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Nuisance Suit Protection For Farms: North Carolina Law Takes A New Approach

The 1979 Session of the North Carolina General Assembly enacted legislation to protect farm operations from nuisance suits under certain circumstances. Representative Tom Ellis, Jr. (D-Vance) was the principal introducer of the law, along with thirty-five co-sponsors. The law, enacted by unanimous votes in both the House and Senate, is of interest to local government officials and planners because of its implications for urban-rural conflicts in land use, suburban growth patterns, and annexation of farm land by municipalities.

NUISANCE COMPLAINTS AGAINST FARM OPERATIONS

Anyone who engages in activity that produces odor, dust, or noise sufficient to interfere with someone else's use and enjoyment of his property is a potential party to a nuisance suit. Mining and heavy industry have often been the subject of nuisance suits. Zoning ordinances have certainly been helpful in reducing the potential for nuisance-type conflicts between industrial and residential land uses. Also, the residential dweller has little incentive to locate near industrial areas.

Different factors define the farm nuisance problem. Farming is a land-based activity. Unlike industry, the farmer lives where he works. Industrial parks can be created by zoning; farm communities can not. Moreover, the residential land user is attracted to the farm community for various aesthetic and economic reasons not present in areas dominated by industrial land use.

Although almost any type of farm operation could be the object of a nuisance suit, an example of the type of problem that prompted the Farm Nuisance Suit Protection Act will aid in its understanding.

Suppose that Farmer Jones lives in a rural farm community on the outskirts of a growing city. Among other things, he keeps a number of hogs-- some for consumption, some to sell for income. He has done this for many years, as have others in the community. There are odors, but there have been no complaints because houses are a good distance from each other and from the hog confinement houses or "pig parlors." The occasional aroma emanating from the pig parlor on a hot day does not annoy his neighbors because they are accustomed to such ordinary smells.

As the city grows outward, land is needed for housing for people who work in the city. The least expensive and most convenient land is along state roads through this rural farm community, resulting in a classic case of strip development. When Farmer Jones's neighbor died, his heirs sold several highway lots for development. One of these is near Farmer Jones's pig parlor. The new residents are unfamiliar with and intolerant of the hog odors. Due to a reluctance on the part of Farmer Jones to give up his livelihood, the newcomers file a nuisance suit and recover $2,000 in damages plus a court order enjoining the operation of the pig parlor.

There is little data available on the number and disposition of nuisance suits involving farm operations. Judgements in trial cases in state courts are not published or indexed by subject matter. Few of these cases reach the appellate courts.

A survey was conducted by the Agricultural Extension Service in 1976 to gather data on nuisance suits and complaints against farm operations. This data showed that swine operations received the most complaints, followed by poultry operations, with complaints against both increasing steadily. Most of the complaints reported were resolved without court action, usually through negotiation and improved odor management of the operations.

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Complaints against farm operations are increasing as residential development moves into rural areas. Photo courtesy of D.S. McLoed

In some cases, however, the only alternative for the farmer is to close down his operation. Perhaps more importantly, the uncertainty caused by potential nuisance suits discourages investment in and improvement of farm operations.

One recent case that caused much concern among pork producers involved a Pamlico County, North Carolina pig parlor, under circumstances similar to the example cited above. The owner of the swine operations was using the best available technology for controlling odors. Yet the jury determined that the operation was a nuisance and awarded the plaintiffs $2,000 in damages (*Kropaczek v. Slade-Harrold-Larrabee, Part.*, 75-CvS-210 (Pamlico County, N.C. 1978)). The reason for widespread interest in this case (which received broad coverage in local newspapers) was the fact that many swine operations produce even more odors than did that one (*New Bern Sun Journal*, April 13, 1978).

The decision in this case, though consistent with existing North Carolina nuisance law, alerted pork producers and other farm operators to the fact that even a well-maintained operation using "state of the art" technology is not immune from being declared a nuisance due to factors beyond the control of the farm operator. This is the critical factor in most of these cases from the farmer's point of view, and that is the problem which the Farm Nuisance Suit Protection Act seeks to remedy.

EXISTING NUISANCE LAW IN NORTH CAROLINA

In order to understand the new agricultural nuisance law, a brief outline of existing nuisance law is necessary. In a nuisance suit against a farm operation, the plaintiff would have to show that the defendant's use of his property was unreasonable under the circumstances, e.g., that the facility produced an unreasonable amount of odor. The plaintiff would also have to prove that these unreasonable odors were the cause of substantial injury and loss of value to the plaintiff's property. The key words here are "unreasonable" and "substantial." It would not suffice for the plaintiff to show that there was some degree of odor detectable on his property that originated on the defendent's property. The odor must be unreasonable under the existing circumstances. Nor would it suffice for the plaintiff to show that the odor had simply caused him some discomfort, inconvenience, or annoyance. He must show substantial injury to his property rights.

How does the jury determine whether or not the defendant's conduct is unreasonable? To a large degree, this will depend upon the judgement of each member of the jury. However, the North Carolina Supreme Court has listed some of the circumstances which are to be considered by the jury in answering this question. These include the surroundings and conditions under which the defendant's conduct is maintained, the character of the neighborhood, the nature, utility, and social value of the defendant's operation, the nature, utility, and social value of the plaintiff's use of his land, the suitability of the locality for the plaintiff's occupation between the parties (See *Watts v. Pama Manufacturing Company*, 256 N.C. 611 (1962). In short, then, the jury is supposed to balance all the circumstances and come up with a fair result.

The court will instruct the jury to consider and weigh all these factors, and that none alone is dispositive of the issue. With such broad guidelines, though, the jury is likely to allow other factors to creep into their consideration. They might consider the relative wealth of the parties or the ability of the defendant to pay damages to the plaintiff. Other factors weighing against the defendent would be the jury's natural sympathy for the homeowner versus a business and their lack of familiarity with farm operations.

ANALYSIS OF THE NEW LAW

The law of nuisance in North Carolina, as in most states, is comprised of case law rather than statutes. It has evolved over the years in response to changing conditions and changing conceptions of property rights. The Farm Nuisance Suit Protection Act does not attempt to codify or repeal existing nuisance law but, instead, it simply modifies the law as it applies to agricultural operations.

As noted earlier, priority of occupation is one of the circumstances to be considered

Nuisance Liability of Agricultural Operations. N.C. Gen. Stat. § 106-107 (Supp. 1979).

§ 106-700. Legislative determination and declaration of policy.--It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this Article to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.(1979, c. 202, § 1.)

§ 106-701. When agricultural operation, etc., not constituted nuisance by changed conditions in locality.--(a) No agricultural operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began; provided, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or its appurtenances.

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

(c) The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by them on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.

(d) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstance set forth in this section are and shall be null and void; provided, however, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or any of its appurtenances. Provided further, that the provisions shall not apply whenever a nuisance results from an agricultural operation located within the corporate limits of any city at the time of enactment hereof.

(e) This section shall not be construed to invalidate any contracts heretofore made but insofar as contracts are concerned, it is only applicable to contracts and agreements to be made in the future. (1979, c. 202, § 1.)

by the jury in determining whether or not the defendant's activity is unreasonable and thus a nuisance. If the jury determines that the defendant has operated with no adverse results until the plaintiff moved in and placed himself where he would suffer from the defendant's activity, then the jury may decide that the plaintiff had brought about his own misery, and could refuse to declare the defendant's operation a nuisance. As described earlier, this "moving to the nuisance" is often the cause of nuisance suits involving farm operations. The problem with existing law was that while the jury *could* consider priority of occupation, it was not required to do so. Thus, the Farm Nuisance Suit Protection Act seized upon this aspect of existing law and made it the controlling factor in certain cases involving agricultural operations.

The term "agricultural operation" is broadly defined so as to include any bona fide commercial farming activity. Obviously it is not intended to protect someone who tries to turn a one-acre subdivision lot into a mini-farm.

The law states that no agricultural operation shall be a nuisance due to changed conditions in the locality after it has been in operation for more than one year, when it was not a nuisance at the time it began. This cuts off a nuisance suit by one who "moves in" on an established farm operation that has operated for at least a year without being sued and declared a nuisance. It would also prevent a successful nuisance suit by someone who already lived near the operation if the one-year period has elapsed. The Legislature apparently felt that one year was sufficient time for a potential plaintiff to determine whether or not he wants to file a lawsuit against the farm operation. This law does not apply to situations where the plaintiff can show that the defendant's facility is being operated in a negligent or improper manner.

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Another section of the law deals with local ordiances that provide for the abatement of an agricultural operation by declaring it a nuisance. The law provides that such ordinances shall be null and void insofar as they apply to an agricultural operation located outside

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the corporate limits of a city at the time the law was enacted (March 26, 1979). As with the other provisions of the law, however, this section does not apply whenever a nuisance results from the negligent or improper operation of the facility.

Prior nuisance law depended, in part, upon the evaluation by the jury of the relative utility and social value of the plaintiff's and defendant's respective uses of their land. It is important to note that this law sets forth the policy of the State "to conserve and protect and encourage the development and

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improvement of its agricultural land for the production of food and other agricultural products," and "to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to a nuisance." This statement of policy and purpose will guide the courts in interpreting this law in light of the prior case law on nuisances, which remains in effect to the extent that it is not inconsistent with this law.

The law purposely leaves unanswered many questions about its application in particular circumstances. To have provided a more comprehensive solution would have required a delegation of rulemaking authority to a regulatory agency. The Legislature chose instead to use an approach that takes advantage of the natural incentives of the parties involved. This approach also utilizes the adversary legal process to obtain results that are suited to the facts of each case. The legislature has simply modified the rules under which these conflicts are resolved.

EFFECTS ON LAND USE

Although not intended as land use legislation, this law will undoubtedly have an effect on land use in areas where farm communities are under pressure from growing cities. Certainly the law would discourage the prudent developer from locating a subdivision near an established farm community, where ordinary odors from livestock would bring complaints from subdivision residents.

By encouraging the protection and improvement of farm land, the law may indirectly benefit local government by reducing the amount of land available for urban sprawl development. At any rate, the legislature foresaw that the preservation of farmland would be beneficial to the entire State, as well as to the farmer.

North Carolina was apparently the first state to provide this sort of protection for the farmer. Florida adopted a similar statute in May of 1979. Virginia's legislature is presently considering such a law, as are a number of other states that are using the North Carolina law as a model.