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Right to Farm

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Right to Farm

J.L. Taraba and R.M. Williams

Landowners in general have the right to use their property in any manner they might find useful or enjoyable except when that use infringes on the right of their neighbor or community to use their property. Conflicting interests of neighbors have been the subject of numerous disagreements resulting in one or the other losing his right to use his property as he wishes. The circumstances surrounding each conflict usually determines the outcome, and farmers should be aware that their right to farm may be at the mercy of courts who have sometimes been sympathetic to grievances of their more urban neighbors. Complaints about farming operations by nearby landowners and the threat of nuisance lawsuits is a growing concern of farmers, particularly in areas prone to urban sprawl, and has resulted in a decrease in the number and size of farming operations in some areas. The fear of loss of productive farming operations has resulted in enactment of "Right to Farm" laws by a number of state legislators. Legislation enabling farmers to create Agricultural Districts is an additional attempt to stop urban expansion into prime agricultural land. The following discussion attempts to summarize some of the problems surrounding the right to farm issue.

The Kentucky "Right to Farm" bill was enacted by the General Assembly in 1980 and incorporated as chapter 413.072 in the Kentucky Revised statutes. The law attempts to provide some relief to farmers from nuisance suits and voids some local nuisance ordinances. The declared purpose is "to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance". Some of the provisions of the laws are summarized as follows:

1. An agricultural operation which has been in operation more than one year shall not be declared a nuisance by any changed conditions in or around the locality if it was ~~not~~ a nuisance at the time the operation began.

2. The law gives no relief if a nuisance results from negligent operation.
3. The law does not protect the farming operation from damages resulting from pollution of the waters of any stream.
4. Voids local ordinances which would make the operation of agricultural operations a nuisance.

A complete text of KRS 413.072 is included as an attachment.

Kentucky court case history concerning the right to farm statute is void of decisions since it was enacted; therefore, there is no judicial basis to determine the limitations of this law. Prior to the enactment of this law, agricultural operations were at the mercy of the courts for relief from nuisance suits. Kentucky court history (nearly 100 years) has shown that agricultural operations could not use the defense that the complaining land owner "came to the nuisance" (see below for explanation). Over 40 states have enacted similar "right to farm" legislation since 1976 when Iowa enacted the first right to farm statute. Examination of the judicial application of these laws may aid in assessing the eventual impact of the Kentucky statute.

What is a nuisance? The underlying doctrine of nuisance is that one is required "to use your own property in such a manner as not to injure that of another".¹ A broadened definition is that a nuisance exists if "a landowner uses his property in a manner that unreasonably interferes with a neighboring landowner's use or enjoyment of his property or if the conduct unreasonably interferes with the health, safety and welfare of the public as a whole".²

Some nuisance complaints may be classified as private nuisances which violated only private rights, and damages one or a limited number of individuals. Private nuisances must sometimes be tolerated when it is beneficial to the general public. A nuisance per se is a nuisance which results in violation of some state or federal statute and is considered a nuisance at all times and under any circumstances regardless of location or surroundings. Most agricultural nuisances depend on the facts or circumstances and courts place repeated emphasis on location.

The wording of the statute leads to a number of questions which may need some clarification.

What are "changed conditions in or about the locality?" The changed conditions are the extension of nonagricultural land uses, residential or otherwise, into existing agricultural areas.

Has the agricultural operation been in operation for more than one year before the changed conditions or when does the time clock begin? Did the agricultural operation initiate when the present owner began the operation or 150 years ago when the land was cleared or drained and became an agricultural operation? With no basis for interpretation in Kentucky case law on nuisances or the statute, one looks to other states. A prevailing view from legal reviews is that an expansion of boundaries or substantial expansion of the agricultural operation would constitute a new starting date for the agricultural operation. The change in ownership may constitute a change that would reinitiate the time clock. The exemption provided by the law cannot be applied to every potential case of nuisance against agricultural operations. Such non-exempt situations would be:

- Surrounding area which is rural/agriculture in land use,
- Surrounding areas that have mixed land use and no substantial changes in land use are found,
- There is a substantial change in the agricultural operation,
- Good agricultural practice is not utilized.

The meaning of substantial changes in the agricultural operation is of great importance so that a determination of the applicability of the right to farm statute can be made. Successful agricultural operations are not static and

formed in concrete enterprises. Decisions are made concerning the management and practices utilized as a result of the impact of weather, prices, labor supply, government policy, technology, etc. For a crop farmer, crop rotation, tillage practices, alternate crops must be made to maximize profit, reduce erosion or increase the efficiency of energy utilization. In animal husbandry energy utilization, expanding the herd size to meet economic changes of the market, new facilities to incorporate the latest technology, changes in the feed formulations in response to economics and ventilation changes in facilities in response to weather are normal practices. The question comes down to degree of the changes. Kentucky case law again is void of decisions for guidance. Other states have shown that normal changes in agricultural practices including some facility expansion, modification or new facilities should be allowed. The degree of change that amounts to a "significant change" varies and the court findings based on facts would address the issue. Changing a small animal production facility to a large production facility has been generally concluded to be a significant change. The replacement of an old facility with a new facility with the same number of animals that included new technology or allowed application of management techniques that reduced odors should be permissible significant change. On the other hand if such a change occurred and the old obsolete facility had been unused for a period of time, this change may be deemed significant. Some state courts have concluded that the intent of the statute is to encourage agricultural operations and to limit their expansion or modernization would serve to violate the intent of the legislation.

Was the agricultural enterprise a nuisance at the time the operation began?

The first day of an agricultural operation may not be the best basis since odors from animal facilities usually do not occur until after manure accumulations have occurred. The basis may be: can this same agricultural enterprise under the same circumstances be operated in other areas without being a nuisance. Thus, do other comparable presently operating agricultural operations operate with no history of nuisance complaints? If the answer is yes, then the operation may be determined not to be a nuisance at the time of initiation date of the operation.

The absence of complaints from adjacent farms and other rural landowners may help to prove that the activity was not a nuisance, yet this consideration should not be conclusive. If for example, the farm currently creates an interference that would be a nuisance even in a rural area, one might conclude that the farm had been a nuisance from the time it began, even in the absence of complaints from farmers and other rural landowners.² In a recent Florida case,⁴ a farming operation changed its method of manure disposal with an attendant increase in odor. The court recognized the legislative intent to protect farmers from the exposure and harassment of nuisance suits. However, the court "does not interpret the Florida Right to Farm Act (1982) as an unfettered license for farmers to alter the environment of their locale merely because the practices which they used in 1982 were acceptable at that time."

What constitutes a negligent operation? The dictionary definition of negligence is "the omission of doing something a reasonable person guided by those ordinary circumstances which ordinarily guide human affairs" and "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm". One could put that in more appropriate terms, a farmer would not be negligent if good agricultural practices were applied to the operation. Good agricultural practices are those that are standard among like agricultural operations generally and are not significantly different from those that have been identified by the Cooperative Extension Service, Soil Conservation Service (SCS), Department of Agriculture, Department of Conservation, Department of Human Resources, and the Department of Natural Resources and Environment Protection. Negligence has also been interpreted to mean not meeting Federal, state and local statutes that would apply to the agricultural operation.

What are damages resulting from pollution of water of any stream? Without guidance from Kentucky court case law, a court could interpret this section along with a definition of negligence defined previously to suggest that agricultural operations must meet the state laws governing water pollution. The Kentucky revised statute 224.060 states that "No person shall directly or indirectly throw, drain, run or otherwise discharge (pollutants) into the waters of the Commonwealth. The DOW has established permitting procedures which allows agricultural operations to operate animal waste handling facilities with no discharge into streams or other water bodies. SCS criteria for managing the storage facility and the disposal of the manure are accepted as criteria for operating the facility. Negligent operation may result in violation of Division of Waste Management Environmental performance standards.

This section of the statute does not mention that the facility does not pollute the air. The state does have an air pollution law whose regulations requires that odor levels be below a minimum standard. Based on the language of subsection 2 concerning negligent operation, an agricultural operation might be required to meet state environmental standards under the right of the state to maintain the safety and health of the citizens. The air pollution standards are established as a criteria to assess whether human health and safety is at risk.

Constitutionality of the "Right to Farm" Legislation.

Law reviews of State "Right to Farm" statutes have stated that they could be challenged on basis that landowners have had their land effectively condemned without compensation. The counter to this argument has been that states can regulate an owners use of his or her own property when that regulation is necessary to promote the public interest. In Kentucky, agriculture is a significant economic activity and the legislature has essentially stated that the diminishing of this activity will injury the public's welfare. Court decisions will determine if these Competing rights are balanced.

Bibliography

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- ¹¹Tinio, F.S. 1972. Nuisance-knowledge of prior existence. Owner L. Rev., 3rd ser., 42, 344-374.
- ¹²Laux V. Chopin Land Assoc., 550 NE 2d 100 (Ind., 1990).

Attachment

413.072 Limitation of conditions under which nuisance suits may be brought against agricultural operations - Local ordinances void.

-(1) It is the declared policy of the Commonwealth 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 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 section 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.

-(2) No agricultural operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one (1) year, when such operation was not a nuisance at the time the operation began; provided, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent operation of any such agricultural operation or its appurtenances.

-(3) For the purposes of this section "agricultural operation" includes, without limitation, any facility for the production of crops, livestock, poultry, livestock products, or poultry products including horticultural and growing of timber.

-(4) The provisions of subsection (1) of this section shall not effect the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by them on account of pollution of the waters of any stream of any such person, firm, or corporation.

-(5) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstances set fourth in this section are and shall be null and void; provided, however, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent operation of any such agricultural operation or any of its appurtenances.