AGRICULTURE, HORTICULTURE AND FOOD: RIGHT TO FARM ACT.

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING — GENERAL POWERS AND PROCEDURES OF COUNTIES.

Right to Farm Act expressly limits circumstances under which agricultural operation is deemed nuisance. Act would preempt county regulation of industrial farming that is inconsistent with Act, unless restriction is attributable to safeguarding of locality's inhabitants. County has no authority to adopt ordinance that limits circumstances under which agricultural operations may be deemed to constitute nuisance, trespass, or other interference with reasonable use and enjoyment of land.

Mr. Rodger L. Smith

County Attorney for Page County

October 8, 1998

You ask whether a county has the authority to adopt an ordinance that limits the circumstances under which agricultural operations may be deemed to constitute a nuisance, trespass, or other interference with the reasonable use and enjoyment of land.

Sections 3.1-22.28 and 3.1-22.29 comprise the Right to Farm Act. The stated purpose of § 3.1-22.28 is "to limit the circumstances under which agricultural operations my be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing agricultural operations."[1] Section 3.1-22.29 limits the authority of local governments to regulate the use of land within their jurisdictions by establishing three basic requirements for local zoning ordinances regulating agricultural operations: (1) that the ordinance not require a special use permit;[2] (2) that the ordinance not prohibit farming practices conducted in accordance with best management practices and the laws and regulations of the Commonwealth;[3] and (3) that the regulation bear a relationship to the health, safety and general welfare of the citizens.[4] This section also provides a definition of "agricultural operation"[5] and nullifies any ordinance "that would make the operation of any such agricultural operation or its appurtenances a nuisance … [unless the] nuisance results from the negligent or improper operation of any such agricultural operation or any of its appurtenances."[6]

The powers of county boards of supervisors in the Commonwealth are limited to those "conferred expressly or by necessary implication."[7] "'This [principle] is a corollary to Dillon's Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.'"[8] Any doubt as to the existence of a power must be resolved against the locality.[9] Accordingly, because local governments are creatures of the Commonwealth and thus subordinate, they possess only those powers that the General Assembly has conferred upon them.[10] Thus, where express statutory provisions prohibit localities from adopting ordinances regulating certain matters, there is legislative intent to remove from local governments the authority to do so.[11]

An ordinance is inconsistent with state law if state law preempts any local regulation in the area.[12] The General Assembly, in its enactment of the Right to Farm Act, expressly limited the circumstances under which an agricultural operation is deemed a nuisance. Additionally, it prohibited a county from adopting an ordinance requiring a special exception or special use permit for agricultural activity (with the exception of certain setback, minimum area and other

requirements applicable to the land on which the agricultural activity is occurring).[13] "[W]hen the General Assembly intends to preempt a field, it knows how to express its intention."[14] Although the Right to Farm Act does not specifically prohibit all local regulation of industrial farming, any restrictions must "bear a relationship to the health, safety and general welfare" of the locality's citizens.[15] Therefore, unless it is attributable to the safeguarding of a locality's inhabitants,[16] a local ordinance regulating industrial farming is preempted by the Right to Farm Act.

Based on the above, it is my opinion that a county does not have the authority to adopt an ordinance, such as the one proposed, that limits the circumstances under which agricultural operations may be deemed to constitute a nuisance, trespass, or other interference with the reasonable use and enjoyment of land.

[1]*See also* 1997 Op. Va. Att'y Gen. 4, 5 n.1.

[2]Section 3.1-22.28; s*ee also* § 15.2-2288 (containing essentially same limitation found in § 3.1-22.28).

[3]Section 3.1-22.29(A).

[4]Section 3.1-22.28.

[5]"'[*A*]*gricultural operation'* shall mean any operation devoted to the bona fide production of crops, or animals, or fowl, including but not limited to the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery and floral products; and the production and harvest of products from silviculture activity." Section 3.1-22.29(B).

[6]Section 3.1-22.29(D).

[7]Commonwealth v. Arlington County Bd., 217 Va. 558, 572, 232 S.E.2d 30, 39 (1977); *see also* op. to Hon. Charles R. Hawkins, Va. Sen. (Jan. 6, 1998).

[8]Commonwealth v. Arlington County Bd., 217 Va. at 574, 232 S.E.2d at 40 (quoting Bd. of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

[9]2A Eugene McQuillin, The Law of Municipal Corporations § 10.19, at 369 (3rd ed. rev. 1996).

[10]*See* Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967) (county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power was expressly implied from act of legislature allowing local governing body to lend money to any authority created by governing body).

[11]*See* Commonwealth v. Arlington County Bd., 217 Va. at 578-79, 232 S.E.2d at 43 (General Assembly has not conferred upon school boards express statutory authority to bargain collectively).

[12]1995 Op. Va. Att'y Gen. 85, 86.

[13]Section 3.1-22.28.

[14]Resource Conservation Mgmt. v. Bd. of Sup., 238 Va. 15, 23, 380 S.E.2d 879, 884 (1989); *see also* 1993 Op. Va. Att'y Gen. 173, 176.

[15]Section 3.1-22.28; *see also* 1997 Op. Va. Att'y Gen., *supra* note 1, at 5.

[16]*Compare* § 15.2-1200 (setting forth police power of counties "to secure and promote the health, safety and general welfare of its inhabitants").