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Agricultural Nuisances: Curbing the Right-To-Farm

by

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Photo: Clear Window

Agricultural Nuisances:

Curbing the Right-to-Farm

People moving next to a smelly or dusty agricultural operation realize that the smell and the dust are a part of one's choice to live in an agricultural area.

by Terence J. Centner

Some people find agriculture objectionable because of the noise and odors and dust created by normal farming activity. Under nuisance law, neighbors may seek to use an injunction to end disagreeable agricultural activity. Since the late 1960s, concern about new neighbors using nuisance law to stop agricultural activities has led agricultural interest groups to support anti-nuisance legislation (Grossman and Fischer). In the early 1980s, the legislation acquired the name "right-to-farm" laws. Such laws are in place in all 50 states.

Right-to-farm legislation gives many agricultural activities sufficient protection from nuisance lawsuits so that existing farmers can carry on their usual farming operations (Hamilton and Bolte). In 1999, protection from nuisance lawsuits in Iowa was changed by a landmark legal decision. In *Bormann v. Board of Supervisors*, the Iowa Supreme Court found unconstitutional the immunity from nuisance lawsuits provided by Iowa Code section 352.11(1)(a) (Centner).

The *Bormann* finding has alarmed agricultural groups and farmers. If Iowa Code section 352.11(1)(a) is unconstitutional, what about other states' right-to-farm laws, and what about other regulations that restrict land use? Decisions by courts in other states to follow the *Bormann* decision may lead to the demise of the nuisance protection afforded by existing right-to-farm laws, and this, in turn, may affect land use in rural areas.

What is protected?

Right-to-farm laws seek to protect the investments farmers have made in their agricultural operations. In many states, these laws work by incorporating a "coming to the nuisance" doctrine. Under this doctrine people and land uses moving toward an offensive activity are prevented from using nuisance law to defend themselves from the existing offensive external effects. However, this doctrine permits property owners with land uses that preceded agricultural activities to continue to use nuisance law to gain relief from objectionable activity.

The expansion of an existing agricultural operation, adoption of new technology, and new production activities pose difficult

ambiguities under most right-to-farm laws. Agricultural operations need to grow and use new methods in order to remain competitive in today's complex marketplace. A right-to-farm law should allow some changes in agricultural operations.

Existing neighbors may not mind an operation that simply involves the production of crops or a small-scale livestock operation. But the introduction of animals, new offensive technology, or the marked expansion of numbers of animals may alter the acceptability of a farming activity, and it may be unfair to neighbors. Similarly, the introduction of a new chemical treatment to a crop may cause neighboring property owners to object. Neighbors may believe that they should not have to bear the increased inconveniences generated by such changes.

Uneasy streets. The expansion of exising operations and adoption of new technology can pose difficult ambiguities under most right-to-farm laws.

State legislatures have had difficulty in addressing the conflicts that come with changing agricultural activities. Some legislatures have attempted to allow unlimited expansion and changes. For example, the Georgia right-to-farm law maintains that the expansion of physical facilities does not alter the established date of the agricultural operation. The Pennsylvania law protects "new activities, practices, equipment and procedures consistent with technological development within the agricultural industry." The Florida right-to-farm law attempts to cover changes in production undertaken by farmers who shift to new kinds of farming pursuits.

Unconstitutional takings

The most recent controversy concerning right-to-farm laws is whether a law can go too far and embody a taking in violation of federal or state constitutions. The "just compensation clause" of a constitution requires payment if a government forces some people to bear public burdens. Whenever a government "takes" property rights for a public use, compensation is owed.

The question is whether an action by a government — allowing farming to continue — constitutes an appropriate use of the government's police power to sustain health and safety, or whether it is a regulatory taking that requires compensation. Laws and regulations that have a substantial relation to the promotion of public health, safety, or general welfare are permitted under a government's police powers. The distinction is whether the action merely restricts the use of property or exceeds constitutional limits, and is thus a taking.

Two categories of governmental actions generally must be compensated without any further inquiry. The first occurs when a government's action involves a permanent or temporary physical invasion of the property. In this case the government must pay compensation. The second, occurs when an owner is deprived of all economically beneficial or productive use of the land. Again, there is a taking for which compensation must be paid. These two categories may be referred to as "*per se*" takings.

If there is no *per se* taking, an ad-hoc factual inquiry is conducted on a case-by-case basis for the "regulatory takings" challenge. The inquiry focuses on three factors: (1) the economic impact of the restriction on the claimant's property; (2) the restriction's interference with investment-backed expectations; and (3) the character of the governmental action.

Takings under Iowa Code section 352.11(1)(a)

In *Bormann v. Board of Supervisors*, the Iowa Supreme Court found that the immunity against nuisances granted by Iowa Code section 352.11(1)(a) was a taking in violation of the due process clauses of the federal and Iowa constitutions. The protection of agricultural enterprises under the right-to-farm law was found to be a "taking" of rights belonging to the nonfarm neighbors.

The *Bormann* case involved approval of a petition to create an "agricultural area." Under Iowa Code section 352.11(1)(a), farmer-applicants petitioned the county to create an agricultural area that would offer landowners protection against nuisance lawsuits. After the agricultural area was approved, neighbors challenged its formation.

The neighbors argued that the designation of an area

where landowners have a right to create a nuisance constituted a *per se* taking. Iowa Code section 352.11(1)(a) said that a farm or an operation within a designated agricultural area "shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities...." By providing immunity from nuisance lawsuits, section 352.11(1)(a) guarantees the right to maintain a nuisance over neighbors' property and this right constitutes an easement. The *Bormann* court found this easement to be a permanent interest — a nontrespassory invasion of property that embodied a *per se* taking.

Takings under other right-to-farm laws

Will other state right-to-farm laws be found to offend a constitutional takings provision? While the Iowa ruling has not been followed, and the Iowa court's decision has no direct effect on other states' laws, agricultural interest groups are concerned. Supporters of right-to-farm laws are attempting to differentiate their state's provisions from the offensive Iowa Code section 352.11(1)(a). In most cases, meaningful distinctions indicate that other state courts will not necessarily follow Iowa's *Bormann* decision. Four distinctions may be noted.

First, it is not clear that other courts will find that the right-to-farm law involving a nontrespassory invasion is a *per se* taking. A more realistic procedure would be to examine a right-to-farm law as a governmental restriction that may constitute a regulatory taking. A court would then use the ad-hoc factual inquiry test delineated by the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corporation* for analyzing the right-to-farm law. If a right-to-farm law advances legitimate state interests, and suffers no other deficiencies, it should be upheld. If a right-to-farm law fails to advance legitimate interests, it goes too far and is a taking.

Second, most right-to-farm laws allow lawsuits based on trespass or negligence and they do not interfere with environmental and health regulations. Physical invasions of neighboring property (such as driving farm

What did they say in Iowa?

Iowa Code section 352.11(1)(a) did not incorporate the "coming to the nuisance" doctrine. Instead, it attempted to grant farmers in some defined areas the right to engage in future nuisance (farming) activities. After examining the effects of this right, the Iowa Supreme Court issued an unprecedented ruling that nontrespassory invasions could constitute a *per se* taking.

The *Bormann* ruling exhibits a consequence of overzealous protection of agriculture as delineated by Iowa Code section 352.11(1)(a). If a governmental regulation goes too far and the interference with the rights of neighbors is too great, the regulation may be found to constitute a taking. Right-to-farm laws may go too far if they grant blanket nuisance immunity for agricultural operations or if they say that all expansion and changes in production activities are protected against nuisance lawsuits.

It may be expected that other right-to-farm laws will be challenged, especially those that grant nuisance protection for operations that expand, adopt new technology, or make changes in production practices (see Table). Yet, each state's right-to-farm law is different from Iowa Code section 352.11(1)(a). It is also not clear that courts will rush to conclude that nontrespassory invasions ought to constitute *per se* takings. Court cases from New York and Michigan suggest that most right-to-farm laws should withstand anticipated constitutional challenges. The result in *Bormann*, therefore, should be interpreted as a warning of constitutional constraints rather than a projection that right-to-farm laws will be found to constitute a taking.

Selected Right to Farm Laws

State and Code Section	Key nuisance exception that could create a basis for a constitutional challenge	Status or prospect of a constitutional challenge
California Civil Code § 3482.5	none apparent	very low
Florida § 823.14	expansion within original boundaries possible unless more excessive noise, odor, dust, or fumes	very low
Georgia § 41-1-7	relation back provision permits expansion and new technology	moderate
Illinois ch. 740, § 70/3	none apparent	very low
Indiana § 34-19-1-4	none apparent	very low
Iowa § 352.11	operation in a designated agricultural area is not a nuisance	unconstitutional in *Bormann*
Iowa § 657.11	broad protection limited by failing to use accepted management practices	unconstitutional in *Ehmen*
Michigan § 286.473	protection of growth, new technology and products	constitutionality upheld in *Gillis*
Minnesota § 561.19	expansion of acreage limited to 25%	low
New Mexico § 47-9-3	relation back provision permits expansion and new technology	moderate
New York Agric. & Mkts. § 308	changes and expansion permitted	constitutionality upheld in *Pure Air & Water, Inc.*
Ohio § 929.04	expansion and technology activities protected in an agricultural district	low to moderate
Oregon § 30.936	broad protection outside of urban growth boundaries	low to moderate
Pennsylvania tit. 3, §§ 952 & 954	permits technological development, statute of limitations permitting expansion, nutrient management plan defense	moderate
Texas Agric. § 251.006	improvements next to agricultural neighbors permitted	low to moderate

equipment across the neighbor's property) are not protected and remain actionable. Nuisances, such as smells or dust, have been categorized as nontrespassory invasions that are distinct from physical invasions (Restatement of the Law Second Torts). In most cases the anti-nuisance protection of right-to-farm laws seems to encompass restrictions other than physical invasions. With no physical invasion, the law may be a regulatory taking that needs to be analyzed under the ad-hoc factual inquiry test.

Third, the adoption of the "coming to the nuisance" doctrine may distinguish many state right-to-farm laws from Iowa Code section 352.11(1)(a). The "coming to the nuisance" doctrine does not offer protection for future agricultural activities. As such, a law may not embrace a physical invasion nor create an easement over existing land uses of the type considered in *Bormann*.

Finally, the checks and balances imbedded in the provisions of some state right-to-farm laws may distinguish them from Iowa Code section 352.11(1)(a). A lower court decision from New York, *Pure Air and Water, Inc. v. Davidsen*, described a distinction in which the New York Commissioner of Agriculture and Markets determines whether an agricultural practice is sound under the New York right-to-farm law. The court found that the New York law did not create a property right nor did it constitute a compensable taking under the federal or New York constitutions.

Concluding Comments

A generation ago, agricultural interests recognized that they needed a defense against nuisance lawsuits that arose when nonfarm land uses extended into agricultural areas. The resultant right-to-farm laws were legislative responses intended to protect the investment of agricultural producers by eliminating some nuisance actions. Most right-to-farm laws adopted a "coming to the nuisance" doctrine to protect existing operations. ■

■ For More Information

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