2013

The Grapes of Wrath: Encouraging Fruitful Collaborations Between Local Governments and Farm Wineries in the Commonwealth

Andrew E. Tarne
University of Richmond

ESSAY

THE GRAPES OF WRATH: ENCOURAGING FRUITFUL COLLABORATIONS BETWEEN LOCAL GOVERNMENTS AND FARM WINERIES IN THE COMMONWEALTH

Philip Carter Strother *
Andrew E. Tarne **

> *"It must be a bad heart, indeed, that is not rendered more cheerful and more generous by a few glasses of wine."*[1]

The United States has a complicated history with wine, beer, and spirits. Indeed, the prohibition of alcohol is the only regulation directed personally at individuals that has ever made it into the Constitution, albeit for a relatively short period of time.[2] The

---

* Founding Partner, Strother Law Offices, PLC, Richmond, Virginia. LL.M, 1999, George Washington University Law School; J.D., 1997, Thomas M. Cooley Law School; B.S., 1991, The Love School of Business, Elon University.

** J.D., 2013, University of Richmond School of Law; M.U.R.P Candidate, 2014, Virginia Commonwealth University; B.A., 2010, University of Virginia.

The authors would like to thank the editorial board and staff of the *University of Richmond Law Review* for their dedicated help and support. Further thanks go to Delegate David Albo, Matthew Conrad, and Travis Hill of the Governor's Office and Stephen Mackey of the Loudoun Wineries Association for their invaluable insights and to Johnathan Newberry of the Albemarle Planning division, Kellie Boles of the Loudoun Department of Economic Development, Stacey Sheetz of Visit Loudoun, and Catherine Payne of the Fauquier County Department of Economic Development for their assistance in data collection.

1. Benjamin Rush, *Inquiry into the Effects of Spiritucus Liquors, in* 3 A SELECTION OF CURIOUS ARTICLES FROM THE GENTLEMAN'S MAGAZINE 456, 461 (John Walker ed., 1814).

2. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-722, at 20 (1931) ("The Eighteenth Amendment represents the first effort in our history to extent [sic] directly by Constitutional provision the police control of the federal government to the personal habits

history of America's relationship with the fruit of the vine, however, is far more nuanced than national prohibition and repeal. Wine, for example, has been in Virginia's blood for over four centuries, ever since the first ships navigated the James River in 1607.[3] From the House of Burgesses' first decree for the cultivation of grape vines[4] to the modern Virginia Farm Winery Zoning Act,[5] wine has been a subject of lawmaking in the Old Dominion. The legal status of the wine industry and its product has changed over the years, traversing a wavelength that takes it, as Richard Mendelson describes, "from demon to darling."[6]

Many have already written on the subject of wine law in the United States and particularly in the Commonwealth of Virginia.[7] This essay will add to the growing corpus of wine law, with a scope roughly limited to discussing the relationship of wineries to the localities in which they are situated. With Virginia's wine industry growing at astounding rates, so too are regulations of that industry at all levels of government: federal, state, and local.

While there is fairly substantial federal regulation in the field of wine law, this essay's scope will be limited to the interplay of Virginia's state and local laws that affect wineries close to home.[8] Within that scope, this essay's purpose is threefold. First, it will

---

and conduct of the individual.").

3. Karen Page & Andrew Domenburg, *Virginia Vintages That Can Hold Their Own*, WASH. POST (May 9, 2007), www.washingtonpost.com/wp-dyn/content/article/2007/05/08/AR2007050800350.html. By 1762, Charles Carter of Virginia had earned international acclaim for the production of "excellent" wines in the Colony of Virginia. *See* Minutes, Meeting of the Royal Society of the Arts, 1762 (on file with the Royal Society of the Arts, London, United Kingdom). The very next year, Mr. Carter was recognized by Lieutenant Governor Fauquier in the first recordation of successfully cultivating a vineyard of European grapes in Virginia. *See* Certification of Charles Carter's European Grapes, Lieutenant Governor Francis Fauquier (Aug. 6, 1763) (on file with the Library of Virginia). *See also* Jennifer Heyns, *History Comes Full Circle at Philip Carter Winery in Hume*, THE WARRENTON LIFESTYLE MAGAZINE, May 2009, at 38.

4. WILLIAMSBURG WINERY, A BRIEFE HISTORY OF WINEMAKING IN WILLIAMSBURG, VIRGINIA 1 (1994).

5. VA. CODE ANN. § 15.2-2288.3 (Repl. Vol. 2012).

6. *See* RICHARD MENDELSON, FROM DEMON TO DARLING 3–5 (2009).

7. *See, e.g.*, WINE IN AMERICA: LAW AND POLICY (Richard Mendelson ed., 2011); CAROL ROBERTSON, THE LITTLE RED BOOK OF WINE LAW (2008); Philip Carter Strother & Robert Jackson Allen, *Wine Tasting Activities in Virginia: Is America's First Wine Producing State Destined to Wither on the Vine Due to Overregulation?*, 23 T.M. COOLEY L. REV. 221 (2006); Philip Carter Strother & Andrew E. Tarne, *Annual Survey of Virginia Law: Land Use and Zoning Law*, 47 U. RICH. L. REV. 223, 247–54 (2012).

8. For a helpful overview of federal issues implicated by wineries, including the three tiered system, interstate and international commerce, and intellectual property, see generally Richard Mendelson, *U.S. Wine Law: An Overview*, *in* WINE IN AMERICA, *supra* note 7, at 19–33.

highlight the key legislation and ordinances that affect farm wineries. Second, it will discuss the interplay between state and local level regulations, concluding that the General Assembly has intended to retain near exclusive regulatory powers over farm wineries. Third, it will briefly analyze the impact of the wine industry on three Virginia counties, concluding that a more temperate approach to local regulation of the wine industry in the Commonwealth is desirable for optimal growth and participation in one of Virginia's most vibrant economic sectors.

I. REGULATION OF VIRGINIA FARM WINERIES

A. *State Statutes*

In Virginia, there are three main statutes that affect the wine industry: the Virginia Farm Winery Zoning Act,[9] the Virginia Alcoholic Beverage Control Act ("ABC Act"),[10] and the Virginia Right to Farm Act.[11] Together, these pieces of legislation suggest that the General Assembly has intended to reserve most of the power to regulate the business of a farm winery unto itself.[12] Moreover, taken together, these acts indicate that the General Assembly has adopted a statewide policy to encourage growth and limit local restrictions on the Virginia farm winery industry. While the General Assembly granted localities the power to regulate land uses under the Zoning Enabling Act,[13] it did not grant localities the power to micromanage the affairs of either business or agricultural uses.[14] Nor did it grant localities the power to pass ordinances that conflict with the general statutory and policy frameworks set out elsewhere in the Code of Virginia.[15]

---

9. VA. CODE ANN. § 15.2-2288.3 (Repl. Vol. 2012).

10. *Id.* § 4.1-100 to -133 (Repl. Vol. 2010 & Cum. Supp. 2013). Portions of the Virginia ABC Act relating to the establishment of farm wineries have historically been known as the "Virginia Farm Winery Act." *See, e.g.*, Strother & Allen, *supra* note 7, at 232. Because this Article discusses title 4.1 of the Virginia Code broadly, rather than simply the provisions relating to farm wineries, the term "ABC Act" will be used for consistency.

11. *Id.* § 3.2-300 to -302 (Repl. Vol. 2008 & Cum. Supp. 2013).

12. The Office of the Attorney General of Virginia has reached a similar conclusion in a recent opinion, discussed *infra* in Part III.A.3.b.

13. VA. CODE ANN. § 15.2-2280 (Repl. Vol. 2012 & Cum. Supp. 2013).

14. *See id.*

15. *See id.*

1. Virginia Farm Winery Zoning Act

Originally passed in 2006 and situated in the zoning chapter of the Code of Virginia, the Virginia Farm Winery Zoning Act is the foundation for local regulation of Virginia farm wineries.[16] The opening lines of the act set forth that "[i]t is the policy of the Commonwealth to preserve the economic vitality of the Virginia wine industry while maintaining appropriate land use authority to protect the health, safety, and welfare of the citizens of the Commonwealth."[17] Moreover, the underlying impetus for the Act was to fight the "micromanaging rules" of local governments that were putting wineries out of business.[18] By passing the Farm Winery Zoning Act, the General Assembly intended to protect the burgeoning Virginia wine industry by preventing overregulation at the local level. Under the Act, localities were left with their basic power to regulate land use for the welfare of their residents; however, the General Assembly established a higher burden for regulations in addition to setting forth a clear statewide policy objective.[19]

Under the general zoning enabling statute, localities may regulate "[t]he use of land, buildings, structures, and other premises[;] . . . [t]he size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures; [and] [t]he areas and dimensions of land, water, and air space to be occupied by buildings."[20] Absent is the ability to directly regulate the operations of the business that occupies the land. Typically these local zoning regulations will be upheld so long as there is a rational basis for the regulation.[21]

---

16. *Id.* § 15.2-2288.3 (Repl. Vol. 2012).

17. *Id.* § 15.2-2288.3(A) (Repl. Vol. 2012).

18. Delegate David Albo, the sponsor of the Farm Winery Zoning Act, has stated the act grew from "a number of wineries who were being put out of business by micromanaging rules from local governments. Wineries *rarely* make a profit on just selling wine. Their volume and price point don't make it profitable alone. They rely on eco-tourism." E-mail from the Hon. David Albo, Member, Virginia House of Delegates, to author (Sept. 17, 2013, 10:25 PM) (on file with author).

19. The heightened burden is that localities may only regulate farm winery activities when they have a *substantial impact* on the public welfare. *See infra* notes 22–25 and accompanying text.

20. VA. CODE ANN. § 15.2-2280 (Repl. Vol. 2012 & Cum. Supp. 2013).

21. *See, e.g.*, Bd. of Supervisors v. McDonald's Corp., 261 Va. 583, 591, 544 S.E.2d 334, 339 (2001); Cnty. Bd. of Arlington v. Bratic, 237 Va. 221, 229–30, 377 S.E.2d 368, 372 (1989).

Under the Farm Winery Zoning Act, however, the standard for regulating wineries is higher than that for the typical zoning statute. First, a locality must consider the economic impact of any proposed restrictions on the licensed farm winery impacted by such restrictions.[22] Second, a locality may only regulate "usual and customary" activities at a farm winery if they cause a "substantial impact on the health, safety, or welfare of the public."[23] While this statute leaves localities free to regulate the traditional size, area, and type of land use, it specifically forbids them from regulating the activities of farm wineries absent a "substantial impact" on the public.[24] Any regulations, therefore, that purport to regulate the actual business activities of a farm winery which do not have an identifiable "substantial impact" on the public welfare will likely be void as ultra vires.[25]

The Virginia Farm Winery Zoning Act establishes a relatively simple legal test to determine if a local regulation is ultra vires. First, localities are forbidden from regulating certain activities. Specifically, localities may not regulate (1) "[t]he production and harvesting of fruit" or the "manufacturing of wine;" (2) "[t]he on-premises sale, tasting, or consumption of wine during regular business hours"; (3) "[t]he direct sale and shipment of wine" to customers, wholesalers, or the ABC Board; (4) the storage and wholesale of wine; or, (5) "[t]he sale of wine-related items that are incidental to the sale of wine."[26] As these activities are specifically exempted from local regulation, any ordinance that attempts to regulate them will be void as ultra vires.

Second, localities may only regulate certain activities at farm wineries in the same manner that they generally regulate other citizens. Specifically, localities may not regulate (1) "private personal gatherings held by the owner of a licensed farm winery differently from private personal gatherings [held] by other citizens," and (2) "noise, other than outdoor amplified music" differently than noise regulated "in the general noise ordinance."[27] When deciding to authorize "outdoor amplified music" at farm

22. VA. CODE ANN. § 15.2-2288.3(A) (Repl. Vol. 2012).

23. *Id.* The statute specifically provides that "usual and customary" activities are those that are usual and customary for farm wineries throughout the entire Commonwealth, not simply those that are usual and customary for a particular county, region, or farm winery. *Id.*

24. *See id.*

25. *See infra* Part II.B.

26. VA. CODE ANN. § 15.2-2288.3(E)(1)–(6) (Repl. Vol. 2012).

27. *Id.* § 15.2-2288.3(A), (D) (Repl. Vol. 2012).

wineries, a locality is required to "consider the effect on adjacent property owners and nearby residents."[28] If any locality seeks to regulate these activities differently from other citizens or businesses, such action is void as ultra vires.

Third, localities must permit "usual and customary" events at farm wineries "without . . . regulation unless there is a substantial impact on the health, safety, or welfare of the public."[29] By mandating that events be permitted "without local regulation," the statute essentially places the heightened burden of proof on the locality to show that an event will have a "substantial impact" on the public.[30]

Fourth, any other local regulations on events and activities at farm wineries must "be reasonable and shall take into account the economic impact on the farm winery . . . , the agricultural nature of such activities and events, and whether such activities and events are usual and customary for farm wineries throughout the Commonwealth."[31]

Condensed, the test under section 15.2-2288.3 is essentially: (1) has the locality attempted to regulate a specifically protected activity; (2) has the locality regulated private gatherings or general noise differently from the rest of the public; (3) has the locality failed to show that a usual and customary event has a substantial impact on the general welfare; and (4) are regulations on activities and events other than those covered in steps (1) through (3) unreasonable, or do they fail to consider the economic impact on the farm winery, their agricultural nature, or their customary nature? If the response to any of these questions is "yes," the locality has acted contrary to the Virginia Code and, therefore, ultra vires.

2. Virginia Alcoholic Beverage Control Act

Under the Code of Virginia, the Virginia Alcoholic Beverage Control Board ("ABC Board" or "the Board") exercises exclusive control over the regulation of alcoholic beverages in the Commonwealth.[32] Included within this grant is the exclusive authority

28. *Id.* § 15.2-2288.3(A) (Repl. Vol. 2012).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* § 4.1-103 (Repl. Vol. 2010).

and discretion to license farm wineries for operation in Virginia.[33] Before the ABC Board decides to issue or deny a license, the interested parties may petition for an internal hearing within the agency.[34] The Board will then determine whether to issue a license, and that determination is final, subject only to an appeal taken to the Court of Appeals of Virginia.[35]

Final regulations of the ABC Board have the effective force of law.[36] Moreover, reiterating that the laws of the Commonwealth are supreme and preempt local ordinances, the ABC Act further states that no locality shall "adopt any ordinance or resolution which regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth."[37]

The ABC Board recently and unequivocally upheld these provisions in the Virginia Code in *In re Paradise Springs Winery, LLC*.[38] In that hearing, the ABC Board determined that a local ordinance could not be used to prohibit a farm winery from opening in Fairfax County because that ordinance was inconsistent with the ABC Act.[39] The ordinance essentially established a higher burden on farm wineries for obtaining a zoning permit than the ABC Board required for obtaining a farm winery license.[40] Because this ordinance presented a situation wherein the county could potentially deny a farm winery the ability to operate after that farm winery was already licensed to operate by the Commonwealth, it was invalid in this instance.[41] As the Supreme Court of Virginia would later hold in an unrelated case, a locality may not "forbid what the legislature has expressly licensed, authorized, or required."[42]

---

33. *Id.* § 4.1-207, 4.1-222 (Repl. Vol. 2010 & Cum. Supp. 2013).

34. *Id.* § 4.1-103(11) (Repl. Vol. 2010).

35. *Id.* § 4.1-224(A) (Repl. Vol. 2010). Appeals from decisions of the ABC Board are taken in accordance with the Virginia Administrative Process Act. *Id.*

36. *Id.* § 4.1-111(A) (Cum. Supp. 2013).

37. *Id.* § 4.1-128(A) (Repl. Vol. 2010 & Supp. 2013). This prohibition is subject to two minor exceptions involving taxation and regulating hours between 12:00 PM on Saturday and 6:00 AM on Monday. *See id.* § 4.1-205 (Repl. Vol. 2010); *Id.* § 4.1-129 (Repl. Vol. 2010).

38. *In re* Paradise Springs Winery, LLC, Appl. #056973 Alcoholic Beverage Control Bd. (Sept. 3, 2009).

39. *Id.* at 25–26.

40. *Id.* at 8–9, 25–26.

41. *See id.* at 25–26.

42. Blanton v. Amelia Cnty., 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quoting King

3. Virginia Right to Farm Act

In addition to the Farm Winery Zoning Act and the ABC Act, the Right to Farm Act is further evidence of a statewide policy to foster the growth of Virginia farm wineries. While the Right to Farm Act does not affect the processing and retail operations of farm wineries, as the other acts do, it does protect production activities at farm wineries. Quite simply, the Right to Farm Act's goal is "to limit the circumstances under which agricultural operations may be deemed to be a nuisance."[43] In relevant part, the Act defines agricultural operation as "any operation devoted to the bona fide production of crops, . . . including the production of fruits."[44] The Act achieves its goal of limiting nuisance status for agricultural operations by prohibiting localities from adopting ordinances or regulations that would require special permits for "any production agriculture . . . in an area that is zoned as an agricultural district or classification."[45] Moreover, the Act states that so long as agricultural operations follow "existing best management practices and comply with existing laws and regulations of the Commonwealth," those operations cannot be deemed a nuisance.[46]

The Act does, however, still allow localities to adopt the customary setback and area requirements that apply to land.[47] This distinction between general regulatory power and the power to specifically regulate land is critical. As discussed below, the Supreme Court of Virginia has consistently recognized that the General Assembly intended for localities to have the power to identify where types of land uses may be located, but not to regulate the operations undertaken on the land.[48]

---

v. Cnty. of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954)) (internal quotation marks omitted); *see also infra* notes 77–81 and accompanying text.

43. VA. CODE ANN. § 3.2-301 (Repl. Vol. 2008 & Cum. Supp. 2013).

44. *Id.* § 3.2-300 (Repl. Vol. 2008 & Cum. Supp. 2013). The Act further defines agricultural operation to include a number of production activities irrelevant to the scope this article. *See id.*

45. *Id.* § 3.2-301 (Repl. Vol. 2008 & Cum. Supp. 2013).

46. *Id.* § 3.2-302 (Repl. Vol. 2008).

47. *See id.* § 3.2-301 (Repl. Vol. 2008 & Cum. Supp. 2013). *But see infra* notes 62–64 and accompanying text (discussing the requirement that setback and other zoning regulations must be reasonable and not deny landowners the legitimate use of their property).

48. *See infra* notes 91–100 and accompanying text. The New York Court of Appeals recently reached a similar decision, holding that "zoning power is not a general police power, but a power to regulate land use." Sunrise Check Cashing v. Town of Hempstead,

While not a section of the Virginia Right to Farm Act, an important provision in the Virginia Uniform Statewide Building Code also protects agriculture operations in the Commonwealth. Specifically, "farm buildings and structures [are] exempt from the provisions of the Building Code."[49] A "farm building or structure" is defined as a building or structure that is "primarily" used for any of a variety of agricultural purposes, including "storage, handling, production, display, *sampling or sale* of agricultural . . . products produced in the farm."[50] In an advisory opinion, the Virginia Attorney General opined that these provisions "indicate[] that the General Assembly contemplated that some non-specified uses would be made of these buildings."[51] That is, if a farm building is occasionally used for an event, such as a wedding reception, that building would still primarily serve as a farm building, and be exempt from the Building Code.[52]

These code provisions are particularly important to farm wineries which derive such a substantial portion of their profits from on-site tastings, sales, and agritourism activities.[53] Furthermore, they reinforce the notion that the General Assembly has actively promoted a statewide policy of encouraging the growth and success of Virginia farm wineries.

B. *Local Regulation*

Localities regulate land uses through various mechanisms, but most notably through the use of zoning ordinances. These ordinances are established not because the localities possess the inherent power to zone, but rather because the General Assembly has granted localities that power.[54] Virginia localities possess only

---

986 N.E.2d 898, 900 (N.Y. 2013).

49. VA. CODE ANN. § 36-99(B) (Repl. Vol. 2011).

50. *Id.* § 36-97 (Repl. Vol. 2011 & Cum. Supp. 2013) (emphasis added). Other uses include animal shelters, business offices, and storage structures. *See id.* § 36-97(1)–(5) (Repl. Vol. 2011 & Cum. Supp. 2013).

51. 2010 Op. Va. Att'y Gen. 10-071, *2, http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/2010opns/10-071-Burke.pdf

52. *See id.*

53. *See* VIRGINIA WINE BOARD, THE ECONOMIC IMPACT OF WINE GRAPES ON THE STATE OF VIRGINIA—2010, at 7 (2012), *available at* http://www.virginiawine.org/system/docs/47/original/virginia_2010_EI_update_Draft_3.pdf?1328208264; e-mail from the Hon. David Albo, *supra* note 18.

54. VA. CODE ANN. § 15.2-2280 (Repl. Vol. 2012 & Cum. Supp. 2013).

those powers which the General Assembly grants to them; any step beyond those granted powers is invalid.[55]

Local governments are the governing bodies closest to the citizens of Virginia. They, therefore, have an important role to play in the regulation of that ultimately local concern—land and its use. For this reason, localities have the power to regulate land and land uses within their borders.[56] Local citizens and local governments have the most interest in the use of their land and the first-hand knowledge necessary to effectively regulate their land. Numerous cases have reinforced the power of localities to zone; however, this power is not without its limits.[57] While a locality does have the power to regulate the use of land, it cannot warp that power into a general regulatory power over individuals and businesses—such a power, within reasonable limits, is reserved to the state under its general police power.[58]

Virginia courts have consistently held that local ordinances must fall when they conflict with state law. While ordinances may regulate within an area that state law regulates, they "must not . . . contravene the general law, nor . . . be repugnant to the policy of the [s]tate as declared in general legislation."[59] As Virginia follows the Dillon Rule, whenever a locality enacts an ordinance that goes beyond those powers granted by the General Assembly, that ordinance is void.[60] In other words, the baseline for local power in Virginia is established by the Code of Virginia. If the locality exercises a power that the Code of Virginia has not expressly granted, that cannot be reasonably implied from express powers, or is not essential and indispensable, that locality has acted ultra vires and its actions are invalid.[61]

---

55. *See, e.g.*, City of Richmond v. Confrere Club of Richmond, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990).

56. *See, e.g.*, City of Norfolk v. Tiny House, Inc., 222 Va. 414, 423, 281 S.E.2d 836, 841 (1981).

57. *See, e.g., id.* at 422–24, 281 S.E.2d at 841 ("Local governments have been granted the authority to adopt and enforce zoning ordinances to ensure the orderly use of land.").

58. *See, e.g.*, Loudoun Cnty. v. Pumphrey, 221 Va. 205, 207, 269 S.E.2d 361, 362 (1980); Allen v. City of Norfolk, 196 Va. 177, 180–81, 83 S.E.2d 397, 399–400 (1954).

59. City of Lynchburg v. Dominion Theatres, Inc., 175 Va. 35, 42, 7 S.E.2d 157, 160 (1940) (quoting 43 C.J.S. *Municipal Corporations* § 219 (1927)) (internal quotation marks omitted).

60. *See City of Richmond*, 239 Va. at 79–80, 387 S.E.2d at 473.

61. *See, e.g.*, Ticonderoga Farms v. Cnty. of Loudoun, 242 Va. 170, 173–74, 409 S.E.2d 446, 448 (1991) ("The Dillon Rule . . . [provides that] 'local governing bodies have only

Furthermore, the Supreme Court of Virginia has stated that local ordinances, specifically zoning ordinances, must be reasonable in scope. In *Board of Supervisors of James City County v. Rowe*, the Supreme Court of Virginia emphasized an earlier holding that "[t]he mere power to enact an ordinance . . . does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property."[62] Specifically, the landowners in *Rowe* argued that building area setback requirements enacted by James City would severely restrict their ability to develop and utilize their land.[63] The Court agreed, noting that collectively the setback requirements deprived the landowners the legitimate use of their property.[64] In short, even though a locality may enact zoning ordinances, those ordinances must not unreasonably curtail the owner's use of his land.

II. STATE SUPREMACY IN THE FIELD OF WINERY REGULATION

A common problem that threatens farm wineries is overregulation at the local level. Such overregulation causes uncertainty as to the valid scope of local ordinances and raises the threat that government bodies may become micromanagers. This threat is not merely perceived, but is in fact very real. Utilizing their power to zone, Virginia localities have at various times attempted to specifically regulate the business activities of farm wineries.[65] Most recently, and quite controversially, Fauquier County passed amendments to its winery ordinance ("Fauquier Ordinance").[66] While the Fauquier Ordinance is nominally a zoning ordinance, it regulates the business operations of farm wineries by establish-

---

those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.'" (quoting Tabler v. Bd. of Supervisors, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980))).

62. 216 Va. 128, 140–41, 216 S.E.2d 199, 210 (1975) (second alteration in original) (quoting Bd. of Supervisors v. Carper, 200 Va. 653, 662, 107 S.E.2d 390, 396 (1959)) (internal quotation marks omitted).

63. *See id.*

64. *See id.*

65. *See* Strother & Allen, *supra* note 7, at 237–42.

66. *See, e.g.*, Susan Svrluga, *Winery Rules Passed After Much Debate in Fauquier*, WASH. POST, Jul. 15, 2012, at C12; Richard Leahy, *Fauquier Wineries Reflect on New Restrictive County Ordinance*, RICHARD LEAHY'S WINE REPORT (July 15, 2012), http://www.richardleahy.com/2012/07/15/fauquier-wineries-reflect-on-new-restrictive-county-ordinance/.

ing operating hours, requiring various administrative licenses, and prohibiting certain functions.[67]

Following the Dillon Rule, Virginia courts have consistently held that where local ordinances and state legislation come into conflict, the local ordinances must fall.[68] As localities are considered administrative departments of the state, the laws of the Commonwealth are supreme, preempting local regulations and ordinances.[69] This preemption covers not only state legislation, but also state level regulations and decisions promulgated by state agencies.[70] While localities have a broad range of powers, when the General Assembly has shown intent to control a given field of law, its word is final.

As discussed below, the General Assembly has shown an intent that the state, not localities, should occupy the central role in regulating farm wineries in Virginia. Farm wineries are affected primarily by three sectors of law and regulation at the state level: zoning, alcoholic beverage control, and agriculture. In each of these fields, the General Assembly has shown its intent for the state, rather than the localities, to control farm wineries.

A. *Preemption, Generally*

As Virginia adheres to the Dillon Rule, whenever a local regulation has not been expressly granted, cannot be reasonably implied from express grants, or is not an essential and indispensable local action, that regulation is invalid. Moreover, if a locality attempts to adopt a regulation that is in conflict with the Code of Virginia or general state policy, that regulation is preempted and, therefore, invalid.[71]

---

67. FAUQUIER COUNTY, VA., ZONING ORDINANCE §§ 3-318, 5-1810.1, 6-102, 6-400, 15-300, *available at* http://www.fauquiercounty.gov/documents/departments/commdev/pdf/zoningordinance/Amends_FarmWineryOrd_07-12-12.pdf.

68. *See supra* Part I.B.

69. *See* VA. CODE ANN. § 1-248 (Repl. Vol. 2011); *see also* City of Winchester v. Redmond, 93 Va. 711, 713, 25 S.E.2d 1001, 1001–02 (1986).

70. *See* Dail v. York Cnty., 259 Va. 577, 585, 528 S.E.2d 447, 451 (2000) ("A local ordinance may be invalid because it conflicts with a state regulation if the state regulation has 'the force and effect of law.'" (quoting Bd. of Supervisors v. Pumphrey, 221 Va. 205, 207, 269 S.E.2d 361, 362–63 (1980))).

71. *See* City of Lynchburg v. Dominion Theatres, 175 Va. 35, 42-43, 7 S.E.2d 157, 160 (1940).

In *Tabler v. Board of Supervisors of Fairfax County*, the Supreme Court of Virginia held that a local ordinance establishing a cash refund for non-alcoholic beverage containers was invalid.[72] In this case, the court found the General Assembly did not intend to convey the power to establish cash refunds to localities.[73] Finding no language in the Code of Virginia that specifically allowed localities to establish a cash refund, the court looked to proposed legislation to determine if such a power was implicitly granted.[74] The court noted that bills banning or taxing nonrefundable beverage containers were rejected by the General Assembly over the course of several years.[75] Finding no explicit language conveying a refund power to localities and a general state policy disfavoring the ban or taxation of nonrefundable containers, the court refused to "imply powers that the General Assembly clearly did not intend to convey."[76]

In *Blanton v. Amelia County*, the Supreme Court of Virginia held that a local ordinance banning the use of biosolids was in direct conflict with state level regulations that explicitly licensed businesses within Amelia County to use biosolids on their land.[77] The court noted that if an ordinance is not in direct conflict with state law or policy, it is the duty of the courts to harmonize local and state regulations and uphold the ordinance.[78] The court went on to state, however, that "local government may not forbid what the legislature has expressly licensed, authorized, or required."[79] The court found that the Code of Virginia and State Board of Health regulations specifically governed, authorized, and licensed the general use of biosolids on land in the Commonwealth.[80] As the local ordinance prohibited the use of biosolids, it had to be nullified because it stood in direct conflict with state law, regulations, and policy.[81]

---

72. 221 Va. 200, 204, 269 S.E.2d 358, 361 (1980).
73. *Id.*
74. *Id.* at 202–04, 269 S.E.2d at 359–61.
75. *Id.* at 203–04, 269 S.E.2d at 360–61.
76. *Id.* at 202, 204, 269 S.E.2d at 360–61.
77. 261 Va. 55, 65–66, 540 S.E.2d 869, 875 (2001).
78. *Id.* at 64, 540 S.E.2d at 874.
79. *Id.* (quoting King v. Cnty. of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954)) (internal quotation marks omitted).
80. *Id.* at 64–66, 540 S.E.2d at 874.
81. *Id.* at 65–66, 540 S.E.2d at 875.

In *City of Lynchburg v. Dominion Theatres, Inc.*, the Supreme Court of Virginia held that a local ordinance prohibiting the exhibition of indecent movies was in conflict with state licenses authorizing the exhibition of such movies.[82] In that case, Dominion Theatres had obtained a license from the Division of Motion Picture Censorship for the State of Virginia for showing a film titled *The Birth of a Baby*.[83] Lynchburg, however, attempted to prohibit the theater from showing the film as a city ordinance prohibited the exhibition of indecent movies.[84] The court recognized that the state had codified laws relating to movie censorship and granted the power to issue licenses to the Division of Motion Picture Censorship.[85] As the state had occupied this field of law, the court moved to the conflicts analysis.[86] Stating that "what the legislature permits the city cannot suppress without express authority therefor," the court held that the local ordinance was in direct conflict with state law and policy.[87] The General Assembly, the court found, intended for the Division of Motion Picture Censorship to determine what films may or may not be shown in the Commonwealth.[88] Any ordinance that attempted to prohibit showings in contravention of the Division's permits was therefore in conflict with state law and void.[89]

The Supreme Court of Virginia has rigorously applied this preemption analysis whenever local ordinances and regulations come into conflict with the Code of Virginia or with policy set forth by the General Assembly. Whenever a local ordinance of any kind is irreconcilable with the Code of Virginia, the ordinance must fall.

B. *Preemption in the Farm Winery Field*

Where the General Assembly has shown an interest in exclusive regulation, localities cannot overregulate. The explicit language of statutes is indicative of legislative intent for either the

82. 175 Va. 35, 43, 7 S.E.2d 157, 160 (1940).
83. *Id.* at 37, 7 S.E.2d at 158.
84. *Id.*
85. *Id.* at 40–43, 7 S.E.2d at 159–60.
86. *Id.* at 42, 7 S.E.2d at 160.
87. *Id.* at 42–43, 7 S.E.2d at 160.
88. *Id.* at 43, 7 S.E.2d at 160.
89. *Id.*

state or localities to control an area of law. Furthermore, courts will not confer implied powers on localities that "the General Assembly clearly did not intend to convey."[90] Virginia statutes, regulations, and case law all suggest that the General Assembly clearly intended to exercise near exclusive control over all matters affecting the farm winery business in the Commonwealth.

In *City of Norfolk v. Tiny House*, the Supreme Court of Virginia held that the General Assembly, in passing the ABC Act, did not intend to usurp the power of localities to regulate the *location* of establishments selling alcoholic beverages through valid zoning permits.[91] The court began its analysis by noting that the Code of Virginia specifically grants localities the power to adopt zoning ordinances.[92] The court found that this grant of power was not displaced by the ABC Act, which granted the ABC Commission the authority to regulate matters concerning alcoholic beverages.[93] The court held that the zoning power allowed localities to regulate the *location and concentration* of establishments selling alcoholic beverages, the ABC Act notwithstanding.[94] The court noted, however, that "[t]he General Assembly intended to grant the ABC Commission exclusive authority to control the 'manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia.'"[95] Further emphasizing this point, the court noted that Norfolk's ordinance was "not a prohibition measure," but rather merely an attempt to prevent the clustering of "adult uses."[96] Norfolk's ordinance was "not designed to prevent or control the use of alcohol or *to regulate the business of those who dispense it*."[97] That power, the court noted, "is the exclusive province of the ABC Commission."[98] As the Norfolk ordinance only sought to regulate the location of establishments selling alcoholic beverages, it was a valid exercise of the city's zoning power.[99] In short,

90. Tabler v. Bd. of Supervisors, 221 Va. 200, 202, 269 S.E.2d 358, 359–60 (1980).

91. 222 Va. 414, 422, 281 S.E.2d 836, 841 (1981).

92. *Id.* at 417, 281 S.E.2d at 838 (citing VA. CODE ANN. §§ 15.1-427 to -503.2 (Repl. Vol. 1981).

93. *Id.* at 421, 281 S.E.2d at 840.

94. *Id.* at 422, 281 S.E.2d at 841.

95. *Id.* (quoting VA. CODE ANN. § 4-96 (Repl. Vol. 1979)).

96. *Id.* at 424, 281 S.E.2d at 842.

97. *Id.* (emphasis added).

98. *Id.*

99. *Id.*

a zoning ordinance that regulates the business of alcohol distribution is invalid. The scope of a zoning ordinance is limited to the regulation of land, not to the regulation of business itself.[100] Any local ordinance, therefore, that purports to regulate the business activities of a farm winery is likely void as ultra vires.

Moreover, similar to the ordinance at issue in *Tabler*,[101] there is no direct language in the Code of Virginia that explicitly authorizes localities to have general regulatory power over wineries. That power has been reserved to the ABC Board whose regulations "have the effect of law."[102] The explicit language of the Code of Virginia denies localities the general power to regulate businesses dispensing alcoholic beverages. Section 4.1-128 recognizes only two instances in which a locality may directly regulate businesses dispensing alcoholic beverages. First, localities may issue licenses for taxation purposes.[103] Second, localities may prohibit the sale of beer or wine between noon on Saturday and 6:00 a.m. on Monday.[104] By the Code's explicit language, these are the only instances that localities may directly regulate businesses dispensing alcoholic beverages.[105] These specifically enumerated exceptions and the general grant of authority to the ABC Board show that the General Assembly intended for the ABC Board, not localities, to have the general authority to regulate businesses dispensing alcoholic beverages. As the General Assembly enumerated exceptions to this general power, it clearly did not intend for localities to have full regulatory power over such businesses.

Furthermore, *Tabler* rejects any notion that the courts, absent a specific intent by the General Assembly, should imply powers for localities that go beyond grants in the Code of Virginia.[106] As there is no specific intent granting localities a general regulatory power over businesses dispensing alcoholic beverages, localities lack that power. Indeed, in *Tiny House*, the Supreme Court of

100. *Id.*

101. *See supra* notes 72–76 and accompanying text.

102. VA. CODE ANN. § 4.1-111(A) (Cum. Supp. 2013); *see also id.* § 4.1-128(A) (Repl. Vol. 2010 & Cum. Supp. 2013) (explicitly stating that no locality shall "adopt any ordinance or resolution which regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth").

103. *Id.* § 4.1-205 (Repl. Vol. 2010).

104. *Id.* § 4.1-129 (Repl. Vol. 2010).

105. *Id.* § 4.1-128 (Repl. Vol. 2010 & Cum. Supp. 2013).

106. *See supra* notes 72–76 and accompanying text.

Virginia specifically recognized that the general power "to prevent or control the use of alcohol or *to regulate the business of those who dispense it* . . . is the exclusive province of the ABC Commission."[107] Any local zoning ordinance that would not simply govern the clustering and location of farm wineries is therefore likely void.[108]

The Code of Virginia explicitly denies localities a general regulatory power over businesses dispensing alcoholic beverages, and the Supreme Court of Virginia has recognized the ABC Board's exclusive authority over such regulations. The Commonwealth, therefore, has shown clear intent to reserve for itself the general authority to regulate farm wineries—establishments that are in the businesses of dispensing alcoholic beverages.

III. COMPARATIVE ANALYSIS

Despite the General Assembly's intent to control the farm winery industry, the treatment of wineries in Virginia varies quite substantially from county to county. Some counties adopt a very laissez-faire approach, while others opt to more tightly control the day-to-day operations of farm wineries. In addition to the legal problems raised by strict local control over wineries, data suggests that there may be a correlation between burdensome regulations and decreased wine production. This data suggests that localities experimenting with more onerous regulations suffer from decreased participation in one of the most vibrant aspects of Virginia's economy.

107. City of Norfolk v. Tiny House, Inc., 222 Va. 414, 424, 281 S.E.2d 836, 842 (1981) (emphasis added).

108. The Supreme Court of Virginia later revisited the issue addressed in *Tiny House*. *See* Cnty. of Chesterfield v. Windy Hill, 263 Va. 197, 204–06, 559 S.E.2d 627, 631–32 (2002) ("We hold that the ABC Commission's exclusive authority to license and regulate the sale and purchase of alcoholic beverages in Virginia does not preclude a municipality from utilizing valid zoning ordinances to regulate the location of an establishment selling such alcoholic beverages." (quoting *Tiny House*, 222 Va. at 423, 281 S.E.2d at 841) (internal quotation marks omitted)).

A. *The Ordinances*[109]

1. Albemarle County

Central Virginia's Albemarle County has a very detailed farm winery ordinance that is one of the most supportive of agribusiness in the Commonwealth. Passed in 2009, the Albemarle ordinance was a response to the Virginia Farm Winery Act of 2006.[110] Following the passage of the Farm Winery Zoning Act, Albemarle sought to revise its winery ordinance, which had become unenforceable under the new legislation.[111] Original drafts saw the county attempting to define what a farm winery is, to regulate operational hours at farm wineries, and to define usual and customary events as those involving at most fifty individuals.[112] Concerned that these attempts were in violation of the Farm Winery Zoning Act, the Virginia Wine Council proposed an alternative ordinance that sought to strike a balance between the concerns of the county, local citizens, and farm wineries.[113] After working with the Virginia Wine Council, the county redrafted the ordinance, dropping the provisions governing business hours and redefining farm wineries.[114] The final ordinance, dubbed a "win-win"

---

109. Ordinances discussed in Part III are generally those ordinances currently in force as of the date of publication. With the exception of the 2012 Fauquier County Wine Ordinance, no major changes have been made to these localities' treatment of farm wineries since approximately 2010. Given the historical treatment of farm wineries by these counties, it is likely safe to discuss data largely in the context of current ordinances. Both Albemarle and Loudoun County have a pattern of loosely regulating farm wineries, while Fauquier County has a history of stricter regulation dating to at least 2005. *See* e-mail from Travis Hill, Deputy Secretary of Agriculture & Forestry, Office of the Governor of Virginia, to author (Sept. 19, 2013, 5:11 PM) (on file with author) (discussing Albemarle's "growing pains" with its farm winery ordinance but noting that both Albemarle and Loudoun work well with the wine industry). For a discussion on historic regulation of farm wineries in Fauquier County, see Strother & Allen, *supra* note 7, at 239–42. *See also* Linda Jones McKee, *A Tale of Two Lawsuits*, WINES & VINES (Feb. 26, 2013), http://www.winesandvines.com/template.cfm?section=news&content=112418; Susan Svrluga, *Fauquier County to Vote on Rules for Farm Wineries*, WASH. POST, Sept. 7, 2011, at C12.

110. Telephone Interview with Matthew Conrad, Deputy Chief of Staff & Deputy Counselor to the Governor, Office of the Governor of Virginia (Sept. 4, 2013). *See also* e-mail from Travis Hill, *supra* note 109 ("Albemarle went through some growing pains initially where wineries were finding it hard to operate under the rules the County was trying to set, but now, for the most part, what I'm hearing is that the County found the proper balance between the wineries and the County's interest in protecting public health, safety and welfare after working collaboratively with winery owners.").

111. *See* Interview with Matthew Conrad, *supra* note 110.

112. *See id.*

113. *See id.*

114. *See id.*

for all interested parties was the product of fruitful collaboration among local planning officials, a business friendly board of supervisors, and the Virginia Wine Council.[115]

Albemarle's ordinance specifically allows a variety of land uses by right, including: the uses expressly provided for by the Virginia Code;[116] the sale, tasting, and consumption of wine within the winery's normal course of business;[117] and events with two hundred or fewer attendees.[118]

Quite notably, Albemarle County also specifically provides for agritourism uses and uses related to wine sales.[119] Specific allowance for both of these potentially expansive uses were not given in either the Loudoun County or Fauquier County ordinance.[120] For two hundred or fewer attendees, the agritourism provision explicitly allows by right not only picnics, catering activities, and tours, but also hayrides, museums, and weddings.[121] Moreover, wineries are allowed to host more than two hundred guests at a time, provided they first obtain a special use permit.[122]

Albemarle only narrowly restricts wineries by regulating sound and yard sizes consistent with the other portions of its zoning ordinance.[123] The only uses that are expressly prohibited are restaurants and helicopter rides.[124]

As discussed below, Albemarle's very accommodating winery ordinance has seemingly contributed to a vibrant local wine industry.[125] In the words of Matthew Conrad, former director of the

---

115. *Id.*

116. These uses include: the production and harvesting of grapes; the sale, wholesale, shipment and storage of wine in accordance with Title 4.1; and private personal gatherings held by the winery's owner. *See* ALBEMARLE COUNTY, VA., CODE ch. 18, § 5.1.25(a) (2013); *see also* VA. CODE ANN. § 15.2-2288.3(E) (Repl. Vol. 2012).

117. Note that this seems to be a subjective element defined by a particular winery's business operations. *See* ALBEMARLE COUNTY, VA., CODE ch. 18, § 5.1.25(a)(2) (2013).

118. *Id.* ch. 18, § 5.1.25(b)(2).

119. *Id.* ch. 18, § 5.1.25(b).

120. FAUQUIER COUNTY, VA., CODIFIED ORDINANCES § 6-401 to -403 (2013), *available at* http://www.fauquiercounty.gov/government/departments/commdev/index.cfm?action=zoningordinance1; LOUDOUN COUNTY, VA., ZONING ORDINANCES § 5-625 (2013).

121. ALBEMARLE COUNTY, VA., CODE ch. 18, § 5.1.125(b) (2013).

122. *Id.* ch. 18, § 5.1.25(c). Contrast this broad allowance to the narrow allowance provided in the Fauquier County Ordinance. FAUQUIER COUNTY, VA., CODIFIED ORDINANCES §§ 5-1810.2, 6–401 (2013), *available at* http://www.fauquiercounty.gov/government/departments/commdev/index.cfm?action=zoningordinance1.

123. ALBEMARLE COUNTY, VA., CODE ch. 18, § 5.1.25(e),(f).

124. *Id.* ch. 18 § 5.1.25(g).

125. *See infra* Part III.B.

Virginia Wine Council, "the Albemarle Ordinance is a model ordinance that should be adopted for the interests of both wineries and local government."[126]

2. Loudoun County

Similar to Albemarle's ordinance, northern Virginia's Loudoun County has a rather brief winery ordinance that leaves farm wineries quite free to manage their own affairs. Most of Loudoun's winery ordinance is dedicated to regulating lot size, building area, landscape buffers, access, parking, and lighting.[127] These regulations are akin to traditional zoning practices, burdening the land on which a farm winery is situated, rather than its business operations.

The only regulation that directly regulates the operations of wineries is a provision that limits operational hours to between 10:00 a.m. and 10:00 p.m.[128] Despite serving as a limitation, the twelve hour time period is still rather broad, likely conforming to the usual and customary hours of wineries throughout the Commonwealth.[129]

Moreover, Loudoun County, as well as Albemarle, is lauded as having promoted an environment that encourages collaboration among the local government, agriculture in general, and farm wineries specifically. Such collaboration has "promote[d] economic development and attract[ed] various agricultural operations" to those counties.[130] As Travis Hill, the Deputy Secretary of Agriculture, has stated:

> Obviously, the growing conditions need to be there in order to grow high quality grapes, something both Albemarle and Loudoun have, but having the right regulatory environment is also necessary to keep things going. . . . [G]rape growers and winemakers are going to want to know that they and their businesses are welcome additions to the community. If they see areas that make it more difficult to succeed as a going concern, . . . they'll avoid those areas, despite good growing conditions.[131]

---

126. Interview with Matthew Conrad, *supra* note 110.

127. LOUDOUN COUNTY, VA., ZONING ORDINANCES § 5-625 (2013).

128. *Id.* § 5-625(A)(3).

129. The Farm Winery Zoning Act generally prohibits regulations that disallow usual and customary activities at farm wineries. *See* VA. CODE ANN. § 15.2-2288.3(A) (Repl. Vol. 2012).

130. E-mail from Travis Hill, *supra* note 109.

131. *Id.* Furthermore, "Loudoun also has some terrific promotion programs that en-

3. Fauquier County

a. The Ordinance

Northern Virginia's Fauquier County has an incredibly detailed set of ordinances related to farm wineries that was recently updated in July of 2012.[132] Unlike the ordinances in Albemarle and Loudoun, the Fauquier ordinance seeks to directly regulate the business activities of farm wineries.

The Fauquier ordinance specifically allows the by right uses established by the Virginia Farm Winery Zoning Act, but only during county-defined business hours.[133] It also expressly allows light food service during defined business hours and two special events per month, during defined business hours and limited to thirty-five attendees.[134] Unlike Albemarle County, Fauquier County does not permit, by right, uses related to agritourism or wine sales.

Like the ordinances in Albemarle and Loudoun, the Fauquier ordinance attempts to regulate lighting, setbacks, parking, and land area.[135] Again, these regulations are essentially traditional zoning regulations which simply affect the land, not the business on the land.[136]

Unlike the ordinances in Albemarle and Loudoun, however, Fauquier's ordinance also attempts to establish a number of explicit restrictions that directly regulate the business operations of farm wineries. For example, the ordinance establishes regular business hours for the wineries as 10:00 a.m. to 6:00 p.m.[137] Ex-

courage development of agricultural operations." *Id.*

132. FAUQUIER COUNTY, VA., CODIFIED ORDINANCES §§ 3-318, 5-1810, 6-102, 6-400, 15-300 (2013), *available at* http://www.fauquiercounty.gov/documents/departments/commdev/pdf/zoningordinance/Amends_FarmWineryOrd_07-12-12.pdf.

133. *Id.* § 6-401(1)–(7).

134. *Id.* § 6-401(8)-(9).

135. *Id.* § 6-402.

136. While these regulations may be considered traditional zoning regulations, they could still suffer from an important legal deficiency: The extent to which they regulate setbacks, parking, and buildable areas could likely be considered unreasonable. When enacting zoning ordinances, local governments must always remember the Supreme Court of Virginia's admonition that "[t]he mere power to enact an ordinance . . . does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property." Bd. of Cnty. Supervisors v. Carper, 200 Va. 653, 662, 107 S.E.2d 390, 396 (1959); *see also* Bd. of Supervisors v. Rowe, 216 Va. 128, 140–41, 216 S.E.2d 199, 210 (1975) (quoting Bd. of Cnty. Supervisors, 200 Va. at 662, 107 S.E.2d at 396.

137. FAUQUIER COUNTY, VA., CODIFIED ORDINANCES § 15-300, *available at* http://www.

tended hours are permissible in certain months if the winery first obtains an administrative permit from the county.[138] The Fauquier ordinance also expressly prohibits a number of accessory uses at farm wineries,[139] and strictly regulates the hosting of events.[140] Unlike Albemarle County, which allows up to two hundred attendees at winery events by right, the Fauquier ordinance generally allows an absolute maximum of two hundred attendees at events, eighteen times per year, and only with a special use permit.[141]

Not only does this ordinance likely suffer from legal problems regarding state control and preemption, but it has also likely contributed to Fauquier County's increasingly smaller impact on the Virginia wine industry.[142] Indeed, as of publication, The Virginia Governor's Secretary of Agriculture and Forestry "is aware of one potential corporate investor in the Virginia wine industry that has stricken Fauquier County from the county listing of where it would consider buying or building a winery . . . due, at least in part, to the passage of the winery ordinance in that County."[143]

b. A Continuing Controversy

The current Fauquier ordinance and its predecessors have been the subject of intense controversy from approximately 2005 to today.[144] Most recently, the Virginia Attorney General issued an ad-

---

fauquiercounty.gov/documents/departments/commdev/pdf/zoningordinance/Amends_FarmWineryOrd_07-12-12.pdf.

138. *Id.* § 5-1810.1.

139. *Id.* § 6-403.

140. *Id.* § 5-1810.2.

141. *Id.* § 5-1810.2(6). Larger wineries are permitted to have up to 250 guests 24 times a year as well as one event with 500 guests once a year. *Id.*

142. *See infra* Part III.B.

143. E-mail from Travis Hill, *supra* note 109.

144. *See, e.g.*, Susan Svrluga, *Fauquier County Passes Rules After Contentious Debate Over Wineries*, WASH. POST (July 14, 2012), http://articles.washingtonpost.com/2012-07-14/local/35489743_1_winery-owners-three-wineries-rural-area; *see also* Mckee, *supra* note 109 ("By 2005, the farm wineries in Fauquier County, Va., west of Washington, D.C., were limited by local regulations that threatened to stifle their ability to grow . . . . Fauquier County officials began to discuss a revised farm winery ordinance as early as 2008, and county supervisors have held numerous work sessions and public hearings on different versions of a potential ordinance."). In the days leading up to the passage of the Fauquier Ordinance, the Virginia Secretary of Agriculture & Forestry sent a letter to the Fauquier Board of Supervisors discussing his concern that the proposed ordinance would hamper the wine industry in Fauquier and that provisions of the ordinance were in conflict with state law. *See* Letter from Todd P. Haymore, Sec. of Agric. & Forestry, Office of the Gover-

visory opinion finding that, in part, the ordinance was "an invalid exercise of local authority because it exceeds the locality's delegated zoning authority and is preempted by state law governing alcoholic beverages."[145]

The opinion begins by first recognizing that localities have broad powers to zone, but that the Commonwealth follows the Dillon Rule, requiring that ordinances conflicting with state law be deemed invalid.[146] While conceding that certain provisions in the Fauquier Ordinance *may* be consistent with the Virginia Farm Winery Zoning Act, the Attorney General determined that significant portions of the ordinance went beyond the scope of power delegated to the county.[147] Specifically, the Attorney General stated:

> To the extent that the process of obtaining a Zoning Permit imposes obligations and burdens, including fees, upon the farm winery applicant and allows Fauquier County the ability to restrict through its review and potential denial of the zoning permit application those activities, the Fauquier County Zoning Ordinance exceeds the locality's zoning authority.[148]

In essence, the opinion reinforces existing case law by declaring that localities cannot expand their specifically delegated power to zone into a general police power over businesses.[149]

The concession that some provisions of the ordinance *may* be consistent with state law should not be read as inherent approval of those provisions. This concession was made without undergoing any of the factual questions posed by the Farm Winery Zoning Act.[150] The Attorney General specifically states that his office does not offer opinions to resolve factual disputes such as those posed by certain sections of the Fauquier ordinance.[151] This opinion,

---

nor of Va., to Holder Trumbo, Jr., Chairman, Fauquier Cnty. Bd. of Supervisors (July 10, 2012) (on file with author).

145. 2013 Op. Va. Att'y Gen. 12-063, *1 http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/2013opns/12-063%20Peace.pdf.

146. *See id.* at *1–2.

147. *See id.* at *2–3.

148. *Id.* at *3.

149. *See id.* at *2; City of Norfolk v. Tiny House, Inc., 222 Va. 414, 414, 424, 281 S.E.2d 826, 841 (1981).

150. For example, the Farm Winery Zoning Act requires that localities first consider the economic impact of ordinances on farm wineries and if the winery operations have a substantial impact on the public welfare. *See* VA. CODE ANN. § 15.2-2288.3(A) (Repl. Vol. 2012); *see also supra* Part I.A.1.

151. 2013 Op. Va. Att'y Gen. 12-063, *supra* note 145, at *1.

therefore, leaves the door open to litigation and dispute over the application of much of the Fauquier ordinance.

B. *The Data*

1. Actively Licensed Farm Wineries

Actively Licensed Farm Wineries[152]					
County	2005	2010	2011	2012	Growth, 2005-2012
State Total	85	165	191	213	151%
Albemarle	10	20	24	26	160%
Loudoun	13	26	29	39	200%
Fauquier	13	24	26	27	108%

The table above shows the growth rates of licensed farm wineries in the counties discussed in Part III.A. Data is listed for the three most recent growing years as well as 2005, prior to the passage of the Virginia Farm Winery Zoning Act. The data suggest that, in the years following its passage, the Virginia Farm Winery Zoning Act initially had an extremely positive impact on the growth of Virginia wineries. Four years after the Act was passed, the number of farm wineries in Virginia had nearly doubled. Albemarle, Loudoun, and Fauquier saw similar growth patterns, with the number of farm wineries in those counties doubling, or nearly doubling by 2010. From 2010 through 2012, growth continued modestly in Albemarle and Fauquier; however, growth in Loudoun County was quite substantial.

Overall, the number of farm wineries in Virginia grew by approximately 151% from 2005 through 2012. In that same period, growth rates in Albemarle and Loudoun were higher than the statewide rate. Loudoun County, whose ordinance could be considered the most relaxed, enjoyed a considerable growth rate of

152. County figures were derived from information available at the Virginia Department of Alcoholic Beverage Control's website. *Retail License Search*, VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, http://www.abc.virginia.gov/licenseesearch/welcome.do. To obtain the figures for each year, the author (1) sorted the entries by date of origin; (2) removed any entries that were surrendered or withdrawn prior to January 1 of the subsequent year; and (3) removed any duplicate entries within that range. The winery counts, therefore, are as of December 31 of the year reported. State totals were obtained from the Virginia Wine Board Marketing Office. E-mail from Annette Boyd, Director, Virginia Wine Board Marketing Office, to author (Sept. 9, 2013, 12:18 PM) (on file with author).

200%, far outpacing the statewide rate. Fauquier County, on the other hand, which has a history of more strictly regulating farm wineries, experienced a growth rate of only 108%, well below the statewide rate.

2. Grape Production and Acreage

Total Grape Production (Tons)					
County	2005[153]	2010[154]	2011[155]	2012[156]	Growth 2005-2012
State Total	5600	6557	7728	7532	35%
Albemarle	904	1099	971	1223	35%
Loudoun	709	1036	1296	1342	89%
Fauquier	418	383	479	443	6%

Total Grape Acreage					
County	2005[157]	2010[158]	2011[159]	2012[160]	Growth 2005-2012
State Total	2560	3123	3158	3376	32%
Albemarle	490	562	461	557	14%
Loudoun	342	543	565	602	76%
Fauquier	213	205	238	242	14%

In 2005, Virginia produced a total of 5600 tons of grapes, grown on approximately 2560 total acres of land. With an average price of $1360 per ton, Virginia farm wineries generated $7,616,000

153. VIRGINIA WINE BOARD MARKETING OFFICE, VIRGINIA 2005 COMMERCIAL GRAPE REPORT [hereinafter 2005 GRAPE REPORT], *available at* http://www.virginiawine.org/system/datas/197/original/2005CommercialGrapeReport.pdf?1248124239.

154. VIRGINIA WINE BOARD MARKETING OFFICE, VIRGINIA 2010 COMMERCIAL GRAPE REPORT [hereinafter 2010 GRAPE REPORT], *available at* http://www.virginiawine.org/system/datas/320/original/2010_Commercial_Grape_Report.pdf?1312838511.

155. VIRGINIA WINE BOARD MARKETING OFFICE, VIRGINIA 2011 COMMERCIAL GRAPE REPORT [hereinafter 2011 GRAPE REPORT], *available at* http://www.virginiawine.org/system/datas/356/original/2011_Commercial_Grape_Report.pdf?1340900266.

156. VIRGINIA WINE BOARD MARKETING OFFICE, VIRGINIA 2012 COMMERCIAL GRAPE REPORT [hereinafter 2012 GRAPE REPORT], *available at* http://www.virginiawine.org/system/datas/376/original/Grape_Report_2012.pdf?1363691676.

157. 2005 GRAPE REPORT, *supra* note 153.

158. 2010 GRAPE REPORT, *supra* note 154.

159. 2011 GRAPE REPORT, *supra* note 155.

160. 2012 GRAPE REPORT, *supra* note 156.

from grape production in 2005.[161] By 2012, Virginia was producing a total of 7532 tons of grapes. At a weighted average price of $1669 per ton, the Virginia Wine Industry generated a total of $12,570,908 from grape production in 2012.[162] These grapes were produced on a total of 3376 acres of land in the Commonwealth.

In total, Virginians produced approximately 35% more grapes in 2012 than they did in 2005. Wine producers in Albemarle County kept pace with the statewide growth rate, while production in Fauquier grew at the substantially slower rate of 6%. During the same period, production in Loudoun County soared. Grape production in Loudoun grew by the considerable rate of approximately 89% from 2005 through 2012.

From 2005 to 2012, acreage dedicated to grape planting increased by 32% in Virginia. Both Albemarle and Fauquier saw acreage increase by a lower rate of approximately 14%. Loudoun County, by comparison, enjoyed 76% more land dedicated to grape production in 2012 than in 2005. As with the growth of licensed establishments and production, the increase of cultivated acreage in Loudoun is substantially larger than in either Albemarle or Fauquier. These figures further indicate a positive correlation between growth and relaxed regulations and a negative correlation between growth and strict regulations.

3. Economic Impact

In 2010, the Virginia Wine Industry as a whole had an estimated impact of $747.1 million on the Virginia economy.[163] In addition to the $10.6 million from grape production, this figure includes, among other items, $27.8 million paid in wages to winery and vineyard employees, $130.6 million generated from agritourism, and nearly $42.7 million in state tax revenue.[164]

Ninety-five percent of the wineries in Virginia contributing to this $747.1 million industry are classified as "small producers, producing less than 10,000 cases."[165] To generate their revenue,

161. *See* 2005 GRAPE REPORT, *supra* note 153.

162. *See* 2012 GRAPE REPORT, *supra* note 156.

163. THE ECONOMIC IMPACT OF WINE AND WINE GRAPES ON THE STATE OF VIRGINIA—2010, *supra* note 53, at 2.

164. *Id.* at 3.

165. *Id.* at 3, 7.

"[t]he vast majority" of these wineries rely on the higher margins produced by sales made directly to the customer in the tasting room.[166] With such a reliance on actual on-site sales, the majority of farm wineries rely on the least restrictive regulations possible in order to effectively conduct their businesses. When local governments have attempted to exercise strict control over the actual day-to-day operations of farm wineries, data suggests that those businesses are not able to thrive as readily as under less burdensome regulations. A weaker participation in the Virginia wine industry hurts not only the wineries themselves, but also the localities in which they are located. Wineries experience more difficulty providing products to their customers, leading to a smaller potential for growth, stymieing the growth of the local economy.

Moreover, in addition to the positive economic impact that farm wineries have, they serve as vehicles for preserving open space. Indeed, "[t]he best way in Virginia, or anywhere, to preserve farmland for agricultural uses is to keep agriculture profitable."[167] Each acre devoted to grape production is an acre that remains conserved for agricultural use. So long as farm wineries are able to effectively profit from their operations, land within these counties will continue to be preserved as rural.

Unsurprisingly, both Albemarle and Loudoun enjoy a substantial share of participation in Virginia's wine economy.[168] Overall, their regulations are less burdensome and leave farm wineries relatively free to manage their own affairs. On the contrary, Fauquier County's participation in the wine economy is quite small by comparison.[169]

In fact, by the end of the period of the most recent economic impact study, 2010, both Albemarle and Loudoun were producing more grapes on more acres than they had been in 2005; Fauquier, however, was producing fewer grapes on fewer acres.[170] Production levels in Fauquier have since risen above the 2005 levels.[171]

---

166. *Id.* at 8. Delegate Albo has also remarked that agritourism is vital to securing profits for farm wineries. *See* Albo, *supra* note 18.

167. Interview with Matthew Conrad, *supra* note 110.

168. *See* 2012 GRAPE REPORT, *supra* note 156.

169. *Id.*

170. *Compare* 2005 GRAPE REPORT, *supra* note 153, *with* 2010 GRAPE REPORT, *supra* note 154.

171. *Compare* 2005 GRAPE REPORT, *supra* note 153, *with* 2012 GRAPE REPORT, *supra* note 156.

An uncertain regulatory environment, however, could severely threaten this renewed growth in Fauquier. The current Fauquier ordinance has been a subject of controversy from around 2008 when it was first being debated, and it is possible that such controversy and uncertainty has since contributed to slower growth in Fauquier.[172] From 2011 to 2012, grape production again fell in Fauquier County.[173]

While it is impossible to state that stricter regulations implemented in Fauquier in 2012 were the sole cause of a downward trend in production, data released in 2013 indicates that grape production in Fauquier decreased from 2011 to 2012 whereas production in both Albemarle and Loudoun increased during the same period.[174]

Overall, the data for 2005 through 2012 indicates a correlation between higher regulation and lower output. More traditional land use regulations, such as those adopted in Albemarle and Loudoun, that largely allow farm wineries to establish their own business procedures and operations, correspond with higher outputs and, therefore, higher revenue (both for the winery and for the government through taxation). More onerous regulations, however, such as those in Fauquier County, that regulate the actual business of farm wineries, thereby limiting their ability to operate freely, correspond with lower outputs and, therefore, lower revenue.[175]

---

172. *See supra* notes 109 & 144 (discussing the history of the Fauquier ordinance and the public controversy surrounding it).

173. *Compare* 2011 GRAPE REPORT, *supra* note 155, *with* 2012 GRAPE REPORT, *supra* note 156.

174. 2012 GRAPE REPORT, *supra* note 156.

175. This data should not be read to show that stricter regulations are the *only* factor that leads to lower outputs. There are a variety of factors that could contribute to lower county-wide production of wine: the economic climate, individual business acumen, and weather patterns, among others. Nonetheless, the data does show a negative correlation between the strictness of regulations and the overall productiveness of farm wineries. Though a comprehensive geographical, geological, and soil analysis is beyond the scope of this article, it is useful to note at least a few general similarities between two of the studied counties, Loudoun and Fauquier. Both counties are geographically located within the Washington D.C. Metropolitan Statistical Area, allowing both access to similar markets. Both counties also have similar soil and geological conditions, indicating that both perhaps have similar positive potential for grape cultivation. *Cf.* e-mail from Tony Wolf, Director, AHS Jr. Agricultural Research and Extension Center, to author (Sept. 24, 2013, 7:28 PM) (on file with author) ("[A] given variety subjected to comparable management practices, including pest management, and grown at similar site conditions, would be expected to perform comparably between the two counties. . . . This is not the same as saying 'all other

IV. CONCLUSION

As the Supreme Court of Virginia has stated, the purpose of zoning is to "strike a deliberate balance between private property rights and public interests."[176] Government, of course, must be permitted to make laws governing its citizens and industries; however, these laws must not be so oppressive as to threaten the existence of the industry they purport to regulate. Virginia's great wine connoisseur, Thomas Jefferson, once stated that while restraining men from injuring each other, a wise government should "leave them otherwise free to regulate their own pursuits of industry and improvement."[177] Virginia's lawmakers should strive to follow Mr. Jefferson's advice and always remember that the public interest must be balanced against the rights of farm wineries and all businesses to conduct their operations as they deem best.

---

things being equal,' as there will be small climatic and other site-specific differences between the two counties. But in the broader sense of your [question regarding growing conditions], I think it would be extremely difficult to discern differences in grapes grown well in Loudoun County from those grown well in Fauquier County."). These general similarities further suggest that local regulations play a chief role in affecting viticultural production within a given county. Although further study is needed on these physical conditions, the general similarities between the counties do help to reinforce the conclusion that there is a negative correlation between strict regulation and grape production.

176. Bd. of Supervisors v. Snell Constr. Corp., 214 Va. 655, 657, 202 S.E.2d 889, 892 (1974).

177. Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), *in* THOMAS JEFFERSON: WRITINGS 492, 494 (Merrill D. Peterson ed., 1984).