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Albemarle County Planning Commission
401 McIntire Road, North Wing
Charlottesville, VA 22902

Re: Comments on Proposed Clean Fill Earth Ordinances

Dear Albemarle County Planning Commission:

Thank you for this opportunity to comment on the proposed ordinances governing clean fill earth. I am submitting these comments on behalf of the Albemarle County Farm Bureau (ACFB). The ACFB's members include farmers who own or lease agricultural land in Albemarle County, many of whom may be negatively affected by this proposed ordinance, if enacted as it stands currently. ACFB is a longstanding, grassroots organization that has been dedicated to representing the interests of Albemarle County's farmers for over 82 years. ACFB has positioned themselves as a trusted representative of the agricultural and rural communities, providing education, advocacy, and resources to its members.

Supported by the state-wide Virginia Farm Bureau Federation (VFBF) and nationally recognized American Farm Bureau Federation (AFBF) agriculture advocacy organizations, ACFB focuses on providing support across many facets of the rural community. From production agriculture and agricultural education in the classroom to Albemarle County's thriving agritourism sector, ACFB supports and promotes the people and communities that make agriculture such an integral part of Albemarle County.

ACFB's longstanding role and respected reputation within the agricultural community provide important context for the issues presented here. Those issues take on particular significance when proposed ordinances will potentially affect Albemarle County farmers' ability to fully utilize his or her own property. Fill dirt is used for legitimate land-improvement purposes that can increase not only the value of the land, but also the productive agricultural use of such land. ACFB has a

vested interest in protecting the rights of farmers to participate in farming activities while being able to utilize their land to its full potential. Against this backdrop, the legal arguments that follow address the extent to which such restrictions are authorized, reasonable, and consistent with the rights afforded to property owners under applicable law.

I. The Proposed Ordinances Contradict the Purpose of § 15.2-2288 and Burden Bona Fide Agricultural Activities

Land-management practices, when performed for bona fide agricultural purposes, are protected from the requirement of a local special use permit under both the explicit provisions of the Albemarle County Ordinance § 5.1.28 and the overriding statutory protections established by the General Assembly of the Commonwealth of Virginia.

a. The Agricultural Cultivation and Restoration of Farmland is Eligible for a Variation or Exception Pursuant to County Ordinance § 5.1.28(j)

Real property dedicated to production agriculture frequently requires the importation of naturally occurring soil and rock materials for necessary agricultural engineering purposes, specifically the refilling and replacement of degraded topsoil. To preserve the economic and environmental viability of local farming operations, these materials are utilized as a bona fide agricultural activity designed to enhance crop productivity, stabilize topsoil integrity, and restore the primary use of the land.

Subsection (j) of the proposed ordinances expressly preserve the authority of the Board of Supervisors to grant a variation or exception from the standard mandates of Section 5.1.28. Subsection 5.1.28(j)(1)(i) of the proposed ordinances explicitly dictate that a variation or exception may be approved upon a finding by the Board that, "the proposed fill activity would further agricultural use of the property."

Because the use of clean, naturally occurring materials to reclaim, stabilize, and cultivate agricultural acreage directly furthers the agricultural use of such properties, these activities satisfy the exact criteria set forth in the ordinance. Subjecting active agricultural producers to an exhaustive special use permit process for foundational soil preservation runs entirely contrary to the regulatory design of the County Ordinance. Accordingly, the Board should recognize a general variation or exception to the County's permitting requirements pursuant to Sec. 5.1.28(j) for all qualifying fill operations taken in furtherance of bona fide agricultural purposes. The following amendments should be made to Sec. 5.1.28(j):

> (j) Variation or exception. The Board of Supervisors may approve a variation or exception from any requirement of this section other than those listed by special use

permit in the summary table in section (e). If the proposed fill activity would further agricultural use of the property, an exception shall be automatically granted.

1. A variation or exception from any requirement of this section may be approved upon a finding that any of the following relevant factors are satisfied: ~~(i) the proposed fill activity would further agricultural use of the property;~~ (ii) the variation or...

b. The Legislative Intent of § 15.2-2288 is Contrary to Albemarle County's Interpretation

Agriculture is an inherently unpredictable industry and to protect it, the Virginia General Assembly (the "General Assembly") enacted Va. Code § 15.2-2288, which aims to mitigate the impact local regulations may have on an already over-regulated industry. Specifically, the provision permitting localities to regulate off-site non-agricultural excavation material was incorporated by an amendment in 2012. Delegate Hugo introduced the amendment to prevent contractors and commercial operators from abusing the Virginia Right to Farm Act by turning protected farmland into unmanaged landfills and open dumps under the guise of agricultural activity.

The legislative history indicates that Delegate Hugo and the General Assembly did not intend for this exception to interfere with authentic, bona fide agricultural operations. This statute reflects a clear policy choice that local regulation should not add to the burden farmers already bear. The utilization of clean earth and rock to replace eroded topsoil is a standard, necessary agricultural practice. Application of § 15.2-2288 to penalize a legitimate agricultural operation would invert the legislative intent, transforming an anti-dumping statute into an impediment to bona fide agricultural production. Although the proposed ordinances do not restrict agriculture on its face, as the following sections show, its application restricts, and will continue to restrict, bona fide agricultural activities in violation of Va. Code § 15.2-2288. In order to keep the ordinances consistent with the legislative intent of § 15.2-2288, the following amendments should be made to Sec. 5.1.28(j):

(j) Variation or exception. The Board of Supervisors may approve a variation or exception from any requirement of this section other than those listed by special use permit in the summary table in section (e). If the proposed fill activity would further agricultural use of the property, an exception shall be automatically granted.

1. A variation or exception from any requirement of this section may be approved upon a finding that any of the following relevant factors are satisfied: ~~(i) the proposed fill activity would further agricultural use of the property;~~ (ii) the variation or...

c. Administrative Hurdles Further Hinder Bona Fide Agricultural Activities

In the instance the Board concludes that special use permits will still be required for agricultural activities even contrary to the arguments contained herein, please consider the following. From an administrative standpoint, requiring a special use permit for these activities is unwarranted because farmers who have sought such permits have had negative experiences with the process. One farmer, Tim Kindrick, whose family has been farming in Albemarle County since 1739 has stated that they waited more than two years to receive final approval for a special exception permit for fill dirt activities on their farm, when those fill dirt activities were originally recommended by both the National Resources Conservation Service (NRCS) and the U.S. Department of Agriculture (USDA). NRCS and USDA endorsed the project to Mr. Kindrick in order to improve the value, productivity, and sustainability of his farmland.

This is where the as-applied restriction of bona fide agricultural activity becomes important. A bona fide agricultural activity is not just the physical, tangible work that occurs in the field. It encompasses all the micro and macro decisions a farmer makes on a daily, monthly, and yearly basis. When farmers must wait two years for a permit that they may or may not be granted, they cannot plan for or make hugely valuable and expensive improvements or changes to their land. Unreasonably restricting their ability to pivot restricts their ability to participate in bona fide agricultural activities.

To put this in perspective, live cattle prices two years ago were about $183 per hundredweight (cwt). Ninety days ago, they were $242 per cwt, and today they are about $218 per cwt. On a 50,000-pound load of cattle, that is the difference between $91,500 two years ago, $121,000 ninety days ago, and $109,000 today. When cattle prices rose two years ago, a farmer could have improved their land or facilities for cattle production to capture some of the market gain. If that farmer could not obtain the necessary approvals in a reasonable amount of time, they would not be able to capitalize on the market and act promptly when circumstances remain favorable.

Contrast this experience with the time stated in Albemarle County Ordinance Sec. 34.5(k) – Special Use Permits: "*Time for decision.* The board shall schedule a reasonable time for the hearing on an application so that it may make its decision within 90 days after the date the application was deemed to be complete. This 90-day period is directory, not mandatory."

While it is clearly stated that the 90-day period is not a hard deadline, as demonstrated by the cattle price example, the difference between 90 days and two years could be huge for farmers in the area. Additionally, a 90-day discretionary deadline is vastly different from the two-year timeline that was experienced. Agriculture is uniquely at the mercy of various market forces, acts of God, and yes, even the price of eggs in China. Being constantly subject to external influences is exhausting, especially when a farmer often can do very little to control their bottom line. Farming requires quick action and pivoting to stay afloat. Necessitating farmers to wait up to two

years for a decision on an action with potentially huge upside is frankly unfair, especially when a suggested time period already appears in the special use permit section of the County ordinances.

Because of the volatile nature of the industry affected by this ordinance, if a special use permit remains a requirement, we request a concrete deadline for special use permits for fill earth activities. The following language should be added to the applicable special use permit sections as it applies to fill earth activities:

> *Time for decision.* The board shall schedule a reasonable time for the hearing on an application so that it may make its decision within 90 days after the date the application was deemed to be complete. If a completed permit application does not have a hearing scheduled within 90 days of submittal, then the permit shall be deemed approved.

II. The Proposed Ordinances Restrict Agriculture Activities That Fall Between State Law Boundaries

Beyond the delays described above with the special use permit process, the proposed ordinances restrict agriculture in this County more broadly. These restrictions do not merely inconvenience individual farmers seeking a single permit. They constrain the day-to-day and season-to-season decisions, from grading and drainage to construction and expansion. As stated, § 15.2-2288 was enacted to prevent localities from restricting exactly this kind of burden on bona fide agricultural activity.

a. Agricultural Fill Activities Are Shielded from Local Permitting Requirements by the Statutory Protections of VA Code § 15.2-2288

Should the Board determine that bona fide agricultural fill activities do not fall within a local variation or exception under Sec. 5.1.28(j), the requirement of a local special use permit for agricultural operations remains legally unauthorized under state law. Under the statutory framework enacted by the General Assembly, local zoning ordinances are strictly prohibited from restricting bona fide agricultural practices via special exceptions or permits.

Va. Code § 15.2-2288 dictates in plain terms that, "a zoning ordinance shall not require that a special exception or special use permit be obtained for any production agriculture... activity in an area that is zoned as an agricultural district or classification." The statute carves out a narrow exception to this broad protection, allowing local regulation of, "the storage or disposal of non-agricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm, subject to the provisions of the Virginia Waste Management Act." While the County may rely upon this clause to argue that soil and rocks "not generated on the farm" are subject to local permit mandates, such an interpretation misconstrues the statutory definition. The text specifies that only non-agricultural excavation material is exempt from

statutory protection. When local farmers import and store natural materials for the express, immediate purpose of refilling agricultural topsoil, the materials are properly classified as agricultural materials rather than non-agricultural waste. The materials serve as direct agricultural inputs and remain protected by the general mandate of Va. Code § 15.2-2288. To accomplish this suggestion, is recommended that the language of Sec. 5.1.28(c)(3) be amended to the following:

> c. Exemptions. The following are exempt from section 5.1.28:
>
> ...
>
> 3. Importing lime and fertilizer to amend the soil as part of an agricultural operation, any other bona fide agricultural activity as defined by Va. Code § 3.2-6400 that is not otherwise subject to regulation by Va. Code § 10.1-1400, or the storage, use and disposal of clean earth fill, or inert waste fill generated on or for use in connection with an agricultural entity, ~~the farm,~~ as defined by Va. Code § 3.2-6400;

b. Clarifying the Scope of the Agricultural Exemption as Related to Current Virginia Law

i. *Virginia Erosion and Stormwater Management Act*

Virginia already regulates land disturbances through the Virginia Erosion and Stormwater Management Act (VESMA). Va. Code § 62.1-44.15 compels localities to administer a Virginia Stormwater Management Program (VSMP) that applies to land disturbances of either 10,000 square feet or 2,500 square feet, depending on the circumstance and even includes a generalized bona fide agriculture exemption. Va. Code § 62.1-44.15:34(F)(6). However, it does not appear as though the ordinances currently under consideration are motivated at all in their enactment by this statute. Maybe when originally enacted in 2020 there was a legitimate, untargeted purpose for this ordinance. However, since then, the ordinance appears to have operated almost exclusively to regulate and restrict agricultural activities within the County. This raises the question of what motivates the ordinances, both now and since its inception. If the ordinance now functions primarily as a mechanism for restricting agriculture, the Board should be prepared to identify the legitimate regulatory purpose served by that restriction and explain how its application is consistent with the intent and requirements of § 15.2-2288. Put simply, are the ordinances serving a legitimate and independently supportable regulatory purpose, or does it give the Board another arrow in the quiver to restrict agriculture in the County, even against the intended purpose of § 15.2-2288?

ii. *Virginia Waste Management Act*

Another area of conflict between state law and the ordinances is the Virginia Waste Management Act (WMA). First, the ordinances exceed the authority the statute grants. The statutory exception

for non-agricultural material is textually limited by the qualifying phrase, "subject to the provisions of the Virginia Waste Management Act." By inserting this qualifying phrase into § 15.2-2288, the legislature intended to limit the locality's expanded regulatory power only to those non-agricultural materials that actively trigger the oversight, hazards, and definitions set forth under the WMA. Under the WMA (VA Code § 10.1-1400) and its corresponding Solid Waste Management Regulations, 9VAC20-81-95, the state expressly exempts clean soil and rock from being regulated as solid waste. Specifically, 9VAC20-81-95(D)(11) conditionally exempts the use of "rocks, brick, block, dirt, broken concrete, crushed glass, porcelain, and road pavement as clean fill," from waste management enforcement, so long as "no open dump, hazard, or public nuisance is created." Because properly using clean soil and rocks for filling is not a controlled hazard under the WMA, the County has no authority under § 15.2-2288 to demand a special use permit for the use of clean earth fill that is furthering a bona fide agricultural purpose.

Further on this first point, the County has cited that the legal standard, "no open dump, hazard, or public nuisance is created," is difficult to enforce and complicated to qualify. However, the Department of Environmental Quality (DEQ) uses this standard themselves to determine whether the materials mentioned in 9VAC20-81-95(D)(11) create such unfavorable conditions. Therefore, the County's argument that this is an unusable standard frankly just does not hold water. If the DEQ has been able to determine how to operate within the confines of the applicable standard, then surely the County can do the same. The fact that the standard may require some interpretation does not make it unworkable, it simply requires the same level of diligence and analysis that the state agency has already undertaken.

Second, the exemption in Sec. 5.1.28(c)(3) is too narrow. It protects some agricultural activities, but agriculture takes many forms. Farming is not one size fits all and by specifically naming lime and fertilizer activities, the proposed ordinances imply that all other activities are not included within the exemption, even though they may be legitimate agricultural activities. Some examples include building up an area around a livestock facility to improve drainage, leveling a field, or repairing an area that erosion or heavy floods have destroyed. The comment on this exemption provides a reference to § 15.2-2288, but that reference does not solve the gap, because the VSMP already governs larger land disturbances. To the extent any fill falls outside the WMA argument above, the ordinances should provide guardrails for the activities that fall between bona fide agricultural activities and the VSMP thresholds.

Third, the language stated by Sec. 5.1.28(c)(3), "...fill generated on the farm" is ambiguous. While this language originates in Va. Code § 15.2-2288, it is unclear in practice. Many farmers in Albemarle County own or rent multiple properties and tracts of land in different locations. Often, a farmer may have multiple farm locations that will be performing substantially the same functions. The language included in this exemption does not specify what on-farm generation means. In the instance a farmer wants to store or dispose of clean earth fill on one farm location that has been generated by another farm location, there is no guidance as to whether this would

be allowed. Similarly, if those farm locations are owned by two separate farmers, under the current proposal there is no guidance as to whether one farmer may share, sell, or otherwise dispose of their fill earth onto another farmer's farm location. To fully incorporate this suggestion, in conjunction with the VSMP comment, it is recommended that the language of Sec. 5.1.28(c)(3) be amended to the following:

> c. Exemptions. The following are exempt from section 5.1.28:
>
> ...
>
> 3. Importing lime and fertilizer to amend the soil as part of an agricultural operation, any other bona fide agricultural activity as defined by Va. Code § 3.2-6400 that is not otherwise subject to regulation by Va. Code § 10.1-1400, or the storage, use and disposal of clean earth fill, or inert waste fill generated on or for use in connection with an agricultural entity, ~~the farm,~~ as defined by Va. Code § 3.2-6400;

III. The 2013 Attorney General Opinion is Non-Binding and Legally Inconsistent with Statutory Construction

A 2013 Official Advisory Opinion from then-Attorney General Kenneth T. Cuccinelli, II, may be referenced to claim that the intended use of excavation material is not relevant to whether the County has the authority to regulate that material so long as the material originated outside of a farm. In that opinion, the Attorney General concluded that the qualifying phrase, "subject to the provisions of the Virginia Waste Management Act," does not limit the types of non-agricultural material a County can regulate, and that the end use of the material, whether agricultural or not, does not impact the authority of localities to require special use permits. This interpretation must be rejected by the Board based upon established legal principles.

First, under Virginia jurisprudence, advisory opinions of the Attorney General are informative but lack binding legal authority over localities, courts, or individuals. The Board is under no legal obligation to adopt the conclusions of past Attorneys General.

Second, the interpretation offered in the 2013 Advisory Opinion claims the WMA merely means that in a direct conflict between the Virginia Code and a local ordinance, the state act prevails. This reading violates fundamental rules of statutory construction by rendering the phrase, "subject to the provisions of the Virginia Waste Management Act," entirely redundant and without independent effect. Under Virginia law, a statute must be read to give reasonable effect to all clauses. The most straightforward reading of the statute is that the clause was intended to restrict the scope of local regulations to materials governed by the WMA.

If the 2013 Advisory Opinion's interpretation is applied strictly, a significant portion of routine and beneficial agricultural activities across Albemarle County would become subject to local zoning penalties and special permit requirements. Agricultural operators would be barred from

bringing in off-site dirt to remediate severe erosion, stabilize farm roads, or level pastures without undergoing an extensive permitting process. This outcome directly contradicts the primary legislative directive of Va. Code § 15.2-2288, which is to protect production agriculture from undue local regulatory interference.

IV. Conclusion

Bona fide agricultural producers using naturally occurring earthen materials to replace topsoil and preserve agricultural viability are not operating commercial landfills or open dumps. When clean fill material is imported to sustain and restore production land, the activity represents an essential component of agricultural management rather than an unregulated disposal operation.

The agriculture industry in Albemarle County is diverse in what it produces, vital to the lives it sustains, and unique in how it has shaped this County since its inception. These ordinances jeopardizes that long-standing legacy by standing in the way of farmers and the decisions they must make to survive. Albemarle County Farm Bureau will advocate for agriculture in this County for as long as it takes, because it deserves to be protected at all costs. Therefore, I, on behalf of ACFB, respectfully request that the Albemarle County Planning Commission amend the proposed ordinances with the regulatory analysis described herein.

Sincerely,



Mark W. Botkin