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An Agricultural Law Research Article

Freedom to Farm! Understanding the Agricultural Exemption to County Zoning in Iowa

by

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FREEDOM TO FARM! UNDERSTANDING THE AGRICULTURAL EXEMPTION TO COUNTY ZONING IN IOWA

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Chapter 358A of the Iowa Code establishes a mechanism for the implementation and operation of a system of county zoning available to any county at the option of the county board of supervisors.[1] It is estimated that over one-half of the counties in the state, including most of those which contain significant urban developments, have adopted county zoning ordinances.[2] However, a significant limitation on both the applicability and effectiveness of any county zoning ordinance is section 358A.2, entitled "Farms exempt." This section provides in pertinent part that "[n]o regulation or ordinance adopted under the provisions of this chapter shall be construed to apply to land, farm houses, farm barns, farm outbuildings or other buildings, structures or erections which are primarily adapted by reason of nature and area, for use for agricultural purposes, while so used; . . . ."[3]

The present language of section 358A.2 is essentially that which was originally adopted in 1946. One significant change was made in 1963, however, when the last clause was amended from, "which are adapted, by reason of nature and area, for use for agricultural purposes as a primary means of livelihood, while so used" to the present version.[4] The effect of this change is discussed below, but the deletion of the "livelihood" test for qualification as an agricultural operation appears to represent a broadening of the exemption.

Although section 358A.2 limits the effectiveness of county zoning ordinances, it could provide surprisingly strong protection for the agricultural sector's "freedom to farm" in future adjudication of disputes concerning the

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1. IOWA CODE §§ 358A.1-.26 (1981).
2. A. VESTAL, IOWA LAND USE AND ZONING LAW § 3.11(a), at 74 (1979).
3. IOWA CODE § 358.2 (1981).
4. 1963 Iowa Acts ch. 218, § 2 (amending IOWA CODE § 358A.2 (1947)). The amendment also added an exemption similar to section 358A.2, to section 332.3 dealing with the adoption of county building codes. In addition, the extraterritorial application of municipal zoning ordinances is subject to section 358A.2. IOWA CODE § 412.23 (1981).

use and development of rural land. The exact meaning and effect of the agricultural exception, however, are relatively unknown. Iowa decisions interpreting section 358A.2 are few, and provide only meager guidance for understanding the scope and effect of the provision. Further, certain of these decisions are subject to critical analysis due to the interpretation given to the language of the exemption. Moreover, a review of several county zoning ordinances indicates that the legality of several commonly used provisions is highly suspect in light of the broad language of the exemption.

The lack of authoritative guidance as to the meaning of the exemption and the somewhat vague language of the provision combine to create a potentially hazardous situation for the practitioner representing either agricultural producers or those interested in developing rural land. At the same time, the present uncertainty creates real questions about the effectiveness of certain features of county zoning ordinances diesigned to control rural development. In addition, the lack of a clear understanding of the scope of the agricultural exemption and the questionable judicial gloss given it are problematic both for the agricultural sector in Iowa in a general sense because of the questions a shifting definition of agriculture raises about the "freedom to farm," and for those policymakers at the state and county level who are exploring methods to preserve agricultural land.

This Article attempts to provide some degree of understanding of the meaning of the agricultural exemption in chapter 358A.2 and its effect on rural development and land use control in Iowa. The Article begins with a discussion of the exemption, a review of the few existing interpretations of its meaning and an analysis of what the exemption most probably means. A discussion of the problems that may arise due to the uncertainty associated with the exemption is then developed by a review of current provisions of various Iowa county zoning ordinances. Finally, a number of the possible means of clarifying the exemption and their effect are discussed.

The best starting place for understanding the meaning of the exemption is to review the few interpretations of the language used in the section. Reported rulings dealing directly with section 358A.2 include two opinions of the Attorney General in 1953 and 1967, and an Iowa Supreme Court case decided in 1971. The question involved in the 1953 opinion was from the Polk County zoning commission and concerned:

> Whether or not a certain number of acres of land shall constitute a farm within the meaning of (§ 358A.2) . . . or whether the provision in that Code section which states 'for use for agricultural purposes as a primary means of livelihood, while so used' shall govern what is intended under the provisions of said Code section 358A.2.[5]

The Attorney General opined that "[w]hether such land is entitled to be exempted depends upon its use primarily as a means of livelihood and not

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5. 1953 REP. ATT'Y GEN. IOWA 96 (Oct. 16, 1953).

on the area of land that might constitute a farm."[6]

Therefore, the effect of the opinion was that Polk County could not establish a minimum acreage requirement to determine which farms may qualify for the exemption; rather, the focus had to be on the use of land. The ruling is significant in that it means that qualifying for the exemption cannot be established by an objective test (e.g., 20 acres or 100 cows), rather it must be based on a factual analysis of the *use* of the land. Further, the opinion is significant in light of the 1963 amendment which removed the "primary means of livelihood" test.[7] The effect of the amendment was to make the exemption available to smaller agricultural enterprises that might not have met a primary means of livelihood test, thereby broadening the exemption.

The second interpretation of the exemption was a 1967 Attorney General's opinion issued in response to questions concerning the applicability of the Hardin County zoning ordinance to two different feedlots.[8] The first fact pattern involved a commercial feedlot, without any associated farming activities being operated on land once used as a gravel pit in a district zoned as a rural area. The county zoning ordinance provided that commercial feedlots could be placed in rural districts only with the approval and issuance of a conditional use permit by the Hardin County Board of Adjustment.[9] The second fact pattern involved a feedlot, part commercial, operated by a farmer in connection with his other crop raising activities in an area zoned as a conservation district. The important questions concerned whether either operation was exempt under section 358A.2, and whether any distinction could be drawn between the two operations.[10]

The Attorney General's opinion stated:

> The purpose of the statute is obviously directed at the protection of the farming community, to give freedom from possible restrictive county zoning. What is necessary is the determination of what is meant by the words, *"which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used."*[11]

The first answer provided by the Attorney General was that the feedlot in the first fact pattern, operated in a former gravel pit, was not exempt from county zoning regulation because it was not operated on "a farm or land" that met the primarily adapted test.[12] The Attorney General decided that the situation was different for the second feedlot because the land it

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6. *Id.* at 97.

7. 1963 Iowa Acts ch. 218 § 2 (amending IOWA CODE § 358A.2 (1947)).

8. 1968 REP. ATT'Y GEN. IOWA 450 (Dec. 12, 1967). For a discussion of the definition of "commercial feedlot" see text accompanying notes 41-50, *infra*.

9. 1968 REP. ATT'Y GEN. IOWA 450 (Dec. 12, 1967).

10. *Id.*

11. *Id.* at 451.

12. *Id.* at 452.

was on did meet the test since it was operated in conjunction with other crop raising activities.[13]

The remainder of the opinion concerns the question whether the operation of a commercial feedlot in conjunction with the farming operation in the second fact pattern removed the land from the exemption of section 358A.2.[14] After a thorough analysis of the existing authorities concerning the legal distinction between farming and agriculture, the opinion concluded that agriculture was the more comprehensive of the two terms and included all forms of crop raising as well as the production of animals, whether combined or separate.[15] Therefore, the choice of the term "agricultural purposes" in section 358A.2 was a significant one.[16] The opinion concluded from these authorities that the fattening of cattle in feedlots is an agricultural function. Therefore, absent a definition of "agriculture" in chapter 358A the common legal definition should apply in Iowa, meaning that the answer to the Hardin County question was that "the use of land for a commercial feedlot does not remove said land from the exemption."[17]

The ruling is important for several reasons. First it essentially holds that commercial feedlots are agricultural in nature and as long as they are operated on agricultural land they are exempt from county zoning ordinances. By implication, this ruling means that county zoning ordinances cannot regulate commercial feedlots, at least not those on agricultural land. The opinion did not, however, take the next logical step and challenge the validity of the Hardin County zoning regulation that required the approval of the board of adjustment for the operation of a commercial feedlot in certain areas, even though this was the holding of the opinion and in essence the purpose of the exemption.

Another important point concerning the 1967 opinion is whether the distinction made between the two different fact patterns was reasonable. No distinction could be made between the feedlots as to their agricultural nature beause both were designed to raise cattle, in whole or part, on a commercial basis for others. The only real difference was that the first feedlot was on land previously used as a gravel pit, while the other was on farmland. The Attorney General found this distinction sufficient to allow the first feedlot to be regulated,[18] but to do so required tying the exemption to the *physical nature* of the land rather than to the *use* of the land, which is the primary focus of any zoning ordinance. This demonstrates a conflict within

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13. *Id.*

14. *Id.* at 454-55.

15. *Id.* at 455.

16. *See, e.g.*, Annot., 97 A.L.R.2d 697, 702 (1964). *See also* 3 Am. Jur. 2d *Agriculture* § 1 (1964). *See also* Rocky Mountain Metropolitan Recreation Dist. v. Hix, 136 Colo. 316, 316 P.2d 1041 (1957); Crouse v. Lloyd's Turkey Ranch, 251 Iowa 150, 100 N.W.2d 115 (1959).

17. 1968 Rep. Att'y Gen. Iowa 455-54 (Dec. 12, 1967).

18. *Id.* at 452.

the exemption and the 1967 opinion. Under a liberal view of the exemption, the first feedlot should not have been regulated because (1) the best test of whether something is adopted to a certain use is if it can be so used, and, (2) even if the exemption must focus on the nature of the property in question, rather than its use, the feedlot could be viewed as a "structure or erection," which is given equal status with "land" in the list of properties exempt from regulation under section 358A.2, if agricultural in nature. Under the conservative view taken by the Attorney General, the focus was on the nature of the land, and since it could not be farmed, having once been a gravel pit, the exemption did not apply. This approach ignored the use of the land and led to the illogical result that while feeding cattle is an agricultural use, and the land was used for feeding cattle, the land was not agricultural.

The question left unanswered in the 1967 opinion, whether an agricultural producer could be made to comply with a county zoning regulation which applied to an agricultural operation, was the subject of the 1971 Iowa Supreme Court case, *Farmegg Products, Inc. v. Humboldt County.*[19] The case involved the plaintiff egg company's proposed construction of two 40-by-400-feet steel buildings on a four-acre tract.[20] Each building was to house 40,000 chicks, confined in cages for twenty-two weeks, at which time the chicks would be transferred to the plaintiff's egg laying houses outside of the county.[21] The question in the case was whether the plaintiff had to comply with the set-back requirements of the Humboldt County zoning ordinance mandating a 200-feet set-back from all boundary lines for any structure housing animals or fowl.[22] Due to the size of the plaintiff's tract, 200-feet set-backs were not feasible. The plaintiff sued the county for a declaratory judgment to construe section 358A.2, and to determine the validity of the county zoning regulation asserting that the proposed construction on and use of the land was exempt under section 358A.2,[23] and thus no zoning certificate or building permit was required for the proposed use.[24] The plaintiff appealed an adverse decree of the trial court to the Iowa Supreme Court.[25]

At first blush, the facts presented in *Farmegg* do not appear that troublesome. There obviously was a structure which was primarily adapted for the agricultural purpose of raising chickens. Further, the structure was being subjected to a county zoning regulation in apparent violation of section 358A.2. The case appeared to present a clear fact pattern for upholding the exemption. Unfortunately, the supreme court did not view the case with such simplicity of reasoning. Instead, the court held:

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19. 190 N.W.2d 454 (Iowa 1971).
20. *Id.* at 456.
21. *Id.*
22. Humboldt County, Ia. Zoning Ordinance § 10(a)(10) (19__).
23. Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d at 456.
24. *Id.* at 457.
25. *Id.* at 456.

> It is clear the activity proposed by the plaintiff . . . will be organized and carried on as an independent production activity and not as part of an agricultural function.
>
> It cannot be logically claimed that the proposed structures would be "primarily adapted by reason of nature and area, for use for agricultural purposes, while so used."[26]

The court saw the question in *Farmegg* as "whether the contemplated use of property acquired by plaintiff is to be considered agricultural property because of its use, and exempt from any zoning regulation under chapter 358A.2 . . . ."[27] The court first noted that the property in question had no use in the plaintiff's operation other than as a site for the two buildings. Th court explained that "the premises in question would be devoted entirely to raising chicks from one day of age to twenty-two weeks of age and would not be used in conjunction with or as an incident to ordinary farming operations as distinguished from those of a *commercial nature.*"[28] Because the statute did not define the term "agricultural purpose," the court reviewed the authorities and found that the term is broader than "farming" and includes the raising of animals, either in connection with or separate from the raising of crops.[29] However, the court chose to focus its attention on the following test of "agriculture":

> Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. *The determination cannot be made in the abstract.* . . . The question is whether the activity in the particular case is carried on as part of the agricultural function or is separably organized as an independent productive activity.[30]

The court then distinguished several cases cited by the plaintiff which held that raising large numbers of fowl on small tracts, while commercial in nature, was nevertheless still agriculture, on the basis that in those cases some amount of crops and feed had been produced in connection with the operation, whereas in *Farmegg* the plaintiff proposed no associated "farming" activities.[31] The court concluded, therefore, in language previously quoted, that the activity proposed was an independent production function and not part of agriculture and therefore not exempt from county zoning.[32]

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26. *Id.* at 459.
27. *Id.* at 456-57.
28. *Id.* at 457 (emphasis added).
29. *Id.*
30. *Id.* at 458 (emphasis by court). This test came from Farmers Reservoir & Irrigation Dist. v. McComb, 337 U.S. 775, 780-81 (1949), a case decided under the Fair Labor Standards Act involving an irrigation ditch company which itself was not involved in land tillage or animal husbandry.
31. Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d at 456-57.
32. *Id.* at 459.

In addition, the court said there was merit to the theory that because the property in question was not zoned agricultural, it being located in a flood plain now rezoned as suburban residential, the land must not be primarily adapted for agricultural use because the local officials had not thought so.[33]

In summary, the majority ruled the proposed chicken houses were not entitled to the agricultural exemption: (1) they were commercial, not agricultural, in nature; (2) they were an independent production activity not operated in conjunction with crop raising activities; and (3) they were located on land which was not zoned agricultural.

The reasoning and result of the *Farmegg* case as to the interpretation of section 358A.2 is at best troublesome and at worst simply wrong. The facts associated with the case, including a subsequent nuisance suit,[34] may indicate that the holding was somewhat result oriented. Regardless, that does not justify the damage the court did to the interpretation of section 358A.2 to reach its result.

The best starting place for a discussion of the questionable rationale of the opinion is the thorough dissent Justice Uhlenhopp filed in the case. The dissent saw the question posed by the case in somewhat more direct terms than the majority: "Do large mechanized chicken houses in which chickens are raised from small chicks to laying hens constitute buildings 'primarily adapted, by reason of nature and area, for use for agricultural purposes'?"[35]

A review of the various authorities concerning the definitions of "farming" and "agriculture" certainly included the raising of poultry, whether or not crops were also produced.[36] Further, a review of section 358A.2 showed that the exemption went beyond farm buildings to other structures, whether or not they were on a farm, as long as they were "for agricultural purposes."[37]

The dissent concluded that since the sole purpose of the two buildings in question was to raise poultry, "under the definitions and decisions of the term 'agriculture,' those two structures will be 'buildings . . . for use for agricultural purposes' and thus within the exemption."[38]

As to the argument that the buildings were commercial and not agricultural, the dissent raised a strong challenge:

> But at this day "agricultural" and "commercial" cannot be divorced. Today's agriculture in Iowa *is* commercial. Today's farmer is essentially a businessman, often a very substantial one, engaged in a commercial enterprise. If poultry and egg production has taken on a commercial coun-

33. *Id.* at 459-60.
34. Patz v. Farmegg Prods., Inc., 196 N.W.2d 557 (Iowa 1972).
35. Farmegg Prods., Inc. v. Humboldt County, 190 N.W.2d at 460.
36. *Id.* at 462.
37. *Id.*
38. *Id.*

> tenance, it is because agriculture has taken on that countenance.[39]

The dissent also noted that agriculture has changed, and that although animal production has become more concentrated, it is still agriculture because "animal husbandry does not cease to be agriculture because the cattleman, hogman or poultryman expands his operation to a point at which a profit can be realized."[40]

Of the majority's view that the situation would be different if the soil were to be tilled, the dissent viewed this proposition as thinking in terms of farming and not agriculture.[41] In addition, the dissent attacked the anti-commercial operator bias of the majority opinion as policy considerations best left to the legislature, noting that "[i]f that body believes modern mechanized livestock structures require special provisions, it can so provide. That is not for us to do even if we dislike big chicken houses. Our function is to give effect to the statutory words as they stand."[42]

Finally, the dissent noted the fallacy in letting the zoning classification of the land determine whether it was primarily adapted for a certain use:

> [T]he question, in exemption cases, is not what a board of supervisors say a particular use is. The question is what the use really is, under the law. If under the law a use is agricultural, the statute grants exemption. If a board of supervisors could obviate the agricultural exemption by the simple expedient of declaring an area suburban residential or similarly characterizing it, they could annul the statutory exemption by their own act.[43]

It is important to note that the *Farmegg* holding is not an isolated incident. In 1972, in *Patz v. Farmegg Products, Inc.*,[44] a case involving a nuisance action against a similar Farmegg facility, the court ruled that the facility was a nuisance. In reaching the result the court refined its holding in the first *Farmegg* case observing that "[d]efendant can make no claim that its operation is agricultural. That question turns not on whether agricultural products are involved. Rather it has to do with the production activity. . . . The raising of over 80,000 chickens in one facility is not incident to rural life."[45]

In a subsequent tort case involving the question of liability for geese running free on a highway, the court noted that "[i]t is of course readily apparent, and we judicially note, free ranging fowl are no longer a major factor in our agricultural economy. In large part, poultry production has

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39. *Id.* (emphasis by dissent).
40. *Id.*
41. *Id,*
42. *Id.* at 463.
43. *Id.*
44. 196 N.W.2d 557 (Iowa 1972).
45. *Id.* at 562.

been taken over by big business."[46]

Rather than attempt to improve on the excellent critique of the majority opinion that the dissent offers in *Farmegg*, a summary of the major flaws of the opinion and its progeny is perhaps the best way to lay the groundwork for an analysis of the dangers created by the present uncertainty about the effect of section 358A.2.

First, the majority's willingness to distinguish between agricultural operations on the basis of whether they are "commercial" in nature is without support either in the language of section 358A.2, in the legal authorities interpreting the term "agriculture," or in the practical reality of the economic structure of agriculture in the state. To rule that an agricultural operation is an independent production activity and commercial solely due to its size or its economic or legal organization, and therefore subject to zoning regulation, is an approach that is fraught with policy determinations more legislative than judicial in nature. Second, the majority's focus on the presence or absence of crop raising activities to determine applicability of the exemption is misplaced because it reflects a reliance on the term "farm" rather than on the more comprehensive term "agriculture" which is used in the exemption. Third, the effect of ruling that poultry raising, due to its economic organization, is commercial and no longer agricultural, as the *Farmegg* decision and its progeny have done, raises the spectre of the court being able to redefine by judicial fiat whole phases of agriculture out of the term. While the practical effect would be minimal (i.e., a hog producer would continue to consider himself involved in agriculture regardless of the court's view) the legal effect could be very grave. Finally, the court's willingness to find merit in the idea that the agricultural exemption could be annulled simply by a rezoning of the property involved shows disregard for the legislative intent embodied in the exemption and a misunderstanding of the purpose of zoning laws, which are intended to focus on the actual use of land and not on the artificial classification of its use.

The idea that section 358A.2 carries with it substantial political significance is not to be taken lightly. While the language of section 358A.2 in legal terms can be interpreted in different ways, there is an important overriding purpose behind it that must be recognized and considered, that is, the political intent of the people who enacted it and the political and historical context of its passage. The exemption was enacted in 1947 when the concept of county zoning was relatively new and untested. In view of the potential power that such a law would give to local officials to influence land use, it is understandable that the powerful representatives of agricultural and rural interests were concerned about the impact county zoning could have on farming. When seen in this light, the true justification for the broad agricultural exemption becomes obvious. Section 358A.2 was a political trade-off

46. Weber v. Madison, 251 N.W.2d 523, 528 (Iowa 1977).

obtained by farm leaders before passage of county zoning was possible. The broad language and expansive nature of the exemption, as well as the fact that the chapter would function more effectively without it, indicate that this is true.

When viewed from this starting point, the exemption can be seen as it was in the dissent in *Farmegg*: a broad protection designed to shield the agricultural sector from the effect of all county zoning requirements, regardless of their reasonableness. In other words, the exemption of section 358A.2 was a signigicant statement of the "freedom to farm."

The effectiveness of such provisions is demonstrated by the experience in Illinois, which has enacted a provision in the county zoning statute that is nearly identical to section 358A.2.[47] In a number of cases interpreting that provision, the Illinois courts have prohibited the application of restrictive county ordinances to agricultural operations. One case has special significance in a discussion of the effect of section 358A.2 because of its similarity to *Farmegg*.[48] In *County of Lake v. Cushman*,[49] the Illinois Appellate Court upheld a circuit court decision that reversed a county zoning department decision denying a landowner the right to build a poultry hatchery on his 3.09 acre tract. The county had denied the building permit because the lot did not meet the county's minimum acreage requirement for an agricultural use, a limitation which the county argued was not prohibited by the statute.[50] The appellate court disagreed with the county, finding that the statute clearly prohibited county ordinances establishing minimum acreage requirements for agricultural uses.[51] The court said the real issue was "whether a hatchery on a 3.09 acre lot can be considered an 'agricultural use' within the meaning of the statute."[52] The court looked at the law concerning the definition of "agriculture" and found that while no previous Illinois case had held

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47. ILL. ANN. STAT. ch. 34 § 3151 (Smith-Hurd 1960). The provision in pertinent part reads:

> [N]or shall they (county zoning powers) be exercised so as to impose regulations or require permits with respect to land used or to be used for agricultural purposes, or with respect to the erection, maintenance, repair, alteration, remodeling, or extension of buildings or structure used or to be used for agricultural purposes upon such land except that such buildings or structures for agricultural purposes may be required to conform to building on set back lines . . . .

48. *See* County of Lake v. Cushman, 40 Ill, App. 3d 1045, 353 N.E.2d 399 (1976). *See also* Tuftee v. Kane County, 76 Ill. App. 3d 128, 394 N.E.2d 896 (1979) (preventing application of a county minimum acreage requirement for the agricultural exemption to a seven acre tract used to board and train show horses); Soil Enrichment Materials Corp. v. Zoning Bd. of Appeals, 15 Ill. App. 3d 432, 304 N.E.2d 521 (1973) (holding that a 60 acre tract to be used as temporary storage of sewage sludge to be used as fertilizer was for an "agricultural purpose" and that county could not impose regulations on the operation).

49. 40 Ill. App. 3d 1045, 353 N.E.2d 399 (1976).

50. *Id.* at ___, 353 N.E.2d at 400.

51. *Id.* at ___, 353 N.E.2d at 401.

52. *Id.*

that raising poultry is "agriculture" the weight of authority required such a result.[53] In its analysis, the court discussed the *Farmegg* decision, but distinguished it on the basis of the use of farm" as a modifier in section 358A.2; the court was of the opinion that "farm" was defined more narrowly than "agriculture."[54] The court added an observation concerning the result in *Farmegg,* noting that "incidentally, the dissent in the case seems more convincing to us."[55]

Cushman and *Farmegg* are almost identical cases in terms of the law involved, the facts, and the county regulation. The only difference between the two cases is in the result. The Illinois court, through its understanding of both the purpose of the state statute and the legal definition of "agriculture," was able to reach a result that more adequately carried out the protection provided by the agricultural exemption. While the *Cushman* case provides an example of how section 358A.2 could provide a significant protection for the "freedom to farm," the analysis of *Farmegg* indicates, and the following discussion of actual county ordinances demonstrates, that the protection of section 358A.2 has been eroded.

The most important measure of the general understanding of section 358A.2 and its workability and effectiveness is to look at county zoning ordinances enacted under section 358A. A review of ordinances from a cross section of sixteen Iowa counties reveals a number of commonly used regulations of questionable enforcibility which are perhaps symptomatic of the difficulty experienced by local officials in implementing the provision.[56]

As they relate to agricultural matters, county zoning ordinances generally have the following features in common:

a) a restatement of the exemption contained in section 358A.2;
b) definitions of several significant terms including:
   (i) "agriculture," generally defined in a broad manner;
   (ii) "farm," generally defined in terms of a minimum acreage requirement, ranging from ten to forty acres, most often the highest figure;
   (iii) "commercial feedlots," the definition turning on the ownership of the operation, its feed purchasing requirements, or, most commonly, the number and density of the animals fed;
c) the creation of agricultural districts in which most agricultural practices are allowed without restriction; and
d) significant restrictions on the operation of commercial feedlots and other animal production facilities as to their size and location, even in those districts established for agricultural purposes.

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53. *Id.* at ___, 353 N.E.2d at 404.
54. *Id.*
55. *Id.*
56. County zoning ordinances that were reviewed include: Black Hawk, Cass, Dubuque, Floyd, Johnson, Linn, Madison, Marshall, Mitchell, Pocahontas, Scott, Story, Warren, Webster, and Woodbury.

As noted, most county ordinances contain in their general provisions a statement of the exemption of section 358A.2, usually in the identical language.[57] Most ordinances also contain expansive definitions of agriculture, such as that contained in the Linn County ordinance: "1. Agriculture. The use of land for agricultural purposes, including farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture and animal and poultry husbandry. . . ."[58] Regardless of the exemptions and the broad definitions of agriculture, most of the ordinances surveyed contain regulations that restrict agriculture.

For instance, a common feature of most ordinances is a definition of "farm," in terms of a minimum acreage requirement. A typical definition is found in the Madison County ordinance: "2.5. *Farm.* An area comprising forty (40) acres or more used for growing of the usual farm products thereon and-or for the raising thereon the usual farm poultry or livestock."[59]

A forty-acre requirement is also found in Story[60] and Johnson[61] Counties, while Pcahontas County defines farm as requiring thirty-five acres.[62] In other counties, for instance Mitchell[63] and Marshall,[64] minimum acreage requirements are contained in lot size requirements for agricultural districts, rather than in the definition of "farm." There appear to be two justifications for such requirements: first, they provide simple objective standards for determining applicability of the exemption; and second, some are designed to preserve prime agricultural land from conversion to residential use by creating significant lot acquisition costs.

A second feature commonly found in county zoning ordinances is the creation of substantial restrictions on the location and operation of "commercial feedlots." While "commercial feedlot" is not uniformly defined, in concept it seems to connote an operation that is larger than a normal "feedlot," and operated in a very businesslike manner solely for profit. Depending on the county ordinance, the focus of the determination as to whether a feedlot is commercial can vary a great deal. Several counties use a determination based on the size or number of animals fed. For instance, in Poca-

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57. Linn County, Ia., Zoning Ordinance art. III, § 1 (July 1959). *See also* Floyd County Zoning Ordinance § 7 (1967).

58. Linn County, Ia., Zoning Ordinance art. V, § 1(1) (July 1959).

59. Madison County, Ia., Zoning Ordinance § 4(25) (adopted by amendment, June 1978).

60. Story County, Ia., Zoning Ordinance art. II (June 1977).

61. Johnson County, Ia., Zoning Ordinance art. VII, § 24 (adopted by amendment Dec. 1978).

62. Pocahontas County, Ia., Zoning Ordinance art. IV, § 400,13 (June 1979).

63. Mitchell County, Ia., Zoning Ordinance art. VIII(E) (1980), which requires a 35-acre lot to build a residence on prime agricultural land. A farm in Mitchell County is defined as "an area used for agricultural purposes and the growing and production of all farm products thereon and their storage on the area." *Id.* Art. V(22).

64. Marshall County, Ia., Zoning Ordinance art. V, § 3 (adopted by amendment Jan. 1980).

hontas County a commercial feedlot is one "in which more than one thousand (1,000) head of cattle, or two thousand (2,000) head of any other livestock or twenty-five thousand (25,000) fowl are on feed, or any combination based on this ratio."[65]

In Madison County the focus is on the density of the operation. A commercial feedlot is defined as "[a]ny tract, lot, or parcel of land used primarily for the commercial feeding of livestock, cattle, hogs or sheep, where the average number of head of cattle exceed 150 per acre or where the average number of hogs or sheep exceed 1,000 per acre."[66]

In Story County the focus is on who owns the operation: "A feedlot as defined herein, under joint or corporate ownership or control and where livestock feed is not grown on the premises."[67]

Perhaps the most interesting definition of "commercial feedlot" is that contained in the Mitchell County ordinance which defines it as "a commercial venture involving the assemblage of livestock for the express purpose of preparation for market, purchasing over 75% *of its feed.*"[68]

Regardless of the definition used by a county for a commercial feedlot, the effect of satisfying it generally results in restrictions both on the location and operation of a facility. Often counties may require the operator to obtain a permit from the board of supervisors, as in Pocahontas County,[69] or from the county board of health, as in Madison County.[70]

More common and certainly more significant than permit requirements, however, are the various forms of set-back requirements imposed on commercial feedlots. These vary greatly depending on the district in which the facility is located or to which it is adjacent. Set-back requirements range from the Pocahontas[71] and Story[72] Counties' requirements that feedlots operated in agricultural zones be located at least one mile from the boundary of any residential district or the corporate limits of any city, to the more common one thousand feet and one-quarter mile set-back requirements found in Madison[73] and Mitchell Counties,[74] respectively.

The third type of restriction that some county ordinances place on agriculture is the outright ban of certain types of agriculture in numerous areas of the county.[75] County zoning ordinances typically divide counties into a number of districts, including agricultural, residential, commercial, and in-

65. Pocahontas County, Ia., Zoning Ordinance art. IV, § 400.15(a) (June 1979).
66. Madison County, Ia., Zoning Ordinance § 4(15) (Dec. 1969).
67. Story County, Ia., Zoning Ordinance art. II (June 1977).
68. Mitchell County, Ia., Zoning Ordinance art. V(14) (1980)(emphasis in original).
69. Pocahontas County, Ia., Zoning Ordinance art. VII, § 710.5 (June 1979).
70. Madison County, Ia., Zoning Ordinance § 9(A)(15) (Dec. 1969).
71. Pocahontas County, Ia., Zoning Ordinance art. VII, § 710.5 (June 1979).
72. Story County, Ia., Zoning Ordinance art. VII(A)(7) (June 1977).
73. Madison County, Ia., Zoning Ordinance § 9(A)(15) (Dec. 1969).
74. Mitchell County, Ia., Zoning Ordinance art. VII(A)(1) (1980).
75. *See, e.g.*, Black Hawk County, Ia., Zoning Ordinance (June 1980).

dustrial.[76] The ordinance establishes, *inter alia*, the types of uses allowable in these districts, the restrictions on their operation, and the conditions for establishing other permitted uses.[77] Every county has a type of district generally called "agricultural," which allows the relatively unlimited operation of agricultural activities.[78] For most other districts, however, significant restrictions or outright bans are placed on agricultural operations. In Black Hawk County, for instance, in an "R-1" residence district the following is a principal permitted use: "Farming and truck gardening but not on a scale that would be obnoxious to adjacent areas because of noise or odors. This provision shall not be construed to allow livestock husbandry of common farm-type animals."[79]

In Story County, a new Agriculture/Residential Zone District was created in 1978. However, within these districts agricultural uses are allowed, "provided that no offensive odors or dust are created, but not including commercial nurseries, commercial greenhouses, truck gardens, feedlots and kennels."[80]

The ordinance further provides that livestock are permitted only if their density does not exceed one cow or horse or three sheep, swine, or goats, or five poultry or other small animals, per acre.[81] In addition, most counties establish several districts where no mention is made of any permitted agricultural uses, thereby completely banning such uses.

When the type of wholesale restrictions on agricultural uses set forth above are viewed in the aggregate, they represent a significant challenge to both agriculture and the viability of section 358A.2. Before discussing the problems inherent in their provisions and the serious dangers they represent for the state's agricultural sector, it is important to first review why counties have enacted such restrictions, even in light of section 358A.2.

County officials view county zoning as a mechanism to plan and direct the development of the county land base in the manner most economically and socially rewarding to the people of the county. To do so requires the ability to deal with the county as an entity. However, this task is clearly made difficult by section 358A.2, especially if that provision is interpreted literally to mean that a whole section of the county, which is often the most significant in terms of land and economy, is immune from restriction. The failure of the legislature to provide objective standards to interpret the exemption exacerbates this situation. Understandably, this leads to counties substituting their own definitions of what the exemption means, and, given the bias of county officials toward more complete regulation, results in more

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* § XI(A)(6).
80. Story County, Ia., Zoning Ordinance art. VII-A(A)(6) (March, 1978).
81. *Id.*

significant restrictions on agriculture as documented above.

The county's attitude toward regulating agriculture is also understandable in light of the traditional approach to urban zoning which is based on the concept of cumulative uses, or "highest and best" uses for land.[82] Under this approach, building houses on land is always a higher and better use than leaving the land as open space; and zoning districts are designed to allow this "upgrading" of the land's use.[83] The difficulty occurs when county officials take the traditional "cumulative" use approach of urban zoning and apply it to rural lands. A good example of this is apparent in the type of restrictions placed on agriculture uses within, and the operation of feedlots adjacent to, low density suburban residential districts. Notwithstanding the nuisance-avoiding justifications, the priority given the residential use vis-a-vis the agricultural use indicates that residential use is viewed as the "higher" or "better" use for the land. A persuasive argument can be made, however, that the application of traditional cumulative use concepts in this manner to agriculture areas is wrong, both in terms of the economic significance agriculture has for the state's economy and particularly in light of the language of section 358A.2. This is true because, when viewed literally, section 358A.2 can be seen as meaning that "agricultural" uses are the highest and best use of land in a county and, therefore, are not to be restricted. Therefore, while a county could, for instance, restrict the locations where houses could be built in rural areas, it could place no zoning-based restrictions on either the location or operation of any agricultural activities. While this is clearly different than the approach now taken and perhaps contrary to traditional zoning concepts, such a view more closely fits a literal interpretation of the "freedom to farm" intent of section 358A.2, and more adequately protects the strong interest the state has in the vitality of its agricultural sector.

To allay the fears of those who might feel that such a literal interpretation of section 358A.2 would create an unreasonable potential for nuisance conflicts between developed and agricultural land, it must be remembered that a number of other provisions of the law would prevent such a result. Among these provisions are federal and state environmental quality rules regarding the location and operation of feedlots,[84] city zoning ordinances which can have extraterritorial application, although subject to the agricultural exemption,[85] and common law nuisance suits.[86] The point is not that

82. For a discussion of the relation of the concept of cumulative use to agriculture zoning, see Jurgensmeyer, *Introduction, State and Local Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463, 473 (1980).

83. *Id.*

84. For a listing of these various provisions, see IOWA CODE § 172D.3 (1981), *See also* McCarty & Matthews, *Foreclosing Common Law Nuisance for Livestock Feedlots: The Iowa Statute*, 2 AGRIC. L. J. 186 (1980).

85. *E.g.*, IOWA CODE § 414.23 (1981).

86. *See* McCarty & Matthews, *supra* note 84, at 193-97.

agriculture is or should be completely unrestricted; the point is that it cannot be regulated under the guise of chapter 358A. This does not judge the reasonableness or necessity of other legally enacted restrictions.[87]

Regardless of the reasons for their enactment, there are a number of problems inherent in the type of restrictive regulations discussed above that effect their enforceability. First, section 358A.2 does not appear to sanction the establishment of minimum acreage requirements because the exemption is not stated in terms of the size or quantity of use, but instead focuses on the nature of the use. There is no reason to believe that a tract smaller than forty acres cannot be agriculturally useable. Many fields in Iowa are smaller than that. Second, if the focus on "farm" implies a necessity for a complete agricultural unit, that too is without justification. Many operations smaller than forty acres, such as orchards, apiaries, and confinement livestock facilities are economically viable. Third, the exemption no longer contains an economic sufficiency test, as it did at the time of the 1953 opinion. Even with such a requirement, that opinion held that minimum acreage requirements were not allowable under the exemption.[88] At least one district court has agreed with this view by refusing to convict an individual for constructing a building without a permit in violation of the forty-acre requirement of a county zoning ordinance.[89] Fourth, the use of minimum acreage requirements to preserve agricultural land appear to be enforceable only if the restriction is placed on the lot needed to build a rural residence, as in Mitchell County,[90] rather than on the definition of farming. To rest agricultural land preservation policies on the questionable basis of restricting the agriculture exemption creates unnecessary uncertainty about the effectiveness of the provisions, especially when land use plans enacted under a county's home rule powers are available to do the job.[91]

As to the numerous restrictions placed on the operation of feedlots,

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87. It is important to note that the recent enactment of Iowa Code chapter 172D (1981), complicates the Iowa law regarding the applicability of county zoning ordinances to feedlots. That Chapter establishes a mechanism to provide feedlot operators with a defense to nuisance suits, conditioned on compliance with both applicable zoning ordinances and environmental protection regulations. Section 172D.3 establishes a phased requirement for feedlot compliance with zoning ordinances; however, the definition of "zoning requirement," in section 172D.1(12) says that nothing in the chapter empowers the enactment of such an ordinance or regulation. Thus, the unresolved legal question is whether the legislature by enacting chapter 172D revoked the section 358A.2 exemption as to feedlots. For an indepth analysis of the issues raised by chapter 172D, see McCarty & Matthews, *supra* note 84.

88. *See* text accompanying notes 5-6 *supra*.

89. State v. Anders, No. 6223, Crim. (Warren Co. Dist. Ct. Aug. 31, 1979). Warren County subsequently amended the definition of agriculture to lower the acreage requirement to 20 acres. *See* Warren County, Ia., Zoning Ordinance art. I, § 14 (1979).

90. *See* note 63 *supra*.

91. For instance, Warren and Story Counties have enacted county land use ordinances. The power to do so is found in the Iowa Constitution. IOWA CONST. art. III (1846, amended 1978).

these too are of questionable enforceability. There is no basis in chapter 358A for the distinction made between "commercial feedlots" and normal animal husbandry, which without question is included in the accepted definition of "agriculture." Only adoption of the *Farmegg* theory, distinguishing commercial operations and normal agricultural operations based on their size or economic organization, supports such restrictions. This theory, however, ignores the changing nature of animal agriculture in this state in which animals are more and more likely to be produced in large facilities, often in confinement. Although the structure and economic organization of animal production may be changing, the facilities continue to be predominantly owned and operated by traditional farm families and, in any case, certainly retain their agricultural nature. Finally, the outright ban of many types of agricultural activities in large areas of a county is completely unenforceable in light of the language of section 358A.2.

More important than the unenforceability of any of these separate ordinances is the danger created for the state's agricultural sector. First, the court's interpretation and the county ordinances discussed above clearly violate the "freedom to farm" intent of the section; second, they violate the strong public policy in favor of preserving prime agricultural land; and third, the use of a shifting definition of "agriculture" creates the potential for the imposition of more serious limitations on the agricultural sector.

A sharply focused concern arising from current interpretations of section 358A.2 is that its effect may be counter to the strong state policy regarding the preservation of agricultural land. The Iowa Supreme Court in two recent cases has noted the importance of agriculture to the state. The first, *Woodbury County Soil Conservation District v. Ortner*,[92] upheld as valid statutorily based restrictions on agricultural practices designed to prevent soil erosion.[93] The second, *Montgomery v. Bremer County Board of Supervisors*,[94] upheld the rezoning of a tract of rural farmland to industrial under a county zoning ordinance.[95] The case did not involve a question of the interpretation of section 358A.2; but significantly, the court did say that "[t]his state has a vital public interest in preserving the open spaces devoted to agriculture. Agriculture is our leading industry. . . . Good stewardship requires us to protect our land and soil for future generations."[96] The court added that it would have preferred to see the land remain in agricultural production, but it would not substitute its judgment for that of the board of supervisors.[97]

These cases show an increasing awareness by the court of the signifi-

92. 279 N.W.2d 276, 278 (Iowa 1979).
93. *Id.* at 279.
94. 299 N.W.2d 687 (Iowa 1980).
95. *Id.* at 697.
96. *Id.* at 696.
97. *Id.*

cance of agriculture to the state, perhaps in a fashion not evidenced in the earlier *Farmegg* and *Patz* decisions. Unfortunately, a strong case can be made that the court's earlier interpretation of section 358A.2, as implemented by the counties, has the effect of violating the public policy so recently enunciated by the court. This violation occurs in two ways. First, the restriction on agriculture contained in county ordinances limits farming opportunities in some counties. For instance, a restrictive size-based definition of "farm" may limit the ability of a new or beginning farmer to get started in agriculture, particularly one who would begin by using a labor-intensive animal production facility, a traditional method of entry into agriculture. Second, beyond simply limiting agricultural opportunities, such restrictions may combine to actually encourage the conversion of agricultural land to non-farm uses. This conversion arises out of the fact that under county ordinances large areas may be off-limits to agriculture, or certain other types of activities, in particular large-scale livestock facilities. As an example, in Story County a farmer could own 640 acres of land, but if his tract bordered on a residential district or on the boundary of an incorporated city or town, because of the one mile set back requirement, the farmer would be completely prevented from operating a "commercial feedlot."[98] Continued economic vitality of a farm operation, however, requires the flexibility to change what products will be produced in response to market conditions. This is part of the concept of "freedom to farm" embodied in section 358A.2. Yet in the case of the Story County farmer, removal of the opportunity to operate a commercial feedlot will make the farm unit less economically viable. As a result, the farmer may be forced to: (a) restrict his operations solely to land-intensive and possible erosive row crop farming; (b) sell the land and move to an unrestricted area; or (c) sell the land and give up farming entirely. If either (b) or (c) occurs, in all likelihood all or part of the land will be purchased by developers due to its proximity to a residential development. The land may then be converted out of agricultural use.

Another area of concern is the overall effect that the present interpretation of section 358A.2 has for the agricultural sector of the state in general. The concern created by the court's introduction of a "commercial" versus "traditional" agriculture test in the *Farmegg* and *Patz* cases is that if the court so desired, it could rule that other sectors of agriculture, in addition to poultry farming, are no longer agricultural. As noted previously, while the practical effect of such an exercise is limited, the legal effect may be more severe. Certainly the immediate legal effect of such an action would be to deny the operator the protection of section 358A.2. The effect of the court's categorization of the operation, however, could probably not be limited solely to the context of the applicability of a county zoning ordinance.

The questions of who is a farmer and what is agriculture have signifi-

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98. *See* text accompanying note 72 *supra*.

cance in a number of other important legal contexts. A recent case from the State of Washington is a prime example of what the possible side effects of ruling that the operators of large-scale feedlots are not farmers could be.[99] The case involved a suit filed by several large feedlot operators against a number of meat packers under the Washington Consumer Protection Act.[100] The meat packers counterclaimed under the antitrust laws claiming that the feeders' regular conference calls represented illegal price fixing.[101] The feeders' defense was that they were "farmers," and the "association" evidenced by their calls were exempt from antitrust laws under the agriculture exemption of the Capper-Volstead Act.[102] The Washington court, in answering the meatpackers' claim that the operators of large cattle feedlots were not "farmers" or "ranchers" but instead "middlemen," said:

> Agriculture has changed substantially over the last 50 years. Now agricultural operations are frequently very specialized, with different aspects of an agricultural commodity's production being accomplished by different individuals or enterprises. Cattle feeders today serve precisely the same function in raising, caring for, and marketing cattle that earlier ranchers did. The major difference is that now cattle are often fattened in enclosed pens, rather than on the open range. *Such a change is not significant for the purpose of the exemption statutes* . . . the cattle feeders are primarily engaged in the raising of an agricultural product.[103]

The language used by the court is significant in considering how to interpret the exemption of section 358A.2 in changing times. The Washington court was able to appreciate that regardless of how agriculture may change as to economic concentration and methods of operation, its essence, that of producing agricultural products, does not change. To date, the Iowa Supreme Court has not indicated an ability or willingness to view agriculture in this context, even though to use its own words, "Iowa is the leading agricultural state in the Union."[104]

If the Washington case had been decided in Iowa, would the court have ruled that operators of large feedlots were not farmers and thus did not deserve the protections of the Capper-Volstead Act? It is the possibility of just that type of ruling that vividly demonstrates *why* the court's previous interpretations of section 358A.2 present a far greater danger to the agricultural sector of this state than simply the effect of a zoning ordinance. The present interpretation of the section creates the possibility of significant disruption of the agricultural sector, and represents a misunderstanding of agriculture and a failure to comprehend the "freedom to farm" intention of

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99. Golob & Sons v. Schaake Packing Co., 93 Wash. 2d 257, 609 P.2d 444 (1980).
100. *Id.* at ___, 609 P.2d at 445.
101. *Id.*
102. *Id.*
103. *Id.* at ___, 609 P.2d at 447 (emphasis added).
104. Benschoter v. Hakes, 232 Iowa 1354, 1362, 8 N.W.2d 481, 486 (1943).

section 358A.2. It is certainly not too late for this situation to be remedied, however, and for the agricultural sector to be given the protection it once received. But, this cannot be done without some action being taken to clarify or redefine the purpose of section 358A.2.

There are a number of ways in which this result could be achieved. The easiest and most appropriate method of resolving the current situation would be to retain the present section 358A.2, but have the court provide a more understandable interpretation of the section in order to guide county officials in their zoning efforts. If the court, when it next considers section 358A.2, would regard the exemption in the enlightened manner of the Washington court, many of the present concerns about earlier interpretations could be alleviated. An interpretation of section 358A.2 that appreciates the changing nature of agriculture, but which recognizes the timeless essence of the sector—that of producing food and fiber—would breathe new life into the "freedom to farm" idea embodied in the exemption.

A second approach would involve legislative clarification of the exemption by restating it in terms that would be more easily converted into an objective standard to be implemented by counties. For instance, the legislature could adopt a definition of farming similar to that used by the United States Department of Agriculture which establishes a minimum dollar value for the goods produced by an agricultural enterprise before it can be viewed as a farm.[105] Such clarification would serve two purposes. First, it would clarify the actual meaning and thus the effect of the provision; and second, it would give the legislature a change to restate the exemption in whatever manner it felt necessary to protect the agricultural community.

A third approach would be for counties that have zoning ordinances to review them and reconsider those provisions that impact on agriculture. Such a re-examination may reveal an unintentional bias that favors the conversion of land away from agriculture. Redrafting county ordinances to reflect a more faithful interpretation of section 358A.2 could help counties avoid serious challenges to the enforcibility of county zoning ordinances and the policies based thereon.

Finally, a fourth solution would be for the state to consider implementation of a more complex method for preserving agricultural land and farm enterprises, such as agricultural districting legislation.[106] In fact, the legislature is now considering a state land use law that would incorporate elements of agricultural districting. Hopefully it will not require draconian regulatory measures for the state to create a healthy and workable environment for its most important industry.

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105. *See* A Time to Choose: Summary Report on the Structure of Agriculture, U.S. Department of Agriculture (1981).

106. For an excellent discussion of the problems inherent in agricultural zoning and of the other methods of preserving farmland, see Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECON. L.Q. 655 (1980).

The state already has a significant provision in the law that could help promote and protect agriculture if it is given an opportunity to work. However, the exemption of section 358A.2 and the "freedom to farm" which it attempts to forward can only be an effective safeguard of the agricultural sector if it is interpreted in a reasonable and forthright manner. This Article has demonstrated that past court interpretations and county implementations of the exemption have failed to recognize the importance of the provision. If the state is to continue as the nation's premier agricultural power, it must take measures to create the proper working environment for agriculture. A clarification of section 358A.2 and a recognition of the intent of its drafters is an important step in creating such an environment. Failure to do so will continue to place unnecessary and unworkable burdens on the state's agricultural community.