



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

July 19, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Christopher K. Peace
Member, House of Delegates
Post Office Box 819
Mechanicsville, Virginia 23111

Dear Delegate Peace:

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 inquire regarding the validity of a Fauquier County Zoning Ordinance related to farm wineries. You specifically ask whether the ordinance's provisions exceed the locality's zoning authority, are preempted by state alcoholic beverage control law, or violate the Constitution of Virginia.

Response

It is my opinion that the Fauquier County Zoning Ordinance for farm wineries, at least in part, is an invalid exercise of local authority because it exceeds the locality's delegated zoning authority¹ and is preempted by state law governing alcoholic beverages.

Applicable Law and Discussion

Virginia follows the Dillon Rule of strict statutory construction, which provides that "municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable"² and its corollary that "[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication."³ Therefore, to have the power to act in a certain area, local governments

¹ To the extent a local government ordinance exceeds the powers granted by the General Assembly, the ordinance would violate the Virginia Constitution. See VA. CONST. art. VII, § 2

² Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

³ Cnty. Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); accord Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

must have express enabling legislation or authority that is necessarily implied from enabling legislation.⁴

Notwithstanding Virginia's reliance on the Dillon Rule, localities generally are conferred broad zoning powers.⁵ Nonetheless, the General Assembly has restricted localities' authority to regulate certain activities and events at farm wineries. Section 15.2-2288.3 specifies several areas in which a locality is either limited in or precluded from exercising its zoning power over farm wineries licensed by the Virginia Alcoholic Beverage Control Board. For instance, "[n]o local ordinance regulating noise, other than outdoor amplified music, arising from activities and events at farm wineries shall be more restrictive than that in the general noise ordinance."⁶ The pertinent County ordinance provides that

Sound generated by outdoor amplified music shall not be audible at or beyond the property line of the Farm Winery. Outdoor amplified music shall include music emanating from a structure, including open pavilions and temporary structures such as tents. In addition, no noise emanating from a Farm Winery shall exceed the noise limits set forth in Section 9-700 [of the county zoning code].^[7]

Because the local provision comports with §15.2-2288.3, I conclude it is a valid exercise of the County's zoning authority.

More generally, § 15.2-2288.3 recognizes that there will be some local control over farm wineries: it states that

Local restriction upon such activities and events of farm wineries licensed in accordance with Title 4.1 to market and sell their products shall be reasonable and shall take into account the economic impact on the farm winery of such restriction, the agricultural nature of such activities and events, and whether such activities and events are usual and customary for farm wineries throughout the Commonwealth.

It further provides that "[u]sual and customary activities and events at farm wineries shall be permitted without local regulation unless there is a substantial impact on the health, safety, or welfare of the public."

Also, § 15.2-2288.3 enumerates several specific areas in which local regulation of farm wineries is strictly prohibited. Subsection E expressly provides that

No locality shall regulate any of the following activities of a farm winery licensed in accordance with subdivision 5 of § 4.1-207:

1. The production and harvesting of fruit and other agricultural products and the manufacturing of wine;
2. The on-premises sale, tasting, or consumption of wine during regular business hours within the normal course of business of the licensed farm winery;

⁴Any doubt as to the existence of such power must be resolved against the locality. *See City of Richmond v. Bd. of Supvrs.*, 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Att'y Gen. 41, 42.

⁵ *See* VA. CODE ANN. § 15.2-2280 (2012).

⁶ Section 15.2-2288.3(A) (2012).

⁷ FAUQUIER COUNTY, VA., ZONING ORDINANCE § 6-402(1).

3. The direct sale and shipment of wine by common carrier to consumers in accordance with Title 4.1 and regulations of the Alcoholic Beverage Control Board;
4. The sale and shipment of wine to the Alcoholic Beverage Control Board, licensed wholesalers, and out-of-state purchasers in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law;
5. The storage, warehousing, and wholesaling of wine in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law; or
6. The sale of wine-related items that are incidental to the sale of wine.

Section 6-401, subsections (1) through (7), of the Fauquier County Zoning Ordinance designates as “by-right uses accessory to the production and harvesting of grapes,” which shall be allowed at a farm winery “upon approval of a Zoning Permit pursuant to section 13-500,” those activities that § 15.2-2288.3(D) and § 15.2-2288.3(E) prohibit localities from regulating.⁸ To the extent that the process of obtaining a Zoning Permit imposes obligations and burdens, including fees, upon the farm winery applicant and allows Fauquier County the ability to restrict through its review and potential denial of the zoning permit application those activities, the Fauquier County Zoning Ordinance exceeds the locality’s zoning authority.

Additionally, § 4.1-128(A) of the Virginia Code prohibits localities from adopting ordinances that regulate alcoholic beverages or certain activities relating to alcoholic beverages at farm wineries.⁹ Section 6-401, subsections (1) through (5), of the Fauquier County Zoning Ordinance regulates those activities at farm wineries that § 4.1-128(A) prohibits localities from regulating. Therefore, Section 6-401, subsections (1) through (5), of the Fauquier County Zoning Ordinance exceeds the locality’s authority under the provisions of § 4.1-128(A) as well as under the provisions of § 15.2-2288.3.

The remaining restrictions on the activities at farm wineries imposed by Section 6-401, subsections 8 and 9, Sections 6-402, 6-403, 5-1810.1 and 5-1810.2 of the Fauquier County Zoning Ordinance may be consistent with § 15.2-2288.3(A).¹⁰ Whether the restrictions are permitted are factual questions based on whether the locality properly considers the economic impact on the farm winery of such restriction, the agricultural nature of such activities and events, and whether such activities and events are usual and customary for farm wineries throughout the Commonwealth. As this Office consistently has declined to answer questions resolving factual matters, rather than pure questions of statutory or Constitutional interpretation, this Office does not offer a view on the validity

⁸ See § 15.2-2288.3(D) (“No locality may treat private personal gatherings held by the owner of a licensed farm winery who resides at the farm winery or on property adjacent thereto that is owned or controlled by such owner at which gatherings wine is not sold or marketed and for which no consideration is received by the farm winery or its agents differently from private personal gatherings by other citizens.”).

⁹ See § 4.1-128(A) (“No county, city, or town shall, except as provided in § 4.1-205 or § 4.1-129, adopt any ordinance or resolution which regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth. Nor shall any county, city, or town adopt an ordinance or resolution that prohibits or regulates the storage, warehousing, and wholesaling of wine in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law at a licensed farm winery.”).

¹⁰ See § 15.2-2288.3(A).

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of these remaining sections of the Fauquier County Zoning Ordinance under the locality's zoning authority.¹¹

Conclusion

Accordingly, it is my opinion that the Fauquier County Zoning Ordinance for farm wineries, at least in part, is an invalid exercise of local authority because it exceeds the locality's delegated zoning authority and is preempted by state law governing alcoholic beverages.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

¹¹ See 1986-87 Op. Att'y Gen. Va. 252.