

Right-to-farm laws: Do they resolve land use conflicts?



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UNDERLYING much of the farmland controversy are local land use conflicts between farmers and rural and suburban residents and industrial users. The irony of the situation is obvious: While farming creates and maintains the atmosphere and bucolic landscape so many wish to be part of, it is the business of agriculture, which mandates certain practices and functions, that many find offensive. The result is conflict that prompts nonfarming neighbors to attempt to restrict or eliminate agricultural practices. This often translates itself into a nonfarming majority that employs land use controls to regulate farming or that resorts to nuisance lawsuits to enjoin or restrict certain practices. What many seek, then, is farmland without farms!

About 30 states have "right-to-farm" laws to address these conflicts. Although they vary considerably, all of the laws attempt to do two things. First, they seek to supersede the common law of nuisance. Second, they favor agricultural uses of

land above all others. The statutes thus attempt to establish a "first-in-time, first-in-right" logic whereby pre-existing agricultural uses have a primacy against all others. The presumption is this: If a farm constitutes a nuisance, it does so only as neighboring land uses change, and the owners of the neighboring land are themselves responsible for any liabilities to their property or person.

New York the forerunner

The genesis of right-to-farm laws can be found in New York State's pioneering agricultural district law (1971). While providing a means for farmers to create a district to preserve critical masses of farmland, the law also deals with the issue of potentially restrictive controls or lawsuits:

"No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety."

Similar statements occur in the agricultural district laws of Virginia (1977) and Illinois (1979). Maryland's statute (1977) is more specific, noting that the "operation

at any time of any machinery used in farm production or the primary processing of agricultural products..." is acceptable so long as farm practices do not "cause bodily injury or directly endanger human health...."

The effectiveness of these sections of state agricultural district laws cannot be easily ascertained. Farmers apparently perceive them to be beneficial because conflict between neighbors is a specific, long-term concern of the farming community (12). This element of the New York law has seldom been used, but its existence may be enough to deter governments and individuals from pressing claims or promulgating restrictive ordinances (3).

North Carolina's statute (1979) has been used as a model for many right-to-farm laws. The purposes of that law are straightforward:

"It is the declared policy of the State to 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 suits. As a result, agricultural operations are sometimes forced to cease operations. Many are discouraged from making investments in farm improvements. It is the purpose of this (law) to re-

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duce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance."

The law maintains that a nuisance does not exist if three conditions can be established: the farm did not constitute a nuisance at the time of initial operation for at least one year prior to the suit; the claim of nuisance is based upon changing local land uses and does not arise from either negligence or improper operation on the part of the farmer; and the alleged nuisance does not contribute either to flooding or water pollution.

A more sophisticated approach was incorporated into Iowa's livestock feedlot nuisance law. The purpose of this law is to provide specific protection for feedlots from nuisance suits brought by neighbors who establish themselves subsequent to the feedlot's establishment. Section 2 of the act reads:

"In any nuisance action or proceeding against a feedlot brought by or on the benefit of a person whose date of owner-

ship of realty is subsequent to the established date of operation of that feedlot, proof of compliance with sections three (3) and four (4) of this Act shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with either section three (3) or four (4) of this Act."

Compliance with the appropriate sections of the act relate to the Iowa Department of Environmental Quality's water pollution abatement program and relevant local zoning ordinances, where they exist (6). In this way Iowa seeks to guarantee that feedlots will be brought into compliance with overall state environmental objectives and appropriate local land use controls.

The State of Washington's law contains elements of both the standard North Carolina approach and some of the specificity of the Iowa law. But unlike all the other right-to-farm laws, Washington's law seeks to prevent rural land subdivisions that may trigger nuisance-like disputes and actions.

Under the Washington statute any agricultural operator who "sells or has sold a portion of that land contiguous to a farm for residential uses" forfeits the right to qualify for protection under the law. Although the logic of preventing farmers from contributing to the problem through the creation of new lots appears self-evident, no other jurisdiction has enacted such a provision.

The matter of scope

A variety of farming and farm-related operations are covered under the right-to-farm statutes. In some cases, "farms" receive protection. In others, "agricultural operations" are covered. Some laws protect food processing and related commercial enterprises. Most of the laws require that protected agricultural operations predate competing land uses, though a majority specify only a minimum of one-year prior operation. Nearly all note that appropriate state and federal laws, such as environmental regulations, cannot be superseded even though local ordinances that are contrary to agriculture are nullified.

While farms and related operations receive protection under these statutes, the laws almost uniformly require that the farms and related operations be managed properly. The most common requirement is that farms maintain "good farming practices," though these are rarely defined. Some laws do not cover farm operations that pollute or "change" water conditions, are run in a negligent or improper manner, or that negatively affect health and safety standards.

Because most right-to-farm laws are relatively new, few have been tested in the courts. An exception is Connecticut's statute, which was held valid in *De Capua v. Cella et al* (7, 11). In this case, the judge noted that the "plaintiff came to the nuisance" and that "the total inconvenience... is relatively small in comparison with the nature and conditioning of defendants' operation as dairy farmers." Moreover, because the farm was operated "in a proper manner," as specified by an inspector for the state's agricultural department, the plaintiff was "not entitled to an injunction" or "an order for monetary damages."

The matter of trespass

Right-to-farm laws are aimed, in the main, to protect farmers against nuisance suits and local ordinances that would make farms nuisances because of changes in neighborhood land uses. Another aspect of the problem, that of trespass, has not been

Characteristics of right-to-farm laws

State	Type of Agricultural Operation Protected*	Farm Must Predate Other Land Uses	Must Predate by 1 Year Minimum	Supersedes Local Ordinances
Alabama			X	X
Arizona	agricultural operations	X		
Connecticut			X	
Delaware			X	
Florida			X	X
Georgia			X	X
Idaho	agricultural operations		X	X
Illinois	farms		X	
Indiana	agricultural operations		X	
Kentucky	agricultural operations		X	X
Maryland	agricultural operations		X	
Massachusetts				X
Michigan	farms, farm operations	X		
Mississippi	agricultural operations		X	
Missouri	agricultural operations		X	
New Hampshire	agricultural operations		X	
New Jersey	commercial farms			X
New Mexico	agricultural operations		X	
New York	agricultural activities	X		
North Carolina			X	X
North Dakota	agricultural operations		X	X
Oklahoma	agricultural activities			
Oregon	farms			X
Rhode Island	agricultural operations			X
South Carolina			X	X
Tennessee		X		
Vermont	agricultural activities	X		
Virginia	agricultural operations		X	X
Washington				
Wisconsin	agricultural practices	X		

*Note: Agricultural operations include farming, processing, and all manner of agriculturally related enterprises; agricultural activities appear to be more farm-related and less food industry-oriented.

Conditions not protected under right-to-farm laws.

State	Negligent Management	Improper Management	Water Pollution or Changed Condition	Affects to Health/Safety
Alabama	X		X	
Arizona	X			X
Connecticut	X			
Delaware	X	X		
Florida				X
Georgia				
Idaho	X	X		X
Illinois	X	X	X	
Indiana				
Kentucky	X	X	X	
Maryland				
Massachusetts				
Michigan				
Mississippi				
Missouri	X	X	X	
New Hampshire	X	X		X
New Jersey				X
New Mexico	X			
New York				
North Carolina	X	X	X	
North Dakota	X	X	X	
Oklahoma				
Oregon	X			X
Rhode Island	X	X		
South Carolina	X	X	X	
Tennessee				
Vermont				X
Virginia	X	X	X	X
Washington				
Wisconsin				

adequately dealt with in the context of these laws. Historically, trespass requires a physical invasion of property. In recent decades, however, at least 10 jurisdictions have rendered judgments that accord dust, noise, and odors—traditional nuisance externalities—trespass status. As one commentator noted of Oregon's right-to-farm law, "Without protection against trespass, the right-to-farm is virtually ineffective" (10).

An evaluation

What, then, are we to make of right-to-farm laws? First, right-to-farm laws are popular with state legislatures and the agricultural community. Even granting the newness of these laws, it is surprising that so few court tests have arisen as a result of their promulgation. This may suggest that such laws are long on rhetoric and short on impact and delivery. Perhaps further court tests are needed (4).

Second, whereas most policies in the past were directed toward the solution of certain basic land use issues and problems, right-to-farm laws respond to site-specific concerns and particular agricultural practices.

Third, right-to-farm laws tend to ignore the contemporary practice of nuisance law. Court-inspired remedies are seldom either/or judgments. Instead, they often force the nuisance generator to use technological mitigation techniques to reduce or eliminate externalities so that both parties can carry on their activities with a minimum of economic and spatial disruption. If we follow the practice established by the nonpoint pollution program of the U.S. Department of Agriculture, this is very likely to mean that the costs of mitigation must be absorbed overwhelmingly by farmers. This invariably raises a number of important equity questions, especially given the dubious nature of the types of nuisances involved.

Fourth, an evaluation of right-to-farm laws indicates that many of these legal instruments use vague terminology, are ambiguous, and may be open to due-process challenges. And, as Ed Thompson of the American Farmland Trust has noted, "creative legal draftsmanship by county and township commissions might very easily result in local ordinances which are entirely consistent with 'right-to-farm' laws, but which significantly restrict agricultural operations" (9).

For all their weaknesses, however, right-to-farm laws represent an attempt to deal with some of the problems associated with changing land use and community values brought about, in part, by the "counterstream" or return migration to rural areas (1). Perhaps not unlike the restoration of some urban neighborhoods, there is more than a trace of class conflict involved in what may be seen as "the gentrification of the countryside." Certainly this phenomena can be observed in a number of local ordinances and plans that erect barriers against the siting of mobile homes and mobile home parks in many rural regions of the country (5). If nothing else, right-to-farm laws attempt to educate a public long separated from the processes of food production.

Perhaps the best solution to these problems was suggested by Noel Perrin in his essay "The Rural Immigration Law." "The solution" to the problems of newcomers with new values who seek to change rural areas is "a good, thorough immigration law. It wouldn't actually keep Don and Sue out, it would just require them to learn rural values before they were allowed to stay" (8). Sometimes that which is said in jest may be more astute and appropriate than the laws of the land. In terms of the right to farm, this may indeed prove to be the case.

REFERENCES CITED

- Brown, D. L., and J. M. Wardwell. 1980. *New directions in urban-rural migration: The population turnaround in rural America*. Academic Press, New York, N.Y.
- Fuggitt, G. V., and P. R. Voss. 1979. *Growth and change in rural America*. Urban Land Inst., Washington, D.C.
- Hexem, Robert, et al. 1980. *Agricultural districts and land use: A pilot study*. Dept. Agr. Econ., Cornell Univ., Ithaca, N.Y.
- Keene, J. 1981. *Incentives: Right-to-farm legislation*. In R. Coughlin et al. [eds.] *The Protection of Farmland: A Reference Guidebook for State and Local Governments*. National Agricultural Lands Study, Washington, D.C.
- Lapping, M. 1982. *Changing rural housing policies: Vermont's mobile home zoning law*. Small Town 12: 4.
- McCarthy, M., and S. Matthews. 1980. *Foreclosing common nuisance for livestock feedlots: The Iowa statute*. Ag. Law J. 2(2): 186-221.
- National Association of State Departments of Agriculture. 1982. *Farmland Notes* 1: 11.
- Perrin, Noel. 1981. *The rural immigration law*. In *Second Person Rural: More Essays of a Sometime Farmer*. Penguin Books, New York, N.Y. pp. 129-132.
- Thompson, E. 1980. *Right-to-farm laws examined*. Aglands Exchange 2: 2.
- Todd, Jennifer B. 1982. *The right to farm in Oregon*. Willamette Law Rev. 18: 153-171.
- U.S. Department of Agriculture. 1982. *Land Use Notes* 35. Washington, D.C.
- White, D., and K. Garner. 1981. *New York's agricultural district program: An analysis of farmers' perceptions in 17 counties*. Dept. Agr. Econ., Cornell Univ., Ithaca, N.Y. □