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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Commissioner of Agriculture and Consumer Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	2 VAC 5 - 20
<b>Regulation title(s)</b>	Standards for Classification of Real Estate as Devoted to Agricultural Use and to Horticultural Use under the Virginia Land Use Assessment Law
<b>Action title</b>	Amendments to reflect regulatory changes required pursuant to Chapter 504 of the 2018 Acts of Assembly; general review of this regulation
<b>Date this document prepared</b>	June 21, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Subject matter and intent

*Please describe briefly the subject matter, intent, and goals of the planned regulatory action.*

Article 4 of Chapter 32 of the Code of Virginia (Va. Code § 58.1-3229 et seq.) (Virginia Land Use Assessment Law) authorizes localities that adopt a land-use plan to adopt an ordinance to provide for the use value assessment and taxation of real estate classified in Va. Code § 58.1-3230. Section 58.1-3230 establishes four special classifications of real estate for the purposes of the Virginia Land Use Assessment Law, including “real estate devoted to agricultural use” and “real estate devoted to horticultural use.” The definitions of both real estate devoted to agricultural use and real estate devoted to horticultural use require the Commissioner of Agriculture and Consumer Services (Commissioner) to prescribe uniform standards in accordance with the Virginia Administrative Process Act (Va. Code § 2.2-4000 et seq.). As directed by this requirement, the Commissioner promulgated 2 VAC 5-20, *Standards*

for Classification of Real Estate as Devoted to Agricultural Use and to Horticultural Use under the Virginia Land Use Assessment Law, which first became effective in 1988.

Chapter 504 of the 2018 Acts of Assembly amended the definition of real estate devoted to agricultural use and real estate devoted to horticultural use, expanding the scope of the standards that the Commissioner is required to promulgate and resulting in the need to revise 2 VAC 5-20. Additionally, this legislative change requires that any uniform standard prescribed through regulation by the Commissioner stating that real estate must be used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use must (i) include the use of similar property by a lessee of the owner in calculating such time and (ii) include a shorter minimum length of time for real estate with no prior qualifying use, provided that the owner submits a written document of the owner's intent regarding use of the real estate containing elements set out in the uniform standards. As 2 VAC 5-20-20 currently includes a requirement that real estate devoted to either agricultural or horticultural use must have been devoted to certain uses for at least five consecutive years previous, these standards will need to be revised to reflect the 2018 amendments to the Virginia Land Use Assessment Law.

The Commissioner is also taking this opportunity to conduct a periodic review and small business impact review of this regulation pursuant to Va. Code § 2.2-4007.1 and Executive Order 17 (2014). Public comment is sought on the review of any issue relating to this regulation.

Until 2 VAC 5-20 is amended, Commissioners of Revenue, local assessing officers, landowners, and other stakeholders may wish to contact legal counsel to address any conflicts that may exist between this regulation and the Virginia Land Use Assessment Law effective July 1, 2018.

### Legal basis

*Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.*

Va. Code § 3.2-102(A) states that the Commissioner shall be vested with the powers and duties set out in Va. Code §§ 2.2-601 and 3.2-102 and such other powers and duties as may be prescribed by law.

Va. Code § 58.1-3230 requires that the Commissioner prescribe uniform standards in accordance with the Virginia Administrative Process Act (Va. Code § 2.2-4000 et seq.) for “real estate devoted to agricultural use” and “real estate devoted to horticultural use,” and Chapter 504 of the 2018 Acts of Assembly amended this section to expand the scope of the standards that the Commissioner is required to promulgate, resulting in the need to revise 2 VAC 5-20.

### Purpose

*Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.*

Chapter 504 of the 2018 Acts of Assembly amended the definition of real estate devoted to agricultural use and real estate devoted to horticultural use, expanding the scope of the standards that the Commissioner is required to promulgate and resulting in the need to revise 2 VAC 5-20. Additionally, this

legislative change requires that any uniform standard prescribed through regulation by the Commissioner stating that real estate must be used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use must (i) include the use of similar property by a lessee of the owner in calculating such time and (ii) include a shorter minimum length of time for real estate with no prior qualifying use, provided that the owner submits a written document of the owner's intent regarding use of the real estate containing elements set out in the uniform standards. The Commissioner expects that the intent of the provisions of Chapter 504 of the 2018 Acts of Assembly regarding 2 VAC 5-20 was to support the economic welfare of impacted landowners.

As a result of recent requests from Commissioners of Revenue for the Commissioner to issue opinions pursuant to 2 VAC 5-20-40, agency staff and legal counsel have identified language in the existing standards that would benefit from greater clarification. Based on this identification and the fact that the standards were last revised in 2004, the Commissioner is also taking this opportunity to conduct a periodic review and small business impact review of this regulation pursuant to Va. Code § 2.2-4007.1 and Executive Order 17 (2014).

Until such time as the effective date of this amended regulation, Commissioners of Revenue, local assessing officers, landowners, and other stakeholders may wish to contact legal counsel to address any conflicts that may exist between this regulation and the Virginia Land Use Assessment Law effective July 1, 2018.

### Substance

*Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

The proposed amendments to the regulation will include standards for determining whether real estate meets the expanded definition of real estate devoted to agricultural use or real estate devoted to horticultural use. Specifically, the amendments will include standards for determining whether real estate is (i) devoted to the bona fide production for sale of plants and animals, or products made from such plants and animals on the real estate, that are useful to man, (ii) devoted to the bona fide production for sale of fruits of all kinds, including grapes, nuts, and berries; vegetables; nursery and floral products; and plants or products directly produced from fruits, vegetables, nursery and floral products, or plants on such real estate, (iii) or devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to soil and water conservation programs under an agreement with an agency of the state or federal government under uniform standards prescribed by the Commissioner in accordance with the Administrative Process Act.

Additionally, the Commissioner will consider whether to continue to include in the regulation a requirement that real estate be used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use. If this requirement will continue to be included in the regulation, the Commissioner will amend the regulation to (i) include the use of similar property by a lessee of the owner in calculating such time and (ii) include a shorter minimum length of time for real estate with no prior qualifying use, provided that the owner submits a written document of the owner's intent regarding use of the real estate containing elements set out in the uniform standards. The proposed regulation will also provide standards for determining whether real estate meets these requirements.

### Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.*

Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no alternatives to this regulation. Va. Code § 58.1-3230 requires that the Commissioner prescribe uniform standards in accordance with the Virginia Administrative Process Act (Va. Code § 2.2-4000 et seq.) for “real estate devoted to agricultural use” and “real estate devoted to horticultural use.” The amendments to the Code of Virginia enacted through Chapter 504 of the 2018 Acts of Assembly necessitate changes to the regulation establishing these standards.

**Public participation**

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is \_\_\_\_\_; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to:

Kevin Schmidt  
Virginia Department of Agriculture and Consumer Services  
102 Governor Street  
Room 214  
Richmond, VA 23219  
Phone: 804 786-1346  
Email: [kevin.schmidt@vdacs.virginia.gov](mailto:kevin.schmidt@vdacs.virginia.gov)

Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

**Periodic review/small business impact review announcement**

If you wish to use this NOIRA to announce a periodic review (§ 2.2-4017 & EO-17 (2014)) and a small business impact review (§ 2.2-4007.1) of this regulation, keep the following text. Modify as necessary for your agency. Otherwise, delete this section.

In addition, pursuant to Executive Order 17 (2014) and § 2.2-4007.1 of the Code of Virginia, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be amended or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.