Texas Right to Farm Statute Overview

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Earlier this year, we discussed legislative amendments to the Texas Right to Farm Statute here. Now that those changes have gone into effect, we thought it might be useful to provide a brief overview of the Texas Right to Farm Statute. To read the full text of the Texas Right to Farm statute (with changes underlined), click here.

TAMU AgriLife photo by Laura McKenzie

Background

One real concern for farmers across the country, especially those whose operations are located in areas where houses are moving out into traditionally more rural areas is the threat of nuisance lawsuits. In order to succeed on a nuisance claim, a plaintiff must show the defendant substantially interfered with the plaintiff's use and enjoyment of his or her own property.

Frequently, nuisance claims against agricultural operations involve complaints about dust, odors, flies, or noise. These types of lawsuits have been filed across the

country, including here in Texas. Given the threat of litigation, attorney's fees, and the potential of facing an injunction shutting down an agricultural operation if successful, this is a serious issue for all agricultural producers. Recognizing these types of lawsuits had the potential to harm American agriculture, legislatures in all 50 states passed Right to Farm statutes, which provide an affirmative defense to an agricultural operation facing a nuisance lawsuit. This means if an agricultural operation is sued for nuisance, it may raise the Right to Farm defense, and so long as the operation is able to meet the requirements of the state's Right to Farm Act, the lawsuit will be dismissed. The Texas Right to Farm Act was passed in 1981 with the express purpose to "conserve, protect, and encourage the development and improvement of Texas' agricultural land for the production of food and agricultural products."

Cases where this defense has been utilized in Texas have involved claims related to manure runoff from a dairy; odor, flies, noise, and lights at a sheep feedlot; and odors from manure application.

The Texas Right to Farm Act can really be divided into three sections: (1) protection from lawsuits by other persons/entities; (2) protection from regulations prohibiting improvements; and (3) protection from other local regulations.

Protection from Lawsuits by Other Persons/Entities

The Texas Right to Farm statute is an important protection for agricultural operations facing lawsuits.

<u>Required Elements</u>

In order to successfully prove the Right to Farm defense applies, a plaintiff must show two key elements: (1) there is an agricultural operation; (2) it has been in operation substantially unchanged for a year or more prior to the date of the lawsuit.

Agricultural Operations

The Texas Right to Farm Act applies to all "agricultural operations," which are defined by statute to include cultivating the soil; producing crops or growing

vegetation for human food, animal feed, livestock forage, forage for wildlife management, planting seed, or fiber; floriculture; viticulture; horticulture; silviculture; wildlife management; raising or keeping livestock or poultry, including veterinary services; and planting cover crops or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure. Texas courts have also found grain handling facilities to be considered an agricultural operation under this Act.

Timing Requirement

The Right to Farm Act may only be used as a defense if the operation has been in operation substantially unchanged for a year or more prior to the lawsuit being filed. If, however, an operation does undergo a "substantial change," then it must operate for at least a year before being able to qualify for the Right to Farm's protections. The operation's established date of operation is the date on which an agricultural operation commenced agricultural operations. A "substantial change" is defined as "a material alteration to the operation or type of production at an agricultural operation that is substantially inconsistent with the operational practices since the established date of operation." It remains to be seen how courts may interpret and apply these provisions and what may constitute a substantial change.

Types of Claims Affected

Initially, the Texas Right to Farm statute stated it was a defense only to nuisance suits. In 2023, the Texas Legislature amended the statute to broaden the scope of its protection beyond nuisance suits to also include "any other action to restrain an agricultural operation." For example, if a neighbor brought a trespass suit, the statute would now expressly be an available defense to that claim.

Burden of Proof

Assuming a plaintiff does file a lawsuit against an agricultural operation that is not prohibited by the Right to Farm Act, they still face an increased burden of proof. As of September 1, 2023, the Texas Right to Farm Act provides that a person who brings a nuisance action or other action to restrain an agricultural operation that is not prohibited by the Right to Farm Act must establish each element by clear and

convincing evidence. This is higher (meaning more difficult for a plaintiff to prove) than the typical preponderance of the evidence standard applicable in most civil cases.

Exceptions to Limitations/Applicability

The Texas Right to Farm Act is not unlimited. The statute expressly states it does not serve to protect an agricultural operation, which is conducted in violation of federal, state, or local law.

Attorney Fee Provision

Generally, in the American justice system, each party pays for his or her own attorney, regardless of the outcome of the case. TI1is can be modified by contract or by statute that allows for a successful party to recover attorney's fees. Under the Texas Right to Farm Act, if a plaintiff brings suit against an agricultural operation that existed more than one year prior to the date of the lawsuit or the prohibition on bringing such actions, an agricultural operation is entitled to recover reasonable attorney fees and costs related to defending the action.

Agricultural Improvements

The Texas Right to Farm statute also prohibits limitations on certain agricultural improvements as well. The statute provides that an owner, lessee, or occupier of agricultural land is not liable to the state, a governmental unit, or the owner, lessee, or occupant of other agricultural land for the construction or maintenance on the land of an agricultural improvement if such construction or maintenance is not expressly prohibited by statute at the time the improvement was constructed.

A couple of key definitions explain the scope of this provision. First, "agricultural land" includes any land the use of which qualifies for special use tax valuation (agricultural use) under Chapter 23, Subchapter C of the Texas Tax Code and any other land on which agricultural operations may exist or take place. Second, "agricultural improvements" are defined to include pens, barns, corrals, fences, arenas, and other improvements designed for sheltering, restriction, or feeding of animals or aquatic life, storage of produce or feed, or storage or maintenance of

implements used for management functions or equipment necessary to carry out agricultural operations.

Importantly, this provision of the statute does not prohibit the enforcement of state or federal statutes.

Effect of Governmental Requirements

Lastly, the Right to Farm Act places limitations on when local governments may place restrictions on agricultural operations.

Political Subdivisions Other than a City

For political subdivisions other than a city, the rule is relatively straightforward. A requirement applies to an agricultural operation that was established after the effective date of the requirement but does not apply to an agricultural operation that was established before the effective date of the requirement. Further, a governmental requirement applies to an agricultural operation if it was in effect prior to this statutory chapter being passed in 1981.

Cities

For cities, the requirements are much more complex. A city may not apply to any agricultural operation beyond its own corporate bounds. For agricultural operations located within the bounds of a city, much more stringent limitations apply.

A city may not impose a governmental requirement on an agricultural operation located within its bounds unless there is clear and convincing evidence that the purposes of the requirement may not be addressed through less restrictive means and the requirement is necessary to protect persons who reside in the immediate vicinity or persons on public property in the immediate vicinity of the agricultural operation from imminent danger of: explosion; flooding; infestation of vermin or insects; physical injury; spread of an identified contagious disease directly attributable to the ag operation; removal of lateral or subjacent support; identified source of contamination of water supplies; radiation; improper storage of toxic materials; crops or vegetation causing traffic hazards; or discharge of firearms in violation of the law.

The city must pass a resolution based on a mandatory report that the requirement is necessary to protect public health. The report must be prepared by the city health officer or a consultant and contain the following: (1) identification of health hazards related to the agricultural operation; (2) determination of the necessity of the regulation and the manner in which the agricultural operation should be regulated; and (3) determination of the regulation will restrict or prohibit a generally accepted agricultural practice identified by a manual prepared by Texas A&M AgriLife Extension Service. If the report does recommend a regulation that will restrict the use of a generally accepted agricultural practice that the manual indicates does not pose a threat to public health, the report must explain why this recommendation is made.

Lastly, the Right to Farm Act lists certain limitations on specific types of laws that cities may not impose. First, a city may not prohibit the use of a generally accepted agricultural practice listed in the manual prepared by Texas A&M AgriLife Extension Service unless each of the steps discussed above related to findings and a health official report are followed. Second, a city may not restrict the growing or harvesting of vegetation for animal feed, livestock forage, or forage for wildlife management, except that the city may impose a maximum vegetation height that applies to agricultural operations only if the maximum height is at least 12 inches and the requirement only applies to portions of the agricultural operation located less than 10 feet from a property boundary adjacent to a public sidewalk, street, highway, or property that is owned by another person and contains an inhabited structure. Third, a city may not prohibit the use of pesticides or other measures to control vermin or disease-bearing insects to the extent necessary to prevent an infestation. Fourth, a city may not require an agricultural operation be designated for agricultural use, open space, or wildlife management property tax valuation. Finally, a city may not impose a restraint of dog requirement on agricultural operations with dogs used to protect livestock on property controlled by the property owner while the dog is being used for the purpose of protecting livestock.