

TOWN OF CLIFTON FAIRFAX, VIRGINIA

Background

Virginia SB 430, signed into law in March 2014, amended § 4.1-208 of the Code of Virginia to include 15.2-2288.3:1 to related to Beer Licenses (full text below).

Specifically, SB430 established a Limited Brewery License for, "breweries that manufacture no more than 15,000 barrels of beer per calendar year, provided (i) the brewery is located on a farm in the Commonwealth on land zoned agricultural and owned or leased by such brewery or its owner and (ii) agricultural products, including barley, other grains, hops, or fruit, used by such brewery in the manufacture of its beer are grown on the farm."

Further, the bill outlines the controls municipalities have in regulating Farm Breweries by stating, "It is the policy of the Commonwealth to preserve the economic vitality of the Virginia beer industry while maintaining appropriate land use authority to protect the health, safety, and welfare of the citizens of the Commonwealth and to permit the reasonable expectation of uses in specific zoning categories." Continuing on the bill reads, "Any locality may exempt any brewery licensed in accordance with subdivision 2 of § 4.1-208 on land zoned agricultural from any local regulation of minimum parking, road access, or road upgrade requirements."

Further, "Usual and customary activities and events at such licensed breweries shall be permitted unless there is a substantial impact on the health, safety, or welfare of the public."

Fauquier and Loudoun Counties conducted a thorough assessment to determine what impact SB430 would have on their jurisdictions and updated their zoning ordinances to ensure Farm Breweries were placed in a suitable zone. Loudoun County was able to successfully prevent operation of Farm Breweries until the zoning ordinances were officially amended.

Explicitly stated, SB430 concludes such licenses shall be issued to breweries that are "located on a farm in the Commonwealth on land zoned agricultural". Today in Fairfax County, the zoning districts are as follows:

- Residential
- Commercial
- Industrial
- Planned Development
- Overlay

RESOLUTION: 2015-06-02D

PRESENTED: June 2, 2015

ADOPTED: June 2, 2015

A RESOLUTION: **Requesting Fairfax County adopt a common sense approach to implementing Farm Breweries**

WHEREAS, the Fairfax County Zoning ordinance stipulates Agriculture as a permitted use within the following residential zones: Rural Agriculture (R-A), Residential Preservation (R-P), Residential Conservation (R-C), Residential Estate (R-E), Residential District / One Dwelling Unit Per Acre (R-1).

WHEREAS, Fairfax County has not done an impact assessment on said zones with regards to traffic, adequacy of roads, impact to adjacent neighbors, impact to the communities, and impact to well/septic or environment as a result of Farm Breweries.

WHEREAS, without an impact assessment, Fairfax County cannot confidently say which zone(s), if any, are most appropriate for Farm Breweries.

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- WHEREAS,** we understand the average amount of water used per household per week is 2,800 gallons.
- WHEREAS,** we understand the amount of water required by a Farm Brewery producing 15,000 barrels per year would be approximately 84,000 gallons of water per week or equivalent to 30 households.
- WHEREAS,** Clifton is located in the Occoquan Watershed and a downzoned area designed to limit development to no more than one residence per five acres and to "protect one of the county's most important natural resources – our drinking water" (<http://www.fairfaxcounty.gov/news/2003/03022.htm>).
- WHEREAS,** Fairfax County has not yet conducted conclusive studies with regards to what impact the substantial well water consumption by a proposed brewery will have on the "health, safety, and welfare of the citizens of the Commonwealth," specifically adjacent families sharing the same aquifer.
- WHEREAS,** Virginia Senior Legislative Attorney Maria J.K. Everett opined that SB430 was intended for agriculturally zoned land and not residential zones with agriculture as a permitted use. (Full text attached.)
- WHEREAS,** Attorney General Ken Cuccinelli opined in a 2013 written opinion that "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. (Opinion Attached.)
- WHEREAS,** Loudoun and Fauquier Counties have implemented Farm Brewery regulations.
- WHEREAS,** Loudoun County was able stay the operation of Farm Breweries until county zoning ordinances were amended in January 2015.
- WHEREAS,** SB430 gives the county the powers "that are specifically conferred on them by the Virginia General Assembly" to regulate Farm Breweries including designating appropriate zones for Farm Breweries.

ADOPTED THIS 2ND DAY OF JUNE 2015.


WILLIAM R. HOLLOWAY, MAYOR

RECORDED VOTE:

Motion by: Eric Hencken

Seconded by: Mayor William Holloway

Yeas: Mayor William Holloway; Wayne Nickum; Jennifer Heilmann;
and, Eric Hencken.

Nays:

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Abstentions:

Absent for Vote:

Deborah Dillard, Vice Mayor Dwayne Nitz

ATTEST: Sandra Scales-Siwiek Sandra Scales-Siwiek, Town Clerk

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Appendix

Full Text of SB430 (<http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0365>)

CHAPTER 365

An Act to amend and reenact § 4.1-208 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 15.2-2288.3:1, relating to breweries located on farms; local regulation of certain activities.

[S 430]

Approved March 27, 2014

Be it enacted by the General Assembly of Virginia:

1. That § 4.1-208 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 15.2-2288.3:1 as follows:

§ 4.1-208. Beer licenses.

The Board may grant the following licenses relating to beer:

1. Brewery licenses, which shall authorize the licensee to manufacture beer and to sell and deliver or ship the beer so manufactured, in accordance with Board regulations, in closed containers to (i) persons licensed to sell the beer at wholesale; (ii) persons licensed to sell beer at retail for the purpose of resale within a theme or amusement park owned and operated by the brewery or a parent, subsidiary or a company under common control of such brewery, or upon property of such brewery or a parent, subsidiary or a company under common control of such brewery contiguous to such premises, or in a development contiguous to such premises owned and operated by such brewery or a parent, subsidiary or a company under common control of such brewery; and (iii) persons outside the Commonwealth for resale outside the Commonwealth. Such license shall also authorize the licensee to sell at retail the brands of beer that the brewery owns at premises described in the brewery license for on-premises consumption and in closed containers for off-premises consumption.

Such license may also authorize individuals holding a brewery license to (a) operate a facility designed for and utilized exclusively for the education of persons in the manufacture of beer, including sampling by such individuals of beer products, within a theme or amusement park located upon the premises occupied by such brewery, or upon property of such person contiguous to such premises, or in a development contiguous to such premises owned and operated by such person or a wholly owned subsidiary or (b) offer samples of the brewery's products to individuals visiting the licensed premises, provided that such samples shall be provided only to individuals for consumption on the premises of such facility or licensed premises and only to individuals to whom such products may be lawfully sold.

2. *Limited brewery licenses, to breweries that manufacture no more than 15,000 barrels of beer per calendar year, provided (i) the brewery is located on a farm in the Commonwealth on land zoned agricultural and owned or leased by such brewery or its owner and (ii) agricultural products, including barley, other grains, hops, or fruit, used by such brewery in the manufacture of its beer are grown on the farm. The licensed premises shall be limited to the portion of the farm on which agricultural products, including barley, other grains, hops, or fruit, used by such brewery in the manufacture of its beer are grown and that is contiguous to the premises of such brewery where the beer is manufactured, exclusive of any residence and the curtilage thereof. However, the Board may, with notice to the local governing body in accordance with the provisions of § 4.1-230, also approve other portions of the farm to be included as part of the licensed premises.*

Limited brewery licensees shall be treated as breweries for all purposes of this title except as otherwise provided in this subdivision.

3. Bottlers' licenses, which shall authorize the licensee to acquire and receive deliveries and shipments of beer in closed containers and to bottle, sell and deliver or ship it, in accordance with Board regulations to (i) wholesale beer licensees for the purpose of resale, (ii) owners of boats registered under the laws of the United States sailing for ports of call of a foreign country or another state, and (iii) persons outside the Commonwealth for resale outside the Commonwealth.

~~3-~~4. Wholesale beer licenses, which shall authorize the licensee to acquire and receive deliveries and shipments of beer and to sell and deliver or ship the beer from one or more premises identified in the license, in accordance with Board regulations, in closed containers to (i) persons licensed under this chapter to sell such beer at wholesale or retail for the purpose of resale, (ii) owners of boats registered under the laws of the United States sailing for ports of

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call of a foreign country or another state, and (iii) persons outside the Commonwealth for resale outside the Commonwealth.

No wholesale beer licensee shall purchase beer for resale from a person outside the Commonwealth who does not hold a beer importer's license unless such wholesale beer licensee holds a beer importer's license and purchases beer for resale pursuant to the privileges of such beer importer's license.

4-5. Beer importers' licenses, which shall authorize persons licensed within or outside the Commonwealth to sell and deliver or ship beer into the Commonwealth, in accordance with Board regulations, in closed containers, to persons in the Commonwealth licensed to sell beer at wholesale for the purpose of resale.

5-6. Retail on-premises beer licenses to:

a. Hotels, restaurants and clubs, which shall authorize the licensee to sell beer, either with or without meals, only in dining areas and other designated areas of such restaurants, or in dining areas, private guest rooms, and other designated areas of such hotels or clubs, for consumption only in such rooms and areas.

b. Persons operating dining cars, buffet cars, and club cars of trains, which shall authorize the licensee to sell beer, either with or without meals, in the dining cars, buffet cars, and club cars so operated by them for on-premises consumption when carrying passengers.

c. Persons operating sight-seeing boats, or special or charter boats, which shall authorize the licensee to sell beer, either with or without meals, on such boats operated by them for on-premises consumption when carrying passengers.

d. Grocery stores located in any town or in a rural area outside the corporate limits of any city or town, which shall authorize the licensee to sell beer for on-premises consumption in such establishments. No license shall be granted unless it appears affirmatively that a substantial public demand for such licensed establishment exists and that public convenience and the purposes of this title will be promoted by granting the license.

e. Persons operating food concessions at coliseums, stadia, or similar facilities, which shall authorize the licensee to sell beer, in paper, plastic, or similar disposable containers, during the performance of professional sporting exhibitions, events or performances immediately subsequent thereto, to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board in such coliseums, stadia, or similar facilities, for on-premises consumption. Upon authorization of the licensee, any person may keep and consume his own lawfully acquired alcoholic beverages on the premises in all areas and locations covered by the license.

f. Persons operating food concessions at any outdoor performing arts amphitheater, arena or similar facility which has seating for more than 3,500 persons and is located in Albemarle, Augusta, Pittsylvania, or Rockingham Counties. Such license shall authorize the licensee to sell beer during the performance of any event, in paper, plastic or similar disposable containers to patrons within all seating areas, concourses, walkways, concession areas, or similar facilities, for on-premises consumption. Upon authorization of the licensee, any person may keep and consume his own lawfully acquired alcoholic beverages on the premises in all areas and locations covered by the license.

g. Persons operating food concessions at exhibition or exposition halls, convention centers or similar facilities located in any county operating under the urban county executive form of government or any city which is completely surrounded by such county, which shall authorize the licensee to sell beer during the event, in paper, plastic or similar disposable containers to patrons or attendees within all seating areas, exhibition areas, concourses, walkways, concession areas, and such additional locations designated by the Board in such facilities, for on-premises consumption. Upon authorization of the licensee, any person may keep and consume his own lawfully acquired alcoholic beverages on the premises in all areas and locations covered by the license. For purposes of this subsection, "exhibition or exposition halls" and "convention centers" mean facilities conducting private or public trade shows or exhibitions in an indoor facility having in excess of 100,000 square feet of floor space.

6-7. Retail off-premises beer licenses, which shall authorize the licensee to sell beer in closed containers for off-premises consumption.

7-8. Retail off-premises brewery licenses to persons holding a brewery license which shall authorize the licensee to sell beer at the place of business designated in the brewery license, in closed containers which shall include growlers and other reusable containers, for off-premises consumption.

8-9. Retail on-and-off premises beer licenses to persons enumerated in subdivisions 5 6 a and 5 6 d, which shall accord all the privileges conferred by retail on-premises beer licenses and in addition, shall authorize the licensee to sell beer in closed containers for off-premises consumption.

§ 15.2-2288.3:1. *Limited brewery license; local regulation of certain activities.*

A. It is the policy of the Commonwealth to preserve the economic vitality of the Virginia beer industry while maintaining appropriate land use authority to protect the health, safety, and welfare of the citizens of the Commonwealth and to permit the reasonable expectation of uses in specific zoning categories. Local restriction

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upon such activities and public events of breweries licensed pursuant to subdivision 2 of § 4.1-208 to market and sell their products shall be reasonable and shall take into account the economic impact on such licensed brewery of such restriction, the agricultural nature of such activities and events, and whether such activities and events are usual and customary for such licensed breweries. Usual and customary activities and events at such licensed breweries shall be permitted unless there is a substantial impact on the health, safety, or welfare of the public. No local ordinance regulating noise, other than outdoor amplified music, arising from activities and events at such licensed breweries shall be more restrictive than that in the general noise ordinance. In authorizing outdoor amplified music at such licensed brewery, the locality shall consider the effect on adjacent property owners and nearby residents.

B. No locality shall regulate any of the following activities of a brewery licensed under subdivision 2 of § 4.1-208:

- 1. The production and harvesting of barley, other grains, hops, fruit, or other agricultural products and the manufacturing of beer;*
- 2. The on-premises sale, tasting, or consumption of beer during regular business hours within the normal course of business of such licensed brewery;*
- 3. The direct sale and shipment of beer in accordance with Title 4.1 and regulations of the Alcoholic Beverage Control Board;*
- 4. The sale and shipment of beer to 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 and warehousing of beer in accordance with Title 4.1, regulations of the Alcoholic Beverage Control Board, and federal law; or*
- 6. The sale of beer-related items that are incidental to the sale of beer.*

C. Any locality may exempt any brewery licensed in accordance with subdivision 2 of § 4.1-208 on land zoned agricultural from any local regulation of minimum parking, road access, or road upgrade requirements.

Letter from Maria J.K. Everett - Legislative Attorney
(<https://www.facebook.com/groups/903447006393351/>)

Dear Del. Hugo

I just got off the phone with Vickie of your office concerning the referenced matter and the situation in Fairfax County. As the drafter of the legislation and also the attorney who staffed the committees in both the House and Senate where this bill was referred (HGL and RSS), I specifically recall that it was the intent of the GA to limit where these breweries could operate to land zoned agricultural. In the language of the bill the words following "provided" are words of limitation. In addition, rules of statutory construction are that the GA in enacting legislation meant to do what they did. If the GA had intended to allow these breweries to operate in other zoning classifications where agriculture may be a permitted use, the GA would have known how to say that. It did not.

The impact of these breweries is both agri-tourism as well as the manufacturing of beer. Large trucks come and go and when events are held there, there are lots of public that attend and such events are usually accompanied by bands and other festival-like activities. All of these activities require space and lots of it. Hence the requirement for land zoned agricultural.

I hope this helps.

Maria J.K. Everett
Senior Attorney
Division of Legislative Services
General Assembly Building,
2nd Floor
201 North 9th Street
Richmond, VA 23219



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

June 21, 2013

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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 dark ink, appearing to read "Ken C" followed by a stylized "II" with a horizontal line through it.

Kenneth T. Cuccinelli, II
Attorney General

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