



COMMONWEALTH of VIRGINIA

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The Honorable Brenda L. Pogge
Member, House of Delegates
Post Office Box 1386
Yorktown, Virginia 23692

Dear Delegate Pogge:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether allowing agriculture as a “by right” use in areas zoned “Rural Residential” constitutes a zoning classification as used in § 3.2-301, part of the Virginia Right to Farm Act (the “Act”).¹ You are particularly concerned about language in the Act stating that “no county shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification.”²

Response

It is my opinion that allowing agriculture “by right” in areas zoned Rural Residential does not constitute a zoning classification as used in § 3.2-301.

Applicable Law and Discussion

Zoning is a local legislative action for “the process of classifying land within a locality into areas and districts, such areas and districts being generally referred to as ‘zones’.”³ It includes “the prescribing and application in each area and district of regulations concerning building and structure designs, building and structure placement and uses to which land, buildings and structures within such designated areas and districts may be put.”⁴ In other words, the exercise of zoning authority by a locality involves the application of two, distinct aspects of legislative authority.

The first is the creation of “zones.” This exercise of authority includes creating classifications and districts. A “class” is defined as “[a] group of . . . qualities or activities that have common

¹ The Virginia Right to Farm Act, VA. CODE ANN. §§ 3.2-300 through 3.2-302 (2008).

² Section 3.2-301 (2008).

³ VA. CODE ANN. § 15.2-2201 (2012).

⁴ *Id.*

characteristics or attributes.”⁵ A “district” is defined as “[a] territorial area into which a . . . political subdivision is divided for . . . administrative purposes.”⁶ Accordingly, for these purposes, a classification is a description of an activity or activities with common attributes, while a district denotes a specific geographic area within which such activities may be authorized. As discussed below, allowing agriculture “by right” in a “Rural Residential” zone is not a classification issue.

The second exercise of legislative authority is the creation of certain defined regulations regarding use, appearance and structure, among other things, that will apply within the districts. This second action includes prescribing what activities are authorized by right, i.e., by virtue of fitting within the classification or lying within the boundaries of the district; as opposed to specifying what activities are allowed in the particular district or classification only if additional conditions beyond those routinely applicable to the district or classification are met, i.e., activities that require special or conditional use permits.⁷ This aspect of the exercise of legislative authority does not define the zone, but clarifies what may occur within that zone. Your inquiry relates to the legislative authority regarding the regulations that will apply within a district.

For purposes of this opinion I will assume that the zoning classifications to which you refer are those routinely found in local governments in Virginia. In that case, a Rural Residential zoning district would be considered a residential classification.⁸ Such a classification does not promote agricultural and silvicultural activities within its geographic boundaries; it promotes residential uses in rural areas. Certain types of agricultural activities might be allowed in such a district. Often, uses that are considered “less intensive” than those authorized by the zoning classification will be authorized as “by right” uses in a district. That does not change the nature of the district or the classification, however. These are merely legislative choices regarding what restrictions to place on or in any particular category. A legislative choice could be made to allow only incidental agricultural uses in residential zones, i.e., gardens for home consumption only. All agricultural uses could be allowed. All agricultural uses could be prohibited unless a special exception or conditional use permit is granted. But in a residential zoning district, § 3.2-301 would not be applicable because it is not “an agricultural district or classification” referred to by the Act.

A final point is that an owner’s existing property rights may be vested and therefore unaffected by future zoning changes provided he:

- (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.^{9]}

⁵ BLACK’S LAW DICTIONARY 105 (Bryan A. Garner ed., 3d Pocket ed. 2006) (alteration in original).

⁶ *Id.* at 218.

⁷ *See generally* JOHN R. NOLON & PATRICIA E. SALKIN, *LAND USE IN A NUTSHELL* 67-71 (2006).

⁸ *Cf.* *Cherrystone Inlet, L.L.C. v. Bd. of Zoning Appeals*, 271 Va. 670, 672, 628 S.E.2d 324, 325 (2006) (referring to a “Rural Village-Rural Residential” zoning classification as “a restrictive *residential* classification” (emphasis added)).

⁹ Section 15.2-2307 (2012).

Each of these conditions must be met before a right is vested. Merely authorizing an activity in a zoning ordinance does not, by itself, create a vested right.¹⁰ Consequently, authorizing agriculture as a “by right” use in Rural Residential zones does not, by itself, vest any rights in a property owner, but other conditions may exist that vest such rights in a property owner.

Conclusion

Accordingly, it is my opinion that authorizing agricultural uses in a Rural Residential zoning district does not create an agricultural district or classification as those terms are used in § 3.2-301.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized, with the first name "Ken" and the last name "C" being prominent, followed by "II" in a smaller font.

Kenneth T. Cuccinelli, II
Attorney General

¹⁰ Bd. of Supvrs. v. Crucible, Inc., 278 Va. 152, 159, 677 S.E.2d 283, 286 (2009).