Understanding "Right to Farm" Laws*

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- Bormann v. Board of Supervisors in and for Kossuth County, 584 N.W.2d 309 (1998), *petition for cert. denied*, 119 S.Ct. 1096 (1999).
- Horne v. Haladay, 728 A.2d 954, 64 (Pa. Super. 1999).

In September of 1998, the Iowa Supreme Court in Bormann v. Board of Supervisors declared one of Iowa's Right to Farm statutes unconstitutional. Early this year the United States Supreme Court declined to review that decision. This memo addresses the Iowa case and its implications for Pennsylvania's "Right to Farm" law.

I. The Iowa Decision

In the Iowa case, several property owners whose land holdings comprised some 960 acres applied for a designation as an "Agricultural Area." After an initial denial and upon the owners' reapplication, the Kossuth County Supervisors granted their request and designated the land as an "Agricultural Area." This designation gave the applicants immunity from any **future** nuisance suits under one of Iowa's "right to farm" laws. It was the contention of the neighbors that the approval of the "Agricultural Area" designation and the attendant immunity from any future nuisance suits would result in the taking of their property without just compensation.A nuisance is defined at common law as a use of land by one party which "unreasonably interferes with the comfortable enjoyment of life or property of another." The neighbors argued that the immunity provision gave the applicants the right to create or maintain a nuisance over their property, thereby creating an easement in favor of the applicants. The Iowa Supreme Court agreed with the neighbors, stating that the applicants, by being immunized from future nuisance suits, had

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a right to use their land in such a way as to burden the property rights of the neighbors. Because a nuisance is analogous to an "invisible" invasion of land, and an easement is a right to invade or use another's land, the Court reasoned that the immunity statute would, in effect, create an easement. This, said the Court, the government cannot do without payment of compensation and, since the government had not paid for an easement, the result was an unconstitutional taking. The parties then asked the United States Supreme Court to review the ruling of the Iowa Supreme Court. Early this year, the United States Supreme Court denied review.

II. The Action of the U.S. Supreme Court

The decision of the United States Supreme Court not to review the Iowa case has been greatly overplayed in the press. The Court receives upwards of 7,600+ petitions for certiorari each term. Of those 7,600 cases, they agree to review fewer than 100. Their decision not to review a case from the highest court in a state has no precedential value as to the reasoning or result of the lower court's decision. As the court has repeatedly stated, "The denial of a writ of certiorari imports no expression on the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923). Consequently we do not know whether the United Supreme Court would agree or disagree with the Iowa court's holding that the "right to farm law" in question in that case is unconstitutional under the United States Constitution's "Takings Clause", U.S. Const., Amend. V as incorporated by Amend. XIV.

It simply means that the U.S. Supreme Court has decided not to take the case.

III. Implications for Pennsylvania's "Right to Farm" Law

To fully understand the implications of the Iowa court's decision declaring Iowa's "Right to Farm" law unconstitutional, one should understand the background of "right to farm" laws. "Right to farm" laws are not rights statutes per se but instead are laws which protect farming operations from nuisance suits. Usually such suits are brought for the maintenance of operations which produce odor, light or noise. All 50 states have passed "right to farm" laws, and each state has its own variation, but basically "right to farm" laws fall into two types:

Type I is a "right to farm" law which immunizes from nuisance suits a farming operation which has been in existence for a given period of time. They read something like this: "If an agricultural enterprise has been operating in a substantially unchanged way for over one year, no nuisance action may be brought to enjoin the operation." Basically, these "right to farm" laws were passed in order to prevent new neighbors from moving into an agricultural area and then suing because the neighboring farming operation caused an annoyance to the suburbanite. This first type of "right to farm" law has been considered by some courts and some of those courts, including the Pennsylvania Superior Court, in reviewing their efficacy have stated that the bar to nuisance suits for an existing operation acts as a statute of limitations. A time bar to an action (a statute of limitations) is simply a cut-off of time to file a lawsuit, **not a taking**. (The theory is that if one doesn't sue within the prescribed period, the harm couldn't be that bad or that the person has slept on his

rights, or that he purchased the property at a discounted price because the nuisance was already in existence.)

The second type of "right to farm" law (which I will call Type II), is an absolute immunity for a farming operation (present or future) which requires no passage of time. Usually this type of absolute immunity carries with it a requirement that the immunity exists only if the farming operation is in compliance with a zoning law, with environmental laws, or with other regulations. It is this second type of "right to farm" law which was at issue in the Iowa case. A Type II law presents more problems in that the aggrieved neighbor does not ever have the opportunity to enjoin a nuisance; that is to say, **it results in the neighbors not being able to stop a bothersome operation of any type or intensity which might start up in the future.**

Pennsylvania's "right to farm" law is really a combination of both Type I and Type II. First, our "right to farm" law1 prevents public2 nuisance actions against operations which have been in existence and have remained substantially unchanged for one year. Second, in May of 1998, our Legislature amended our "right to farm" law and added a second provision: immunization from nuisance suits for any new or expanded operation that has obtained approval of a nutrient management plan and is in compliance with the Nutrient Management Act.

The first part of our law, our Type I, **has recently been construed by our Superior Court in a decision handed down on March 30, 1999**3 as a statute of limitations and the issue of a noncompensable taking did not arise. In Horne v. Haladay an adjoining property owner (Horne) sued the Haladay poultry business for allegedly maintaining a nuisance on his property. In November of 1993 the Haladays had stocked their poultry house with 122,000 laying hens. The facility remained unchanged except for the construction of a decomposition building for waste which was built in August 1994. Horne filed suit on November 21, 1995 (approximately two years after the Haladays had begun their operations), complaining of the odor, noise, feathers, and flies which were created by the Haladay's operation. Amongst other defenses, the Haladays raised the Right to Farm Act as a time bar to the action because their operation had remained substantially unchanged. The Columbia County Court of Common Pleas agreed with the Haladays that the Right to Farm Act barred the Horne's private nuisance claim. On appeal the Superior Court reiterated Pennsylvania's legislative policy that it is the intent of the Commonwealth to conserve, protect, and encourage development of agricultural land and therefore the Legislature enacted the Right to Farm Act in order to limit the circumstances under which nuisance suits may be brought. After considering several of Mr. Horne's arguments4, the Superior Court held that "to avoid the application of the one year limitation period, [a landowner] must adduce evidence that [the agricultural] operation violated local, state, or federal statutes." Without such evidence, the Common Pleas court may enter summary judgment in favor of the agricultural enterprise if it shown that the operation has been in existence in a substantially unchanged condition for one year or more.

It is the amended portion of our law, the absolute bar to nuisance suits for expanded or new operations with a nutrient management plan (a Type II law), which is most similar to the Iowa statute, and which might, after the Iowa decision, come under attack in our courts. That is not to say that our Type I might not also come under attack in our Supreme Court; it is not known yet whether Horne or some other party might not challenge the Superior Court's ruling and until our Supreme Court rules definitively on the issue, we have no final answer. However, the Iowa decision lends fuel primarily to an attack on a Type II "right to farm" law. But one should keep in mind that the public policy of Pennsylvania is to protect agricultural operations and often our courts are most persuaded by our Legislature's statement of public policy. Therefore, it is not altogether certain that the Pennsylvania Court would come to the same conclusion as the Iowa Supreme Court.

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13 P.S. § 951 et seq., as amended by Act No. 1998-58 (May 15, 1998).
2This was probably a mistake in nomenclature. One Common Pleas court has held that it also prevents private nuisance actions, See Dunn v. Rogers, 1 Bradford County L.J. 217 (1992) and the Pennsylvania Superior Court in Horne v. Haladay, considered this issue carefully and decided that the law prohibits private as well as public nuisance suits.
3Horne v. Haladay, 728 A.2d 954, 64 (Pa. Super. 1999).
4 Mr. Horne argued that the Act covered only public nuisance suits as the section subtitle indicates. However, the court after reviewing the complete statute decided that the subtitle was not controlling and that the legislative intent appeared to cover all nuisance actions, public and private.

Mr. Horne also argued that the Act's preface indicated an intent to protect farms from new neighbors moving into rural areas and therefore did not cover his action since he was a pre-existing neighbor. The court disagreed.

Mr. Horne also argued that the operation was not "lawful," but the court found that the farm was in an area that was zoned for agriculture, appeared to be a "normal agricultural operation" as defined by the Act, and that there was no indication that the Haladay operation violated any local, state, or federal statutes or regulations.