Agricultural Nuisances and Right to Farm Laws

by

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Abstract: The expansion of residential areas may result in an agricultural facility becoming a nuisance. Forty-four states have enacted right to farm laws to assist in preserving farm land from encroaching nonagricultural uses. Major legislative provisions of these state laws are identified along with several policy considerations concerning competing property interests.

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Conflicts between agricultural and nonagricultural land uses were greatly accentuated in the 1960's because of urban sprawl and the extension of residential land uses into rural areas. Although established institutions such as zoning and nuisance law served as a vehicle for an orderly reconciliation of these conflicts, the institutions tended to minimize consideration of the existing investments of farmers and the importance of productive farmland. With the increased demand for agricultural products in the 1970's, the loss of prime agricultural land became the focal point for legislative action (Thompson 1982b; Grossman and Fisher). Commencing in 1978, 40 state legislatures enacted provisions to abate losses of agricultural resources, which have become known as the "right to farm" laws (see table 1). States based these legislative enactments upon the finding that the loss of agricultural land was contrary to state policy regarding the production of food and other agricultural products.

Right to farm laws do not grant farmers carte blanche to engage in agricultural pursuits, and do not simply favor agriculture at the expense of other land uses. Rather, the laws modify common law nuisance by codifying the "coming to the nuisance" doctrine (Grossman and Fisher; Hand; Hanna). Persons who move proximate to an established agricultural facility are limited in their use of nuisance law as a basis for obtaining judicial relief to preclude an objectionable agricultural practice. By limiting the right of future property owners to successfully use nuisance law to preclude agricultural activities and property uses, agricultural producers were to be

encouraged to make improvements that would make their operations more viable and productive.

Right to farm laws thereby impact the property rights of farmers and their neighbors. Under nuisance law, norms of behavior among property owners are established based upon community standards and majority rule. Such norms assign temporal property rights to landowners, generally expressed as negative rights, to preclude neighboring land users from engaging in activities that are objectionable. By adopting the "coming to the nuisance" doctrine, legislatures altered the sanctioned behavioral scheme of relations between existing agricultural facilities and future neighbors. Existing agricultural operations and pursuits are exempted from subsequent community standards which may arise as neighboring properties change uses. Persons adopting changed property uses proximate to an agricultural operation cannot use nuisance law to preclude existing agricultural practices and conditions if the practices and conditions were not a nuisance when first adopted or at the time of the adoption of the right to farm law, whichever was later.

This paper summarizes the basic provisions of the state right to farm laws through an examination of the basic provisions to provide a background for an analysis of the alteration of property rights. Particular problems of the abbreviated statutory provisions adopted by some states are identified to disclose their limited usefulness in achieving the purported objectives. Displacement of agricultural producers is analogized to the tragedy of the commons and several concepts are used to explain the legislative abrogation of common law nuisance.

State Right to Farm Laws

Forty-four state legislatures have adopted statutory provisions concerning agricultural nuisances, a majority of which are commonly referred to as right to farm laws. Although the provisions vary considerably, the underlining theoretical basis and operational effect may be summarized by analyzing the succinct Georgia statute:

> It is the declared policy of the state to conserve, protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance actions. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farming improvements. It is the purpose of this Code section to reduce losses of the state's agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.
>
> No agricultural or farming operation, place, establishment, or facility, or any of its appurtenances or the operation thereof, shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such agricultural or farming operation, place, establishment, or facility if such agricultural or farming operation, place establishment, or facility has been in operation for one year or more (Official Code).

This sample statute identifies the public policy of preserving and encouraging agricultural production as the justification for enacting the right to farm law. However, the purpose of the statute is to abate the loss of farmland due to common law nuisance actions which arise when nonagricultural land uses expand into agricultural areas. Agricultural production is not protected beyond this narrow "coming to the nuisance" exception.

Right to farm laws thereby do not exempt agricultural or farming operations, practices, establishments, or facilities (hereafter called agricultural facilities) from nuisance actions. If neighbors find an

agricultural facility to be objectionable, they may sue under nuisance law despite the existence of a right to farm law, and the agricultural operator may raise the right to farm law as an affirmative defense. Litigation costs from spurious or unsuccessful nuisance lawsuits may constitute a problem for agricultural producers, prompting a few state legislatures to include provisions in their right to farm statute that relegate costs and expenses of a successful defense of a nuisance action by an agricultural operator to the persons initiating the unsuccessful lawsuit.

Defining the Coverage

Omission of a definition of farm, farm operation, farm product, agricultural facility, or other similar term in the above-referenced sample statute creates considerable ambiguity concerning its scope and coverage. Does the statute cover farms, or the conditions and activities of agricultural enterprises (Thompson 1982a). Rules of statutory construction presumably mean that the statute covers all facets of general agricultural production. But questions remain concerning quasi-agricultural facilities, such as a processing plant that is part of an integrated production facility. Although the sample statute was interpreted by the judiciary as being inapplicable to a facility producing utility poles despite the agricultural origin of logs, it is not clear whether a poultry processing plant or auction barn that is part of a larger production operation qualifies as an agricultural facility.

In the absence of an appropriate definition of agricultural facilities, uncertainty exists as to the meaning and scope of the sample right to farm law, including what nuisance activities are protected by the statute and who has what property interests. Indefiniteness concerning the ownership of

property rights may be analogized to an incomplete contract. Theory developed by Klein, Williamson, and De Alessi (1983) show incomplete contracts as involving efficiency losses due to excessive transaction costs. This theory suggests that a more definitive statement of facilities excepted from nuisance law may reduce transaction costs and thereby constitute a preferred reconciliation of competing property interests.

Excessive Coverage

Another problem with the simplistic language of the sample statute is that it offers protection for all agricultural land regardless of whether there exists a genuine need of the parcel for agricultural production or whether the acreage could best be used for some other activity. Right to farm statutes were intended to encourage agricultural production and to preserve of agricultural land threatened by nuisance actions. However, since the legislative derogation of common law nuisance may adversely affect property rights of persons proximate to existing agricultural facilities, a limitation of the exception to viable and productive farmland may constitute an appropriate mechanism for balancing competing property rights. Such differentiation appears to be consistent with the public policy of encouraging agricultural production and the purported purpose of limiting common law nuisance, yet would also be condusive to the growth of other buisness activities on unproductive acreage. A number of state right to farm laws reflect this concept by limiting their scope to commercial agricultural facilities, thereby excluding small and unproductive tracts.

Protection from nuisance actions afforded agricultural facilities by the sample statute also appears to cover nuisances arising from negligent or improper operation of existing agricultural facilities. Grossman and Fisher

note that public policy does not support such a broad exception for agriculture; negligent or improper operations creating nuisances do not need to be shielded from nuisance law. Several legislatures have worded their statutes to incorporate this rationality so that their right to farm law does not foist upon agricultural neighbors onerous nuisances that may be abated or remedied through the adoption of normal husbandry practices.

Changes in Use, Expansion, and New Technology

One of the major questions under many of the right to farm statutes is whether a change in use (or product), the expansion or change in intensity of an agricultural operation, or the adoption of new technology are protected by the statute. Only eleven of the 44 statutes contain provisions which deal with this issue (see table 1). Positing an example for each of these questions may clarify the issues: may a dairy farmer change to raising beef cattle without compromising the affirmative defense provided by the right to farm statute; may a poultry operation expand its facilities by constructing an additional poultry house and still meet the statutory requirements; and may a crop farmer who adopts new technology such as a new tillage practice that involves greater amounts of dust qualify for the right to farm defense against a nuisance action based upon dust.

A judicial decision from Georgia analyzed the sample statute to respond to the question of a change in use. Neighbors sued the owners of an egg farm, claiming that flies and offensive odors from poultry facilities were a nuisance and requesting an injunction of the poultry operation. The defendent-owners of the egg farm responded with the right to farm statutory defense, alleging that their property had been used for agricultural purposes for the requisite time period before changes in the community

caused their facilities to become a nuisance. Defendants had used their property as pasture land for many years, and then improved the property through the addition of poultry houses at a later date. The court declined to find that the use of the property as a pasture constituted the agricultural facility at issue. Rather, the agricultural facility causing the nuisance was the poultry houses. Since the poultry houses had not been built one year prior to the adjacent nonagricultural property uses, defendants did not qualify for the right to farm defense.

Under the sample statute, a change in the use of property being used for agricultural production may constitute a new facility which then must be in existence for one year prior to changed conditions in the locality before the right to farm defense is applicable. What changes in use constitute a new facility, as opposed to a permissible modification of an existing facility? If a dairy farmer changes to raising beef cattle, is this a new facility? What if a farmer adds some hogs to his corn production, is this a new facility? Since the question of whether a particular agricultural activity constitutes a new facility is being raised to determine whether the activity is a nuisance, the issue concerns the commencement of the offensive activity. If the nuisance-generating activity from the converted dairy farm is odors that existed when the farm was used for dairy purposes, the alternative use for beef cattle should not be found to affect the applicability of the right to farm statute. With the example of the corn-hog farm, if the nuisance is the smelly hogs, then a new agricultural facility commenced when the farmer began raising hogs. If the nuisance-generating activity is dust from the tillage of cropland, the introduction of the hogs is not related to the nuisance and should not be considered to have triggered a new facility.

Expansion of an existing agricultural facility poses a more difficult issue. In order for a right to farm statute to have any application, it must be construed to permit some flexibility in allowing producers to increase in size. The policy statements of most right to farm laws imply or specify that a major problem under common law nuisance is the discouragement of investments in farming improvements. Since investments generally involve expansion or the adoption of new technology, right to farm statutes impliedly adopt the premise that farmers may make investments to expand existing agricultural facilities and qualify for the right to farm exception. However, the statutory incorporation of this premise must be reconciled with the "coming to the nuisance" doctrine. Moreover, the language of the above-referenced sample statute further limits expansion, as the statutory defense only applies to "such" facilities -- facilities in operation before changes in the neighborhood gave rise to the nuisance. The question of whether expansion is permitted thereby will depend upon the circumstances. Expansion may constitute a permissible modification of an existing facility, or it may constitute an impermissible new (changed) facility.

Returning to the posited example of a poultry operator who adds a poultry house to several existing houses, the question appears to be one of degree. Under the sample statute, an increase of production by 15 percent probably does not constitute a new facility and the right to farm statutory defense should be interpreted as applying to such a facility. On the other hand, an increase of production that is accompanied by a marked increase of an offensive activity creating a nuisance probably would not qualify for the right to farm statutory defense. Since the nuisance had not been in

existence when the neighbors moved to the neighborhood, the expanded production could be considered to be a new facility.

The issue of whether a farmer may adopt a new husbandry practice or new technology and qualify for a statutory right to farm defense to a nuisance action would probably be resolved in a manner similar to expansion. The question is whether the new practice or technology is so different that it constitutes a new facility. Returning to the example of a crop farmer adopting a new tillage practice that involves greater amounts of dust, the practice arguably constitutes an investment in an improvement which qualifies as part of an existing operation. However, if the tillage results in a considerable increase in the offensive activity, it would follow that the new practice is not an appurtenance of an existing agricultural facility so is not part of "such" facility exempted by the sample statute.

Many statutes, as the sample statute, omit any meaningful reference to changes in use, expansion, and new technology. The absence of statutory guidelines creates ambiguity that may be expected to increase transaction costs. Although there may not be an easy solution to the resolution of conflicting property interests between neighbors and farmers who need to alter their operations to remain competitive in the production of their products, a legislature may promote efficiency by eliminating transaction costs though some type of acknowledged resolution of the coverage afforded to these changes. The Florida legislature resolved these ambiguities by specifically stating that a change in product does not create a nuisance, while expansion or the adoption of a new husbandry practices are not protected unless the agricultural facility was not adjacent to an established homestead or business as of March 15, 1982.

Circumvention by Local Governments

Nuisance law is not the only institutional device that may be employed to restrict agricultural activities which neighbors find disagreeable. Zoning and regulatory powers of local governments allow citizens to preclude objectionable activities through the enactment of local laws and ordinances. The ability of citizens to enact local ordinances that effectively preclude an agricultural activity may render the statutory abrogation of common law nuisance actions superfluous, unless the statute includes a provision that limits the authority of local governments in using their zoning and police powers to regulate agricultural nuisances.

Eighteen state statutes, but not the sample statute, address this problem through some type of provision that limits the authority of local governments to regulate agricultural nuisances (see table 1). Basically, these other right to farm statutes mandate that any ordinance or local law that makes the operation of an agricultural facility a nuisance shall be null and void. However, some legislatures evidentually felt that the complete derogation of local authority was not warranted. Several legislatures attempted to balance local authority with the enumerated state policy of preserving agricultural land through the differentiation of agricultural facilities in urban as opposed to rural areas. The North Carolina statute only allows cities, and not other local governments, to enact local legislation that makes an agricultural facility a nuisance or to provide for the abatement of agricultural nuisances through local legislation. This legislative scheme favors agriculture in rural areas, but allows urban areas to use health, public safety, and economic concerns to justify the enactment of local ordinances which may be inimical to agricultural facilities.

Alteration of Property Rights

To a large extent, nuisance law and the exception to nuisance law embodied in the state right to farm laws concern the use of air and water. Under American common law, air and water are generally considered to be communal or common property, as numerous people have rights in these items and their use in nonexclusive. However, at the same time, American law imparts certain property rights in air and water to private property owners. Thus, there is an attenuation of the common property rights in these resources (Furubotn and Pejovich). Various private property restrictions affect the use, alteration, and transfer of these resources. By codifiying the "coming to the nuisance" doctrine, state legislatures impact common property rights in air and water.

Nuisance actions concerning the use of common property basically arise from the use or exploitation of a resource beyond a point considered to be reasonable. Overuse of the resource may reduce the benefits that flow from the resource, or may be found to be so unreasonable that the offensive activity is enjoined by the judiciary. Exploitation generally involves negative externalities that affect others using the common property. Right to farm laws impact nuisance law since they limit the injuctive relief available for overuse and enable qualifying agricultural facilities to produce negative externalities, such as odors, dust, insects, noise, pollutants, and contaminated water.

The overuse of common property has been labeled as the tragedy of the commons (Hardin; Runge). However, the true historical tragedy may have been the institutional changes that displaced peasants who were dependent upon the use of common property for their livelihood (Ciriacy-Wantrup and Bishop). Nuisance law is an institution that acts to preclude the overuse

of private and common property by incorporating current community standards of reasonableness and injunctive relief. It is the flexibility of community standards in nuisance law which causes the loss of farmland addressed by the right to farm laws. An activity that has been employed by a landowner for many years may be prohibited if the community standards change. Therein lies a similarity of nuisance law with the true tragedy of the commons. Changing community standards under nuisance law may result in the displacement of farmers who were dependent on the use of air and water resources for their livelihood.

Suggested economic responses to the tragedy of the commons are the internalization of externalities (Demsetz; Cheung), the privitization of common property (Barton; Johnson; De Alessi 1980), and the application of a public trust doctrine to fugitive resources (Ciriacy-Wantrup and Bishop). Although transaction and policing costs compound the difficulty of analyzing the resources affected by the right to farm laws, the above responses offer some insight into the mechanics of these legislative enactments.

Right to farm laws preclude the adoption of new community standards to govern nuisance actions against existing agricultural facilities. Thus, these laws freeze current community standards so that existing agricultural facilities receive the future right to use air and water even when such use may unreasonably deny clean air or water to subsequent neighboring property owners. Relegation of future rights defines and enforces exclusivity (Cheung; Sutinen and Anderson). Since the relegation is to private agricultural land owners, there is also a privitization of the future ownership of common property rights in air and water.

Exclusivity and privitization of rights in air and water may internalize some of the external costs associated with common ownership. Uncertainties

about future nuisance actions are abated so that agricultural producers are assured that they may continue with current practices. The elimination of uncertainties is accompanied by a reduction in negotiation or transaction costs, which constitutes a major advantage of the right to farm statutes. At the same time, however, the privitization of future use of air and water resources increases other costs. Privitization justifies nuisances and accompanying negative externalities. Privitization also eliminates the incentive of agricultural producers to reduce existing negative externalities, and may contribute to a further inequality in the distribution of wealth.

Conclusions

It is not clear whether the privilization achieved by the right to farm laws is an optimal allocation of property interests or a reallocation of power disguised by rhetoric concerning the preservation of agricultural land. Interdependence between agricultural property owners and their neighbors precludes a well-defined decision rule for agricultural producers that would guide them in determining when to make additional investments in their facilities. Right to farm laws further define the rights concerning the use of air and water for existing agricultural facilities, thereby removing some of the uncertainty which contributed to the problem of loss of farmland from nuisance actions. The removal of uncertainty should foster efficiency gains.

However, the above discussion of the sample statute and other state right to farm laws discloses three instances where the scope of the privitization of air and water resources effected by legislatures is undoubtledly too broad. Legislative dispensation for unproductive or

unprofitable facilities, negligent or improper agricultural operations, and complete abrogation of nuisance law for agricultural facilities in highly urban areas do not appear to be justified philosophically or economically. Although the displacement of farmers through nuisance actions may constitute a problem justifying the partial legislative derogation of nuisance law, the ubiquitous and ambiguous coverage of many of the statutes create new uncertainties that detract from the governments' efforts to achieve a more equitable distribution of property rights.

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Table 1. State Right To Farm Laws

State	Statute	Year Adopted	Changes	Local Authority
Alabama	Ala. Code § 6-5-127	1978		X
Arizona	Ariz. Rev. Stat. Ann. §§ 3-1051 to -1061	1981		
Arkansas	Ark. Stat. Ann. §§ 34-120 to -126	1981	X	X
California	Cal. Civ. Code § 3482.5	1981		X
Connecticut	Conn. Gen. Stat. Ann. § 19a-341	1981		X
Delaware	Del. Code Ann. tit. 3, § 1401	1980		
Florida	Fla. Stat. § 823.14	1982	X	
Georgia	O.C.G.A § 41-1-7	1980		
Idaho	Idaho Code §§ 22-4501 to -4504	1981		X
Illinois	Ill. Rev. Stat. c. 5, §§ 1101-1105 (S-H)	1981		
Indiana	Ind. Code Ann. § 34-1-52-4 (Burns)	1981		
Iowa	Iowa Code Ann. § 93A.11	1982	X	
Kansas	Kan. Stat. Ann. §§ 2-3201 to -3202	1982		
Kentucky	Ky. Rev. Stat. Ann. § 413.072 (Baldwin)	1980		X
Louisiana	La. Rev. Stat. Ann. §§ 3:3601 to :3607	1983	X	X
Maine	Me. Rev. Stat. Ann. tit. 17, § 2805	1981		
Maryland	Md. Cts. & Jud. Proc. Code Ann. § 5-308	1981		
Massachusetts	Mass. Gen. Laws Ann. c. 111, § 125A	1979		
Michigan	Mich. Comp. Laws Ann. §§ 286.471 to .474	1981		
Minnesota	Minn. Stat. Ann. § 561.19	1982	X	
Mississippi	Miss. Code Ann. § 95-3-29	1981		
Missouri	Mo. Ann. Stat. § 537.295 (Vernon)	1982		X
Montana	Mont. Rev. Codes Ann. §§ 27-30-101, 45-8-111	1981		
Nebraska	Neb. Rev. Stat. c. 2, § 2-4403	1982		
Nevada	Nev. Rev. Stat. §§ 40.140, 202.450	1985		
New Hampshire	N.H. Rev. Stat. Ann. §§ 430-C:1 to :4	1981		
New Jersey	N.J. Stat. Ann. § 4:1C-26	1983		
New Mexico	N.M. Stat. Ann. § 47-9 3	1981		X
New York	N.Y. Pub. Health Law § 1300-c	1981	X	
North Carolina	N.C. Gen. Stat. § 106-701	1979		X
North Dakota	N.D. Cent. Code §§ 42-04-01 to -05	1981		X
Ohio	Ohio Rev. Code Ann. §§ 929.04, 3767.13	1982		X
Oklahoma	Okla. Stat. Ann. tit. 50, § 1.1	1980		
Oregon	Or. Rev. Stat. §§ 30.930 to .945	1981		X
Pennsylvania	Pa. Cons. Stat. Ann. tit. 3 § 954	1982	X	
Rhode Island	R.I. Gen. Laws § 2-23-1 to -7	1982		X
South Carolina	S.C. Codified Laws Ann. §§ 46-45-10 to -50	1980		X
Tennessee	Tenn. Code Ann. §§ 44-18-101 to -104	1982	X	
Texas	Tex. Agric. Code Ann. §§ 251.001 to -005	1981	X	X
Utah	Utah Code Ann. §§ 78-38-7 to -8	1981	X	X
Vermont	Vt. Stat. Ann. tit. 12, §§ 5751-5753	1981		
Virginia	Va. Code §§ 3.1-22.28 to .29	1981	X	X
Washington	Wash. Rev. Code §§ 7.48.300 to .310	1979		
Wisconsin	Wis. Stat. Ann. §§ 814.04(9), 823.08	1981		

* State law contains provisions concerning changes in use, expansion, and/or new technology.

+ State law contains provisions concerning the limitation of nuisance actions of local governments..