–52.
209. *Id.* at 52.
210. Ida Twp. v. Se. Mich. Motorsports, LLC, No. 303595, 2013 WL 5495553, at *1–2 (Mich. Ct. App. Oct. 3, 2013).
211. *Id.* at *3.

seemed to posit that since riding motocross was "customary" within the township, that custom applied to the individual parcel at issue.[212]

The court rejected that argument, correctly concluding that constructing motocross tracks and riding motocross vehicles on that track must be subordinate to, dependent upon or pertain to, and enhance or further, the principal use of the property.[213] Although approximately 20 acres of the property were planted in soybeans and the landowner planned to farm pheasants on the property, the property's predominate use consisted of a motocross track.[214] In addition, even if agriculture was the principal use, the motocross track would not promote or support that use.[215] Therefore, the court affirmed the ruling of the trial court disallowing the motocross track on the property.[216]

As these cases help demonstrate, with respect to zoning and local land use regulation, agritourism is considered an accessory use to agricultural production activities.[217] The agritourism activities must be on the same parcel of land as the agricultural activities and be subordinate and incidental to agricultural activities.[218] This analysis is similar to the core and peripheral activities model, but adds the scale dimension, where the agricultural activities must occur at a larger scale than the agritourism activities.[219]

However, state statutory definitions, and to some degree definitions within the zoning ordinance, greatly influence the results with respect to zoning and land use. For example, the state legislature in Tennessee has significantly expanded the definition of agritourism, allowing activities that lack a connection to the agricultural activities to qualify.[220]

Even with state and local definitions of agritourism, courts struggle to resolve specific disputes. The pace of change in agritourism makes many of the definitions obsolete.

212. *See id.* at *6.
213. *Id.* at *7.
214. *Id.*
215. *Id.*
216. *Id.*
217. *See* AKWII & KRUSZEWSKI, *supra* note 16, at 16, 20, 23.
218. *See, e.g.*, *Ida Twp.*, 2013 WL 5495553, at *6.
219. *See Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 17.
220. TENN. CODE ANN. § 43-39-101(1) (West 2024).

C. Challenges with Agritourism-Related Taxation

Despite the lack of clarity associated with the application of liability and zoning laws to agritourism, policymakers, administrative agencies, and the courts have perhaps devoted even less attention to agritourism-related tax matters. While most states have adopted laws attempting to define agritourism for liability purposes, few states have sought to do the same for real property taxation. At the federal level, no guidance explains which agritourism activities are "farming" activities under the Internal Revenue Code or when an agritourism endeavor by a farmer becomes a separate commercial business.[221] This section examines the current tax landscape and identifies unanswered questions creating economic uncertainty, both for farmers and for state and federal taxing authorities.

1. Real Property Taxation and Differential Assessment for Agritourism Property

States collect billions of dollars from taxing the value of real property each year.[222] These taxes are generally levied by local governments to fund cities, counties, and school districts.[223] All states have rules that value certain classes of property favorably for the purpose of assessing tax.[224] In all states, agricultural real property is subject to a favorable differential assessment, meaning that the taxable value assigned to agricultural property is generally lower than that assigned to other types of property, such as commercial land.[225] Whether land and buildings used in agritourism endeavors are eligible for this differential assessment is an important legal question.

A minority of states have addressed this issue through legislation.[226] Most states, however, have no specific guidance, leaving this an evolving area of the law where taxing authorities may be applying ad hoc standards. The following is a summary of the limited state authority addressing the impact of agritourism activities on property tax valuation.

221. GUIDO VAN DER HOEVEN, RURAL TAX EDUC., FARM, FARMING AND WHO'S A FARMER FOR TAX PURPOSES 5 (2022), https://www.farmers.gov/sites/default/files/2022-03/whos-a-farmer.pdf [https://perma.cc/TRJ9-5EKU].

222. *State and Local Tax Policies*, TAX POL'Y CTR. (Jan. 2024), https://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-property-taxes-work [https://perma.cc/H9VC-TDTH].

223. *Id.*

224. *Id.*

225. Evin Bachelor & Peggy Kirk Hall, *Differential Tax Assessment of Agricultural Lands*, NAT'L AGRIC. L. CTR. (July 6, 2024, 10:18 AM), https://nationalaglawcenter.org/state-compilations/differentialtaxassessment/ [https://perma.cc/6CZL-FQK2].

226. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-12151(12) (2024).

i. Arizona

Arizona revised its law in 2019 to specify that land devoted to "agritourism" is "agricultural real property," eligible for the differential assessment, unless the context otherwise requires.[227] "Agritourism" is defined for this purpose as:

> any activity that allows members of the general public, for recreational or educational purposes, to view, enjoy or participate in rural activities, including farming, ranching, historical, cultural, u-pick, harvest-your-own produce or natural activities and attractions occurring on property defined as agricultural real property. . . if the activity is conducted in connection with and directly related to a business whose primary income is derived from producing livestock or agricultural commodities for commercial purposes.[228]

ii. Florida

In 2007, Florida legislators declared that "farm operations are encouraged to engage in agritourism."[229] To further promote this policy, Florida revised its law in 2022 to provide that an agricultural classification "may not be denied or revoked solely due to the conduct of agritourism activity on a bona fide farm or the construction, alteration, or maintenance of a nonresidential farm building, structure, or facility on a bona fide farm which is used to conduct agritourism activities."[230] If the "building, structure, or facility is an integral part of the agricultural operation, the land it occupies shall be considered agricultural in nature."[231] However, these buildings and land improvements must be assessed "at their just value and added to the agriculturally assessed value of the land."[232] For purposes of these provisions, "agritourism activity" is defined as:

> any agricultural related activity consistent with a bona fide farm, livestock operation, or ranch or in a working forest which allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy activities, including farming, ranching, historical, cultural, civic, ceremonial, training and exhibition, or harvest-your-own activities and attractions. An agritourism activity does not include the construction of new or additional structures or facilities intended primarily to house, shelter, transport, or otherwise accommodate members of the general public. An

227. *Id.*
228. *Id.* § 3-111(2).
229. FLA. STAT. ANN. § 570.87(1) (West 2024).
230. *Id.*
231. *Id.*
232. *Id.*

> activity is an agritourism activity regardless of whether the participant paid to participate in the activity.[233]

iii. Idaho

In 2013, Idaho passed the Idaho Agritourism Promotion Act, which states that "[t]he use of a farm or ranch to conduct an agritourism activity shall not affect the assessment of the property as land actively devoted to agriculture."[234] For purposes of this protection, "agritourism activity" is defined as:

> any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment or educational purposes, to view or enjoy rural activities including, but not limited to, farming, ranching, historic, cultural, on-site educational programs, recreational farming programs that may include on-site hospitality services, guided and self-guided tours, bed and breakfast accommodations, petting zoos, farm festivals, corn mazes, harvest-your-own operations, hayrides, barn parties, horseback riding, fee fishing and camping. An activity is an agritourism activity whether or not the participant paid to participate in the activity.[235]

iv. Kansas

In 2022, Kansas changed its law to provide that "land devoted to agricultural use" for property tax classification purposes includes land "otherwise devoted to the production of plants, animals or horticultural products that is utilized as part of a registered agritourism activity."[236] In 2024, Kansas expanded its law retroactively (for all taxable years beginning in 2021 or later) to specify that land devoted to agricultural use includes land that is otherwise "devoted to the production of plants, animals or horticultural products that is utilized as part of a registered agritourism activity . . . including, but not limited to, all land and buildings, whether permanent or temporary, that are utilized for such agritourism activity."[237] The law also clarifies that selling merchandise or products as part of the agritourism activity does not change the classification of the agricultural land or buildings.[238] An "agritourism activity" in Kansas includes:

233. *Id.* § 570.86(1).
234. IDAHO CODE ANN. § 6-3006 (West 2024).
235. *Id.* § 6-3003(1).
236. KAN. STAT. ANN. § 79-1476(g)(1)(A), (g)(B)(iii) (West 2024).
237. *Id.* § 79-1476(g)(B)(iii).
238. *Id.*

> any activity that allows members of the general public, for recreational, entertainment or educational purposes, to view or enjoy rural activities, including, but not limited to, farming activities, ranching activities or historic, cultural or natural attractions. An activity may be an "agritourism activity" whether or not the participant pays to participate in the activity.[239]

v. Ohio

Since 2016, Ohio law has stated that "the existence of agritourism on a tract, lot, or parcel of land that otherwise meets the definition of 'land devoted exclusively to agricultural use'. . . does not disqualify," that property from agricultural valuation.[240] In Ohio, land devoted exclusively to agricultural use means land:

> devoted exclusively to commercial animal or poultry husbandry, aquaculture, algaculture, . . . apiculture, the cultivation of hemp [by a licensed grower, the commercial production of] timber, field crops, tobacco, fruits, vegetables, nursery stock, ornamental trees, sod, or flowers, or the growth of timber for a noncommercial purpose, if the land on which the timber is grown is contiguous to or part of a parcel . . . that is otherwise devoted exclusively to agricultural use.[241]

"'Agritourism' means an agriculturally related educational, entertainment, historical, cultural, or recreational activity, including you-pick operations or farm markets, conducted on a farm that allows or invites members of the general public to observe, participate in, or enjoy that activity."[242]

vi. South Carolina

In 2007, South Carolina enacted a law providing that uses "of agricultural real property for 'agritourism' purposes is deemed an agricultural use of the property to the extent agritourism is not the primary reason any tract is classified as agricultural real property but is supplemental and incidental to the primary purposes of the tract's use for agriculture, grazing, horticulture, forestry, dairying, and mariculture."[243] "These supplemental and incidental agritourism uses are not an 'other business for profit.'"[244] Under this law,

239. *Id.* § 79-1476(g)(2).
240. OHIO REV. CODE ANN. § 5713.30(A)(4) (West 2024).
241. *Id.* § 5713.30(A)(1)(a).
242. *Id.* § 901.80(2).
243. S.C. CODE ANN. § 12-43-233(A) (2024).
244. *Id.*

> agritourism uses include, but are not limited to: wineries, educational tours, education barns, on-farm historical reenactments, farm schools, farm stores, living history farms, on-farm heirloom plants and animals, roadside stands, agricultural processing demonstrations, on-farm collections of old farm machinery, agricultural festivals, on-farm theme playgrounds for children, on-farm fee fishing and hunting, pick your own, farm vacations, on-farm pumpkin patches, farm tours, horseback riding, horseback sporting events and training for horseback sporting events, cross-country trails, on-farm food sales, agricultural regional themes, hayrides, mazes, crop art, harvest theme productions, native ecology preservations, on-farm picnic grounds, dude ranches, trail rides, Indian mounds, earthworks art, farm animal exhibits, bird-watching, stargazing, nature-based attractions, and ecological-based attractions.[245]

In 2012, the South Carolina Attorney General issued an opinion stating that agritourism alone is not "sufficient to create an agricultural use classification for property that would not otherwise qualify" under South Carolina law.[246] In this opinion, the Attorney General responded to a taxpayer asking whether a 201.7-acre parcel of property could be classified as agricultural where 65 acres was devoted to pasture and stables and the remaining acreage was devoted to the agritourism activities of horseback riding and nature trails.[247] Although the attorney general determined that the pasture and stables qualified for the agricultural use classification, that classification could not automatically apply to the entire parcel because it comprised less than 50% of the acreage.[248] Because the agritourism activity was not an agricultural use standing alone, the Attorney General reasoned that those acres would not qualify as agricultural real property.[249]

vii. West Virginia

Since 2018, West Virginia law has provided that, in general, "the occurrence of agritourism does not change the nature or use of property that otherwise qualifies as agricultural for building code, zoning, or property tax classification purposes."[250] In a recent case applying this statute, the petitioner's property

245. *Id.*

246. S.C. Off. of the Att'y Gen., Opinion Letter on Whether a Particular Parcel Meets the Requirements for an Agricultural Use Classification for the Purposes of Ad Valorem Taxation 4 (July 2, 2012), https://www.scag.gov/wp-content/uploads/2012/07/welch-w-os-9453-7-12-12-agricultural-use-qualification-ad-valorem-taxation.pdf [https://perma.cc/LTW6-TCHG].

247. *Id.* at 1.

248. *Id.* at 3–4.

249. *Id.* at 5.

250. W. VA. CODE ANN. § 19-36-5(a) (West 2024).

consisted of 29 acres of land known as Flying Squirrel Ranch & Farm.[251] The petitioner's farm plan stated that his "objective was to 'provide enough food stock and other resources to pay for [the property] and produce sustainable income generated from sales and on-site activities open to the public.' Non-farm ranch activities would be '[c]amping, fishing, zip-lin[ing], . . . whiskey and wine tasting, [and] facility rental.'"[252] The petitioner also ran a mini-distillery.[253] The assessor denied petitioner's application for farm use valuation for property tax purposes after finding there was no sign of farming taking place.[254]

Overall, instead of granting special tax benefits to property upon which agritourism occurs, these statutes generally clarify that an agricultural classification is not denied to agricultural land or buildings merely because incidental or supplemental agritourism activities occur on the property.[255] Where states have not enacted a protective statute, it appears that most existing laws should yield a similar result. Most states' agricultural classification rules apply if the primary use of the property is for specified agricultural purposes, such as crop or livestock production.[256] If a nonagricultural use is secondary to or incidental to the agricultural use, the agricultural classification will generally stand.[257]

This approach corresponds to the core and peripheral activities model of agritourism. However, as discussed above, the scale of the agritourism activity compared to that of the farming activity is a key consideration.[258] If so-called "core" agritourism activities such as festivals and hayrides are the primary use of the property, it does not appear that the favorable agricultural classification will apply in most states.[259] Despite these general principles, absent explicit guidance, ambiguity remains, leaving open the possibility that assessors may struggle to apply general rules to property used in agritourism endeavors. When is the line crossed between a secondary use and a primary use? Is the answer to that question based upon revenue, number of days during which the activity occurs, or hours invested by the property owner? In light of these questions, those initiating

251. Settimi v. Irby, No. 21-0046, 2022 WL 292317, at *1 (W. Va. Feb. 1, 2022).

252. *Id.*

253. *Id.*

254. *Id.*

255. *See, e.g.*, W. VA. CODE ANN. § 19-36-5; OHIO REV. CODE ANN. § 5713.30(A)(4) (West 2024).

256. *See, e.g.*, ARIZ. REV. STAT. ANN. § 3-111(2) (2024); FLA. STAT. ANN. § 570.86(1) (West 2024); OHIO REV. CODE ANN. § 5713.30(A)(1)(a).

257. *See, e.g.*, S.C. CODE ANN. § 12-43-233(A) (2024).

258. *See* discussion *supra* Section IV.B.

259. *See generally Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 18.

agritourism activities must consider the risk of uncertainty when reviewing the potential impact of their activity on an existing agricultural assessment.

2. Federal Income Tax Considerations

Agritourism activities generate uncertainty under federal income tax law as well. Is the agritourism activity incidental to the farming business or is it a separate, non-farming business? The extent to which the agritourism activity relates to the farming business appears to determine the proper application of tax rules to the business, and ultimately, its financial bottom line.[260] In some cases, the agritourism "business" may not be a business at all, but a hobby or even a startup activity for which expenses are not deductible.[261] Because no federal tax guidance specifically addresses agritourism, this section reviews the application of general tax law to agritourism activities, highlighting the ambiguity and noting potential risk.[262]

i. Does the Agritourism Activity Constitute "Farming?"

Farmers wishing to supplement their income with agritourism activities must consider whether the adjacent activity is an expansion of the current farming activity, a separate farming activity, or a separate non-farming activity.[263] Under federal tax law, "individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants," are generally farmers.[264] "Individuals, trusts, partnerships, S corporations, LLCs taxed as partnerships," and single-member LLCs with income derived from these activities report their farm income on International Revenue Service (IRS) Form 1040, Schedule F, Profit and Loss from Farming.[265] "The term 'farm' 'embraces the farm in the ordinarily accepted sense,' and includes livestock, dairy, poultry, fish, fruit, and truck farms. It also includes plantations, ranches, ranges, and orchards and groves."[266] Land used in farming is land used "for the production of crops, fruits,

260. *See id.*; *see also* HOEVEN, *supra* note 221.

261. *Farm Losses Versus Hobby Losses: How to Avoid Adverse Tax Consequences*, UTAH ST. UNIV. (June 2024), https://extension.usu.edu/ruraltax/tax-topics/farm-losses-versus-hobby-losses [https://perma.cc/K5LH-JESP].

262. *See* HOEVEN, *supra* note 221, at 5.

263. *See* I.R.C. § 183(b) (West).

264. Treas. Reg. § 1.61-4(d) (as amended in 1997).

265. INT'L REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 225, FARMER'S TAX GUIDE 9 (2023), https://www.irs.gov/pub/irs-pdf/p225.pdf [https://perma.cc/EX9Y-W35Q].

266. *Who Files a Schedule F*?, IOWA ST. UNIV. (July 26, 2024, 9:58 PM), https://www.calt.iastate.edu/who-files-schedule-f#:~:text=The%20term%20%E2%80%9Cfarm%E2%80%9D%20%E2%80%9Cembraces,ran

or other agricultural products, including fish, or for the sustenance of livestock."[267] If business income is not derived from farming, the taxpayer will generally report income and expenses on IRS Form 1040, Schedule C, Profit and Loss from Business.[268]

In complying with tax law, farmers apply special income tax rules, most of which are tailored to benefit agriculture. These rules, which do not apply to non-farming activities, include the following:

- Excluding "qualified farm indebtedness" from discharge of indebtedness income;[269]
- Providing a farm exception to the business interest expense limitation rule;[270]
- Allowing qualified farmers to take a charitable contribution deduction for the donation of a conservation easement in an amount up to 100% of adjusted gross income;[271]
- Allowing farmers to carry net operating losses back two years;[272]
- Allowing farmers to deduct the cost of soil and water conservation expenditures;[273]
- Allowing farmers to presently deduct the cost of fertilizer;[274]
- Allowing a deduction for agricultural cooperatives and their patrons;[275]
- Providing special uniform capitalization rules for farming businesses;[276]

ges%2C%20and%20orchards%20and%20groves [https://perma.cc/Q4MC-VZCF]; I.R.C. § 1.175-3.

267. I.R.C. § 1.175-4(a)(1).

268. *See* INT'L REVENUE SERV., U.S. DEP'T OF THE TREASURY, 2023 INSTRUCTIONS FOR SCHEDULE C (2023), https://www.irs.gov/pub/irs-pdf/i1040sc.pdf [https://perma.cc/8BCZ-NDY9].

269. I.R.C. §§ 108(a)(1)(C), 1017(b)(4).

270. *Id.* § 163(j)(7)(A)(iii), (j)(7)(C).

271. *Id.* § 170(b)(1)(E)(iv).

272. *Id.* § 172(b)(1)(B).

273. *Id.* § 175(a).

274. *Id.* § 180(a).

275. *Id.* § 199A(g), (i) (scheduled to sunset at the end of 2025).

276. *See id.* § 263A.

- Allowing a 75% business/personal use allocation for farm vehicles without specific documentation;[277]
- Providing special rules for cash accounting and farming tax shelters;[278]
- Allowing a different standard for material participation in a farming activity for surviving spouses under the passive loss rules;[279]
- Allowing certain farmers to defer recognition of crop insurance or disaster payments until the following year;[280]
- Providing special deferral rules for the weather-related sales of livestock;[281]
- Providing rules allowing farmers to deduct certain prepaid expenses;[282]
- Allowing farmers in an S corporation or partnership to aggregate activities for purposes of the at-risk rules;[283]
- Offering involuntary conversion rules for livestock destroyed by disease;[284]
- Providing ordinary gain and capital loss for the disposition of converted wetlands or highly erodible croplands;[285]
- Providing an exception from the imputed interest rules for sales of farms less than $1 million;[286]
- Allowing farmers to average their income to over multiple years to take advantage of lower tax rates;[287]
- Applying self-employment tax to farm leases where material participation is required, and landlord does materially participate;[288]

277. Treas. Reg. § 1.274-6T(b) (as amended in 2019).
278. *See* I.R.C. §§ 447–48; Treas. Reg. § 1.471-6(a) (as amended in 2002).
279. I.R.C. § 469(h)(3).
280. *Id.* § 451(f).
281. *Id.* §§ 451(g), 1033(e).
282. *Id.* § 464.
283. Prop. Treas. Reg. § 1.465-43.
284. I.R.C. § 1033(d).
285. *Id.* § 1257(a), (b).
286. *Id.* § 1274(c)(3)(A).
287. *Id.* § 1301.
288. *Id.* § 1402(a)(1).

- Exempting commodity wages from Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes;[289]
- Exempting gasoline and diesel fuel used on farms from the federal fuel tax;[290]
- Allowing farmers to avoid estimate tax payments if they file and pay their taxes by March 1.[291]

Each of the above federal income tax provisions has its own criteria for determining whether the taxpayer qualifies as a "farmer." These rules vary, but they generally require the taxpayer to be raising or managing the raising of crops or livestock.[292] Courts have long reasoned that cultivating, operating, or managing a farm for profit means that the owner or tenant must (1) participate to a significant degree in the farming process and (2) bear a substantial risk of loss in the process.[293]

For example, under this definition, a person who operates a feedlot for profit is considered a farmer, but a supplier of fertilizer is not.[294] Although the supplier engages in the activity for a profit and bears a substantial risk of loss, he does not "cultivate, operate, or manage a farm for profit as an owner or tenant."[295] He is, instead, in the business of merchandising or sales.[296] Whether or not taxpayers are farmers does not require them to till the soil by their own labor "rather than by that of hired hands, tenant farmers, or even professional nurserymen."[297] Where a taxpayer assumes "the risk that the crop will never be harvested due to unforeseen circumstances and the crop is related to the taxpayers' farming endeavors, the expenses they incur with regard to that crop are farming expenses."[298]

289. *Id.* §§ 3121(a)(8)(A), 3121(g), 3306(b)(11), 3306(k).

290. *Id.* §§ 6420(a), 6427(c).

291. *Id.* § 6654(i).

292. *See, e.g.*, *id.* § 6420(c).

293. *E.g.*, Maple Leaf Farms, Inc. v. Comm'r, 64 T.C. 438, 448 (1975); Duggar v. Comm'r, 71 T.C. 147, 157–58 (1978).

294. *See, e.g.*, Cameron v. Comm'r, 43 T.C.M. (CCH) 1341 (1982); Ward AG Prods. v. Comm'r, 75 T.C.M. (CCH) 1886 (1998), *aff'd*, 216 F.3d 1090 (11th Cir. 2000) (decision without published opinion).

295. *Ward AG Prods.*, 75 T.C.M. (CCH) 1886.

296. *Id.*

297. Maple v. Comm'r, 440 F.2d 1055, 1057 (9th Cir. 1971).

298. *Id.*

Many standalone agritourism activities will not constitute "farming," as interpreted by the IRS and the tax courts.[299] Activities not directly related to the growing or raising of livestock or crops are generally non-farm activities.[300] If the nonfarm activity is connected to an established farm business, the taxpayer must consider whether the activity is incidental to the existing business or separate and distinct.[301] If the activity is incidental to farming, the income and expenses can generally be reported on Schedule F, along with the farming activity.[302] If the agritourism activity is more than incidental, it is likely a separate, non-farming trade or business. The income and expenses for this separate trade or business will generally be reported on Schedule C.[303] This analysis requires a comparison of the scale of the agritourism activity, as compared to the farming activity, even for many so-called "core" agritourism activities. While a u-pick operation would generally fall under the definition of "farming" under most tax code provisions, farm stays or farm festivals likely would not.[304] In these latter cases, the treatment of the agritourism activity on a tax return, and the determination of which rules apply, will depend upon its relation to the farming operation, both in scale and scope.[305]

ii. Is the Agritourism Activity a Separate Trade or Business?

The point at which a new business activity becomes a separate trade or business is not always clear. No specific rule delineates this line. A single taxpayer can have more than one trade or business[306] or multiple activities that comprise a single trade or business.[307] Whether a separate trade or business exists is a question of fact.[308] Relevant considerations may include the degree of "organizational and economic interrelationship of various undertakings," the business purpose of the

299. *See* HOEVEN, *supra* note 221.

300. *See generally Cameron*, 43 T.C.M. (CCH) 1341; *Ward AG Prods.*, 75 T.C.M. (CCH) 1886.

301. *See* Treas. Reg. § 1.446-1(d) (as amended in 2021).

302. *See* FARMER'S TAX GUIDE, *supra* note 265, at 9, 18, 86.

303. *See generally* 2023 INSTRUCTIONS FOR SCHEDULE C, *supra* note 268.

304. *See* I.R.C. § 1.175-4(a)(1) (West).

305. *See generally Ward AG Prods.*, 75 T.C.M. (CCH) 1886.

306. Californians Helping to Alleviate Med. Probs., Inc. v. Comm'r, 128 T.C. 173, 183 (2007).

307. *See* Davis v. Comm'r, 29 T.C. 878, 889 (1958).

308. Owens v. Comm'r, 114 T.C.M. (CCH) 188, at *21 (2017).

activities, and the "similarity of various undertakings."[309] A separate and distinct trade or business must have a "complete and separable set of books and records."[310]

Several farm-specific tax provisions have rules allowing activities "incidental to farming" to be covered by the farm-specific rule. For example, the IRS has established an "incidental" rule for purposes of the gasoline tax exemption: "[g]asoline used . . . in connection with the planting, cultivating, caring for, or cutting of trees," or preparation (other than sawing into lumber, chipping or other milling) of trees for market, *if incidental to farming operations*, is used for farming.[311] These activities are considered "incidental" to farming "only if they are of a minor nature in comparison with the total farming operations involved."[312]

The uniform capitalization rules, which define a farming business as the "cultivation of land or the raising or harvesting" of commodities, apply a similar concept.[313] Specifically, a farming business includes processing activities "normally incident to the growing, raising, or harvesting of agricultural or horticultural products."[314] A "farming business does not include the processing of commodities or products beyond those activities that are normally incident to the growing, raising, or harvesting of such products."[315] For example, a farmer in the business of raising poultry and other livestock is not "in the farming business with respect to the slaughtering, processing, packaging, and canning" activities.[316]

In the preamble to the final uniform capitalization rules issued in 2000, the IRS addressed commenters' concerns that engaging in non-farming activities might disqualify a legitimate farmer from applying the special farming rules.[317] Specifically, the commenters were concerned that the IRS did not consider custom harvesting to be farming because the taxpayer did not grow or raise the commodity.[318] Would this disqualify a legitimate farmer who custom harvests his neighbor's crop, for example, from applying the favorable capitalization rules? In response, the IRS stated:

309. Olive v. Comm'r, 139 T.C. 19, 41 (2012), *aff'd*, 797 F.3d 1146 (9th Cir. 2015); Treas. Reg. § 1.183-1(d) (1972).

310. Treas. Reg. § 1.446-1(d)(2) (as amended in 2021).

311. *Id.* § 48.6420-4(f) (as amended in 1987).

312. *Id.*

313. *Id.* § 1.263A-4(a)(5)(i) (as amended in 2021).

314. *Id.* § 1.263A-4(a)(5)(ii)(A).

315. *Id.* § 1.263A-4(a)(5)(ii)(B).

316. *Id.* § 1.263A-4(a)(5)(iii).

317. Rules for Property Produced in a Farming Business, 65 Fed. Reg. 50638-02, 50639 (Aug. 21, 2000).

318. *Id.*

> [W]hether and to what extent a taxpayer is engaged in a farming business is to be determined based on all the facts and circumstances. No inference is intended that merely because a taxpayer engages in nonfarm activities, such as contract harvesting, in addition to farm activities, that such taxpayer is not engaged in a farming business.[319]

IRS guidance directs farmers to report income from custom harvesting on Schedule F, with this caveat: "If you perform custom work activities that are more than incidental to your farming business, include the income and expenses from the custom work on Schedule C."[320]

If taxpayers combine non-incidental, non-farming activities with their farming activities, the combined business may not qualify as a farm. The IRS once determined that a corporation that was engaged in the business of growing, purchasing, processing, packaging, and selling citrus fruit was not, as a whole, engaged in the business of farming.[321] As such, the tax rules governing farmers and farming were not applicable to the taxpayer.[322] The IRS found that the business was primarily a merchandising business subject to the rules governing such businesses.[323] Although not addressed in the ruling, the taxpayer likely could have avoided this result by establishing a separate trade or business for the merchandising activities, thus retaining use of the beneficial tax code provisions for the growing operation.

When the agritourism activity is incidental to an established farming operation, or is sporadic and isolated, a separate trade or business likely does not exist, and the expenses and income are reportable with the other farming income on a Schedule F.[324] In determining whether the activity is incidental to the farming operation, an important factor in addition to the nature of the agritourism activity is likely the amount of revenue derived from the activity. As discussed in the zoning and real property sections above, the scale of the activity matters.[325] Occasional income from a sporadic or isolated non-farming, but farming-adjacent activity is likely incidental to the farming operation. However, if the farmer's income from the non-farming activity is significant as compared to the farming

319. *Id.*
320. FARMER'S TAX GUIDE, *supra* note 265, at 18.
321. Rev. Rul. 64-148, 1964-1 C.B. 186.
322. *Id.*
323. *Id.*
324. *See* FARMER'S TAX GUIDE, *supra* note 265, at 9, 18.
325. *See* discussion *supra* Section IV.B.

activity, a separate trade or business should be established, and the income and expenses should be reported on a Schedule C.[326]

Even where the businesses are separated, income from non-farming agritourism activities may disqualify farmers from qualifying for some beneficial provisions available only where a certain percentage of income is "gross income from farming."[327] Activities falling into the category of incidental agritourism activities might include activities primarily designed to showcase the farm and educate the public about the primary farming activity. These activities could include inviting the public to tour a dairy farm or sponsoring a yearly corn maze. "U-pick" operations generally constitute a farming activity in their own right, as long as the sales are limited to produce raised on the farm.[328] Selling strawberry jam or apple fritters is a non-farming activity. Growing grapes is a farming activity but selling wine or hosting a winetasting event is not. While these activities may directly flow from the farming activity (i.e., the wine is produced from the grapes grown or the jam is created from the raised strawberries), the processing required to produce the jam and the wine is not incidental to the growing, raising, and harvesting of the crop.[329]

If the agritourism business incorporates non-farming activities, it is unclear at what point a separate, non-farming trade or business must be established. Whether a trade or business is separate and distinct from another commonly owned business depends on the facts and circumstances. However, once non-farming agritourism activities such as selling processed or packaged items, charging for hayrides, renting space for wedding venues, etc., become more than sporadic or incidental in revenue as compared to the farming activity, a separate trade or business should be established, with the income from that business reported on a Schedule C.

iii. Is the Activity a Trade or Business at All?

The above analysis presumes that an established farmer is conducting the agritourism activity. In other words, it applies where the agritourism activity is adjacent or supplemental to an existing farming business. Although not the primary focus of this Article, it should be mentioned that different income tax concerns arise where the agritourism activity occurs apart from an existing farm. For

326. *See generally* 2023 INSTRUCTIONS FOR SCHEDULE C, *supra* note 268; Treas. Reg. § 1.446-1(d) (as amended in 2021).

327. *See, e.g.*, I.R.C. § 6654(i)(2) (West).

328. *See generally* I.R.C. § 1.175-4.

329. *See* Treas. Reg. § 1.263A-4(a)(5)(ii)(B) (as amended in 2021); Rev. Rul. 64-148, 1964-1 C.B. 186.

example, if a couple purchases 10 acres to raise and sell pumpkins and offer hayrides, are they conducting a farming activity? Are they even operating a trade or business for which expenses can be deducted? If they are operating the endeavor for profit, at what point do they leave the startup phase?

Taxpayers must be engaged in a trade or business to deduct business expenses[330] and to receive the benefit of many tax code provisions.[331] Trade or business activities must be regular and continuous, and they must be conducted for the purpose of earning a profit.[332] "A sporadic activity, a hobby, or an amusement diversion does not qualify" as a trade or business.[333] If an agritourism activity is regular and continuous, but operated for recreation or pleasure and not to earn a profit, taxpayers may claim only those deductions allowed under the hobby loss rules.[334] Additionally, a "taxpayer has not 'engaged in carrying on any trade or business' . . . until such time as the business has begun to function as a going concern and performed those activities for which it was organized."[335] Expenses incurred before this time are startup expenses, deductible or amortizable only when the trade or business begins.[336]

Because of these rules, non-farming landowners engaging in agritourism will not be eligible to deduct business expenses related to the activity unless and until it is regular and continuous and engaged in for profit.[337] Planting a pumpkin patch and allowing neighbors to pick and purchase pumpkins in the fall (even if they throw in a few hayrides) is not sufficient activity to constitute a trade or business. The couple would instead have to show regular and continuous activity, demonstrated by regular hours and regular sales to the public.[338] Likewise, raising deer and charging a fee for public hunting is not a trade or business if the primary

330. *See* I.R.C. § 162.

331. *See, e.g.*, *id.* § 199A(a)(2) (20% qualified business income deduction); *id.* § 1231 (ordinary loss treatment for the sale of property used in a trade or business); *id.* § 179 (election to expense certain depreciable property).

332. Comm'r v. Groetzinger, 480 U.S. 23, 35 (1987); Wolf v. Comm'r, 4 F.3d 709, 713 (9th Cir. 1993).

333. *Groetzinger*, 480 U.S. at 35.

334. *See* I.R.C. § 183(b).

335. Antonyan v. Comm'r, 122 T.C.M. (CCH) 368 (2021).

336. Hardy v. Comm'r, 93 T.C. 684, 687, 692 (1989); I.R.C. § 195(b)(1).

337. *See Groetzinger*, 480 U.S. at 35.

338. *See id.*

motive of the landowner is recreation or pleasure.[339] Deducting business expenses for this activity would generally be disallowed.[340]

Despite current uncertainty, it would be difficult to craft an agritourism definition that would apply fairly across all situations, and it is unlikely that Congress would take that step. Over time, court decisions should help to shape the rules and provide more clarity. In the absence of specific guidance, agritourism businesses must apply existing law to their own facts and circumstances to determine which tax rules apply to their endeavors.

Although incidental non-farming income can generally be reported on a Schedule F, farmers should use caution to separate an agritourism business that is not incidental to a primary farming business.[341] Even when separated, the income from the agritourism activity may impact the farmer's overall qualification for some beneficial tax rules available only to farmers.[342] Those wishing to engage in agritourism activities should consult with tax advisors before initiating the activity to better understand how it may impact their tax treatment and, ultimately, their bottom line.

V. CONCLUSION

The agritourism industry is growing exponentially.[343] This growth often involves new activities, many of which appear less and less connected to agricultural production activities. The new activities create a moving target for federal, state, and local regulatory authorities, which have failed to keep pace. Critically, many regulatory authorities either fail to define agritourism or use outdated or unclear definitions.[344] The lack of a clear definition forms the basis of the law's struggles to keep up with the growing and rapidly changing nature of

339. *See id.*

340. I.R.C. § 183(b) (showing how if an activity is not engaged in for a profit, but for sport, hobby, or recreation, the hobby loss rules generally provide that taxpayers can deduct the expenses of carrying on the activities only in an amount up to the gross income produced from the activity). While the Tax Cuts & Jobs Act of 2017 did not change the hobby loss rules, it suspended miscellaneous itemized deductions subject to the 2% floor through 2025. *Id.* § 67(a)–(b), (g). This means that taxpayers engaged in hobby activities cannot take business deductions in any amount for tax years before January 1, 2026. *Id.*

341. *See generally* FARMER'S TAX GUIDE, *supra* note 265, at 9.

342. *See, e.g.*, I.R.C. § 6654(i)(2).

343. Sara Steever, *The Rise of Agritourism (and How Brands Can Respond to It)*, FORBES (Nov. 30, 2022, 7:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2022/11/30/the-rise-of-agritourism-and-how-brands-can-respond/ [https://perma.cc/8GHG-GF3S].

344. HOEVEN, *supra* note 221, at 5.

agritourism. Consequently, courts, enforcement agencies, and others attempt to categorize and regulate agritourism.

This Article began by highlighting the dynamic nature of the agritourism industry and by presenting some models to define the industry. It then used land use regulation, real property taxation, and federal income taxation to illustrate the practical difficulties of regulating the agritourism industry in starkly different contexts. Although the contexts and the adopted definitions differ, the difficulties are similar.

The core and peripheral activities model, consistent with other definitions of agritourism, focuses on the agricultural business as the principal activity and classifies agritourism activities based on their relationship to the core activity.[345] Although the core and peripheral activities model implies that the agritourism activity should support and be secondary to the agricultural activity, the model does not directly address the relative scale issue.[346] When the agritourism activity becomes the principal activity and the agricultural activity becomes secondary, the original intent of agritourism seems to be defeated.

In summary, regulatory and enforcement agencies must decide whether definitions should be adopted or changed to evolve with the evolving nature of agritourism, or whether to maintain the status quo. The Tennessee legislature adopted the former approach by amending the definition of agritourism to include entertainment activities not necessarily connected to agricultural production.[347] Congress, on the other hand, will likely stay the course by not defining agritourism explicitly. Instead, if non-incidental activities do not meet the narrow definition of "agriculture" under the Internal Revenue Code, the favorable treatment accorded to agricultural activities do not apply.

The authors recommend that regulatory and enforcement agencies adopt clear definitions of agritourism and related terms. Clear definitions would alleviate many of the problems and uncertainty illustrated in this Article. Further, the definitions should address the scale of agricultural activity and agritourism activity. Common definitions of agritourism cite a desire to allow agricultural businesses to supplement their incomes with agritourism activities.[348] When the agritourism business dominates the agricultural business, that purpose is lost, and

345. *Agritourism: Toward a Conceptual Framework for Industry Analysis*, *supra* note 11, at 17–18.

346. *See id.*

347. 2014 Tenn. Pub. Acts 581 (S. 1614); *see supra* notes 97–134 and accompanying text.

348. *See, e.g.*, Jefferson Cnty. v. Wilmoth Family Props., LLC, No. E2019-02283, 2021 WL 321219, at *14 (Tenn. Ct. App. Feb. 1, 2021).

the impacts on neighboring landowners may be much different. Finally, where agritourism activities overwhelm the agricultural business, the agricultural business may be displaced.