

Agricultural Nuisance Liability in Nebraska after LB 227 (2019)*

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Introduction

In the 2019 legislative session, the Nebraska Legislature considered [LB 227](#).¹ Driven in part by a concern for large verdicts awarded in cases in North Carolina and a need to expand producer protections to accommodate agricultural growth, it adopted modest changes to the statutory nuisance protection for agricultural producers. That statutory protection is often referred to as a “right-to-farm law.”

Nebraska first started wrestling with the issue of protecting producers from nuisance suits in 1977, with significant amendments in 1980.² In 1982, Nebraska adopted new statutes that largely displaced those earlier efforts. Those 1982 statutes, [Neb. Rev. Stat. sections 2-4401 through 4404](#) were the subject of LB 227. This Article provides a brief background on Nebraska’s right-to-farm law. It then uses that background to show the significance of the proposed changes the legislature considered in 2019. This Article then offers some commentary on the course of the bill and the resulting legislation. In the end, while there were very significant changes on the drawing board during the course of debate, the legislature settled on a more moderate form of producer protection—a two-year statute of limitations—that could prove harmful to the unwary.

* An earlier version of this article was published in the [Agricultural Law Update](#), a publication of the American Agricultural Law Association.

¹ The link contains the initial legislation, all amendments related to the legislation, and the slip law.

² See [Neb. Rev. Stat. 81-1506\(1\)\(b\)](#).

Background

The details of Nebraska's land use regulation as it pertains to livestock operations can be found elsewhere.³ But some background is necessary here.⁴ The right-to-farm defense to nuisance liability is best understood by starting with the conditions under which liability may attach to producers. To some extent, the uncertainty attending the legal standards for nuisance liability contribute to the willingness of legislators to protect producers.⁵

Nuisance liability is an important aspect of property ownership and use. It is the primary common-law means by which we determine rights and duties among neighboring property owners. In essence, it is the golden rule: Do unto others, as you would have them do unto you. This golden rule is important because nearly no land use is free of external impacts. So, the law must allow for judgments concerning the harms we must bear as landowners and those we must refrain from imposing on our neighbors. The legal standard used in Nebraska, which is common, focuses on how significant a harm is or, more precisely, the significance of the interference that one's land use poses to her neighbor's land use. Nebraska courts, in equity, require that the interference be "substantial," which requires that the use would cause a person of ordinary sensibilities actual physical discomfort. At law, Nebraska courts have adopted the *Restatement (Second) of Torts* approach, requiring that the interference be both intentional and unreasonable, where unreasonableness involves a balancing inquiry that seeks to determine whether or not the utility of the interference-causing land use justifies the gravity of the harm it causes.⁶

³ [Anthony B. Schutz, *Land Use Law and Livestock Production*, THE HISTORY OF NEBRASKA LAW \(2008\)](#).

⁴ See also [Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 707–12 \(2013\)](#) (briefly discussing some of the development of right-to-farm laws since the common law era).

⁵ Constitutional questions loom about whether compensation should be paid when producers are protected with right-to-farm laws. See [Bormann v. Bd. of Supervisors](#), 584 N.W.2d 309 (Iowa 1998) (finding Iowa's Right to Farm law constituted a taking); [Gacke v. Pork Xtra, LLC](#), 684 N.W.2d 168 (Iowa 2004); [Honomichl v. Valley View Swine, LLC](#), 914 N.W.2d 223 (Iowa 2018). Such questions are beyond the scope of this article.

⁶ *Restatement (Second) of Torts* § 822 (1979); [Hall v. Phillips](#), 231 Neb. 269, 278, 436 N.W.2d 139, 145 (1989). Further Nebraska cases enunciating these

Of course, these standards lack specifics. This is one of the main benefits of nuisance liability: it is endlessly adaptive to the various conflicts that can arise on landscapes in private ownership, where each owner enjoys wide latitude in what they can do with their property. Rural landscapes, of course, have that sort of variety today. Residential uses, commercial uses, industrial uses, recreational uses, uses involving natural amenities like rivers and streams, uses geared at the preservation of wildlife, and so on, all exist on the same rural stage. These sorts of uses sometimes come into conflict. Nuisance law is an important means of resolving disputes involving such conflicts. Again, however, the interference imposed by one land use on another must be substantial or unreasonable.

Illustrations can help put a face on these necessarily vague standards. Such a picture emerges from the reported cases. The Nebraska Supreme Court, for example, has concluded that nuisance liability may arise when an adjacent livestock operation effectively makes a home uninhabitable. But not all conflicts involve residential homeowners in rural areas suing livestock operations. For instance, in another case, the court concluded that atrazine drift may give rise to nuisance liability among agricultural landowners.⁷ Pesticide drift cases are also litigated under nuisance rules.⁸ In all cases, the court does not allow a plaintiff to pursue a nuisance case merely because he is dissatisfied with his neighbor. The court requires significant harms that are unjustified under the circumstances.

With this understanding of liability, the role of nuisance immunity can be clearly understood as requiring one landowner to tolerate substantial or unreasonable interferences with his property. So, the residential neighbor would have to tolerate the livestock operation, the soybean farmer has to tolerate the atrazine drift, and

standards are collected in Schutz, *supra* note 3. Links to them are found *infra* note 7.

⁷ A good example of nuisance liability can be found in [Cline v. Franklin Pork Inc.](#), 210 Neb. 238, 313 N.W.2d 667 (1981) (hog operation), [Stephens v. Pillen](#), 12 Neb. App. 600, 681 N.W.2d 59 (2004) (hog operation), and [Hall v. Phillips](#), 231 Neb. 269, 436 N.W.2d 139 (1989) (atrazine drift). A helpful collection of nuisance cases involving livestock operations can be found at <https://agecon.unl.edu/research/nebraska-livestock-expansion-white-paper.pdf> on page 14.

⁸ See [Johnson v. Paynesville Farmers Union Co-op](#), 817 N.W.2d 693 (Minn. 2012).

the organic producer has to tolerate the pesticide drift. This, clearly, constitutes a reduction in one property owner's property rights and an expansion of the other's property rights. Where the neighbor once had the ability to seek recourse for the burden placed on his land ownership, nuisance immunity would force him to accept that burden. Such immunity elevates the rights of the protected landowner over those of the unprotected one. Respect for such rights therefore requires, at least,⁹ that such an endeavor be undertaken with great care.

Right-to-Farm Laws in Nebraska

Historically, Nebraskans have been careful with the extent to which we will elevate the property rights of farm operations over those of other rural land uses (farms, residences, etc.). To date, our efforts at providing nuisance immunity to farmers have all involved ensuring that a newcomer residential rural neighbor could not sue a long-standing farm operation claiming it had become a nuisance.¹⁰ Such an assurance comports with the oft-occurring notion that first-in-time is first-in-right. In those cases, the policy judgement was that newcomer residents should take their property rights subject to any interference caused by an older adjacent farm operation's activity. That activity, by the terms of the right-to-farm law, must not have constituted a nuisance before the newcomer arrived.

As an example, imagine a livestock feeding operation that is operating without imposing a substantial or unreasonable burden on adjacent farm fields. Such an operation is not a nuisance. However, if a parcel of adjacent property is sold to someone who erects a home and begins to use the property for residential purposes, the operation of the livestock feeding operation may become a nuisance. The policy solution to this perceived injustice is to bar the newcomer residential neighbor from recovery against the long-standing farm

⁹ Constitutionally, such an elevation may constitute a forced conveyance of a servitude that requires compensation. See [Bormann v. Bd. of Supervisors](#), 584 N.W.2d 309 (Iowa 1998).

¹⁰ There are two right-to-farm laws in Nebraska. [Section 81-1506](#) is our earliest version. [Sections 2-4401 through 2-4404](#) are our newest versions, with the operative provision found at [2-4403](#). The latter was amended by this bill. Nebraska is one of ten states that has a first-in-time immunity standard. See [Loka Ashwood, et al., *Property rights and rural justice: A study of U.S. Right-to-Farm Laws*, 67 J. RURAL STUDIES 120, 126-27 \(2019\).](#)

operation. As a result of the right-to-farm law's immunity, newcomers have the burden of avoiding areas where their homes might interfere with established land uses.

These early efforts at protecting farmers were very much geared at maintaining the status quo, despite a change in the type or character of land uses on nearby properties. Maintaining the status quo, however, does little to protect a producer who changes their land use to a more intensive production model that has significant adverse impacts on neighboring land uses.

To recast the example from above, imagine two rural homesteads on adjacent quarter sections involving row-crop production. The homes and building sites were built around the same time and have been continuously occupied by the same two farm families. One of the families decides to expand their operation into swine production and builds a large farrowing unit, complete with a lagoon and sprayfield on the quarter section they own. Given the prevailing winds and the proximity, this change makes the other homestead uninhabitable. Nebraska's existing right-to-farm law does not protect this operator from nuisance liability because the swine operation did not precede the adjacent residential/farmstead use.¹¹ It was not first in time. In such cases, the expanding operation has the burden of avoiding areas where their expanded operations might interfere with established land uses.¹²

While this expansion from row-crop production to confined animal feeding is a stark change in circumstances, other changes are more subtle and spread out over longer periods of time. This sort of progression does not nicely fit the right-to-farm statutes' notion of "first in time." Take, for instance, a small feedlot feeding perhaps 100 head of cattle for a month or two during a year. Such an operation could expand to feeding 10,000 head of cattle, with cattle on feed all year round. If that operation achieved that growth over a

¹¹ For a similar case see [Flansburgh v. Coffey](#), 220 Neb. 381, 370 N.W.2d 127 (1985).

¹² There are options for doing this. One option is to buy property where the operation will have less of an impact. Planning and zoning can assist in designating such areas on a large landscape. Another option is to purchase easement rights from adjacent property owners that would eliminate the ability of the adjacent property owners from engaging in conflicting land uses (like, for instance, residential uses) or from suing for nuisances, or both.

period of ten years, at what point might we say it has “changed”? At what point might we conclude that the feedlot is now new, relative to the adjacent land uses? That newness, of course, serves to divest the feedlot from its nuisance protection under the right-to-farm law. As agriculture industrializes, these expansions are arguably necessary for the continued vitality of existing operations.¹³ But the land-use impacts of these changes are significant and, sometimes, producers face liability for harming their neighbors.¹⁴ These tensions (along with a general hostility to civil liability) were cited as the main reason for modifying the right-to-farm statutes during the debates on LB 227.

LB 227

Discussing the parameters of what became LB 227 is somewhat difficult because it changed substantially over the course of its consideration. In fact, the amendment presented on the floor bore little resemblance to the bill that was considered by the Agriculture Committee. For discussion, it helps to distinguish between two different phases of the legislation (despite the multiple versions of language that emerged through the amendment process). The first phase (embodied in the original bill, as well as [AM 746](#) and [AM 1209](#)) involved a push for dramatically expanded nuisance immunity to all farming operations, regardless of any changes in the type or intensity of their land use. That phase of bill development abandoned the first-in-time principle. This would have been a remarkable expansion of nuisance immunity, absolving even the new hog operation in the example above from all nuisance liability, as well as the expanding feedlot. In the second phase (embodied in [AM 1287](#), and [AM 1485](#)), the legislature turned its focus to limiting the time frame within which a plaintiff could sue a farming operation

¹³ *But see generally* [Ashwood](#), *supra* note 10, at 127 (largely discussing the negative impact that laws tailored to larger-scale production have on smaller producers such as “family farmers”).

¹⁴ *See also* [Pifer](#), *supra* note 4, at 707–12 (discussing how modern changes may also involve impact smaller producers who may turn to other modes of profit-generation that may preclude their protections under right-to-farm statutes without expansion of the statutes’ coverage).

for nuisance. Ultimately, the legislature settled on a limitations period (embodied in [AM 1485](#)).¹⁵

The development of this bill illustrates how difficult balancing competing property-rights claims is. Generally, the expansion of Nebraska’s right-to-farm law was bogged down by a debate about what conditions ought to attend a broader nuisance immunity. Specifically, it was a debate about the circumstances under which one property owner ought to bear the impacts of a neighboring property owner’s use of her property. No one seemed to think that producers should never be liable for the harms they pose to neighbors. Rather, the producer was to be protected—sometimes. Historically, we concluded that producers should be protected when they were there first, even if they are harming their neighbors. In expanding nuisance immunity, the legislature ran headfirst into the task of identifying other times when producers should be protected from legitimate nuisance claims.¹⁶

Phase 1

In the first phase of the legislation, the bill attached four conditions on the expansion of nuisance immunity having to do with the following subjects: (1) enterprise longevity, (2) operational changes, (3) manner of operations, and (4) regulatory compliance.

The first requirement was that the farming operation needed to operate for at least a year to qualify for immunity. At one point, the language seemed to require that the farming operation not be a nuisance during that time. Subsequent amendments removed that language. In any event, this condition contained the seed for what the legislation would become. The basic idea was that if a farming operation had been up and running for a certain period of time, it should not be called upon to cease or pay in a lawsuit. That idea is not that far removed from the idea of protecting producers from

¹⁵ For video discussions of these developments, visit the following links: Before AM 1209 [here](#) (April 2, 2019); After AM 1209 [here](#) (April 9, 2019); AM 1287 [here](#) (April 10, 2019); AM 1485 [here](#) (April 27, 2019).

¹⁶ The expansion from a “longevity of place” is a common aspect of how these laws have changed in many states. See [Ashwood](#), *supra* note 10, at 127. While first-phase expansion would have essentially decimated a first-in-time principle, Nebraska’s ultimate conclusion (a two-year provision) also rests on different values, unrelated to this original sentiment.

newcomers, like the original right-to-farm legislation.¹⁷ Both ideas are based to some extent on the passage of time. Nevertheless, most farming operations in the state have been operating in some form or another for at least a year. In substance, then, such a provision standing alone would appear to be a blanket immunity for all farming operations. The provision did not, however, stand alone.

The second condition was that the operation had not undergone any significant change. The no-change criterion could have operated as a significant limit. And when taken in light of the first condition, a one-year clock would attend every significant change in a farming operation. However, the concept of “no significant change” was defined so broadly as to transform the no-change criterion into a license for unlimited change. It did this by defining significant change to exclude any change in ownership, change in technology, change in government enrollment status, and change in the type of farming operation. The final part of the definition—a change in the type of farming operation—was probably the most noteworthy. It meant, for instance, that the conversion of a (year-old) row-crop operation to a large livestock facility was not a significant change and, thus, would be protected from nuisance liability if it fulfilled the remaining conditions. Such a conversion was not a “significant change.”

The third condition dealt with the manner in which the operation was conducted. Specifically, it required that the producer use reasonable techniques to keep dust, noise, insects and odors to a minimum. Such a requirement offered neighbors some protection. But it was problematic in at least three ways. First, the scope of the list became the source of debate. Dust, noise, insects and odors were not the only sorts of things that could make one’s life as a neighbor miserable. Things like light from an adjacent property during sleeping hours, vermin, stormwater runoff, standing water, heavy truck traffic, and chemical (herbicide or pesticide) or pollen drift also emerged as potential sources of interference.

¹⁷ However, some commentators have noted that statutory requirements such as a one-year immunity establishment period actual benefit large corporate producers to the detriment of the family farms the right-to-farm laws were erected to protect. *See, e.g.,* [Socially Responsible Agricultural Project, Press Release: Study Is First of Its Kind to Analyze U.S. Right-to-Farm Laws, \(Apr. 4, 2019\)](#).

Second, the attention it did pay to dust, noise, insects and odors was arguably incomplete. The requirement of “reasonable techniques” arguably failed to consider the impact of dust, noise, insects and odor on the neighbor. What was reasonable might, for instance, turn simply on what was cost-effective in the particular industry. Nebraska nuisance law has long rejected a focus on how reasonable the manner of a defendant’s operation is.¹⁸ It does this for a good reason: nuisance liability is concerned with the significance of the harm to the plaintiff, not how good the defendant is at doing what they do. Sometimes a land use simply has adverse impacts that cannot be avoided with reasonable care. In such cases, liability still attaches if the neighboring plaintiff is being forced to bear an untenable burden. This bill’s introduction of reasonableness into the manner of the operation as a condition on nuisance immunity would not protect neighbors if it ignored the impact on them. They would have been left to shoulder even the most inevitable and foreseeable burdens attending production, regardless of how significant the interference with their land use was, so long as the techniques the producer was using were reasonable. This concern emerged as the legislature debated the first phase of proposals.

Third, the term “to a minimum” (which pertained, again, only to noise, dust, insects, and odor) also arguably had no relation to what is tolerable for an adjacent property owner. The concern, again, is the impact of the unavoidable. Unavoidable amounts of dust, noise, and odor may nonetheless make a home uninhabitable or substantially interfere with some other adjacent, legal, and beneficial land use. Whether such amounts of dust, noise, and odor were at “a minimum” was unclear and, again, the focus of debate.

As debate wore on, later amendments sought to change the reasonable-techniques language to assuage interference-based

¹⁸ See [Botsch v. Leigh Land Co.](#), 195 Neb. 509, 513–17, 239 N.W.2d 481, 484–87 (1976) (“The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance.”); [Hall v. Phillips](#), 231 Neb. 269, 278, 436 N.W.2d 139, 145 (1989) (“[O]ne may have to endure insubstantial interferences with the use and enjoyment of land, but an invasion or interference which is substantial may result in equitable liability for a private nuisance and consequent damages, regardless of the reasonableness of the interference.”).

objectors. The main proposal was to introduce the phrase “reasonable techniques to mitigate negative effects on the property of others, including, but not limited to, reasonable techniques to keep dust, noise, insects, and odors at a minimum.” It was hardly clear that this change meant anything, but it at least mentioned effects. And expanding the attention beyond the manner of operations was somewhat responsive. But changing the language from “to a minimum” to “mitigation” through a double dose of “reasonable techniques” was a step in a different and confusing direction.¹⁹

The fourth and final condition was that the producer comply with “applicable laws and regulations, including any zoning regulations.” This requirement is commonly found in right-to-farm laws. In fact, Nebraska’s other right-to-farm statute contains such a requirement.²⁰ It was here, however, that the role of nuisance law in the land-use regulatory structure emerged as a concern.

The best objection to this aspect of the legislation was that compliance with the existing slate of agricultural environmental laws and county zoning did little to guard against the specific neighbor-to-neighbor impacts of modern production agriculture on an increasingly complex rural landscape. And some logic began to set in as well: If such regulations did avoid those impacts, then there is little reason to fear nuisance liability. And if there is no reason to fear nuisance liability, then why create immunity?

As a land-use matter (even in a state like Nebraska where zoning does apply to farm and ranch land) production agriculture is among the least regulated forms of industrial production. Most of our efforts at stemming agriculture’s impact on the environment tend to consist of (for very good reasons) cost-sharing and incentive-based approaches, rather than command-and-control regulations. Even something like the Clean Water Act has a large exemption in it for

¹⁹ At this point, the legislature may have come somewhat close to doing nothing. That is, if this proposal simply required producers to make sure the impacts they have on neighbors are reasonable, then it would basically be restating current nuisance law. It would, in essence, mean that to get nuisance immunity, you must not be a nuisance. But, given the language, it seems that the legislature was attempting to place manner over effect, in a way that the common law has long rejected in nuisance suits.

²⁰ See [Neb. Rev. Stat. 81-1506\(1\)\(b\)](#).

agricultural stormwater and return flows from irrigated agriculture. There is nearly no regulation of soil erosion or drainage in Nebraska. Odor is notoriously beyond the scope of regulatory attention. And the Clean Air Act has nearly no application to production agriculture. As a result, the bill's regulatory-compliance element overstated the significance of environmental regulation in the agricultural sector.

Moreover, many of those environmental laws are geared at protecting natural resources at state or national scales. Attention to such matters does not necessarily translate into protection for neighbors. So, compliance with such laws does little to protect neighbors. Generally, attention to such impacts are accomplished at local regulatory levels.

Local regulation in Nebraska consists primarily of county zoning. However, our land-use system is not yet up to speed on how to plan and regulate the increasingly intense forms of production agriculture on a landscape that involves so many other legal, beneficial, and investment-back land uses. Examples are emerging as applications for conditional-use permits for poultry operations are making their way before county boards in Nebraska.

But even when land-use regulation in Nebraska matures at the county level, it likely will still not displace the need for nuisance liability. Fundamentally, county zoning is part of a political process that very often, and by design, considers the good of the community over that of the individual applicant or neighbor. It is not often well-suited to dealing with the impact of a particular land use on an adjacent property. After all, one individual neighbor's burden is unlikely to result in political pressure on the elected board making the land-use decision. As a result, the politics of such decisions require a strong common-law backup like nuisance liability.²¹

County zoning also makes reasonable errors that nuisance liability helps deal with. For instance, error is likely to accompany the sorts of predictions that must attend the issuance of land-use

²¹ [Johnson v. Knox Cty. P'ship](#), 273 Neb. 123, 728 N.W.2d 101 (2007), is a good example of an operation in compliance with county zoning but, nonetheless, constituting a nuisance to its neighbors (at least at the summary judgment stage of litigation).

permits. Take for instance a conditional-use permit for a new swine operation in a hilly area of Dodge County near a winery, a parcel of land used for deer and duck hunting, and a home. Can all of the likely conflicts be anticipated, and can conditions be placed on the use that will protect these adjacent uses? If so, how much protection is necessary? And do we think the county zoning process is particularly well-suited to protecting the neighbors' legal, beneficial, and investment-backed land uses? It might. But it might not. And, historically, nuisance law operated to help deal with reasonable errors in the permitting process. Permit issuance and compliance often does not protect the interests of the applicant's neighbor.

County land-use decisionmakers are also wary of the uncertainty associated with the issuance of permits for livestock operations. It seems reasonable to anticipate that the lack of a nuisance backup would adversely affect the willingness of counties to permit intense agricultural land uses that could impact neighbors. There would be little margin for error. Moreover, the existence of the uses after they are permitted, along with the prospect of perpetual nuisance immunity, could significantly limit the pool of those willing to buy land nearby. Such an impact could further diminish the willingness of counties to permit intense agricultural land uses. And the willingness of counties to issue permits for livestock operations in particular has been a source of frustration for the industry. Nuisance immunity may exacerbate that problem.

Finally, to rely on zoning and environmental regulation as a means of protecting neighbors proves too much. If the permitting is sufficient to adequately deal with the external impacts of the new or expanded land uses, then there is no need for nuisance immunity, because there would be no nuisance.²²

²² Importantly, compliance with zoning is relevant to a nuisance inquiry, though not dispositive. Because nuisance liability is focused on the harm to the plaintiff it tends to focus first on that aspect of the plaintiff's claim. However, the question of whether the gravity of a particular harm is justified by the utility of the harm-causing land use involves questions about the comparative suitability of land uses to the location. Compliance with zoning is relevant to the suitability of a particular land use in a particular place.

Taken together, these four conditions—(1) enterprise longevity, (2) operational changes, (3) manner of operations, and (4) regulatory compliance—were difficult to defend and, in many instances, raised significant questions about the scope of nuisance immunity and the functions of nuisance suits in the land-use regulatory arena.

Phase 2

As a result of the debate that ensued around the four conditions, the proponents of the legislation pulled back and reassessed their approach.²³ As they looked at the conditions, the one that seemed to garner the least objection was the one dealing with the extent to which the operation had been up and running with no lawsuits filed against it. A statute of limitations appeared to be feasible. But, as with any statute of limitations, the sticking point was not so much the time frame associated with bringing suit, but rather the time at which the clock starts running. Debates began to emerge around the concept of defining an “established date of operation” that started running the clock from various points in time, roughly categorized according to changes in the operation or changes in the impacts the operation had on neighbors.²⁴

In the end, they settled on language that tries to start the clock from the time at which the producer’s operation becomes a nuisance:

No suit shall be maintained against a farm or farm operation . . . for public or private nuisance more than two years after the condition which is the subject matter of the suit reaches a level of offense sufficient to sustain a claim of nuisance.²⁵

²³ In the interim, I proposed a replacement that sought to bring the various points up for debate in an organized fashion. While the proposal was never presented as an amendment, the text and a brief explanation can be found here: <https://tinyurl.com/schutzRTF>

²⁴ See [Steven D. Shrout, *Missouri’s Right to Farm Statute’s Durational Use Requirement and The Right to Farm Amendment*, 83 UMKC L. REV. 499, 516 \(2014\)](#) (discussing in part the impact of different accrual bases on right-to-farm statutes of limitation and noting that an accrual based on the nexus of the nuisance provides “slightly more protection” to adjacent properties).

²⁵ [Neb. Rev. Stat. § 2-4403\(2\) \(2019\)](#).

Further language was added to ensure that court orders for remediation of a nuisance would be effective beyond the two-year period.

The obvious objection to this language is that the very amorphous nature of nuisance liability means that determining when the clock started to run will be difficult. As a defense to nuisance liability, it seems likely that the producer will have the burden of showing when the interference became substantial or unreasonable. But it is unclear what, exactly, might have to be shown. For instance, will it be necessary for the producer to show that the plaintiff knew or should have known of the interference for at least two years? And what of the notion that a nuisance doesn't exist until damage occurs? Does the "level of offense sufficient to sustain a claim of nuisance" require that the offense cause harm? If so, would the continuing nature of some nuisances mean that this legislation really only limits the time period for which past damages can be assessed?

Many questions remain, but it is clear there is a new layer of complexity to nuisance litigation. Perhaps that was the end game for proponents of this legislation. It will make recovery more difficult and increases the costs of litigation. So, it may nonetheless have a chilling effect on nuisance litigation in Nebraska.

Conclusion

While producers' worries about nuisance liability are understandable, limiting their liability is problematic. Pitting rural interests against agricultural interests, the debate over the scope of LB 227 highlighted the issues that arise. At a deeper level, it also illustrated the utility of nuisance suits in the land-use scheme. There are, of course, drawbacks to the civil liability system. But we have yet to come up with a better gap filler that adequately attends to the proper balance of rights among neighbors.

As agriculture continues to develop and rural areas are used in different ways, conflicts are likely to arise. Production agriculture has the potential to conflict, at times, not just with rural residential uses, but also with recreational pursuits, nature-based entrepreneurship, and other forms of agricultural production. A

useful comparison is the development of land-use planning and regulation on urban landscapes. There, the emergence of more intense land uses that had large external impacts among a variety of different types of land uses did not lead to nuisance immunity for growing industries. Rather, it led communities to plan and regulate in a way that ordered land uses to avoid conflict. Such ordering enhanced the value of the land within the community, as property owners could better anticipate what uses would be made of property in and around the areas where they were seeking to make investments. However, nuisance law persisted as a means of providing the backups discussed above.

The modern development of rural landscapes is presenting us with the same sorts of difficulties that have faced policymakers on urban landscapes for nearly 100 years. And today we are developing a more sophisticated understanding of the external impacts of production agriculture. Taken in that light, it is difficult to see why the response should be to eliminate an important part of the legal structure (nuisance liability) and pay little attention to the prospect of avoiding these conflicts through good planning and zoning.²⁶ Rather, it is even more important to keep a robust system for balancing neighboring landowners' ownership rights.

But, what's done is done. And, at this point, Nebraska plaintiffs had better go to court within two years of when things gets bad.

²⁶ For a discussion of other options for reconciling these interests see [Terence J. Centner, *Nuisances form Animal Feeding Operations: Reconciling Agricultural Production and Neighboring Property Rights*, 11 DRAKE JOURNAL OF AG LAW 5 \(2006\).](#)