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What the heck is "agritourism"? Defining a non-farming agricultural use

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N.C. General Statute 160D-903(a) prevents zoning ordinances in county and municipal extraterritorial jurisdiction from affecting "property used for bona fide farm purposes." This statute also blocks zoning regulations in these same areas from applying to buildings or structures used for "agritourism." But what is agritourism and what uses does it include? Halloween hayrides? Campsites? Shooting ranges? This blog reviews the factors one can use in evaluating whether a use should be considered "agritourism."

Before we dive in, it is important to keep in mind the limits of this exemption: G.S. 160D-903 only blocks *zoning* regulations from affecting property used for bona fide farm purposes. Other local regulations, such as nuisance ordinances, sound regulations, subdivision ordinances, and the like *still apply* to bona fide farms and agritourism uses, wherever they might be located. Zoning ordinances also still apply to farm-related property inside municipal limits and property that may be on a farm but is not being put to farm use. For more on other aspects of zoning and agricultural uses, please see David Owens's April 2020 summary of zoning and agricultural uses, or Adam Lovelady's recent post on the related issue of housing for agricultural workers.

The Rules

Most bona fide farm uses are no surprise – the growing and producing of plants, animals, and dairy are all bona fide farm uses that qualify property for protection from county and extraterritorial zoning. Others might be less obvious but nonetheless involve growing and maintaining plants and animals, such as horticulture (raising house plants), silviculture (tree farming), and aquaculture (fish farming).

As mentioned above, the zoning protection of G.S. 160D-903(a) also applies to "a building or structure that is used for agritourism." The term "agritourism" is defined as "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." The statute explicitly includes as buildings used for agritourism those that are used for "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."

There are some agritourism activities that should fall squarely within this definition if they occur on a bona fide farm, such as corn mazes, horsemanship demonstrations, and nature walks; these activities allow members of the public to enjoy "rural activities" and take place on a farm because of its farm or rural setting. There are other less-obvious uses that are explicitly included, such as the old horse barn that is now used for weddings and corporate events. But what about the situations that are not so clear, like camping areas, rodeos, or even tractor pulls?

The statutes do not give us any other clues, but the North Carolina Court of Appeals provided some additional guidance through its decision in the case of *Jeffries et al v. Harnett County*, 259 N.C. App. 473, 817 S.E.2d 36 (2018), *cert denied* 826 S.E.2d 710 (2019). In that case, the court analyzed what factors might make shooting-related uses, such as a shooting range, sporting clays, or a game reserve, more or less likely to be considered agritourism.

The *Jeffries* court identified three main factors that contribute to whether a use can be considered agritourism and exempted from the application of zoning regulations:

1. Agritourism uses are those performed on a farm because it derives some value from or requires the farm or natural setting. For example, a shooting range just needs open space—it does not derive any other value from being on a farm or in a natural environment. On the other hand, a game reserve with animals kept on site necessarily has to be in a rural setting. In practice, this can be a tricky factor to analyze, but one might consider what value the use derives from being on a farm or in a rural environment. For instance, does it *have* to be in a rural setting? Does being on a farm add substantially to the experience?
2. A use is more likely to be considered agritourism if its risk profile aligns with that of farm uses. Chapter 99E of the General Statutes, where the definition of "agritourism" was found at the time of the *Jeffries* decision, also defines the "inherent risks of agritourism activity." These risks include "surface and subsurface conditions, natural conditions of land, vegetation, and waters, the behavior of wild or domestic animals, and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations." Thus, as the *Jeffries* court reasoned, if the risks inherent to a use differ greatly from those related to natural conditions, animals, and farm structures and equipment, it is likely not agritourism. For instance, a shooting range has risks (misfires, accidental shooting, etc.) that differ significantly from the risks of operating a farm.

3. Agritourism uses do not require much in the way of artificial structures or alterations to the land. The *Jeffries* court also described the construction and use of artificial structures or the altering of natural land as making it less likely that a structure or activity would be considered agritourism. So a hunting preserve, which does not require alteration of the natural environment save for the odd deer stand or duck blind that is relatively easy to remove, is more likely to be an agritourism use. On the other hand, an outdoor shooting range that requires construction of berms or baffles, targets, possibly lights, and a covered firing line substantially alters the natural environment.

Evaluating possible agritourism uses

Based on the factors listed in the statute and used by the *Jeffries* court, when evaluating a potential agritourism use, consider the following:

1. Does the activity allow members of the general public to view or enjoy activities that are necessarily rural in nature (such as farming, ranching, historic, cultural, harvest-your-own activities, hunting, fishing, equestrian activities, or natural activities and attractions)?
2. Is the building or structure used for weddings, receptions, meetings, demonstrations of farm activities, meals, and similar events?
3. Is the activity taking place on the farm *because* of its farm or rural setting – in other words, is there a reason this activity should be or needs to be on a farm or in a rural setting, besides just needing a lot of space?
4. Are the risks inherent to the activity similar to risks of working on a farm?
5. Does the use require no or little alteration of the farm and natural environment?

The more you answer "yes" to these questions, the more likely it is that the use you are evaluating is an agritourism use.

What if there's no farm to go with the agritourism?

Some rural properties are not in farm use but provide agritourism services. Imagine, if you will, a barn. When the land on which it sits was used for raising crops and animals, that barn was an important part of the bona fide farm use of the property. Now, the property is not used as a farm, but the barn is rented out for special events. All of the property's "farm" income comes from agritourism. Does it still qualify for the zoning exemption?

One might think that, since farm property used for agritourism tends to be protected from the application of zoning regulations, it would be protected even as its own use. However, if we look closely at the statutory language, it would appear that agritourism may need some other form of agriculture on the property to maintain its protected status.

G.S. 160D-903(a) exempts agritourism uses from being affected by county or extraterritorial zoning "if the building or structure is located on a property that (i) is owned by a person who holds a qualifying farm sales tax exemption certificate from the Department of Revenue pursuant to G.S. 105-164.13E(a) or (ii) is enrolled in the present-use value program pursuant to G.S. 105-277.3." This language suggests that, if there is no sales tax exemption for the property and it is not in the present use valuation program (for property tax purposes), the agritourism protections do not apply. Further, the definition of "agriculture" in G.S. 106-581.1, which is referenced in G.S. 160D-903(a), describes agritourism as an "activit[y] incident to" farming or farm operation (emphasis added). This language likewise suggests that there must be a farming use to which the agritourism use is incident, or else it might not be considered *agri*tourism.

Losing agritourism status

So what happens to the property when it is no longer used as a bona fide farm? G.S. 160D-903 refers to property that is "used for bona fide farm purposes" in the present tense. Presumably, this means that once the property is no longer used for a bona fide farm use, it would be subject to the local zoning code.

More precisely, the statute refers to "building[s] or structure[s]…used for agritourism," so if a building or structure ceases to be used for agritourism, it will no longer be shielded from county and extraterritorial zoning. In addition, once the building or structure is classified as a bona fide farm purpose, any "[f]ailure to maintain the requirements of this subsection" for the next three years makes the building or structure subject to zoning regulations. The statute does not specify exactly which "requirements of this subsection" must be met, but the preceding sentence states that agritourism buildings and structures must be on property that holds a sales tax exemption or present-use property tax valuation. Presumably it is special sales or property tax status (and documentation of the same) that must be maintained for three years from the structure's classification as a bona fide farm purpose.

Once a building or structure loses agritourism or bona fide farm zoning protection, does the use have to come into compliance with the zoning code immediately, and does a structure immediately need to be altered to comply with zoning regulations? Not necessarily. Once the zoning ordinance applies, the jurisdiction's regulations on nonconformities will most likely apply (for more on nonconformities, see this blog post from David Owens). In most cases, nonconforming uses that

were legally established (such as bona fide farm uses and attendant agritourism uses) can remain as long as they do not change to another nonconforming use or expand the nonconforming use of the property. Hence, as long as the use of the property was legally an agritourism use on a working farm, it will likely be allowed to continue under certain conditions.

Takeaways

Even with the additional clarity provided by legislative tweaks and by the *Jeffries* case, whether a given use could be considered "agritourism"—and thus whether it can avoid zoning regulations—will depend a great deal on the facts of each individual situation: does the activity take place on a farm? Is it listed among or like one of the "agritourism" uses in the statutes? Does it need to be in a farm or rural setting? Does it have risks similar to those for farming activities? To what degree does it require altering the natural environment? All of these factors will play into whether a particular use should be considered an agritourism activity. Planning practitioners should consider these factors in evaluating potential agritourism uses and use their best judgment, at least until the courts take up the question again…