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Kemper M. Beasley III, Esquire
Attorney for Cumberland County
Post Office Box 36
Farmville, Virginia 23901

Dear Mr. Beasley:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the offering of short-term rental accommodations at an operating farm, where the short-term rental occupants are offered the opportunity to participate in farming activities during their stay at the property, constitutes "agritourism activity" under Virgnia Code § 15.2-2288.6, such that the locality is prohibited from regulating such use of the property through its zoning ordinances.

Applicable Law and Discussion

The General Assembly has delegated to localities the authority to control land use within their boundaries through zoning.[1] "This delegation of authority . . . is a delegation of the Commonwealth's police power to legislate" in the area of land use.[2] Although localities have broad discretion in the enactment of zoning ordinances, their zoning powers are limited.[3] Adopted "ordinances must be consistent with the laws of the Commonwealth[,]"[4] and "[w]hen a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail."[5]

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[1] VA. CODE ANN. § 15.2-2280 (2018).

[2] 2013 Op. Va. Att'y Gen. 222, 225; *see also* 2022 Op. Va. Att'y Gen. No. 22-027, *available at* https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/2247-2022-official-opinions#august.

[3] 2022 Op. Va. Att'y Gen. No. 22-027.

[4] W. Lewinsville Heights Citizens Ass'n v. Bd. of Sup'rs of Fairfax Cnty., 270 Va. 259, 265 (2005).

[5] Rowland v. Town Council of Warrenton, 298 Va. 703, 713 (2020) (quoting Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 567, 576 (2012)).

Virginia Code § 15.2-2288.6 expressly limits local zoning authority with respect to certain aspects of agricultural operations. It provides, in relevant part, that "[n]o locality shall regulate the carrying out of any of the following activities at an agricultural operation . . . unless there is a substantial impact on the health, safety, or general welfare of the public . . . ."[6] For property zoned as an agricultural district or classification, § 15.2-2288.6 also precludes local governments from "requir[ing] a special exception, [local] administrative permit . . . or special use permit for any [listed] activity . . . ."[7] The statute includes "agritourism activities as defined in § 3.2-6400" among the listed activities.[8]

Section 3.2-6400 defines "agritourism activity" as

> [A]ny 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, wineries, ranching, horseback riding, historical, cultural, harvest-your-own activities, or natural activities and attractions.[9]

You ask whether offering short-term rental accommodations falls within this definition.

"When construing a statute, our primary objective is to 'ascertain and give effect to legislative intent,' as expressed by the language used in the statute."[10] Accordingly, in resolving your question, "[w]e look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the relevant statute."[11] Courts "disfavor a construction of statutes that renders any part of the statute useless or superfluous[,]"[12] and "when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional."[13]

As set forth above, the statutory definition of "agritourism activity" includes "*any* activity . . . that *allows* . . . the general public . . . to view or enjoy rural activities . . . ."[14] As previously noted by this Office, "[t]he Supreme Court of Virginia has held that the term '[a]ny' is an indefinite word and includes 'all'

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[6] VA. CODE ANN. § 15.2-2288.6(A) (Supp. 2022). It is important to note that § 15.2-2288.6(A) is limited to the regulation of certain activities, and not to regulation of the agricultural operation or the property more broadly. I offer no opinion on the applicability of any federal, state, or local regulatory schemes that may pertain to the operation of the property more generally.

[7] Section 15.2-2288.6(B). Regulation is permitted when "there is a substantial impact on the health, safety, or general welfare of the public." *Id.*

[8] VA. CODE ANN. § 15.2-2288.6(A)(1).

[9] VA. CODE ANN. § 3.2-6400 (Supp. 2022). The definition clarifies that "[a]n activity is an agritourism activity whether or not the participant paid to participate in the activity."

[10] Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425 (2012) (quoting Commonwealth v. Amerson, 281 Va. 414, 418 (2011)) (further citation and internal quotation marks omitted).

[11] Zinone v. Lee's Crossing Homeowners Ass'n, 282 Va. 330, 337 (2011) (quoting Addison v. Jurgelsky, 281 Va. 205, 208 (2011)).

[12] Shoemaker v. Funkhouser, 299 Va. 471, 487 (2021).

[13] *Zinone*, 282 Va. at 337.

[14] Section 3.2-6400 (emphases added).

unless restricted."[15] Accordingly, the statutory language the General Assembly employed here is very broad and can encompass a wide array of potential activities, including overnight accommodation. Indeed, "[a]s the [U.S.] Supreme Court has indicated, '[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[16]

The definition of "agritourism activity" contained in § 3.2-6400 is not limited to the activities expressly named in the statute. First, the use of the word "including" suggests that the enumerated activities are merely demonstrative and not exhaustive.[17] Second, the list simply specifies types of *rural* activities that may be sought to be enjoyed at a farm or ranch[18] while the definition of "agritourism activity," as a whole, more broadly covers "any activity" that "allows" people to experience such activities as well as the rural activities themselves. The only restrictions contained within definition are that the activity must occur "on a farm or ranch," must "allow[] . . . the general public . . . to view or enjoy rural activities[,]" and ultimately must be "for recreational, entertainment, or educational purposes."[19] Offering overnight accommodations, by permitting the public to extend their stay at an agricultural operation, is an activity that thus would "allow[] members of the general public . . . to view or enjoy rural activities" offered by the establishment.

I therefore conclude, based on the plain language of the applicable statutes, including § 3.2-6400, that offering short-term rental accommodations, in defined circumstances, falls within the protections against local regulation afforded certain activities under § 15.2-2288.6.[20] Nevertheless, I caution that whether a particular instance of a property owner offering short-term rental accommodations is exempt from local zoning regulation depends on whether all attendant statutory conditions are met. For an activity to be exempt from local regulation under § 15.2-2288.6, the associated property must be zoned as a part of

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[15] 1986-87 Va. Op. Att'y Gen. 177, 178 (internal quotation marks omitted) (quoting County of Loudoun v. Parker, 205 Va. 357, 362 (1964)). *See also* Dodson v. Dir. of Dep't of Corr., 233 Va. 303, 309 (1987) ("Unless restricted, the word 'any' includes 'all.'").

[16] Alexander v. Carrington Mortg. Servs., LLC, 23 F.4th 370, 376 (4th Cir. 2022) (third alteration in original) (quoting Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008)).

[17] *Id. See* Auer v. Commonwealth, 46 Va. App. 637, 645 (2005) (noting, despite finding the statute at issue ambiguous, that "[g]enerally speaking, the word 'include' implies that the provided list of parts or components is not exhaustive and, thus, not exclusive").

[18] "Absent a contrary intent, a qualifying word or phrase should be read as modifying only the last noun or phrase that immediately precedes it, i.e., the last antecedent." Coffman v. Commonwealth, 67 Va. App. 163, 168-69 (2017) (citing Alger v. Commonwealth, 267 Va. 255, 259 (2004)).

[19] Section 3.2-6400.

[20] The legislative history you reference in your request letter does not require a different result. First, resort to legislative history is appropriate only in instances of statutory ambiguity. *See, e.g.*, 2013 Op. Va. Att'y Gen. 138, 139 (citing Brown v. Commonwealth, 284 Va. 538, 543 (2012)). I find no ambiguity here. Further, the history you cite is failed legislation: although it may be considered, *see* Tabler v. Bd. of Sup'rs, 221 Va. 200, 203 (1980), the rejection of a proposed amendment is not dispositive, for "several equally tenable inferences may be drawn from such [rejection], including the inference that the existing legislation already incorporated the offered change.'" United States v. Craft, 535 U.S. 274, 287 (2002) (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)). Accordingly, I will not speculate as to the understanding of certain members of the General Assembly in proposing, or the intent of the body as a whole in rejecting, an amendment to the Code.

an agricultural district or classification[21] or engaged in an "agricultural operation" as defined in § 3.2-300.[22] The activity must occur on property meeting the definition of a "farm or ranch,"[23] which in turn requires the land to be used in the creation of "agricultural products," as further defined by statute.[24] "Rural activities" must be available for the general public to experience.[25] Section 15.2-2288.6 thus will not apply to short-term rental accommodations unless all of the required elements are satisfied.[26]

Conclusion

Accordingly, it is my opinion that, provided all attendant statutory conditions are met, the offering of short-term rental accommodations, in conjunction with the opportunity to view or participate in rural activities during the stay, falls within the definition of "agritourism activity" for purposes of Virgnia Code § 15.2-2288.6.

With kindest regards, I am,

Very truly yours,

Jason S. Miyares
Attorney General

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[21] Section 15.2-2288.6(B).

[22] Section 15.2-2288.6(A). Section 3.2-300 defines "agricultural operation" to mean "any operation devoted to the bona fide production of crops, animals, or fowl, including the production of fruits and vegetables of all kinds, meat, dairy, and poultry products, nuts, tobacco, nursery, and floral products and the production and harvest of products from silviculture activity" and "any operation devoted to the housing of livestock as defined in § 3.2-6500."

[23] *See* § 3.2-6400. A "farm or ranch" is "one or more areas of land used for the production, cultivation, growing, harvesting or processing of agricultural products."

[24] *Id.* ("'Agricultural products' means any livestock, aquaculture, poultry, horticultural, floricultural, viticulture, silvicultural, or other farm crops.").

[25] *See* § 3.2-6400.

[26] Whether a specific short-term rental qualifies as "agritourism activity" is a factual determination that is beyond the scope of an opinion of this Office; this Office traditionally declines to opine on issues involving a question of fact rather than one of law. *See, e.g.*, 1997 Op. Va. Att'y Gen. 195, 195-96.