An Agricultural Law Research Article

"Right to Farm" Statutes –The Newest Tool in Agricultural Land Preservation

by

Randall Wayne Hanna

Originally published in FLORIDA STATE UNIVERSITY LAW REVIEW
10 FLA. ST. U. L. REV. 415 (1982)

"RIGHT TO FARM" STATUTES—THE NEWEST TOOL IN AGRICULTURAL LAND PRESERVATION

RANDALL WAYNE HANNA

The seemingly inexhaustible supply of agricultural land and open space that America was so blessed with is rapidly diminishing. In fact, the irretrievable commercial development of agricultural land is reaching near epidemic proportions. Approximately three million acres are converted each year from agricultural to nonagricultural uses, with one-third of that coming from the nation's cropland base.[1] In addition, "[b]y the year 2000, most if not all of the nation's 540 million acre cropland base is likely to be in cultivation."[2]

Several reasons have been cited for this rapid loss of available farmland, including economic problems,[3] increased demand for agricultural exports,[4] and urbanization.[5]

The decline has caused many to become concerned.[6] Worries about losing cheap and dependable food supplies, disenchantment with sprawling urban development, concern about the loss of rural lifestyles, "a preference for the visual and aesthetic amenities associated with rural land, and the belief that the decline of agriculture as an industry will result in economic losses to local communities"

---

1. NATIONAL AGRICULTURAL LANDS STUDY, 1981 Final Report 8 (1981). The "cropland base" is the number of acres of land in America that is suitable for growing crops.

2. *Id.*

In Florida alone more than 639,000 acres of "prime" farmland were shifted from agricultural to nonagricultural uses between 1958 and 1977. Fla. H.R., Committee on Agriculture & General Legislation, Staff Report, Agricultural Lands in Florida, 18 (1981). In addition, since 1970 the state has lost more than 110,000 acres in citrus. *Id.* at 20.

3. *See* Wershow, *Agriculture and the Law*, 54 FLA. B.J. 29 (1980); *see also* Batie and Looney, *Preserving Agricultural Lands: Issues and Answers*, 1 AGRIC. L.J. 600, 603 (1979-80).

4. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1.

5. About 10% of the cropland lost each year is lost to urban development. Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECOLOGY L.Q. 655, 658 n. 11 (1980) (citing Krause & Hair, *Trends in Land Use and Competition for Land to Produce Food and Fiber*, U.S. DEP'T OF AGRICULTURE, PERSPECTIVES ON PRIME LANDS 16 (1975)).

6. An inherent human right to protection of the ultimate source of our nation's food supply, the land on which it is grown can be judicially protected "against action by any person or department of government which would destroy such a right. . . ." As hunger stalks even our United States, there can be no more fundamental human right entitled to constitutional protection than the right to a share in the natural abundance of our land.

Yannacone, *Agricultural Lands, Fertile Soils, Popular Sovereignty, The Trust Doctrine, Environmental Impact Assessment and the Natural Law*, 51 N.D.L. REV. 615, 652 (1975) (quoting Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34, 40 (Colo. 1962)).

have all stimulated a variety of governmental efforts to halt the conversion of agricultural land to nonagricultural uses.[7]

A discussion of the various policies and arguments behind the preservation of agricultural land is beyond the scope of this comment. However, the subject has been and will continue to be the topic of discussion among many researchers, land use planners, farmers and others. Once the decision has been made to initiate programs to save agricultural lands, the states have a variety of tools available to accomplish their purpose. This article will present a brief analysis of the various mechanisms used to preserve agricultural lands[8] and then will explore in depth a dramatic action that has been taken by most of the nation's state legislatures - the abrogation of the common law nuisance doctrine as it relates to the right to farm under certain circumstances.

I. VARIOUS TOOLS USED

A. Federal Programs

Until recently the loss of agricultural land had not been seen as a national issue. However, as the issue has intensified in scope and concern, several administrative and congressional actions have directly and indirectly affected the subject of preserving agricultural lands.

The National Environmental Policy Act[9] and the A-95 Review Process[10] require federal, state, and local governments to consider farming and farmland preservation goals when evaluating the environmental impact of more than one hundred major federal programs. They must also consider the relation of individual projects to regional comprehensive planning goals.[11] But the impact of these programs on the retention of agricultural land is questionable. Interviews with federal officials show that agricultural land considerations must be more specifically designated in these pro-

7. Geier, *supra* note 5, at 655.

8. An in-depth presentation of the mechanisms used is beyond the scope of this comment. It will only present a brief analysis of the federal and state programs designed to save agricultural land. For excellent comprehensive reviews on both the state and federal laws on the subject of farmland preservation see Batie and Looney, *supra* note 3; Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119 (1979).

9. 42 U.S.C.S. §§ 4321-61 (Law. Co-op. 1982).

10. *See* OFFICE OF MANAGEMENT AND BUDGET, Circular No. A-95 (1976).

11. Keene, *supra* note 8, at 123.

grams or the "effective identification of adverse agricultural land impacts will be limited."[12]

During the Carter administration both the Farmers Home Administration (FmHA), a rural credit agency of the United States Department of Agriculture, and the Environmental Protection Agency adopted programs providing for review and attempted mitigation of federal agency impact upon agricultural land.[13] For example, one of FmHA's functions is to provide loans for multifamily housing in rural areas. An approach taken in some states was to require loan applicants to show that the land to be developed for housing was not prime agricultural land and that no less-productive land was available. Initial reports show that the Reagan administration is continuing this and related programs.[14]

Two of the more important congressional enactments touching on the subject are the Tax Reform Act of 1976[15] and the Economic Recovery Tax Act of 1981,[16] both dealing with estate and gift taxes. Estate taxes have always been a major problem for farm families because their primary asset, real estate, is included in the gross estate at its highest and best use value.[17] In order to pay the large estate tax, it is often necessary to sell the farm.[18] This has two effects. It deprives the family of the deceased of its main source of income and it may remove productive land from agricultural use if the purchaser chooses not to farm the land.

The Tax Reform Act of 1976 allows the land to be assessed at its value as a farm rather than its highest use value.[19] The Economic Recovery Tax Act of 1981 supplemented this by decreasing the maximum tax rates of the 1976 act and increasing that portion of an estate which can be devised without being subject to taxation.[20] Although it is too early to determine the impact of these statutes

---

12. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 76.
13. *Id.*
14. *See* 47 Fed. Reg. 31,699 (1982). However, support for other farmland preservation programs may not be as strong as may be inferred from the Reagan Administration's recent opposition to S.1713, a bill designed to provide special tax breaks for the sale of farmland development rights to state or local governments under qualified farmland preservation programs. Although expressing support for the idea of preserving farmland, Treasury Tax Legislative Counsel William McGee testified that additional tax breaks are unwarranted. DAILY TAX REP. (BNA) No.100, at G-1-2 (May 24, 1982). *See also infra* notes 29-43.
15. Tax Reform Act of 1976, Pub. L. No. 94-455. 90 Stat. 1520.
16. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.
17. 1 J. WERSHOW, FLORIDA AGRICULTURAL LAW, ch. 10, 7 (1981).
18. *Id.*
19. I.R.C. § 2032A (1981). *See also infra* notes 47-61.
20. WERSHOW, *supra* note 17, at ch. 10, 2 (citing I.R.C. § 2010).

on the retention of agricultural land, the possibilities are great that this expansion of the tax rules affecting farmers will encourage families to remain in agriculture.[21]

B. State Programs

Since the passage of the Maryland preferential assessment law in 1956,[22] almost every state has experimented with various methods of preserving agricultural land. Nearly all of the activity, however, has taken place since 1970.[23]

1. Agricultural Districts

Agricultural districts are designed to encourage farming. Unlike zoning, the use of the land in an agricultural district is not completely controlled by the state's police power.[24] Through a voluntary retention program, a single producer or several producers form an agreement with the local governmental unit to retain their land for agricultural purposes in exchange for tax and other incentives.[25] The acts are designed to "keep farmland in production, to protect farmers from rising taxes, and to insure the economic feasibility of farming by releasing some of the farmer's capital investment—all while allowing the landowner to retain his ownership of the land."[26] At least six states have some form of agricultural districting program.[27] The effectiveness of these programs depends upon the combination of the protective elements included within the scheme. Most of the programs are too new to be evaluated. However, statistics gathered from the New York program, enacted in 1971, suggest that it has been successful[28] and that agricultural

---

21. *See* Wershow, *supra* note 17, at ch. 10, 1-14.

22. MD. ANN. CODE art. 81, § 19(b) (1957). The Maryland statute was declared unconstitutional in State Tax Comm'n v. Wakefield, 161 A.2d 676 (Md. 1960). In 1961 the state passed constitutional amendments which cured the defect.

23. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 63.

24. Batie and Looney, *supra* note 3, at 619.

25. R. Clouser and D. Mulkey, An Expanded Review of Agricultural Land Preservation Programs and their Policy Implications 21 (unpublished manuscript on file at College of Agriculture, University of Florida).

26. Wershow, *supra* note 17, at ch. 1, 4.

27. Clouser and Mulkey, *supra* note 25, at 21.

28. A total of 411 agricultural districts have been established in 79% of the state's counties, covering 16% of the state's land area. Estimates are that 53% of the agricultural land in metropolitan areas is also part of agricultural districts. Clouser and Mulkey, *supra* note 25, at 25. *But cf.* NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 65-66 (concluding that the New York program has been ineffective on those areas with immediate prospects for urban development) and Batie and Looney, *supra* note 3, at 621 (suggesting that the

districting may provide a useful pattern for other states to follow as a first step in the development of a comprehensive program for the preservation of agricultural resources.[29]

2. Purchase of Development Rights

Under this program, the local government purchases the development rights to a parcel of land owned by the farmer. This leaves the farmer free to work the land at its current use. The public ownership of an easement allows vigilant officials to restrain efforts to develop the land.[30] The tax burden is decreased because the assessed value is reduced to reflect alienation of the farmer's development rights. As an alternative, the farmer "may elect to give the development rights to the government and receive a charitable deduction on his federal income tax."[31] At least seven states have some type of program involving the purchase of development rights.[32] Because these programs are new, their full impact has not yet been realized. Such a program is much more efficient than an outright purchase of a fee interest because of lower initial costs, a cash exchange for a right in the land, and the fact that an individual landowner continues using the land, thereby carrying some of the tax burden.[33]

However, several commentators have questioned the program because the cost of acquisition to the local government is high and the reduction of the tax base - with the consequent reduction in tax revenues - may be significant.[34] The program may increase the cost of production and encourage "small country estates" as opposed to commercial agricultural operations.[35] In addition, the costs of enforcement must be included.[36] However, if the technical and practical problems can be solved, purchase of development

---

agricultural districting in New York has been "relatively ineffective in reducing the rate of conversion of agricultural land").

29. Myers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1, 38 (1979-80).

30. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 66.

31. Wershow, *supra* note 17, at ch. 1, 5.

32. *See* Clouser and Mulkey, *supra* note 25, at 29-30.

33. Wershow, *supra* note 17, at ch. 1, 5. Of course, the tax rate will be lower because of the reduced assessed value. *Id.*

34. *Id.*

35. Batie and Looney, *supra* note 3, at 609, citing Lesher & Eiler, Farmland Preservation in an Urban Fringe Area: An Analysis of Suffolk County's Development Rights Purchase Program, AE Res. Pub. 77-3, Cornell University (1977).

36. *Id.*, citing Coughlin & Plant, Less Than Fee Acquisition for the Preservation of Open Space: Does It Work? AIP 452 (Oct. 1978); Comment, *The Saskatchewan Land Bank*, 40 SASK. L. REV. 1 (1975).

rights programs should be helpful because it provides landowners an opportunity to farm while being compensated for foregoing more intensive development of their land.[37]

3. *Transfer of Development Rights*

A closely related concept to purchase of development rights is the private market device of transferring development rights (TDR's). Landowners in agricultural areas transfer the development rights of their property to landowners in development areas who wish to engage in higher density development. The local governmental unit makes an initial determination of the size of the agricultural area to be retained and then supervises the transfers.[38]

In addition to preserving agricultural lands, TDR's have been used to preserve historic sites,[39] to create incentives for low income housing[40] and to regulate land use generally.[41]

As with purchase of development rights programs, the transfer of development rights creates an interest separate from the fee. Once development rights have been sold, land use is limited to agriculture, so the impacts may be permanent.[42] However, the effectiveness of the program is still being tested.[43] Among the problems found to date include the nature of compensation[44] and political acceptability.[45]

4. *Tax Incentives*

Real property taxes often can consume fifteen to twenty percent of a farmer's net agricultural income[46] and in many rural-urban

---

37. *See* Peterson and McCarthy, *Farmland Preservation By Purchase of Development Rights: The Long Island Experiment*, 26 DE PAUL L. REV. 447 (1977). *See also* Wershow, *supra* note 17, at ch. 1, 5; Batie and Looney, *supra* note 3, at 610.

38. *See* Clayton and Mulkey, FRE 32, Transfer of Development Rights, University of Florida, 1980.

39. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

40. J. DUKEMINIER AND J. KRIER, PROPERTY, 1202-03 (1981).

41. *Id.*

42. Clayton and Mulkey, *supra* note 38.

43. Transfer of development rights programs for agricultural purposes have been started in municipalities and counties in New York, Pennsylvania, Maryland, Massachusetts, Connecticut and New Jersey. Clouser and Mulkey, *supra* note 25, at 36.

44. Fred F. French Investing Co., Inc. v. City of New York, 352 N.Y.S.2d 762 (N.Y. Sup. Ct. 1973).

45. Batie and Looney, *supra* note 3, at 618.

46. Keene, *supra* note 8, at 137, citing Regional Science Research Institute, Untaxing Open Space: An Evaluation of the Effectiveness of Differential Assessment of Farms and Open Space, 49-56 (1976).

fringe areas they can equal or exceed farm income.[47] Because of this and the concern that high ad valorem property taxes will lead to the loss of agricultural land, nearly all states have adopted a special method of assessing agricultural lands.[48]

The various methods used have been given different names and labels,[49] but the one factor running through all of them is that farmland is assessed not at 100% of its best-use value but at its value as agricultural land.[50]

Many states use a preferential assessment system. Bona fide farming operations are assessed purely on the basis of agricultural use with no penalty if the land is converted to a nonagricultural use. At least seventeen states have this type of pure preferential assessment program.[51] Although each of the statutes varies in some way, Florida's statute is one of the strongest. The county property appraiser grants the agricultural classification based on a set of criteria including the size of the parcel, the length of time the land has been used for agricultural purposes, whether the agricultural use has been continuous, the price paid for the land, whether the land is being cared for in accordance with accepted commercial agricultural practices and whether the land is under lease.[52] Some argue, however, that the pure preferential statute and others like it subsidize developers and farmers, allowing them to hold land until it can be converted into higher intensity uses.[53]

Another approach to differential assessment for agricultural land is the deferred tax method. The property appraiser records both an agricultural use valuation and a full valuation of the property without regard to its agricultural use. If the property is sold for a nonagricultural use a "rollback" provision collects the difference be-

---

47. *Id.*

48. As of 1981, Georgia, Mississippi and Kansas were the only states without some form of preferential use-value assessment program for farmlands.

49. *See* Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821, 821 (1978). *See also* Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 U. KAN. L. REV. 215 (1976-77).

50. *See* Currier, *supra* note 49, at 821.

51. Clouser and Mulkey, *supra* note 25, at 5.

52. FLA. STAT. § 193.461 (1981). Florida was the second state to adopt a use-value assessment program. The first was Maryland. *See supra* note 22. For an excellent synopsis of the Florida law on the subject, see Wershow, *supra* note 17, at ch. 3.

53. Wershow, *Recent Developments in Ad Valorem Taxation*, 20 U. FLA. L. REV. 1, 11 (1967-68); *See* Note, *The Continuing Preferential Tax Treatment Accorded the Florida Land Speculator*, 7 FLA. ST. U.L. REV. 571 (1979); *See also* Cooke and Power, *Preferential Assessment of Agricultural Land*, 47 FLA. B.J. 636 (1973).

tween the two assessments.[54] In other words, the governmental unit recaptures the tax savings if the landowner sells or grants his land prematurely. At least twenty-eight states have some type of deferred taxation program for agricultural lands.[55] Of course, an advantage of a deferred taxation program is that it removes some of the financial incentive for speculators to abuse the intent of the law.[56] On the other hand, some farmers will be penalized even though they have sold their land for what they consider legitimate reasons.

Some states with preferential programs have opted for a rather unique system of restrictive agreements. The landowner agrees to restrict the use of his land for a period of years in return for tax concessions.[57]

Because of increasing urban pressures on fringe agricultural areas, the various ad valorem assessment programs have had their share of problems.[58] In addition, some commentators contend that although differential assessment has been praised as a way of preserving agricultural land, the results have been quite the opposite.[59] There have also been several state constitutional questions regarding the preferential scheme.[60]

However, preferential assessment programs are here to stay, be-

---

54. Nelson, *supra* note 49, at 223.

55. Clouser and Mulkey, *supra* note 25, at 10.

56. Comment, *Assessment To Preserve Agricultural Land: With Application to the Four-State Region of Iowa, Kansas, Missouri and Nebraska*, 47 UMKC L. REV. 629, 633 (1978-79), citing Hady, *Differential Assessment Programs for Agricultural Land*, in LAND USE: TOUGH CHOICES IN TODAY'S WORLD 114, 115 (1977).

57. Comment, *supra* note 56 at 634, citing U.S. DEPARTMENT OF AGRICULTURE, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND 2, 3 (1974). *See* CAL. GOVT. CODE §§ 51200-05.1 (Supp. 1982). For a similar program involving agricultural districts, see *supra* notes 22-27. *See also* VT. STAT. ANN. tit. 24, § 2741 (1975 & Supp. 1982) (providing for contracts between farmers and local governments to fix the tax rate). Michigan and Wisconsin have developed circuit breaker tax credit programs which allow for a tax credit on the agricultural producer's state income tax which exceeds a certain percentage of farm income. Clouser and Mulkey, *supra* note 25, at 13-15.

58. Wershow, *supra* note 53, at 10-11.

59. *See* Myers, *Farmland Preservation in a Democratic Society: Looking to the Future*, 3 AGRIC. L.J. 605, 608 (1981-82). *But see* Currier, *supra* note 49, at 840 (stating that agricultural preferential taxation does serve other purposes such as easing the income squeeze on farmers and "exacerbat[ing] what farmers contend is already an unfair situation—that they pay property taxes disproportionate to the public services they use that are supposedly funded by the property tax."). *Id.*

60. Comment *supra* note 56, at 648 (stating that the uniformity clauses in many of the state constitutions have presented problems for backers of preferential assessment schemes). *See, e.g.* Switz v. Kingsley, 173 A.2d 449 (1961), *aff'd as modified* 182 A.2d 841 (N.J. 1962).

cause of the needed and deserved tax break they give to the land intensive industry, especially in states like Arizona, Florida and California where the land usually includes a high speculative value.

5. Agricultural Zoning

Agricultural zoning is another way to preserve open space and to prevent the destruction of important farmland.[61] While a great deal of effort has been made in establishing state programs in preferential taxation,[62] some contend that too little attention has been paid to zoning as a means of saving agricultural land.[63]

Until recent years most of the agricultural zoning programs have permitted small minimum lot sizes with an open-ended list of permitted nonfarm uses.[64] These statutes have been criticized as not being effective because of the easy conversion to nonagricultural uses.

At least twenty-seven states allow local jurisdictions to zone land for agricultural uses.[65] In addition, some states have begun experimenting with exclusive agricultural zoning which normally discourages or actually prohibits nonfarm use.[66] The use of exclusive agricultural zoning has been touted as a way of excluding incompatible uses if it is combined with minimum lot size requirements and a limit on the number of building permits issued.

Most of the exclusive agricultural zoning plans currently in use contain large minimum lot sizes, a restriction on nonfarm land uses and other restrictions on development.[67]

The size of the lot is probably the most crucial factor. Minimum lot sizes range from less than one acre up to 640 acres.[68] Of course, care must be taken lest the large minimum lot size should result in agricultural land turning into small country estates for urban dwellers.[69]

---

61. 3 P. ROHAN, ZONING AND LAND USE CONTROLS, § 19.01[1] (1978).

62. *See* Juergensmeyer, *Introduction: State and Local Land Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463, 464-65 (1980).

63. *Id.*

64. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 72. *See also* Juergensmeyer, *supra* note 62, at 473 (stating that the result is much the same as in cumulative zoning).

665. Clayton and Mulkey, FRE 29, Exclusive Agricultural Zoning, University of Florida (1980).

66. *Id.*

67. Batie and Looney *supra* note 3, at 608, citing Plant, Urban Growth and Agricultural Decline, unpublished Ph.D. Dissertation, University of Pennsylvania (1978).

68. Batie and Looney, *supra* note 3, at 614.

69. *Id.*

Some serious constitutional questions have been raised with regard to agricultural zoning.[70] Debate has been vigorous as to whether agricultural zoning constitutes a "taking" without just compensation under the fifth amendment.[71] Equal protection questions have also been raised based upon the discriminatory effects of size requirements.[72] In addition, there have been a number of cases concerning whether a particular activity constitutes "farming" as defined in the various statutes and ordinances.[73]

Today, zoning is one of the most frequently used land use devices for controlling depletion of agricultural lands.[74] However, there has not yet been a solid indication of its effectiveness.

> On the one hand, there are strong indications that agricultural zones carefully laid out on the basis of accurate and complete data on soil productivity, land tenure patterns, and agricultural activity, can significantly change the expectations of both farmers and potential developers regarding the development potential of agricultural land. On the other hand, zoning is vulnerable to change if there is a shift in political power.[75]

II. NUISANCE AND ITS RELATION TO AGRICULTURE

Very recently a large majority of the states have in rapid succession abrogated the right to bring a common law nuisance action against farmers under certain circumstances.[76] Most of the legisla-

---

70. "Generally, an agricultural zoning ordinance will be upheld if it 'is grounded upon a health-community-welfare concept and bears a reasonable relationship to the purposes of zoning.' " Rohan, *supra* note 61, at 19.01[2], citing Hourun v. Township Comm. of Union, 238 A.2d 501, 504 (N.J. 1968); *see* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

71. Gisler v. County of Madera, 112 Cal. Rptr. 919, 922 (1974).

72. *Id.; but cf.* County of Lake v. Cushman, 353 N.E.2d 399 (Ill. Ct. App. 1976) (county could not under its zoning ordinance prevent landowner from building poultry barn on his 3.9-acre lot).

73. *See, e.g.*, Jackson v. Building Inspector, 221 N.E.2d 736 (Mass. 1966) (holding that the dehydration for general sale of manure actually produced on the land is proper as a farming activity). *But cf.* Town of Lincoln v. Murphy, 49 N.E.2d 453 (Mass. 1943) (holding that a 55 acre tract used solely for the raising of more than 2000 hogs was not a "farm" within the meaning of the town's zoning ordinance).

74. *See* Juergensmeyer, *supra* note 62.

75. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 73.

76. ALA. CODE § 6-5-127 (Supp. 1981); ARIZ. REV. STAT. ANN. §§ 3-1051—61 (Supp. 1981-82); ARK. STAT. ANN. §§ 34-120—26 (Supp. 1981); CAL. CIVIL CODE § 3482.5 (West Supp. 1982); 1981 Conn. Pub. Acts 81-226 (Reg. Session); DEL. CODE ANN. tit. 3, § 1401 (Supp. 1980); 1982 Fla. Sess. Law Serv. 82-24 (West); GA. CODE ANN. § 41-1-7 (1982); IDAHO CODE §§ 22-4501—04 (Supp. 1982); 1981 Ill. Legis. Serv. 82-509 (West); IND. CODE ANN. § 34-1-52-4 (Burns Supp. 1982); IOWA CODE ANN. § 172D (West Supp. 1981-82); 1982 Kan. Sess. Laws

tion has been passed in the last three years. This rapid and dramatic action by the various state legislatures provides a significant advantage for the farmer in his battle to save agricultural land. This section will explore the nuisance action and the various statutes and their effectiveness in abrogating nuisance liability as tools in the state's overall program of preserving agricultural land.

A. The Nuisance Action

Common law nuisance is a confusing doctrine.[77] Historically, nuisance actions have been divided into two separate categories: (1) private nuisance, which deals with the invasion of interests in the use or enjoyment of land and (2) public nuisance, which extends to "virtually any form of annoyance or inconvenience interfering with common public rights."[78] The two actions have little in common, except that each involves the "element of harm, inconvenience or annoyance to someone."[79]

Modern private nuisance actions can be traced to the action for trespass on the case and the assize of nuisance. A private nuisance action, a tort against land, must always be founded on the plaintiff's interest in the land. [80]

Courts, when considering private nuisance actions, have attempted to strike a balance between the plaintiff's right to use and enjoy his premises and the defendant's privilege of making reasonable use of his own property for his own benefit. "In every case the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the

---

Ch. 3, p.3; KY. REV. STAT. § 413.072 (Bobbs-Merrill Supp. 1980); LA. REV. STAT. ANN. § 51:1202 (West Supp. 1982); ME. REV. STAT. ANN. tit. 17, § 2805 (Supp. 1981-82); MD. CTS. AND JUD. PROC. CODE ANN. § 5-308 (Supp. 1982-83); MASS. GEN. LAWS ANN. ch. 111, § 125A (West Supp. 1981); MISS. CODE ANN. § 95-3-29 (Supp. 1981); MONT. CODE ANN. §§ 27-30-101, 45-8-111 (1981); NEB. REV. STAT. §§ 2-401-02-4404 (Cum. Supp. 1982); N.H. REV. STAT. ANN. § 430-C (Supp. 1981); N.Y. PUB. HEALTH LAW § 1300-C (Consol. Supp. 1981-82); N.C. GEN. STAT. § 106-700—701 (Supp. 1981); N.D. CENT. CODE § 42-04-02 (Supp. 1981); OKLA. STAT. ANN. tit. 50, § 1.1 (West Supp. 1981-82); OR. REV. STAT. §§ 30.930-.945 (1981); S.C. CODE §§ 46-45-10—50 (Law Co-op. Supp. 1981); 1982 Tenn. Pub. Acts ch. 609; TEX. CODE ANN. § 251.001 et seq. (Vernon 1982); UTAH CODE ANN. § 78-38-7 (Supp. 1981); VT. STAT. ANN. tit. 12, § 5751 (Supp. 1982); VA. CODE §§ 3.1-22.6—22.8 (Supp. 1982); WASH. REV. CODE ANN. §§ 7.48.300—.905 (Supp. 1982); WYO. STAT. §§ 11-39-101—104 (1977).

77. "It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." W. PROSSER, LAW OF TORTS 571 (4th ed. 1971).

78. *Id.* at 572.

79. RESTATEMENT (SECOND) OF TORTS § 821 (introductory note) (1977).

80. *Id.* at §§ 821D, 821E.

harm to the plaintiff must be weighed against the utility of the defendant's conduct."[81]

There has never really been any question that farming activities may constitute a nuisance.[82] A plaintiff who brings a private nuisance action against a farmer must also show that the farmer's activity is an unreasonable interference with the use and enjoyment of the plaintiff's land.[83] For example, in nuisance actions against farmers, courts have considered a variety of factors, including the character of the surrounding neighborhood, the location and proximity of the farm to the plaintiff's home, the intensity and volume of the odors, the interference with the plaintiff's well-being and enjoyment and any consequential depreciation in the value of the affected property.[84]

A different analysis is used when a private litigant brings a nuisance action against a defendant for an activity which has been deemed unlawful.[85] The illegality of the activity forecloses the court's consideration of the reasonableness of the defendant's conduct.[86] In addition, the defendant's conduct may constitute both a private nuisance and a public nuisance.[87]

The public nuisance action, on the other hand, is designed to allow the government to abate an activity which is injurious to the health, safety or general welfare of the community.[88] "It is not necessary, however, that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right." Normally a condition or activity which substantially interferes with the private interests of any considerable number of individuals in a community also will interfere with some public right.[89] A public nuisance suit may be brought by a private individual, but the damage that the plaintiff sustains

---

81. Prosser, *supra* note 77, at 596.

82. "[I]f a person keeps his hogs, or other noisome animals, so near the houses of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house." Yeager & Sullivan, Inc. v. O'Neill, 324 N.E.2d 846, 851 (Ind. Ct. App. 1975), quoting *Blackstone's Commentaries*, at 217.

83. 2 N. HARL, AGRICULTURAL LAW § 13.02(2), citing Jones v. Rumford, 392 P.2d 808 (Wash. 1964).

84. Baldwin v. McClendon, 288 So. 2d 761, 764 (Ala. 1974).

85. McCarty & Matthews, *Foreclosing Common Law Nuisance For Livestock Feedlots: The Iowa Statute*, 2 AGRIC. L.J. 186, 194-95 (1980-81).

86. *Id.* at 195.

87. *Id.*

88. *Id.*, citing Prosser, *supra* note 77, at 583-86.

89. Prosser, *supra* note 77, at 583, 585.

must be of a different kind than that suffered by society as a whole.[90]

The plaintiff in a public nuisance action, usually a private individual with special damages or a governmental body, has a higher burden of proof than does a plaintiff in a private nuisance action. This is because of the required proof of the public nature of the harm.[91]

As with private nuisance actions, the court will consider a variety of factors including location, condition and frequency and manner of operation of the activity. However, these factors are not weighed against the benefit to the public in determining whether the activity is reasonable. Rather, they are used only to help find the injury to the public.[92]

In both private and public nuisance actions there are several basic ways in which relief may be granted. As in other tort actions, a prayer for damages will be heard.[93] In some cases, courts will invoke their equity powers and abate the activity by granting injunctive relief if the damages available at law would not be adequate.[94]

A new approach which has generated a great deal of discussion was enunciated in *Spur Industries, Inc. v. Del E. Webb Development Co.*[95]. The court abated the activity but only after the plaintiff, who established a residential community near a previously existing cattle feedlot, indemnified the defendant for his loss.[96]

---

90. *Id.* at 587. *See* Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706 (Ariz. 1972) ("It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance.") *But cf.* McCollum v. Kolokotrones, 311 P.2d 780, 783 (Mont. 1957) (Plaintiff, who was not able to show special damages, was not allowed to bring a suit to enjoin a chicken operation.)

91. Comment, *"Ill Blows The Wind That Profits Nobody": Control of Odors From Iowa Livestock-Confinement Facilities*, 57 IOWA L. REV. 451, 464 (1971). *But cf.* RESTATEMENT (SECOND) TORTS § 821B, comment g (1977) (stating that some states have statutes defining a public nuisance to include interference with "any considerable number of persons." Under these statutes no public right need be shown.)

92. McCarty & Matthews, *supra* note 85, at 196.

93. Harl, *supra* note 83, at § 13.02(4).

94. Prosser, *supra* note 77, at 603. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (holding that no injunction would lie if the defendant paid permanent damages).

95. 494 P.2d 700.

96. *Id.* at 708. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View Of The Cathedral*, 85 HARV. L. REV. 1089 (1972). (This article, a process of a model articulated during the same year as *Spur*, came up with basically the same result. The authors reasoned that the plaintiff would be protected by an injunction only if he gets permission from the owner or pays damages in an amount to be judicially determined.) *See*

For years courts have considered the idea of "coming to the nuisance" as a defense to nuisance actions, with varying results.[97] In recent years the doctrine has not served as a complete bar to nuisance actions,[98] but has been considered in the balancing approach used by the courts.[99] In other words, "the safer and more accurate statement would appear to be that 'coming to the nuisance' is merely one factor, although clearly not the most important one, to be weighed in the scale along with the other elements which bear upon the question of 'reasonable use.' "[100]

At the same time, courts have continued to uphold nuisance actions against farmers even when they are conforming to applicable health and safety standards. In *Pendoley v. Ferreira,* the Ferreiras began the operation of a hog farm in 1949 in what was then a "rural community."[101] In later years the area grew. In fact, more than thirty new homes were built near the farm. Although the hog farm was one of the best operated in the state,[102] the court granted the new neighbors an injunction, and provided the Ferreiras a "reasonable time" to find new premises. Although taking into account that the Ferreiras were in the area first, the court placed great emphasis on the fact that the injury to the farmers was "only economic" while the material interference with the rights of the plaintiffs [was] in the day to day use and comfort of the places where they live."[103]

In the famous case of *Spur Industries,*[104] an area some fourteen or fifteen miles outside of Phoenix had been used primarily for

---

also Dukeminier and Krier, *supra* note 40, at 954; Rabin, *Nuisance Law: Rethinking Fundamental Assumptions,* 63 VA. L. REV. 1299 (1977).

97. "If my neighbour makes a tan-yard so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy [the nuisance coming to the plaintiff]; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue [the plaintiff coming to the nuisance]." Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557 (1980), citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 402 (17th ed. 1830); *see* Dill v. Excel Packing Co., 331 P.2d 539, 548 (Kan. 1958).

98. Kellog v. Village of Viola, 227 N.W.2d 55 (Wisc. 1975).

99. Spencer Creek Pollution Control Ass'n v. Organic Fertilizer Co., 505 P.2d 919 (Or. 1973).

100. Prosser, *supra* note 77, at 611. *See* Annot., 42 A.L.R.3d 344 (1972 & Supp. 1981). *See also* RESTATEMENT (SECOND) TORTS § 840D (1977).

101. 187 N.E.2d 142, 144 (Mass. 1963).

102. "Their piggery is in the upper 5% to 10% of . . . [comparable] piggeries insofar as quality of operation is concerned." In addition, the Boxford board of health was "satisfied with . . . [the] operation of the farm." *Id.* at 144.

103. *Id.* at 146.

104. 494 P.2d 700.

farming since the early 1900's. By 1950 the only nearby urban areas were between two and three miles away. In 1956 a cattle feedlot operation was started in the area. Three years later Del Webb started making plans for the development of an urban area known as Sun City, a retirement village. He was able to purchase the land at a much lower rate than he could have closer to Phoenix.[105] At the same time Spur began a rebuilding and expansion program extending both to the north and south of their original facilities. This work was completed in 1962. Del Webb sold his first home in 1962, some two and one-half miles north of Spur's facilities. Although aware of the large feedlot operation, Del Webb continued building south until 1967. Late that year he filed his original complaint alleging that more than 1,300 lots in the southwest portion were unfit for development because of the flies and the smell.[106]

The court took an apparently novel approach to the case. Instead of opting for one of the traditional choices of damages or injunctive relief[107] the court required Spur to move, but only after being indemnified by Del Webb.[108]

The court's rationale for this decision is exemplified by the following statement in its decision: "Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public."[109] The court did not mention the public's interest in retaining agricultural land.

The court explained its reason for requiring Del Webb to indemnify Spur when it stated:

> It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.[110]

Although the court took the middle road, a seemingly fairer result than in *Pendoley,* the court's decision still had the effect of converting the land to nonagricultural uses. The results in both of

---

105. *Id.* at 702-03. Del Webb paid only $570 per acre for the 20,000 acres of farmland he purchased. *Id.* at 704.

106. *Id.* at 704-05.

107. *See* Harl *supra* note 83 at § 13.02(4).

108. 494 P.2d at 708.

109. *Id.*

110. *Id.*

these cases are good examples of the basic problem. While agricultural land is becoming scarce, courts are using the rather flexible nuisance doctrine to effectively remove productive land from agricultural uses.

Statutes have been passed in an effort to help halt the trends—both the farmland conversion trend and the courts' actions in the nuisance area. In simplified form, the typical state statute provides that a nuisance action cannot be brought against a farm if the farmer has been in operation for a period greater than one year and is not violating applicable health and safety regulations.[111]

Most of this legislative action has been in recognition of the farmer's value to society and because of the concern for the loss of agricultural land.[112] The statutes can also be viewed as a rejuvenation of the "coming to the nuisance" doctrine.

Regardless of the justification the response has been overwhelming. Almost overnight the farmer has received some needed recognition from nearly all of the state legislatures.

B. The Right to Farm Statutes

Although the statutes have been given various names, the most eye-catching and strongest one in terms of exemplifying legislative intent is "right to farm."[113] In all future references in this article, the statutes abrogating the common law nuisance doctrine under certain circumstances will be referred to as "right to farm" statutes. Although each of the statutes has similarities, they can generally be broken down into two separate groups.[114]

1. Right to Farm for General Agricultural Operations

The most common type of right to farm statute provides that a farming operation may not be declared a nuisance if it was not a nuisance when it began, even if conditions have changed in the area where the farm is located.[115] States adopting this type of statute also normally provide that the agricultural operation must

---

111. *E.g.*, 1982 Fla. Sess. Law Serv. 82-24 (West).

112. Many of the statutes refer to preservation of agricultural land as the reason for their enactment. *See infra* notes 117-21.

113. 1982 Fla. Sess. Law Serv. 82-24 (West).

114. *See* Taylor and Quate, State Right To Farm Laws, American Farm Bureau Federation, 1981.

115. *Id.*

have been operating at least one year prior to the filing of the lawsuit and that the alleged nuisance does not involve water pollution or flooding or result from the negligent conduct or improper operation of the agricultural activity.[116]

Most of the statutes in this group first set forth a policy declaration or a legislative findings and purpose section.[117] The most common is exemplified by Georgia's statute, which provides:

> It is the declared policy of the State to conserve and 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 others are discouraged from making investments in farm improvements. It is the purpose of this law . . . to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.[118]

This policy declaration is broad and strong enough to show a legislative intent to protect agricultural operations from encroaching urbanization. Of course, since all of the statutes are new, the impact of the various policy statements in showing legislative intent is yet to be seen. However, in an unofficial opinion, the attorney general of Georgia indicated that the owners who moved a large egg farm into a residential area are not entitled to protection under the statute.[119] In attempting to determine the legislative intent, the attorney general gave great weight to the policy declaration.

> The use of the phrases 'when nonagricultural land uses extend into agricultural areas' and 'changed conditions in or around the locality of [a previously existing agricultural operation'] indicates that the General Assembly was directing this protection from nui-

---

116. *Id.*

117. However, several states in this group do not have policy declarations. Among them are Alabama, Maryland, Michigan, Mississippi, New York, North Dakota, Oregon and Utah.

118. GA. CODE ANN. § 41-1-7 (1981). Of course, in those states having statutes without policy declarations, the courts can utilize other tools in determining the legislative intent. *E.g.*, ALA. CODE § 6-5-127 (Supp. 1981) contains no declaration of legislative intent. *But see* Entertainment Ventures Inc. v. Brewer, 306 F. Supp. 802 (M.D. Ala. 1969) (holding that the title of an act may be looked to in order to ascertain intent and remove uncertainty).

119. U80-51 Op. Att'y Gen. Georgia 473 (1980).

> sance suits to agricultural operations that are subject to encroachment by nonagricultural land uses.[120]

However, in this case the chicken farmer moved his operation to the residential area so the owners would not be entitled to protection under the act.

By referring to the policy declaration, the Georgia attorney general illustrated the great weight customarily given to policy declarations and legislative findings when determining legislative intent. Therefore, the clearer and stronger the statement, the less likely there will be deviations from the statute's purpose.

In this regard, Vermont and Florida appear to have the strongest policy statements. The Florida statute provides the following statement of legislative policy:

> The Legislature finds that agricultural production is a major contributor to the state's economy; that agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of agricultural activities preserves the landscape and environmental resources of the state, contributes to the increase of tourism, and furthers the economic self-sufficiency of the people of the state; and that the encouragement, development, improvement and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state. The Legislature further finds that agricultural activities conducted on farm land in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance, and that these suits encourage and even force the premature removal of the farm land from agricultural use. It is the purpose of this act to protect reasonable agricultural activities conducted on farm land from nuisance suits.[121]

Even though the courts will often give great weight to it, the policy declaration is not the main substance of any statute.[122]

Most of the statutes in this group contain a list of definitions. For example, Maine defines "farm," "farm operation," and "farm product" very broadly.[123] "Farm" is defined as the "land, buildings

---

120. *Id.* at 474.

121. 1982 Fla. Sess. Law Serv. 82-24 (West); *see also* VT. STAT. ANN. tit. 12, § 5751 (Supp. 1982).

122. If language used in the statute is understandable and plain, the court should gather legislative intent from the language used and not resort to rules of statutory construction. State *ex rel.* Appling v. Chase, 355 P.2d 631 (Or. 1960).

123. ME. REV. STAT. ANN. tit. 17, § 2805 (Supp. 1981-82).

and machinery used in the commercial production of farm products."[124] "Farm products" are defined as "those plants and animals useful to man and includes, but is not limited to forages and sod crops, grains and food crops, dairy products, poultry and poultry products, bees, livestock and livestock products and fruits, berries, vegetables, flowers, seeds, grasses and other similar products."[125] "Farm operation" is "a condition or activity which occurs on a farm in connection with the commercial production of farm products."[126] By providing a very broad list of definitions, the Maine Legislature has extended the protection under the act to a large number of farmers and agriculturists.[127]

Most of the statutes provide a one-year limitation on the bringing of nuisance actions. The North Dakota statute is typical in this regard:

> An agricultural operation is not, nor shall it become, a private or public nuisance by any changed conditions in or about the locality of such operation after it has been in operation for more than one year, if such operation was not a nuisance at the time the operation began.[128]

Mississippi, on the other hand, has developed a slightly stronger statement:

> In any nuisance action, public or private, against an agricultural operation, proof that said agricultural operation has existed for one (1) year or more is an absolute defense to such action, if the conditions or circumstances alleged to constitute a nuisance have existed substantially unchanged since the established date of operation.[129]

Although states such as Mississippi have made strong statements about "absolute defense," others state only that the agricultural activities are presumed to be reasonable and not a nuisance. For example, the Vermont statute provides:

> Agricultural activities conducted on farmland, if consistent with

---

124. *Id.* at subsection 1A.
125. *Id.* at subsection 1C.
126. *Id.* at subsection 1B.
127. For a similar but slightly broader list of definitions see 1982 Fla. Sess. Law Serv. 82-24 (West).
128. N.D. CENT. CODE § 42-04-02 (Supp. 1981)
129. MISS. CODE ANN. § 95-3-29 (Supp. 1981).

> good agricultural practices and established prior to surrounding non-agricultural activities, shall be entitled to a rebuttable presumption that the activity is reasonable and does not constitute a nuisance. If an agricultural activity is conducted in conformity with federal, state, and local laws and regulations, it is presumed to be good agricultural practice not adversely affecting the public health and safety. This presumption may be rebutted by a showing that the activity has a substantial adverse effect on the public health and safety.[130]

A few states have adopted a one-mile radius standard instead of the one-year limitation.[131] The state of Washington has adopted a unique position by protecting against government over-regulation in addition to the normal protection against nuisance actions.[132]

One of the major problems in most of these statutes will be the determination of an "established date of operation." Although many of the statutes are silent on the subject, several states have attempted to provide in-depth criteria and standards for the courts to use. Mississippi provides:

> 'Established date of operation' means the date on which the agricultural operation commenced operation. If the physical facilities of the agricultural operation are subsequently expanded, the established date of operation for each expansion is deemed to be a separate and independent "established date of operation" established as of the date of commencement of the expanded operation and the commencement of expanded operation shall not divest the agricultural operation of a previously established date of operation.[133]

Florida's version is slightly different:

> If the farm operation is subsequently expanded within the original boundaries of the farm land, the established date of operation of the expansion shall also be considered as the date the original farm production commenced. If the land boundaries of the farm are subsequently expanded, the established date of operation for each expansion is deemed to be a separate and indepen-

---

130. VT. STAT. ANN. tit. 12, § 5753 (Supp. 1981). *See also* OKLA. STAT. ANN. tit. 50, § 1.1 (West Supp. 1981-82); ARIZ. REV. STAT. ANN. § 3-1061 (Supp. 1981-82).

131. *See, e.g.*, 1982 Tenn. Pub. Acts ch. 609.

132. WASH. REV. CODE ANN. §§ 7.48.300—.905 (Supp. 1982).

133. MISS. CODE ANN. § 95-3-29 (Supp. 1981).

dent established date of operation.[134]

Many of the states also provide that the statute does not apply when the farming or agricultural operation is conducted negligently.[135]

Some of the states also provide for exceptions. By expressly providing for exceptions in their statutes, the legislatures are apparently attempting to limit the inroads by the courts.[136] This is evident in the Florida statute which has a rather unique list of exceptions:

> The following conditions shall constitute evidence of a nuisance:
>
> 1. The presence of untreated or improperly treated human waste, garbage, offal, dead animals, dangerous waste materials or gases which are harmful to human or animal life.
>
> 2. The presence of improperly built or improperly maintained septic tanks, water closets, or privies.
>
> 3. The keeping of diseased animals which are dangerous to human health unless such animals are kept in accordance with a current state or federal disease control program.
>
> 4. The presence of unsanitary places where animals are slaughtered which may give rise to diseases which are harmful to human or animal life.[137]

Finally, some of the statutes in this group contain a severability clause,[138] and a contract clause providing that the act only applies to contracts entered into after the statute was passed.[139]

2. *Right to Farm for Specific Agricultural Activities*

The second group of statutes serve to protect specific types of activity. The Iowa statute,[140] enacted in 1976,[141] provides an absolute defense to nuisance suits against livestock feedlots if the feed-

---

134. 1982 Fla. Sess. Law Serv. 82-24 (West).

135. *E.g.*, S.C. CODE § 46-45-30 (Law. Co-op Supp. 1981) in relevant part provides: "The provisions of this section shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or its appurtenances."

136. *See* Thayer v. State, 335 So. 2d 815 (Fla. 1976) (applying the doctrine expressio unius est exclusio alterius).

137. 1982 Fla. Sess. Law Serv. 82-24 (West).

138. WASH. REV. CODE ANN. §§ 7.48.900—.905 (Supp. 1982).

139. N.C. GEN. STAT. §§ 106-700-01 (Supp. 1981).

140. IOWA CODE ANN. § 172D (West Supp. 1982-83).

141. Iowa was the first state to enact a "Right to Farm" statute.

lots are in compliance with state environmental regulations and zoning ordinances. Enacted with the support of the Iowa Pork Producers' Association and the Iowa Cattlemen's Association[142] and over the objection of the Iowa Attorney General,[143] the statute has apparently been a success.[144]

The statute is based upon the common law defense of "coming to the nuisance":

> In any nuisance action or proceeding against a feedlot brought by or on behalf of a person whose date of ownership of realty is subsequent to the established date of operation of that feedlot, proof of compliance with [applicable environmental and zoning laws] shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with [applicable environmental and zoning laws].[145]

Massachusetts takes a slightly different approach. The same provision that provides for a board of health to abate farm activities also provides "that the odor from the normal maintenance of livestock or the spreading of manure upon agricultural and horticultural lands shall not be deemed to constitute a nuisance."[146]

The Connecticut legislature also decided to specifically list the types of agricultural activity protected. Its statute provides that the following activities will not be deemed a nuisance if the one-year requirement has been met:

> (1) odor from livestock, manure, fertilizer or feed, (2) noise from livestock or farm equipment used in normal, generally acceptable farming procedures, (3) dust created during plowing or cultivation operations, (4) use of chemicals, provided such chemicals and the method of their application conform to practices approved by the Commissioner of Environmental Protection or, where applicable, the Commissioner of Health Services, or (5) water pollution from

---

142. McCarty & Matthews, *supra* note 85, at 187 n.1.

143. The Iowa Attorney General questioned the constitutionality of the statute. Op. Iowa Att'y Gen. 451 (1976). His concerns were apparently not heeded by the state legislature. For a thorough analysis of the constitutional issues regarding the abrogation of the nuisance doctrine see McCarty & Matthews, *supra* note 85, at 197-207.

144. Since the statute was enacted no successful cases have been reported in Iowa where nuisance actions were brought against farmers who are in conformance with the prescribed regulations.

145. IOWA CODE ANN. § 172D.2 (West Supp. 1981-82).

146. MASS. GEN. LAWS ANN. ch. 111, § 125A (West Supp. 1981). *See* MONTANA CODE ANN. §§ 27-30-101, 45-8-111 (1981).

livestock or crop production activities, except the pollution of public or private drinking water supplies.[147]

In requiring the farmer to conform to accepted agricultural activities, the state took a rather unusual approach by providing a statutory standard of prima facie evidence that the farm follows generally accepted agricultural practices.[148]

Maryland protects only those agricultural operations used for:

(1) Cultivation of land;
(2) Production of agricultural crops;
(3) Raising of poultry;
(4) Production of eggs;
(5) Production of milk;
(6) Production of fruit or other horticultural crops, and
(7) Production of livestock.[149]

By using the term "agriculture" instead of "farm" the Maryland Legislature potentially expanded the protection of the statute.[150] However, any expansion is surely curtailed by limiting it to the seven areas of agricultural work.

III. CONCLUSION

The farmer, who once was seen as the backbone of this country[151] now holds a less worthy place in the minds of many Americans.[152] Nonetheless, the farmer is an unusually proud person. Farmers have stood strong in their convictions and have fought against many problems. However, the forces against the farmer are beginning to win the battle, with economic problems causing much of the loss of agricultural land.[153] Placed at the mercy of the supply

147. 1981 Conn. Pub. Acts 81-226 (Reg. Session).

148. *Id.*

149. MD. CTS. & JUD. PROC. CODE ANN. § 5-308(a) (Supp. 1981).

150. Jackson v. Building Inspector, 221 N.E.2d 736, 738 (Mass. 1966).

151. "Those who labor in the earth are the chosen people of God." KORPELA, FEDERAL FARM LAW MANUAL, § 2, 2 (1956), (quoting Thomas Jefferson).

152. "The average American takes his food and fiber supply very much for granted . . . . When some thought is given to the human element in the production of these items, the 'farmer' is vaguely and inconsistently conceived of as a cross between a noble visionary worthy of residence on the banks of Walden Pond and a country bumpkin growing fat on government subsidies." Wershow and Juergensmeyer, *Agriculture and Changing Legal Concepts In An Urbanized Society*, 27 U. FLA. L. REV. 78 (1974-75).

153. *See* Wershow, *supra* note 3. *See also* Batie and Looney, *supra* note 3.

and demand system[154] with the prospects of continuing price supports, government aid[155] and helpful regulations looking bleak[156] the chances of the small-and average-size farmer improving his rather small profit margin do not appear promising.[157] Instead of continuing to operate at a small or even a negative profit ratio, thousands have sold their farms and set aside many years of hard work, dedication and love for the land.[158] At the same time, American farmers have responded to market demands and have begun cultivating more and more land as the call for United States agricultural exports increases.[159] Both of these factors are leading to the loss of agricultural land.

Another factor leading to the loss of agricultural land is urbanization.[160] "The steady annual rate of urban conversion, coupled with its permanence and the high quality of land typically affected, makes urbanization the greatest single threat to the agricultural land base nationwide."[161]

Nonetheless, things may be changing. Starting with the passage of the Maryland Preferential Assessment Tax in 1956, the nation

---

154. Wershow, *supra* note 3.

155. The Farmers Home Administration, an agency of the United States Department of Agriculture, has more than ten different loan programs for American farmers, ranging from farm ownership to soil and water loans. *This Is FmHA*, UNITED STATES DEPARTMENT OF AGRICULTURE, PROGRAM AID NUMBER 973, August 1980.

156. The Reagan administration has proposed drastic cuts in both the price support and farm aid program. *See From the Schools to the Sewers*, TIME, March 2, 1981, at 16. *But cf. High Cost of a Helping Hand*, TIME March 2, 1981, at 25 (stating that many people are critical of continued spending by FmHA.)

157. A free market would result in considerable price and income instability with farm income going down. Frederick, *Federal Price and Income Support Programs for Agriculture—Some Alternatives*, 2 AGRIC. L.J. 1, 9 (1980-81); *but cf.* Harrison, *Parity, Politics and Procedures—A Proposal for Reform in Determining Parity for the Dairy Industry*, 21 S.D.L. REV. 617 (1976) (concluding that the current system leaves parity determination open to political pressures).

158. Of course, many additional factors contribute to the farmer's economic problems. A perfect example is fluctuating weather patterns with a lack of insurance protection for such contingencies. *See* Comment, *Federal Crop Insurance: An Investment in Disappointment??*, 7 U. KAN. L. REV. 361 (1958-59). Another area of increasing concern in the agricultural industry is labor regulation. *See* Haughton, *The Influence of Labor-Management Relations on the Settlement of Agricultural Disputes*, 35 ARB. J. No. 2, 3 (1980). *See also* Levy, *Collective Bargaining for Farmworkers—Should There Be Federal Legislation?*, 21 SANTA CLARA L. REV. 333 (1981). For an analysis of the coverage of agricultural workers under minimum wage laws, unionization laws, worker's compensation laws and occupational safety laws, see Uchtmann & Bertagnolli, *The Coverage of the Agricultural Worker In Labor Legislation: Deviations From the Norm*, 2 AGRIC. L.J. 606 (1980-81).

159. NATIONAL AGRICULTURAL LANDS STUDY, *supra* note 1, at 8.

160. *See supra* note 5 and accompanying text.

161. Geier, *supra* note 5, at 658-59.

has started to recognize once again the value of the farmer to society. Within the past three years many of the states have reaffirmed their support by abrogating the right to bring a common law nuisance action against farmers.[162]

Those statutes, however, may do no more than serve as a pat on the back. In order for a statute to be effective in retaining agricultural land, a state must do two things. First the statute must be strong enough and clear enough to prevent misinterpretation by the courts. This can be accomplished by a strong legislative findings section, by expressly providing for exceptions and by not providing for weak notions of presumptions. The states must also realize that the "right to farm" statutes cannot operate in a vacuum. The right to farm cannot be protected by one single statute. The statute must be part of an overall farmland preservation program including preferential taxation, agricultural districts, development rights programs and zoning.

162. One mechanism not discussed in this comment received a great deal of attention recently when, on November 2, 1982, voters of the state of Nebraska approved by a 57-43% margin a "save-the-farm" amendment to the Nebraska Constitution prohibiting non-family corporations from buying farm or ranch lands in the state. Nebraska is the only state to have passed such an amendment.