

RIGHT-TO-FARM LAWS: HISTORY & FUTURE

Right-to-Farm Laws: Why?

Right-to-farm laws were originally designed to protect agricultural operations existing within a state or within a given area of the state by allowing owners or operators of those operations who meet the legal requirements of the right-to-farm law a defense to nuisance suits which might be brought against the operation.

These statutes were originally developed in the 1970s as state lawmakers were becoming more aware of and concerned about the loss of agricultural land. Losses of agricultural land were occurring in that period of our history from conflicts in potential uses of agricultural land and from the rising tide of urban encroachment into traditional agricultural areas. Persons not involved in farming were beginning to move into traditional agricultural areas and with them they were bringing new complaints concerning the way agricultural is: complaints concerning odor, flies, dust, noise from field work, spraying of farm chemicals, slow moving farm machinery, and other necessary byproducts of farming operations.

If neighboring landowners brought a lawsuit against an agricultural operation and it was found to be a nuisance, courts had the option of closing the operation, altering the way it conducted its business, or assessing penalties to compensate the neighboring landowner for the nuisance. Sometimes, even if a lawsuit failed, the cost of defending against the suit could threaten or even close the farming operation.

When looking across the nation at these laws one immediately finds that, all in all, the state laws are strikingly similar. Most of the laws have defined to some degree the purpose behind passage of the protection. Most states make some mention of the need to conserve and protect agricultural land, the encouragement and development and improvement of agricultural land for food production. Most states make mention of the fact that as nonagricultural land uses have extended into agricultural areas, an increase in nuisance suits has occurred. In addition to citing the potential loss of agricultural operations, some states also mention the potential for problems in investments being made in farm improvements with exposure to nuisance litigation. The state statutes therefore attempt to limit the circumstances under which agricultural operations can be deemed a nuisance.

As you examine the various state right-to-farm laws, you will find that many terms are defined within the statutes, with a small level of consistency state-to-state in definition. Most state right-to-farm statutes define such terms as: agricultural operations, agricultural activities, farming and farm operations.

Types of right-to-farm laws.

There are several types of right-to-farm laws: the traditional, the laws requiring generally accepted agricultural management practices, laws protecting specific types of agricultural activities, laws protecting feedlots and laws protecting operations located within agricultural districts.

Traditional right-to-farm laws protect the agricultural operation if it has been in existence for one year prior to a change in the surrounding area which has given rise to the nuisance claim. Agricultural activities which could be classified as a nuisance when the activities began or activities which are negligently or improperly conducted are not protected under traditional right-to-farm laws.

Some right-to-farm laws require the use of generally accepted agricultural management practices (GAAMPs) in order to be protected from nuisance litigation. These laws usually create a presumption of reasonableness on the part of an operation if standard practices are followed. GAAMPs are similar to best management practices (BMPs). The outstanding issues involved when a state chooses to use the GAAMPs approach is the question of who establishes the GAAMPs? Some state laws require the state department of agriculture to set those standards. Other laws are silent on who establishes the standards. Silence on this issue leaves the farmer to, in litigation on the nature of the operation, place into evidence information concerning what the standard or acceptable practice might be and information that will support that he or she followed those practices.

Some laws reflect that if an operation is in conformity with federal, state and local laws and regulations concerning agricultural practices or permit requirements, a presumption is created that the agricultural practice is a good agricultural practice and that there are no adverse effects on public health or safety.

In some states, the Agriculture Commissioner establishes the acceptable agricultural practices for the state, presumably by rule or regulation. Some state statutes require the Commissioner to take into consideration information from the extension service, colleges of agriculture, and other relevant entities. In addition, some states require that the farmer cooperate with NRCS and the state department of natural resources or other industry organizations who have a role in establishing acceptable standards for the agricultural industry.

In still other states, right-to-farm laws list specific agricultural activities which are protected from nuisance litigation. Examples of specific agricultural activities, or in some cases, agricultural byproduct creations, which may be protected are: odor from livestock, manure, fertilizer, feed, noise from livestock or farm equipment used in the normal fashion, dust created during plowing or cultivation operation, use of chemicals if in conformity with established practices, and water pollution from livestock or crop production.

Animal feedlots are specifically protected in some states, particularly if the problems complained of is odor or waste related. Most nuisance suits brought against agricultural operations involve odors from animal feeding or some question concerning the handling of waste. For example, Iowa's law defines "feedlots" and offers protection to activities occurring in relation to those feedlots. Other states offering specific protection to animal feedlots are: Oklahoma, Wyoming, Tennessee, and Kansas.

Finally, some right-to-farm laws require that in order for the agricultural operation to have protection, the operation must be located within an acknowledged and approved agricultural district. These laws are usually part of a broader farmland preservation statutory program. For example, in Iowa, in order to form an agricultural district farmers within that district must agree to restrictions on converting their land to non-agricultural uses for a period of time. The districts are created by a local county board after being petitioned by a group of farmers for the creation of the agricultural district. Some state laws grant absolute protection from nuisance suits for operations conducted within the confines of a properly created agricultural district. These types of laws exist in: Delaware, Illinois, Iowa, Maryland, Minnesota, Ohio, Oregon, Virginia, and Wisconsin.

Although we usually think of right-to-farm laws as having been created at the state level, some localities have passed specific right to farm ordinances. Some states allow local protections but other states do not give local governments the power to regulate agricultural operations at any level.

Common attributes of right-to-farm laws.

Most right-to-farm laws require that the farming operation must have been in existence before any change in the surrounding area occurred. Changes in the surrounding area usually refer to development in the area, someone moving in, a private business being opened or other activity. Some laws require that an "established date of operation" be set. This date is the date upon which agricultural activities began on the site. If the operation should expand or change its operations in significant ways, a new established date of operation may be set. Usually states require that the agricultural operation have been in existence at least one year before the change in the surrounding neighborhood. Some laws require unchanged operation for more than one year, while other laws require only a prior existence with no specific time requirements.

Another pivotal feature required in order to obtain and keep protection is that there must not have been a change on the farm. The change must have occurred in the surrounding neighborhood. Most right-to-farm protection is given those operations which can point to the change in the surrounding neighborhood while the farming operation remain unaffected. If the farming operation is changing, either in size or farming methods used, the protection from right-to-farm statutes may be lost.

If an operation expands or adopts changes in technology, most operations will lose their protected status. Questions predictably arise when the operation expands or uses a changed technology on the farm without necessarily incorporating any expansion. States have begun passing laws addressing these issues. Those laws may require: a new time period to run after each expansion; that a “reasonable” expansion will not affect the original established date of operation so long as “significant” differences in environmental pressures on neighbors and livestock has not occurred; that the operation ensure its waste handling capabilities not exceed minimum recommendation of the extension service; that complete relocation of the operation has not occurred. These new provisions will: allow expansions but give each expansion a separate established date of operation; provide no protection for expanded operations; provide no protection if there is a substantial increase in size of the operation; or, provide no change in established date, even if expansions or adoption of new technology has occurred. In other words, the states are all over the map on whether and to what extent a change in established date of operation will occur with expansion or adoption of technology on the farming site.

Most laws require that the farming operation be run in a reasonable manner. The operation cannot be handled in a negligent or improper manner. The problem then becomes answering the age-old question of what is reasonable and proper. What is reasonable and proper to one particular farmer may not be reasonable and proper to another farmer, the extension service or other agricultural professional, or to the non-farming community.

Water pollution and erosion are usually not protected by right-to-farm laws. Most laws do not allow the farmer to hide behind a right-to-farm law if she is conducting operations which are causing or may cause water pollution and soil erosion.

In addition, most right-to-farm laws require the operation be in compliance with all relevant local laws and regulations applicable to the operation, which can include zoning ordinances and waste disposal rules.

While right-to-farm laws offer the farmer a defense in nuisance suits, the laws do not protect the farmer from a suit being filed. Some states are enacting statutes which shift the costs and attorney fees onto the person who brings the nuisance suit if they are unsuccessful in proving their case. These statutes are called fee-shifting statutes. These types of statutes can offer an additional deterrent to the bringing of nuisance suits against agricultural operations.

Criticisms of right-to-farm statutes.

Most right-to-farm statutes could use improvement in definition of terminology and in clarity of purpose and language. For example, do current large confined animal feeding operations qualify as agricultural operations according to the framers intentions? The agricultural community is still not well-versed in the mechanism for usage of a right-to-farm statute, preferring to think of the statutes as a general blanket protection for all agricultural activities while the statutes were never intended to be applied in that manner.

Case law interpreting right-to-farm laws

As early as the beginning of this decade, only a few dozen reported cases concerning interpretation of right-to-farm laws had appeared in the casebooks. While the number of reported cases had increased over time, there were still relatively few cases on the books. Whether this phenomenon indicates that the protections offered agricultural operations under right-to-farm laws served as a deterrent against unsubstantiated nuisance claims, or whether there were a rising number of nuisance claims against agricultural operations but the claims were either not going on to appellate courts for eventual reporting or were being settled out of court, is still in question.

Of the reported cases, the courts have found that the right-to-farm protection will not apply if the activity in question was simply not covered specifically by the right-to-farm statute, if the nuisance resulted from changes in the farm, if the neighbors were already present during and before the complained of activity, if the activity in question was not an agricultural activity, if the GAAMPs were not being followed, or if the operation was being conducted in an improper manner.

The Bormann case: The shortage of reported cases in the right-to-farm area came to a complete halt with the September decision of the Iowa Supreme Court in *Bormann v. Board of Supervisors in and for Kossuth County, Iowa*. On September 23, 1998, the Iowa Supreme Court handed down a decision in *Bormann* which held unconstitutional a provision of the Iowa right-to-farm statutes. The provision allowed right-to-farm protections in properly designated “agricultural areas.”

In order to declare an “agricultural area” in Iowa, an application must be filed with the county board of supervisors. An agricultural area may include certain types of activities: raising and storing of crops, care and feeding of livestock, treatment or disposal of wastes resulting from livestock and creation of noise, odor, dust, or fumes associated with agricultural activities. If an agricultural area is designated, section 352.11(1)(a) of the Iowa statutes provides that agricultural operations within the area are given immunity from nuisance suits. Specifically, the statute provides in part:

A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation.

This protection from nuisance does not apply if the operation is in violation of federal or state laws or regulations, if the operation is being conducted in a negligent manner, if an injury is sustained to person or property prior to the creation of the agricultural area, or if the operation is causing pollution or a change in the condition of water, overflow, or excessive soil erosion, unless caused by an act of God.

Facts: In September 1994, Gerald and Joan Girres applied to the Kossuth County Board of

Supervisors for establishment of an “agricultural area” which would include land they owned as well as land owned by others in the surrounding vicinity. All total, the land in question was to involve 960 acres. In November 1994, the Board denied their application finding that there were no non-agricultural development pressures in the area, that the nuisance protections afforded by an agricultural area designation would have a direct and permanent impact on the private property rights of adjacent landowners, and that the private property rights of those adjacent landowners outweighed any agricultural land preservation policy which might be furthered by the designation.

In 1995, the applicants tried again and the Board approved the designation of an agricultural area by the flip of a coin on a 3-2 vote. A few months later, the neighbors of the new agricultural area filed an action in district court seeking to have the statute declared unconstitutional. The district court found the action of the Board to be arbitrary and capricious but rejected all other arguments of the neighbors. The neighbors sought and received a certification of appeal to the Iowa Supreme Court.

The Iowa Supreme Court examined the agricultural area statutes and accompanying nuisance protections in light of the Fifth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution in order to determine whether the decision to create an agricultural area and thus afford operations with nuisance protection “effects a taking of the neighbors’ private property for a use that is not public.” In this particular case it should be noted that there were no facts presented which would allege that a nuisance existed in the area - the entire challenge to the statute was on its constitutionality.

The Fifth Amendment states that “no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.” The Fourteenth Amendment prohibits a state from “depriving any person of life, liberty, or property without due process of law.” The Fourteenth Amendment also makes the Fifth Amendment applicable to the states and their political subdivisions. Article I, section 9 of the Iowa Constitution provides that “no person shall be deprived of life, liberty or property, without due process of law” and further provides that “private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury.”

The court answered several questions in its analysis. The first question: does the immunity given under the statute create a property right? The answer was *yes*. The court identified the property interest at stake in this particular case to be that of an easement (an interest in land). Case law in Iowa had long identified the right to maintain a nuisance as an easement. The court said the nuisance immunity created an easement in the property affected by the nuisance in favor of the applicants’ land. The immunity therefore allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. The second question: is an easement a protected property right subject to just compensation rights? The answer was *yes*. The third question: has the easement resulted in a taking? The answer was *yes*. Using the analysis

contained in the 1992 U.S. Supreme Court case, *Lucas v. South Carolina Coastal Council*, the court ultimately found that “the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance.”

The court found that the legislature had exceeded its authority “by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation.” The court held unconstitutional that portion of the agricultural area statutes that provides immunity against nuisance suits for those operations within a designated agricultural area. Among the final words of the court in their opinion was the following observation:

We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly-we think flagrantly-unconstitutional.

We clearly must watch for the effects of this decision on the farming community in Iowa and around the country. Other states have similar statutes, some of which have come under increased scrutiny based on constitutional grounds in the last few years. The potential impact of this decision is, as yet, hard to say. One thing we do know is that problems between agricultural operations and their neighbors are not always resolved well within the court system. Perhaps it is time to examine the use of other means short of litigation to resolve conflicts with our neighbors.