Wisconsin Legislative Council
INFORMATION MEMORANDUM

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WISCONSIN'S RIGHT TO FARM LAW

Wisconsin's "right to farm" law is set forth in s. 823.08, Stats. Despite its colloquial name, the law does not explicitly create a "right" to farm. Instead, it 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 the plaintiff's property.

A plaintiff can proceed on the grounds that the alleged nuisance is either "private" or "public." 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 private and public 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 advancements in agricultural technology, practices, and scale of operation. In particular, the law established limits on the remedies available in certain 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 zoned exclusively for agricultural use.[2]

If the land 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.
- Awarding nominal damages only, 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.
- 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 zoned exclusively 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. These changes are reflected in Wisconsin's current right to farm law, which has been largely unchanged since that time. Despite the statute's longstanding operation, there are very few published cases on it. The lack of case law may indicate that the law is effectively fulfilling its statutory purpose by deterring nuisance actions that might otherwise arise from agricultural uses and practices.

Like the first right to farm law, the current version limits the available remedies in a successful nuisance action. The current version, however, also limits the scope of a nuisance action. In another departure from the first right to farm law, the current version applies equally to areas zoned exclusively for agricultural use and to areas not so zoned.

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[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] The statute referred to land zoned exclusively for agricultural use as land "subject to an ordinance." [s. 823.08, 1981-82 Stats.]

Limited Scope of a Nuisance Action

Under the current right to farm law, an agricultural use or practice will not be found to be a nuisance if all of the following apply:

- The alleged nuisance is an **agricultural use or practice**. The statute defines "agricultural use" by listing various agricultural activities conducted for the purpose of producing an income or livelihood, such as crop production and keeping livestock.[3] It defines "agricultural practice" as any activity associated with an agricultural use.[4] A Wisconsin court recently used a plain language approach to construe the word "associated" in this latter definition as meaning "related to" or "connected with." It thus concluded that farmland drainage activity undertaken by the farmer was indisputably associated with crop production (i.e., an "agricultural use") and thus was an "agricultural practice."[5]

- The agricultural use or practice is conducted on, or on a public right-of-way adjacent to, land that was **in agricultural use without substantial interruption** before the plaintiff began the particular use of his or her land that the plaintiff claims was interfered with by the agricultural use or practice (i.e., the plaintiff "came to the nuisance"). The proper test is whether the defendant's land was in agricultural use—by anyone—before the plaintiff's use of the plaintiff's land began.[6]

- The agricultural use or practice does not present a **substantial threat to public health or safety**.[7]

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 land on which the alleged nuisance is located was not previously in agricultural use, that such land was previously in agricultural use but the agricultural use 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 any of these findings, the plaintiff still must successfully prove that the agricultural use or practice constitutes a nuisance in order to win the lawsuit.

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[3] The other listed activities are forage production; beekeeping; nursery, sod, or Christmas tree production; floriculture; aquaculture; fur farming; forest management; or enrolling land in a federal agricultural commodity payment program or a federal or state agricultural land conservation payment program. "Agricultural use" also means any other use that the Department of Agriculture, Trade and Consumer Protection by rule, identifies as an agricultural use. [ss. 91.01(2) and 823.08 (2) (b), Stats.]

[4] s. 823.08(2) (a), Stats.

[5] *Buchholz v. Schmidt*, 2024 WI App 47, ¶¶29, 35. In certain circumstances, drainage activity conducted by a drainage district might not be an agricultural practice under the right to farm law. *Id.* ¶ 40 (discussing *Timm v. Portage Cnty. Drainage Dist.*, 145 Wis. 2d 743 (Ct. App. 1988)).

[6] *Id.* ¶ 44 ("when considering the nuisance-creating activity, the focus is on the use of the land irrespective of who used the land at any given time; by contrast, when considering the interfered-with use, the focus is on the plaintiff's' use of that property. The timing comparison is not between the defendant's use and the plaintiff's use, but between the land's use and the plaintiff's use.").

[7] 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 must 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.

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 must 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 act (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.

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.[8]

This information memorandum was prepared by Ethan Lauer, Senior Staff Attorney, on September 5, 2024.[9]

[8] 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.]

[9] A previous version of this information memorandum was prepared by Kaitlin Farquharson, Legal Intern, on October 18, 2016.