

A CRITIQUE OF VERMONT'S RIGHT-TO-FARM LAW AND PROPOSALS FOR BETTER PROTECTING THE STATE'S AGRICULTURAL FUTURE

INTRODUCTION

Throughout most of American history there has been a general pattern of migration from rural areas into cities and urban centers.¹ The slow transition from an agrarian to a manufacturing economy fueled this phenomenon, and the pattern held tight until the 1970s.² In that decade, the nation experienced its first reverse migration as increased highway infrastructure, suburbanization, and a host of other factors led many to seek out the fresh air, open spaces, and slower-paced lifestyle afforded by the countryside.³ In the 1990s, rural areas saw a second wave of population growth as telecommuters, amenity migrants, and the first wave of retiring baby boomers sought out the country life.⁴

As rural communities absorbed these new residents, clashes over land uses and agricultural practices became commonplace. New residents, unaccustomed to the byproducts of farming operations, invoked nuisance law and other legal doctrines in an effort to attain the more comfortable rural existence they envisioned prior to moving. While some agricultural producers successfully defended such assaults, others fell victim to unfavorable verdicts or the costs of legal proceedings.⁵ State legislatures, recognizing the value of agriculture, came to the aid of producers by passing right-to-farm laws that limit nuisance liability, remove burdensome local regulations, and reduce the costs associated with litigation.

This same story played out in Vermont, where a steady influx of urban migrants, retirees, and vacation homeowners significantly altered the balance between “native” and “non-native” Vermonters.⁶ Expecting a tranquil pastoral setting, many new residents were unpleasantly surprised

1. Brian J. L. Berry & Donald C. Dahmann, *Population Redistribution in the United States in the 1970s*, 3 POPULATION & DEV. REV. 443, 443 (1977).

2. *Id.*

3. *Id.* at 451–53.

4. Walter F. Kuentzel & Varna Mukundan Ramaswamy, *Tourism and Amenity Migration: A Longitudinal Analysis*, 32 ANNALS TOURISM RES. 41, 420 (2005).

5. See Tiffany Dowell, Comment, *Daddy Won't Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers*, 18 SAN JOAQUIN AGRIC. L. REV. 127, 135 (2009) (providing numerous anecdotal accounts of the individual experiences of farmers facing nuisance lawsuits).

6. See VINCE BOLDOC & HERB KESSEL, VERMONT IN TRANSITION: A SUMMARY OF SOCIAL, ECONOMIC, AND ENVIRONMENTAL TRENDS 11 (2008), available at http://vtrural.org/sites/default/files/library/files/futureofvermont/documents/VTTransitions_Full_noAppen.pdf (noting that an influx of older residents and an out-migration of “native born” youth contributed to a gradual decline in the percent of Vermonters who were “native born,” from over 75% in 1960 to 53% in 2005).

by the realities of neighboring an agricultural operation, particularly the state's famed dairies. Consequently, Vermont enacted its own right-to-farm law in 1981.⁷

As agricultural nuisance lawsuits tested right-to-farm laws across the nation and the farming sector evolved, legal scholars began recognizing both the strong points of such legislation and areas where the various state approaches leave the industry vulnerable.⁸ The resulting literature also produced ideas for improving right-to-farm laws for both farmers and non-agricultural rural residents.⁹ Utilizing the existing scholarship, this Note evaluates Vermont's right-to-farm law and advocates for state lawmakers to make a number of reforms to better protect the state's agricultural industry. Part I of this Note details the history of the right-to-farm movement, while Part II highlights the menu of state right-to-farm statutes enacted throughout the country. Part III then analyzes the strengths and weaknesses of Vermont's statute. Finally, Part IV concludes by offering a variety of recommendations for improving Vermont's law to better protect farmers and other agricultural producers.

I. HISTORY OF RIGHT-TO-FARM LAWS

While many American families possess an agrarian heritage, “[f]ewer than 2 percent of Americans farm for a living today, and only 17 percent of Americans now live in rural areas.”¹⁰ This disconnection can generate conflict as urbanites, unfamiliar with agricultural traditions and practices, locate themselves in farming communities. As a result, a rural transplant may view certain agricultural practices as unreasonable, intolerable, or even unethical, and commonly invoke the legal system to resolve disputes.¹¹ In the face of rural in-migration during the 1970s and the resulting conflicts between new and older residents, states responded to agricultural interests by protecting farmers through statutory changes to state nuisance law.

The basic legal principles that comprise right-to-farm laws first emerged in the 1960s and were specifically tailored to nuisances associated

7. VT. STAT. ANN. tit. 12, § 5753 (2011).

8. See, e.g., Thomas B. McNulty, Comment, *The Pennsylvania Farmer Receives No Real Protection from the Pennsylvania Right to Farm Act*, 10 PENN ST. ENVTL. L. REV. 81 (2001) (lambasting the shortcomings of Pennsylvania's right-to-farm law and identifying strengths in other state laws).

9. See, e.g., Dowell, *supra* note 5, at 133–52 (identifying the content of stronger right-to-farm laws for family farms).

10. *About Us*, NAT'L INST. OF FOOD & AGRIC., U.S. DEP'T OF AGRIC., <http://www.csrees.usda.gov/qlinks/extension.html> (last visited Dec. 1, 2011).

11. See Terrence Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 91–92 (2006) (stating that encroaching “[n]onfarmers . . . flex[ed] their political muscle to challenge objectionable agricultural activities”).

with feedlots.¹² Modern right-to-farm laws, encompassing a wider spectrum of agricultural activities, arrived in the late seventies and early eighties with all but eight states passing their laws between 1979 and 1983.¹³ This unified effort came on the back of academic reports predicting a food-supply crisis if greater efforts were not undertaken to preserve farmlands.¹⁴ By 1992, all fifty states had passed right-to-farm laws.¹⁵ Although protecting farmers from tort liability is the central focus of a right-to-farm law, such legislation also signifies a legislative determination that agriculture is an important part of the economy and the community.

II. COMPONENTS OF TYPICAL RIGHT-TO-FARM LAWS

In creating right-to-farm legislation, states take a variety of approaches to achieve a host of sub-goals. This Part, which draws upon the common components identified in the work of Margaret Grossman and Thomas Fischer,¹⁶ Terrence Centner,¹⁷ and Tiffany Dowell,¹⁸ explores the purpose and function of the various provisions and strategies employed throughout the nation that limit farmers' exposure to nuisance liability and provide other forms of legal protection. In general, these provisions support agricultural operators by limiting nuisance liability, prohibiting burdensome local regulation, and reducing costs associated with litigation.

A. Nuisance Liability

The most fundamental part of a right-to-farm law is a provision that shields a farmer from common-law private-nuisance liability. Private nuisance is a principle of tort and property law that prohibits unreasonable interferences with the use and enjoyment of another's real property.¹⁹ Traditional nuisance law calls for an examination of the "reasonableness" of

12. Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 111 (1983).

13. Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1707 (1998).

14. See NAT'L AG. LANDS STUDY, FINAL REPORT 8–10 (1981) (detailing the conversion of agricultural land to nonagricultural uses in the context of growing demand for American agricultural exports and increasing energy costs).

15. Neil D. Hamilton, *Right-to-Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, J. AGRIC. TAX. & L. 195, 195 (1992).

16. See Grossman & Fisher, *supra* note 12, at 117–35 (discussing the common components of right-to-farm legislation).

17. See Centner, *supra* note 11, at 94–117 (identifying the common components of right-to-farm legislation).

18. See Dowell, *supra* note 5, at 133–52 (analyzing the components of right-to-farm legislation for the purpose of drafting a strong statute for family farms).

19. RESTATEMENT (SECOND) OF TORTS § 822 (1979).

one's actions, and conflicts are resolved by normative evaluations of the "wrongfulness" of those actions.²⁰ Under this approach, plaintiffs hold the burden of demonstrating a nuisance, while the defendants have the burden of demonstrating reasonableness. Ultimately, the court will select a winner with either the plaintiff securing an injunction against the nuisance-producing activity or the court determining that the defendant's activity is reasonable and may continue.²¹ By emphasizing the character of the actions, as opposed to the consequences of those actions, the traditional analysis can lead to economically irrational results. For example, a factory employing hundreds and producing tremendous benefit to the community could be shuttered upon a finding that it produced a nuisance affecting the ability of a single neighboring resident to enjoy their property.²²

More modern nuisance law, based in part on the work of Ronald Coase and the law-and-economics movement, emphasizes a utilitarian approach to resolving conflicts.²³ Modern nuisance law differs from the traditional approach by applying a greater focus on the outcomes of landowner actions. By comparing the relative benefits of the nuisance activity to the harms suffered, courts employing modern nuisance law may permit the nuisance-producing defendant to continue nuisance-producing activities so long as plaintiffs are compensated for the harm suffered.²⁴ Theoretically, the modern approach promotes efficient land-use allocations by defining property rights and allowing rational actors to perform cost-benefit analysis in their land-use decisions.²⁵ Specifically, if a landowner seeks to engage in a conflicting land use, the landowner must evaluate the costs of paying those harmed relative to the benefits accrued from pursuing that activity in a particular location.²⁶

Right-to-farm laws employ traditional fault-based principles of nuisance law and codify the "moving-to-the-nuisance" doctrine.²⁷ This

20. Reinert, *supra* note 13, at 1699–1700.

21. Leah C. Hill, Note, "A Pig in the Parlor Instead of the Barnyard?" *An Examination of Iowa Agricultural Nuisance Law*, 45 *DRAKE L. REV.* 935, 944 (1997) ("American courts . . . have become more willing to award money damages as a remedy rather than imposing an injunction in nuisance cases." (citing NEIL D. HAMILTON, *A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW* 14 (1992))).

22. *See, e.g., Whalen v. Union Bag & Paper Co.*, 101 N.E. 805 (N.Y. 1913) (enjoining operation of a pulp mill employing 400 to 500 employees because discharge from the mill created nuisance for a downstream landowner).

23. Reinert, *supra* note 13, at 1700.

24. *See, e.g., Boomer v. Atlantic Cement Co.* 26 N.E.2d 870, 872 (Ill. 1970) (requiring nuisance-producing cement factory to pay affected neighboring landowners for "permanent" loss of property value in order to continue operating).

25. Reinert, *supra* note 13, at 1700–01.

26. *Id.* at 1701.

27. *Id.* (noting right-to-farm laws "represent a dogmatic return to the fault-based origins of nuisance law").

reflects a value determination by state legislatures that new residents are at fault for encroaching upon agricultural operations and should bear the burden of conflicting land uses.²⁸ Mechanically, right-to-farm laws either provide an affirmative defense to a nuisance suit²⁹ or establish a presumption of reasonableness for agricultural activities, thereby shifting the burden to a plaintiff to demonstrate “unreasonableness.”³⁰ The presumption of reasonableness is generally only surmountable upon a finding that the activity poses a threat to public health and safety.³¹ The choice between an affirmative defense or a rebuttable presumption of reasonableness is the only significant variation between different state nuisance liability provisions.

B. Acknowledgment of Other Benefits Produced by Farming Operations

Regressing back to the traditional fault-based nuisance analysis draws the ire of adherents to modern nuisance doctrine because of the potential for economically irrational results.³² This is a valid concern because in some instances, the harm suffered by neighboring landowners may significantly outweigh any benefits of retaining the nuisance-producing agricultural activity when measured monetarily. However, the reversion is justified if a legislature acknowledges that farming holds special status in society and produces value for the state beyond measurable economic benefits readily attributable to the farm. Specifically, farming operations can produce open space, cultural benefits, and other environmental amenities³³ that are difficult if not impossible to quantify. Legislative acknowledgment of these values is one of the main components of any right-to-farm law.

28. *Id.* at 1703.

29. *See, e.g.*, WYO. STAT. ANN. § 11-44-103 (2011) (“[A] farm or ranch operation shall not be found to be a public or private nuisance by reason of that operation if that farm or ranch operation”); KAN. STAT. ANN. § 2-3202 (2011) (“Agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to surrounding nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance”); OHIO REV. CODE ANN. § 929.04 (LexisNexis 2011) (providing a “complete defense” to agricultural nuisance lawsuits); *see also* Elizabeth Springsteen, *States’ Right-to-Farm Statutes*, NAT’L AG. LAW CTR. (2010), <http://www.nationalaglawcenter.org/assets/righttofarm/index.html> (compiling state right-to-farm laws).

30. VT. STAT. ANN. tit. 12, § 5373 (2011).

31. *See* N.H. REV. STAT. ANN. § 432:33 (2011).

32. *See generally* Reinert, *supra* note 13, at 1699–1703 (discussing the modern principles of nuisance liability in right-to-farm laws).

33. *See* AM. FARMLAND TRUST, THE ECONOMIC IMPORTANCE OF AGRICULTURE: A PROFILE OF ADDISON AND FRANKLIN COUNTIES, VERMONT 2–3, available at http://www.farmlandinfo.org/documents/37007/Ec_Importance_of_Ag_Vt_counties.pdf (last visited Dec. 1, 2011) (describing the secondary economic benefits of farming operations, particularly how they affect local businesses and tourism).

C. Generally Accepted Agricultural Practices

To provide producers and neighbors (and courts) notice of activities covered by right-to-farm statutes, many states enumerate generally accepted agricultural practices.³⁴ Once adopted, generally accepted agricultural practices typically provide an affirmative defense to an agricultural nuisance lawsuit so long as the accepted practice is the subject of the litigation.³⁵ Legislatures generally charge either an administrative agency or a special committee with the task of identifying acceptable practices.³⁶ Special committees typically have diversity requirements whereby membership is allotted by the interest represented.³⁷ This provides not only fairness in representation, but also the opportunity to conduct multidisciplinary analyses of proposed practices. Practices adopted by

34. *See, e.g.*, MICH. DEP'T OF AGRIC., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR THE CARE OF FARM ANIMALS (2010), available at http://www.michigan.gov/documents/MDA_Care_Farm_Animals_GAAMP_129713_7.pdf (outlining specific generally accepted practice for farm animals in part for right-to-farm purposes). However, generally accepted practices may also serve other functions such as ensuring compliance with environmental regulations. *See, e.g.*, 20-10 VT. CODE R. §§ 3-4 (2006), available at <http://www.vermontagriculture.com/ARMES/awq/AAPs.htm>. Sections 3 and 4 list accepted and restricted practices, respectively. Section 4.03(c) makes manure spreading subject to water-quality standards; section 4.03(e) relates to pesticide regulations; sections 4.07(a), (d) and (f) concern Federal Flood Insurance, the state's Fluvial Erosion Hazard Zones, and USDA standards; section 4.08 concerns groundwater; section 4.09 handles streambank stabilization; and section 5.2 establishes enforcement powers. All of these provisions hearken to other aspects of federal or state law to ensure compliance with environmental regulations. *Id.*

35. *See, e.g.*, LA. REV. STAT. ANN. § 3:3603 (2011).

No agricultural operation shall be deemed to be a nuisance in any action brought under the provisions of Civil Code Article 669, R.S. 33:361, R.S. 40:14, or any other grant of authority authorizing the suppression or regulation of public or private nuisances if the agricultural operation is conducted in accordance with generally accepted agricultural practices

Id. § 3:3603(B).

36. *See, e.g.*, MICH. COMP. LAWS § 286.474 (2011) (vesting authority to identify generally accepted agricultural and management practices in a commission); N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2011) (vesting authority to identify generally accepted agricultural practices in the Commissioner of the State Department of Agriculture and Markets, with consultation from an advisory council within the agency).

37. *See, e.g.*, N.J. STAT. ANN. §§ 4:1C-4 (West 2011).

The committee shall consist of 11 members, five of whom shall be the Secretary of Agriculture, who shall serve as chairman, the Commissioner of Environmental Protection, the Commissioner of Community Affairs, the State Treasurer and the Dean of Cook College, Rutgers University, or their designees, who shall serve ex officio, and six citizens of the State, to be appointed by the Governor with the advice and consent of the Senate, four of whom shall be actively engaged in farming, the majority of whom shall own a portion of the land that they farm, and two of whom shall represent the general public.

Id.

administrative agencies go through the standard rule-making process, which incorporates public comment and expertise from applicable agencies.

The process for recognizing accepted practices may be either prospective and generally applicable³⁸ or an ad hoc recognition of specific practices for a specific agricultural operation.³⁹ Michigan does both. The state periodically recognizes new generally accepted practices such as novel techniques practiced in other jurisdictions.⁴⁰ The state also deems all traditional practices, not currently recognized, as presumptively accepted so long as they do not threaten the environment or public health and safety.⁴¹ Accepted practice provisions also typically provide for any citizen to seek an advisory opinion.⁴² Finally, although accepted-practices provisions typically provide a complete defense, most states do not provide protection under the right-to-farm law if the accepted practice is conducted in a negligent manner.⁴³

D. Scope and Scale of the Operation

Some states limit the availability of right-to-farm protections based on the scope and scale of the operation. Right-to-farm legislation may limit coverage to primary producers, those that grow the crops or raise the animals, or small-scale “family farms.” For example, Alaska’s statute only protects processors of agricultural products, such as slaughterhouses, if the processing is incidental to or in conjunction with primary agricultural production.⁴⁴ Additionally, Minnesota denies protection to certain large-scale producers,⁴⁵ while Nebraska only extends coverage to farms with ten or more acres.⁴⁶ Some commentators suggest that given the ability of right-to-farm laws to disrupt the land-use landscape, right-to-farm laws should

38. *See, e.g.*, MICH. COMP. LAWS § 286.474(4)(8)(a) (2011) (establishing an advisory committee to make recommendations to the commission of agriculture with vested authority to propose generally accepted practices).

39. N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2011).

40. MICH. COMP. LAWS § 286.474(4)(8)(a).

41. *Id.*

42. N.Y. AGRIC. & MKTS. LAW § 308.

43. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-341(c) (West 2011) (“The provisions of this section shall not apply whenever a nuisance results from negligence or wilful or reckless misconduct in the operation of any such agricultural or farming operation, place, establishment or facility, or any of its appurtenances.”).

44. *See* ALASKA STAT. § 09.45.235(d)(2) (2011) (dictating that Alaska’s statute protects primary agricultural operations and “any practice conducted on the agricultural facility as an incident to or in conjunction with [primary agricultural] activities.”) Thus, only agricultural-processing facilities on the same site as primary agricultural activities qualify for protection.

45. *See* MINN. STAT. § 561.19(2)(c)(1) (2011) (denying right-to-farm protections to hog operators with 1,000 or more hogs and cattle operations with more than 2,500 head).

46. NEB. REV. STAT. § 2-4402(1) (2011).

only protect “actual farms”—those operations of a certain size or profitability.⁴⁷

Although stronger right-to-farm laws omit all size and scope limitations, such provisions can be critical for maintaining support for the legislation. Defining the scale and scope of the operation is an important, politically driven determination by a legislative body. If drawn too narrowly or exclusive to an unpopular segment of the agricultural economy, such as large-scale confined feedlots, a right-to-farm law may be seen as undue political favoritism. However, if coverage emphasizes politically popular farming operations, like the quintessential “family farm,” the legislation will likely receive greater support.

E. Accommodating an Evolving Industry

Although the farming industry in general, and certain farmers in particular, seem set in their ways, the agricultural business is actually an ever-evolving field that perpetually generates new research, methods, and technology. A fatal flaw in many right-to-farm laws is that they overly codify the moving-to-the-nuisance doctrine, thereby handcuffing producers from altering their operations for fear of losing protection. Laws written in this manner can end up discouraging farmers from investing in new technology, upgrading to more efficient or environmentally friendly practices, diversifying their agricultural operations, or entering more profitable markets.⁴⁸

To address these concerns, states take a variety of approaches to incorporate flexibility into right-to-farm laws beyond expanding the list of generally accepted agricultural practices. South Carolina grants the greatest amount of flexibility to farmers by pegging right-to-farm protections solely by the date of the farm’s establishment.⁴⁹ Thus, a farmer can expand his or her facilities, switch products, or adopt any new technology without losing right-to-farm protections provided a more senior neighbor does not object.⁵⁰ Other states offer less flexibility, but still afford farmers the opportunity to change with the times. Indiana grants right-to-farm protection to agricultural operations that have not undertaken “significant change.”⁵¹ Missouri allows producers to “reasonably expand” farming operations

47. See Grossman & Fischer, *supra* note 12, at 126 (arguing that laws should protect large operations, not family farms).

48. *Id.* at 128.

49. S.C. CODE ANN. § 46-45-70 (2011).

50. *Id.*

51. IND. CODE ANN. § 32-30-6-9(d)(1) (LexisNexis 2011) (permitting change in operation type, adoption of new technology, change in ownership, or enrollment in a government program).

without losing legal protections.⁵² While the Indiana and Missouri approaches provide needed flexibility, their subjective language provides less assurance for farmers seeking to take advantage of the provisions than the specifically enumerated approach. Presumably recognizing this problem, Colorado permits agriculturalists to make certain enumerated alterations such as changing ownership, briefly ceasing production, participating in a government program, adopting new technology, or changing the agricultural product produced without losing protection.⁵³ This approach provides farmers greater security in altering their operations but may omit some important forms of change not contemplated by the legislature from the statute.

Perhaps the most common mechanism for providing farmers flexibility is a statute of repose for the establishment of a new agricultural operation or practice. A statute of repose differs from a statute of limitations in that a statute of limitations “establish[es] a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered),”⁵⁴ whereas a statute of repose “bar[s] any suit that is brought after a specified time since the defendant acted in some way (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury.”⁵⁵ In the agricultural nuisance context, the completed activity generally refers to the establishment of a new practice. Under such a provision, farmers can change practices—provided the new practice qualifies as generally accepted—and rely on right-to-farm protection for that practice so long as no complaints are filed within the defined period of time.⁵⁶ A political benefit of this approach is that it provides pre-existing neighbors an opportunity to veto agricultural practices they are unwilling to accept. Yet at the same time, these types of provisions leave the farmer without protection during the probationary period, thereby lowering incentive to innovate.

Regardless of its manifestation, a strong right-to-farm law includes some mechanism for farms to adapt to changing circumstances and industry conditions. By excluding a flexibility mechanism, states restrict right-to-farm protection to the practices employed at the time neighboring non-agricultural uses are established, doing their farmers a great disservice by possibly undermining the long-term viability of agriculture.

52. MO. ANN. STAT. § 537.295(1) (West 2011).

53. COLO. REV. STAT. § 35-3.5-102(1)(b) (2010).

54. BLACK'S LAW DICTIONARY 677 (3d Pocket ed. 2006).

55. *Id.*

56. *See* ARK. CODE ANN. § 2-4-107 (2011) (providing for new date of establishment for material increase in size or change in character).

F. Exemption from Zoning and Other Local Regulations

Although the primary focus of right-to-farm legislation is to protect agriculturalists from nuisance lawsuits, provisions restricting local regulation of farming operations are a common component of right-to-farm legislation. As one scholar notes, right-to-farm laws “proceed from the assumption that localities use zoning laws to ‘zone out’ agricultural operations.”⁵⁷ Typical examples of this behavior are zoning ordinances prohibiting outbuildings and other structures necessary to conduct agricultural activities. To remedy these discriminatory policies, some states use right-to-farm legislation to exempt farms from zoning regulations and permitting requirements.⁵⁸ Thus, a farmer desiring to construct an outbuilding would not have to apply for any special-use permits or ensure that the structure meets applicable size, height, and setback requirements. Other states prohibit local zoning ordinances and other regulations from defining agricultural activities as a nuisance.⁵⁹ Strong right-to-farm laws provide sufficient protection from hostile municipal regulation without allowing development that may ultimately impair political support for farming.⁶⁰

G. Disclosure

A primary source of conflict between new residents and agricultural operations is a lack of understanding as to the expectations of living in farming country and the extent of right-to-farm laws.⁶¹ Real-estate brokers have no incentive to inform potential homeowners of the implications of

57. Reinert, *supra* note 13, at 1705.

58. *See, e.g.*, IDAHO CODE ANN. § 22-4504 (2011) (“Zoning and nuisance ordinances shall not apply to agricultural operations that were established outside the corporate limits of a municipality and then were incorporated into the municipality by annexation.”).

59. *See* ALA. CODE § 6-5-127(c) (2011).

Any and all ordinances heretofore or hereafter adopted by any municipal corporation in which such . . . farming operation facility . . . is located, which purports to make the operation of any such . . . farming operation facility, . . . or its appurtenances a nuisance or providing for an abatement thereof as a nuisance in the circumstances set forth in this section are, and shall be, null and void . . .

Id.

60. For example, complete exemptions to municipal land-use regulations can lead to unwise and environmentally damaging agricultural developments such as buildings in floodplains that negatively affect downstream riparian owners. *See Negative Effects of Livestock Grazing Riparian Areas*, OHIO STATE UNIV., <http://ohioline.osu.edu/lr-fact/0002.html> (last visited Dec. 1, 2011) (describing the negative environmental effects of agricultural use of floodplains and other riparian areas).

61. *Rural Neighbors and the Right to Farm*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/rural-neighbors-right-farm-29869.html> (last visited Dec. 1, 2011).

right-to-farm laws on the properties they offer.⁶² Consequently, new residents may feel cheated when they realize their subordinate legal status. This reaction, which can lead to more vigorous efforts to seek legal remedies or influence policymakers, can be avoided by informing new residents of right-to-farm laws before they make a purchase. To redress this problem, New York requires sellers to notify prospective buyers of the presence of agricultural operations protected by right-to-farm laws.⁶³ Such provisions benefit both farmers and new residents by promoting awareness and understanding.

H. Administrative Proceedings

To protect farmers from the expense of going to court, some jurisdictions require plaintiffs to exhaust administrative remedies or take other measures prior to filing a lawsuit.⁶⁴ These proceedings typically involve a panel of experts that render quasi-adjudicative decisions concerning the reasonableness of the agricultural practice.⁶⁵ Some administrative bodies can then prescribe mitigation measures binding on the parties. An administrative proceeding can be faster, cheaper, and more responsive than a lawsuit because administrative bodies generally have greater knowledge of the issues than courts. This eliminates the need for costly experts and allows for a better understanding of the harms suffered and the availability of mitigation measures.

Yet, complaining to a government official is easier than filing a lawsuit and may lead to abuse of the system. Cognizant of this concern, some states impose disincentives for citizens who waste agency time and resources by filing unfounded complaints against agricultural producers. Michigan requires citizens to first lodge a complaint with the Department of Agriculture, which must investigate all complaints and verify whether the activity at issue conforms to generally accepted agricultural practices.⁶⁶ If the investigator determines that the activity is a generally accepted agricultural practice, the director can impose the full costs of the investigation on the complainant for their fourth (and any subsequent) unverified complaint against the same farm.⁶⁷ Other states more readily

62. AM. FARMLAND TRUST, AGRICULTURE AND FARMLAND PROTECTION FOR NEW YORK, 20–21, 40–48 (1993).

63. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 310 (McKinney 2011) (requiring grantors and grantees of land in agricultural areas to sign disclosure notices informing them of the right-to-farm law).

64. MICH. COMP. LAWS § 286.474(1)–(3) (2011); *see also* IOWA CODE § 352.11(1)(c) (2011) (requiring mediation prior to the filing of any complaint in court).

65. MICH. COMP. LAWS § 286.474(1)–(3) (2011).

66. *Id.*

67. *See id.* § 286.474(4).

impose costs on nefarious complainants. Washington permits agencies to recover reasonable costs from any complainant who initiates the complaint “maliciously and without probable cause.”⁶⁸

Because administrative proceedings are often better suited to respond to issues of agricultural nuisance, they are important components of right-to-farm laws. Reducing costs is a critical factor in preserving the viability of agricultural operations. Robust requirements in administrative proceedings help to accomplish this goal.

I. Fee Recovery

Given that many agricultural operations get by on the slightest of margins, some states permit farmers to recover attorney’s fees and other costs upon the successful defense of a nuisance lawsuit. States take varying approaches to the availability of fee recovery. Wisconsin, New Mexico, and Hawaii allow fee recovery for frivolous suits.⁶⁹ The Wisconsin statute, for example, vests authority in judges to make initial determinations as to the likelihood of the plaintiff prevailing on his or her claim.⁷⁰ If the judge determines there is no chance of success, the claim is frivolous and the plaintiff must pay for litigation expenses.⁷¹ 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 the nuisance action.⁷² Other states provide for fee recovery whenever a farmer successfully defends a nuisance lawsuit.⁷³

Fee-recovery statutes can be critical because the mere threat of a lawsuit can discourage farmers from engaging in lawful activity. Wealthier complainants, knowing that farmers cannot recover fees even if the complaint is meritless, can pursue legal actions for the strategic purpose of exploiting a farmer’s lack of financial resources. This can result in a farmer conceding the lawsuit to avoid costs or ultimately selling the farm to cover legal expenses. Statutes that provide greater protections to farmers offer greater opportunity to recover legal expenses should a farmer successfully defend against an agricultural nuisance suit.

68. WASH. REV. CODE ANN. § 7.48.320 (West 2011).

69. WIS. STAT. ANN. § 823.08(4) (West 2011); N.M. STAT. ANN. 1978 § 47-9-7 (LexisNexis 2011); HAW. REV. STAT. §§ 165-5; 607-14.5 (2011).

70. WIS. STAT. ANN. § 823.08(4).

71. *Id.*

72. *Id.* § 823.08(4)(b).

73. *See* WASH. REV. CODE ANN. § 7.48.315 (West 2011) (“A farmer who prevails in any action, claim, or counterclaim alleging that agricultural activity on a farm constitutes a nuisance may recover the full costs and expenses determined by a court to have been reasonably incurred by the farmer as a result of the action, claim, or counterclaim.”).

J. Remedies

Advanced right-to-farm laws require courts and administrative agencies to fashion relief for complainants in a way that allows the farm to viably operate following the conclusion of a legal action. States with common-law traditions of granting an unconditioned permanent injunction upon the finding of a nuisance are the best candidates for such provisions. Michigan grants producers thirty days to correct violations of generally accepted practices before courts can apply more substantial legal penalties.⁷⁴

Wisconsin is an example of a state that articulately defines available remedies for agricultural nuisance.⁷⁵ The Wisconsin right-to-farm statute prohibits a court from granting relief that would “substantially restrict or regulate the agricultural use or agricultural practice” unless the practice causes a substantial threat to public health or safety.⁷⁶ Further, courts in Wisconsin must incorporate mitigation measures suggested by public agencies⁷⁷ and provide the farmer sufficient time to implement these measures.⁷⁸ Finally, Wisconsin courts cannot grant any relief that adversely affects the economic viability of the farming operation.⁷⁹

III. VERMONT'S RIGHT-TO-FARM LAW

The menu of provisions examined in the previous Part provides context for evaluating the relative strengths and weaknesses of Vermont's right-to-farm law. Although Vermont passed its right-to-farm law in 1981, it amended the statute in 2004. The state thus had an opportunity to borrow ideas employed in other jurisdictions. This Part begins by reviewing the language of Vermont's right-to-farm law and analyzing the implications of the 2004 amendment. The Part then reviews the case law interpreting Vermont's right-to-farm law. Finally, the Part concludes with an overview of the statute's glaring problems evidenced by the text of the statute and the associated case law.

74. MICH. COMP. LAWS § 286.474(3) (2011).

75. See WIS. STAT. ANN. § 823.08(1) (West 2011) (outlining available remedies for agricultural nuisance suits).

76. *Id.* § 823.08(3)(b)(1).

77. *Id.* § 823.08(3)(b)(2)–(3).

78. *Id.* § 823.08(3)(b)(2)(b).

79. *Id.* § 823.08(3)(b)(3).

A. Legislation

Vermont joined the right-to-farm movement when the legislature passed Act 68 in 1981.⁸⁰ In enacting the legislation, the legislature found “that agricultural production is a major contributor to the state’s economy . . . 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.”⁸¹ The stated purpose of the Act was to “protect reasonable agricultural activities conducted on farmland from nuisance lawsuits.”⁸² Thus, while the stated purpose could be stronger, the section does recognize that agriculture provides value to the state beyond direct economic benefits. This is essential for justifying a law that might lead to economically irrational results.

Originally, the legislation afforded protection by providing farmers a rebuttable presumption of reasonableness for their “agricultural activities.”⁸³ “The presumption may be rebutted by a showing that the activity has a substantial adverse effect on the public health and safety.”⁸⁴ To receive this protection, an “agricultural activity”⁸⁵ on “farmland”⁸⁶ must have been “established prior to surrounding non-agricultural activities” and conform “with federal, state, and local laws and regulations.”⁸⁷

In response to litigation concerning the ability of farmers to change their operations and receive protection under the Act,⁸⁸ the Vermont legislature amended the Act in 2004.⁸⁹ The legislative findings and purpose of the Act now read:

80. 1981 Vt. Acts & Resolves 266–67; *The Vermont Approach*, SMART GROWTH VERMONT, <http://www.smartgrowthvermont.org/toolbox/landuselaw/righttofarm/thevermontapproach/> (last visited Dec. 1, 2011).

81. 1981 Vt. Acts & Resolves 266.

82. *Id.*

83. 1981 Vt. Acts & Resolves 267.

84. *Id.*

85. The Act stated that an “agricultural activity” included, but was not limited to, “the growing, raising and production of horticultural and silvacultural crops, grapes, berries, trees, fruit, poultry, livestock, grain, hay, and dairy products.” 1981 Vt. Acts & Resolves 266.

86. *See id.* (defining “farmland” as “land devoted primarily to commercial agricultural activities”). The “farmland” language was removed by the 2004 amendments. *See* 2004 Vt. Acts & Resolves 588.

87. 2004 Vt. Acts & Resolves 582.

88. *See Trickett v. Ochs*, 2003 VT 91, 176 Vt. 89, 838 A.2d 66 (2003) (rejecting availability of right-to-farm protection for an apple orchard that implemented new waxing and packaging processes after new residents occupied adjacent farmhouse).

89. 2004 Vt. Acts & Resolves 582. Some of the amendments to Vermont’s right-to-farm statute were triggered by the *Trickett* case, 2003 VT 91, 176 Vt. 89, 838 A.2d 66 (2003), specifically the language in the purposes section acknowledging that “farms will likely change, adopt new technologies, and diversify into new products.” VT. STAT. ANN. tit. 12, § 5751 (2011).

The general assembly finds that agricultural production is a major contributor to the state's economy; that agricultural lands constitute unique and irreplaceable resources of statewide importance; that the continuation of existing and the *initiation of new agricultural activities* preserve the landscape and environmental resources of the state, contribute to the increase of tourism, and further the economic welfare and self-sufficiency of the people of the state In order for the agricultural industry to survive in this state, *farms will likely change, adopt new technologies, and diversify into new products, which for some farms will mean increasing in size.* It is the purpose of this chapter to protect reasonable agricultural activities conducted on the farm from nuisance lawsuits.⁹⁰

While the statute still provides farmers a rebuttable presumption of reasonableness, the 2004 amendments also created a generally accepted practices provision.⁹¹ The generally accepted practices provision, in conjunction with 10 V.S.A. § 1259(f), vests authority in the Secretary of Agriculture, Food, and Markets to define accepted agricultural practices after conducting a public hearing.⁹² Now, to be eligible for right-to-farm protection, a farm must comply with the law, operate consistent with “good agricultural practices,” be established prior to surrounding residences or other non-agricultural activities, and refrain from “significantly” expanding or changing its operations after surrounding residences or other non-agricultural activities are established.⁹³

Lastly, the amendment offers greater opportunity for residential landowners to rebut the presumption of reasonableness. While plaintiffs previously had to prove that a contested agricultural activity substantially threatened the public health and safety, the statute now allows residential landowners to defeat the presumption by demonstrating a “noxious and significant interference with the use and enjoyment of the neighboring property.”⁹⁴ This is a lower standard than that adopted in the original 1981 version of the statute because a plaintiff previously had to demonstrate a

90. VT. STAT. ANN. tit. 12, § 5751, as amended by 2004 Vt. Acts & Resolves 588 (emphasis added to show changes in legislation).

91. VT. STAT. ANN. tit. 12, § 5753(a)(1)(B).

92. *Id.* § 5753(a)(1)(A); VT. STAT. ANN. tit. 10, § 1259(f) (“The provisions . . . of this section [prohibiting pollution of water sources] shall not regulate accepted agricultural or silvicultural practices, as such are defined by the secretary of agriculture, food and markets and the commissioner of forests, parks and recreation, respectively, after an opportunity for a public hearing.”).

93. VT. STAT. ANN. tit. 12, § 5753(a)(1)(A)–(D); SMART GROWTH VERMONT, *supra* note 80.

94. VT. STAT. ANN. tit. 12, § 5753(a)(2).

public harm (i.e., that the agricultural activity caused actual physical harm to some segment of the population). Now, a plaintiff presumably only needs to show a private harm (i.e., that the activity greatly infringes upon the personal use and enjoyment of the plaintiff's property). Although the Vermont Supreme Court has not determined what constitutes "noxious and significant interference," the 2004 amendment certainly increases the likelihood of successful lawsuits and decreases the security afforded farmers by the prior version of the statute.⁹⁵

While the original legislation and the subsequent amendment included two critical provisions of a strong right-to-farm law—acknowledgment that farming produces non-economic benefits and protection from nuisance liability—many other components are noticeably absent. Namely, there is no mention of administrative remedies, fee recovery, or limitations on remedies that preserve the economic viability of the farming operation.

B. Litigation

Given the mechanical nature of the statute—absent the demonstration of a "significant and noxious interference" with property, a court must only determine whether the farmer initiated the agricultural activity prior to the establishment of neighboring non-agricultural uses—few agricultural nuisance cases are appealed. Arguably, this is an indicator of the legislation's success. However, the Vermont Supreme Court has reviewed three cases concerning the right-to-farm statute that shed a different light on the law's ability to protect and support Vermont's agricultural industry.

1. *Coty v. Ramsey Associates*⁹⁶

Coty v. Ramsey Associates presented an unusual fact pattern in that the defendant intentionally established a hog farm to retaliate against a neighbor who successfully opposed the "farmer's" plans to construct a hotel on his property.⁹⁷ In a footnote, the court noted that the defendant's actions, which were premised on malice or spite, were outside the scope of the right-to-farm statute.⁹⁸ Accordingly, it affirmed the lower court's holding that the agricultural operation constituted an actionable nuisance.⁹⁹ Additionally, although not noted by the court, the "farmer" was not eligible for protection

95. SMART GROWTH VERMONT, *supra* note 80.

96. *Coty v. Ramsey Assocs.*, 149 Vt. 451, 546 A.2d 196 (1988).

97. *Coty*, 149 Vt. at 454–55, 546 A.2d at 199–200.

98. *Id.* at 458 n.2, 546 A.2d at 202 n.2.

99. *Id.* at 458–59, 546 A.2d at 202.

anyway because he began his operation after an established residential use.¹⁰⁰

2. *Trickett v. Ochs*¹⁰¹

Trickett v. Ochs is the seminal Vermont right-to-farm case that sparked the 2004 amendments to the statute.¹⁰² In this case, an agricultural property was divided into two parcels.¹⁰³ One parcel contained the original farmhouse and was purchased by new owners for use as a residence.¹⁰⁴ The other parcel included the preexisting apple orchards and remained an agricultural operation.¹⁰⁵ In reaction to a changing market, the orchardists adopted a new waxing procedure, began constructing packing crates, and brought in refrigerated trucks to store the apples on-site,¹⁰⁶ which the court described as “significant change[s].”¹⁰⁷ The owners of the residential property brought suit, arguing that the packaging and storing activities were not established prior to the neighboring residence.¹⁰⁸

In its decision, the Vermont Supreme Court interpreted the right-to-farm statute narrowly and offered two primary reasons why the right-to-farm protections were unavailable to the orchardists. First, the court determined that because the residence existed prior to the establishment of the packaging operation, the non-agricultural use did not “encroach” upon the farm.¹⁰⁹ The court reasoned that the purpose of the law was to protect farmers from urban encroachment.¹¹⁰ Because the residential structure had existed approximately as long as the farm had, there was no actual encroachment on a farming operation.¹¹¹

Second, the court found that the defendants could not invoke the right-to-farm statute because Vermont had no agricultural regulations for noise or truck exhaust.¹¹² According to the statute, agricultural practices must be “conducted in conformity with federal, state, and local laws and

100. *Id.* at 455, 546 A.2d at 200.

101. *Trickett v. Ochs*, 2003 VT 91, 176 Vt. 89, 838 A.2d 66 (Vt. 2003).

102. Specifically, this case brought about the “farms will likely change, adopt new technology, and diversity into new products” language in VT. STAT. ANN. tit. 12, § 5751 (2011).

103. *Trickett*, 2003 VT 91, ¶ 2.

104. *Id.*

105. *Id.*

106. *Id.* ¶ 3.

107. *Id.* ¶ 25.

108. *Id.* ¶ 18.

109. *Id.* ¶ 32.

110. *Id.* ¶ 30.

111. *Id.* ¶ 32.

112. *Id.* ¶ 35.

regulations.”¹¹³ The court determined that right-to-farm protections did not apply because none of the generally accepted agriculture practices provided for truck exhaust.¹¹⁴

3. *John Larkin, Inc. v. Marceau*¹¹⁵

In *John Larkin, Inc. v. Marceau*, the plaintiff characterized drifting pesticides from neighboring farmlands as a trespass rather than a nuisance in order to avoid facing the right-to-farm defense.¹¹⁶ The court rejected the plaintiff’s claim, however, determining that trespass required a physical impact and that particles in the ambient air could not create such an impact.¹¹⁷ Accordingly, the court affirmed the trial court’s order rejecting the plaintiff’s trespass action.¹¹⁸

C. *Problems with Vermont’s Right-to-Farm Law*

The text of Vermont’s right-to-farm law leaves many gaps in protection and the case law is brief and not very informative. An analysis of the statutory text and case law reveals three significant concerns. First, the law might not protect new agricultural enterprises if a single non-agricultural use is established in proximity to the agricultural operation.¹¹⁹ Second, the law overly codifies the “moving to the nuisance” doctrine such that producers may lose coverage if they “significantly change” their operation after the establishment of a non-agricultural neighboring use as evidenced by *Trickett*.¹²⁰ Third, the previous two problems might still occur even if a neighboring landowner acquires the pre-existing, non-agricultural property subsequent to the establishment of the farm or implementation of the new practice.¹²¹ This is because the availability of the protection is predicated on the establishment of the non-agricultural *use* and not the arrival of a non-agricultural *landowner*.

These problems must be addressed to strengthen Vermont’s protection of the agricultural industry. Additionally, any proposal to strengthen the law

113. VT. STAT. ANN. tit. 12, § 5753(a) (2011).

114. *Trickett*, 2003 VT 91, ¶ 39.

115. *John Larkin, Inc. v. Marceau*, 2008 VT 61, 184 Vt. 207, 959 A.2d 551 (2008).

116. *Id.* ¶ 8.

117. *Id.* ¶ 15.

118. *Id.* ¶ 18.

119. See VT. STAT. ANN. tit. 12, § 5753(a)(1)(C) (2011) (stating that agricultural activity must be “established prior to surrounding nonagricultural activities”).

120. See *Trickett v. Ochs*, 2003 VT 91, ¶ 32, 176 Vt. 89, 101, 838 A.2d 66, 76 (2003) (holding that new waxing, packaging, and trucking practices of an established apple orchard were not protected by Vermont’s right-to-farm law).

121. *Id.* ¶ 26.

must also address the critical components of right-to-farm laws not included in the text of the statute.

IV. IMPROVING VERMONT'S RIGHT-TO-FARM LAW

As the previous Part makes clear, there are significant shortcomings in Vermont's current right-to-farm law that leaves the state's agricultural industry vulnerable. This Part, modeled after the work of Thomas McNulty¹²² and Tiffany Dowell,¹²³ proposes improvements to strengthen the law for each critical component identified in the state survey.

A. Nuisance Liability

As part of the 2004 amendments, the Vermont legislature lowered the standard for complainants to successfully rebut the presumption of reasonableness by adopting the “noxious and significant interference with the use and enjoyment of the neighboring property” language.¹²⁴ The House Committee on the Judiciary made the recommendation to include the “noxious and significant interference” standard despite the fact that no other state employs this language. From the legislative history,¹²⁵ this recommendation presumably originated from testimony proffered by a group of “practicing lawyers, constitutional scholars, and professors of law.”¹²⁶ The group suggested that legislation that effectively denies landowners a right to sue for private nuisance might constitute an

122. See McNulty, *supra* note 8, at 101–04 (providing recommendations for strengthening Pennsylvania's right-to-farm law).

123. See Dowell, *supra* note 5, at 133–52 (recommending specific provisions for strengthening right-to-farm laws for family farmers).

124. VT. STAT. ANN. tit. 12, § 5753(a)(2) (2011).

125. The legislative history as compiled by the author includes: H. 778, 2003–2004 Leg., Reg. Sess. (Vt. 2004) (Draft No. 1) (on file with author) (showing the recommendation of the House Committee on the Judiciary to include the “noxious and significant interference” language); Memorandum from Sam Burr, Legislative Counsel, to the House Comm. on Agric. (Jan. 6, 2004) (on file with author) (explaining the potential ramifications of the 2004 amendment for nuisance liability); Memorandum from Erik B. Fitzpatrick, Legislative Counsel, to Peter Welch, Vt. State Senator (Apr. 14, 2004) (on file with author) (regarding potential issues for the judiciary); E-mail from Peter Teachout, Professor of Law, Vt. Law School, to Sara Branon Kittell, Chair, Vt. Senate Comm. on Agric. (Apr. 25, 2004) (on file with author) (laying out possible amendments to the bill, including the “noxious and significant interference” language); Letter from Robert Gensburg, Esq. et al., Members of the Vermont Bar and Concerned Citizens, to Vt. Senate Judiciary Comm. (May 4, 2004) (on file with author) (warning about the possible unconstitutionality of limiting private nuisance law); see also YALE AGRIC. LAW PROJECT, THE RIGHT TO FARM REPORT: WHY VERMONT'S CURRENT LAW ALREADY PROTECTS TRADITIONAL AGRICULTURE, (2004).

126. Letter from Robert Gensburg, Esq. et al., *supra* note 125.

unconstitutional taking of property under both the state and federal constitutions.¹²⁷

The group specifically cites *Bormann v. Board of Supervisors in and for Kossuth County* to justify its concerns.¹²⁸ In *Bormann*, the Iowa Supreme Court found that a right-to-farm provision that provides private- nuisance immunity for any and all changes in farming activities within agricultural districts, regardless of the date of establishment of neighboring non-agricultural uses, constituted an unconstitutional taking of property under the Iowa constitution.¹²⁹ While constitutional issues raised in other jurisdictions should not be overlooked, the legislature overreacted to an issue that may not even be a problem in Vermont.¹³⁰

The amendment is an overreaction because it does not differentiate between prior-existing and future farming activities in assigning the “noxious and significant interference” standard. No court has found constitutional defects with right-to-farm laws that limit private-nuisance immunity to farming activities initiated prior to the establishment of neighboring non-agricultural uses.¹³¹ Thus, the amendment unnecessarily cuts into the protection afforded prior-existing activities to address a potential problem only applicable to activities initiated after the establishment of neighboring non-agricultural uses. Further, the language of the amendment obviated the need to even address the potential constitutional issue raised in the group’s testimony. As discussed in greater

127. *Id.* Other testimony in the legislative history, notably from Professor Peter Teachout, suggests that the public-harm standard would not constitute a taking, and other courts have upheld the constitutionality of right-to-farm laws. E-mail from Peter Teachout, *supra* note 125; see *Overgaard v. Rock Cnty. Bd. of Comm’rs*, No. Civ. A. 02-601, 2003 WL 21744235, at *7 (D. Minn. 2003) (holding that a state right-to-farm act that provided nuisance immunity under a public-harm standard did not take property).

128. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

129. *Id.* It should be noted that the Iowa Supreme Court determined that under Iowa law a right to maintain a nuisance is an easement. *Id.* at 315. After finding an easement, the court went on to essentially conduct a per se takings analysis as opposed to a regulatory taking. *Id.* at 317–22. Other courts, upholding the constitutionality of agricultural nuisance immunity provisions, analyzed the government action as a regulatory taking. See *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 643 (2004), *cert. denied*, 543 U.S. 1146 (2005) (analyzing nuisance immunity provision for grass-seed farmers as a regulatory taking). Whether the U.S. Supreme Court or the Vermont Supreme Court would endorse a per se or regulatory takings analysis of an agricultural nuisance immunity provision should be the subject of a future paper, but some commentators argue that immunities should never be analyzed as a per se taking. See, e.g., Eric Pearson, *Immunities as Easements as “Takings”*: *Bormann v. Board of Supervisors*, 48 DRAKE L. REV. 53, 76–77 (1999) (disputing the principle that immunities qualify as easements).

130. See, e.g., E-mail from Peter Teachout, *supra* note 125 (presenting options to assuage the legislature’s fears of creating a taking); *Overgaard*, 2003 WL 21744235, at *7.

131. See Harrison Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465 (2011) (reporting outcomes of all right-to-farm-related litigation throughout the nation).

detail below, Vermont farmers likely cannot receive right-to-farm protection for activities initiated after the establishment of neighboring non-agricultural uses under the existing legislation.¹³² Accordingly, the change in standard advocated by the group is superfluous. If the lower standard should be included at all, it should be limited to farming activities that occur after the arrival of neighboring non-agricultural land owners.

As previously discussed, the “noxious and significant interference” language lowers the level of protection afforded farmers because plaintiffs only need to show a private harm as opposed to the more onerous public harm. This language undermines the protections afforded by the statute to the point that it may be toothless. Therefore, to strengthen the law for agricultural producers, the legislature should eliminate the “noxious and significant interference” language and rely solely on the “health and safety” standard employed by every other state.

B. Acknowledgment of Other Benefits Produced by Farming Operations

The purposes section of Vermont’s current law does acknowledge some of the benefits produced by farming operations other than direct economic contributions. Specifically, it recognizes open space, environmental amenities, and some secondary economic benefits.¹³³ However, the statute makes no mention of cultural benefits. To place Vermont’s right-to-farm law on a stronger foundation, the purposes section should make some reference to how farm preservation maintains the state’s agricultural heritage. Although purpose statements take a back seat to the substantive provisions of a statute, this proposal provides both symbolic importance and additional guidance for courts to more readily find fault in non-agricultural uses that erode Vermont’s farming culture and heritage.

C. Accepted Agricultural Practices

Vermont’s right-to-farm law vests authority in the Agency of Agriculture to develop accepted agricultural practices (referred to as AAPs).¹³⁴ The current AAPs mostly pertain to water quality standards,¹³⁵ and accordingly are more oriented toward pollution control than protecting farmers from nuisance lawsuits. In practice, the Agency of Agriculture is reluctant to identify new AAPs, particularly those for which the main

132. VT. STAT. ANN. tit. 12, § 5753(a)(1)(C) (2011).

133. *Id.* § 5751.

134. *Id.* § 5753(a)(1)(A).

135. 2-3 VT. CODE R. §§ 401–409 (2006), available at <http://www.vermontagriculture.com/ARMES/awq/AAPs.htm>.

purpose is something other than pollution control. This is understandable because of the resources and political will required to promulgate new AAPs. Additionally, the right-to-farm law should preclude any need to develop AAPs that address nuisance. However, AAPs serve an important notice function for both farmers and neighboring landowners. If the legislature is unwilling to adopt a flexibility mechanism for allowing farmers to adopt new practices and products, AAPs can serve as a stopgap measure to provide protection to individual practices as they arise. This proposal will require more legislative direction to both clarify that AAPs can provide nuisance liability protection and to motivate the Agency of Agriculture to actually promulgate AAPs.

D. Scale and Scope Limitations

The current law does not limit protection based on the size or scope of the operation. Rather, applicability hinges on temporal considerations of when agricultural practices and non-agricultural uses are established. While stronger right-to-farm laws generally provide protection for all farms regardless of their physical characteristics, Vermont might consider a provision that more narrowly identifies certain new agricultural operations of specific sizes that can receive protection despite being established later in time than non-agricultural uses. For example, such a provision would be particularly useful for urban agriculturalists who, by definition, come along after non-agricultural uses. To provide some protection to these newer agricultural enterprises, the legislature could adopt a scope and scale provision that provides a limited, targeted exemption from the temporal limitations of the current right-to-farm law.

Vermont might also use a size-and-scope restriction to eliminate protections for certain unfavorable forms of agriculture. Specifically, the legislature could use a size-and-scope restriction to assuage apprehension pertaining to large, confined feedlots. A significant portion of the testimony in the legislative history argued against any expansion of Vermont's right-to-farm law because expanded protections may facilitate an increase in the number of large, confined feedlots and exacerbate the environmental and health problems associated with those facilities.¹³⁶ A size-and-scope limitation would be an effective instrument to address these concerns.

136. See YALE AGRIC. LAW PROJECT, *supra* note 125, at 4–19 (discussing fears of potential favoring of large concentrated agricultural operations, which the report describes as antagonistic toward the preservation of traditional agriculture); Letter from Robert Gensburg, Esq. et al., *supra* note 125.

E. Administrative Proceedings

Vermont's current right-to-farm law does not require complainants to exhaust administrative proceedings prior to filing a lawsuit. Given the nature of most claims and the mechanical operation of the statute, Vermont could conserve resources by mandating an administrative proceeding prior to granting access to the courts. This proposal would also save farmers considerable expense because they could avoid obtaining legal counsel and hiring experts. Because farming operations are particularly vulnerable to the threat of legal expenses, mandatory administrative proceedings would better achieve the stated purpose of protecting Vermont's agricultural industry.¹³⁷

F. Changes in Agricultural Operations

Under the existing statute, Vermont farmers are vulnerable to suit if they pursue "significant changes" to their operations after the establishment of surrounding non-agricultural uses.¹³⁸ This language creates two major problems. First, as identified earlier in this Note, the current statute pegs protection to the date surrounding non-agricultural uses are established as opposed to the date of the arrival of the litigant. Therefore, a litigant who purchases property with full knowledge of the current practices on a neighboring farm has the potential to prevail in an agricultural nuisance lawsuit if a second neighboring property owner (who might not even object to the current practices) established his or her non-agricultural use prior to the farm initiating its current practices. In essence, the current language creates a loophole to the moving-to-the-nuisance doctrine and effectively restricts a farmer to the practices employed as of the time the first neighboring, non-agricultural use was established. To remedy this problem, the legislature should peg protection to the date the litigant takes ownership of the neighboring property. This proposal effectuates the principles of the moving-to-the-nuisance doctrine while still providing notice to non-agricultural landowners who choose to move near a farm.

The second problem with the current language is that farmers are largely prevented from adapting to changing market conditions because they cannot engage in "significant change" and still receive right-to-farm protection. This restriction ultimately undermines the sustained future of Vermont's agricultural sector because every producer will eventually become locked into certain agricultural practices as non-residential uses proliferate in rural Vermont. Given the prospects of litigation, producers may find agriculture too risky to make the long-term investments necessary

137. VT. STAT. ANN. tit. 12, § 5751 (2011).

138. *Id.* § 5753(a)(1)(D).

to sustain a successful agricultural operation. Further compounding this problem is the uncertainty inherent in the ambiguous term “significant change.” Without assurances of continued protection, producers are discouraged from adopting more profitable, and perhaps more environmentally friendly, practices. To strengthen protections for producers, the legislature needs to establish a clear and predictable flexibility mechanism that permits producers to make needed changes in light of market conditions.

To provide clarity, the legislature should adopt the Colorado approach and define the term “significant change” by enumerating activities that are “insignificant.”¹³⁹ This proposal provides producers greater certainty for investing in new practices while affording neighboring landowners some notice of the permissible future activities on surrounding farmland. Without legislative intervention, the task of defining “significant change” ultimately falls on the Vermont Supreme Court. As evidenced by *Trickett*, the court seems to hold a narrow view of what constitutes “significant change,”¹⁴⁰ and the legislature should not allow the court to make additional interpretations of this term if it seeks to protect farmers.

In addition, Vermont should also adopt a statute of repose, which provides protection for activities that do not receive complaints within a statutorily defined period of time, to cover all non-enumerated activities that otherwise comply with the law.¹⁴¹ A statute of repose would provide farmers added flexibility to change their operations while granting neighboring landowners an opportunity to challenge objectionable new practices. Determinations of the validity of complaints should be handled through administrative proceedings with a right to appeal to the courts. Furthermore, such a provision might be necessary to avoid constitutional challenges to right-to-farm provisions that eliminate private-nuisance liability for activities initiated after the establishment of non-agricultural uses.¹⁴²

139. COLO. REV. STAT. § 35-3.5-102(1)(b) (2011). Colorado permits agriculturalists to change ownership, briefly cease production, participate in a government program, adopt new technology, or change the agricultural product produced without losing right-to-farm protection.

140. *Trickett v. Ochs*, 2003 VT 91, ¶ 19, 176 Vt. 89, 96, 838 A.2d 66, 73–74 (2003) (describing new waxing, packaging, refrigeration, and trucking practices at an apple orchard as “significant change[s]” despite the trial court’s determination that such activities were “reasonable”).

141. *See, e.g.*, OKLA. STAT. tit. 50, § 1.1(C) (2011) (“No action for nuisance shall be brought against agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action.”).

142. As discussed previously, the *Bormann* court struck down a statute that provided private-nuisance immunity, regardless of the date neighboring non-agricultural uses are established, as unconstitutional. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 314 (Iowa 1998). In *Overgaard*, a federal district court relied heavily on a statute of repose in upholding the constitutionality of Minnesota’s right-to-farm law that provided private-nuisance immunity for activities initiated after the

By adopting these flexibility mechanisms, the Vermont legislature can better effectuate the goals and objectives laid out in the purposes section of the current statute. Allowing agriculturalists to evolve to meet existing market conditions is essential for preserving the long-term viability of Vermont's agricultural sector. With a competitive farming industry, Vermont can capitalize on both the economic and non-economic benefits of agriculture recognized by the legislature.

G. Exemption from Municipal Regulation

Vermont law provides agricultural producers with certain exemptions from municipal regulation, although these are not found in the right-to-farm statute itself. The most prominent of these are the exemptions from local zoning and development bylaws¹⁴³ and the Act 250 permitting process.¹⁴⁴ However, this is an area where Vermont's efforts to protect farming may be too strong. The complete exemption inspires great consternation for municipalities attempting to regulate growth. It may also facilitate unwise development, such as development in a floodplain or other hazard areas. Additionally, the exemption may encourage construction of unnecessary structures that ultimately reduce the agricultural potential of the property. This could potentially serve as a backdoor means of circumventing restrictions on conditional uses and facilitate the conversion of agricultural properties to non-agricultural uses.

The extent of the exemptions is profound and counterproductive to the goal of protecting agricultural viability. While any amendments to these exemptions should preserve a farmer's ability to make reasonable improvements with minimal municipal oversight, agricultural interests would be wise to use the exemption as a bargaining chip for obtaining some of the other proposals included in this Note.

H. Attorney Fee Recovery

Agricultural producers currently cannot recover fees and expenses under Vermont's right-to-farm law. This leaves cash-strapped farmers vulnerable to bankruptcy or ceasing operations upon the filing of a lawsuit, even if a producer ultimately prevails. Such an outcome conflicts with the law's stated purpose of preserving the state's agricultural economy.¹⁴⁵ Other

establishment of neighboring non-agricultural uses. *Overgaard v. Rock Cnty. Bd. of Comm'rs*, No. Civ. A. 02-601, 2003 WL 21744235, at *7 (D. Minn. 2003).

143. VT. STAT. ANN. tit. 24, § 4413 (2011).

144. VT. STAT. ANN. tit. 10, § 6001(3)(D) (2011).

145. VT. STAT. ANN. tit. 12, § 5371 (2011).

jurisdictions provide a host of ways in which to construct a fee-recovery provision. While awarding fees for frivolous lawsuits provides an initial level of protection, the Vermont legislature should adopt the Texas approach that guarantees fee recovery upon the successful defense of any agricultural nuisance suit.¹⁴⁶

I. Disclosure

An innovative prophylactic means of alleviating tension between new residents and farming operations is a disclosure requirement. The Vermont legislature should mandate, as New York does,¹⁴⁷ a requirement that some notification be provided to potential purchasers of real property in proximity to agricultural uses. However, given the number of rural houses sold in Vermont, real-estate interests would certainly oppose such a provision.

J. Remedies

Vermont's right-to-farm law places no limitations on a court's ability to craft relief upon a finding of a nuisance. Previous decisions have granted permanent injunctions, the traditional remedy.¹⁴⁸ That means Vermont producers who fall out of line with accepted practices or modify their operations to maintain viability might also face an injunction. To ensure the preservation of the state's farming economy, the legislature should adopt Wisconsin's approach to limiting available remedies. The Wisconsin approach prohibits courts from granting any relief that adversely affects the economic viability of the farming operation, thereby providing producers the greatest level of protection.¹⁴⁹

146. TEX. AGRIC. CODE ANN. § 251.004(b) (West 2011).

147. N.Y. AGRIC. & MKTS. LAW § 310 (McKinney 2011).

148. *See, e.g.*, *Trickett v. Ochs*, 2003 VT 91, ¶ 39, 176 Vt. 89, 104, 838 A.2d 66, 78 (2003) (imposing an injunction on a farmer who was not protected by the right-to-farm law).

149. *See* WIS. STAT. ANN. § 823.08(1) (West 2011) (prohibiting a court from granting relief that would "substantially restrict or regulate the agricultural use or agricultural practice" unless the practice causes a substantial threat to public health or safety). Further, courts in Wisconsin are obligated to incorporate mitigation measures suggested by public agencies and provide the farmer sufficient time to incorporate these measures. *Id.* § 823.08(2). Finally, courts are proscribed from granting any relief that adversely affects the economic viability of the farming operation. *Id.* § 823.08(3).

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CONCLUSION

Although Vermont's right-to-farm statute provides farmers with basic protection from private-nuisance liability, it is drastically inadequate in light of its shortcomings, the alternatives employed in other states, and the ongoing changes in the agricultural industry. Given the legislature's determination that the state's agricultural industry is important and deserving of protection, policymakers should consider instituting the reforms proposed in this Note. If political realities limit the legislature's ability to consider all of the proposals, the legislature should focus on adopting a flexibility mechanism, adjusting the standard for overcoming the presumption of reasonableness, and adding some form of fee recovery because these proposals address the most glaring deficiencies with Vermont's statute. While a revamped right-to-farm law will not guarantee the long-term viability of Vermont's agricultural industry, it would provide valuable protection from a primary threat.

—Garrett Chrostek**

