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Agriculture in Conflict: Right-to-Farm Laws and the Peri-Urban Milieu for Farming

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During the 1970s the rapid spread of residential, commercial, and industrial development in peri-urban areas collided directly with the boom days in U.S. agriculture. Farm exports were at record levels and projected to rise. The secretary of agriculture encouraged farmers to plant "fence row to fence row" to meet what was then a projected steadily increasing foreign demand for U.S. farm products.

Conversely, sprawl and increasing suburbanization were consuming ever more agricultural land, particularly in high-visibility peri-urban areas surrounding metropolitan areas. As the sprawl continued, alarm was sounded about the rapid depletion of the nation's prime agricultural land.

These alarms prompted the Carter Administration, through the U.S. Department of Agriculture and the U.S. Environmental Protection Agency, to sponsor an interagency federal task force to investigate the loss of agricultural land on a national basis. This effort culminated in the publication of the National Agricultural Lands Study (NALS). The highly publicized finding of this study was that about three million acres of American farmland were being converted to nonagricultural uses annually (*13*).

The study's many critics now charge that faulty data and research techniques led the NALS to overestimate greatly the amount of agricultural land being taken out of production each year (*18*). In fact, the Soil Conservation Service, the branch of the U.S. Department of Agriculture whose statistics had formed the basis for many NALS findings, has issued a report that in effect retracts NALS (*18*). The actual rate of urban growth, it is now argued, has not changed significantly since the 1950s.

While experts may contest the actual magnitude of annual U.S. farmland loss, urbanization has an undeniably adverse effect upon agriculture—not just from the actual loss of productive farmland through conversion to other uses, but also due to what has been referred to as the "urban shadow effect" (*7*). This phenomenon involves the loss in the productivity of farmland and eventual pressure upon farmers to cease to farm once other incompatible land uses locate in a farming area. Further, the "critical mass" of farms necessary to support appropriate agribusiness institutions and farms erodes, placing additional pressures on the remaining farmers (*8*).

Pressures exerted upon farmers to discontinue farming operations due to the adverse off-site impacts they may have on neighboring land uses have resulted in the enactment of what are commonly called "right-to-farm" laws. These statutes, which have been adopted by nearly all states, are intended to at least partially insulate farmers from the complaints of adjoining landowners who object to the off-site impacts of conventional farm operations (*1, 2, 4, 5, 10, 20*).

What is a Right-to-Farm Law?

Although they vary considerably, right-to-farm laws attempt to do two things. First, they all seek to supersede the common law of nuisance, the fundamental area of law used to challenge farming in peri-urban areas. Second, they attempt to favor agricultural uses of the land above all others, especially those that are inherently competitive. Right-to-farm laws seek to establish a "first in time, first in right" logic, wherein prior farming uses of land have primacy over all others.

The genesis of these laws can be found in New York State's pioneering agricultural district law (1971). While initially providing a mechanism whereby local farmers could voluntarily create a district to preserve critical masses of farmland, the statute also dealt with the issue of potentially restrictive controls or lawsuits. The relevant section of the law contains the following language: "No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety" (*8*).

Other agricultural district laws contain similar statements. The Maryland statute (1977), for example, is more specific, stating that the "operation at any time of machinery used in farm production or the primary processing of agricultural products..." is acceptable so long as farm practices do not

"cause bodily injury or directly endanger human health..." (*12*).

The effectiveness of agricultural district laws and their relevance for right-to-farm issues cannot be ascertained easily. Farmers appear to perceive them to be of genuine benefit, however. A review of the New York program indicates that this element of the law has seldom been used or invoked. But its existence may have been enough to deter governments and individuals from pressing claims or promulgating restrictive ordinances (*6*).

The Law of Nuisance

Right-to-farm laws are founded upon the idea of altering the common law doctrine of nuisance to protect existing farming operations from conventional nuisance claims. The evolution of the nuisance doctrine over the years has been a tortuous one. In fact, it has been stated that "[t]here is perhaps no more inpenetrable jungle in the entire law than that which surrounds the word 'nuisance'" (*19*).

Common law nuisances are classified as private or public nuisances. A public nuisance impairs the health, safety, morals, and comfort of the general community without necessarily harming particular property rights in any special way. A private nuisance unreasonably interferes with the use and enjoyment of another's land. Although theoretically quite distinct, the distinction between the two may be of little practical significance (*3*).

Right-to-farm laws, attempting as they do to reorder the relative property rights of neighboring land users, are concerned primarily with the private nuisance. A private nuisance is a civil wrong whose remedy lies in the hands of the individual whose rights have been disturbed (*19*). To have a nuisance for which the law will provide a remedy, there must be a substantial and unreasonable interference with the property interest being asserted.

This interference can be either negligent or intentional. For the purposes of farm operations, an action constituting a nuisance will be deemed intentional, although it is unintended, if it is an easily foreseeable consequence of the farmer's otherwise protected farming activities. Thus, the drifting of sprayed farm pesticides onto a neighbor's land is considered an intentional nuisance, even though this particular result is unintended (*19*). A nuisance emanating from farming operations may also arise from negligent conduct, where the defendant has failed to take appropriate precautions against risks apparent to a "reasonable" man. Right-to-farm laws generally except from protection agricultural activities that are conducted in a negligent manner.

Most nuisance-driven land use disputes focus on the reasonableness of the defendant's conduct. Because all property owners are entitled to the reasonable use and enjoyment of their lands, some balance must be struck between the discordant and often incompatible uses to which the lands are being put (*11*). In each case, the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighed against the utility of the defendant's conduct (*19*). Thus, something approaching a "balancing" act often takes place upon judicial review.

Because many otherwise reasonable actions can be considered nuisances under particular conditions, courts are often hesitant to find fault under the nuisance doctrine. "Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation" (*19*).

Right-to-farm laws tip the balance further in favor of the defendant by statutorily declaring that standard farming practices are reasonable land uses, despite their potentially adverse impacts upon neighboring lands. The laws also alter the balancing process by establishing, legislatively, that the utility of farming outweighs, at least to an enhanced degree, some measure of incidental harm to neighboring landowners.

Right-to-farm laws also modify relative property rights in instances where property owners are said to have "come to the nuisance." This oft-litigated aspect of nuisance law involves situations where an aggrieved plaintiff/landowner has purchased and occupied land despite the presence of obviously incompatible land uses.

The prevailing rule, when there is no right-to-farm law, is that the party responsible for the objectionable activity cannot compel the surrounding premises to endure the nuisance and that the purchaser is entitled to the reasonable use and enjoyment of his land to the same extent as any other owner (*19*). Right-to-farm laws generally modify this rule by expanding the priority rights of agricultural land users. These laws allow farmers to perform certain operations upon the land, based upon being there first, when priority in time ordinarily would not be a controlling factor in a common law nuisance action.

Key Provisions of Right-to-Farm Laws

The many states that attempted to shield farmers from nuisance actions have taken various approaches to preserving the right to farm. The essential provisions for such a statute are discussed below.

Definition of Farming Operation. To enjoy the protection afforded by right-to-farm statutes, an agricultural operation generally must satisfy statutory standards concerning what constitutes a "farm" and an acceptable "farm practice." These terms are defined broadly within the statutes to provide for expansive application of the laws' protection. The Oregon statute, for example, defines "farm" as "any facility...used in the commercial production of crops, livestock, poultry, livestock products or poultry products" (*17*). The term "commercial" within this atypical definition can prove critical because it may serve to exclude from protection the activities of landowners on large-lot "hobby farms."

The manner in which the term "farming operations" is defined is important for two reasons. Farming operations must be defined in such a manner as to not lock farmers into methods and technologies existing at the time of the law's passage. The Oregon provision broadly defines farming practice in terms of present and future operations, thus eliminating the need to continually revise the law to cover changes in farming practices (*22*).

The right-to-farm statutes commonly limit protection to farming operations that are "*non-negligent.*" Negligence, as applied to nuisance law, involves situations "where there is no intent to interfere in any way with the plaintiff, but merely a failure to take precautions against a risk apparent to a reasonable man" (*19*).

Negligent conduct is defined with varying degrees of specificity. This presents the danger, in the case of a vague statute, that the courts will need to evaluate individual farming operations. The New Hampshire law exemplifies those statutes providing greater statutory guidance concerning the issue of negligence, stating that "agricultural operations shall not be found to be negligent or improper when they conform to federal, state, and local laws and regulations" (*15*). The New Hampshire-type definition can also leave a great deal of uncertainty regarding the propriety of various agricultural activities, depending upon the guidance provided by state and local laws and regulations. A proposed model right-to-farm statute addresses this issue by establishing a certification procedure for agricultural practices (*21*).

Establishing a Priority. The statutes use varying methods to establish the right to preference under a state's right-to-farm law. Some states use priority of ownership, requiring that the farmer owned his farm prior to the complaining neighbor's purchase of the land. The majority of statutes focus not upon a priority based upon date of purchase, but rather upon

the defendant/farmer's use of the land prior to the changes in the locality as a whole (*4*). These "prior use" statutes focus on the issue of whether agricultural operations were a reasonable land use at the time of their commencement and have become less so only due to changes in the character of the surrounding area. This is especially relevant in the peri-urban region.

A third method of conditioning the right to protection under the right-to-farm laws is the so-called "statute of limitations type" of law. This requires the farm to have been in operation for at least one year, and in some statutes three years, prior to the neighboring complainant's land use (*21*).

Excluding Farmer/Developers. At the heart of right-to-farm laws is the desire to protect innocent farmers from land use actions or conditions that evolve around them and over which they have no control. The possibility exists, however, that the land use conflicts precipitating a nuisance lawsuit were caused by the farmer himself, as he shaves land off the farm and sells it for residential development.

The State of Washington's statute recognizes this possibility and does not extend the right-to-farm protection to farmers who have so subdivided their landholdings. In effect, the Washington legislature has demonstrated a willingness to help farmers to resist those persons "coming to the nuisance," but not if the farmers themselves are the ones to entice the movement to the nuisance (*24*). In Washington, then, farmers cannot have it both ways.

Attorneys' Fees. Having the law on one's side may not be enough for a beleaguered farmer who is continually dragged into court to defend his farming activities under the provisions of a right-to-farm statute. The expense in time and attorney's fees of what could literally be "nuisance lawsuits" may encourage the farmer to terminate a farming operation.

While several states prohibit such suits under the terms of their statutes, at least one state has addressed this issue directly. The Texas statute (*23*) provides that parties bringing nuisance suits, as prohibited under the Texas right-to-farm statute, against covered parties "shall be liable to the agricultural operator for all his costs and expenses incurred in defense of such action, including but not limited to attorney's fees."

Trespass—Right-to-Farm's Achilles Heel?

Legal actions founded in trespass, a legal doctrine akin to nuisance, pose a significant threat to farmers whose agricultural activities are ostensibly

protected under right-to-farm laws. The Restatement of Torts concludes that "the line between trespass and nuisance has become wavering and uncertain" (*19*). The law of trespass imposes liability for the unauthorized entry upon the land of another. As the legal doctrine of trespass has evolved in the United States, liability for trespass arises only if the unauthorized entry was intentional or negligent. While the trespass of airborne chemicals and noxious odors is generally an *unintended* result of normal farming operations, courts and juries are becoming more willing to find such results to be *negligent*, in light of the current awareness of the potential health hazards of farm chemical pollution.

Traditionally, the courts have required a physical invasion of a landowner's property by tangible substances in order for an act to constitute a trespass. In recent years, however, a test for trespass has evolved that in many jurisdictions merely requires that the suspect activity interfere with a landowner's exclusive possession of his property. Under this broadened test, airborne odors and particulate matter, which frequently are the cause of farm-related land use conflicts, would constitute a cause of action under trespass. Because right-to-farm laws generally limit their protection of farmers to a partial shield against *nuisance* actions, the farmers in many jurisdictions will remain vulnerable to lawsuits brought under a *trespass* theory.

Right-to-Farm in Canada

The issues and pressures that have combined to make right-to-farm laws popular in the United States also exist in Canada. While the legal systems of the countries are different, the roots of the nuisance equation are very similar. Three provinces—New Brunswick, Ontario, and Nova Scotia—have taken the lead in the right-to-farm area. Within New Brunswick, the expansion of rural, nonfarm residences into livestock raising areas is the focus of concern. In two suits, the Lac Unique case and the Sullivan case, nuisance-based judgments were made against farmers. The provincial Department of Agriculture and Rural Development responded, in a paper on the right-to-farm problem, that "people cannot expect to move to rural areas and enjoy all the amenities there such as open space and pleasant scenery without accepting the agricultural operations which maintain that open space and pleasant scenery" (*14*). As a result of these cases, and the larger body of concerns they have raised, the province formulated a set of livetock manure and waste management guidelines as a probable first-step toward implementing a full right-to-farm law. This is perhaps

most appropriate in New Brunswick, as zoning laws are largely nonexistent in much of the province because municipalities do not exist in most of the rural areas.

In Ontario the nature and scope of right-to-farm issues was partially determined by a 1986 survey of farmers conducted by the Ontario Ministry of Agriculture and Food. The results of the survey indicated that the three most common complaints made against farmers were moving farm machinery on highways, manure spreading, and noise from farm machinery. The ministry established a Right-to-Farm Advisory Committee in the same year. Following hearings and studies of the issue, a recommendation was put forward to promulgate a right-to-farm law that would "protect farmers from nuisance actions under common law provided they were using normal farming practices. It would require permit criteria for future farm-related severances and for the construction of new livestock facilities and residences in agricultural areas. Minimum separation distances would be used as one criterion for a permit" (*16*). The minister of agriculture and food currently is conducting further meetings on the implementation of a right-to-farm law.

Finally, in Nova Scotia two court cases in 1985 moved the province to initiate activities on the right-to-farm front. Although both cases against farmers were dismissed, the province attempted to protect farmers by enacting the "Agricultural Operations Protection Act" in May 1986. In essence, the law maintains that a properly managed farm cannot be classified as a nuisance. This logic conforms with a 1976 amendment to the Nuisance Act in Manitoba that does much the same thing as the Nova Scotia legislation. Although Canadian planning and land use guidance are more sophisticated than in the United States, the need for right-to-farm laws is not diminished.

Conclusions

The actual severity of the need for farmland preservation is presently unclear. The urgent warnings that the nation was running out of farmland have been largely dismissed. In peri-urban areas, however, the loss of farmland remains real and severe. The development of technology that promises to greatly increase yields per acre and per animal would also seem to diminish the severity, or at least the imminence, of the farmland crisis.

Nevertheless, urban sprawl and the introduction of competing and incompatible land uses into an area continue to threaten existing farming

operations. The omnipresent threat of nuisance-related lawsuits challenging the continued existence of a farm may precipitate a decision to terminate a farm operation. Right-to-farm laws can play a major role in preserving the opportunity for farmers to continue to pursue farming as a livelihood, should they choose to do so.

Again, however, the distinction should be made between what right-to-farm laws can and cannot do. While such laws might preserve the opportunity for an established farmer to continue farming, they do not perpetually preserve farmland. Other farmland preservation techniques, such as the purchase of development rights, guarantee the long-term use of farmland for farming purposes. Right-to-farm laws, on the other hand, merely afford a landowner the right to operate a farm so long as he or she chooses to do so. Should a farmer, or his or her heirs, decide to sell the farm for development, right-to-farm laws do not present an obstacle to that choice. In fact, a priority-of-ownership-type of statute may even fail to protect the land in the event of a purchase or transfer to another party who actually intends to continue farming it.

Right-to-farm laws do not address the real threat to farmland from the land's increased value and the potential economic gains available by converting farmland to more intensive uses. This is the issue facing many farmers who operate in the city's shadow. Further, even the limited effect of right-to-farm laws is threatened by the possibility of trespass suits. These actions could attack the very conditions that are legalized under the protection from nuisance actions provided by the right-to-farm statutes.

Ultimately, the courts will determine the effectiveness of the right-to-farm laws. However, these statutes are—with the possible exception of differential/preferential tax schemes (*9*)—the most popular form of agricultural land or land-related statute on the state level. This may reflect the inherent fears all farmers have in dealing with a general population that has grown ever more alienated from the larger realities of agriculture.

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