Odors, Nuisance, and the Right to Farm

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Production agriculture has previously faced problems of odors. In the late 1960s, concern about new neighbors using nuisance law led agricultural-interest groups to advance anti-nuisance legislation. This legislation acquired the name of "right to farm" laws. While each state adopted individual legislation, the basic model sought to protect the existing investments of farmers in their agricultural operations. It sought this protection by incorporating a "coming to the nuisance" exception whereby persons moving to an offensive activity could not use nuisance law to seek judicial termination of the activity.

Right to farm laws gave a new life to many agricultural activities. While most of the laws were challenged, and provisions of the laws had to be interpreted by the judiciary, right to farm laws were fairly successful at discouraging nuisance lawsuits against farmers. At the same time, right to farm laws did not sanction offensive activities, negligent operations, or pollution. Because they only applied to nuisance actions, an incentive existed for farmers to be vigilant not to offend their neighbors or create problems. Zoning and local ordinances remained as vehicles for neighbors to seek redress against imprudent operations.

Recently, however, courts have been asked to view right to farm laws under constitutional takings jurisprudence. Current decisions and pending cases present some startling prospects--some state right to farm laws are unconstitutional. The Iowa Supreme Court found that a right to farm provision violated the Iowa Constitution and the Fifth Amendment of the U.S. Constitution. In the absence of compensation, the Iowa right to farm provision resulted in the taking of an easement of neighboring property without compensation.

A New York court is presented with a similar argument: does the N.Y. Agriculture and Markets law effect an unconstitutional taking of private property rights where it provides that agricultural practices will not constitute a private nuisance if the Commissioner of Agriculture has issued a Sound Agricultural Practice Opinion favorable to the farmer.

This paper will address these legal cases and the question of how AFOs might approach nuisance actions if courts adjudicate the demise of right to farm laws. Will AFO operators shop for the state where the right-to-farm protection has been upheld as not offending state and federal constitutions? Will nuisance law spur AFOs to adopt additional technology? Will AFOs be limited to locating in sparsely populated areas or selecting rural areas where their activities do not offend nuisance law? By examining right to farm laws, takings jurisprudence, and technology, the paper will seek answers to these questions.

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