When Is an Agricultural Activity a Nuisance?

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Overview

Land use conflicts are often present in urban, residential and commercial areas. However, they also occur in rural areas. Large-scale livestock agricultural operations, wind "farms" and similar rural land uses present many of the same issues.

How does the law handle rural land-use conflicts? How can these conflict situations with adjoining landowners best be minimized or avoided?

Land use conflicts in rural areas, ag nuisances and pointers for minimizes conflict among landowners – this is the discussion of today's post.

What's An Ag Nuisance?

A nuisance is an invasion of an individual's interest in the use and enjoyment of land rather than an interference with the exclusive possession or ownership of the land. See, e.g., *Peters, et al. v. Contigroup, et al., 292 S.W.3d 380 (Mo. Ct. App. 2009); Jones v. Hart, 2021 Vt. 61, 261 A.3d 1126 (2021).* Nuisance law prohibits land uses that unreasonably and substantially interfere with another individual's quiet use and enjoyment. The doctrine is based on two interrelated concepts: (1) landowners have the right to use and enjoy property free of unreasonable interferences by others; and (2) landowners must use property so as not to injure adjacent owners. In a nuisance action, proof of general damages (diminished quality of life) may be sufficient evidence to support a monetary award. *See, e.g., Stephens, et al. v. Pillen, 681 N.W.2d 59, 12 Neb. App. 600 (2004).*

The two primary issues at stake in any agricultural nuisance dispute are whether the use alleged to be a nuisance is reasonable for the area and whether the use alleged to be a nuisance substantially interferes with the use and enjoyment of neighboring land. *See, e.g., Bower v. Hog Builders, Inc., 461 S.W.2d 784 (Mo. 1970).*

Are Nuisance and Negligence the Same?

"Nuisance" and "negligence" are not the same thing. Operating a farming or ranching activity properly and having all requisite permits may still constitute a nuisance if a court or jury determines the activity is "unreasonable" and causes a "substantial interference" with another person's use and enjoyment of property. Whether a complained of activity, such as spreading manure, results in a "substantial" and "unreasonable" interference with another's property will depend on the facts of each case and the legal rules used in the particular jurisdiction. *See, e.g., Penland v. Redwood Sanitary Sewer Service District, 156 Or. App. 311, 965 P.2d 433 (1998).*

Because each claim of nuisance depends on the fact of the case, there are no easy rules to determine when an activity will be considered a nuisance. In general, a court faced with a particular nuisance claim will consider several factors. *See, e.g., Hernandez v. Jefferson County Sheriff's Office, No. 3:19-cv-1404-JR, 2020 U.S. Dist. LEXIS 109784 (D. Or. Jun. 23, 2020).* Primary among these factors is whether the use

complained of is a reasonable use that is common to the area or whether it is not suitable. *See, e.g., May v. Brueshaber, 265 Ga. 889, 466 S.E.2d 196 (1995).* Also important is whether the use complained of is a minor inconvenience which happens very infrequently or whether it is a regular and continuous activity. The nature of the property use being disturbed is also an important consideration. If the interference has a significant impact on the complaining party's use of their own property, such as the prevention of living in the complaining party's home, a nuisance will likely be found. Similarly, if the complained of use is preventing another landowner's use of their property that is a vital part of the local economy, the court will balance the economics of the situation and most likely conclude that the complained of use constituted a nuisance. An additional important factor, but not conclusive in and of itself of the issue is whether the complained of use was in existence prior to the complaining party's use of their property which is now claimed to be interfered with. A related concern, if the activity generating the alleged nuisance was in existence prior to the complaining party moving into the vicinity, is whether the nuisance activity was obvious at the time the complaining party moved in.

Note: Many courts also attempt to balance the economic value to society of the uses in question. If the complained of use adds jobs and income to the local economy, the value to society of continuing the alleged nuisance may outweigh the negative impact it causes.

If A Nuisance Exists, What Then?

If a court determines that a nuisance (just one that is anticipated to occur in the future) exists, it has much discretion in establishing an appropriate remedy for a nuisance. The most common remedy is for the court to stop (enjoin) the nuisance activity. *See, e.g., Moody, et al. v. Wiza, 2007 Ohio 5356 (Ohio Ct. App. 2007); Simpson, et.al. v. Kollasch, et. al., 749 N.W.2d 671 (Iowa 2008); Walker, et al. v. Kingfisher Wind, LLC, No. CIV-14-D, 2016 U.S. Dist. LEXIS 141710 (W.D. Okla. Oct. 13, 2016).* However, most courts try to fashion a remedy to fit the particular situation. *See, e.g., Valasek v. Baer, 401 N.W.2d 33 (Iowa 1987); Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972).*

Aesthetic Injury Only?

What if the only complained-of problem is aesthetic? Is that enough to make out a claim for nuisance? The issue has come up in a court case from Vermont involving solar panels. In *Myrick v. Peck Electric Co., 204 Vt. 128, 164 A.3d 658 (2017), t*he plaintiff was a landowner that sued the defendant, two solar energy companies, when the plaintiff's neighbors leased property to the defendants for the purpose of constructing commercial solar arrays (panels). The plaintiff claimed that the solar arrays constituted a private nuisance by negatively affecting the surrounding area's rural aesthetic which also caused local property values to decline. The trial court granted summary judgment to the defendants. On appeal, the Vermont Supreme Court affirmed. The Court noted that Vermont law has held, dating back to the late 1800s, that private nuisance actions based on aesthetic disapproval alone are barred. The Court rejected the plaintiff's argument that the historic Vermont position should change based on changed society. The Court also rejected the notion that Vermont private nuisance law was broad enough to apply to aesthetic harm, stating that, "An unattractive sight, without more, is not a substantial interference as a matter of law because the mere appearance of the property of another does not affect a citizen's ability to use and enjoy his or her neighboring land." Emotional distress is not an interference with the use or enjoyment of land, the court stated. But, if the solar panels casted reflections, for example, that could be an interference with the use and enjoyment of one's property. Aesthetic values, the court noted, are inherently subjective and the court wasn't going to set an aesthetic standard. The Court also noted that the plaintiffs had conceded at oral argument that they were not pursuing a claim that diminution in value, by itself, was sufficient to constitute a nuisance. However, the Court went on to state that a nuisance claim based solely on loss in value invites speculation that the Court would not engage in.

The Vermont court's decision follows the majority rule among jurisdictions in the United States. There are some exceptions. For example, a few courts have held that proof of general damages (diminished quality of life) may be sufficient evidence to support a monetary award. *See*, *e.g.*, *Stephens, et al. v. Pillen, 12 Neb. App. 600 (2004).* But, in general, aesthetic injury, by itself, is not enough to make a claim for nuisance. However, if it is coupled with claims of substantial interference with use and enjoyment of property, a nuisance claim might successfully be made. Renewable energy generation (solar and wind) tends to require a large amount of land for its operation, but unsightliness, by itself, is likely not enough to constitute a nuisance.

Landlord Liability for Tenant's Nuisance

Generally, a landlord is *not* responsible for the acts of a tenant. But there are exceptions to that general rule. One of those exceptions applies when the landlord knows that the tenant is harming the property rights of adjacent landowners and does nothing to modify the tenant's conduct or terminate the lease. In that situation, the landlord can be held liable along with the tenant. A good example of this can be found in *Tetzlaff v. Camp, et al., 715 N.W.2d 256 (Iowa 2006).* In the case, a farm tenant operated a hog facility for the landlord. The plaintiff lived adjacent to land on which the tenant surface spread hog manure within 90-feet of the plaintiff's home. The plaintiff complained to the landlord over approximately a four-year period. The complaints fell on deaf ears. The plaintiff sued and the Iowa Supreme Court held that the landlord was responsible for the tenant's creation of a nuisance because the landlord knew of the tenant's conduct, its impact on the plaintiff and did nothing about it.

Potential Defenses

Priority of location. If a farmer gets sued for the alleged creation of a nuisance, how does the farmer mount a defense? While there are no common law defenses that an agricultural operation may use to shield itself from liability arising from a nuisance action, as noted above, the courts do consider a variety of factors to determine if the conduct of a particular farm or ranch operation is a nuisance. Of primary importance are priority of location and reasonableness of the operation. Together, these two factors have led courts to develop a "coming to the nuisance" defense. This means that if people move to an area they know is not suited for their intended use, they should be prohibited from claiming that the existing uses are nuisances.

Right-to-farm laws. Every state has enacted a right-to-farm law that is designed to protect existing agricultural operations by giving farmers and ranchers who meet the legal requirements a defense in nuisance suits. The basic thrust of a particular state's right-to-farm law is that it is unfair for a person to move to an agricultural area knowing the conditions which might be present and then ask a court to declare a neighboring farm a nuisance. Thus, the basic purpose of a right-to-farm law is to create a legal and economic climate in which farm operations can be continued. Right-to-farm laws can be an important protection for agricultural operations, but, to be protected, an agricultural operation must satisfy the law's requirements. *See, e.g., Alpental Community Club, Inc., v. Seattle Gymnastics Society, 86 P.3d 784 (Wash. Ct. App. 2004); Hood River County v. Mazzara, 89 P.3d 1195 (Or. Ct. App. 2004).*

The most common type of right-to-farm law is nuisance related. This type of statute requires that an agricultural operation will be protected only if it has been in existence for a specified period of time (usually at least one year) before the change in the surrounding area that gives rise to a nuisance claim. *See, e.g., Vicwood Meridian Partnership, et al. v. Skagit Sand and Gravel, 98 P. 3d 1277 (Wash. Ct. App. 2004).* These types of statute essentially codify the "coming to the nuisance defense," but do not protect agricultural operations which were a nuisance from the beginning or which are negligently or improperly run. For example, if any state or federal permits are required to properly conduct the agricultural operation, they must be acquired as a prerequisite for protection under the statute.

Another type of right-to-farm statute may be structured to bar local and county governments from enacting regulations or ordinances that impose restrictions on normal agricultural practices. Still another type exempts (at least in part) agricultural uses from county zoning ordinances. The major legal issue involving this type of statute is whether a particular activity is an agricultural use or a commercial activity. In general, "agricultural use" is defined broadly. *See, e.g., Knox County v. The Highlands, L.L.C., 302 Ill. App. 3d 342, 705 N.E.2d 128 (1998), aff'd, 723 N.E.2d 256 (Ill. 1999).*

Note: Sometimes noise may not appear to be connected with the production of agricultural products, but it actually might be. For instance, a howling dog in the night might normally be considered to be a nuisance because it interferes with a neighbor's right to use and enjoy their property. But the noise of the barking dog might be because the dog is guarding livestock and, thus, the dog is engaged in an agricultural activity that is protected by a right-to-farm statute. *See, e.g., Hood River City v. Mazzara, 193 Ore. App. 272, 89 P.3d 1195 (Or. Ct. App. 2004).*

An important point is that while right-to-farm laws try to assure the continuation of farming operations, they do not protect subsequent changes in a farming operation that constitute a nuisance after local development occurs nearby. *See, e.g., Davis, et al. v. Taylor, et al., 132 P.3d 783 (Wash. Ct. App. 2006); Flansburgh v. Coffey, 370 N.W.2d 127 (Neb. 1985).* While a right-to-farm law may not bar an action for a change in operations when a nuisance is present, if a nuisance cannot be established a right-to-farm law can operate to bar an action when the agricultural activity on land changes in nature. *See, e.g., Dalzell, et al. v. Country View Family Farms, LLC, No. 1:09-cv-1567-WTL-MJD, 2012 U.S. Dist. LEXIS 130773 (S.D. Ind. Sept. 13, 2012), aff'd., 517 Fed. Appx. 578 (7th Cir. 2013). See also Parker v. Obert's Legacy Dairy, 988 N.E.2d 319 (Ind. Ct. App. 2013).*

Conclusion

Land use conflicts in rural areas are not uncommon and have become more prevalent in recent decades as the structure of agriculture had changed and new types of rural land uses have appeared. To minimize conflict with neighbors and stay out of court defending a nuisance case, attention should be paid to certain key points. Location of any facility that could give rise to a nuisance claim is key. Related to location, particularly with respect to odor-related issues is wind direction. For confinement livestock facilities, proper ventilation is key as is manure storage and field injection practices. Of course, the overall appearance of farm structures is important - perhaps almost as important as are manure disposal practices.

Keeping these points in mind just might keep the farming operation out of court.