Agricultural Uses and Zoning

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Legislative summary(ies)

The authority to regulate agricultural activities is one of the few significant differences between city and county land use regulatory authority in North Carolina. Cities have broad authority to regulate a wide range of agricultural activities. County authority is more limited.

Summary:

[Adapted from Owens, Land Use Law in North Carolina (4th ed. 2023)]

The authority to regulate agricultural activities is one of the few significant differences between city and county authority to regulate land use in North Carolina. Cities have broad authority to regulate a wide range of agricultural activities. County authority is more limited.

Cities can regulate agricultural operations through zoning within their corporate limits but may not do so in their extraterritorial jurisdictions.[1] Cities also frequently have restrictions on keeping animals within the corporate limits.[2] G.S. 160D-903(c) allows, but does not require, cities to grant regulatory flexibility to land that is included within voluntary agricultural districts (such as allowing on-farm sales, pick-your-own operations, road signs, agritourism, and other activities incidental to farming).

When the authority to adopt zoning ordinances was extended to all counties in 1959, the legislation exempted bona fide farming from zoning regulation. This exemption was later extended to farms located within municipal extraterritorial areas.

It is important to note that nonfarm uses, even if located on a bona fide farm, are not exempt from county zoning.[3] Only the farm use on a bona fide farm is exempt.

A critical threshold question related to the agricultural exemption from zoning is what constitutes a *bona fide farm*.

Under G.S. 160D-903(a), bona-fide-farm purposes "include the production and activities relating or incidental to the production of crops, grains, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agriculture, as defined in G.S. 106-581.1." The cross-referenced statute, G.S. 106-581.1, defines the terms *agriculture*, *agricultural*, and *farming* to include the following activities:

> 1. the cultivation of soil for production and harvesting of crops, including fruits, vegetables, sod, flowers, and ornamental plants;
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> 2. the planting and production of timber;
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> 3. dairying and the raising, management, care, and training of livestock, including horses, bees, poultry, deer, elk, and other animals for individual and public use, consumption, and marketing;
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> 4. aquaculture;
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> 5. the operation, management, conservation, improvement, and maintenance of a farm and the structures on the farm, including the repair, replacement, or expansion of such structures and construction incidental to the farming operation;[4]
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> 6. activities incidental to the operation of a farm, including the marketing and selling of agricultural products, agritourism, the storage and use of materials for agricultural purposes (when performed on a farm), and the packing, treating, processing, sorting, storage, and other activities performed to add value to agricultural items produced on the farm;[5] and
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> 7. a public or private grain warehouse or warehouse operation that holds grain for ten days or longer, including but not limited to all buildings, elevators, equipment, and warehouses consisting of one or more warehouse sections and considered a single delivery point with the capability to receive, load out, weigh, dry, and store grain.

G.S. 160D-903(a)[6] specifies that several items shall constitute sufficient evidence that property is being used for bona-fide-farm purposes. These include: (1) a farm sales-tax exemption;[7] (2) a property-tax listing showing the property is eligible for the use-value-taxation program;[8] (3) a farm owner or operator's schedule from a federal income-tax return; or (4) a forest-management plan. This statute provides that other evidence may also be considered.

"Agritourism" is included within an exempt farm use. G.S. 160D-903(a) was amended in 2017 to specify what qualifies as agritourism and thus a "farm purpose" in order to be exempt from county zoning. To qualify, the land must be owned by a person who holds a qualifying farmer sales-tax exemption or is enrolled in the present-use-value property-tax program. An IRS Schedule F or a forestry-management plan still qualifies the property as a farm, but they are not sufficient to qualify agritourism as a nonfarm use exempt from zoning. The property must remain in one of the two qualifying circumstances for three years after the start of the agritourism use. If that is not done, the agritourism use becomes subject to county zoning. This statute goes on to require that the agritourism use have at least some modest farm connection by including the following:

> For purposes of this section, "agritourism" means 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 farming, ranching, historic, cultural, harvest-your-own activities, hunting, fishing, equestrian activities, or natural activities and attractions. A building or structure used for agritourism includes any building or structure used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.

North Carolina cases provide additional clarification on the definition of bona fide farms and exempted farm uses.

Development Associates, Inc. v. Wake County Board of Adjustment[9] involved a dog-breeding and kennel facility on a 2.5-acre tract in Wake County. The county zoning ordinance defined agricultural and farming purposes to include any area of realty that either comprised forty or more acres or comprised less than forty acres but brought in an annual gross income of $500 or more from any agricultural, farming, livestock, or poultry operation, exclusive of home gardens. The court ruled that G.S. 153A-340 (now G.S. 160D-903) exempted only farming and livestock operations from zoning. Because the statute did not define the terms, the court looked to various agricultural, criminal, and negligence statutes relating to animals for guidance on what *livestock* included. The court concluded that dogs were not livestock and therefore ruled that the kennel was subject to county zoning.

Baucom's Nursery Co. v. Mecklenburg County[10] involved a nursery and greenhouse on a 19.6-acre tract in Mecklenburg County. The county had secured local legislation in 1967 explicitly authorizing it to define *bona fide farm* for the purpose of the agriculture exemption from county zoning. The county adopted the following definition:

Any tract of land containing at least three (3) acres which is used for dairying or for the raising of agricultural products, forest products, livestock or poultry and including facilities for the sale of such products from the premises where produced provided that, a farm shall not be construed to include commercial poultry and swine production, cattle feeder lots and fur-bearing animal farms.

The court held that the nursery and greenhouse were a bona fide farm because agricultural operations included the growing of vegetables, flowers, and shrubs.

Sedman v. Rijdes[11] involved a plant- and vegetable-greenhouse operation on a 41-acre tract adjacent to the plaintiff's property in Orange County. The operation included four greenhouses, fans, a loading dock, and some sales of the plants on the premises. The court dismissed the contention that the operation was in violation of the zoning ordinance, ruling that the entire horticultural operation was exempt from zoning as a bona fide farm.

In *Ball v. Randolph County Board of Adjustment*, the court held that treatment of petroleum-contaminated soil through a process known as "land farming" was not an agricultural use. This process of soil remediation involved transporting contaminated soil to a site and treating the soil chemically with nutrients to stimulate microbial consumption of the contaminants. The process required tilling the soil to stimulate the process. The Randolph County zoning regulation did not specifically address this use. The county staff ruled that the process was a permitted use in the residential-agricultural district because of its similarity to common farming practices, a determination upheld by the board of adjustment. However, on appeal the court held that because no crops, plants, or other agricultural products were involved, it was, as a matter of law, a waste-treatment process and not an agricultural use of the land.[12]

County of Durham v. Roberts[13] addressed the question of the scope of activities that can be considered to be incidental to agricultural operations and thus within the scope of the county zoning exemption. The defendant there owned a 113-acre tract and proposed to raise horses for her family's enjoyment. The defendant improved the pastures by grading the site, removing some three feet of clay, and expanding several ponds. The material removed was sold to an excavation contractor for use in a landfill. The county contended this constituted "resource extraction," a prohibited use in the zoning district. The court held that raising horses is the "production of livestock" within the agriculture exemption even if the

horses were not commercially traded. The court further held that the pasture improvements were incidental to that operation, even if the by-products were sold for nonagricultural purposes and even if such activity is not "necessary and customary" for farming.

North Iredell Neighbors for Rural Life v. Iredell County[14] involved a proposed biodiesel operation intended to produce 500,000 gallons of fuel per year. The court held that the facility was an industrial use not covered within the bona-fide-farm exemption and that nonfarm uses of a farm were subject to county zoning. Key factors in this determination included the fact that the operation was not self-contained (some of the seeds used in production would be produced off-site) and that the facility would produce substantially more fuel than could be used for on-site agricultural activities.

Hampton v. Cumberland County[15] presented the issue of whether a shooting range was agritourism and exempt from county zoning. The court noted that even though the owners had qualified the property as a farm,[16] "nonfarm uses" were still subject to zoning. The court held that having one of the qualifiers as a "farm" was "sufficient evidence" of farm use but not "conclusive evidence." However, the court found that the record before the board of adjustment did not resolve the factual determination of how the range was actually used—whether it was used occasionally by the owners and invitees for target practice or was regularly used for commercial firearms training. The court remanded the matter for findings by the board.

The court in *Jeffries v. County of Harnett* addressed whether commercial shooting activities (shooting towers, archery ranges, ranges and courses for clay pigeon shooting, rifle ranges, and pistol pits) constituted agritourism when conducted on a bona fide farm. The court noted that while hunting is a traditional rural activity, that is not the case with shooting ranges.[17] The court noted the examples of agritourism listed in the statute—"farming, ranching, historic, cultural, harvest-your-own activities, or other natural activities and attractions"—were all rural activities, and this implied that other exempt agritourism should be similar "natural" activities that could be enjoyed without alteration of the land.[18] While an outdoor shooting range may require land space that only a rural setting can provide, shooting is not purposefully performed on a farm for the aesthetic value of the farm or its rural setting. The court thus held that the shooting activities were not agritourism and were subject to county zoning.

G.S. 160D-903(a) provides that an existing or new residence is incidental to farming and thus exempt from county zoning if it is situated on the farm, is constructed according to the residential building code, and is occupied by the owner, lessee, or operator of the farm. Other buildings or structures "sheltering or supporting" the farm use and operation also are considered incidental to the farm use. Farmworker housing on the farm, including housing for temporary farm workers, is likely also exempt if it is occupied solely by persons working on that farm.[19]

The statutes also limit the use of zoning to prohibit residential incursion into agricultural areas. G.S. 160D-903(b)[20] provides that counties may not prohibit single-family detached homes on lots greater than ten acres in size in zoning districts where more than 50 percent of the land is used for agriculture or silviculture (unless the property is in a commercial or industrial zoning district allowing a broad variety of commercial or industrial uses).

As the number of large-scale hog farms dramatically increased in North Carolina in the 1990s, the General Assembly took several steps to regulate the location and management of these facilities. The General Assembly enacted uniform state standards for hog lots[21] but allowed no county zoning of hog farms.

The court held in *Craig v. County of Chatham* that these state statutes, along with the statutes on animal-waste-management systems, showed an intention to cover the entire field of swine-farm regulation and thus preempted both general county ordinances and local board-of-health regulation of swine farms.[22]

For a time, there was an exception to the county zoning exemption for hog farms. In 1997, the statute was amended to remove large swine farms from the bona-fide-farm exemption from county zoning. Hog farms served by an animal-waste-management system with a design capacity of 600,000 pounds steady-state live weight or greater could be subjected to a county zoning regulation. A county was not permitted, however, to adopt zoning regulations that excluded such farms from the zoned area of the county, nor could it require discontinuance of large swine farms that were in existence at the time county regulations were adopted, require the amortization of such farms, or prohibit repair and replacement on those farms. The zoning-exemption exception for large hog farms was, however, repealed in 2017.

The state statutes regarding regulation of outdoor advertising also include a modest exemption from regulation for some farm signs. G.S. 136-129(2a) exempts advertising to promote a bona fide farm that is exempt from county zoning regulation from sign regulations. The sign can be no more than three feet long on any side and must be on farm property that is owned or leased by the owner or lessee of the bona fide farm.

City and county authority to regulate subdivisions in agricultural areas is also somewhat limited by the exemption of land divisions greater than ten acres from subdivision regulation (local governments may, however, establish minimum lot sizes greater than ten acres in appropriate rural-agricultural zoning districts).[23]

State legislation limits both city and county regulation of some forestry activity. G.S. 160D-921 prohibits counties and cities from regulating activities associated with growing, managing, and harvesting trees on lands subject to forestry use-value property taxation or activity being conducted in accordance with a forest-management plan. These statutes provide that they do not limit local regulation of activity associated with development. A difficult situation arises when both forestry and development are involved. For example, trees may be grown on a site under a forestry-management plan until the owner determines that the site is ready for development, at which point the trees are harvested and sold and the site is subsequently converted to nonforest use. The statutes address this situation by providing that counties and cities may deny building permits, site plans, and subdivision plats in certain instances of clear-cutting the property. If the harvest results in the removal of substantially all of the trees that were protected under city or county regulation, development approval can be withheld for up to three years after the harvest (and for up to five years if the harvest was a willful violation of local ordinances). Also, G.S. 153A-123(h) and 160A-175(h) prohibit any local ordinance from regulating trees on property owned or operated by a public-airport authority.

G.S. 143-138(b4) exempts specified farm buildings outside of municipal-development-regulation jurisdiction (and greenhouses and therapeutic equine facilities inside of cities) from building code regulation.[24] Spectator seating in such buildings is subject to an annual safety inspection.

State law provides a variety of other nonregulatory protections for agricultural land uses. The state's Agricultural Development and Farmland Preservation Trust Fund, G.S. 106-744, provides grants for purchase of agricultural conservation easements. Qualifying farmland may be assessed at its agricultural value rather than market value for property taxes. G.S. 105-277.2 to -277.7. Counties and cities may also

establish voluntary agricultural districts that limit water and sewer assessments for farmland and require special public hearings before condemnation of farmland. G.S. 106-735 to -743.5. Property that is in active farm use may not be annexed into a city without the written consent of the owner. G.S. 160-58.54(c).

Private-nuisance actions against preexisting farm uses are also limited. A farmer's intentional conduct may be held to be a nuisance if it unreasonably interferes with the use and enjoyment of a neighbor's property and the gravity of the harm to the neighbor outweighs the utility of the farmer's conduct.[25]

The "Right to Farm" Act, G.S. 106-701, was added to the statutes in 1979. It provides that if an agricultural or forestry operation has been in existence for one year, it shall not become a nuisance as a result of changed conditions around it unless there is a fundamental change in the farm operation. The statute, as with similar legislation around the country, codifies a "coming to the nuisance" defense that protects farm operations from suits as the surrounding lands become more populated.

A series of twenty-six cases in federal court were brought by some 500 neighbors of large-scale hog farms in 2013 contending the use of open waste ponds (termed hog "lagoons") and spraying the effluent on adjacent croplands constituted a nuisance, largely due to the odors.[26] The court in *In re: NC Swine Farm Nuisance Litigation* held that the right-to-farm statute did not protect the farm operation from a nuisance action brought by residents in place prior to the initiation of the swine farms.[27] A number of the cases were consolidated and the plaintiffs were awarded substantial actual and punitive damages in 2018.

In 2018, the statute was amended to limit suits brought after a fundamental change in the nature of an existing farm. The amendment provides that a change in the size of the farm or a change in the type of agricultural product being raised is not a "fundamental change" in the existing farm.

Protected agricultural operations include commercial production of crops, livestock, poultry, livestock products, and poultry products. Protected forestry operations include growing, managing, and harvesting trees. This statute does not limit nuisance actions where the neighboring land use was in existence prior to initiation of the agricultural use. It also does not apply when the agricultural operation itself is substantially changed. Attorney's fees may be awarded if the losing party made frivolous or malicious claims.

In addition to limits on private-nuisance actions, G.S. 106-701(d) prohibits local ordinances from making agricultural operations a nuisance in a way inconsistent with these same limits, provided the agricultural operation is not operated in a "negligent or improper" manner.

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[1]. Bona fide farms were exempt from city zoning in the extraterritorial area from 1959 to 1971, were subject to city zoning from 1971 to 2011, and exempt again after 2011.

[2]. G.S. 160A-186 authorizes ordinances on keeping domestic animals within a city. Municipal regulation of farm animals has a long history in the state. See, e.g., State v. Stowe, 190 N.C. 79, 128 S.E. 481 (1925) (upholding ordinance prohibiting keeping cows in Charlotte); State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912) (upholding ordinance prohibiting keeping hogs within a quarter mile of Greensboro); State v. Hord, 122 N.C. 1092, 29 S.E. 952 (1898) (upholding ordinance setting minimum separations between hogpens and residences, storehouses, and wells).

[3]. G.S. 160D-903(a).

[4]. G.S. 106-678 provides that local governments may not regulate the use, sale, distribution, storage, transportation, disposal, manufacture, or application of fertilizer. However, this statute goes on to state that "[n]othing in this section shall prohibit a county, city, or other political subdivision of the State from exercising its planning and zoning authority . . . or from exercising its fire prevention or inspection authority."

[5]. G.S. 160D-903(a) was amended in 2013 to expand where farming activity can take place and still allow application of the zoning exemption to marketing, selling, processing, storing, and similar activity related to farm products. That law exempted these activities for farm products produced not only on the farm property within the county's zoning jurisdiction but also those products produced on any other farm owned or leased by the farmer, wherever located. The provision was further liberalized in 2017 when the phrase "when conducted on the farm" was amended to read "when conducted on a farm." This provision was further extended in 2022 to include buildings and structures used solely for the storage of cotton, peanuts, or sweet potatoes (and by-products of those farm commodities) and to provide that these structures need not have the documentation required for other farm uses. .

[6]. This list of items originally included a farm identification number issued by the U.S. Department of Agriculture, but that was deleted from the list in 2017.

[7]. G.S. 105-164.13E requires that a person have $10,000 in annual income from farm operations in order to qualify for the sales-tax exemption. There is also a conditional exemption for new farmers.

[8]. G.S. 105-277.3 sets minimum acreage and farm-income levels to qualify for participation.

[9]. 48 N.C. App. 541, 269 S.E.2d 700 (1980), *review denied*, 301 N.C. 719, 274 S.E.2d. 227 (1981).

[10]. 62 N.C. App. 396, 303 S.E.2d 236 (1983).

[11]. 127 N.C. App. 700, 492 S.E.2d 620 (1997).

[12]. 129 N.C. App. 300, 498 S.E.2d 833, *appeal dismissed*, 349 N.C. 348, 507 S.E.2d 272 (1998).

[13]. 145 N.C. App. 665, 551 S.E.2d 494 (2001).

[14]. 196 N.C. App. 68, 674 S.E.2d 436, *review denied*, 363 N.C. 582, 682 S.E.2d 385 (2009).

[15]. 256 N.C. App. 656, 808 S.E.2d 763 (2017), *appeal dismissed as improvidently allowed*, 373 N.C. 2, 832 S.E.2d 692 (2019).

[16]. The owners had secured a USDA farm identification number, which at that time was one of the listed ways to establish that the land was a farm.

[17]. 259 N.C. App. 473, 817 S.E.2d 36 (2018), *review denied*, 372 N.C. 297, 826 S.E.2d 710 (2019).

[18]. *Id*. at 489, 817 S.E.2d at 47 (quoting G.S. 99E-30(1)). The court concluded that shooting ranges shared little resemblance to the listed rural-agritourism examples or the spirit of preservation and traditionalism embodied in the statute.

[19]. Housing for migrant farm workers is broadly defined in G.S. 95-223(6). However, to be exempt from zoning it must be incidental to use of the property for farm purposes, which would generally require the workers to be engaged for work on that farm, not any farm. Other statutes and regulations have habitability standards for migrant housing. The Migrant Housing Act is codified as G.S. 95-222 to -229.1. Federal laws also impose minimum health and safety requirements for migrant agricultural workers. 29 U.S.C. § 1823.

[20]. This provision was added to the statutes in 2011 and was apparently motivated by Tonter Investments, Inc. v. Pasquotank County, 199 N.C. App. 579, 681 S.E.2d 536 (2009) (limiting residential use in agricultural zoning district unless lot has specified access to public water supply and to state road or its equivalent).

[21]. The state enacted the Swine Farm Siting Act in 1995, codified at G.S. 106-800 to -805.

[22]. 356 N.C. 40, 565 S.E.2d 172 (2002).

[23]. However, G.S. 160D-903(b) limits zoning restrictions on single-family detached homes on lots greater than ten acres in size in agricultural areas.

[24]. Primitive camps and primitive farm buildings are also excluded from building code regulation by this statute.

[25]. The basic standards for an intentional private nuisance are set forth in Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977). It is, however, difficult for plaintiffs to prevail in nuisance actions against farm operations. See, e.g., Parker v. Barefoot, 130 N.C. App. 18, 502 S.E.2d 42 (1998), *rev'd*, 351 N.C. 40, 519 S.E.2d 315 (1999).

[26]. The lagoon and spray-field method of waste disposal was banned for new operations in 1997, but existing farms were allowed to continue the practice.

[27]. No. 5:15-CV-00013-BR, 2017 WL 5178038 (E.D.N.C. Nov. 8, 2017).

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