NC STATE EXTENSION

Commentary on 2018 Changes to North Carolina's Voluntary Agricultural District Law

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On June 27th, 2018, the North Carolina General Assembly overrode the Governor's veto to pass the North Carolina Farm Act of 2018 (S.711, Session Laws 2018-113) (the "Act") making a significant change to the state's Right to Farm law (N.C.G.S. §107-700 *et seq.*), concerning a person's right to bring a nuisance lawsuit against a farm operation.[1] The Act made sundry other changes to various existing statutes, including North Carolina's Voluntary Agricultural District enabling statute, The Agricultural Development and Farmland Preservation Enabling Act, N.C.G.S. §106-735 *et seq.* ("the VAD enabling legislation"). The change made mandatory reasonable proximity notice of swine, poultry and dairy farms for parties researching title to nearby tracts. These changes appear to have been legislative responses to the recent nuisance lawsuits against Smithfield Foods regarding operational practices of confined hog operations.

This change has prompted a convenient place to weigh in on a general review of Voluntary Agricultural District ordinances currently underway across North Carolina, as members of Cooperative Extension and others charged with administering a VAD ordinance in their county.

Mandatory proximity notice of qualifying farms

Regarding the recent VAD change, the Farm Act of 2018 modified N.C.G.S. § 106-741(a) to state that "[a]ll counties ***shall*** require that land records include some form of notice reasonably calculated to alert a person researching the title of a particular tract that such tract is located within one-half mile of a poultry, swine, or dairy *qualifying farm* or within 600 feet of any other qualifying farm or within one-half mile of a voluntary agricultural district." (N.C. Sess. Laws 2018-113, §9.) While providing such notice - such as displaying a buffer layer in a county's geographic information system (GIS) - was permissive (using the word "may") before, the legislature has made the addition of such layer a requirement (replacing "may" with "shall").

Though the VAD enabling legislation specifically mentions poultry, swine and dairy farms, note that these still must be *qualifying farms* as defined by the statute, which by definition (see below)

[1] This is the subject of a coming publication.

means they have enrolled in the VAD program by signing a voluntary or irrevocable conservation agreement with the county.[2] The statute does not require these conservation agreements be recorded with the county deed registry (N.C.G.S. § 121-41) (see note below regarding required recording for irrevocable agreements under Enhanced VAD ordinances). The proximity notice requirement applies to these farms whether or not they are in an actual VAD as defined in a county's ordinance.

The notice requirement does not include a funding component or deadline, or specify the location and manner in which such notice be posted. For those counties with geographic information systems (GIS), an added layer to provide visual buffers (measured according to statute) would seem obvious. At least one county (Orange) causes the conservation agreement on a qualifying farm (tract) to appear in searches on properties surrounding that tract within the defined buffer. Some counties have posters on the walls of their physical deed registries (the "deed vaults"), but it is unclear whether such notice is specific enough to identify target qualifying farm parcels and their buffers and meet the "reasonably calculated" requirement.

Though the statute also leaves unclear which state agency is charged with enforcing compliance with the new law, the VAD enabling legislation requires that a county record its VAD ordinance with the North Carolina Department of Agriculture and Consumer Services (NCDA&CS) and report once a year on matters including "the status, progress and activities of its farmland preservation program" (N.C.G.S. §106-743). It follows that NCDA&CS may provide a mechanism for compliance review.

Though the VAD enabling legislation does not direct how or in what manner the county - via its board of commissioners - effects this proximity notice requirement, the convenient place - given that the requirement appears in the VAD enabling state - would logically be the VAD ordinance itself by way of amendment. VAD boards across the state should probably be discussing this requirement with representatives of the board of commissioners, the county manager, Registrar of Deeds, and the GIS office. It would seem that extension agents (and whoever else, such Soil & Water Conservation staff) charged with administering the program will be called to coordinate such meetings.

Counties should note that the poultry, swine and dairy farms are not themselves defined. Though one can imagine the legislature intended such operations were confined animal feeding operations (those normally under contract with an integrator), the statute is not specific and can include smaller operations raising such animals so long as the tract fits the statute's definition of qualifying farm. Likewise, "dairy" is undefined as well and could include non-cow smaller milk operations and creameries who have executed the conservation agreement with the county. It

[2] Note that the voluntary (regular VAD) or irrevocable (Enhanced VAD) conservation agreements are not the same as the permanent conservation *easements* defined by N.C.G.S. 106-744(b).

would seem that the decision to extend the buffer from 600 feet to one-half mile will depend on whether that farm is raising chicken and pork, whether confined with large numbers of animals or pastured with small numbers. The challenge, therefore, will be classifying qualifying farms according to their production and applying the appropriate proximity buffer.

Changes to farm enrollment requirements

Note also that the definition of **qualifying farm** in the VAD enabling act has been broadened over the past decade may require changes to older VAD ordinances. In previous versions of the VAD enabling statute, the legislature placed stricter requirements on which farms were considered "qualifying farms." Prior to 2005, the VAD enabling statute included a requirement that real property include **soils** be "certified by NRCS that (i) are best suited for providing food, seed, fiber, forage, timber, and oil seed crops, (ii) have good soil qualities, (iii) are favorable for all major crops common to the county where the land is located, (iv) have a favorable growing season, and (v) receive the available moisture needed to produce high yields an average of eight out of 10 years; or on which at least two-thirds of the land has been actively used in agricultural, horticultural or forestry operations as defined in G.S. 105-277.2(1), (2), and (3) during each of the five previous years." This attribute was eliminated in 2005. [citation omitted]

In 2011, the legislature eliminated the requirement that real property "be enrolled in the **Present Use Value** property tax program under G.S. 105-277.2 through 105-277.7" (or otherwise met the program's requirements as certified by the county). This provision remains common in ordinances passed prior to 2011 and not since updated. It is also possible that some ordinances passed prior to 2005 and not amended will contain the "best soils" language as well.

These past changes leave us with the current definition of "qualifying farmland": "[A] qualifying farm is defined as real property that 1) "[i]s engaged in agriculture as that word is defined in G.S. 106-581.1., 2) Is managed in accordance with the Soil Conservation Service defined erosion control practices that are addressed to highly erodable land, and 3) Is the subject of a conservation agreement, as defined in G.S. 121-35, between the county and the owner of such land that prohibits nonfarm use or development of such land for a period of at least 10 years, except for the creation of not more than three lots that meet applicable county and municipal zoning and subdivision regulations." N.C.G.S. §106-737.

The question counties are now asking is whether their older ordinances should be updated to eliminate the "best soils" language and the PUV requirement. Normally, a North Carolina county cannot impose an ordinance that is more restrictive than that allowed by the state enabling statute (this legal concept is commonly known as "Dillon's Rule"). However, this principle only applies if the county "ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation." N.C.G.S. §106A-174(b)(5) (cited in *Craig v.*

County of Chatham, 354 N.C. 68, 553 S.E.2d 37 (2001). Whether the VAD enabling statute demonstrates the requisite legislative intent rising to that definition is yet to be seen.

This issue will only truly be tested is that if a county chooses not to amend its ordinance to eliminate any "best soils" or PUV requirement, and as a result denies a farm that would otherwise qualify under the current definition. From an academic legal perspective, a court case would provide an answer, though the financial stakes associated with VAD enrollment may not be enough for an aggrieved landowner to take the matter that far. For the sake of counties administering the VAD ordinance, it would seem that the decision whether to update the ordinance should be made at the point when a landowner tests the more stringent requirement, claiming such is not authorized by the VAD enabling statute and therefore an illegitimate basis by which to exclude a farm otherwise wishing to avail itself of the notice "protection" offered by the statute. More practicably, a county may simply use the recent changes to cause a revisitation of the ordinance to address other issues that may have arisen over the years: redefining districts to reduce the number of VAD board members required, addressing meeting frequency and approval of applications, etc.

Recording of conservation agreements

One other minor observation concerning the **recording of conservation agreements**. Prior to 2011, all conservation agreements executed between the county and landowner pursuant to N.C.G.S. § 121-41 required recordation. House Bill 406 (Session Law 2011-219) changed the recording requirement to apply only to the irrevocable agreements authorized by G.S. 106-743.2. Current law reads accordingly: **(c) A conservation agreement entered into for the purpose of enrolling real property in a voluntary agricultural district pursuant to G.S. 106-737(4) is not required to be recorded unless such conservation agreement is irrevocable as provided pursuant to G.S. 106-743.2."** The effect is that voluntary conservation agreements under the "regular" VAD program do not have to be recorded. However, as in the Orange County manner above, not doing so may remove a practical approach to complying the Farm Act's mandatory proximity notice requirement.