THE RIGHT TO FARM ACT: WHEN CAN BARRING NUISANCE ACTIONS OR ZONING ENFORCEMENT CONSTITUTE AN UNCONSTITUTIONAL TAKING?
OR
SOMETHING'S ROTTEN IN THE STATE OF IOWA

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I. Introduction

A. We have nothing against pigs. Pig production is an index of the degree of civilization: a report from Rome.

B. Purpose of Right to Farm laws, in effect in virtually every state: to protect family farms from urban sprawl and "nimbyism" by granting immunity from nuisance suits.

C. Brief primer on the law of nuisance: There are two types of nuisance:

1. Public nuisance: affects everyone and has four elements:

(a) Condition complained of has a natural tendency to create danger or inflict injury to person or property;

(b) Dangerous and continuing one;

(c) Use of land is unlawful or unreasonable; and

(d) Existence of nuisance is proximate cause of injury or damage.[1]

Think: public diving board in shallow water or sewer plant that perpetually pollutes public waterways.

2. Private nuisance: Conduct which interferes with one's use or enjoyment of land, having three elements:

(a) Invasion of plaintiff's use and enjoyment of property;

(b) Defendant's conduct caused the invasion; and

(c) Invasion was intentional and unreasonable or unintentional and negligent or reckless.[2]

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[1] W. Prosser and W. Keeton, *Torts* 5th Edition (1984), Section 86, p. 616
[2] Restatement (Third) *Torts*, Section 822 (1979)

Think: intentionally, unreasonably draining water onto a neighboring property, or the sweet smell of a hog farm.

3. These concepts are often confused, and Right to Farm acts do not distinguish between the two. However, in most cases, farms present private nuisances due, among other elements, to the lack of public danger.

D. Actual effect of Right to Farm Acts: the protection of mega-farms.

1. Farms have industrialized, involving less than 2% of the United States population.

2. Two-thirds of American farms depend on a single commodity for 50% or more of sales.

3. The largest 8% of farms produce 53% of nation's food.

4. Huge farms necessarily concentrate a large number of animals or agricultural activity, resulting in concentrations of waste, noise, lighting, dust, and odor, all of which can result in nuisances.[3]

II. *Bormann v. Board of Supervisors*, 584 NW 2d 309 (Iowa 1998)

A. Facts

1. Farm applies for agricultural area designation to give it property protection under Iowa's Right to Farm Act.

2. State Board of Supervisors approves, and adjacent land owners appeal, claiming the designation creates a taking of land under the Iowa and Federal Constitutions.

3. Iowa Code Section 352.11(1)(a) provides: A farm or farm operation located within an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operations.

(a) Avoids any consideration of priority of ownership or unreasonable intensification of use.

(b) Reasoning of the Court

(1) Under both federal and State Constitutions, the government cannot take property without just compensation.

[3] See Center, "Governments and Unconstitutional Takings: When do Right to Farm Laws Go Too Far?" 33 B.C. Envtl. Aff. L.Rev. 87 (2006)

(2) The right to maintain a nuisance is an easement over the affected properties. It is a right of a dominant estate over a servient estate. ". . . The nuisance immunity provision . . . creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance." 584 NW 2d at 316.

(3) The creation of the easement constitutes a *per se* taking because it is a physical invasion of property, similar to the flooding of that property or establishing an airplane flight path over that property. The Court equates immunity from nuisance with the physical taking of a strip of land in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

(a) As distinguished from a regulatory taking, which requires balancing of:

(i) economic impact on plaintiff's property;

(ii) the interference with investment-backed expectations; and

(iii) the character of the government action. See *Penn Central Transportation Company v. New York City*, 438 U. S. 104 (1978).

(4) According immunity from nuisance suits is voided by the Court, essentially invalidating the statute on its face. The Court engaged in no analysis as to the actual effect of the immunity on the plaintiff's properties but assumed a taking.

(c) The Court's ruling was later extended on State constitutional grounds to invalidate immunity from nuisance suits to large animal feeding operations, even though that immunity excepted feeding operations which unreasonably and for substantial periods of time interfered with the enjoyment of property or which did not utilize generally accepted management practices. *Gacke v. Pork Extra LLC*, 684 N.W. 2d 168 2004 Iowa Sup. LEXIS 193 (Iowa 2004) reversing on other grounds but upholding the right to bring property damage claims of nuisance against bulk feeding operations.

III. No other state has followed the Iowa Supreme Court in declaring right to farm laws

unconstitutional takings.

A. Michigan has a similar enactment and has generally upheld it to allow modernization of farming.

1. See *Vasko v. Department of Agriculture*, 2006 Mich. App. LEXIS 293 (Mich. Ct. App. Feb. 2, 2006)

2. For a while, Michigan excepted zoning enforcement performance standards – noise, dust, light odor – from immunity, but then repealed this exception. See *Travis v. Preston*, 249 Mich. App. 338, 643 N.W. 2d 235 (2002).

3. Michigan still requires commercial use and best management practices to qualify for immunity. *Charter Township of Shelby v. Papesh*, 267 Mich. App. 92, 704 NW2d 92 (2005)

B. Rhode Island barred zoning enforcement of dust performance standards against a turf farm, which had dug an irrigation pond in violation of zoning. The Court ruled that zoning enforcement standards generally grew out of nuisance law and were subject to the same immunity protection. *Town of North Kingstown v. Albert*, 767 A.2d 659 (2001).

C. California has interpreted its Right to Farm Act to bar suits in trespass for physical invasion of property, in the case of agricultural property draining onto a residential subdivision. See *Rancho Viejo LLC v. Tres Amigos Viejos LLC*, 100 Cal. App. 4th 550, 123 Cal. Rptr. 2d 479 (2002). In so doing, the Court overlooked a changed circumstance or intensification in the irrigation of the farm property.

D. Washington Courts dismissed suit under Right to Farm Act when property owners and cities sought to enjoin operation and smells emanating from indoor mushroom plant. *Vicwood Meridian Partnership v. Skagit Sand and Gravel*, 123 Wn. App. 877, 98 P3d 1277 (2004).

IV. Some states have limited Right to Farm Acts or have interpreted them in a more limited way.

A. Idaho did not protect expanded pig farm when it added open impoundments for manure. *Crea v. Crea*, 135 Idaho 246, 16 P3d 922 (2001) holding that a change in operations was not protected.

B. In *Petsey v. Coleman*, 259 Conn. 345 (2002), negligent operation of a cow manure to energy plant (which blew up during the trial and never did work right) was not protected by Right to Farm Act.

C. Texas, among other states, allows nuisance suits, but they must be brought within one year of creation of the nuisance. *Holubec v. Brandenberger*, 111 SW 3d 32, 46 Texas

Sup. J 702 (2003), remanding for determination of when one-year period began. Note, this is a statute of repose, not a statute of limitations, and it begins to run when the nuisance was created, as opposed to when the plaintiff became aware of the nuisance. See *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999), holding that failure to bring suit within one year of installation of manure decomposition building for 222,000 chicken barred action.

V. Effect of Right to Farm Act on zoning enforcement varies with statute and facts.

A. Pennsylvania Right to Farm Act places one-year statute of repose on private zoning actions, but not public ones. *Horne v. Haladay*, *supra*.

B. Rhode Island courts essentially equate zoning enforcement of performance standards of public or private entities with nuisance and subject them to the immunity. *Town of North Kingston v. Albert*, *supra.*

C. A zoning violation may be the basis for a claim of nuisance *per se*, but it does not follow that if a farm complies with zoning, it is not a nuisance. See *Trickett v. Ochs*, 838 A.2d 66 (2003), where the state exempted noise from agricultural operations from local zoning enforcement, but the apple farm still constituted a nuisance. ". . . A land use may comply with local zoning ordinances and other relevant regulation but still constitute a nuisance because of the condition and means of operation of the use." 176 VT at 103.

D. Georgia requires a farm to be in operation for at least one year before neighborhood changes to avoid nuisance suits from neighbors. See *Herrin v. Opatut*, 281 S.E.2d 575 (GA 1981)

E. Indiana does not protect changes in farming activity, such as switching from grain farming to hog raising. Also, significant increases in number of hogs are not protected. *Laux v. Chopin Land Associates*, 550 NE2d 115 (Ind. Ct. App. 1989) See a similar holding in *Durham v. Britt*, 451 S.E.2d 1 (NC Ct. App. 1994), changing from turkeys to hogs.

F. Some Right to Farm Acts pre-empt local zoning, with the State Department of Agriculture having all permitting authority. See, for example, Michigan law granting state control over odors. Similarly, Connecticut has a State standard for noise.

VI. Does the holding in *Borman* have any legs? or paws? or hoofs?

A. It is unlikely any other state will rule, in the way that Iowa did, that a Right to Farm Act is unconstitutional on its face. Federal courts particularly have shied away from facial challenges to statutes on constitutional grounds. *Reno v. Flores*, 507 US 292, 301 (1992), holding that in order to prevail in a facial challenge, the challenger must establish that no set of circumstances exists under which the Act would be valid.

B. It is also unlikely that any other state will find right to farm immunity a taking *per se*. The extent of the taking would probably depend on facts such as:

(1) The impact on the property.

(a) Did you know that odor can be analyzed by:

(i) intensity;

(ii) character;

(iii) concentration; and

(iv) hedonic tone

(2) Activity causing the nuisance.

(3) Alternative ways of operating the farm to mitigate the nuisance.

(4) The priority of who owned which property first: the concept of moving to the nuisance.

(5) Violation of compliance with general management standards.

(6) Violation of compliance with state and local laws.

C. It seems more likely that other states will analyze claimed takings under the Right to Farm Act as regulatory (*Penn Central*) takings, requiring analysis of impact, investment-backed expectations, and government interests.

(1) In effect, isn't immunity from nuisance tantamount to a regulatory, as opposed to a physical taking?

(2) Isn't priority of ownership similar to investment-backed expectations? For a similar analysis, see 33 B.C. Envtl. Aff. L. Rev. 87 (2006).

D. Some Right to Farm statutes which, for example, permit trespass or negligence claims, or which do not protect changes in use or intensifications of use or require certain standards of performance, might fare better in constitutional challenges, because they offer other means of redress which must be exhausted. See *Pure Air and Water Inc. v. Davidsen*, No. 2690 97 (N.Y. Sup. Ct. 5/25/99), holding that regulatory standards protect Act from constitutional challenges.. Statutes of repose, however, would probably not escape such challenges, although statutes of limitations might, as they are not depriving litigants of unknown rights. See *Overgaarde v. Rock County Board of Commerce*, 2003 U.S. District LEXIS 13001 (D. Minn. 7/25/03), holding two-year statute protects Act from becoming unconstitutional taking.

E. One commentator has called for exempting Concentrated Animal Feeding Operations (CAFO's) and spraying fields from the Right to Farm Act, endorsing Minnesota's exemption of farms with a swine capacity of 1,000 or more and cattle of 2,500 or more. See 11 Drake J. Agric. L. 5 (Spring 2006). See also *Pasco County v. Tampa Farm Services, Inc.*, 573 So2d 909 (Fla. Dist. Ct. App. 1990), holding conversion from the newer application to spray application not protected due to intensification of smell.

F. Agri-businesses will continue to fight hard to protect Right to Farm Acts, and home builders, realtors, etc., will ultimately fight back. Agri-business will continue to be concentrated in poorer areas, less likely to bring legal enforcement actions, or in the alternative, they will move overseas. It remains to be seen whether others follow Iowa and constitutionally limit Right to Farm Acts.