WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

Wisconsin's Right to Farm Law

Wisconsin's "right to farm" law is set forth in s. 823.08, Stats. The law does not explicitly create a "right" to farm, but instead directs courts to favor agricultural uses in certain legal disputes. Specifically, the law applies to civil suits in which a plaintiff files a nuisance action arising from the defendant's agricultural use or practice. The right to farm law provides certain protections for agricultural land uses and practices in such actions. This Information Memorandum discusses the origin of Wisconsin's right to farm law and provides an overview of the current law.

BACKGROUND PRINCIPLES ON NUISANCE LAW

The right to farm law applies to legal actions in which agricultural uses or practices are alleged to be a nuisance. A common law action for nuisance alleges that a particular activity or property use substantially and unreasonably harms the plaintiff's interests in the use and enjoyment of his or her property.

A plaintiff can proceed on the grounds that the alleged nuisance is either "public" or "private." A private nuisance is an improper interference with an individual's private use and enjoyment of his or her land. A public nuisance is an improper interference with a right common to the general public and does not necessarily involve interference with the use and enjoyment of land. However, if an alleged nuisance does interfere with the use and enjoyment of land, it may be both a public and private nuisance depending on the facts and circumstances of the case. In that situation, a plaintiff could choose to assert a private nuisance claim or a public nuisance claim.

WISCONSIN'S FIRST RIGHT TO FARM LAW

LEGISLATIVE PURPOSE

Wisconsin's right to farm law was first enacted on March 13, 1982. The purpose of the law was to facilitate the resolution of conflicts arising from development in agricultural technology, practices, and scale of operation. In particular, the law established limits on the remedies available in particular lawsuits so that agricultural production and the use of modern agricultural technology would not be hampered. The law also urged local units of government to use their zoning power to prevent such conflicts from arising in the future. [s. 823.08 (1), 1981-82 Stats.]

LIMITED REMEDIES

The first right to farm law limited the remedies available to a plaintiff who won a nuisance action arising from the defendant's agricultural use or practice[1] based on whether the use or practice was conducted on land "subject to an ordinance."[2]

If the land was not subject to an ordinance, meaning it was not zoned exclusively for agricultural use, the court could consider the following limited remedies:

- Ordering closure, but only if the agricultural use or practice was a threat to public health and safety.
- If the agricultural use or practice was conducted at the same location, on substantially the same scale and in substantially the same manner prior to the time that the plaintiff acquired an interest in his or her damaged property, awarding nominal damages only.
- Ordering the defendant to adopt agricultural practices that had the potential to reduce the offensive aspects of the activity or use found to be a nuisance.

[s. 823.08 (2), 1981-82 Stats.]

If the land was subject to an ordinance, meaning it was zoned for agricultural use, the court was prohibited from granting relief that substantially restricted or regulated the agricultural use or practice, unless it was necessary to protect public health or safety. [s. 823.08 (3), 1981-82 Stats.]

COSTS AND FEES

If the defendant prevailed in a nuisance action arising out of the defendant's agricultural use or practice, the defendant was entitled to recover costs and expenses reasonably incurred in connection with the defense, as well as a reasonable amount for attorney fees. [s. 823.08 (4), 1981-82 Stats.]

WISCONSIN'S CURRENT RIGHT TO FARM LAW

The right to farm law was substantially amended by 1995 Wisconsin Act 149, and these changes are reflected in Wisconsin's current right to farm law. Despite the statute's longstanding operation, there are very few published cases on the right to farm law. The lack of case law may indicate that the law is effectively fulfilling its statutory purpose by deterring nuisance actions arising from agricultural uses and practices.

---

[1] An "agricultural use" was defined as "beekeeping; commercial feedlots; dairying; egg production; floriculture; fish or fur farming; forest and game management; grazing; livestock raising; orchards; plant greenhouses and nurseries; poultry raising; raising of grain, grass, mint and seed crops; raising of fruits, nuts and berries; sod farming and vegetable raising." An "agricultural practice" was defined as "any activity associated with an agricultural use." [ss. 91.01(1) and 823.08(2), 1981-82 Stats.]

[2] An "ordinance" in this context was defined as "an exclusive agricultural use zoning ordinance." Therefore, the first right to farm law limited available remedies based on whether the land was zoned for agricultural use. [s. 823.08, 1981-82 Stats.]

LIMITED SCOPE OF A NUISANCE ACTION

While the first right to farm law primarily limited the available remedies in a successful nuisance action, current law also limits the scope of a nuisance action. An agricultural use or practice will not be found to be a nuisance if all of the following apply:

- The agricultural use or practice is conducted on land that was in agricultural use without substantial interruption before the plaintiff began using his or her land (i.e., the plaintiff "came to the nuisance").
- The agricultural use or practice does not present a substantial threat to public health or safety.[3]

This protection against nuisance actions applies even if a change in the agricultural use or practice allegedly contributed to the nuisance.

Therefore, a plaintiff may proceed with a nuisance action only if the court finds that the agricultural use or practice was substantially interrupted or that the agricultural use or practice presents a substantial threat to public health or safety. However, even if the court makes either of these findings, the plaintiff still has to successfully prove that the agricultural use or practice constitutes a nuisance in order to win the lawsuit.

LIMITED REMEDIES

Similar to the first right to farm law, the current law also limits the remedies available to a plaintiff who wins a nuisance action arising out of the defendant's agricultural use or practice. The remedies are restricted as follows:

- The granted relief cannot substantially restrict or regulate the agricultural use or practice unless the use or practice is a substantial threat to public health or safety.
- If the court orders the defendant to take any action to mitigate the effects of the agricultural use or practice, the court has to do all of the following:
    - Request suggestions for suitable practices from public agencies with expertise in agricultural matters.
    - Provide the defendant with reasonable time to take action (no less than one year, unless the agricultural use or practice is a substantial threat to public health or safety).
- If the court orders the defendant to take any action to mitigate the effects of the agricultural use or practice, the ordered action cannot substantially and adversely affect the economic viability of the use, unless the agricultural use or practice is a substantial threat to public health and safety.

---

[3] This requirement represents a departure from the law of private nuisance, which allows for recovery for an unreasonable and substantial interference with the use and enjoyment of one's property. Because the plaintiff has to show that the agricultural use or practice is a substantial threat to public health or safety, the burden of proof is higher than under the law of private nuisance.

COSTS

If the defendant prevails in a nuisance action arising out of the defendant's agricultural use or practice, the defendant is entitled to recover litigation expenses.[4]

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Kaitlin Farquharson, Legal Intern, on October 18, 2016.

WISCONSIN LEGISLATIVE COUNCIL
One East Main Street, Suite 401 • Madison, WI 53703-3382
Telephone: (608) 266-1304 • Fax: (608) 266-3830
Email: leg.council@legis.wisconsin.gov
http://www.legis.wisconsin.gov/lc

[4] The statute defines "litigation expenses" as the "sum of the costs, disbursements and expenses, including reasonable attorney, expert witness and engineering fees necessary to prepare for or participate in an action in which an agricultural use or agricultural practice is alleged to be a nuisance." [s. 823.08 (4), Stats.]