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What Does the Farm Exemption from Zoning Regulation Include?

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When the legislature in 1959 extended zoning powers to counties, it was determined that farming should not be subject to county zoning regulation. Cities had been using zoning since 1923 to address "urban" issues such as the compatibility of adjacent land uses. Given the rural nature of unincorporated areas of counties in 1959, along with the considerable political influence of the agricultural community, exempting farming from county zoning regulation was a relatively noncontroversial policy choice.

That policy choice still applies and is still relatively noncontroversial. Counties can elect to use their zoning powers to regulate residential, commercial, and industrial land uses, but not farming.

A question that is increasingly arising around the state, however, is just what is "farming" that is exempt from county zoning regulation? It clearly includes growing crops and farm animals, but does it also include shooting ranges? Garden shops? Rodeos? Wedding and special event facilities? Are these land uses "farming" when it comes to zoning regulation?

The scope of the farming exemption from zoning is sometimes contentious. In some instances this has involved a proposed land use that has more intense or different land use impacts than is the case with traditional farming, raising concerns in the rural neighborhood about traffic, noise, and similar land use concerns. In other instances the surrounding farm community has expressed concern about activity that is "not really farming" using the exemption to avoid regulation and disrupt farm areas. These concerns are often pitted against the interests of the landowner — sometimes a farmer and sometimes not – seeking a more profitable use of the land.

The Farm Exemption

The original county zoning exemption for farming was simple and straightforward: County zoning may not affect bona fide farms, but use of farm property for nonfarm purposes is subject to county zoning. That basic proposition is still included within the zoning statutes at **G.S. 1600D-903(a).**

As Rich Ducker details in this blog **post**, legislative and judicial refinements have been made to the basic policy over the decades. A definition was added for "farm purposes." What qualifies property to be considered a "farm" was specified. Some limited sale of non-farm products was allowed. Large-scale hog farms were allowed to be subject to county zoning, but this allowance was later repealed. A half-dozen cases have litigated various aspects of the zoning exemption for farming.

The bona fide farm exemption has also been extended beyond county zoning. In 2011 G.S. the statutes were amended to exclude land being used for farm purposes from municipal extraterritorial jurisdiction (ETJ). Farming in the ETJ is exempt from city zoning to the same extent it would be exempt from county zoning. **G.S. 160D-903(c)**. Cities also have the option of exempting farm accessory buildings from the building code to the same extent they would be exempt under county jurisdiction. **G.S. 160D-903(d)**.

Two Dimensions of the Zoning Exemption

There are two critical qualifications an activity must have to be exempt from zoning regulation in county or municipal ETJ areas. First, the property involved must be on a "farm." Second, the activity must be a "farming purpose."

The first of these questions is usually easy to resolve. In the early decades of the farm exemption, some counties wrestled with what constituted a "bona fide" farm as opposed to a hobby farm or some clever developer's scheme to avoid regulation. Did the farm have to generate a minimum amount of farm income? Was it enrolled in the present use value property tax program? These questions are now rarely raised because in 2011 **G.S. 160D-903(a)** was amended to simplify resolution of this first question. The statute now provides that production of any one of four items is sufficient to establish that a property is being used for bona fide farm purposes: (1) a farm sales tax certificate; (2) eligibility for present use value property taxation; (3) a Schedule F for federal income taxes; or (4) a forest management plan. This list used to include a USDA farm identification number, but that was deleted from the statute in 2017. While not the exclusive means

to establish that property is being used as a farm, these qualifiers are sufficiently easy and inexpensive to obtain that they resolve most disputes as to whether the property qualifies as a "farm."

The second question is more difficult to resolve. While production of one of the four items noted above is sufficient to establish that the property is being used for farm purposes, it is very important to remember that just as was the case in 1959, **G.S. 160D-903(a)** provides that county zoning regulation still applies to the use of farm property for nonfarm purposes. Nonfarm land uses are not exempt from county zoning. Hampton v. Cumberland County, 256 N.C. App. 656, 808 S.E.2d 763 (2017).

So what activities on a farm qualify as a bona fide farm purpose? The zoning statute provides that the exempt activities are the production of agricultural products. The statute incorporates the broad definition of agriculture from **G.S. 106-581.1**, which includes:

1. Production and harvesting of crops, including fruits, vegetables, sod, flowers and ornamental plants;
2. Planting and production of trees and timber;
3. Dairying and the raising, management, care, and training of livestock, including horses, bees, poultry, and other animals;
4. Aquaculture;
5. Operation and maintenance of farm land, structures and buildings;
6. Marketing and selling of agricultural products, agritourism, the storage and use of materials for agricultural purposes, packing, treating, processing, sorting, storage, and other activities that add value to agricultural items produced on the farm and on any other farm owned or leased by the bona fide farm operator; and
7. Public or private grain warehouses.There is also a limited additional exemption for production of a modest amount of nonfarm products identified under the "Goodness Grows in North Carolina" program if it is done on a farm subject to a conservation easement.

Several cases illustrate the difficulty in drawing the line between farm and nonfarm uses.

The court in Ball v. Randolph County, 129 N.C. App. 300, *appeal dismissed*, 349 N.C. 348 (1998), held that use of farm equipment to till petroleum contaminated soil into farm land may look like farming, but it is pollution remediation, not farming, and is subject to county zoning. Any land use claimed to be exempt must itself be a farm purpose. The facts that the use is conducted on a farm or that it produces useful income for a farmer do not make the use exempt from zoning if it is a

nonfarm purpose. G.S. 130A-291(g), however, provides that production of a crop in accordance with an approved nutrient-management plan on land that is permitted as a septage-land-application site is a bona-fide-farm use for county zoning purposes.

The court in Jeffries v. County of Harnett, 259 N.C. App. 473, 817 S.E.2d 36 (2018), *rev. denied*, 372 N.C. 297, 826 S.E.2d 710 (2019),. 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. The court noted the examples of agritourism listed in the statute 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. An outdoor shooting range may require land space that only a rural setting can provide, but they are not purposefully performed on a farm for the aesthetic value of the farm or its rural setting. The court thus held the shooting activities were not agritourism and were subject to county zoning.

Activities "relating or incidental to" the production of these seven listed activities are also exempt. Merriam-Webster defines "incidental" to be "happening as a minor part or result of something else." In the context of this statute then, the activity claimed to be exempt as incidental to farming must be a minor part of or directly related to the exempt farm purposes listed above. Unless the activity falls within one of these categories, it is a nonfarm purpose that is subject to county zoning even if conducted on bona fide farm property.

Cases have addressed the scope of what can reasonably be considered incidental to exempt farm purposes. In County of Durham v. Roberts, 145 N.C. App. 655 (2001), the court held sale of excavated soil was incidental to the exempt activity of improving pasture land and expanding ponds for horses. In North Iredell Neighbors for Rural Life v. Iredell County, 196 N.C. App. 68, *review denied*, 363 N.C. 582 (2009), the court held a biodiesel production operation was an industrial use rather than a farm use. The fact that the facility would use some agricultural products grown elsewhere and would produce more fuel than could be used on-site were key factors in this determination. The statute was amended in 2017 to clarify that residential use is incidental to the farm use is the residents are the owner, lessee, or operator of the farm. See this **post** by Adam Lovelady for a discussion of the scope of the farm exemption for housing. Also,

The statute was also amended in 2017 to provide some clarity for the scope of the exemption for "agritourism" as an exempt farm use. G.S. **160D-903(a)** limits use of the farm exemption for

agritourism to those farms that have a farm sales tax exemption or is enrolled in the present-use value property tax program. Both of these require some real farm income to qualify. The properties must maintain that qualification for three years after after qualification as a bona fide farm to retain the zoning exemption. "Agritourism" is defined by the statute to include "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 may be used for weddings, receptions, meetings, meals, and other events "that are taking place on the farm because of its farm or rural setting."

Questions at the Margins

If you consider a continuum with "farm purposes" on one end and "nonfarm purposes" on the other, activities on either end of the scale are easy to identify. A horse stable, a commercial greenhouse, and a pond growing fish for sale are farm purposes exempt from county zoning. An asphalt plant, a convenience store/gas station, or a residential subdivision are nonfarm purposes subject to county zoning even if conducted on a qualifying farm. A roadside farm stand is incidental to the farm. A Super Walmart that has a produce section is not. Clearing out the barn for a monthly square dance is likely incidental to farming or agritourism, but an outdoor amphitheater with regular large concerts is a nonfarm commercial activity subject to zoning.

It is the activities in the center of this spectrum, at the border between "farm" and "nonfarm" that are most difficult to characterize. A wine making operation located on a vineyard is exempt. An adjacent tasting room is likely incidental to that winery and would also be exempt. But at some point as the tasting room expands to a restaurant or bed and breakfast facility, it is no longer a minor part of the winery but a commercial use that is subject to county zoning. The difficult question, which must be resolved on a case by case basis, is determining just when this line is passed.

So, when a farm exemption from county zoning or municipal land use regulation in the ETJ is claimed, the zoning administrator must make a determination on whether the property qualifies as a bona fide farm AND, if so, whether the activity is a farm purpose. Land uses meeting both criteria qualify for the zoning exemption but if the activity is an industrial, commercial, or residential activity that is not closely tied to legitimate farming, it is subject to zoning.