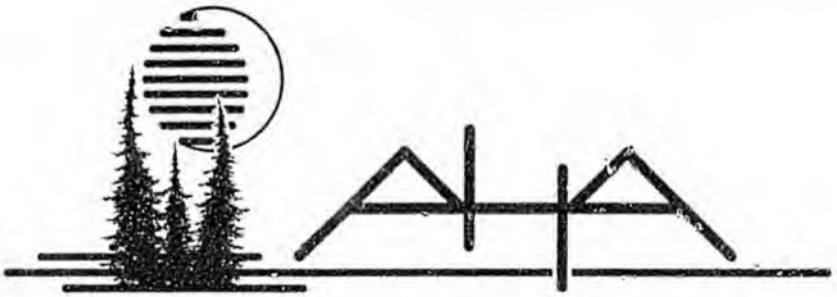
SB

409



Alaska Horticultural Association

March 6, 1986

Alex Shadura
3/6500 Ste 148
Juneau, AK 99801

RE: SENATE BILL 409

Dear Mr. Shadura:

We are writing to express our strong support for SB 409, the Alaska Right to Farm Act. The Alaska Horticultural Association enthusiastically welcomes the support for farming and horticulture expressed by this Bill and asks your support in assuring its passage through the Senate.

Our Association recognizes the rapid development of Alaskan farm lands into housing areas as a very real threat to the industry. We must protect what farming and horticultural efforts and opportunities we have to assure the potential for production of Alaskan-grown food and plant materials.

We must protect the economic and self-sufficiency advantages farming affor s the State of Alaska. Our hard-working farmers and horticulturists deserve consideration and defense.

Very Sincerely Yours,

Steven Shropshire,
AHA President

AG:hr

P.O. Box 1909, Palmer, Alaska 99645

Alaska State Legislature

Senate

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

DATE: March 26, 1986

FROM: Senator Jay Kerttula

TO: Representative Peter Goll,
Chair, House Community & Regional Affairs

RE: CSSB-409 (Right to Farm)

Dear Representative Goll:

CSSB-409 passed out of the Senate (unanimously) on March 21 and is now in the House. It is assigned to Community & Regional Affairs, Resources and Judiciary.

I have enclosed information on CSSB-409 for you. On March 26, 1986, Scott Burgess, Executive Director of the Alaska Municipal League, testified before the House Resources Committee that the Municipal League supports the policy behind right to farm legislation, and that the League did not object to CSHB-632 (which is exactly the same as CSSB-409) as long as it did not interfere with municipalities' zoning and planning powers. The two bills do not interfere with municipal powers to zone/plan, and the municipal league has no problem with the bills.

The House bill did not receive an assignment to your committee as did the Senate bill. If the Senate bill is passed out of House C&RA it will go directly to the House Judiciary Committee since the House Resources Committee has already heard all the necessary information during its hearing on CSHB-632 on March 26 and has decided to transfer the bill upon receiving it from House C&RA.

Thank you for your consideration of CSSB-409.

Jay Kerttula

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : CS SB 409 (Rs)
Title : Right to Farm

Sponsor : Senate Resources Committee
Requestor : Senate Resources Committee
Date of Request : 3/17/86

FISCAL DETAIL

Agency Affected : Natural Resources
BRU : Agricultural Management

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	0	0

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Carol Wilson
Division : Commissioner's Office
Phone : 465-2400
Date : 3/17/86

Approved by Commissioner : Norm D. Agnew, Deputy
Date : 3/17/86
Agency : Natural Resources

Distribution (by Agency preparing fiscal note) :
Legislative Finance
Legislative Sponsor
Requestor
Office . Management and Budget
Impac. 1 Agency(ies)

10/25/85

3-26-86

OVERVIEW OF COMMITTEE SUBSTITUTE FOR SENATE BILL 409,

"RIGHT TO FARM"

36 STATES HAVE A FORM OF "RIGHT TO FARM" LEGISLATION. 6 STATES HAVE LEGISLATION PENDING. NEW YORK PIONEERED THIS AREA IN 1971 WITH ITS AGRICULTURAL DISTRICT LAW.

CONNECTICUT'S "RIGHT TO FARM" BILL HAS BEEN UPHELD BY THE COURTS. WASHINGTON STATE HAS AN EXTREMELY STRONG "RIGHT TO FARM" STATUTE-IT CREATES A "CONCLUSIVE PRESUMPTION" THAT FARMING IS NOT A NUISANCE.

THE ALASKA MUNICIPAL LEAGUE'S POLICY STATEMENTS ARE SUPPORTIVE OF THE IDEA BEHIND "RIGHT TO FARM" LEGISLATION AND THE LEAGUE HAS NO OBJECTION TO THIS BILL.

CSSB-409 WILL NOT INTERFERE WITH MUNICIPALITIES' ZONING POWERS OR THE POWER OF EMINENT DOMAIN.

CSSB-409 DOES NOT AFFECT THE ALASKA CODES OF CIVIL OR CRIMINAL PROCEDURE. PEOPLE CAN STILL SUE CIVILLY UNDER AS 9.45.230 TO ENJOIN ACTIVITY THEY CONSIDER NEGLIGENT OR IMPROPER. SB-409 WILL CREATE A PRESUMPTION OF NON-LIABILITY IF THE FARM IS BEING RUN PROPERLY. CSSB-409 DEALS ONLY WITH PRIVATE NUISANCES, IT DOES NOT DEAL WITH PUBLIC NUISANCES-WHICH ARE CRIMES. PUBLIC NUISANCES, SUCH AS WATER POLLUTION, WILL CONTINUE TO BE PROSECUTED UNDER TITLE 46 OF THE ALASKA STATUTES. D.E.C.'S AUTHORITY IS NOT TOUCHED BY CSSB-409.

CSSB-409 HELPS FARMERS AVOID HARASSMENT LAWSUITS BROUGHT BY THOSE WHO MOVE IN AFTER THE FARM HAS EXISTED FOR AT LEAST 3 YEARS. THE FARM MUST NOT HAVE BEEN A NUISANCE AT THE TIME IT BEGAN FOR CSSB-409 TO APPLY, AND IF THE FARM IS BEING RUN IMPROPERLY OR NEGLIGENTLY CSSB-409 IS NO PROTECTION.

SB-409 IS SOMEWHAT FUTURISTIC IN ALASKA, BUT ACCORDING TO THE PLANNING DIRECTOR OF THE NORTH STAR BOROUGH, THERE ARE PRIVATE NUISANCE LAWSUITS PENDING RIGHT NOW THAT ARE CREATING REAL PROBLEMS FOR FARMERS IN THE FAIRBANKS' AREA.

A FEBRUARY, 1986, STUDY OF THE MAT-SU BORO DONE BY THE UNIVERSITY OF ALASKA UNDER THE DIRECTION OF DR. JAMES DREW SAYS THAT 98% OF THOSE SURVEYED ARE OPPOSED TO DEVELOPMENT ON AGRICULTURAL LANDS. THE STUDY CONCLUDED THAT "IT IS EVIDENT THAT SUPPORT FOR RETENTION OF FARMLAND-ASSOCIATED AMENITIES IS WIDESPREAD IN THE BOROUGH" (P.32 OF THE STUDY). THE STUDY NOTED NOT ONLY THE FUNDAMENTAL VALUE OF FARMLAND IN PROVIDING ALASKANS FOOD, BUT ALSO RECOGNIZED THE MORE ESOTERIC HISTORIC AND TOURIST VALUE, ALONG WITH THE "UNIQUE BEAUTY" (P.3) PROVIDED BY ALASKAN FARMLAND.

IT IS SIMPLY UNFAIR THAT A FARMER WHO HAS BEEN OPERATING PROPERLY FOR YEARS SHOULD BE DRAGGED INTO COURT DURING THE

MIDDLE OF A VERY SHORT GROWING SEASON FOR RUNNING A TRACTOR AT MIDNIGHT. SB-409 WILL HELP AVOID THIS SITUATION.

SB-409 IS ONE SMALL PROVISION THAT WILL HELP THE ALASKAN FARMER REMAIN PRODUCTIVE-AND THAT HELPS US ALL.

(LIST OF SUPPORTERS ON FOLLOWING PAGE)

LIST OF SUPPORTERS FOR SB-409

ALASKA STATE SOIL AND WATER CONSERVATION BOARD

(JOHN PEOPLES OF THIS BOARD HAS BEEN INSTRUMENTAL IN HELPING DRAFT THIS LEGISLATION)

MAYOR JUANITA HELMS OF THE NORTH STAR BOROUGH

MAYOR DOROTHY JONES OF THE MAT-SU BOUROUGH

MR. DAVID HEDBURG, PLANNING DIRECTOR OF THE NORTH STAR BOROUGH

(MR. HEDBURG HELPED DRAFT THE CALIFORNIA "RIGHT TO FARM" BILL. HE HAS SAID THAT THERE IS BROAD SUPPORT FOR SB-409 IN THE FAIRBANKS-NORTH STAR BOROUGH, AND THAT THE ALASKA MUNICIPAL LEAGUE'S POLICY STATEMENTS ARE FAVORABLE TOWARD THE IDEA OF "RIGHT TO FARM" LEGISLATION).

ALASKA FARMERS AND STOCKGROWERS ASSOCIATION

("RIGHT TO FARM" LEGISLATION IS PART OF THEIR 1986 RESOLUTION PLATFORM)

ALASKA HORTICULTURE ASSOCIATION

(THEIR LETTER OF MARCH 6, 1986 STATES, "OUR ASSOCIATION RECOGNIZES THE RAPID DEVELOPMENT OF ALASKAN FARM LANDS INTO HOUSING AREAS AS A VERY REAL THREAT TO THE INDUSTRY. WE MUST PROTECT WHAT FARMING AND HORTICULTURAL EFFORTS AND OPPORTUNITIES WE HAVE TO ASSURE THE POTENTIAL FOR PRODUCTION OF ALASKAN-GROWN FOOD AND PLANT MATERIALS.")

Alaska State Legislature

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4907

Senate
Committee on Resources

M E M O R A N D U M March 6, 1986

TO: All Members
Senate Resources Committee

FROM: Staff, Senate Resources Committee

RE: SB 409 "An Act relating to the right to farm"

Senate Bill 409 would protect agricultural operations from being declared a nuisance in areas where urban development may come in conflict with agricultural development.

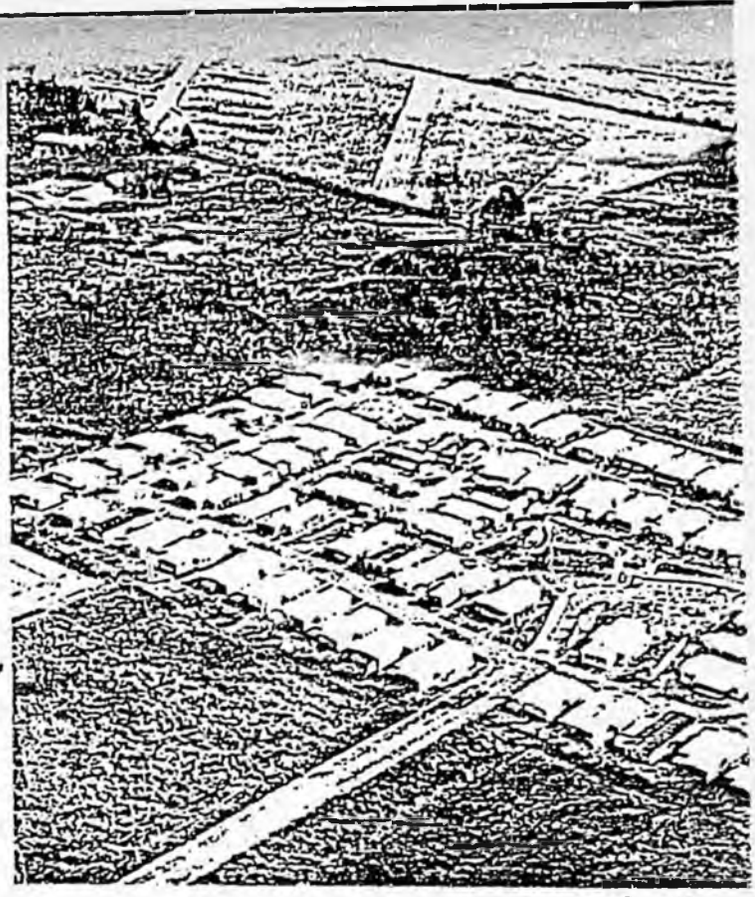
This bill would also provide that state law would take precedent over any municipal ordinance or regulation.

There is no fiscal note.

Enclosures:
Resolution of Ak. Soil & Water Conservation Districts
List of States with Right to Farm Laws
Related Articles

Right-to-farm laws: Do they resolve land use conflicts?

By Mark B. Lapping, George E. Penfold, and Susan Macpherson



Doug Wilson

UNDERLYING much of the farmland controversy are local land use conflicts between farmers and rural and suburban residents and industrial users. The irony of the situation is obvious: While farming creates and maintains the atmosphere and bucolic landscape so many wish to be part of, it is the business of agriculture, which mandates certain practices and functions, that many find offensive. The result is conflict that prompts nonfarming neighbors to attempt to restrict or eliminate agricultural practices. This often translates itself into a nonfarming majority that employs land use controls to regulate farming or that resorts to nuisance lawsuits to enjoin or restrict certain practices. What many seek, then, is farmland without farms!

About 30 states have "right-to-farm" laws to address these conflicts. Although they vary considerably, all of the laws attempt to do two things. First, they seek to supersede the common law of nuisance. Second, they favor agricultural uses of land above all others. The statutes thus attempt to establish a "first-in-time, first-in-right" logic whereby pre-existing agricultural uses have a primacy against all others. The presumption is this: If a farm constitutes a nuisance, it does so only as neighboring land uses change, and the owners of the neighboring land are themselves responsible for any liabilities to their property or person.

Mark B. Lapping is professor and director and George E. Penfold is assistant professor, University School of Rural Planning and Development, University of Guelph, Guelph, Ontario, N1G 2W1. Susan Macpherson is a land use analyst, Foodland Preservation Branch, Ontario Ministry of Agriculture and Food, Toronto, Ontario.

New York the forerunner

The genesis of right-to-farm laws can be found in New York State's pioneering agricultural district law (1971). While providing a means for farmers to create a district to preserve critical masses of farmland, the law also deals with the issue of potentially restrictive controls or lawsuits:

"No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety."

Similar statements occur in the agricultural district laws of Virginia (1977) and Illinois (1979). Maryland's statute (1977) is more specific, noting that the "operation at any time of any machinery used in farm production or the primary processing of agricultural products..." is acceptable so long as farm practices do not "cause bodily injury or directly endanger human health...."

The effectiveness of these sections of state agricultural district laws cannot be easily ascertained. Farmers apparently perceive them to be beneficial because conflict between neighbors is a specific, long-term concern of the farming community (*12*). This element of the New York law has seldom been used, but its existence may be enough to deter governments and individuals from pressing claims or promulgating restrictive ordinances (*3*).

North Carolina's statute (1979) has been used as a model for many right-to-farm laws. The purposes of that law are straightforward:

"It is the declared policy of the State to 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 are discouraged from making investments in farm improvements. It is the purpose of this (law) to re-

duce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance."

The law maintains that a nuisance does not exist if three conditions can be established: the farm did not constitute a nuisance at the time of initial operation for at least one year prior to the suit; the claim of nuisance is based upon changing local land uses and does not arise from either negligence or improper operation on the part of the farmer; and the alleged nuisance does not contribute either to flooding or water pollution.

A more sophisticated approach was incorporated into Iowa's livestock feedlot nuisance law. The purpose of this law is to provide specific protection for feedlots from nuisance suits brought by neighbors who establish themselves subsequent to the feedlot's establishment. Section 2 of the act reads:

"In any nuisance action or proceeding against a feedlot brought by or on the benefit of a person whose date of ownership of realty is subsequent to the established date of operation of that feedlot, proof of compliance with sections three (3) and four (4) of this Act shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with either section three (3) or four (4) of this Act."

Compliance with the appropriate sections of the act relate to the Iowa Department of Environmental Quality's water pollution abatement program and relevant local zoning ordinances, where they exist (6). In this way Iowa seeks to guarantee that feedlots will be brought into compliance with overall state environmental objectives and appropriate local land use controls.

The State of Washington's law contains elements of both the standard North Carolina approach and some of the specificity of the Iowa law. But unlike all the other right-to-farm laws, Washington's law seeks to prevent rural land subdivisions that may trigger nuisance-like disputes and actions. Under the Washington statute any agricultural operator who "sells or has sold portion of that land contiguous to a far for residential uses" forfeits the right qualify for protection under the law. A though the logic of preventing farme from contributing to the problem throu the creation of new lots appears self-ev dent, no other jurisdiction has enacte such a provision.

The matter of scope

A variety of farming and farm-relate operations are covered under the right-t farm statutes. In some cases, "farms" re ceive protection. In others, "agricultur operations" are covered. Some laws prote food processing and related commerci enterprises. Most of the laws require tha protected agricultural operations predat competing land uses, though a majorit specify only a minimum of one-year prio operation. Nearly all note that appropriat state and federal laws, such as environ mental regulations, cannot be supersede even though local ordinances that are con trary to agriculture are nullified.

While farms and related operations re ceive protection under these statutes, th laws almost uniformly require that th farms and related operations be manage properly. The most common requiremen is that farms maintain "good farming prac tices," though these are rarely defined Some laws do not cover farm operation that pollute or "change" water conditions, are run in a negligent or improper manner, or that negatively affect health and safety standards.

Because most right-to-farm laws are relatively new, few have been tested in the courts. An exception is Connecticut's statute, which was held valid in *De Capua v. Cella et al* (7, 11). In this case, the judge noted that the "plaintiff came to the nuisance" and that "the total inconvenience... is relatively small in comparison with the nature and conditioning of defendents' operation as dairy farmers." Moreover, because the farm was operated "in a proper manner," as specified by an inspector for the state's agricultural department, the plaintiff was "not entitled to an injunction" or "an order for monetary damages."

The matter of trespass

Right-to-farm laws are aimed, in the main, to protect farmers against nuisance suits and local ordinances that would make farms nuisances because of changes in neighborhood land uses. Another aspect of the problem, that of trespass, has not been

Characteristics of right-to-farm laws

State	Type of Agricultural Operation Protected*	Farm Must Predate Other Land Uses	Must Predate by 1 Year Minimum	Supercedes Local Ordinances
Alabama			X	X
Arizona	agricultural operations	X	X	
Connecticut			X	
Delaware			X	
Florida			X	X
Georgia			X	X
Idaho	agricultural operations		X	X
Illinois	farms		X	
Indiana	agricultural operations		X	
Kentucky	agricultural operations		X	X
Maryland	agricultural operations		X	
Massachusetts				X
Michigan	farms, farm operations	X		
Mississippi	agricultural operations		X	
Missouri	agricultural operations		X	
New Hampshire	agricultural operations		X	
New Jersey	commercial farms			X
New Mexico	agricultural operations		X	
New York	agricultural activities	X		
North Carolina			X	X
North Dakota	agricultural operations		X	X
Oklahoma	agricultural activities			
Oregon	farms			X
Rhode Island	agricultural operations			X
South Carolina			X	X
Tennessee		X		
Vermont	agricultural activities	X		
Virginia	agricultural operations		X	X
Washington				
Wisconsin	agricultural practices	X		

*Note: Agricultural operations include farming, processing, and all manner of agriculturally related enterprises; agricultural activities appear to be more farm-related and less food industry-oriented.

Conditions not protected under right-to-farm laws.

State	Negligent Management	Improper Management	Water Pollution or Changed Condition	Affects to Health/Safety
Alabama	X	X	X	
Arizona	X			X
Connecticut	X			
Delaware	X	X		
Florida				X
Georgia				
Idaho	X	X		X
Illinois	X	X	X	
Indiana				
Kentucky	X	X	X	
Maryland				
Massachusetts				
Michigan				
Mississippi				
Missouri	X	X	X	
New Hampshire	X	X		X
New Jersey				X
New Mexico	X			
New York				
North Carolina	X	X	X	
North Dakota	X	X	X	
Oklahoma				
Oregon	X			X
Rhode Island	X	X		
South Carolina	X	X	X	
Tennessee				
Vermont				X
Virginia	X	X	X	X
Washington				
Wisconsin				

adequately dealt with in the context of these laws. Historically, trespass requires a physical invasion of property. In recent decades, however, at least 10 jurisdictions have rendered judgments that accord dust, noise, and odors—traditional nuisance externalities—trespass status. As one commentator noted of Oregon's right-to-farm law, "Without protection against trespass, the right to farm is virtually ineffective" (*10*).

An evaluation

What, then, are we to make of right-to-farm laws? First, right-to-farm laws are popular with state legislatures and the agricultural community. Even granting the newness of these laws, it is surprising that so few court tests have arisen as a result of their promulgation. This may suggest that such laws are long on rhetoric and short on impact and delivery. Perhaps further court tests are needed (*4*).

Second, whereas most policies in the past were directed toward the solution of certain basic land use issues and problems, right-to-farm laws respond to site-specific concerns and particular agricultural practices.

Third, right-to-farm laws tend to ignore the contemporary practice of nuisance law. Court-inspired remedies are seldom either/or judgments. Instead, they often force the nuisance generator to use technological mitigation techniques to reduce or eliminate externalities so that both parties can carry on their activities with a minimum of economic and spatial disruption. If we follow the practice established by the nonpoint pollution program of the U.S. Department of Agriculture, this is very likely to mean that the costs of mitigation must be absorbed overwhelmingly by farmers. This invariably raises a number of important equity questions, especially given the dubious nature of the types of nuisances involved.

Fourth, an evaluation of right-to-farm laws indicates that many of these legal instruments use vague terminology, are ambiguous, and may be open to due-process challenges. And, as Ed Thompson of the American Farmland Trust has noted, "creative legal draftsmanship by county and township commissions might very easily result in local ordinances which are entirely consistent with 'right-to-farm' laws, but which significantly restrict agricultural operations" (*9*).

For all their weaknesses, however, right-to-farm laws represent an attempt to deal with some of the problems associated with changing land use and community values brought about, in part, by the "counterstream" or return migration to rural areas (*1*). Perhaps not unlike the restoration of some urban neighborhoods, there is more than a trace of class conflict involved in what may be seen as "the gentrification of the countryside." Certainly this phenomena can be observed in a number of local ordinances and plans that erect barriers against the siting of mobile homes and mobile home parks in many rural regions of the country (*5*). If nothing else, right-to-farm laws attempt to educate a public long separated from the processes of food production.

Perhaps the best solution to these problems was suggested by Noel Perrin in his essay "The Rural Immigration Law." "The solution" to the problems of newcomers with new values who seek to change rural areas is "a good, thorough immigration law. It wouldn't actually keep Don and Sue out, it would just require them to learn rural values before they were allowed to stay" (*8*). Sometimes that which is said in jest may be more astute and appropriate than the laws of the land. In terms of the right to farm, this may indeed prove to be the case.

REFERENCES CITED

1. Brown, D. L., and J. M. Wardwell. 1980. *New directions in urban-rural migration: The population turnaround in rural America.* Academic Press, New York, N.Y.
2. Fuggitt, G. V., and P. R. Voss. 1979. *Growth and change in rural America.* Urban Land Inst., Washington, D.C.
3. Hexem, Robert, et al. 1980. *Agricultural districts and land use: A pilot study.* Dept. Agr. Econ., Cornell Univ., Ithaca, N.Y.
4. Keene, J. 1981. *Incentives: Right-to-farm legislation.* In R. Coughlin et al. [eds.] *The Protection of Farmland: A Reference Guidebook for State and Local Governments.* National Agricultural Lands Study, Washington, D.C.
5. Lapping, M. 1982. *Changing rural housing policies: Vermont's mobile home zoning law.* Small Town 12: 4.
6. McCarthy, M., and S. Matthews. 1980. *Foreclosing common nuisance for livestock feedlots: The Iowa statute.* Ag. Law J. 2(2): 186-221.
7. National Association of State Departments of Agriculture. 1982. Farmland Notes 1: 11.
8. Perrin, Noel. 1981. *The rural immigration law.* In *Second Person Rural: More Essays of a Sometime Farmer.* Penguin Books, New York, N.Y. pp. 129-132.
9. Thompson, E. 1980. *Right-to-farm laws examined.* Aglands Exchange 2: 2.
10. Todd, Jennifer B. 1982. *The right to farm in Oregon.* Willamette Law Rev. 18: 153-171.
11. U.S. Department of Agriculture. 1982. Land Use Notes 35. Washington, D.C.
12. White, D., and K. Garner. 1981. *New York's agricultural district program: An analysis of farmers' perceptions in 17 counties.* Dept. Agr. Econ., Cornell Univ., Ithaca, N.Y.

STATE RIGHT TO FARM LAWS

Prepared by Richard Taylor, Staff Attorney,
General Counsel's Office

and

Shep Quate, Associate Director, NER Division,
American Farm Bureau Federation
September 1, 1981

As urban areas grow and expand into agricultural areas, city dwellers often find the odors, dust, noise, and other incidents of an agricultural operation, to be objectionable. These objections often result in lawsuits against the farmer-neighbor, claiming that the operations of the farm constitute a nuisance.

These law suits are very expensive to defend, time consuming, and are a great source of aggravation and frustration to the farmer, even if he is successful in defending such actions. In an effort to reduce the loss of agricultural resources as a result of these lawsuits, many states have passed "right to farm" laws, which limit the circumstances under which agricultural operations may be deemed to be a nuisance. These "right to farm" laws seem to be of four types.

A. The most popular type of statute provides that a court cannot declare a farming operation a nuisance if it finds the following:

1) that the agricultural operation did not constitute a nuisance at the time it began;

2) that the only basis for the nuisance claim is that conditions have changed in the locality where the farm is located;

3) that the agricultural operation had been in operation for at least one year prior to the filing of the lawsuit;

4) that the alleged nuisance did not result from negligent conduct or improper operation of the agricultural activity, and

5) that the alleged nuisance does not involve water pollution or flooding.

This type of legislation has been passed in the following states:

Alabama
Arkansas
Connecticut
Delaware
Florida
Georgia
Idaho
Illinois
Indiana
Kentucky
Maine
Maryland
Mississippi
Michigan
North Carolina
North Dakota
New Hampshire
New York
Oregon
South Carolina
Texas
Virginia
Utah

RESOLUTION NO. AASWCD 85-7

SUBJECT OF RESOLUTION Alaska Right-to-Farm Act

SOURCE OF RESOLUTION [illegible] Soil and Water Conservation Districts

DATE OF ORIGIN October 19,1985

WHEREAS, agricultural operations are valuable to the state's economy and the general welfare of the state's people; and

WHEREAS, agricultural operations conducted in developing urban/suburban areas are potentially subject to lawsuits based on the theory of nuisance; and

WHEREAS, these suits may encourage and even force the premature removal of farm land from agricultural use; and

WHEREAS, thirty two states currently have some form of a "Right to Farm" law; and

WHEREAS, it is desirable and in the state's interest to protect reasonable agricultural activities from nuisance suits;

THEREFORE BE IT RESOLVED, that the Legislature of the State of Alaska enact the Alaska Right-To-Farm Act, identified as exhibit I of this resolution.

BE IT FURTHER RESOLVED, that a copy of this resolution be sent to:

Governor Bill Sheffield
Members of the Alaska Senate
Members of the Alaska House of Representatives
Commissioner Esther Wunnicke, Alaska Department of Natural Resources
Attorney General Harold Brown

ACTION TAKEN BY AASWCD STANDING COMMITTEE _____

ACTION TAKEN BY AASWCD RESOLUTIONS COMMITTEE _____

ACTION TAKEN BY AASWCD _____

CHRONOLOGY OF STATES WITH

RIGHT-TO-FARM LAWS

1979

ALABAMA
FLORIDA
MASSACHUSETTS
NORTH CAROLINA
TENNESSEE
WASHINGTON

1980

DELAWARE
KENTUCKY
MISSISSIPPI
OKLAHOMA
SOUTH CAROLINA
PILESGROVE TOWNSHIP,N.J.

1981

GEORGIA
NEW JERSEY
ARIZONA
ARKANSAS
CONNECTICUT
IDAHO
ILLINOIS
VIRGINIA
INDIANA
MAINE
MARYLAND
COLORADO
MONTANA
NEW HAMPSHIRE
NORTH DAKOTA
TEXAS
UTAH
VERMONT
OREGON
NEW YORK
MICHIGAN

1982

RHODE ISLAND

OTHER STATES LAWS PASSED
DATE UNKNOWN

NEW MEXICO
CALIFORNIA

PENDING IN LEGISLATIVE
POSSIBLE PASSAGE NOW

OHIO
PENNSYLVANIA
NEVADA
MISSOURI
WISCONSIN
MINNESOTA

IOWA--HAS PASSED A LIVESTOCK
FEEDLOT NUISANCE LAW

STATES WITHOUT RIGHT-TO-FARM
OR NUISANCE LAWS

LOUISANA
KANSAS
NEBRASKA
ALASKA
HAWAII
WEST VIRGINIA
SOUTH DAKOTA
WYOMING

B. The second type of "right to farm" statute provides that agricultural activities if, (1) conducted consistently with good agricultural practices and, (2) established prior to the surrounding non-agricultural activities, are presumed to be reasonable and therefore not a nuisance, unless the activity has a substantial adverse effect on the public health and safety.

If the activity conforms with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

The main difference between this type of statute and the type described in "Type A" above, is that this type merely raises a presumption of reasonableness as to agricultural activity when certain circumstances exist. In most states, this presumption of reasonableness is rebuttable.

However, the difference between statute type A and type B is more one of form than of substance. If the factors that give rise to the presumption are present, (that is, (1) the activity conforms to federal, state and local regulations and, (2) the activity is prior in time), it would be very difficult to establish a nuisance.

This type of legislation has been passed in the following states.

Arizona
Oklahoma
Vermont
Washington (presumption is conclusive)

The state of Washington amended their Right-to-Farm law in 1981 to protect against government over-regulation.

Their legislative findings read:

"New Section. Sec. 29. The legislature finds that agricultural land is essential to providing citizens with food and fiber and to insuring aesthetic values through the preservation of open spaces in our state. The legislature further finds that government regulations can cause agricultural land to be converted to nonagricultural uses. The legislature intends that agricultural activity consistent with good practices be protected from government over-regulations."

C. The third type of "rights to farm" legislation protects feed lots, dairy farms and egg production houses from liability for private nuisance if, (1) the activity complies with federal and state regulations and if, (2) the agricultural activity started operations before the complainant acquired his property.

This approach protects activities of feedlots, dairy farms and egg production houses that are complying with federal and state regulations from private nuisance suits. This approach places the control over these activities in the hands of the state departments of health.

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LAND: ISSUES AND PROBLEMS

No. 63 January 1984*

LOCAL AGRICULTURAL AND FORESTAL DISTRICTS: A LAND PRESERVATION PROGRAM FOR FAIRFAX COUNTY, VIRGINIA

by Janet O. Kilby**

Most people can agree that fresh produce, clean air, woodlands, and wildlife are valuable to a quality environment. The desire to preserve these qualities in Fairfax County, Virginia, is what brought a large turnout to a public hearing by the County's Board of Supervisors on an evening in April of 1980. Citizen after citizen, farmer after farmer, spoke of the farmland preservation benefits that would come to the County if the Board would adopt the land-use tax, an ordinance to give farm and forest owners an opportunity to have their land valued for taxation at its farm and forest value rather than its fair market value. The Board did not act that night, but it did ask the County's planning staff to estimate what a land-use tax program would cost and review alternatives for preserving farm and forest land. From the effort that followed, the County formulated and implemented an agricultural preservation program specifically suited to its needs. On May 9, 1983, the County established, starting on June 30, 1983, a special agricultural and forestal districts program that allows districts as small as 25 acres.

PRESERVATION TECHNIQUES STUDIED

So that the reader may understand why Fairfax County came to focus upon agricultural and forestal districts, a review of the County's 1981 study entitled "Preserving Agriculture and Open Space in Fairfax County" is needed. This study evaluated alternative land preservation techniques, and the Board of Supervisors used it in deciding what course Fairfax County should pursue[1]. In addition to the land-use tax, the County staff studied agricultural and forestal districts, zoning, fee-simple acquisition, easement acquisition, transfer of development rights, and transfer of development credits.

At the outset, attention focused on use-value taxation, popularly known as the land-use tax, since this technique was known to the public and allowed by state law, Chapter 15 of Title 58, Article 1.1 of the *Code of Virginia*. This law enables local governments to evaluate land for tax purposes in accordance with its use rather than its fair market value. Often, the result is a significant reduction in real estate taxes, and this is thought to assist the landowner in keeping his land in its existing agricultural, horticultural, forest, or open-space use by reducing his operating cost. Actually, the land-use tax should be considered more as a tax-deferral program than a tax-relief program because each landowner who changes his eligible land to a developed use must pay back a portion of the taxes from which he was relieved.

The study determined that if the County adopted a land-use tax ordinance the cost in the first fiscal year, 1983, would be as much as $1.1 million for an ordinance applying only to agricultural and horticultural lands, $6.0 million for one applying only to forest lands, and $7.2 million for a program applying to all four uses including open space. However, cost was not the only concern. Reports from other urbanizing localities in Virginia[2] as well as the agricultural preservation literature, particularly a report by the Council on Environmental Quality, *Untaxing Open Space*,[3] indicated that the implementation of a land-use tax program alone, without any accompanying development controls, was not an effective land preservation technique. In addition, there was concern that the local comprehensive plan and zoning could not be considered in awarding the land-use tax under Article 1.1 of the *Code*, thus allowing the program to work sometimes at cross purposes with the County's other land-use planning and regulation efforts.

The agricultural and forestal district was another preservation technique available to the County through state legislation, Chapter 36 of Title 15.1 of the *Code*. Under this 1977 act, as amended, farm and forest land owners voluntarily may apply to the local governing body to have their land placed in an agricultural and forestal district. Such a district is not a zoning district but a special designation for the land indicating that it is to continue in agricultural and forestal use and that qualifying land can become eligible for the land-use tax. The local governing body may condition its approval of a district to the effect that land in the district cannot be developed to a more intensive use than the existing use while it remains in the district. However, provisions included in the law allow landowners to withdraw their land from districts upon concurrence of the local governing body. Established districts must be recognized by State agencies and local government so that laws, policies, and actions, including securing certain rights-of-way for public utilities, do not conflict with the continuance of farming and forestry in the districts. The local governing body can consider such factors as the agricultural and forestal significance of the land and local development patterns and needs, in deciding whether to establish a district.

The concept of the agricultural and

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to the Fairfax County Board than the land-use tax alone since a restriction preventing development could be secured at the same time the district was established and since zoning and the comprehensive plan could be used as factors to determine whether or not a proposed district could be established. However, the 1977 Act was not expected to be very useful in the County because the Act required a 500-acre minimum size. Consequently, since adoption of the Act, only two districts had been successfully established in the County. The owners of smaller farms in Fairfax County were not being benefited.

Other techniques explored in the study, including zoning, fee-simple and easement acquisition, and transfer of development rights and credits, were options that would provide longer-term preservation compared to the land-use tax and agricultural and forestal districts. Zoning techniques and easement acquisition were determined most likely of use to a rapidly-urbanizing county where remaining farms are small and scattered, but considerable time was needed to set up such potentially controversial and expensive programs. Therefore, a more timely solution to the immediate situation of continuing loss of farmland in the County was required; the Fairfax County Board of Supervisors decided to petition the General Assembly to allow establishment of agricultural and forestal districts smaller than 500 acres.

ENABLING LEGISLATION CREATED

Senate Bill 355 was introduced in the 1982 session of the General Assembly. This bill proposed a new law, entitled "Local Agricultural and Forestal Districts Act," which would allow districts as small as 25 acres. A local governing body would have an option to choose a minimum district size larger than 25 acres; however, 25 acres was the smallest acreage that such a body could use. The idea was to allow local governments to adopt small districts that would not require recognition by state agencies. Presumably, the Assembly had chosen 500 acres as a minimum size for a district because farm and forest areas below this size were not considered of sufficient "critical mass" to warrant State recognition. State and local government laws, policies, and right-of-way acquisition policies were not proposed to be modified in local agricultural and forestal districts as they are in districts established under the 1977 Act.

Because smaller farms are often under development pressures are high, and, because these areas often change in short periods of time, Senate Bill 355 specified eight years as the limited effective period for a district. This contrasted sharply with a district being established for an extended period with a option to renew for [illegible] eight years, as the 1977 law specified. Only upon concurrence of both the owners of land lying within the district and the local governing body could a district be renewed for subsequent periods of eight years each.

Because these districts were strictly of local significance, the bill was enabling legislation, leaving the local governing body to decide whether or not to set up a local districts program.

The proposal review process, using the Agricultural and Forestal District Advisory Committee, the Planning Commission, and the Board of Supervisors, was to be much the same as under the 1977 law. Local districts were to be created by ordinance, the provisions of that ordinance being specified in the bill. These stated that the land could not be developed to a more intensive use than its existing use, that it would be eligible for the land-use tax, and that the district would be for an eight-year period subject to renewal.

Senate Bill 355 allowed a landowner to withdraw his land from a district only if permitted by the local governing body. Upon withdrawal, the land previously in the district would become subject to roll-back taxes and an additional penalty in the amount equal to two times the fair-market-value taxes determined in the year following withdrawal. The penalty for withdrawing from a local district was, therefore, greater than for withdrawing from a statewide district, the latter only making roll-back taxes applicable if use of the land is changed to a nonqualifying use.

The factors that could be considered by the local governing body when deciding to establish a local district include several applicable to districts established under the 1977 Act; for example, the agricultural and forestal significance of lands in and around the district, the nature and extent of land uses other than active farming and forestry in and around the district, and local developmental patterns and needs. The latter factor was further clarified in Senate Bill 355, so that establishment of local districts could include the consideration of the Comprehensive Plan and zoning. Two additional factors for local districts included the scenic and historic features of the land and the environmental benefits of preserving lands in the [illegible] their existing uses.

When considered by the Assembly, Senate Bill 355 was amended in several important areas. The principal amendment effectively limited the applicability of the law to Fairfax County by defining "local governing body of any county having an urban county executive form of government." Therefore, for the present, no other local government can adopt a local agricultural and forestal districts program.

Another important amendment removed the necessity for the local governing body to grant approval of land withdrawal from a district during its eight-year life. As adopted, the law allows an owner to withdraw his land upon his request. The roll-back tax and penalty provision was allowed to remain as proposed.

The "Local Agricultural and Forestal Districts Act" passed the General Assembly on March 11, 1982, and was signed into law by the Governor on April 10, 1982.

COUNTY ORDINANCE CREATED

The major tasks at hand for the county included setting the minimum district size and development of criteria for evaluating applications, based on the consideration of factors set forth in the law. Recommendations regarding these issues were developed through the efforts of both County staff and a specially-formed committee of citizens and farmers, the Agricultural Planning Advisory Committee, and presented to the County Board of Supervisors in 1983 in the "Agricultural and Forestal Districts Ordinance Report."

While the Local Agricultural and Forestal Districts Act had been designed with Fairfax County in mind and had included provisions that districts could be as small as 25 acres, additional research was needed to see if 25 acres was indeed the best minimum district size for the County. In a 1983 staff report, data on farm and forest acreages were updated. These showed that a majority of the County's farms and forests contained fewer than 100 acres and that many were between 25 and 50 acres. In addition, these farms and forests were scattered, making joint applications for districts made up of land owned by more than one owner difficult. However, there was still the question of whether these scattered small farms could be economically viable.

A study prepared [illegible] by Rene Johnson, Agriculture Coordinator for the Montgomery County, Maryland, Office of [illegible] Development, determined that a family of

of $24,500 from a 25-acre vegetable and fruit farm. The study concludes that "... opportunity exists for successful family operations on a small acreage." Using this study as well as other sources, Montgomery County chose to base its agricultural preservation program on a minimum farm size of 25 acres. Since Montgomery County is located adjacent to Fairfax County, and the two counties are subject to some of the same development pressures and economic conditions, the conclusion was that 25 acres would be a reasonable minimum farm size in Fairfax County. This is especially true since intensive fruit and vegetable production is the kind of agriculture most likely to succeed in the County.

The Local Agricultural and Forestal Districts Act does not specify a minimum parcel size or farm size. In other words, under the Act, a district made up of several small farms or forest properties having different ownerships, which together meet the minimum district size, could be allowed. However, the County considered 25 acres the minimum size for a significant farm or forest. The farm or forest may be made up of several tax parcels. However, all the land in the district must be owned either by one owner or by owners who are members of the same immediate family.

The criteria developed for the establishment and review of districts were divided into two groups. The local ordinance provides that all districts should meet all of Criteria Group A and at least two of Criteria Group B. However, an exception can be made to Group A criteria dealing with the proper designation of the land on the Comprehensive Plan if at least three of Criteria Group B are met.

Criteria Group A: To be considered for district status, the land must:

- be a minimum of 25 acres,
- be predominantly agricultural and forestal in use,
- be zoned for residential use with a minimum lot size of two acres,
- be shown on the Comprehensive Plan for development that is no more intense than 2-acre residential lots,
- have surrounding lands planned for similar intensities,
- have at least two-thirds of the soils in agricultural use classified as Class I, II, III, or IV, as defined by the U.S. Soil Conservation Service,
- [illegible] conservation plan prepared by the local Soil Conservation District, and
- [illegible] a history of improvements or other evidence of commitment to the present use.

Criteria Group B: The County must consider whether the land:

- is producing farm and/or forest products,
- is providing scenic vistas,
- is an historic site recognized by the County,
- is zoned for five-acre lots or larger,
- is subject to a permanent open-space easement, and
- is being operated so that the farm or forestry operations practice unique or every effective agricultural best management practice.

Several of the criteria in Group A warrant some explanation. While most would agree that lands in the district should be predominantly agricultural and forestal in use, some might question why land in the district may be zoned and planned for residential densities as intense as 0.5 units per acre, or two-acre lots. The reason is that previous planning and zoning action in the County resulted in many farms in the northern part of the County being zoned for two-acre lots. Many of these farms would have been excluded by a more stringent standard. Areas of the County planned and zoned for two-acre lots often have developed in large lots and have a semi-rural flavor. Therefore, Fairfax County chose two-acre-lot planning and zoning as the maximum residential intensity allowed. Criteria dealing with soil quality and conservation plans were intended to promote good conservation practices. These plans must include plans for implementing agricultural best management practices, thereby providing increased environmental benefits from preservation of the land.

Not all farms and forests could meet all of the criterions in Group B. Most working farms and producing forests could meet the first two criterions. The other four criterions allowed unique properties to be preserved, such as an historic farm zoned for low-intensity use but located in an area of the County planned for high-density development or a parcel of mature forest held by a conservation group for environmental, but not wood production, purposes.

Cost was still a potential issue for the local agricultural and forestal districts program; therefore, efforts were made to estimate what the program might cost the County in terms of revenue loss and administrative costs. The acreage of land calculated. However, the planner realized that the resulting acreage figure could lead to an overestimation of the cost, since all owners of acreage qualifying for the program probably would not apply.

In order to assess their interest in the program, a mail survey was sent in November, 1982, to owners of all potentially eligible farm and forest land in the County. Landowners were asked whether they were interested in participating in the local agricultural and forestal districts program. The survey also sought other information, particularly about what factors influence owners of farm and forest land to continue farming or practicing forestry in the County. A response rate of 45 percent was achieved. The results showed that, among the 250 owners of land qualifying for the program as proposed, 68 were willing to respond that they were interested in participating. This allowed a low and a high estimate of total program costs. The low estimate, representing participation of 4,280 acres, projected a total cost of $349,000 for FY 1986. The high estimate, representing participation of 19,436 acres, projected a total cost of $1,109,000. Estimates were made for FY 1986 because that is the first budget-year that the full effects of the program were expected to impact the County. Actual program costs are expected to be at some level between the low and the high estimate, but probably closer to the low estimate.

IMPLEMENTING THE ORDINANCE

Support for the program was provided by the Agricultural Planning Advisory Committee, and by many citizens and farmers who appeared at public hearings. The Boards of Supervisors adopted the ordinances on May 9, 1983, to become effective on June 30, 1983. The first applications have been submitted and are in the review process. This means that some districts may be established in time to affect tax bills in 1984.

Experience with this new program will indicate whether an appropriate balance has been struck between what is asked of the landowners, that is, what development restrictions are required, and what benefits the landowner receives that will assist him in keeping his farm or forest property. Fairfax County hopes that this new program will at least slow the conversion of its farm and forest land to other uses, allowing maintenance of the availability of local produce, clean air, woodlands, and wildlife.

1. Fairfax County Office of Comprehensive Planning. *Preserving Agriculture and Open Space in Fairfax County* (Fairfax, VA: Office of Comprehensive Planning, 1981).
2. *Ibid.*, pp. 50-52.
3. Keene, J. C., D. Berry, R. E. Coughlin, J. Fernam, E. Kelly, T. Plaut, and A. L. Strong, *Untaxing Open Space, Summary* (Washington, D.C.: Council on Environ-

4. Sec. 58.-1010 of the Code of Virginia.
5. Fairfax Office of Comprehensive Planning. *Agricultural and Forestal Districts Ordinance Report* (1983).
6. Johnson, R., "Small Farm Economics," *Appendix B, Preliminary Plan, Functional Master Plan for the Preservation of Agricultural and Rural Open Space in Montgomery County* (Silver Spring, MD: Maryland-National Capital Park and Planning Commission, 1980), p. 13.
7. Maryland-National Capital Park and Planning Commission, *Preliminary Plan Functional Master Plan for the Preservation of Agricultural and Rural Open Space in Montgomery County* (Silver Spring, MD), p. 42.

LAND

To a large degree, Fairfax County's local agricultural and forestal districts reflect Virginia's solution to two problems that the New York legislature had to deal with in 197[illegible] when enacting their first agricultural and forestal districts law. Both problems involved the land: one its taxation, the other its protection. The former was a constitutional issue, the latter a philosophic matter.

The constitutional issue arises from wording found in state constitutions, including wording in Article X of the Constitution of Virginia: "All taxes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . .."

Let's suppose that a state authorizes land-use taxation only for land lying in agricultural and forestal districts that have a minimum of 500 acres. In that state there is a county in which the only operating farms are two dairy farms that lie ten miles apart. One of these farms totals 1,000 acres owned by one family, and the other totals 100 acres owned by another family. The family with the 1,000-acre farm applies to the county for an agricultural and forestal district and, after the review process [illegible] established, making the land qualify for land-use taxation.

The land of the 100-acre farm is devoted to agricultural use, but the acreage does not meet the 500-acre criterion and no adjoining land qualifies to organize a district. As the "authority levying the tax," would this county meet the criterion that "All taxes . . . shall be uniform upon the same class of taxable subjects within the territorial limits" of the county? General agreement exists that the answer is no. The situation posed by the above example was faced by Fairfax County as it sought to respond to it public in 1980.

To solve the uniformity problem, the law enacted in New York provided that an owner of land lying in situations such as the 100-acre dairy farm could contract with the local government to keep his land in the qualifying use for eight years, thereby enabling the land to become eligible for land-use taxation. This feature of the New York law was omitted when the General Assembly of Virginia enacted in 1977 the law enabling local governments to establish agricultural and forestal districts of 500 acres or more.

The 500-acre-minimum district and the (Fairfax County) local agricultural and forestal district (vis-a-vis the contract) reflect major differences in the philosophic position taken to protect and retain qualifying land in agricultural and forestal use.

With the 500-acre-minimum district, the state provides, among others, restraints on public investment by all levels of government. This reduces the pressure on the land and the government makes a commitment to protect and retain the land in agricultural and forestal uses. This is neither an irrevocable nor a "forever" commitment, as the life of each district is subject to periodic review.

establishing such a district with its institutional restraints, government makes a long-term commitment to protect and retain the land in the qualifying uses.

For the local agricultural and forestal district, there is no commitment to protect the land by restraining public investment, a point Ms. Kilby makes in this sentence: "State and local government laws, policies, and right-of-way acquisition policies were not proposed to be restricted in local agricultural and forestal districts as they are in districts established under the 1977 law." Thus, the effect of local agricultural and forestal districts (as with the contract) is to extend land-use taxation to qualifying, eligible land until such time as the County (or, as in Fairfax County, the landowner) may deem it appropriate that the land lying within a district be devoted to developed uses.

* * *

Views and comments of the readers are welcomed and should be addressed to Land: Issues and Problems, Room 323, Hutcheson Hall, Virginia Tech, Blacksburg, VA 24061-0088.

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CHAPTER 5

INCENTIVES: RIGHT-TO-FARM LEGISLATION*

I. INTRODUCTION

There is a basic incompatibility between many types of agricultural activity and residential use. As city people begin to move into rural areas, they object to the smells, noises, dust, pesticides, and other by-products of operating a modern farm. These complaints can take several forms. A landowner may sue the farmer, claiming that his farm operations are a nuisance. He may try to persuade the local government to pass an ordinance limiting various farm activities. He may report the farmer to a county or state agency that is responsible for enforcing air or water pollution control laws for the purpose of getting an order to end the offending farm practices.

Farmers find that defending themselves against such actions can be expensive, time-consuming and aggravating, even if they are successful. They have turned with increasing frequency to their state legislators for protection. The laws that have been passed in response have been called "right-to-farm" laws. They recognize that just as new residents in a rapidly urbanizing area should be protected against the unhealthful and offensive odors of a nuisance, such as a large feedlot, that has become "a right thing in the wrong place—like a pig in the parlor, instead of the barn,"[1] so too must farmers in agricultural areas be protected against legal actions by their neighbors and local governments arising from the fact that homes have been built in the wrong places—so that parlors open out on pigpens.

II. PURPOSES AND CHARACTERISTICS OF RIGHT-TO-FARM LEGISLATION

At least seventeen states, listed in Table 5-1, have adopted some form of right-to-farm legislation.[2] They fall into four major groups, each of which is based to a greater or lesser extent on a different prototype.

A. Laws Based on New York's Statute

New York's law was enacted in 1971 and has served as a model for the Illinois, Oregon, Virginia, and the Twin Cities Metropolitan Area legislation. It provides:

> No local government shall exercise any of its powers to enact [illegible]
> within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety.

As reported in Chapter 4, little explicit use has been made of the law, and there have not been any judicial interpretations of its language. Regulations that restrict farm structures and practices in support of the purposes of the act are permitted, as are regulations of lot size, subdivision, and partitioning that do not restrict farm structures or practices. Regulations that bear a direct relationship to the public health or safety are permitted by the law even though they unreasonably restrict farm structures and practices in contravention to the purposes of the act. (However, it is not clear how a local regulation could be constitutional if it regulates farm structures and practices in an unreasonable way.) Only regulations that protect the public morals or general welfare, such as certain provisions of zoning ordinances, are curtailed by the law, and even then are permissible if the restrictions they impose on farming are reasonable. This is specifically recognized in Virginia's legislation. It is not clear exactly how a farmer would avail himself of the protections provided by the act. Presumably, he could use it in a political way to persuade his local government not to adopt restrictive regulations. If he were unsuccessful in doing so, he might be able either to bring a declaratory judgment action to have the resulting ordinance declared invalid, or to use the law as a legal defense should the local government seek to enforce the ordinance against him. In such an event the judge would have to address the central and most difficult question presented by the act: How will the balance be struck between, on the one hand, the extent to which the ordinance restricts a farming operation in contravention of the purposes of the agricultural districting law

* The principal author of this chapter was John C. Keene.

TABLE 5-1
STATES WITH STATUTES PROTECTING FARMERS**

Laws Protecting Against Local Government Regulations

Alabama (1980)	New York* (1971)
Delaware (1980)	North Carolina (1979)
Illinois* (1979)	Oregon (1973)
Kentucky (1980)	Tennessee (1979)
Louisiana (1978)	Virginia* (1977)
Maryland* (1977)	
Minnesota (Twin Cities)* (1980)	

Laws Protecting Against State Regulations

Tennessee (1979)	Oregon* (1973)

Laws Protecting Against Private Nuisance Lawsuits

Alabama (1980)	Mississippi (1980)
Delaware (1980)	North Carolina (1979)
Florida (1979)	Oklahoma (1980)
Georgia (1980)	Tennessee (1979)
Kentucky (1980)	Washington (1979)
Louisiana (1978)	

* The statute applies only in agricultural districts or, in the case of Oregon, in exclusive farm use zones.
** Some states provide more than one form of protection.

and, on the other, the degree to which the ordinance protects the public's health and safety? The statute gives no guidance to assist in this delicate balancing process.

Oregon's law does not extend its protections to farm practices that generate odor, dust, or other materials that interfere with the use of lands outside the exclusive farm use zone. It also contains a specific disclaimer of any intent to limit the powers of all levels of government to protect the public's health, safety, and welfare.

B. Laws Based on North Carolina's Statute

North Carolina's right-to-farm law takes a different approach in that it seeks to modify traditional principles of the common law of nuisance. Some or all of its provisions have been adopted by Alabama, Delaware, Florida, Georgia, and Kentucky and Louisiana. The law provides as follows:

> *Section 106-700.* 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 agricultural 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.
>
> *Section 106-701.* (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. Pro-

at the time of commencement of the farm operation, or those in effect now?

Third, it can be assumed that plaintiffs' lawyers will allege that the agricultural activity is a nuisance for reasons other than changed conditions in the locality. For instance, if there have [illegible] it started, they will attempt to demonstrate that the operation is using different farming techniques, different fertilizers, pesticides, and herbicides, and generally that its technology has evolved over the years so that it is now a nuisance without regard to changed conditions nearby. Thus, much of the protection hoped for will be lost.

Fourth, the statute provides neighbors with a one-year period after the commencement of a farming operation within which to attempt to have it declared a nuisance. The statute does not make it clear, however, whether this same right would be available in the event that a farmer adopts drastically different farming techniques that produce a lot more noise, dust, or other environmental pollution. If this right is not available, then the statute exposes neighbors to serious health risks; if it is available, the law may have the effect of restricting the ability of farmers to improve their farming techniques, and in any case, presents the issue of how much change is necessary before the farmer loses the protection accorded by the law.

Fifth, the North Carolina statute and some of its progeny withhold their protections from agricultural operations that cause injury to others because of "negligent" (Kentucky) or "negligent or improper" (North Carolina, Alabama) conduct. Negligence is a different type of wrong from nuisance and has a completely different legal basis from the one on which nuisance is based, although certain acts may result in liability for both negligence and nuisance. To put it simply, one person can recover damage from another for injuries resulting from negligence if he can prove that the other did not act as a reasonable person would have under all the circumstances. The main part of the statute concerns only nuisance liability and does not attempt to limit liability for damages caused by negligence, so the language concerning negligence is superfluous. Furthermore, it is not clear what the legislature meant by "improper." The word has no established legal meaning and could cover all kinds of morally reprehensible actions. Thus, for example, if pesticides were causing a neighbor's family to be sick, he might be able to recover damages from the [illegible] though he could not prove negligence. In fact, maintaining a nuisance is a good example of "improper" activity which is not negligent.

Finally, the law extends its protection to agricultural operations even after the land on which they operate has been annexed by a city, if the annexation takes places after the effective date of the act. The legislature made the judgment that even if the land around an agricultural operation becomes so urbanized that it is politically desirable to incorporate it into a city, the protection against municipal regulations based on change of conditions should continue. Such a long-term, universal protection for nuisance-like activities seems not to take into account the varying conditions which will be found across a state.

C. Tennessee's Statute

Tennessee's right-to-farm law is itself derived from feedlot laws that have been enacted in states such as Wyoming and Iowa. It recognizes that air, water, and noise pollution are now governed by complex sets of federal and state regulations, as a result of the enactment of laws such as the federal Clean Air Act, Clean Water Act, the Resources Conservation and Recovery Act, and their state counterparts. The Tennessee statute applies only to feedlots, dairy farms, and egg production houses — agricultural activities that are important to its economy and can generate serious concentrated air and water pollution. It provides that any such activity that is subject to the regulatory jurisdiction of the state department of health is insulated against liability for private nuisance if the activity is in compliance with state regulations and if the agricultural activity started operations before the complaining neighbor bought or started using his property. If the operations are expanded, the original activity maintains its priority date and the new activity receives a priority date as of the time it was established.

The statute also provides limited exemptions from state environmental regulations and local zoning and farm nuisance regulations. Feedlots, dairy farms, and egg production houses must comply first with regulations and standards applicable under a permit from the National Pollutant Discharge Elimination System created by the federal Clean Water Act, second, with regulations of the state Health Department and local governments that were in effect on April 12, 1979, the effective date of the act, and third, with any such regulations that take effect before the agricultural activity is established. The activities are exempt from rules and regulations that are passed after the effective date of the law and the date they began operation. The protected agricultural activities are also exempted from post-1979 zoning and anti-nuisance regulations that become applicable to them because a city has annexed the land on which they are conducted.

Tennessee's approach recognizes that effective control over certain types of agricultural pollution rests in the hands of the state Department of Health. On the one hand it applies a limited first-in-time, first-in-right principle that protects certain activities from changed state regulations. The only issue that this seems to raise is whether the state can permit certain types of pollution that federal laws prohibit. On the other hand, the statute protects agricultural activities that are complying with state rules from most private nuisance suits and hostile local regulations. The law incorporates by reference the detailed environmental standards established by the Department of Health. Operators of the designated agricultural activities must meet them in order to avoid nuisance liability and local regulation.

D. Laws Based on Washington's Statute

The laws of Washington and Oklahoma provide:

> Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding non-agricultural activities, are [conclusively, in Washington] presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety.
>
> If that activity is undertaken in conformity with federal, state, and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

This approach incorporates by reference all the relevant federal, state, and local standards and insulates farm activities that are meeting them from nuisance liability to property owners who buy land or begin activity after the start of the agricultural activity. Obviously, an operation that was not would be exposed to administrative action as well. It does not attempt to deal with overly restrictive local ordinances. Even though federal and state environmental protection laws have largely supplanted local regulation and established minimum water and air quality standards, it is still possible that local governments may have the power to set standards that could have a serious impact on agricultural activities without providing commensurate protection of the public health and safety. This possibility should be addressed in right-to-farm legislation.

E. Other Approaches

Some states, such as California, have not attempted to create a right to farm but have simply exempted certain types of agricultural activities, such as burning, aerial spraying, and the use of pesticides, from certain requirements of their air pollution control laws.[8] Mississippi's law provides only that an agricultural operation that has been in existence for a year is immune from liability for public or private nuisance if the conditions alleged to constitute a nuisance have existed substantially unchanged since the date the operation started. Expansions are entitled to their own priority date, as is the case in Tennessee.

In a recent proposal for a program for farmland retention in New Jersey,[9] it was suggested that the state should develop specifications of acceptable farm management practice that would both tell farmers what they could do without exposing themselves to liability for environmental pollution or nuisance, and at the same time protect the health and safety of the state's residents.

The proposal stressed that all of the following activities should be covered by right-to-farm legislation: growing crops and raising poultry and cattle; processing and marketing produce; applying fertilizers, pesticides and herbicides; clearing woodlands; installing water and soil conservation facilities; designing farm structures; using water; burning in the open; disposing of organic wastes on the farm; and providing supplies, processing facilities, and markets near farming areas. The report suggested that a special, non-adversary arbitration process be established that would handle complaints about farm nuisance.

III. EFFECTIVENESS

There is, at the time of writing, little evidence bearing on the effectiveness of the various types of right-to-farm legislation. This is at least partly true because much of it has been enacted in the last year and a half. Serious questions of a practical and legal nature arise concerning many of the statutes. Much can be learned from the experience with feedlots, where the environmental problems are severe and the need for protection against local regulation and nuisance suits is great. Tennessee's approach of identifying a small number of particularly onerous or nuisance-like activities and granting them limited protections if they comply with state and federal environmental regulations has much to commend it. It recognizes, as does New Jersey's farmland retention proposal, that to protect farmers against unreasonable environmental regulations and lawsuits, while at the same time protecting the public's health and safety, requires a cooperative public and private effort involving careful data-gathering and analysis, and preparation of a statement establishing balanced state level farm management practices. Conditions will vary from state to state and from one part of a state to another. Clearly it is not an appropriate undertaking for a judge in a private nuisance suit to determine what best management practices are and to balance the needs of farmers against the needs of the non-farm public. Farm organizations and agricultural extension programs must play an important role in developing the kinds of protection that farmers are demanding.

FOOTNOTES-CHAPTER 5

1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, (1926). See Spur Industries, Inc. v. Del E. Webb Dev. Co., 103 Ariz. 178, 494 P. 2d. 700 (1972).

2. Ala. Code, Section 6-5-127 (Cumm. Supp. 1980); Del. Code tit. 3 Section 1401; Fla. Stat. Ann. Section 823.14 (1980 Supp.); Ga. Laws, 1980 Sess. Act 1297; *Ill. Stat. Ann. ch. 5, Section 1018 (Smith-Hurd Supp. 1980); Ky. Rev. Stat. Ann. ch. 413 (Ky Acts 1980 ch. 214); La. Rev. Stat. Ann. Section 51:1202 (Supp. 1981); *Md. Ann. Code, Agriculture, Section 2-513 (Supp. 1980); *Minn. 1980 Session Laws, ch. 566, Section 473H.12; Miss. Code 95-3-29 (Cumm. Supp. 1980); *N.Y. Agric. & Mkts. Law Section 305(2) (McKinney 1972); N.C. Gen. Stat. Sections 106-700 and 106-701 (Supp. 1979); Okla. Stat. Ann. tit. 50, Section 11 (1980 Session Laws, 2d. Sess., ch. 189); *Ore. Rev. Stat. Section 215.25 (Repl. 1979-80); Tenn. Code Ann. Sections 53-6701, 53-6704 (Supp. 1979); *Va. Code Ann., Section 15.1-1512.3 (Cumm. Supp. 1980); Wash. Rev. Code, Sections 7.48.300, 7.48.305, and 7.48.310 (Supp. 1980). Several local governments have passed right-to-farm ordinances, and it is possible that other states have too.

* In states marked with an asterisk, the statute applies only to land in agricultural districts or, in the case of Oregon, in exclusive farm-use.

3. See William L. Prosser, *The Law of Torts* (St. Paul, Minn., West Pub. Co., 1971, 4th ed.) p. 571.

4. Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P. 2d 700 (1972).

5. McQuade v. Tucson Tiller Apts., 25 Ariz. App. 312, 543 P. 2d 150 (1975). See also, *Restatement of Torts, 2d* (St. Paul, Minn., American Law Inst. Publishers, 1979) Sections 821A -840E.

6. See Edward P. Thompson, "Right to Farm Laws Examined," *Agland Exchange*, Nov.-Dec., 1980 (Washington, D.C.: National Association of Counties Research Foundations) for a thoughtful discussion of these laws.

7. The law is taken from the same model as statutes such as those of Wyoming (Wyo. Stat. Ann. ch. 39, Sections 11-39-101 to 11-39-104), and Iowa (Iowa Code Ann. Sections 172D.1 to 172D.4) that apply only to feedlots. They, in turn, build on older feedlot laws such as that of Kansas (Kan. Stat. Ann. Section 47-1505) which provides that feedlots operated in compliance with the statute are deemed not to be nuisances. Parenthetically, the Attorney General of Iowa gave an opinion that a proposed law placing limitations on maintaining nuisance actions against the operation of feedlots was of questionable constitutionality. Iowa Code Ann., Section 172D.1, annotation (Supp. 1980)

8. Cal. Health and Safety Code, Section 41704(b).

9. "Grassroots: An Agriculture Retention and Development Program for New Jersey," N.J. Departments of Agriculture and Environmental Protection (1980).

HOUSE

COMMITTEE REPORT

(7)

Date referred: 3/24/86

RESOURCES

FURTHER REFERRALS: JUDICIARY

DATE: 4-2-86

The COMMUNITY AND REGIONAL AFFAIRS Committee has considered CSSB 409(Res)

"An Act relating to a right to farm."

and recommends:

[X] do pass

[ ] do not pass

[ ] do pass with attached amendment(s)

[ ] no recommendation

[X] replace with HCS CSSB 409 (Res) [X] same title

[ ] new title

and recommends

[ ] further referral to the ________ Committee

and attaches:

[ ] letter of intent

[ ] first fiscal note

[ ] new fiscal note

[X] zero fiscal note

SIGNING DO PASS:

F. Kay Wallis

[signature] MARROU

Rolfe Pell

[signature] Kooonsen

Peter Goll

SIGNING OTHER RECOMMENDATIONS:

W. Furnace NO Rec

[signature] Greenberg No Rec

[signature]

Chairman

Offered: 3/17/86
Referred: Rules

Original sponsor: Kerttula

IN THE SENATE BY THE RESOURCES COMMITTEE

CS FOR SENATE BILL NO. 409 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to a right to farm."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. LEGISLATIVE FINDINGS. The legislature finds that agriculture makes an important contribution to the economy of the state and that the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state. The legislature further finds that conflict between agricultural operations and urban and suburban land uses threatens the permanent loss of agricultural land.

* Sec. 2. AS 09.45 is amended by adding a new section to read:

Sec. 09.45.235. AGRICULTURAL OPERATIONS AS PRIVATE NUISANCES. (a) An agricultural operation and an operation appurtenant to an agricultural operation is not and does not become a private nuisance by a changed condition that exists on neighboring land if the agricultural operation has been in operation for more than three years and if the agricultural operation was not a nuisance at the time the agricultural operation began.

(b) The provisions of (a) of this section do not apply to a nuisance resulting from improper or negligent conduct of agricultural operations or operations appurtenant to an agricultural operation.

(c) The provisions of (a) of this section supersede a municipal ordinance or regulation to the contrary.

14-2032
Bradley
4/1/86

IN THE HOUSE

BY THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

HOUSE JOINT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

Relating to a joint legislative conference of the Yukon Legislative Assembly, the Northwest Territories Legislative Assembly, and the Alaska State Legislature.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS the State of Alaska and the Yukon Territory are neighbors, sharing over 700 miles of international boundary; and

WHEREAS Alaska and the Yukon Territory share rich Native and non-Native cultures that long predate the establishment of international boundaries; and

WHEREAS Alaska and the Yukon Territory share a common habitat for caribou, salmon and other wildlife resources; and

WHEREAS Alaska and the Yukon Territory share the potential for development of tourism, hydroelectric power, and mineral resources; and

WHEREAS Alaska and the Yukon Territory have made cooperative agreements in the areas of transportation and tourism; and

WHEREAS Alaska, the Yukon Territory, and the Northwest Territories lie in or near the arctic and thus share common problems and challenges that can best be solved by greater communication and cooperation between the state and territorial governments, rather than at the federal level; and

WHEREAS increased communication, and a mutual understanding of our forms of government will foster improved international cooperation; and

WHEREAS in 1982 the Alaska State Legislature, the Yukon Legislative Assembly and the Northwest Territories Legislative Assembly held a join

legislative conference in order to foster such cooperation, and in 1983, 1984, and 1986 the Alaska State Legislature and the Yukon Legislative Assembly held similar conferences; and

WHEREAS a delegation from the Alaska State Legislature was invited to meet with the Yukon Legislature this year during the Arctic Winter Games in Whitehorse, Yukon Territory;

BE IT RESOLVED that the Alaska State Legislature invites members of the Yukon Legislative Assembly and the Northwest Territories Legislative Assembly to meet in Juneau, Alaska during the First Session of the Fifteenth State Legislature, between January and May 1987, for a joint conference; and be it

FURTHER RESOLVED that the Alaska State Legislature is encouraged to foster cooperation and friendship with the Yukon Legislative Assembly and the Northwest Territories Legislative Assembly by continuing joint legislative conferences in the years ahead.

COPIES of this resolution shall be sent to all members of the Yukon Legislative Assembly and the Northwest Territories Legislative Assembly.

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

7/25/89
Date

02-519 (REV 8/78)