

# CREATING AN 'UNDEVELOPED LANDS PROTECTION ACT' FOR FARMLANDS, FORESTS, AND NATURAL AREAS

TERENCE J. CENTNER

## SUMMARY

Under nuisance law, bothersome activities conducted on farmlands, forests, and natural areas are being enjoined. The cessation of activities on these lands is sometimes detrimental to the ecology of an area or the continued economic viability of agronomic pursuits. As a result, some of our nation's farmlands, forests, and natural areas are unnecessarily being lost to development. Because positive attributes of undeveloped areas are undervalued, the environmental community might lend support to owners of these lands in the form of a more forceful defense against nuisance lawsuits. Drawing upon an economy of nature, new legislation called an "Undeveloped Lands Protection Act" is proposed. Ecological and civic-societal objectives are incorporated in a legislative proposal that would offer owners of undeveloped lands greater protection against nuisance lawsuits. The anti-nuisance legislative response is intended to foster a debate that will lead to greater protection for our natural resources.

## INTRODUCTION

The farm community and agribusiness firms have long championed right-to-farm legislation to preclude nuisance lawsuits from adversely affecting their activities and businesses (see Appendix 1).<sup>1</sup> Agriculture was recognized as different from other business

---

1. See, e.g., Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 117-30 (discussing the early right-to-farm statutes); NEIL D. HAMILTON, A LIVESTOCK PRODUCERS LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW (1992) (delineating a comprehensive analysis of nuisance law and issues); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 305-06 (1984) (concluding that right-to-farm statutes reverse the preference for development under traditional nuisance law to favor the less intensive use of land).

activities and deserving of special dispensation.<sup>2</sup> The protection in many early right-to-farm laws was to cover the growing and harvesting of crops, the feeding, breeding, and management of livestock, and other agricultural and horticultural uses.<sup>3</sup> Some laws sought to preserve farmland from urban sprawl.<sup>4</sup> Over the subsequent decades, right-to-farm laws were amended to expand protection to business and service activities including marketing operations and processors.<sup>5</sup>

The scope of many right-to-farm laws suggests that farm organizations and agribusiness firms have been successful in achieving special legislative dispensation for agriculture.<sup>6</sup> The anti-nuisance exception, moreover, benefits agriculture and society.<sup>7</sup> Simultaneously, right-to-farm laws may cause producers to be less sensitive to neighbors' rights,<sup>8</sup> reduce the efficient allocation of land use entitlements,<sup>9</sup> intrude on the property rights of neighbors,<sup>10</sup> and

---

2. See, e.g., C. Ford Runge, *Environmental Protection from Farm to Market*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 200-16 (Marian R. Chertow & Daniel C. Esty eds., 1997) (claiming that agriculture is different for environmental protection programs); Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 105 (1998) (noting that right-to-farm laws are a popular form of pro-agriculture legislation at the state level).

3. E.g., 740 ILL. COMP. STAT. ANN. 70/2 (2002). However, the major thrust of the legislation was to protect existing farm investments by reducing actions under nuisance law that enjoined agricultural activities. Hand, *supra* note 1, at 305-06 (observing a priority for agricultural uses).

4. See Grossman & Fischer, *supra* note 1, at 152 (observing that the laws protect farmland by limiting nuisance relief).

5. See, e.g., GA. CODE ANN. § 41-1-7 (1997 & Supp. 2006) (protecting the processing and packaging of eggs, the manufacturing of feed for poultry or livestock, and food and forest products processing plants); NEB. REV. STAT. § 2-4403 (Supp. 2005) (adding protection for grain warehouses); see also Terence J. Centner, *Anti-nuisance Legislation: Can the Derogation of Common Law Nuisance Be a Taking?*, 30 ENVTL. L. RPTR. 10253, 10255 (2000) (identifying several statutes that delineate broad expansion of protected activities by right-to-farm laws).

6. See, e.g., David R. Bliss, *Tilting at Wind Turbines: Noise Nuisance in the Neighborhood After Rassier v. Houim*, 69 N. DAK. L. REV. 535, 540 (1993) (observing that most states confer special dispensation on agricultural producers through their right-to-farm laws).

7. Grossman & Fischer, *supra* note 1, at 141 (predicting that right-to-farm laws would support continued agricultural production and a strong state economy); Hand, *supra* note 1, at 305 (suggesting that society reaps social benefits by keeping land in agricultural production under right-to-farm laws).

8. Joshua M. Duke & Scott A. Malcolm, *Legal Risk in Agriculture: Right-to-Farm Laws and Institutional Change*, 75 AGRIC. SYSTEMS 295, 299 (2003) (noting that farmers may believe they are protected against injunctions for nuisances, so they are not as concerned about how their practices affect their neighbors).

9. See Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998) (maintaining that neighboring properties have a reduced

protect operations that contribute to the degradation of rural landscapes.<sup>11</sup> While modern nuisance law has moved toward flexible mediation by courts,<sup>12</sup> right-to-farm laws rely on wrongfulness of land use.<sup>13</sup> The laws may also constitute a significant obstacle to common law remedies against farms<sup>14</sup> or to local governments' ability to regulate land use options.<sup>15</sup>

Over the years, right-to-farm laws have faced a number of challenges,<sup>16</sup> with the most significant being constitutional challenges that the laws go too far in denigrating the rights of others.<sup>17</sup> The

---

choice of options for the use of lands burdened by adjacent nuisance activities under right-to-farm laws).

10. See *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998), cert. denied, 525 U.S. 1172 (1999). Permitted intrusions have been called easements. *Id.*

11. See Reinert, *supra* note 9, at 1738 (expressing concern that right-to-farm laws offer too much protection to farmers).

12. Robert H. Cutting, "One Man's Ceilin' is Another Man's Floor": *Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819, 868 (2001) (noting that flexibility in the common law of nuisance allows courts discretion in weighing equities).

13. Nuisance law may consider the wrongfulness of the defendant's land use for the location to adopt one-sided solutions of either an injunction or allowing the defendant's interference to continue. Reinert, *supra* note 9, at 1699-1703. This response means that right-to-farm laws can fail to consider the efficient allocation of resources. *Id.* at 1738.

14. See, e.g., David Osterberg & David Wallinga, *Addressing Externalities From Swine Production to Reduce Public Health and Environmental Impacts*, 94 AM. J. PUB. HEALTH 1703, 1707 (2004) (suggesting that right-to-farm laws may shield concentrated animal feeding operations that are causing adverse public health impacts); James B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 316 (2000) (claiming that right-to-farm laws are an obstacle to environmental remedies).

15. See MICH. COMP. LAWS ANN. § 286.474(6) (West 2003 & Supp. 2006) (preempting local ordinances and regulations); 3 PA. CONS. STAT. ANN. § 953 (West 2006) (prohibiting local governments from adopting unauthorized local ordinances). See also Wendy K. Walker, Note, *Whole Hog: The Pre-Emption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 VAL. U.L. REV. 461, 476-95 (2002) (criticizing the Michigan right-to-farm law and its preclusion of local control).

16. See Centner, *supra* note 5, at 10253 (noting that right-to-farm laws have presumably stopped a great number of nuisance lawsuits from being filed yet simultaneously have not stopped nuisance lawsuits concerning operations and activities that predate neighboring land uses).

17. See *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998) (interpreting IOWA CODE § 352.11 (1993) as effecting a taking); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 175-77 (Iowa 2004) (interpreting the immunity provided by IOWA CODE § 657.11(2) (1999) as violating art. I, § 1 of the Iowa Constitution). See also Terence J. Centner, *Governmental and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006) (evaluating constitutional challenges to right-to-farm laws to suggest the enactment of laws based upon an economy of nature); Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 128 (2000) (categorizing types of right-to-farm laws).

Supreme Court of Iowa found Iowa Code section 352.11<sup>18</sup> unconstitutional in *Bormann v. Board of Supervisors*<sup>19</sup> and Iowa Code section 657.11<sup>20</sup> unconstitutional in *Gacke v. Pork Xtra, L.L.C.*<sup>21</sup> Although the decisions are based on the Iowa Constitution<sup>22</sup> and distinguished from other right-to-farm laws, the precedents should concern other states.<sup>23</sup> People unhappy with the anti-nuisance protection accorded by right-to-farm laws could initiate lawsuits based upon the constitutional concerns enumerated in *Bormann* and *Gacke*.<sup>24</sup> Given the importance of right-to-farm laws to agricultural business operations, an alternate approach might be advisable.

This article presents an “Undeveloped Lands Protection Act,” (ULPA) a new anti-nuisance paradigm for the protection of lands used as farmland, forestry, and natural areas.<sup>25</sup> Drawing upon an economy of nature, ecological and civic-societal objectives are incorporated into ULPA, a uniform act that supplements existing right-to-farm legislation by offering special protection for natural resources.<sup>26</sup> The distinction is that the current anti-nuisance protection for marketplace investments may not provide sufficient

---

18. IOWA CODE § 352.11 (1993).

19. 584 N.W.2d 309, 321 (Iowa 1998).

20. IOWA CODE § 657.11 (1999).

21. 684 N.W.2d 168, 173 (Iowa 2004).

22. The *Bormann* decision found that Iowa Code section 352.11 was a *per se* taking under the Iowa and federal constitutions. 584 N.W.2d at 321-22. Arguments exist that the challenged law would not violate the U.S. Constitution. See Centner, *supra* note 17, at 120-21. The Iowa court declined to make a similar conclusion in *Gacke*. *Gacke*, 684 N.W.2d at 174. Rather, the Iowa Supreme Court relied only on the Iowa Constitution. *Id.*

23. See Centner, *supra* note 17, at 145-46 (identifying the protection of nuisances from certain business activities as affecting a regulatory taking); Centner, *supra* note 5, at 10258-60 (suggesting that the *Bormann* decision should not lead to the demise of the nuisance protection afforded by most right-to-farm laws).

24. *But see* *Pure Air and Water, Inc. v. Davidsen*, No. 2690-97 (N.Y. Sup. Ct. May 25, 1999) (finding that the New York right-to-farm law did not effect an unconstitutional taking); *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 646 (Idaho 2004) (concluding that an Idaho statute was not offensive to the federal or state takings clauses); *Overgaard v. Rock County Bd. of Comm'rs*, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at \*20-22 (D. Minn. July 25, 2003) (differentiating facts from those present in the *Bormann* case to conclude no unconstitutional deprivation of property).

25. See Undeveloped Lands Protection Act (hereinafter ULPA), *infra* app. 2.

26. An analysis of constitutional challenges to right-to-farm laws has already discussed the reasons for advocating a new anti-nuisance paradigm in the form of an Undeveloped Lands Protection Act. See Centner, *supra* note 17, at 141-45 (evaluating constitutional challenges). See also *infra* note 71 and accompanying text

protection for natural resources.<sup>27</sup> The object of the new paradigm is to offer a separate, more forceful defense against nuisance lawsuits for qualifying land resources.<sup>28</sup> Due to the amenities offered by undeveloped lands, greater protection might be available to protect and preserve these resources.<sup>29</sup> While the paradigm does not address the need for greater governmental involvement in land preservation, it seeks to influence the economics of land conversion by providing further assurance that necessary activities relating to undeveloped land use may continue.<sup>30</sup>

## I. LAND RESOURCES VERSUS INVESTMENTS

The accepted nomenclature of “right-to-farm laws” offers a description of the intent of these anti-nuisance statutes.<sup>31</sup> Legislatures intended that agricultural pursuits continue due to the investments in facilities and the contributions that agricultural production makes to local economies.<sup>32</sup> Farmers were entitled to continue farming despite

---

27. See Andrea Ross, *Justifying Environmental Regulation*, 8 HUME PAPERS ON PUB. POL'Y 6, 7 (2000) (maintaining that there is no market for environmental amenities so that they are not valued sufficiently to prevent their demise); Duke & Malcolm, *supra* note 8, at 302 (observing that uncertainty as to whether right-to-farm laws providing anti-nuisance protection detracts from their effectiveness and recommending further efforts to clarify rights). The Undeveloped Lands Protection Act seeks to offer more protection to activities on undeveloped lands by excluding protection for business activities. See tit. III(A), *infra* app. 2.

28. A few of the state right-to-farm laws already offer this protection. See, e.g., KAN. STAT. ANN. § 2-3202 (2001) (protecting agricultural activities that are consistent with good agricultural practices and established prior to surrounding nonagricultural activities). Others, however, are more comprehensive and seem to offer protection based on a marketplace economy. See Centner, *supra* note 5, at 10255 (citing statutes that protect business activities).

29. See *infra* notes 82-93 and accompanying text.

30. This might be achieved through land use controls, such as the agricultural zoning statutes of Hawaii and Oregon. HAW. REV. STAT. ANN. §§ 205-1 to -18 (LexisNexis 2005) (establishing a state land use commission with land being placed in one of four use districts); OR. REV. STAT. §§ 215.203-298 (2005), available at <http://www.leg.state.or.us/ors/215.html> (allowing zoning ordinances “to zone designated areas of land within the county as exclusive farm use zones”). See also Racelle Alterman, *The Challenge of Farmland Preservation*, 63 J. AM. PLANNING ASSN. 220, 221-35 (1997) (comparing farmland preservation in the United States with several other countries to enunciate the distinction that other countries control permission on converting farmland while governments in the United States address economic incentives to retain farmland).

31. They were intended to allow farmers to continue to farm despite objectionable nuisance activities.

32. See, e.g., 740 ILL. COMP. STAT. ANN. 70/1 (West 2002) (noting that Illinois' Farm Nuisance Suit Act is intended to encourage investments in farm improvements and avoid the cessation of operations); *Herrin v. Opatut*, 281 S.E.2d 575, 577 (Ga. 1981) (citing the Georgia right-to-farm law and the concern about agricultural operations being discouraged from making investments and ceasing production).

the nuisances they created and the problems their activities caused to neighbors.<sup>33</sup> Many of the laws adopted a “coming to the nuisance” doctrine whereby existing agricultural activities could continue only if the nuisance was created due to people moving to the existing activity.<sup>34</sup> Under the doctrine, less protection is afforded people who move next to existing activities due to the fact that the property’s value already reflects the impairment.<sup>35</sup> People moving to the countryside should accept some of the negative spin-offs of existing agricultural production.<sup>36</sup>

Some of the right-to-farm laws moved beyond the coming to the nuisance doctrine to offer protection to new agricultural activities.<sup>37</sup> The distinction is most important.<sup>38</sup> Under the classic right-to-farm law, the protection offered is based on priorities of land uses.<sup>39</sup> If a farm engages in activities prior to the arrival of neighbors who find the activities objectionable, the farm has a defense against nuisance lawsuits.<sup>40</sup> The special dispensation is for existing operations at the expense of neighboring property owners who might later want to

---

33. The protection varied upon the provisions adopted by the legislative body. *See infra* notes 37-44 and accompanying text.

34. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002) (noting the problem of nonagricultural land uses extending into agricultural areas).

35. *See* Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 933-34 (1999) (discussing the coming to the nuisance doctrine and the belief that people who move next to a nuisance should not benefit).

36. *See* *Herrin v. Opatut*, 281 S.E.2d 575, 578 (Ga. 1981) (observing that the Georgia right-to-farm law offered protection against nuisance lawsuits where changes in land uses on surrounding land caused an agricultural facility to become a nuisance).

37. *See* IDAHO CODE ANN. §§ 22-4801 to -4804 (2001 & Supp. 2005) (allowing the “open burning of crop residue grown in agricultural fields”); IOWA CODE § 352.11 (1993) (exempting farm operations from nuisance suits regardless of when activity commences); IOWA CODE § 657.11(4) (1999) (exempting animal feeding operations from nuisance suits regardless of when activity commences). These Iowa Code provisions were respectively found unconstitutional in *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998) (overturning § 352.11) and *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 175-77 (Iowa 2004) (overturning § 657.11(4)).

38. Right-to-farm laws can potentially eliminate the equitable foundation whereby a neighboring objectionable activity should be enjoined.

39. *See, e.g.*, *Swedenberg v. Phillips*, 562 So.2d 170, 172-73 (Ala. 1990) (concluding the right-to-farm law had no application because the plaintiffs resided on their property prior to the construction of the defendant’s chicken house).

40. Many of the right-to-farm laws required activities to exist at least one year prior to changed conditions in the neighborhood. *See, e.g.*, 740 ILL. COMP. STAT. ANN. 70/3 (West 2002) (exempting farms from nuisance suits arising due to “any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation”).

commence land uses incompatible with the established agricultural uses.<sup>41</sup>

Statutes that go beyond the coming to the nuisance doctrine require neighboring property owners to accept new nuisance-generating activities.<sup>42</sup> Rather than protecting investments of existing property owners, these laws denigrate property rights of people next to those commencing new nuisance activities.<sup>43</sup> It was this interference with neighbors' property rights that was found by the Iowa Supreme Court to go too far so that two right-to-farm statutes were unconstitutional.<sup>44</sup>

### A. *Going Beyond Nuisance Law*

While some right-to-farm laws may embody an equitable resolution of competing interests, the overriding issue is whether

---

41. For example, the Indiana Court of Appeals considered the application of a statutory coming to the nuisance provision in *Erbrich Products Co. v. Wills*, 509 N.E.2d 850, 859-60 (Ind. Ct. App. 1987) (considering IND. CODE § 34-1-52-4(f) (1982)). Nearby neighbors brought a lawsuit against a manufacturing facility with a nuisance cause of action. *Erbrich*, 509 N.E.2d at 852. The defendant moved for summary judgment on the nuisance claim due to the coming to the nuisance provision of the state's anti-nuisance law. *Id.* at 858; IND. CODE § 34-1-52-4(f). In analyzing the evidence, the appellate court found that the defendant had established qualification under the law. *Erbrich*, 509 N.E.2d at 859. The defendant's operations had not changed significantly since it commenced operation in 1932 in an industrial/commercial neighborhood. *Id.* After the defendant commenced operations, the neighborhood began to develop as a residential neighborhood. *Id.* Because these residential land users came to the nuisance, the defendant qualified for summary judgment under the anti-nuisance law. *Id.* at 859-60.

42. IDAHO CODE ANN. § 22-4801 (2001 & Supp. 2005) (providing a safe harbor for farmers burning crop residue); IOWA CODE ANN. § 352.11(1)(a) (West 2001 & Supp. 2006) (granting protection against nuisance lawsuits regardless of the established date of operation or expansion of the agricultural activities); IOWA CODE ANN. § 657.11(1)-(2) (West 1998 & Supp. 2006) (granting protection against nuisance lawsuits to promote the expansion of animal agriculture); MINN. STAT. ANN. § 561.19, subd. 2(a) (West 2000 & Supp. 2006) (stating that an agricultural operation is not a nuisance if it has been operating two years and meets statutory qualifications); MISS. CODE ANN. § 95-3-29(1) (2004) (providing an absolute defense to nuisance actions to operations operating one year if the conditions or circumstances alleged to constitute a nuisance have existed substantially unchanged since the established date of operation); 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2006) (providing a statute of limitations against nuisance actions where an agricultural operation meets statutory qualifications); TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2004 & Supp. 2006) (using a statute of limitations to extinguish nuisance rights); See also S.B. 26, 148th Gen. Assem., Reg. Sess. (Ga. 2005), available at [http://www.legis.state.ga.us/legis/2005\\_06/pdf/sb26.pdf](http://www.legis.state.ga.us/legis/2005_06/pdf/sb26.pdf) (proposing to extend anti-nuisance protection to poultry and meat by-product facilities).

43. *Bormann*, 584 N.W.2d at 316 (finding that an Iowa right-to-farm law created an easement).

44. *Id.* at 321; *Gacke*, 684 N.W.2d at 179 (finding an oppressive effect on neighboring property owners).

legislatures should be attempting to grant exceptions from common law nuisance law.<sup>45</sup> Why shouldn't courts simply employ nuisance law to resolve conflicting interests?<sup>46</sup> One justification for relief from nuisance law involves the difficult hurdles for plaintiffs faced with establishing proof of pollution from specific properties.<sup>47</sup> Thus, legislatures enacted environmental legislation.<sup>48</sup> Second, because nuisance law was found to be inadequate as a mechanism for reducing or controlling objectionable activities and practices, further governmental intervention has occurred.<sup>49</sup> Legislatures enacted land use statutes and zoning regulations to assign rights and govern conflicting interests.<sup>50</sup>

---

45. From an economic perspective, some scholars have advanced a return to free market environmentalism based upon the superiority of private property and free markets which would require the repeal of environmental laws. See, e.g., Norman W. Spaulding, III, Note, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 294 (1997).

46. This arguably would be similar to a return to free market environmentalism, except that nuisance law already requires governmental interference to delineate rights. See Gary D. Meyers & Simone C. Muller, *The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy*, 4 BUFF. ENVTL. L.J. 1, 29-30 (1996) (observing some of the criticisms of free market environmentalism).

47. See J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1455 (1997) (noting difficulties in proof of causation, fault, injury, and damages).

48. See *Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm'n*, 200 Cal. Rptr. 575, 583 (Cal. Ct. App. 1984) (noting that legislation concerning the placement of unauthorized fill into waters involved the governmental regulation of nuisances under an environmental statute).

49. See Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 415 (1997) (noting that nuisance law was unable to reduce pollution to optimal levels); Glenn P. Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENVTL. L. REV. 521, 560 (1997) (commenting that pollution controls were enacted due to the inability of nuisance law to protect health and property). Moreover, environmental legislation generally was not intended to preempt common law nuisance actions. See *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 603 P.2d 1329, 1336 (Cal. 1979) (holding that claims for personal injuries founded upon nuisance were not federally preempted by the Federal Aviation Act); *Leo v. General Electric Co.*, 538 N.Y.S.2d 844, 847 (N.Y. App. Div. 1989) (finding that the Comprehensive Environmental Response, Compensation, and Liability Act did not preempt common law nuisance); *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 608-12 (Tex. App. 2001) (finding that the Federal Telecommunications Act of 1996 did not preempt a nuisance claim).

50. See, e.g., Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 837 (1924) (observing that zoning operates to prevent nuisances); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1554 (2003) (observing that regulations prevented nuisances); see also Brief on Behalf of National Conference on City Planning et al. as Amici Curiae Supporting Appellant at 23-30, *Euclid v. Ambler Realty Co.*, 272



Thus, zoning, land use regulations, and environmental regulations already supplement nuisance law to provide resolution for many land use conflicts.<sup>51</sup> Right-to-farm laws were enacted because existing remedies were unable to address the pressures being exerted on agricultural producers as residential and commercial land uses sprawled into the countryside.<sup>52</sup> Right-to-farm laws may be viewed as an extension of land use regulations that attempt to resolve conflicts created when people move to a nuisance.<sup>53</sup> Nuisance law, zoning, and anti-nuisance legislation have become accepted parts of our jurisprudence.

A nuisance lawsuit is initiated when a plaintiff complains to a court of an unreasonable interference with the use and enjoyment of property by a neighbor.<sup>54</sup> While the use and enjoyment may involve more than economic interests, the resolution of nuisance lawsuits may become overly dependent on financial considerations.<sup>55</sup> In balancing

---

U.S. 365 (1926) (justifying zoning under a traditional nuisance-based conception of the police power and disclaiming any intention to zone for aesthetic purposes).

51. See Andrew Auchincloss Lundgren, *Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl*, 11 BUFF. ENVTL. L.J. 101, 124-25 (2004) (discussing zoning as an alternative to nuisance law); Ora R. Sheinson, Note, *Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate*, 26 COLUM. J. ENVTL. L. 483, 524 (2001) (noting zoning was a response to environmental and pollution concerns that nuisance law could not adequately address); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1006 (2004) (noting that nuisance is supplemented by other rules of proper land use such as pollution control and zoning); see also *Seawall Assoc. v. City of New York*, 542 N.E.2d 1059, 1069 (N.Y. 1989) (observing that local laws may be enacted to control nuisance-like activities).

52. See Reinert, *supra* note 9, at 1705 (observing pressures on farmers in the form of rising land values and neighbors who object to farming practices); Daniel Diaz & Gary Paul Green, *Growth Management and Agriculture: An Examination of Local Efforts to Manage Growth and Preserve Farmland in Wisconsin Cities, Villages, and Towns*, 66 RURAL SOC. 317, 338-39 (2001) (concluding that agricultural zoning as a tool for preserving farmland is limited due to the low income derived from farming).

53. See *Crea v. Crea*, 16 P.3d 922, 925 (Idaho 2000) (finding that the plaintiffs had not moved to the nuisance but rather the expansion of a hog operation caused the nuisance so the state's right-to-farm statute did not apply); *Durham v. Britt*, 451 S.E.2d 1, 2 (N.C. Ct. App. 1994) (finding that a turkey farmer who changed to raising hogs created the nuisance so that the offensive activity was not protected by the state's right-to-farm law).

54. See RESTATEMENT (FIRST) OF TORTS § 822 (1939) (defining a private nuisance as a "non-trespassory invasion of another's interest in the private use and enjoyment of land"). The RESTATEMENT (SECOND) OF TORTS defined a public nuisance as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) TORTS § 821B (1997).

55. See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 376 (1999) (discussing how nuisance examples are employed in analyses of the economics of law); Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 WASHBURN L.J. 515, 525-26 (2002) (opining that courts compare externalized costs with benefits to determine whether relief should be granted in a nuisance action); George P. Smith II, *Nuisance Law: The Morphogenesis of an*

equities to determine whether to grant injunctive relief in a nuisance lawsuit, the expected costs of the damage may be compared to the expected costs of abating the damage.<sup>56</sup> This reliance on economic factors shifts the analysis of nuisance law from an evaluation of the violation of antecedent rights to an evaluation of the merits of the activities.<sup>57</sup>

This reliance on economic considerations may also be at the expense of long-term health, civic, moral, aesthetic, and environmental concerns.<sup>58</sup> Discussions concerning property rights and environmental quality have led to the identification of considerations beyond economics that may be equally appropriate for addressing conflicts.<sup>59</sup> Rather than relying on market-based economic concepts, greater attention might be focused on the economy of nature and the civic economy.<sup>60</sup>

The fact that we are a society of laws means that might does not make right.<sup>61</sup> The protection and preservation of resources may be as

---

*Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 701-02, 740 (1995) (arguing that economic efficiency is the core of a reasonable judicial decision and that courts should balance the value of what is obtained versus the value of what is sacrificed); Smith, *supra* note 51, at 967-68 (observing that nuisance lawsuits may be resolved using a cost-benefit approach).

56. See generally *supra* note 55. See also *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970) (declining to enjoin the disturbing activities of a cement factory due to the investment of the cement company in its facility and the economic benefits to the community); Smith, *supra* note 51, at 968 (noting that dependence on economic considerations may lead to the placement of liability on the cheapest cost avoider).

57. *Id.* at 969.

58. See Jeffrey A. Berger, *Efficient Wireless Tower Siting: An Alternative to Section 332(C)(7) of the Telecommunications Act of 1996*, 23 TEMP. ENVTL. L. & TECH. J. 83, 110-11 (2004) (discussing causes of action based on aesthetic nuisances); Zygmunt J.B. Plater, *The Three Economies: An Essay in Honor of Joseph Sax*, 25 ECOLOGY L.Q. 411, 417-20 (1998) (offering a comparison of a marketplace economy with an economy of nature).

59. See *supra* note 58. This also might include the public trust doctrine under which it is recognized that private land use should be burdened by the community's interest in its use and enjoyment. Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 422 (2005).

60. The civic economy includes societal concerns. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993) (discussing the *Lucas* decision and the economy of nature); Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359, 369 (1999) (discussing the civic-societal economy as one that considers societal concerns that exist beyond the elements of a marketplace economy).

61. See, e.g., Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 809 (2001) (advancing the argument that a majority cannot make an immoral, unfair, or unjust rule fair or acceptable). In a similar manner, reliance on economic profit to justify a rule may be misplaced. *Id.*

important to our future as current economic well-being.<sup>62</sup> Our society is more than a marketplace driven by economic forces, as an over-dependence on market forces may be adverse to our quality of life.<sup>63</sup> Given that nuisance law balances equities, it ought to account for considerations beyond economics.<sup>64</sup> It follows that anti-nuisance legislation should be based on additional, noneconomic factors. Indeed, objectives include the protection of land resources and the production of foodstuffs.<sup>65</sup> Two economies have been offered to supplement the economic-based marketplace economy; the “economy of nature” and the “civic economy.”<sup>66</sup> Although all three economies overlap to some degree, their distinctions explain why a new paradigm is being advanced to supplement right-to-farm laws.

### *B. Additional Economies*

The economy of nature views lands from an ecological perspective consisting of systems defined by their function.<sup>67</sup> Land ownership involves a custodial role whereby landowners have obligations to non-landowners.<sup>68</sup> Property rights accompanying land ownership involve the consideration of both the owner’s and the community’s interests.<sup>69</sup> Under the economy of nature, land consists of an intricate complex of living, geophysical systems defined by their function.<sup>70</sup> Land, in its unaltered state, performs important services.<sup>71</sup>

---

62. See John C. Dernbach, *Sustainable Versus Unsustainable Propositions*, 53 CASE W. RES. L. REV. 449, 474 (2002) (arguing that laws are necessary for the improvement of the quality of life).

63. See Ross, *supra* note 27, at 7-8 (concluding that the marketplace economy allows for the impairment of natural resources and environmental amenities).

64. This might include aesthetic and historic values. See, e.g., Stephen Christopher Unger, Note, *Ancient Lights in Wrigleyville: An Argument for the Unobstructed View of a National Pastime*, 38 IND. L. REV. 533, 552-60 (2005) (discussing the application of nuisance law to preserving views).

65. Grossman & Fischer, *supra* note 1, at 111 (noting that right-to-farm laws were intended to preserve farmland); Hand, *supra* note 1, at 328 (noting that right-to-farm laws, in conjunction with other programs, can assist in preserving farmland); Thomas B. McNulty, Comment, *The Pennsylvanian Farmer Receives No Real Protection From the Pennsylvania Right to Farm Act*, 10 PENN ST. ENVTL. L. REV. 81, 88 (2001) (observing continued food production from farmlands as being a significant objective of right-to-farm laws).

66. Plater, *supra* note 60, at 362-74.

67. Plater, *supra* note 58, at 419 (criticizing classification of lands based on manmade boundaries).

68. See Sax, *supra* note 60, at 1451 (claiming that contemporary land use management has incorporated the notion that property owners have obligations “to protect natural services”).

69. *Id.* at 1453 (addressing the “American experience with navigable waters”).

70. *Id.* at 1442; Plater, *supra* note 58, at 429.

It also intersects and interacts with two other economies: the marketplace and civic economies.<sup>72</sup> Considerations, including the absorption of wastes, mean the economy of nature involves externalities that may not be measured in traditional economic terms.<sup>73</sup>

The civic economy, sometimes called the civic-societal economy,<sup>74</sup> extends beyond the marketplace economy to cover externalized costs, including resources, energy, inputs, outputs, values, qualities, and consequences of the life and welfare of human society.<sup>75</sup> While the importance of externalized costs has long been recognized, economic and political pressures often result in many of these external factors being marginalized.<sup>76</sup> The significance of the civic economy is that nuisance law based primarily on a marketplace economy will not be giving adequate consideration to externalities and the quality of life.<sup>77</sup>

Turning to anti-nuisance protection, right-to-farm laws are based mainly on a marketplace economy whereby the capital investments in infrastructural components of business activities justify an exception to nuisance law.<sup>78</sup> The laws generally do not separate the economic factors concerning land resources from business interests so that both land and businesses are treated in a similar fashion.<sup>79</sup> In an eagerness to protect agribusiness interests against nuisance lawsuits, some right-to-farm laws granted so much protection that they offended

---

71. Sax, *supra* note 60, at 1442 (observing that “forests regulate the global climate, marshes sustain marine fisheries, and prairie grass holds the soil in place”).

72. *Id.* at 429.

73. *Id.* See also Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595, 596-604 (1995) (discussing externalities as the failure to consider the costs or benefits of individuals’ actions on other people due to poorly enforced property rights).

74. Plater, *supra* note 60, at 368.

75. Plater, *supra* note 58, at 430.

76. See *id.* (maintaining that externalized costs are often “overlooked in the day-to-day economic and political pressures of the marketplace”).

77. The emphasis of the marketplace economy on profits overshadows or emasculates the consideration of noneconomic values. For a discussion on the application of nuisance law beyond the marketplace economy, see Unger, *supra* note 64.

78. See *supra* note 32 and accompanying text. See also *Bowen v. Flaherty*, 601 So. 2d 860, 861 (Miss. 1992) (noting an investment of \$640,000 in a cotton gin before evaluating the applicability of a right-to-farm law).

79. See, e.g., MINN. STAT. ANN. § 561.19, subdiv. 1(a) (West 2000 & Supp. 2006) (offering protection to facilities and appurtenances at agricultural operations so that the right-to-farm laws protect more than land).

constitutional parameters.<sup>80</sup> Challenges to other right-to-farm laws may be expected, as they may go too far in adversely affecting neighboring property owners.<sup>81</sup>

This failure to distinguish between land resources and business interests is important due to the services and resources provided by land.<sup>82</sup> Land is finite, takes thousands of years to develop,<sup>83</sup> and provides different externalities than businesses.<sup>84</sup> Rural lands often have positive externalities in the form of open space, wildlife habitat, scenic views, protection against flooding, and areas to absorb pollutants.<sup>85</sup> The total positive values of these externalities are generally not factored into the price of land.<sup>86</sup>

More important, the positive externalities of land may be lost when structures such as homes or commercial development are built.<sup>87</sup> The ability to use land in the future for agronomic production may

---

80. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998) (finding a taking); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 185 (Iowa 2004) (finding a violation of the inalienable rights clause of the state constitution).

81. See *supra* note 24 (noting challenges to other state right-to-farm laws, although none were found to offend constitutional requirements).

82. See Robert J. Johnston, James J. Opaluch, Thomas A. Grigalunas & Marisa J. Mazzotta, *Estimating Amenity Benefits of Coastal Farmland*, 32 GROWTH & CHANGE 305, 316-21 (2001) (identifying three categories of nonmarket values related to farmland: location dependent use values, non-location dependent use values, and non-use values).

83. AM. FARMLAND TRUST, FARMLAND INFO. CTR., FACT SHEET: WHY SAVE FARMLAND? 1 (2003), available at [http://www.farmlandinfo.org/documents/28562/Why\\_Save\\_Farmland\\_1-03.pdf](http://www.farmlandinfo.org/documents/28562/Why_Save_Farmland_1-03.pdf) (relating American farmland to our economic well-being).

84. Land provides open space while businesses involving buildings do not. See Randall S. Rosenberger & John B. Loomis, *The Value of Ranch Open Space to Tourists: Combining Observed and Contingent Behavior Data*, 30 GROWTH & CHANGE 366, 378 (1999) (noting studies reporting positive benefits associated with open space and concluding that the land allocation market may not be efficient).

85. AM. FARMLAND TRUST, *supra* note 83, at 2-3 (arguing that the country's farmland is at risk because of conversion to development). See also George Boody, Bruce Vondracek, David A. Andow, Mara Krinke, John Westra, Julie Zimmerman & Patrick Welle, *Multifunctional Agriculture in the United States*, 55 BIOSCIENCE 27, 27 (2005) (noting that maintaining landscape structure, preserving biodiversity, and contributing to the socio-economic viability of rural areas are beneficial externalities of agriculture).

86. See Stephen N. Wheeler, *The Evolution of Urban Form in Portland and Toronto: Implications for Sustainability Planning*, 8 LOC. ENV'T 317, 326 (2003) (noting the externalities associated with sprawl are significant factors not reflected in land prices).

87. See Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 496 (2003) (advancing a centralized system for natural resource preservation in response to the inability of local decision makers to internalize beneficial externalities); Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 880 (2003) (observing that developed parcels impose environmental costs on neighboring undeveloped parcels).

also not be incorporated into its marketplace value.<sup>88</sup> Another concern is that the use of prime farmland for development causes the country to rely on inferior lands for agricultural production.<sup>89</sup> Furthermore, the loss of farmland may adversely affect neighboring farmers and their ability to continue with their agronomic activities.<sup>90</sup>

This suggests that greater attention might be given to assure proportionality between ecosystem needs and the institutions employed in a market-based economy.<sup>91</sup> This does not involve the subjugation of property rights to ecology, but rather that ecology enters the equation for balancing rights among stakeholders.<sup>92</sup> Through an anti-nuisance paradigm incorporating elements of the economy of nature, undeveloped land resources might be offered greater protection against market forces that fail to incorporate long-term economic and societal benefits offered by farmland, forests, and natural areas.<sup>93</sup>

88. See Richard P. Greene & John Stager, *Rangeland to Cropland Conversions as Replacement Land for Prime Farmland Lost to Urban Development*, 38 SOC. SCI. J. 543, 554 (2001) (concluding that as farmland is converted to other uses, less-sustainable lands are employed for agricultural production); David L. Szlanfucht, Note, *How to Save America's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333, 337 (1999) (observing that reductions in acreages of farmland are felt in local communities).

89. See Rutherford H. Platt, *The Farmland Conversion Debate: NALS and Beyond*, 37 PROF. GEOGRAPHER 433, 441 (1985).

90. See Szlanfucht, *supra* note 88, at 337 (discussing the loss of farmland and its effects on neighboring property).

91. See Erik C. Martini, Comment, *Wisconsin's Milldam Act: Drawing New Lessons from an Old Law*, 1998 WIS. L. REV. 1305, 1325 (discussing efforts to remove dams on rivers in Wisconsin and that the allocation of property rights ought to consider ecology).

92. *Id.*; Sax, *supra* note 60, at 1454.

93. The preservation of land was an objective of early right-to-farm legislation. See *supra* note 4 and accompanying text. See also KAN. STAT. ANN. § 2-3201 (2001) (enunciating the objective of preserving farmland "for the production of food and other agricultural products."). While the preservation of undeveloped land remains the objective for some right-to-farm laws, others were revised to add business activities. The original Georgia right-to farm law adopted in 1980 covered agricultural and farming operations, places, establishments and facilities. 1980 Ga. Laws, p. 1253, §§ 1-2. Subsequently, the Georgia right-to-farm law was amended to protect:

(E) The production and keeping of honeybees, the production of honeybee products, and honeybee processing facilities;

(F) The production, processing, or packaging of eggs or egg products;

(G) The manufacturing of feed for poultry or livestock;

(H) The rotation of crops, including without limitation timber production;

(I) Commercial aquaculture

(J) The application of existing, changed, or new technology, practices, processes, or procedures to any agricultural operation; and

(K) The operation of any roadside market.

GA. CODE ANN. § 41-1-7(3) (1997 & Supp. 2006).

## II. DEVELOPING ANTI-NUISANCE PROTECTION FOR UNDEVELOPED LANDS

Activities occurring on farmlands, forests, and natural areas may create conflicts with neighboring property owners.<sup>94</sup> Prominent objectionable activities for agriculture involve odors from animal feeding operations.<sup>95</sup> Aerial spraying of herbicides<sup>96</sup> and logging constitute forestry practices that may irk neighbors.<sup>97</sup> Accumulated brush,<sup>98</sup> invasive species,<sup>99</sup> and insect infestations<sup>100</sup> on lands that are natural areas may cause annoyances that lead to nuisance lawsuits.<sup>101</sup> Many residential property owners feel they should not have to bear the inconveniences accompanying agricultural and silvicultural production.<sup>102</sup> To address these nuisance concerns, an “Undeveloped Lands Protection Act” (ULPA) is proposed (see Appendix 2). ULPA is modeled after right-to-farm laws but is limited to providing protection against nuisance lawsuits involving undeveloped lands.<sup>103</sup>

---

94. See *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909, 910 (Fla. Dist. Ct. App. 1990) (involving a conflict concerning odors from liquid poultry manure); *Herrin v. Opatut*, 281 S.E.2d 575, 576 (Ga. 1981) (considering odors from a poultry operation); *Crea v. Crea*, 16 P.3d 922, 925 (Idaho 2000) (considering the expansion of a hog operation); *Payne v. Skaar*, 900 P.2d 1352, 1356 (Idaho 1995) (considering odors from a cattle feedlot); *Laux v. Chopin Land Assoc.*, 550 N.E.2d 100, 103 (Ind. Ct. App. 1990) (considering odors from a hog operation); *Flansburgh v. Coffey*, 370 N.W.2d 127, 130-31 (Neb. 1985) (considering the construction of a hog confinement building); *Holubec v. Brandenberger*, 111 S.W.3d 32, 34 (Tex. 2003) (alleging noise and flies); *Trickett v. Ochs*, 838 A.2d 66, 69 (Vt. 2003) (alleging noise, light glare, and traffic).

95. See *supra* note 94.

96. See *Anderson v. Minnesota*, 693 N.W.2d 181, 192 (Minn. 2005) (alleging that the state's use of pesticides on poplar groves created a private nuisance).

97. See *Alpental Cmty. Club, Inc. v. Seattle Gymnastics Soc'y*, 111 P.3d 257, 258 (Wash. 2005) (alleging that clear-cutting a slope was a nuisance due to the increased potential of an avalanche).

98. See Jeffrey P. Cohn, *Tiff over Tamarisk: Can a Nuisance Be Nice, Too?*, 55 BIOSCIENCE 648, 653 (2005) (noting that accumulations of woody materials from tamarisk trees provided fuel for wildfires).

99. See *id.* at 650 (reporting efforts to remove buffelgrass, an invasive weed, because the species causes wildfires to burn very hot and spread to additional areas).

100. See *Fox v. Cheminova, Inc.*, 387 F. Supp. 2d 160, 175 (E.D. N.Y. 2005) (declining to grant defendants summary judgment with respect to a public nuisance claim based on the spraying of pesticides to control the West Nile Virus); *Buchanan v. Simplot Feeders Ltd. P'Ship*, 952 P.2d 610, 614 (Wash. 1998) (alleging an infestation of flies at an animal feedlot constituted a nuisance); *Farmers Ins. Exch. v. California*, 221 Cal. Rptr. 225, 227 (Cal. Ct. App. 1985) (alleging a nuisance involving the release of a chemically destructive spray into the atmosphere to control an infestation of Mediterranean fruit flies).

101. See *infra* notes 132-133 and accompanying text.

102. See *generally supra* note 94.

103. See *generally* ULPA, tits. I-VII, *infra* app. 2. Undeveloped lands refer to real property consisting of acreages of land and/or water used as farmlands, forests, and natural areas.

The distinction involves the exclusion of business activities that are not necessary for the stewardship of land or its productive capacity.<sup>104</sup>

While ULPA differentiates activities relating to the use of land from business activities, it is not intended to downplay the importance of business activities to economically beneficial land-use.<sup>105</sup> Other mechanisms, however, are already available to support such business activities, including existing right-to-farm laws, tax incentives, conservation easements, purchasing development rights, and transferring development rights.<sup>106</sup> ULPA supplements these other mechanisms to offer an enhanced nuisance defense to undeveloped lands. By excluding business activities, the statutory defense applies in fewer situations and thus can go further in using a state's police power to re-balance the equities among neighbors with conflicting land uses.<sup>107</sup> Under ULPA, the economy of nature supports additional protection solely for undeveloped lands.<sup>108</sup>

---

Practices to improve the productive capacity of lands, structures for educational purposes, and efforts to preserve archaeological and cultural resources are permitted. *See* tit. III(G), *infra* app. 2.

104. The division of business activities from lands mirrors the division of economic incentives from land preservation. Rather than focusing on the economic viability of business activities, ULPA seeks to stop nuisance lawsuits that interfere with the use of undeveloped land. *See* tit. II, *infra* app. 2. *See also* Alterman, *supra* note 30, at 222, 238 (contrasting European land preservation to the use of economic incentives to preserve farmland in the United States).

105. Business activities are important to land but are more appropriately governed by existing nuisance provisions, including right-to-farm laws.

106. *See* Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 422-57 (2002) (discussing agricultural zoning as a major player among programs to save farmland); Mark W. Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. L. 371, 393-98 (2005) (discussing the preservation of farmlands within the context of interfering with private property rights); Theodore A. Feitshans, *PDRs and TDRs: Land Preservation Tools in a Universe of Voluntary and Compulsory Land Use Planning Tools*, 7 DRAKE J. AGRIC. L. 305, 329 (2002) (discussing transfer of development rights as a means to preserve farmland); Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 283-308 (2004) (discussing regulatory options that might be used to preserve farmland); Jesse J. Richardson, Jr., *Downzoning Fairness and Farmland Protection*, 19 J. LAND USE & ENVTL. L. 59, 75-90 (2003) (discussing who should pay for diminished values of lands preserved as farmlands); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 143 (1998) (opining a need to balance farmland preservation with urban growth). *See also* Szlanfucht, *supra* note 88, at 343-52 (discussing methods to save farmland).

107. *See* Hamilton, *supra* note 2, at 113 (observing that right-to-farm laws were passed when agricultural production was quite different and that the laws might not be appropriate for the size of modern operations); Walker, *supra* note 15, at 461 (noting differences in the size of agricultural operations and suggesting that these structural changes alter the justifications for right-to-farm laws).

108. *See supra* notes 67-93 and accompanying text (delineating the economy of nature).



ULPA consists of seven sections: the legislative purpose, protection, definitions, exceptions, retained rights, preemption of local ordinances, and litigation expenses.<sup>109</sup> The provisions are adapted from right-to-farm laws and directed toward nuisances that occur on undeveloped lands.<sup>110</sup> ULPA is not intended to replace right-to-farm laws; rather, it provides a supplemental defense for qualifying property owners against nuisance actions.<sup>111</sup>

### A. *Legislative Purpose*

To delineate what is intended and to define legitimate governmental objectives, ULPA sets forth a legislative purpose.<sup>112</sup> Several issues are incorporated into the statement describing the act's objectives. The first legislative directive delineates a policy of encouraging the use and improvement of the state's farmlands, forests, and natural areas while simultaneously conserving and protecting these resources.<sup>113</sup> As described in title I(A), these lands offer important services and are irreplaceable resources of statewide importance.<sup>114</sup> Given the nature of the natural resources being protected, the act contributes to the general benefit of people's health and welfare.<sup>115</sup>

A second aspect of ULPA's purpose is to enhance the use of undeveloped lands for outdoor recreational activities, scenic vistas, and ecological and natural resources.<sup>116</sup> Title I(B) observes that open

---

109. See ULPA, tits. I-VII, *infra* app. 2 (text of the proposed act).

110. The intent is to protect land resources: lands that have not been developed or have been developed with a minimum of permanent structures that interfere with agricultural, recreational, or open space land uses. See tit. I, *infra* app. 2.

111. The act would be of special assistance in states where a right-to-farm law was found to offend constitutional provisions. See *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 175-77 (Iowa 2004) (finding right-to-farm laws unconstitutional).

112. Tit. I, *infra* app. 2 (incorporating ideas from several right-to-farm laws, including the Pennsylvania law, 3 PA. STAT. ANN. § 951 (West 1995 & Supp. 2006) (stating that the law's purpose is to conserve and encourage the protection of agriculture land)).

113. *Id.*

114. Tit. I(A), *infra* app. 2 (mirroring the legislative purpose of Kansas' right to farm law). See, e.g., KAN. STAT. ANN. § 2-3201 (2001) (encouraging agricultural production).

115. *Id.* (adopting a statement that the preservation of agriculture will serve citizens' best interests from right-to-farm laws in Florida and New Jersey). See, e.g., FLA. STAT. ANN. § 823.14 (West 2006); N.J. STAT. ANN. § 4:1C-2 (West 1998).

116. Tit. I(B), *infra* app. 2 (listing purposes delineated by the Vermont right-to-farm law). See, e.g., VT. STAT. ANN. tit. 12, § 5751 (2002 & Supp. 2006) (stating that agricultural activities preserve the state's resources and landscape while contributing to tourism and the general health and welfare of the people).

fields, pastures, forests, and natural areas are important to tourism and the quality of life of people in the state.<sup>117</sup> Forest lands may be important to an area's economic and ecological health.<sup>118</sup> Undeveloped lands may cleanse common water and air resources.<sup>119</sup> This is why efforts should be made to limit urban encroachment, the development and construction of structures, and the paving of areas with impervious surfaces.<sup>120</sup> Simultaneously, the legislative purpose acknowledges the lack of adequate and informed consideration of natural resources, their relationship to the state's economy, and the need to sustain activities on undeveloped lands.<sup>121</sup>

Title I(C) of ULPA sets forth a legislative purpose concerning urban encroachment and the development of physical structures.<sup>122</sup> These activities result in fragmentation that diminishes the long-term ability of the land and appurtenant parcels to be maintained in natural productive uses, which may lead to the loss of resources.<sup>123</sup> Fragmentation and the development of structures also interfere with the long-term use of undeveloped lands because, as farm and forest

---

117. *See id.*

118. Donna L. Erickson, Robert L. Ryan & Raymond De Young, *Woodlots in the Rural Landscape: Landowner Motivations and Management Attitudes in a Michigan (USA) Case Study*, 58 LANDSCAPE & URB. PLAN. 101, 101 (2002) (finding that aesthetics and environmental protection were more significant than economics for maintaining woodlots).

119. *See* Michael D. Jawson, Evert Byington, Dale Bucks, Mark Weltz & Robert Wright, *East, or West—Suiting Farms to Their Environments*, 53 AGRIC. RES., Aug. 2005 at 2, 2 (noting that agriculture can provide ecological services); Keith L. Olenick, Urs P. Kreuter & J. Richard Conner, *Texas Landowner Perceptions Regarding Ecosystem Services and Cost-sharing Land Management Programs*, 53 ECOLOGICAL ECON. 247, 247-48 (noting ecological services performed by rangelands).

120. This is not to say that limits on areas of impervious surfaces are universally considered a good idea. *See* Jonathan E. Jones, T. Andrew Searles, Elizabeth A. Fassman, Edwin E. Herricks, Ben Urbonas & Jane K. Clary, *Urban Storm-Water Regulations—Are Impervious Area Limits a Good Idea?*, 131 J. ENVTL. ENGINEERING 176, 178 (2005) (chastising limits on impervious surfaces because they often create “more significant environmental problems”).

121. Tit. I(B)(3), *infra* app. 2 (adopting ideas from a Florida law delineating a policy for agricultural production). *See, e.g.*, FLA. STAT. ANN. § 604.001(6) (West 2003) (stating that the lack of informed consideration has caused problems for agricultural production).

122. Tit. I(C), *infra* app. 2.

123. Tit. I(C)(1), *infra* app. 2. *See also* IDAHO CODE ANN. § 22-4501 (2001) (stating “that agricultural activities conducted on farmland in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses, and in some cases prohibit investments in agricultural improvements.”); R.I. GEN. LAWS § 2-23-2(4) (1998) (postulating “[t]hat conflicts between agricultural and urban land uses threaten to force the abandonment of agricultural operations and the conversion of agricultural resources to non-agricultural land uses, whereby these resources are permanently lost to the economy and the human and physical environments of the state.”).

lands are developed, fragmentation begets fragmentation.<sup>124</sup> When owners of undeveloped land sell parcels for development, remaining lands become scattered and are more likely to experience annoyances and interferences.<sup>125</sup> Urbanization results in the loss of more land than is incorporated in urban land uses and often diminishes the quality of nearby water resources.<sup>126</sup>

Urban development next to farmlands, forests, and natural areas tends to create conflicts that threaten the demise of these resources.<sup>127</sup> Title I(C)(2) notes that the urbanization of an area may lead to the demise of important natural resources.<sup>128</sup> Certain activities necessary to the use of agricultural and forestry lands are not always pleasant.<sup>129</sup> Pesticides and herbicides may be used and neighbors may fear that the poisons will adversely affect their health.<sup>130</sup> Fertilization with animal manure may result in offensive odors.<sup>131</sup> Natural areas may accumulate plant undergrowth that creates a fire hazard to neighboring homes and structures,<sup>132</sup> and controlled burns may be

---

124. Rutherford V. Platt, *Global and Local Analysis of Fragmentation in a Mountain Region of Colorado*, 101 AGRIC., ECOSYSTEMS & ENV'T 207, 217 (2004) (analyzing changes in fragmentation of urban development between 1985 and 1999).

125. Elizabeth Brabec & Chip Smith, *Agricultural Land Fragmentation: The Spatial Effects of Three Land Protection Strategies in the Eastern United States*, 58 LANDSCAPE & URB. PLAN. 101, 101 (2002) (discussing issues accompanying agricultural land fragmentation).

126. Bryan C. Pijanowski, Bradley Shellito, Snehal Pithadia & Konstantinos Alexandridis, *Forecasting and Assessing the Impact of Urban Sprawl in Coastal Watersheds Along Eastern Lake Michigan*, 7 LAKES & RESERVOIRS: RES. & MGMT. 271, 282 (2002) (employing a model to analyze urban-use changes in Michigan and analyzing data to show the impairment of watersheds and loss of riparian habitats as areas urbanize).

127. See R.I. GEN. LAWS § 2-23-2(3)-(4) (1998) (citing conflicts between traditional agricultural land uses and urban land uses as justification for the Rhode Island right-to-farm law); WASH. REV. CODE ANN. § 7.48.300 (West 1992 & Supp. 2005) (observing that nuisance lawsuits in urbanizing areas may lead to the "premature removal of the lands from agricultural uses and timber production."). Alternatively, the availability of off-farm employment may lead farmers to opt for non-farm occupations and the reversion of farmland to forest land. Kristi MacDonald & Thomas K. Rudel, *Sprawl and Forest Cover: What is the Relationship?*, 25 APPLIED GEOGRAPHY 67, 75 (2005) (discussing urban sprawl and the loss of forest cover).

128. *Infra* app. 2.

129. See generally *supra* note 94 (identifying various nuisance cases involving objectionable activities).

130. *Macias v. California*, 897 P.2d 530, 531 (Cal. 1995) (alleging damages from helicopter spraying of the insecticide malathion); *Adkins v. California*, 59 Cal. Rptr. 2d 59, 61 (Cal. Ct. App. 1996) (alleging damages from hanging traps in a pest eradication program).

131. *Pasco County v. Tampa Farm Serv., Inc.*, 573 So.2d 909, 912 (Fla. Dist. Ct. App. 1990) (noting that the Florida right-to-farm law was to protect established farmers from "sprawling urban development").

132. See Cohn, *supra* note 98, at 653 (discussing an exotic species of tree that provides fuel for wildfires that kills native vegetation).

advocated to burn undergrowth creating a nuisance to neighboring lands.<sup>133</sup> The anti-nuisance protection seeks to safeguard the long-term ability of lands and appurtenant parcels to be maintained in natural productive uses.<sup>134</sup>

Finally, ULPA's purpose notes in title I(D) that the overriding purpose of the act is to limit the circumstances under which farmlands, forests, and natural areas may be deemed a nuisance.<sup>135</sup> Neighbors resort to nuisance lawsuits to stop the annoying activities. If the activities are enjoined, the inability to employ a practice may force the premature demise of the current productive capacities.<sup>136</sup> ULPA intends to limit interferences with the inherent agronomic qualities and ecological values of the state's undeveloped lands.<sup>137</sup>

### B. *The Protection*

Title II delineates the protection offered by the ULPA.<sup>138</sup> Activities needed for the viable use of farmlands, forests, and natural areas are permitted to continue.<sup>139</sup> Conditions commonly associated with these parcels need to be accepted by people who locate nearby despite their objectionableness.<sup>140</sup> This protection is important to owners of undeveloped lands because it discourages incompatible

---

133. See J. Morgan Varner, III, Doria R. Gordon, Francis E. Putz & J. Kevin Hiers, *Restoring Fire to Long-Unburned Pinus palustris Ecosystems: Novel Fire Effects and Consequences for Long-Unburned Ecosystems*, 13 RESTORATION ECOLOGY 536, 541 (2005) (advocating restoring and maintaining southeastern pine ecosystems); Sharon Levy, *Rekindling Native Fires*, 55 BIOSCIENCE 303, 304 (2005) (noting the value of controlled burns in restoring native habitats).

134. Tit. I(C), *infra* app. 2. See IDAHO CODE ANN. § 22-4501 (2001) (citing "the premature removal of the lands from agricultural uses"); R.I. GEN. LAWS § 2-23-2(4) (1998) (expressing concern about "the conversion of agricultural resources to non-agricultural land uses" and the permanent loss of resources).

135. Tit. I(D), *infra* app. 2 (adopting a legislative purpose from similar provisions in numerous right-to-farm laws including HAW. REV. STAT. ANN. § 165-1 (LexisNexis 2000), IDAHO CODE ANN. § 22-4501 (2001), 740 ILL. COMP. STAT. ANN. 70/1 (West 2002), N.M. STAT. ANN. § 47-9-2 (LexisNexis 1999), and S.C. CODE ANN. § 46-45-10(3) (1987 & Supp. 2005)).

136. See S.C. CODE ANN. § 46-45-10(2) (1987 & Supp. 2005) (noting the problem of agricultural facilities being forced to cease production).

137. Tit. I(D), *infra* app. 2. See *Lichtman v. Nadler*, 426 N.Y.S.2d 628, 631 (N.Y. App. Div. 1980) (rejecting a claim that stagnant water was a nuisance due to mosquitoes and unpleasant odors).

138. Tit. II, *infra* app. 2.

139. *Id.*

140. *Id.* tit. II(A). See also OR. REV. STAT. § 30.933(2)(c) (2005) (declaring that "[p]ersons who locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting.").

land uses from moving into the area.<sup>141</sup> After a short policy declaration, ULPA sets forth three different provisions for protection of land resources: (1) a statute of limitations, (2) a rebuttable presumption that activities are not a nuisance and (3) an affirmative defense to nuisance actions involving coming to the nuisance.<sup>142</sup>

First, title II(A) specifies a state policy that activities are to continue on lands covered by the act.<sup>143</sup> By referring to the conditions at the particular setting, ULPA tells people that they should expect activities that are consistent with the setting.<sup>144</sup> People living next to crop lands should expect annoyances from land cultivation and harvesting activities.<sup>145</sup> Timber harvesting in forests will involve logging activities accompanied by negative externalities that adversely affect neighbors.<sup>146</sup> People with farmland, forestry areas, and natural areas should be able to allow natural vegetation including weeds to grow.<sup>147</sup> Under ULPA, plaintiffs are stopped from

---

141. The significance of limiting non-agricultural land uses is that there will be fewer pressures to develop or sell land. See Brett Zollinger & Richard S. Krannich, *Factors Influencing Farmers' Expectations to Sell Agricultural Land for Non-Agricultural Uses*, 67 RURAL SOC. 442, 459 (2002) (noting that changes in land use may encourage a farmer to sell land for non-agricultural purposes).

142. Tit. II(B)-(D), *infra* app. 2. See also VT. STAT. ANN. tit.12, § 5753 (2002 & Supp. 2006) (establishing a rebuttable presumption that a prescribed activity is not a nuisance); 3 PA. STAT. ANN. § 954 (West 1995 & Supp. 2006) (establishing a one year statute of limitation for initiating a nuisance action).

143. Tit. II(A), *infra* app. 2. See also OR. REV. STAT. § 30.933 (2005) (delineating the protection of lands).

144. Tit. II(A), *infra* app. 2 (referencing particular settings [farmlands, forests, and natural areas] to recognize that activities on farmlands may be different from those occurring on forests and that the conditions only pertain to the individual setting).

145. See Marti Maguire, *Caution: Farm Zone; Agricultural Districts Could Protect Farmers from Newcomers Who Raise a Stink*, NEWS & OBSERVER (Raleigh, N.C.), July 10, 2005, at B1 (noting tractors kick up dust and create nuisances); Jane Hawes, *Rural Relations: Talking Across the Fence Helps Farmers, Newcomers Get Along*, COLUMBUS DISPATCH (Ohio), July 20, 2003, at 01B (noting a neighbor's objections to the dust and dirt from a nearby cattle and hog operation).

146. See P. Bérubé & F. Lévesque, *Effects of Forestry Clear-cutting on Numbers and Sizes of Brook Trout, *Salvelinus fontinalis* (Mitchill)*, in *Lakes of the Mastigouche Wildlife Reserve, Québec, Canada*, 5 FISHERIES MGMT. & ECOLOGY 123, 133 (1998) (noting that logging may cause the siltation of streams and decreased fishing stocks); Ansgar Kahmen & Erik S. Jules, *Assessing the Recovery of a Long-lived Herb Following Logging: *Trillium ovatum* Across a 424-year Chronosequence*, 210 FOREST ECOLOGY & MGMT. 107, 113-15 (2005) (observing that long term biological diversity depends on logging practices).

147. *But see* Goodenow v. City of Maquoketa, 574 N.W.2d 18, 20 (Iowa 1998) (finding that the city could enforce an ordinance requiring a landowner to mow grass and weeds in a city right-of-way).

maintaining nuisance lawsuits about activities or conditions that ordinarily transpire on undeveloped lands.<sup>148</sup>

A case from Florida shows the need for this protection.<sup>149</sup> In *Kupke v. Orange County*, a county enforcement officer cited a farmer for “operating an unauthorized ‘junkyard’ on his agricultural zoned land because he ‘stored’ a bushhog, a bulldozer, a crane, a backhoe, and various other equipment and materials outdoors. . . .”<sup>150</sup> The issue was whether the equipment said to constitute a nuisance was protected by the anti-nuisance provisions of the Florida right-to-farm law.<sup>151</sup> For the county’s case, witnesses claimed the machinery created a nuisance without addressing the question of whether the equipment was used for farming purposes.<sup>152</sup> Moreover, at the hearing on the citation, the defendant was not allowed to present testimony from farmers about the nature of the equipment.<sup>153</sup> In considering a writ of certiorari, the appellate court quashed the lower decisions.<sup>154</sup> The matter was remanded to provide the defendant an opportunity to show that “the challenged equipment has an agricultural use which meets the policy expressed by the legislature” for maintaining the production of agricultural commodities for food and fiber.<sup>155</sup> ULPA’s

148. Tit. II(A), *infra* app 2. Like the right-to-farm laws, ULPA would be an affirmative defense and some nuisance causes of action would continue to be viable. *See id.* tits. IV-V (delineating exceptions to the defense).

149. *Kupke v. Orange County*, 838 So. 2d 598, 590 (Fla. Dist. Ct. App. 2003).

150. *Id.* at 598-99.

151. *Id.* (citing FLA. STAT. ANN. § 823.14(4) (West 2006)).

152. *Kupke*, 838 So. 2d at 599 (complaining about “contamination, fires, snakes and rats”).

153. *Id.* (thwarting efforts of the defendant to show that the equipment was being used for farming purposes).

154. *Id.* at 599-600 (remanding the issue to the circuit court and the county code enforcement board).

155. *Id.* (citing FLA. STAT. ANN. § 604.001 (West 2003)). In addressing agricultural production in Florida, the Legislature has declared that:

(1) It is the public policy of this state and the purpose of this act to achieve and maintain the production of agricultural commodities for food and fiber as an essential element for the survival of mankind.

....

... (3) A sound agricultural industry in this state requires the efficient and profitable use of water and energy and many other natural, commercial, and industrial resources.

....

... (5) It is important to the health and welfare of the people of this state and to the economy of the state that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable. . . .

FLA. STAT. ANN. § 604.001 (West 2003). Some of the provisions of this Florida law have been incorporated in the legislative purpose of ULPA. *See* tit. I(B), *infra* app. 2.

title II delineates anti-nuisance protection to sanction activities associated with agricultural and forestry production.<sup>156</sup>

Simultaneously, ULPA contains an important qualification: the activities must be conducted according to “generally accepted practices.”<sup>157</sup> This qualification sets a benchmark whereby unjustified practices, and practices that deviate from the norm, are excluded from coverage by the act.<sup>158</sup> Further qualifications concerning generally accepted activities are set forth in the definition of this term.<sup>159</sup>

To provide more protection than is offered by most right-to-farm laws, ULPA’s title II(B) establishes a two-year statute of limitation for nuisance actions on qualifying undeveloped lands.<sup>160</sup> Four states (Minnesota, Mississippi, Pennsylvania, and Texas) have adopted time periods to serve as a period of limitation and defeat nuisance actions.<sup>161</sup> The two-year period, adapted from the Minnesota Right to Farm Act,<sup>162</sup> provides a limited time frame during which nuisance claims can be brought against an operation protected by the statute.<sup>163</sup> After the two-year window closes, a neighboring landowner is precluded from bringing a nuisance action.<sup>164</sup>

---

156. Tit. II, *infra* app. 2.

157. *Id.* tit. II(A). *See also* Walker, *supra* note 15, at 480-85 (discussing the “generally accepted agricultural and management practices” as delineated by the Michigan right-to-farm law).

158. *See* tit. II(A), *infra* app. 2. *See* Souza v. Lauppe, 69 Cal. Rptr. 2d 494, 500 (Cal. Ct. App. 1997) (observing that activities conducted consistent with proper and accepted customs were not a nuisance). *See also* HAW. REV. STAT. ANN. § 165-4 (LexisNexis 2000 & Supp. 2005) (requiring “generally accepted agricultural and management practices” for qualification under the right-to-farm law); MINN. STAT. ANN. § 561.19, subdiv. 2(a)(3) (West 2000 & Supp. 2006) (requiring “generally accepted practices” to qualify for the exception to nuisance law).

159. *See* tit. III(D), *infra* app. 2.

160. *Id.* tit. II(B).

161. MINN. STAT. ANN. § 561.19, subdiv. 2(a) (West 2000 & Supp. 2006), *interpreted in* Overgaard v. Rock County Bd. of Comm’rs, No. 02-601, 2003 U.S. Dist. LEXIS 13001, \*20-22 (D. Minn. July 25, 2003); MISS. CODE ANN. § 95-3-29(a) (2004), *interpreted in* Bowen v. Flaherty, 601 So. 2d 860, 862-63 (Miss. 1992); 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2006), *interpreted in* Horne v. Haladay, 728 A.2d 954, 956-58 (Pa. Super. Ct. 1999); TEX. AGRIC. CODE ANN. § 251.004 (Vernon 2004 & Supp. 2006), *interpreted in* Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544, 548-49 (Tex. App. 2004).

162. MINN. STAT. ANN. § 561.19, subdiv. 2(a) (West 2000 & Supp. 2006).

163. *See* tit II(B), *infra* app. 2.

164. *See* Overgaard v. Rock County Bd. of Comm’rs, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at \*20-22 (D. Minn. July 25, 2003) (interpreting the Minnesota right-to-farm law’s statute of limitations).

Third, ULPA's title II(C) offers a rebuttable presumption that activities are not a nuisance on lands covered by the act.<sup>165</sup> This presumption applies to all activities on these lands regardless of whether the activities predated neighboring land uses.<sup>166</sup> In this manner, ULPA supports and protects activities even though they slightly interfere with neighboring properties.<sup>167</sup> However, limitations are provided in other provisions of the act. An activity needs to be conducted according to generally accepted practices in order to qualify for the protection of the act,<sup>168</sup> and certain enumerated activities do not qualify for the presumption.<sup>169</sup> If a new activity is unreasonable, the presumption can be overcome and nuisance law would provide a resolution for the conflict.<sup>170</sup>

Fourth, for individuals moving near existing parcels, ULPA's title II(D) sets forth a "coming to the nuisance" doctrine.<sup>171</sup> If an activity was not a nuisance when commenced, and has continued for one year prior to people moving next to the activity, the anti-nuisance defense is available.<sup>172</sup> This provision is important for protecting investments in capital and labor used for farming and forestry business pursuits.<sup>173</sup> The exception must also be read in conjunction

---

165. Tit. II(C), *infra* app. 2 (adopting a rebuttable presumption from the Vermont right-to-farm statute, VT. STAT. ANN. tit. 12, § 5753(a) (2002 & Supp. 2006)).

166. *Id.* Simultaneously, the activities that were there first are further protected by the coming to the nuisance doctrine delineated in part D of title II. *Id.* tit. II(D).

167. *See generally id.* tit. II. The presumption in ULPA's title II(C) indicates that activities should be excepted from nuisance even if they have not existed, but this may be overcome by evidence to the contrary. Since nuisance involves a balancing of equities, the act would recognize a legislatively espoused priority of safeguarding undeveloped lands. *See id.* tit. II.

168. *Id.* tit. II(A). *See also id.* tit. III(D) (defining "generally accepted practices").

169. *See id.* tits. IV, V(A).

170. *Id.* tit. II(C). This is because not only does the presumption not apply, but the affirmative defense is also not applicable because the coming to the nuisance provision does not protect new activities. *Id.* tit. II(D). *See also* Trickett v. Ochs, 838 A.2d 66, 72-74 (Vt. 2003) (finding that the rebuttable presumption did not preclude a nuisance action where there was not urban encroachment).

171. Tit. II(D), *infra* app. 2. This doctrine has been adopted by many right-to-farm laws. *See* Hand, *supra* note 1, at 307 (noting priority in usage is consistent with the coming to the nuisance defense).

172. Tit. II(D), *infra* app. 2 (adopting a one-year time frame to define the coming to the nuisance exception from several right-to-farm laws). *See, e.g.*, GA. CODE ANN. § 41-1-7(c) (1997 & Supp. 2006); 740 ILL. COMP. STAT. ANN. 70/3 (West 2002); IND. CODE ANN. § 32-30-6-9(d) (West 1999 & Supp. 2006).

173. *Cf. supra* note 123. The coming to the nuisance defense will be important for activities that started before changes in nearby land uses. In *Vicwood Meridian Partnership'ship v. Skagit Sand & Gravel*, a farm in existence since the 1920s was composting poultry litter for the production of mushrooms. 98 P.3d 1277, 1279 (Wash. Ct. App. 2004). The defendant altered its



with title IV of the act which requires conformity with all laws, no maliciousness, and excludes activities that would be injurious to public health or safety.<sup>174</sup>

### C. Definitions

ULPA sets forth seven definitions to enunciate the meanings of key terms.<sup>175</sup> Through the definition of activities, farmlands, forests, generally accepted practices, manure, natural areas, and undeveloped lands, parameters are given for the protection accorded by the act.<sup>176</sup>

#### 1. Activities

Activities are defined in two separate paragraphs: one for food and crop production areas and the second for natural areas.<sup>177</sup> Activities include conditions and pursuits associated with the production of agricultural, aquacultural, and silvicultural products and the management of the production areas for continued agronomic objectives.<sup>178</sup> To further delineate what types of activities this might include, ULPA lists fertilizer application, weed and pest control, planting, cultivating, reforestation, on-site composting,<sup>179</sup> drainage,<sup>180</sup> mowing, harvesting, land clearing, insect and disease control, constructing ponds associated with farming or aquacultural operations, thinning, fire protection, and fence maintenance.<sup>181</sup> This

---

composting process and was sued by neighbors who had moved to the nuisance. *Id.* The court found that the coming to the nuisance defense incorporated in the right-to-farm law protected the defendant against the nuisance lawsuit. *Id.* at 1280-82 (interpreting WASH. REV. CODE ANN. §§ 7.48.300-310 (West 1992 & Supp. 2005)). Similarly, ULPA incorporates the coming to the nuisance doctrine in title II(D) to offer the protection to existing activities. *Infra* app. 2.

174. Tit. IV, *infra* app. 2. *See also infra* Part II.D (discussing the exceptions of ULPA's nuisance protection).

175. Tit. III, *infra* app. 2.

176. *Id.*

177. *Id.* tit. III(A)(1)-(2).

178. *Id.* tit. III(A)(1) (listing activities from the Washington state right-to-farm law, WASH. REV. CODE ANN. § 7.48.310(1) (West 1992 & Supp. 2005)).

179. However, bringing materials to the site for composting would be a business activity not intended to be protected by the act. Tit. III(A)(1), *infra* app. 2. *See also* Johnson v. Compost Prods., Inc., 731 N.E.2d 948, 950 (Ill. Ap. Ct. 2000) (considering an allegation that a mushroom composting business constituted a nuisance).

180. Flooding would constitute a nuisance under ULPA, tit. V(A)(2), *infra* app. 2. *Cf.* Ditch v. Hess, 292 N.W.2d 397, 398 (Iowa 1980) (observing that an interference with drainage causing farmland to be unusable could constitute a continuing nuisance).

181. Tit. III(A)(1), *infra* app. 2 (listing activities from the Kentucky right-to-farm law, KY. REV. STAT. ANN. § 413.072(3) (West 2005), and permitted activities from Washington state funding for recreation and wildlife, WASH. REV. CODE ANN. § 79A.20.010(1) (West 2001)).

list is not intended to be exhaustive of the activities that will be covered.<sup>182</sup> Furthermore, the text notes that an activity may be accompanied by odors, noise, air particulates, use of chemicals, and the lawful impairment of waters.<sup>183</sup>

Due to the fact that natural areas may have quite different activities from those occurring on lands specifically geared for the production of crops, ULPA's title III(A)(2) contains a separate paragraph protecting conditions and pursuits associated with natural areas.<sup>184</sup> Reference is made to activities involving the protection, management, and development of scenic, outdoor recreational, cultural, archaeological, and ecological resources.<sup>185</sup> ULPA is intended to offer anti-nuisance protection for undeveloped lands providing these resources.

## 2. Farmlands

"Farmlands" are defined to include parcels greater than ten acres that are devoted primarily for the production of crops, livestock, freshwater aquacultural, horticultural, or other agricultural commodities.<sup>186</sup> Areas of land, swampland, ponds, and small lakes may be included in the calculation of the requisite acreage size.<sup>187</sup> A parcel of less than ten acres suggests that the area is of an insufficient size to constitute a meaningful, undeveloped land resource.<sup>188</sup>

To give further direction to the definition of farmlands, a listing of land uses is included, enumerating field crops, vineyards, orchards, groves, vegetable and fruit crops, pastures, areas without roofed structures for holding farm animals, water bodies for the production of aquacultural products, ponds, small lakes, and forestry areas as

---

182. *Id.*

183. *Id.* (adopting the list of activities from the Connecticut right-to-farm law, CONN. GEN. STAT. ANN. § 19a-341(a) (West 2003 & Supp. 2006), and the Rhode Island right-to-farm law, R.I. GEN. LAWS § 2-23-5(a) (1998)).

184. *Id.* tit. III(A)(2). For example, natural water areas with excess nutrients and sediments may allegedly create a nuisance. *Steilacoom Lake Improvement Club v. Washington*, No. 31676-5-II, 2005 Wash. App. LEXIS 1936, at \*1 (Wash. Ct. App. 2005) (alleging that the aquatic plant growth in a lake constituted a nuisance).

185. Tit. III(A)(2), *infra* app. 2 (adopting activities for preservation of natural areas from a Washington statute, WASH. REV. CODE ANN. § 79.70.010 (West 2001)).

186. *Id.* tit. III(B) (adopting the ten-acre idea from the Nebraska right-to-farm law, NEB. REV. STAT. § 2-4402(1) (2001)).

187. *Id.* (adopting the idea of including waters used for aquacultural production from the Mississippi right-to-farm law, MISS. CODE ANN. § 95-3-29(2)(a) (2004)).

188. Areas less than ten acres may be associated with urbanization and thus do not have sufficient qualities to be considered as undeveloped lands. *See supra* note 186.

acceptable land uses.<sup>189</sup> The definition of farmlands also includes appurtenant natural areas, which would include parcels that are not readily incorporated into cultivated acreages.<sup>190</sup>

### 3. Forests

ULPA's title III(C) defines forests to mean parcels greater than ten acres that are used in the production of timber and related fiber crops.<sup>191</sup> Forestry production activities include timber harvest, site preparation, slash disposal including controlled burning, tree planting, pre-commercial thinning, fertilization, animal damage control, reasonable water resource management, insect and disease control in forest land, and any other generally accepted, reasonable, and prudent practice normally employed in the management of the timber resource for monetary profit.<sup>192</sup> Through the definition of forests, recognized forestry activities receive protection from nuisance lawsuits.<sup>193</sup>

### 4. Generally Accepted Practices

One of the difficulties in exempting practices from nuisance lawsuits is defining what practices are exempted. While malicious and injurious practices are excepted,<sup>194</sup> there remain other practices that are not reasonable and should not be protected from nuisance lawsuits. A definition of "generally accepted practices" is provided in ULPA to provide guidance in discerning the coverage of the act.<sup>195</sup> Generally accepted practices mean reasonable and prudent methods for the activities being conducted and apply to activities used in a county or contiguous county in which a nuisance claim is asserted.<sup>196</sup>

---

189. Tit. III(B), *infra* app. 2. This supports the objective of protecting undeveloped lands.

190. *Id.* Farms may have small parcels of less than ten acres that are woodlands, corners between fields, or buffers that can be considered to be part of the farmlands that merit anti-nuisance protection.

191. *Id.* tit. III(C) (adopting the ten-acre minimum as used for farmlands). The overlap of this definition with farmlands is intentional; all agricultural and silvicultural crops are intended to be within the protection afforded by the act.

192. *Id.* (adopting activities permitted under the Kentucky right-to-farm law, KY. REV. STAT. ANN. § 413.072(3) (West 2005)).

193. *Id.* However, a few activities are not protected. *See id.* tit. IV(B)(4) (prohibiting the clear-cutting of forests).

194. *Id.* tit. IV(A)(1).

195. *Id.* tit. III(D) (adopting language for qualification from the Kentucky right-to-farm law, KY. REV. STAT. ANN. § 413.072(3) (West 2005)).

196. *Id.* (incorporating the idea of having generally accepted practices relate to counties from the Minnesota right-to-farm law, MINN. STAT. ANN. § 561.19, subdiv. 1(c) (West 2000 & Supp. 2006)).

This limitation precludes practices from a divergent region of a state from qualifying as generally accepted practices.

Generally accepted practices include those practices necessary for the on-site production and preparation of agricultural or forestry commodities, such as the operation of equipment, proper use of pesticides, air and water quality control, noise control, fertilizer application, labor practices, and crop protection methods.<sup>197</sup> As further clarifications, two presumptions are delineated. Practices that are commonly or reasonably associated with agricultural production are assumed to qualify as generally accepted practices.<sup>198</sup> Activities in conformity with federal, state, and local laws and regulations are presumed to be conducted according to generally accepted practices.<sup>199</sup>

## 5. Manure

One of the controversial activities involving agricultural production and nuisance law is manure application to fields.<sup>200</sup> The application of manure can be a nuisance, especially if the application occurs at an inappropriate time or fails to conform with acceptable practices.<sup>201</sup> Simultaneously, the application of manure to fields is a desired agronomic practice, as manure contributes to the fertility of the soil by adding organic matter and nutrients.<sup>202</sup> ULPA's title III(E) sets forth a definition for manure providing guidance for future provisions of the act that distinguishes permitted manure application to fields from other practices that remain subject to nuisance lawsuits.<sup>203</sup> "Manure" is defined to include organic matter from farm

---

197. *Id.* tit. III(D)(1) (incorporating ideas on practices from N.J. STAT. ANN. § 4:1C-9 (West 1998 & Supp. 2006) and N.Y. AGRIC. & MKTS. LAW § 308(1)(b) (McKinney 2004)).

198. *Id.* tit. III(D)(2) (adopting the presumption from the Colorado right-to-farm law, COLO. REV. STAT. ANN. § 35-3.5-102(1)(a) (West 1998 & Supp. 2006)).

199. *Id.* (adopting the qualification from the right-to-farm laws from a number of states including ARIZ. REV. STAT. ANN. § 3-112(B) (2005), KAN. STAT. ANN. § 2-3202 (2001), and UTAH CODE ANN. § 78-38-7(2) (2002)).

200. *See supra* note 94 (citing cases concerning odors).

201. Tits. IV(B)(3), V(B)(1), *infra* app. 2 (excepting animal waste lagoons and spray fields from the protection offered by ULPA but protecting the application of manure to fields).

202. A.A. Araji ET AL., *Efficient Use of Animal Manure on Cropland: Economic Analysis*, 79 BIORESOURCE TECH. 179, 179-180 (2001) (noting that the use of animal manure for crop production should be encouraged as it supplies nutrients and organic matter to the soil, augments the soil's water-holding capacity, and increases the soil's fertility). *See also* Terence J. Centner, *EMPTY PASTURES: CONFINED ANIMALS AND THE TRANSFORMATION OF THE RURAL LANDSCAPE* 63 (2004) (noting that the application of manure to land for crop growth is a recommended practice).

203. Tit. III(E), *infra* app. 2. *See also id.* tits. IV(B)(2)-(3), V(B).

animals used as fertilizer in agriculture.<sup>204</sup> Poultry litter is also defined as involving excreted manure from avian species mixed with bedding material.<sup>205</sup> For the purposes of the act, manure includes poultry litter.<sup>206</sup>

## 6. Natural Areas

“Natural areas” are defined as parcels greater than ten acres which have retained their natural, undeveloped character.<sup>207</sup> These areas would exclude cultivated fields and forests, but would include forestry areas that consist of natural regeneration of trees.<sup>208</sup> Moreover, natural areas do not have to be completely undisturbed as they might include lands that are important in preserving archaeological or cultural resources, ecosystems, flora, fauna, geological, open space, natural historical, scenery, wildlife habitat, wetlands, or similar features of scientific or educational value.<sup>209</sup>

## 7. Undeveloped Lands

An additional description of undeveloped lands of ten acres or more is offered in title III(G) to categorize parcels that are afforded protection from nuisance lawsuits.<sup>210</sup> Undeveloped parcels include lands used for farmlands, forests, and natural areas that may be used for outdoor recreational activities, hunting, forestry, scenic views, and ecological functions.<sup>211</sup> Undeveloped lands cannot have any structure used for human habitation, building used for confined animal production, nor any building used for a commercial purpose that is not directly related to use of the land as farmland, forest, or a natural area.<sup>212</sup> Outhouses, lean-to shelters, historical and educational structures, and minor farm buildings are permitted on lands.<sup>213</sup>

---

204. *Id.* tit. III(E).

205. *Id.* See also P. Pengthamkeerati ET AL., *Soil Carbon Dioxide Efflux from a Claypan Soil Affected by Surface Compaction and Applications of Poultry Litter*, 109 AGRIC., ECOSYSTEMS & ENV'T 75, 77 (2005).

206. Tit. III(E), *infra* app. 2. When poultry litter is applied to land as a fertilizer, the issues of smell and water contamination are similar to those created by the application of manure.

207. *Id.* tit. III(F) (adopting the ten-acre minimum as used for farmlands).

208. *Id.* Natural areas may overlap with forests, and both constitute undeveloped lands.

209. *Id.* (adopting ideas describing natural areas for a Washington land preservation statute, WASH. REV. CODE ANN. § 79.70.020 (West 2001 & Supp. 2006)).

210. *Id.* tit. III(G) (adopting the ten-acre minimum used for farmlands).

211. *Id.*

212. *Id.* This relates to the purpose of the act to protect lands in their unaltered state. The provision attempts to allow expected utility or farm out-buildings that do not detract from the preservation of lands. Simultaneously, the act does protect activities at buildings used for

The intent of this definition is to include lands that retain significant resource attributes. In some cases, undeveloped lands may be accompanied by a building or paved area serving a business need.<sup>214</sup> Rather than disqualifying the undeveloped portion of the parcel, nonqualifying buildings or paved areas on plots connected to farmlands, forests, or natural areas may be deemed separate parcels not covered by the act.<sup>215</sup>

#### *D. Exceptions to the Protection*

The broad coverage of activities on undeveloped lands may be misinterpreted to cover some conditions that should not be exempted from nuisance law.<sup>216</sup> Therefore, ULPA's title IV sets forth nine exceptions that delineate activities for which there is no anti-nuisance protection.<sup>217</sup> The activities covered by these exceptions are insufficiently related to the economy of nature or so onerous that neighbors should retain their common law right of nuisance to seek judicial relief.<sup>218</sup>

##### 1. Nonapplication of the Act

The first group of four exceptions concerns situations where the anti-nuisance protection accorded by ULPA does not apply.<sup>219</sup> Following right-to-farm laws, ULPA provides that any activity conducted in a malicious, improper, or negligent manner does not

---

businesses or activities that do not need to be conducted on lands covered by the act. *See id.* tit. IV(B)(1)-(2) (listing buildings as not being within the anti-nuisance protection afforded by ULPA).

213. *Id.* tit. III(G) (allowing unobtrusive structures). The objective is to protect lands, recognizing that a few minor structures may not notably detract from the resources associated with the parcel.

214. For example, historic, educational, or scientific undeveloped areas may have buildings for exhibits or rest rooms, and paved parking areas.

215. Tit. III(G), *infra* app. 2. Farmlands and other lands may be accompanied by residences, barns, or other buildings. While the anti-nuisance protection of ULPA is not intended to apply for the plots where these structures are located, ULPA is intended to apply to lands extending from these structures.

216. Nuisance law is intended to be the norm, with the anti-nuisance defense of ULPA limited to special situations.

217. Tit. IV, *infra* app. 2. As might be expected, these exceptions severely restrict the coverage of the act.

218. *Id.* These ideas are taken from various right-to-farm laws and reported nuisance cases. *See infra* Part D.1—2 (discussing the coverage of ULPA's title IV, which disqualifies certain onerous or unnecessary activities from protection under the act).

219. *Id.* tit., IV(A).

qualify for anti-nuisance protection.<sup>220</sup> Allied with this exception is a provision asserting that an activity not in conformity with federal, state, and local law, ordinance, regulation (including a zoning regulation), or permit issued by a governmental agency cannot claim anti-nuisance protection.<sup>221</sup> These exceptions should be important in precluding undeserving activities from qualifying for the anti-nuisance defense.

A case from the state of Washington illustrates the need for an exception regarding violations.<sup>222</sup> In *Gill v. LDI*, plaintiffs, suing for nuisance, alleged that defendant's activities polluted waters flowing into the plaintiffs' pond.<sup>223</sup> In opposition to the right-to-farm law defense,<sup>224</sup> the court cited admitted violations of a permit issued pursuant to the Clean Water Act.<sup>225</sup> Under the right-to-farm law, a nuisance that involves the violation of a permit requirement subjects the violator to damages.<sup>226</sup> The anti-nuisance exception was not intended to serve as a defense to nuisances by a defendant who fails

---

220. Tit. IV(A)(1), *infra* app. 2. See also 740 ILL. COMP. STAT. ANN. 70/3 (West 2002) (establishing that the anti-nuisance defense is not available "whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances."); VA. CODE ANN. § 3.1-22.29(A) (1994) (providing the anti-nuisance defense is not available for negligent or improper operations); *Concerned Area Residents for the Env't v. Southview Farms*, 834 F. Supp. 1410, 1419 & 1421 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114, 120-121 (2d Cir. 1994) (noting the right-to-farm law required sound agricultural practices and that the defendants had alleged improper manure application); Margaret Rosso Grossman, *Biotechnology, Property Rights and the Environment*, 50 AM. J. COMP. L. 215, 234 (Supp. 2002) (noting that right-to-farm laws often protect farmers only if their practices are not negligent or improper); Randall Wayne Hanna, *Right to Farm Statutes—The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U. L. REV. 415, 430-31 (1982) (concluding the most common type of right-to-farm law normally does not offer protection to the negligent conduct or improper operation of an agricultural activity).

221. Tit. IV(A)(2), *infra* app. 2 (adopting this statement from right-to-farm laws). See, e.g., MINN. STAT. ANN. § 561.19, subdiv. 2(a)(2) (West 2000 & Supp. 2006). See also Grossman & Fischer, *supra* note 1, at 117 (observing the requirement of conformity with laws).

222. *Gill v. LDI*, 19 F. Supp. 2d 1188, 1198-99 (W.D. Wash. 1998) (finding that the defendant could not benefit from the right-to-farm statute because it had not engaged in "good forestry practices" due to violation of water quality laws).

223. *Id.* at 1191 (concerning water pollution from quarrying activities).

224. *Gill*, 19 F. Supp. 2d at 1200 (citing WASH. REV. CODE ANN. §§ 7.48.300, 305 (West 1992 & Supp. 2006)).

225. *Gill*, 19 F. Supp. 2d at 1198-99 (involving violations of a National Pollutant Discharge Elimination System permit).

226. *Id.* at 1198 (citing *Tiegs v. Watts*, 954 P.2d 877, 884-85 (Wash. 1998), which found that the violation of a permit constituted a nuisance when it "unreasonably interferes with the use and enjoyment of another's property.").

to employ good practices.<sup>227</sup> Violation of duly enacted regulatory proscriptions shows the absence of good practices.<sup>228</sup> Thus, the right-to-farm defense was not available.

While title IV(A)(2) supports the enforcement of local actions, simultaneously, some type of limitation on interferences with activities on undeveloped lands by local governments is needed.<sup>229</sup> Title VI addresses this issue by precluding local governments from interfering with production and management activities on undeveloped lands conducted according to generally accepted practices.<sup>230</sup> Differentiating between permitted local actions and unpermitted local interferences with activities on undeveloped lands is challenging. ULPA intends to preclude local governments from enacting laws, ordinances, or regulations that interfere with agricultural and forestry production activities.<sup>231</sup> But, local governments can control activities such as the storage of abandoned cars, worn tires, and other nuisance activities,<sup>232</sup> as ULPA does not offer protection to property owners who are not in compliance with provisions concerning these types of nuisances.<sup>233</sup>

ULPA's title IV(A)(3) makes it clear that the act does not afford a defense against any action regarding a diseased plant or animal or harboring a pest that is injurious to human welfare or health.<sup>234</sup>

---

227. *Id.* at 1200 (interpreting WASH. REV. CODE ANN. §§ 7.48.300, .305 and noting the failure of the defendant to engage in good practices). See also *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001) (interpreting that nonqualifying agricultural activities could be found to be public nuisances despite the statutory defense of the Florida right-to-farm law).

228. *Gill*, 19 F. Supp. 2d at 1200.

229. Otherwise, local governments may pass ordinances or local laws that impede the preservation of undeveloped lands.

230. See tit. IV, *infra* app. 2.

231. See *id.* See also *infra* notes 316-344 and accompanying text.

232. See, e.g., *Hedrick v. Pfeiffer*, 10 F. Supp. 2d 1106, 1107 (D. Neb. 1998) (affirming action by a city government to abate a nuisance consisting of wrecked or abandoned cars, unused machinery, and other items).

233. Tit. IV(A)(2), *infra* app. 2, See also *Northville Twp. v. Coyne*, 429 N.W.2d 185, 187 (Mich. Ct. App. 1988) (finding that although the defendant qualified for the anti-nuisance defense of the state's right-to-farm law, the defendant could be penalized for violating a local building permit requirement).

234. Tit. IV(A)(3), *infra* app. 2. Cf. *Altman v. Town of Amherst*, 190 F.Supp. 2d 467, 468 (W.D.N.Y. 2001) (upholding a mosquito spraying program to control "nuisance and vector mosquitoes"); *Ex rel. Lockyer v. Sun Pac. Farming Co.*, 92 Cal. Rptr. 2d 115, 119 (Cal. Ct. App. 2000) (affirming injunctive relief for a public nuisance that ordered the removal of citrus trees infected with a virus); *Gleaves v. Waters*, 220 Cal. Rptr. 621, 623 (Cal. Ct. App. 1985) (acknowledging the right to abate a public nuisance consisting of an invasion of Japanese beetles); *Kaso v. Ohio Dep't of Health*, 794 N.E.2d 776, 778, 784 (Ohio Ct. Cl. 2003) (finding the department of health not liable for damages involving a program developed to combat a rabies



Because ULPA does not affect governmental police-power actions to control diseases and pests, efforts to control such on undeveloped lands are not affected.<sup>235</sup> Preventing the introduction of a disease or pest is important for the continued viability of a land use.<sup>236</sup> Cotton production was decimated by the introduction of the boll weevil in 1892, and has cost our country more than \$22 billion.<sup>237</sup> Red fire ants are estimated to cause more than \$1 billion of damages per year in the southern United States.<sup>238</sup> Formosan termites cause a similar amount of damage.<sup>239</sup> More recent concerns about bovine spongiform encephalopathy (mad cow disease) illustrate the need to definitively allow governments to take appropriate action to control diseases and pests.<sup>240</sup>

---

epidemic); *Tex. Boll Weevil Eradication Found. Inc. v. Lewellen*, 952 S.W.2d 454, 462 (Tex. 1997) (finding that the boll weevil constituted a public nuisance and “eradication of the boll weevil is a proper subject for regulation by the State pursuant to its police power.”). *But see* *Dep’t Agric. & Consum. Serv. v. Polk*, 568 So.2d 35, 40 n.4 (Fla. 1990) (finding the plants infected with a bacterial disease did not create a nuisance so that the destruction of nearby plants was a compensable taking).

235. State and federal governments faced with emergencies due to infestation of an insect may take appropriate action that damages private property. *Teresi v. California*, 225 Cal. Rptr. 517 (Cal. Ct. App., 1986) (considering an emergency consisting of an invasion by Mediterranean fruit flies). Moreover, damages resulting from a police-power response to an emergency are excepted from the constitutional requirement that compensation be paid for property taken for public use. *Id.* at 518-19 (observing that property damage resulting from a valid exercise of the police power to avoid an impending peril does not need to be compensated). This police-power response is not absolute; rather, emergencies that are not extreme or those that lack necessity may not justify a governmental invasion of property and, therefore, require compensation as a “taking” of private property. *See* Royal C. Gardner, *Invoking Private Property Rights for Environmental Purposes: The Takings Implications of Governmental-Authorized Aerial Pesticide Spraying*, 18 STAN. ENVTL. L.J. 65, 88-93 (1999) (discussing how the aerial application of pesticides to control an outbreak of Mediterranean fruit flies might constitute a taking).

236. David Pimentel et al., *Environmental and Economic Costs of Nonindigenous Species in the United States*, 50 BIOSCIENCE 53, 58 (2000) (reporting that the European green crab has caused the demise of the New England and maritime Canadian softshell clam industry with an estimated loss of \$44 million per year in economic returns).

237. James Coppedge & Robert M. Faust, *Winning the Weevil War: Beating a \$22 Billion Bug*, AGRIC. RES., Feb. 2003, at 2 (highlighting how researchers have achieved control over the boll weevil).

238. Pimentel et al., *supra* note 236, at 57-58 (calculating damages from estimates from Texas).

239. *Id.* at 58.

240. *See* GENERAL ACCOUNTING OFFICE, MAD COW DISEASE: IMPROVEMENT IN THE ANIMAL FEED BAN AND OTHER REGULATORY AREAS WOULD STRENGTHEN U.S. PREVENTION EFFORTS, GAO 02-183 (Jan. 2002) (recommending stronger enforcement measures and increased inspections to preclude the introduction of bovine spongiform encephalopathy); Editorial, *Testing Madness*, SCI. AM. 8, July 2004, at 8 (commenting that only cattle older than 30 months should be tested for bovine spongiform encephalopathy).

Title IV(A)(4) addresses conditions injurious to public health or safety and excludes them from protection against nuisance lawsuits.<sup>241</sup> Three categories of activities are enumerated. An improperly built or improperly maintained septic tank, water closet, or privy is not protected by the Act.<sup>242</sup> Untreated or improperly treated human waste, garbage, offal, dead animal or waste from a slaughtered animal remains subject to nuisance law.<sup>243</sup> Dangerous waste materials and gas which are harmful to human or animal life are excepted.<sup>244</sup> ULPA's text makes it clear that public health and safety laws and ordinances based on preventing public nuisances are not affected.<sup>245</sup>

## 2. Activities Subject to Nuisance Law

A second group of exceptions for the anti-nuisance protection accorded by title IV(B) involves business activities that are not within the economy of nature paradigm.<sup>246</sup> It is felt that these activities are not necessary for the protection of lands so that neighboring property owners should be burdened with associated nuisances.<sup>247</sup> Rather, these activities involve business choices that are appropriately addressed by community standards, nuisance law, and land use regulations.<sup>248</sup>

The initial business activity subject to nuisance law involves activities in buildings and structures used for milling inputs,

---

241. Tit. IV(A)(4), *infra* app. 2 (adopting language from the New Hampshire right-to-farm law, N.H. REV. STAT. ANN. § 432:33 (2002), whereby the law is not applicable to any aspect of an agricultural operation that is injurious to public health or safety).

242. *Id.* tit. IV(A)(4)(a).

243. *Id.* tit. IV(A)(4)(b).

244. *Id.* tit. IV(A)(4)(c) (adopting exceptions from the Florida right-to-farm law, FLA. STAT. ANN. § 823.14(4)(a)(1)-(4) (West 2006)).

245. *Id.* tit. IV(A). A case from Washington serves to show how the anti-nuisance exception would be limited. *Costello v. Weyerhaeuser Co.*, 1998 Wash. App. LEXIS 1746 (Wash. Ct. App. Dec. 11, 1998). Plaintiffs had alleged a nuisance for defendant's failure to control hunters on its property. *Id.* at \*7. The issue involved the defendant taking appropriate action to keep neighbors safe from hunting activities. *Id.* at \*8. The court found that the plaintiff had advanced facts to maintain a nuisance lawsuit. *Id.* at \*16. Similarly, an allegation of a nuisance based upon safety would not be precluded by ULPA. Tit IV(A)(4), *infra* app. 2.

246. *Id.* tit. IV(B).

247. *Id.* As an exception to nuisance law, the anti-nuisance protection should be limited to deserving activities. The activities are those that normally occur on undeveloped lands, and tend to exclude activities relating to business practices.

248. *Id.* A state's nuisance law and anti-nuisance legislation already provide a resolution for nuisance disputes involving business activities. All right-to-farm laws derogate common law nuisance for qualifying agricultural business activities and a few laws derogate nuisance for non-agricultural business activities. *See, e.g.*, 3 PA. STAT. ANN. §§ 951-954 (limiting nuisance protection to agricultural operations).

manufacturing agricultural and forestry products, or processing products.<sup>249</sup> A case from Georgia involving a business which manufactured utility poles from untreated logs<sup>250</sup> shows why ULPA declines to offer an anti-nuisance defense to businesses. In *Roberts v. Southern Wood Piedmont Co.*, a homeowner sued for relief from noise and vibrations from the nearby manufacturing facility.<sup>251</sup> In reversing a directed verdict for the defendant, the court noted the homeowner had advanced a claim in nuisance.<sup>252</sup> Allegations of changes at the facility in 1980 causing noise and vibrations showed a new unreasonable interference with the plaintiff's "use and enjoyment of her property."<sup>253</sup> While a legislature may choose to promote commercial and industrial activities, as occurs under many right-to-farm laws, ULPA is intended to only protect natural resources.<sup>254</sup> Business activities involving the processing and marketing of agricultural and forestry products do not qualify for the anti-nuisance protections offered by ULPA.<sup>255</sup>

---

249. *Id.* tit. IV(B)(1).

250. *Roberts v. S. Wood Piedmont Co.*, 328 S.E.2d 391 (Ga. Ct. App. 1985).

251. *Id.* at 392 (averring that the loading and unloading of logs caused the noise and vibrations). While the facility had been existence for many years, it was the increase in the noise and vibrations that led to the lawsuit. *Id.*

252. *Id.* at 393.

253. *Id.* (noting the Georgia right-to-farm law was not applicable because the law did not cover the facility).

254. Tit. 1, *infra* app. 2. Actually, right-to-farm laws are mixed on protecting business activities. A few protect businesses. *Compare* *Erbrich Products Co. v. Wills*, 509 N.E.2d 850, 857 & 859-60 (Ind. Ct. App. 1987) (finding a facility used for manufacturing bleach was protected by an anti-nuisance statute), *and* *Horne v. Haladay*, 728 A.2d 954, 956 (Pa. Super. Ct. 1999) (finding that a new poultry operation housing 122,000 laying hens qualified for the anti-nuisance protection afforded by the Pennsylvania right-to-farm law), *with* *Trickett v. Ochs*, 838 A.2d 66, 68-69 (Vt. 2003) (finding that new activities involving the storage and marketing of apples were not protected by the Vermont right-to-farm law with respect to the plaintiffs' prior residential use).'

255. Tit. IV(B), *infra* app. 2.

The next two provisions involve animal production.<sup>256</sup> The production of animals in buildings, feedlots, and pens at a concentrated animal feeding operation, as defined by state law, entails a business activity of a character quite different from the land resources being afforded protection by ULPA.<sup>257</sup> Likewise, the disposal of animal waste via lagoons and spray fields are specialized business responses that can be especially egregious.<sup>258</sup> Neighbors should not have to accept the aggravating situations that accompany these business activities, so ULPA provides that they remain subject

---

256. *Id.* tit. IV(B)(2)-(3). Problems associated with confined animal production have received considerable attention. *Cf.* Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 190-91 (2002) (advocating greater regulatory attention to jurisdictional boundaries for regulating animals); Theodore A. Feitshans & Kelly Zering, *Federal Regulation of Animal and Poultry Production Under the Clean Water Act: Opportunities for Employing Economic Analysis to Improve Societal Results*, 10 PENN ST. ENVTL. L. REV. 193, 212-15 (2002) (advocating regulations that consider social welfare and efficiency); David R. Gillay, *Oklahoma's Concentrated Animal Feeding Operations Act: Balancing the Interests of Landowners with the Exponential Growth of the Hog Industry*, 35 TULSA L.J. 627, 642-49 (2000) (analyzing one state's regulations of concentrated animal feeding operations); Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367 (2002) (discussing problems with concentrated animal feeding operation regulations).

257. *Infra* App. 2, tit. IV(B)(2) (adopting a qualification in the Minnesota right-to-farm law differentiating confined animal feeding operations, MINN. STAT. ANN. § 561.19, subdiv. 2(c)(1) (West 2000 & Supp. 2006)). Regulating the size of a confined animal operation addresses the issue of how much an operation may expand and still qualify for the protection of a right-to-farm law. *See also* Nickels v. Burnett, 798 N.E.2d 817, 821-26 (Ill.App. Dist. 2003) (enjoining defendants from constructing a hog confinement facility as a prospective nuisance given the high probability that the facility would be a nuisance); Buchanan v. Simplot Feeders Ltd. P'ship, 134 Wash.2d 673, 681-85 (Wash. 1998) (observing that the plaintiffs had come to rangeland and that the lagoon and spray field were developed later, creating a nuisance that was not protected by the right-to-farm law). *But see* Crea v. Crea, 16 P.3d 922, 925 (Idaho 2000); Payne v. Skaar, 900 P.2d 1352, 1355-56 (Idaho 1995) (arguing that the expansion of a feedlot should be protected by the right-to-farm law)."

258. Tit. IV(B)(3), *infra* app. 2. The Act clarifies that lagoons and spray fields do not qualify for anti-nuisance protection. The objectionable nature of lagoons and spray fields also involve health issues. *See* Dana Cole et al., *Concentrated Swine Feeding Operations and Public Health: A Review of Occupational and Community Health Effects*, 108 ENVTL. HEALTH PERSPECTIVES 685, 685-96 (2000) (reviewing health issues associated with the swine industry); ROBBIN MARKS, CESSPOOLS OF SHAME: HOW FACTORY FARM LAGOONS AND SPRAYFIELDS THREATEN ENVIRONMENTAL AND PUBLIC HEALTH 117-60 (2001), available at <http://www.nrdc.org/water/pollution/cesspools/cesspools.pdf>; K.M. Thu, *Public Health Concerns for Neighbors of Large-Scale Swine Production Operations*, 8 J. AGRIC. SAFETY & HEALTH 175, 176-82 (2002) (reporting health problems associated with the swine industry); Keynen J. Wall, *Knowing When To Say When To Hog Waste: Do State Lagoon Regulations Adequately Protect Ground Water in Kansas?*, 11 KAN. J.L. & PUB. POL'Y 113, 118-19 (2001) (finding that animal waste poses a threat to drinking water supplies).

to nuisance law.<sup>259</sup> Conversely, the production of animals at a facility that is not a concentrated animal feeding operation and the appropriate application of manure are activities within the scope of the anti-nuisance protection afforded by the Act.<sup>260</sup>

A Minnesota animal nuisance case displays a factual situation where ULPA would not support an anti-nuisance defense.<sup>261</sup> In *Wendinger v. Forst Farms, Inc.*, neighbors claimed that a hog confinement facility created a nuisance.<sup>262</sup> The facility had an outdoor concrete manure lagoon and the contents of the lagoon were pumped and spread on fields each autumn.<sup>263</sup> By presenting evidence that the defendant intentionally maintained a condition that was offensive to the senses, the plaintiffs established an actionable claim in nuisance.<sup>264</sup> The protection of natural resources under ULPA is not intended to interfere with nuisance actions for facilities with concentrated animal production, lagoons, or spray fields.<sup>265</sup>

ULPA is also not intended to preclude nuisance actions involving the clear-cutting of timber or the development of roads.<sup>266</sup> With respect to the provision for the clear-cutting of timber, the Supreme Court of Washington has held that this practice was not protected under Washington anti-nuisance provisions.<sup>267</sup> However, the court's decision was based upon the coming to the nuisance doctrine and the fact that the defendant had never logged the property.<sup>268</sup> To clarify that the anti-nuisance protection does not

---

259. Tit. IV(B)(2)-(3), *infra* app. 2.

260. *See id.* tits. III(B), V(B) (clarifying the coverage of these activities).

261. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003).

262. *Id.* at 549. The plaintiffs also alleged a trespass but the court found that the odors complained of did not interfere with their "exclusive possession" of land but rather with their "use and enjoyment." *Id.* at 550.

263. *Id.* at 549. This facility became operational in 1995, replacing livestock production that had involved animal waste mixed with straw that was hauled away in solid form. *Id.*

264. *Id.* at 551-552 (rejecting the defendant's argument that a nuisance claim had to be supported by evidence of "wrongful conduct").

265. Tit. IV(B)(2)-(3), *infra* app. 2. *But see* Charter Twp. of Shelby v. Papesh, 704 N.W.2d 92, 104 (Mich. Ct. App. 2005) (denying plaintiff's summary judgment on a nuisance claim against a poultry operation due to the possibility that the right-to-farm law provided a defense); *Horne v. Haladay*, 728 A.2d 954, 955 (Pa. Super. Ct. 1999) (finding that allegations concerning a poultry operation interfering with plaintiffs' use and enjoyment of their property was defeated by the Pennsylvania right-to-farm law).

266. Tit. IV(B)(4), *infra* app. 2.

267. *Alpentel Cmty. Club, Inc. v. Seattle Gymnastics Soc'y*, 111 P.3d 257, 262 (Wash. 2005) (declining to find that the clear-cutting of a slope was shielded by an anti-nuisance statute).

268. *Id.*

apply to clear-cutting, an exception denying its coverage is warranted.<sup>269</sup>

Another exception from the anti-nuisance protection includes activities involving sewage sludge.<sup>270</sup> The aboveground application or storage of sewage sludge for the production of crops or forest products is not accorded anti-nuisance protection under ULPA.<sup>271</sup> Due to the potential that these activities might involve significant adverse consequences for neighboring landowners, they are more appropriately handled by existing nuisance law and other regulations.<sup>272</sup>

A state may desire that the anti-nuisance protection of ULPA not apply in some areas where there is no justification for changing nuisance law.<sup>273</sup> Any activity on lands within an incorporated city might remain subject to nuisance lawsuits.<sup>274</sup> This provision would be tailored by each state for governmental subdivisions in which lands should not be granted anti-nuisance protection.<sup>275</sup> Presumably, a legislature would not want the protection to apply in an area where concentrations of human activities mean there is little justification for protecting nuisances and where nuisances on governmental

---

269. Tit. IV(B)(4), *infra* app. 2 (stating that the “clear cutting of timber and development of roads” remains subject to nuisance law). This is due to the fact that clear-cutting is not considered to be an appropriate activity due to accompanying ecological harm. See Stuart L. Pimm et al., *Can We Defy Nature’s End?*, 293 SCIENCE 2207, 2207 (2001) (observing that clear-cutting can adversely affect biodiversity); Charles R. Scott, Note, *Liquidation Timber Harvesting in Maine: Potential Policy Approaches*, 29 HARV. ENVTL. L. REV. 251, 256-57 (2005) (observing that clear-cutting has detrimental consequences on soils and the ecology).

270. Tit IV(B)(5), *infra* app. 2.

271. *Id.* (adopting a provision from the Virginia right-to-farm law, VA. CODE ANN. § 3.1-22.28 (1994), regarding the application of sewage sludge to allow local governments to regulate this activity).

272. See *Blanton v. Amelia County*, 540 S.E.2d 869, 875 (Va. 2001) (finding that a state statute regulating the application of sewage sludge preempted the challenged county ordinances). Cf., *Hydropress Envtl. Serv., Inc. v. Twp. of Upper Mount Bethel*, 836 A.2d 912, 920 (Pa. 2003) (finding that regulation of the land application of sewage sludge by a county ordinance was not preempted by the state’s Solid Waste Management Act but the local government exceeded its police power in enacting its ordinance regulating sludge).

273. See tit. IV(C), *infra* app. 2. Some states limit anti-nuisance protection to lands within agricultural districts. See N.Y. AGRIC. & MKTS. LAW §§ 308(3) (McKinney 2004).

274. *Id.* (adopting a provision from the South Dakota right to farm law, S.D. CODIFIED LAWS § 21-10-25.5 (2004), whereby the right-to-farm law does not apply “within the limits of any incorporated municipality”).

275. *Id.* States have varied individualized rules concerning local governmental units. A legislature may decide that anti-nuisance protection is not appropriate for a category of local unit. See, e.g., MO. ANN. STAT. § 537.295(4) (West 2000) (declining to provide anti-nuisance protection to activities in cities, towns, and villages).

properties, such as parks, are already accorded other forms of protection.<sup>276</sup>

### *E. Retained Rights*

In absence of further clarification, ULPA might be interpreted expansively to provide anti-nuisance protection against a few claims that should be retained.<sup>277</sup> Alternatively, ULPA might be interpreted to interfere with manure application practices that should continue to be viable.<sup>278</sup> Title V of the Act specifically addresses four categories of rights to acknowledge their intended resolution under the Act.<sup>279</sup>

#### 1. Unaffected Claims

Title V(A) identifies three groups of claims that are not affected by the Act.<sup>280</sup> The first group involves damages for activities in violation of any federal, state, or local statute or governmental regulation, permit, or court order.<sup>281</sup> ULPA does not impact liability for violations of existing legal provisions. The second category of claims involves damages for pollution, discharges, overflows, and trespasses.<sup>282</sup> ULPA is not intended to eliminate liability for activities

276. *Id.* Protection may occur under governmental or sovereign immunity provisions. See Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 289-303 (2002) (examining situations where states may waive their sovereign immunity); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 489 (2001) (arguing that sovereign immunity in the United States developed independently from English law); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1375-89 (2001) (offering ideas for Congress to subject states to damages liability for violations of intellectual property rights); Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1243 (2003) (examining our “nonsensical scheme” of waivers of sovereign immunity that has “left the federal judicial system helpless to prevent manifest injustice and waste of judicial resources.”).

277. For example, flooding and violations of existing legal provisions.

278. Such as the agronomic application of manure.

279. Tit. V, *infra* app. 2.

280. *Id.* tit. V(A).

281. *Id.* tit. V(A)(1). While it may be obvious that an anti-nuisance law simply addresses nuisance causes of action, a more definitive statement will prevent defenses such as that asserted in *State ex. rel. Miller v. DeCoster*, 596 N.W.2d 898 (Iowa 1999), whereby the defendant hog-producer sought to violate waste control requirements via the state’s right to farm statute. See *infra* notes 285-296 and accompanying text for a discussion of the case.

282. Tit. V(A)(2), *infra* app. 2 (incorporating provisions from the Illinois Right-To-Farm statute, 740 ILL. COMP. STAT. ANN. 70/4 (West 2002) that precludes nuisance protection for polluting and overflow events causing damages).

that that led to physical damages of another's property.<sup>283</sup> If an activity constitutes a violation, leads to pollution, or involves a trespass, the adversely affected party may advance a claim for resulting damages.<sup>284</sup>

A case from Iowa illustrates why it is helpful to state explicitly that citizens remain liable for damages from a violation of an existing regulatory or statutory requirement.<sup>285</sup> In *State ex. rel. Miller v. DeCoster*, the Iowa Attorney General sued a hog producer for violations involving improper spray irrigation of hog waste and inadequacies in an earthen waste storage basin.<sup>286</sup> DeCoster refused to take responsibility for his actions, claiming that the state's enforcement action of its water pollution and animal waste control requirements was unwarranted by the facts.<sup>287</sup> Regarding the spray irrigation, DeCoster argued that his introduction of pollutants to navigable waters was indirect, so there could be no liability.<sup>288</sup> In rejecting this argument, the court noted that a loophole for indirect actions would not provide meaningful protection against pollution.<sup>289</sup>

For charges concerning violations of a storage basin regulation, DeCoster claimed that the violation was not foreseeable due to his

---

283. *Id.* See also *Simon v. Neises*, 395 P.2d 308, 312 (Kan. 1964) (observing that the maintenance of a levee causing increased volume of surface water to damage an adjacent property constituted a continuing nuisance); *Meyers v. Kissner*, 594 N.E.2d 336, 340 (Ill. 1992) (finding that property owners could incur liability under the law for continuing nuisances for constructing earthen levees that obstructed the natural flow of water, causing injury to plaintiff's farmland).

284. Tit. V(A)(1)-(2), *infra* app. 2 (drawing upon the language of a number of right-to-farm laws including 740 ILL. COMP. STAT. ANN. 70/4 (West 2002), KY. REV. STAT. ANN. § 413.072(6) (West 2005), 3 PA. STAT. ANN. § 955 (West 1995), and VA. CODE ANN. § 3.1-22.29(C) (1994)).

285. *State ex. rel. Miller v. DeCoster*, 596 N.W.2d 898 (Iowa 1999). See also *State ex. rel. Miller v. DeCoster*, 608 N.W.2d 785, 792 (Iowa 2000) (contesting the imposition of "a strict liability standard for the discharge of waste into the state's watercourses."); *Gill v. LDI*, 19 F. Supp. 2d 1188, 1200 (W.D. Wash. 1998) (finding the right-to-farm affirmative defense was not applicable since defendants had violated several water quality laws). But see *Horne v. Haladay*, 728 A.2d 954, 958 (Pa. Super. Ct. 1999) (finding that an allegation that the defendant was violating a statute or regulation was not proven).

286. 596 N.W.2d at 900-01. Evidence showed that tile drains from the spray application field were discharging a dark putrid liquid into a stream running into the Iowa River. *Id.* 901-02. The violation involving the earthen storage basin involved waste overtopping the berm. *Id.* at 903.

287. *Id.* at 902-03.

288. *Id.* at 902-03 (arguing that the liquid waste was sprayed on fields and only entered a river after passing through a tile under the field indirectly). The defendant claimed that culpability under the Iowa law required direct pollution. *Id.* (citing IOWA CODE § 455B.186(1) (1995)).

289. *Id.* at 902 (noting the absurdity of such an interpretation as it would render pollution statutes meaningless).



lack of specific information.<sup>290</sup> The court noted that the issue was actually whether the trier of fact believed DeCoster's testimony that he did not know about the problem, as opposed to contrary evidence produced by another witness.<sup>291</sup> Evidence to knowledge supported the finding of the district court; thus the ruling that DeCoster had violated water pollution provisions was upheld.<sup>292</sup>

A year later, this same defendant again sought relief from the Supreme Court of Iowa from a judgment concerning a strict liability standard for violating a state statute.<sup>293</sup> Again, the court declined to interpret the pollution statute as urged by DeCoster.<sup>294</sup> The tenacity of this defendant in attempting to escape liability for pollution shows a need for an unequivocal provision in ULPA that people remain liable for damages regarding violations of law.<sup>295</sup> Furthermore, the definitive statement concerning violations, discharges, overflows, and trespasses make it obvious that strict liability standards incorporated in pollution statutes remain as causes of action.<sup>296</sup>

For discharges, overflows, and trespasses, the Georgia case of *Lincoln v. Tyler* concerning damages for excessive stormwater and sediment discharges evinces why such actions should not receive protection against nuisance lawsuits.<sup>297</sup> Developers had constructed a subdivision that caused discharges onto plaintiffs' property causing damages.<sup>298</sup> Although, there was evidence of a "minimal amount of sediment deposits from the subdivision onto plaintiffs' property" and "inadequately maintained" sediment control structures, the trial court granted summary judgment for the defendant.<sup>299</sup> In reversing the trial

---

290. *Id.* at 903 (claiming that his employee was not warned of the freeboard level at the earthen basin, so his conduct was not a substantial factor in producing the violation).

291. *Id.* (acknowledging that plaintiff's argument would be true if he had established his version of the facts).

292. *Id.* at 903.

293. *State ex. rel. Miller v. DeCoster*, 608 N.W.2d 785, 792 (Iowa 2000) (concerning a violation of IOWA CODE § 455B.191 (1997)).

294. *Id.* (affirming the judgment for the state).

295. Tit. V(A)(1)-(2), *infra* app. 2.

296. *Id.* See *State ex. rel. Miller*, 596 N.W.2d at 902 (finding strict liability under IOWA CODE § 455B.186(1) (1995) for the discharge of a pollutant into state waters").

297. *Lincoln v. Tyler*, 574 S.E.2d 440, 442 (Ga. Ct. App. 2002) (affirming damages from sediment discharge based upon trespass and nuisance claims).

298. *Tyler v. Lincoln*, 527 S.E.2d 180, 181 (Ga. 2000) (considering an appeal concerning summary judgment denying punitive damages in favor of defendant).

299. *Tyler v. Lincoln*, 513 S.E.2d 6, 7-8 (Ga. Ct. App. 1999), *rev'd on other grounds*, 527 S.E.2d 180 (Ga. 2000). The ruling of this court supports the contention that plaintiffs often have difficulties in maintaining causes of action for discharges. The case reveals the need for a

court's ruling, the appellate court noted that the measure "of personal damages recoverable in a nuisance case is the enlightened conscience of the jury."<sup>300</sup> At the subsequent trial, the jury found for the plaintiffs on their trespass and nuisance claims.<sup>301</sup> The provision on pollution, discharges, overflows, and trespasses in ULPA would assure that people remain liable for actionable damages and trespasses.<sup>302</sup> The act does not sanction activities that physically invade or alter neighboring properties.<sup>303</sup>

A third category of unaffected claims involves tort actions in which the attractive nuisance doctrine applies.<sup>304</sup> Title V(A)(3) clearly states that the act does not apply to this doctrine.<sup>305</sup> While this

---

definitive statement in ULPA whereby actions for discharges do not qualify for the anti-nuisance protection. Tit. V(A)(2), *infra* app. 2.

300. *Tyler*, 513 S.E.2d at 9 (citing *Arvida/JMB Partners v. Hadaway*, 489 S.E.2d 125 (Ga. Ct. App. 1997) and denying defendants' motion for summary judgment on the nuisance, trespass, and negligence causes of action).

301. *Lincoln v. Tyler*, 574 S.E.2d 440, 442 (Ga. Ct. App. 2002) (awarding \$43,000 in special damages and \$90,000 in attorney fees and expenses of litigation).

302. *Infra* app. 2, tit. V(A)(2). The California right-to-farm law provides a contrary resolution. *See Rancho Viejo v. Tres Amigos Viejos, LLC*, 123 Cal. Rptr. 2d 479, 494 (Ct. App. 2002). In watering crops, runoff irrigation water flowed onto the plaintiff's property causing damage. *Id.* In responding to a suit for damages, the court interpreted the California right-to-farm law as covering "traditional farming operations." *Id.* at 491. While the law covered nuisances, the court found an intent to cover "ongoing, standard agricultural activities" regardless of the labeling of the conduct as a nuisance or trespass. *Id.* at 488. Since California law defines nuisances to include activities that intrude upon and cause physical damage to property, the anti-nuisance defense was available to defeat the claim regarding the runoff water. *Id.* at 489, 494. *See also Souza v. Lauppe*, 69 Cal. Rptr. 2d 494 (Ct. App. 1997) (granting summary judgment to defendants as the cause of action for water intrusion was precluded by the right-to-farm law).

303. Tit. V(A)(2), *infra* app. 2. Another case involving an action for flooding illustrates the importance of this provision. *Benton City v. Adrian*, 748 P.2d 679 (Wash. Ct. App. 1988). In *Benton City*, farmers discharged excess irrigation water fouling a well serving a private residence, eroding an area to expose a City sanitary water line, and depositing sand and silt in an irrigation canal. *Id.* at 680-81. The City and owner of the irrigation canal sued for injunctive relief and damages. *Id.* at 681. On appeal, the *Benton City* court noted that the Washington right-to-farm law did not prevent the lawsuit for a trespass. *Id.* at 681-682. Under ULPA, damages for flooding would be allowed; adversely affected individuals will have protection against damages from discharges, flooding, and trespasses. Tit. V(B)(2), *infra* app. 2. This would include actions for damages for the construction of physical features that cause flooding. *See, e.g., Grundy v. Thurston County*, 117 P.3d 1089, 1094 (Wash. 2005) (allowing a nuisance cause of action for the construction of a sea wall that caused a property to be vulnerable to flooding).

304. Tit. V(A)(3), *infra* app. 2. An attractive nuisance doctrine may apply to children to protect them from hidden, attractive dangers.

305. *Id.* (adopting the idea from a dispute in Washington State involving natural bodies of water, *Degel v. Majestic Mobile Manor*, 914 P.2d 728, 733 (Wash. 1995)). *See also Fritts v. Clover Park Sch. Dist. No. 400*, No. 30323-0-II, 2003 Wash. App. LEXIS 2895, at \*5-9 (Wash.

may be obvious to most in the legal community, the inclusion of this provision should assure the public that ULPA does not affect the continued viability of this doctrine.<sup>306</sup>

## 2. Further Clarification for Manure Application

Title V(B) enumerates additional provisions for manure application to define rights that are not affected by ULPA.<sup>307</sup> The act endorses the practice of applying manure to lands as a source of nutrients for plant growth because it is an agronomic practice that should be encouraged as part of sustainable production.<sup>308</sup> This is in contrast to the over application of manure as a waste byproduct and concentrations of animals that may severely denigrate local environmental conditions.<sup>309</sup>

Differentiating between acceptable manure application and unacceptable lagoons and spray fields is challenging. ULPA retains nuisance rights against bothersome business activities involving lagoons and spray fields while exempting farming activities involving fertilization with manure.<sup>310</sup> The distinction is that lagoons and spray fields involve business decisions to employ specialized technologies to handle wastes that are accompanied by a propensity for adversely affecting neighboring property owners, whereas manure application to fields is an agronomic practice consistent with the economy of nature.<sup>311</sup> However, qualifications are needed to preclude

---

Ct. App. 2003) (showing how the attractive nuisance doctrine works with a discussion of the elements needed for a young child to qualify).

306. Tit. V(A)(3), *infra* app. 2. ULPA does not address distinctions for minors so does not affect the attractive nuisance doctrine; ULPA simply clarifies that the attractive nuisance doctrine remains in force. *Id.*

307. *Id.* tit. V(B).

308. *Id.* See ARAJI ET AL., *supra* note 202, at 179-80 (citing studies showing manure to constitute “a valuable bio-resource that should be utilized.”); Terence J. Centner, *Developing Institutions to Encourage the Use of Animal Wastes as Production Inputs*, 21 AGRIC. & HUMAN VALUES 367, 372 (2004) (advancing regulations that mandate selected production requirements or practices to remedy pollution problems).

309. See Tit. IV(B)(2)-(3), *infra* app. 2 (providing that concentrated animal feeding operations, lagoons, and spray fields do not receive protection against nuisance lawsuits).

310. *Id.* tits. IV(B)(3), V(B).

311. *Id.* See also *Community Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 946-47 (9th Cir. 2002) (finding ongoing violations of the Clean Water Act by dairies discharging pollutants into navigable waters); *United States v. New Portland Meadows, Inc.*, 2002 U.S. Dist. LEXIS 19153, at \*5-6 (D. Ore. July 30, 2002) (alleging a discharge of animal waste in violation of a condition in a state permit); *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, 2001 U.S. Dist. LEXIS 21314, at \*3 (E.D. N.C. Sept. 20, 2001) (alleging violations of the Clean Water Act by North Carolina hog producers); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1173 (D. Idaho 2001) (alleging water contamination from a wastewater holding

unacceptable manure-application practices.<sup>312</sup> Therefore, provisions from the federal regulations governing best management practices for the application of manure from concentrated animal feeding operations are incorporated into ULPA's title V(B).<sup>313</sup>

Manure application needs to be conducted pursuant to generally acceptable practices, including agronomic rate requirements.<sup>314</sup> For applications to meet the agronomic rate requirement, the producer must develop and implement a nutrient management plan that incorporates application rates for manure that "minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management."<sup>315</sup> Such technical standards include "a field-specific assessment of the potential for nitrogen and phosphorus transport from the field" to surface waters, address the application of nutrients on each field to achieve realistic production goals, and minimize nitrogen and phosphorus movement to surface waters.<sup>316</sup> These requirements should allow an agronomic practice consistent with the economy of nature while minimizing adverse impacts on neighbors.

---

pond); *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1132-33 (E.D. Wash. 1999) (alleging the discharge of pollutants into navigable waters by defendant dairies); *Neuse River Found. v. Smithfield Foods, Inc.*, 574 S.E.2d 48, 50-51 (N.C. Ct. App. 2002) (alleging pollution and contamination of navigable waters by North Carolina hog producers). ' See also Araji, ET. AL., *supra* note 202, at 190 (observing that animal manure is a biological resource with ecological benefits).

312. Tit. V(B)(1)-(2), *infra* app. 2. See *supra* notes 255-265 (addressing concentrated animal feeding operations).

313. *Id.* (incorporating text from 40 C.F.R. pts. 122, 412 (2005) to prescribe best management practices for point-source concentrated animal feeding operations that apply manure to fields).

314. *Id.* tit. V(B)(1). The issue of overapplication was noted in the Environmental Protection Agency's comments accompanying the publication of new regulations for concentrated animal feeding operations. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7186 (Feb. 12, 2003) (preamble).

315. Tit. V(B)(1), *infra* app. 2 (adopting prescriptions on best management requirements for concentrated animal feeding operations from the federal regulations, 40 C.F.R. § 412.4(c)(2) (2005)).

316. *Id.* tit. V(B)(2) (adopting provisions from federal regulations, 40 C.F.R. § 412.4(c)(1) (2005)).

### *F. Local Governments*

Laws, ordinances, and regulations adopted by local governments (hereafter called local regulations) may contribute to the demise of land resources by interfering with agricultural and forestry practices.<sup>317</sup> As a minority of the voting public,<sup>318</sup> property owners seeking to preserve their farms and forestry operations may not be able to stop local regulations from interfering with their production and management practices.<sup>319</sup> To preclude local interferences, ULPA's title VI sets forth provisions that preempt certain local regulations.<sup>320</sup>

The need for a preemption provision may be gleaned from two cases in which local regulations interfered with production activities. In the first case, the appellate court found that a local government

---

317. See *Overgaard v. Rock County Bd. of Comm'rs*, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at \*4-5 (D. Minn. July 25, 2003) (considering a local ordinance regulating animal feedlots); *Big Creek Lumber Co. v. County of San Mateo*, 37 Cal. Rptr. 2d 159 (Ct. App. 1995) (considering a zoning ordinance that established a buffer where timber could not be harvested); *Milan Twp. v. Jaworski*, No. 240444, 2003 Mich. LEXIS 3105, at \*2 (Mich. Ct. App. Dec. 4, 2003) (requiring a local permit to raise game birds); *Villari v. Zoning Bd. of Adjust. of Deptford*, 649 A.2d 98 (N.J. Super. Ct. 1994) (considering a zoning ordinance that established acreage requirements for raising pigs); *French v. Mt. Jackson*, No. 2606, 1985 Va. Cir. LEXIS 109, at \*1 (Va. Cir. Ct. July 2, 1985) (considering a provision of a town code that regulated weeds, grass, and foreign growth on property).

318. The farm population is estimated to comprise of less than three percent of the U.S. population. EMERY N. CASTLE, *AGRICULTURAL INDUSTRIALIZATION IN THE AMERICAN COUNTRYSIDE* 12 (1998).

319. *E.g.*, *Pasco County v. Tampa Farm Serv., Inc.*, 573 So.2d 909 (Fla. Dist. Ct. App. 1990) (involving the issue of whether a poultry producer could engage in a "wet manure distribution process").

320. Tit. VI, *infra* app. 2 (adopting the idea from the Michigan right-to-farm law, MICH. COMP. LAWS ANN. § 286.474(6) (West 2003 & Supp. 2006), that local governments should not enact any ordinance, regulation, or resolution that conflicts with the accepted agricultural and management practices developed under the state statute). See also COLO. REV. STAT. ANN. § 35-3.5-102(5) (West 2005) (precluding ordinances and resolutions in certain cases); FLA. STAT. ANN. § 823.14(6) (West 2006) (precluding local ordinances that "prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural land"); IDAHO CODE ANN. § 22-4504 (2001) (limiting powers of local governments regarding zoning and ordinances that may interfere with agricultural practices); TEX. AGRIC. CODE ANN. § 251.005 (Vernon 2004 & Supp. 2006) (establishing limitations on the regulation of existing agricultural operations for some local governments); H.B. 1646, § 1, Reg. Sess. (Pa. 2005) (prohibiting local governments from adopting unauthorized local ordinances) (available at <http://www.legis.state.pa.us>) (in the "by Bill" window scroll to "2005-2006 Regular Session" and search "HB 1646" in the adjacent search bar); VA. CODE ANN. § 3.1-22.28 (1994) (precluding county ordinances that require "a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district").

could interfere with a forestry practice.<sup>321</sup> In the second case, the Michigan right-to-farm law operated to preclude a local ordinance that sought to control a nuisance activity.<sup>322</sup> To effect the purposes set forth in ULPA's title I, local governments must be precluded from interfering with production and management activities conducted according to generally accepted practices.<sup>323</sup>

In *Big Creek Lumber Co. v. County of San Mateo*, a California county adopted provisions in its zoning ordinance to address conflicts accompanying timber harvesting.<sup>324</sup> The ordinance prohibited "commercial timber harvesting in designated rural areas of the County 'within 1,000 feet of any legal dwelling. . . .'"<sup>325</sup> A lumber company challenged the buffer requirement established by the ordinance claiming it was preempted by the Z'berg-Nejedly Forest Practice Act of 1973.<sup>326</sup> The court found that the state statute preempted local regulation of timber harvesting but not regulations defining where timber may be harvested.<sup>327</sup> In upholding the county's buffer requirement, the court affirmed the ability of a county to enact regulations for parcels not designated in timber production zones and to preclude harvesting on these parcels.<sup>328</sup> Thus, in California, local governments can interfere with timber production. Under ULPA, local governments retain their powers to zone but may not interfere

---

321. *Big Creek Lumber Co. v. County of San Mateo*, 37 Cal. Rptr. 2d 159, 162 (Ct. App. 1995).

322. *Milan Twp. v. Jaworski*, No. 240444, 2003 Mich. LEXIS 3105, at \*3 (Mich. Ct. App. Dec. 4, 2003).

323. Tits. I, III(A), VI(A)-(B), *infra* app. 2 (delineating the legislative purpose, defining activities, and establishing the preemption of some local regulations).

324. 37 Cal. Rptr. 2d 159, 162 (Ct. App. 1995) (citing complaints about noise and potential wildfire and erosion, and noting concerns about scenic and aesthetic qualities).

325. *Id.* at 161-62 (observing that the county had decided that neither the state statute nor the "regulations adopted thereunder establish[ed] a buffer zone between residential uses and timber harvesting.").

326. CAL. PUB. RES. CODE §§ 4511-4628 (West 2001 & Supp. 2006). The court noted that "the Legislature had established a comprehensive statutory scheme regulating the conduct of timber operations." *Big Creek Lumber*, 37 Cal. Rptr. 2d at 160.

327. *Id.* at 162-63 (observing the regulatory preemption of local regulations concerning the conduct of timber operations but not where the operations might take place). Under the California Timberland Productivity Act of 1982, CAL. GOV'T CODE §§ 51100-51155 (West 1983 & Supp. 2005), local governments must zone described timberlands as "timberland production zones." 37 Cal. Rptr. 2d at 162-63. *See also* CAL. GOV'T CODE §§ 51104(g), 51112-51113. However, for parcels outside of these zones, local controls are possible. *Id.* § 51112(d).

328. *Big Creek Lumber*, 37 Cal. Rptr. 2d at 165 (distinguishing timber production zones from other areas that contain timber and finding that local governments retain zoning authority for these other areas).

with production and management activities conducted according to generally accepted practices.<sup>329</sup>

A local government's interference with a defendant raising pheasants and quail at a hunting preserve was considered by a Michigan appellate court in *Milan Township v. Jaworski*.<sup>330</sup> The defendant defied a local ordinance and continued to raise game birds, leading the township to seek injunctive relief for a "nuisance per se."<sup>331</sup> A trial court agreed, and the defendant was enjoined from "selling the right to hunt game birds on its property."<sup>332</sup> On appeal, the defendant alleged error in the court's finding that the ordinance was not preempted by the Michigan Right to Farm Act.<sup>333</sup> The appellate court found the preserve qualified as a farm operation<sup>334</sup> and there was a direct conflict between the local ordinance and the state law.<sup>335</sup> The local ordinance was preventing the defendant from running a farm operation protected by the state right-to-farm law.<sup>336</sup> Due to the state preemption provision, the contrary local ordinance was not applied.<sup>337</sup> Similar to the Michigan right-to-farm law, ULPA would preclude a local ordinance from interfering with the operation of a hunting preserve.<sup>338</sup>

The preemption of local ordinances by state laws has become a significant issue.<sup>339</sup> In the absence of preemption, local governments

---

329. Tit. VI(A), *infra* app. 2.

330. No. 240444, 2003 Mich. App. LEXIS 3105, at \*3 (Mich. Ct. App. Dec. 4, 2003). The hunting preserve, owned by a limited liability company, was licensed by the state Department of Natural Resources. *Id.* at \*1-3. The enforcement action ensued after the local government rejected the defendant's application for a special use permit and the defendant continued its operations. *Id.* at \*2. However, the local government contended a special permit was required because the defendant was charging a fee that rendered the preserve a "commercial recreational area." *Id.* at \*3.

331. *Id.*

332. *Id.* (finding no preemption by the state right-to-farm law).

333. *Id.* at \*16 (considering the preemption offered by MICH. COMP. LAWS ANN. § 286.474(6)).

334. *Id.* at \*10-12 (analyzing the Michigan right-to-farm law's definitions for farm and farm operation, MICH. COMP. LAWS ANN. § 286.472(a)-(b) (West 2003)).

335. *Id.* at \*16-17.

336. *Id.* at \*16-17 (disagreeing with the government that defendant's game preserve was a recreational area because it qualified under the right-to-farm law as a farm operation).

337. *Id.*

338. Tit. VI(A)-(B), *infra* app. 2.

339. See Alexandra Manchik Barnhill, Note, *Entrenching the Status Quo: The Ninth Circuit Uses Preemption Doctrines to Interpret CERCLA as Setting a Ceiling for Local Regulation of Environmental Problems*, 31 *ECOLOGY L.Q.* 487, 513-28 (2004) (addressing the preemption of local authority concerning hazardous waste cleanup); Jeffrey A. Berger, Comment, *Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and*

may take actions that undermine state policy.<sup>340</sup> ULPA follows the Michigan right-to-farm law to preclude local governments from interfering with production and management activities conducted according to generally accepted practices.<sup>341</sup> Production and management activities include those conditions and pursuits that are defined as activities by the act.<sup>342</sup> This should assist landowners of undeveloped lands in continuing activities associated with the use of their lands.

At the same time, local governments are not completely precluded from regulating significant local problems.<sup>343</sup> Title VI(C) allows local governments to prescribe standards regarding the

*Local Impediments to Airport Expansion*, 97 NW. U.L. REV. 941, 991-92 (2003) (advocating a liberal preemption stance to limit local and state interference with airport expansion); Emily Chiang, *Think Locally, Act Globally: Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 979-92 (2003) (advocating a doctrinal test for dormant federal common law preemption of actions affecting foreign affairs); Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1, 17-20 (2002) (analyzing federal preemption over airports and how it interacts with local controls concerning noise); Emily V. Griffen, Comment, “*Relations Stop Nowhere*”: *ERISA Preemption of San Francisco’s Domestic Partner Ordinance*, 89 CALIF. L. REV. 459, 482-83 (2001) (evaluating how the federal Employee Retirement Income Security Act preempts local ordinances requiring benefits for domestic partners to be the same as for married co-workers); Robert Stumberg, *Preemption & Human Rights: Local Options after Crosby v. NFTC*, 32 LAW & POL’Y INT’L BUS. 109, 119-27 (2000) (considering the preemption of state laws that attempt to boycott goods from foreign countries with human rights violations); Valerie Watnick, *Federal Preemption of Tort Claims Under FIFRA: The Erosion of a Defense*, 36 U. MICH. J.L. REFORM 419, 430-54 (2003) (discussing the judicial elimination of preemption under the Federal Fungicide, Insecticide, and Rodenticide Act for certain tort claims); Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law*, 24 HARV. ENVTL. L. REV. 237, 285 (2000) (evaluating preemption in general on local efforts to protect the environment to advocate allowing different “levels of government to take the lead in formulating and implementing environmental law”). See also *Blanton v. Amelia County*, 540 S.E.2d 869, 875 (Va. 2001) (finding a county’s ordinances to be void and unenforceable due to conflict with state law).

340. See, e.g., *J-II Invs. Inc. v. Leon County*, 908 So.2d 1140, 1141 (Fla. Dist. Ct. App. 2005) (finding that the right-to-farm law prevented local governments from adopting ordinances relating to agriculture but did not preclude enforcing ordinances in place); *In re Proesch*, 44 P.3d 1173, 1179 (Idaho 2002) (observing that the Idaho right-to-farm law precludes the adoption of ordinances or resolutions declaring activities conducted in accordance with generally recognized agricultural practices to be a nuisance); *Belvidere Twp. v. Heinze*, 615 N.W.2d 250, 254-55 (Mich. Ct. App. 2000) (finding the Michigan right-to-farm law, MICH. COMP. LAWS ANN. § 286.474(6), preempts township zoning restrictions on agricultural practices).

341. Tit. VI(A), *infra* app. 2 (preempting local ordinances, regulations, or resolutions that limit production and management activities on undeveloped lands so long as they are conducted according to generally acceptable practices). See also MICH. COMP. LAWS ANN. § 286.474(6) (West 2003 & Supp. 2006).

342. *Id.* tit. III(A). See also Centner, *supra* Part C.1. (defining activities covered by ULPA).

343. Tits. IV(A), VI(C), *infra* app. 2.



keeping of a diseased plant or animal which is injurious to human welfare or health.<sup>344</sup> Local governments are also free to regulate waste materials creating an injurious condition to public health as delineated by title VI(A)(4).<sup>345</sup>

### G. Litigation Expenses

Title VII enumerates provisions whereby the costs of litigation can be shifted to persons initiating unsuccessful lawsuits.<sup>346</sup> This idea is adopted from several different right-to-farm laws.<sup>347</sup> Due to the costs of litigation, an ungrounded lawsuit against a property owner may lead to the demise of a land resource.<sup>348</sup> A defendant may be so

---

344. *Id.* tit. VI(C). This provision is slightly different from the exceptions to the anti-nuisance protection provided by title IV(A)(3). *Id.* app. 2. Title IV allows nuisance lawsuits concerning diseased plants and animals and for harboring pests. *Id.* Local governments may continue to regulate local diseased plants and animals, but are precluded from regulating pests. *Id.* tit. VI(C). Justification for this differentiation may be gleaned from examining the local ordinance considered in *Kupke v. Orange County*, 838 So.2d 598, 599 (Fla. Dist. Ct. App. 2003). The county cited a farmer for violating a local ordinance, with evidence suggesting that there was concern that rats and snakes were creating a nuisance. *Kupke*, 838 So.2d at 599. For agricultural and forestry producers, most pests should not be a problem as producers will control pest infestations to enhance production and profits. Moreover, pests that cause diseases can be regulated. Therefore, there is no overriding justification for allowing local ordinances controlling pests on undeveloped lands. However, states continue to have authority to regulate pests. Tit. IV(A)(3), *infra* app. 2.

345. *Id.* tit. IV(A)(4).

346. *Id.* tit. VII. This alters liability law by adopting a “plaintiff pays” policy for unsuccessful plaintiffs. Concern over frivolous lawsuits has led legislatures to craft unbalanced fee-shifting provisions weighted toward the interests of particular categories of plaintiffs. See Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent But Irrelevant*, 11 CORNELL J.L. & PUB. POL’Y 1, 37-38 (2001) (discussing a fee-shifting statute for challenges concerning employment references); Edward F. Sherman, *From ‘Loser Pays’ to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1870 (1998) (analyzing the premise that “loser pays” rules encourage settlements).

347. See COLO. REV. STAT. ANN. § 35-3.5-102(3) (West 2005); 740 ILL. COMP. STAT. ANN. 70/4.5 (West 2002); S.D. CODIFIED LAWS § 21-10-25.6 (2004); TEX. AGRIC. CODE ANN. § 251.004(b) (Vernon 2004 & Supp. 2006); WIS. STAT. ANN. § 823.08(3)(c)(2) (West 1994 & Supp. 2005). A Wisconsin case involving a suit against a defendant for nuisance involving the use of fertilizer in a cranberry bog also shows why ULPAs incorporate provisions on litigation expenses. *LeVake v. Zawistowski*, No. 02-C-0657-C, 2004 U.S. Dist. LEXIS 4916, at \*5-10 (W. D. Wis. Mar. 12, 2004). Lakefront property owners sued the cranberry farmer for causing algae growth in the waters adjacent to their properties. *Id.* at \*2. The court found insufficient evidence supporting the plaintiffs’ claims, and dismissed the case. *Id.* at \*3-5. The defendant sought attorney fees and costs under the state right-to-farm law. *Id.* at \*5 (citing WIS. STAT. ANN. § 823.08). The lack of jurisdiction precluded an award under the right-to-farm law, but the court was able to award costs under 28 U.S.C. § 1919 (2000) due to the lack of justification in bringing the suit. *LeVake*, 2004 U.S. Dist. LEXIS 4916, at \*7-10.

348. Fee-shifting generally might be adopted for situations where individuals bring unmeritorious suits to extract settlements. See Steven Shavell, *The Fundamental Divergence*

overwhelmed by a lawsuit, or may incur so many expenses, that defending the claim is not a reasonable response.<sup>349</sup> Thus, an aggressive plaintiff might cause undeveloped lands to be taken out of use without winning a lawsuit.<sup>350</sup>

To counter the possibility of a plaintiff advancing an unjustified lawsuit, ULPA provides that a prevailing defendant will recover the aggregate amount of litigation expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, together with a reasonable amount for attorney fees.<sup>351</sup> Litigation expenses are to include court costs and litigation costs.<sup>352</sup> Moreover, no bad faith on the part of the plaintiff is required for the recovery of expenses and fees.<sup>353</sup>

However, ULPA title VII offers a limitation to circumscribe liability for expenses and fees through a more descriptive definition of a prevailing defendant.<sup>354</sup> A prevailing defendant is defined as a defendant in whose favor a final court order or judgment is rendered.<sup>355</sup> Therefore, a prevailing defendant does not include a defendant who entered into a negotiated settlement agreement.<sup>356</sup> Moreover, a defendant who takes corrective or other action to reduce an aggravating situation prior to a final court order or judgment would not qualify as a prevailing defendant.<sup>357</sup>

---

*Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 588 (1997) (observing that fee-shifting might be desirable if it discouraged suits that were unlikely to succeed, but not finding strong support that fee-shifting reduces the number of lawsuits).

349. See Paster, *supra* note 106, at 300 (concluding that a nuisance lawsuit can adversely affect agricultural operations).

350. See *id.*; See also Tom Daniels, *WHEN CITY AND COUNTRY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE* 220 (Island Press, 1999) (identifying increased liability insurance fees as an expense facing owners of lands near development).

351. Tit. VII(A), *infra* app. 2 (adopting the recovery provisions from the Illinois and Wisconsin right-to-farm laws, 740 ILL. COMP. STAT. ANN. 70/4.5 (West 2002), WIS. STAT. ANN. § 823.08(3)(c)(2) (West 1994 & Supp. 2005)).

352. *Id.* tit. VII(C). This may differ from how a state views such costs. See *Vicencio v. Lincoln-Way Builders, Inc.*, 789 N.E.2d 290, 295 (Ill. 2003) (differentiating court costs from litigation costs).

353. Tit. VII, *infra* app. 2. Other statutes providing remuneration for prevailing defendants may contain a requirement that payment is only due if the plaintiff acted in bad faith. See *Boeckenhauer v. Joe Rizza Lincoln Mercury*, No. 2-04-1213, 2005 Ill. App. LEXIS 1043, at \*8-14 (Ill. Ct. App. Oct. 12, 2005) (considering the issue of whether bad faith was required to award attorneys fees under a consumer fraud statute).

354. Tit. VII(B), *infra* app. 2.

355. *Id.* (incorporating a requirement for a prevailing defendant from the Illinois right-to-farm law, 740 ILL. COMP. STAT. ANN. 70/4.5 (West 2002)).

356. *Id.*

357. *Id.*

A further definition of litigation expenses is also set forth to guide parties and judges.<sup>358</sup> Litigation expenses mean the sum of the costs, disbursements and expenses, including reasonable attorney, expert witness and engineering fees necessary to prepare for or participate in an action in which an activity is alleged to be a nuisance.<sup>359</sup>

## CONCLUSION

Anti-nuisance provisions have been a prominent feature of nuisance law for more than twenty years. While the right-to-farm laws have generally provided appropriate resolutions for competing property interests regarding family farms, agriculture and society have markedly changed. Massive consolidation of agricultural production has created concentrations of animals and supporting input and processing facilities. These agricultural enterprises are quite different from the family farms that were considered as a justification for the right-to-farm legislation.<sup>360</sup> Right-to-farm laws offering protection to such facilities may not reflect the feelings of the majority and may not constitute a good resolution for competing interests.<sup>361</sup>

Changed circumstances and judicial rulings on constitutional proscriptions mean that the future of some right-to-farm laws may be in doubt.<sup>362</sup> By protecting commercial facilities that generate major negative externalities, the laws may no longer offer an appropriate resolution for conflicting interests.<sup>363</sup> Simultaneously, there is a need to offer greater protection for undeveloped lands and natural resources.<sup>364</sup> ULPA incorporates an anti-nuisance paradigm based upon an economy of nature to provide new protection for farmland, forests, and natural areas without impacting right-to-farm laws.<sup>365</sup> With the adoption of ULPA, a state's right-to-farm law may change or be repealed without affecting the anti-nuisance protection

---

358. *See id.* tit. VII(C).

359. *Id.* (incorporating a description of expenses from WIS. STAT. ANN. § 823.08(3)(c)(2) (West 1994 & Supp. 2005)).

360. *See Walker, supra* note 15, at 489 (commenting on the significance of family farms and encroaching suburbanization with respect to the adoption of the Michigan right-to-farm law).

361. *See supra* notes 8-15 and accompanying text.

362. *See supra* notes 17-24 and accompanying text.

363. *See supra* note 5.

364. *See supra* notes 82-93 and accompanying text.

365. Tits. I, II, *infra* app. 2.

accorded to the state's land resources. Owners of undeveloped lands will have greater protection against nuisance lawsuits for production and management activities conducted according to generally accepted practices.<sup>366</sup>

---

366. *Id.* tit. II.

## APPENDIX 1: STATE RIGHT TO FARM LAWS

State	State Codifications
Alabama	ALA. CODE § 6-5-127 (LexisNexis 2005)
Alaska	ALASKA STAT. § 09.45.235 (2004)
Arizona	ARIZ. REV. STAT. ANN. §§ 3-111 to -112 (2005)
Arkansas	ARK. CODE ANN. § 2-4-107 (1996 & Supp. 2005)
California	CAL. CIV. CODE §§ 3482.5-6 (West 1997 & Supp. 2006)
Colorado	COLO. REV. STAT. ANN. § 35-3.5-102 (West 2005)
Connecticut	CONN. GEN. STAT. ANN. § 19a-341 (West 2003 & Supp. 2006)
Delaware	DEL. CODE ANN. tit. 3, § 1401 (2001)
Florida	FLA. STAT. ANN. § 823.14 (West 2000 & Supp. 2006)
Georgia	GA. CODE ANN. § 41-1-7 (1997 & Supp. 2006)
Hawaii	HAW. REV. STAT. ANN. §§ 165-1 to -6 (LexisNexis 2000 & Supp. 2005)
Idaho	IDAHO CODE ANN. §§ 22-4501 to -4504 (2001 & Supp. 2006) IDAHO CODE ANN. §§ 22-4801 to -4804 (2001 & Supp. 2006) IDAHO CODE ANN. § 22-4803A (Supp. 2006)
Illinois	740 ILL. COMP. STAT. ANN. 70/1 to /5 (West 2002)
Indiana	IND. CODE ANN. § 32-30-6-9 (West 1999 & Supp. 2006)
Iowa	IOWA CODE ANN. §§ 172D.1-4 (West 1999 & Supp. 2006) IOWA CODE ANN. § 352.11 (West 2001 & Supp. 2006) IOWA CODE ANN. § 657.11 (West 1998 & Supp. 2006)
Kansas	KAN. STAT. ANN. §§ 2-3201 to -3203 (2001) KAN. STAT. ANN. § 47-1505 (2000)
Kentucky	KY. REV. STAT. ANN. § 413.072 (West 2005)
Louisiana	LA. REV. STAT. ANN. §§ 3:3601-:3609 (2003)
Maine	ME. REV. STAT. ANN. tit. 17, § 2805 (2006)

Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (LexisNexis 2002 & Supp. 2006)
Massachusetts	MASS. GEN. LAWS, ch. 111, § 125A (West 2004 & Supp. 2006) MASS. GEN. LAWS, ch. 243, § 6 (West 2003 & Supp. 2006)
Michigan	MICH. COMP. LAWS ANN. §§ 286.471-.474 (West 2003 & Supp. 2006)
Minnesota	MINN. STAT. ANN. § 561.19 (West 200 & Supp. 2006)
Mississippi	MISS. CODE ANN. § 95-3-29 (2004)
Missouri	MO. ANN. STAT. § 537.295 (West 2000 & Supp. 2006)
Montana	MONT. CODE ANN. §§ 27-30-101 to -105 (2005)
Nebraska	NEB. REV. STAT. §§ 2-4401 to -4404 (1997 & Supp. 2005)
Nevada	NEV. REV. STAT. ANN. § 40.140(2) (2002)
New Hampshire	N.H. REV. STAT. ANN. §§ 432:32-:35 (2002) & Supp. 2006)
New Jersey	N.J. STAT. ANN. §§ 4:1C-1 to -10 (West 1998 & Supp. 2006)
New Mexico	N.M. STAT. ANN. §§ 47-9-1 to -7 (LexisNexis 1999 & Supp. 2003)
New York	N.Y. AGRIC. & MKTS. LAW §§ 308, 308-a (McKinney 2004 & Supp. 2006)
North Carolina	N.C. GEN. STAT. § 106-701 (2000 & Supp. 2005)
North Dakota	N.D. CENT. CODE §§ 42-04-01 to -05 (1999 & Supp. 2005)
Ohio	OHIO REV. CODE ANN. § 929.04 (West 1994 & Supp. 2006) OHIO REV. CODE ANN. § 3767.13 (West 2006)
Oklahoma	OKLA. STAT. ANN. tit. 2, § 20-18 (West Supp. 2006) OKLA. STAT. ANN. tit. 50, § 1.1 (West 2000 & Supp. 2006)
Oregon	OR. REV. STAT. §§ 30.930-.947 (2005)
Pennsylvania	3 PA. STAT. ANN. §§ 951-954 (West 1995 & Supp. 2006)
Rhode Island	R.I. GEN. LAWS §§ 2-23-1 to -7 (1998 & Supp. 2005)

South Carolina	S.C. CODE ANN. §§ 46-45-10 to -70 (1987 & Supp. 2005)
South Dakota	S.D. CODIFIED LAWS §§ 21-10-25.1 to -25.6 (2004)
Tennessee	TENN. CODE ANN. §§ 43-26-102 to -103 (2000 & Supp. 2005) TENN. CODE ANN. §§ 44-18-101 to -104 (2000 & Supp. 2005)
Texas	TEX. AGRIC. CODE ANN. §§ 251.001-.006 (Vernon 2004 & Supp. 2006)
Utah	UTAH CODE ANN. §§ 78-38-7 to -8 (2002)
Vermont	VT. STAT. ANN. tit. 12, §§ 5751-5753 (2002 & Supp. 2006)
Virginia	VA. CODE §§ 3.1-22.28, .29 (1994)
Washington	WASH. REV. CODE ANN. §§ 7.48.300-.310 (West 1992 & Supp. 2005)
West Virginia	W. VA. CODE §§ 19-19-1 to -5 (2004)
Wisconsin	WIS. STAT. ANN. § 823.08 (West 1994 & Supp. 2005)
Wyoming	WYO. STAT. ANN. §§ 11-39-101 to -104 (2005) WYO. STAT. ANN. §§ 11-44-101 to -103 (2005)

## APPENDIX 2: UNDEVELOPED LANDS PROTECTION ACT

### I. Legislative Purpose of the Act

A. It is the declared policy of this state to encourage the use of lands for farmlands, forests, and natural areas while also conserving and protecting these resources. Lands used for the production of food, fiber, agricultural, horticultural, aquacultural, and forestry products involve the productive use of the state's resources. Equally important are the state's natural areas. Farmlands, forests, and natural areas, hereafter referred to as "undeveloped lands," constitute unique and irreplaceable resources of statewide importance, and the protection and preservation of these lands will result in a general benefit to the health and welfare of people in the state.

B. It is the further purpose of this act to protect undeveloped lands used for cleansing air and water resources, scenic vistas, and outdoor recreational activities for their continued use as ecological and natural resources.

1. Open fields, pastures, forests, and natural areas are important to tourism and the quality of life of people in the state.

2. The production of agricultural commodities and forestry products are basic industries that are important to the health and welfare of the people and to the economy. Sound agricultural and silvicultural industries require the efficient and profitable use of water and energy and many other natural, commercial, and industrial resources.

3. A lack of adequate and informed consideration of natural resources, their relationship to the state's economy, and the need to sustain activities on undeveloped lands has caused problems for agricultural production in this state.

C. The legislature finds that urban encroachment and the development and construction of structures on undeveloped lands consisting of farmlands, forests, and natural areas often diminish the long-term ability of the land and appurtenant lands to be maintained in natural productive uses.

1. The sustained long-term use of undeveloped lands may be achieved by avoiding development that leads to fragmentation of parcels. Fragmentation begets interferences that may lead to the further demise of undeveloped lands.



2. Conflicts between urban land uses and activities on undeveloped lands threaten the demise of important natural resources. Subsequent nuisance lawsuits may encourage or force the premature demise of the current productive capacities and significantly interfere with the inherent agronomic qualities and ecological values of these lands.

D. It is therefore the purpose of this act to limit the circumstances under which farmlands, forests, and natural areas may be deemed a nuisance.

## II. The Protection

A. People who locate on or near areas used as farmlands, forests, and natural areas must accept the conditions commonly associated with living in the particular setting. It is the policy of this state that farmlands, forests, and natural areas are protected; therefore, necessary activities are allowed to continue. To qualify under this act, an activity on undeveloped lands, as defined by the act, must be conducted according to “generally accepted practices.”

B. No activity on undeveloped lands shall become a private or public nuisance after two years from its established date of the activity as a matter of law if the activity is conducted in conformity with the provisions of all applicable federal, state, and local laws, regulations, rules, ordinances, and permits and according to generally accepted practices.

C. An activity on undeveloped lands is entitled to a rebuttable presumption that it does not constitute a nuisance if the activity is conducted in conformity with the provisions of all applicable federal, state, and local laws, regulations, rules, ordinances, and permits and according to generally accepted practices.

D. No activity on undeveloped lands shall be found a public or private nuisance as a result of changed conditions in or around the locality of the land or water resource if the activity has been in such use for one year or more and if the activity was not a nuisance at the time it began.

## III. Definitions

A. “Activities” refer to:

1. Conditions and pursuits associated with the production of agricultural, aquacultural, and silvicultural products and the management of production areas for continued agronomic objectives. Activities include, but are not limited to, fertilizer application, weed

and pest control, planting, cultivating, reforestation, on-site composting, drainage, mowing, harvesting, land clearing, insect and disease control, constructing ponds associated with a farming or aquacultural operation, thinning, fire protection, and fence maintenance. An activity may be accompanied by odors, noise, air particulates, use of chemicals, and the lawful impairment of waters, except as otherwise provided.

2. Conditions and pursuits associated with natural areas including, but not limited to, those for the protection, management, and development of scenic, outdoor recreational, cultural, historic, archaeological, educational, and ecological resources.

B. "Farmlands" mean parcels greater than ten acres that are devoted primarily to the production of crops, livestock, aquacultural, horticultural, or other agricultural commodities, and include, but are not limited to, lands used for field crops, vineyards, orchards, groves, vegetable and fruit crops, pastures, areas without roofed structures for holding farm animals, water bodies for the production of aquacultural products, ponds, small lakes, forestry areas, and natural areas appurtenant thereto.

C. "Forests" mean parcels greater than ten acres that are used for the production of timber and related fiber crops. Forestry production activities include timber harvest, site preparation, slash disposal including controlled burning, tree planting, pre-commercial thinning, fertilization, animal damage control, reasonable water resource management, insect and disease control in forest land, and any other generally accepted, reasonable, and prudent practice normally employed in the management of a timber resource for monetary profit.

D. "Generally accepted practices" mean reasonable and prudent methods for the activities being conducted in a county or contiguous county in which a nuisance claim is asserted.

1. Generally accepted practices will include, but not be limited to, those practices necessary for the on-site production and preparation of agricultural or forestry commodities, such as the operation of equipment, proper use of pesticides, air and water quality control, noise control, fertilizer application, labor practices, and crop protection methods.

2. Practices that are commonly or reasonably associated with agronomic production and activities in conformity with federal, state, and local laws and regulations are presumed to be conducted according to generally accepted practices.

E. "Manure" is organic matter from farm animals used as fertilizer in agriculture, and shall include poultry litter. Poultry litter is excreted manure from avian species mixed with bedding material. Manure contributes to the fertility of the soil by adding organic matter and nutrients.

F. "Natural areas" mean parcels greater than ten acres which have retained their natural, undeveloped character, although not necessarily completely undisturbed, including lands which are important in preserving archaeological or cultural resources, ecosystems, flora, fauna, geological, open space, natural historical, scenery, wildlife habitat, wetlands, or similar features of scientific or educational value.

G. "Undeveloped lands" include farmlands, forests, and natural areas in parcels that are greater than ten acres. These lands may be used for farming, outdoor recreational activities, hunting, forestry, scenic views, and ecological functions. Undeveloped lands cannot have any structure used for human habitation, building used for confined animal production, nor any building used for a commercial purpose that is not directly related to use of the land as farmland, forest, or a natural area. Outhouses, lean-to shelters, historical and educational structures, and minor farm outbuildings are permitted on undeveloped lands. Nonqualifying buildings or paved areas on plots connected to farmlands, forests, or natural areas may be deemed to be separate parcels that are not covered by the act.

#### IV. Exceptions to the Protection

A. Notwithstanding the other provisions of this act, the anti-nuisance protection accorded by this act shall not apply to:

1. Any activity conducted in a malicious, improper, or negligent manner.
2. Any condition not in conformity with any federal, state, or local law, ordinance, regulation (including zoning regulations), or permit issued by a governmental agency.
3. The keeping of a diseased plant or animal, or harboring a pest, which is injurious to human welfare or health.
4. Any condition injurious to public health or safety, including but not limited to: (a) an improperly built or improperly maintained septic tank, water closet, or privy, (b) untreated or improperly treated human waste, garbage, offal, dead animal or waste from a slaughtered animal, or (c) dangerous waste material or gas which is harmful to human or animal life.

B. Notwithstanding the other provisions of this act, the following activities remain subject to nuisance law:

1. Any building or structure not directly used in conjunction with agricultural or silvicultural production or the management of scenic, outdoor recreational, cultural, historic, archaeological, educational, or ecological resources. Buildings and structures not qualifying under the act include those used for milling inputs, manufacturing agricultural and forestry products, or processing products.

2. Any building, pen, or feedlot used for the production of confined animals meeting the definition under state law for concentrated animal feeding operations.

3. Any lagoon employed for animal waste, and spray field used for disposing liquid or slurry from a lagoon.

4. The clear-cutting of timber and the development of roads.

5. The production of crops or forestry products involving the aboveground application or storage of sewage sludge.

C. Any activity on lands within an incorporated city.

## V. Retained Rights

A. Notwithstanding the other provisions of this act, any person, firm, or corporation retains the right to recover damages for injuries sustained on account of:

1. Any activity conducted in violation of any federal, state or local statute or governmental regulation, permit, or court order.

2. Any pollution of, or change in conditions of, the waters of any stream or on account of any discharge, overflow, or trespass.

3. Any tort for which the attractive nuisance doctrine grants a cause of action.

B. Notwithstanding the other provisions of this act, this act shall not affect the right of any agricultural producer to apply manure, organic crop residuals, or processing by-products to the land at agronomic rates as a source of nutrients for plant growth.

1. For manure application to meet the agronomic rate requirement, the producer must develop and implement a nutrient management plan that incorporates application rates for manure that minimize phosphorus and nitrogen transport from the field to surface waters in compliance with technical standards for nutrient management.

2. Technical standards shall include a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters, and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters.

## VI. Local Governments

A. Except as provided in title VI(C), this act preempts any local ordinance, regulation, or resolution that limits production and management activities on undeveloped lands conducted according to generally accepted practices.

B. Production and management activities on undeveloped lands include only those conditions and pursuits as defined as activities by title III(A).

C. A local unit of government may prescribe standards regarding:

1. The keeping of a diseased plant or animal which is injurious to human welfare or health.

2. A condition injurious to public health or safety delineated by title IV(A)(4).

## VII. Litigation Expenses

A. In any nuisance action in which an activity on undeveloped lands covered by this act is alleged to be a nuisance, a prevailing defendant shall recover the aggregate amount of litigation expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, together with a reasonable amount for attorney fees.

B. For the purposes of this act, a prevailing defendant is a defendant in a lawsuit in whose favor a final court order or judgment is rendered. A defendant shall not be considered to have prevailed if, prior to a final court order or judgment, he or she enters into a negotiated settlement agreement or takes any corrective or other action that renders unnecessary a final court order or judgment.

C. Litigation expenses mean the sum of the costs, disbursements, and expenses, including reasonable attorney, expert witness, and engineering fees necessary to prepare for or participate in an action in which an activity is alleged to be a nuisance.