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AMERICAN AGRICULTURAL LAW ASSOCIATION

INSIDE

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Cash and share lease provisions

In November, 2007, the Department of Agriculture sought comments on developing a set of regulations to determine when an agricultural real-estate leasing arrangement is a share-rent lease or a cash-rent lease for purposes of various farm programs, disaster assistance, crop insurance, payment eligibility, etc.

Distinguishing between cash and share rent becomes difficult in cases where the rental payment is structured in a way that places some production risk on the landlord. For example, consider a lease provision structuring payment at $80/acre with an additional payment in the event the tenant's yields or revenue on the rented land exceed a certain level. In this example, the additional payment is triggered by the level of the tenant's production in whole (if the trigger is a yield trigger) or in part (if the trigger is a revenue trigger). Thus, the lease involves both a cash-rent aspect (the $80/acre payment) and a share-rent aspect (the additional payment based entirely or partially upon yields). Additionally, some leases may allocate production risk to the landlord through the additional payment. This happens when the additional payment (regardless of the trigger) takes the form of a percentage of the crops harvested from the rented acreage.

Given the various programs' concern with production risk—e.g., as seen in insurable-interest requirements or payment-eligibility rules—the presence of such risk with the landlord will tend to make the lease a share-rent lease for the programs under consideration. Allocation of the landlord and tenant's share under such leases, of course, becomes difficult in these situations given the contingent nature of the additional-payment obligations.

Given the difficulties that these sorts of leases bring to program administration, as well as inconsistent approaches taken by different programs and agencies, the FSA and RMA are proposing to issue regulations to deal with these leases. The original comment period ended on November 27, 2007. However, the comment period has been reopened and extended to January 17, 2008. Details on submitting comments can be found at 72 Fed. Reg. 71606 (December 18, 2007), as well as www.regulations.gov.

—Anthony Schutz, University of Nebraska College of Law

Farm Service Agency overhauls loan programs

The statutes have not changed, but the implementation has. On November 8, 2007, the FSA and CCC issued final regulations to streamline the regulations governing direct loan programs. The release is published at 72 Federal Register 63242 through 63361. The release includes lengthy responses to comments, the regulations, as well as appendices setting forth new notification forms for distressed borrowers. Acting Agriculture Secretary Chuck Conner touted these changes as "a historic transformation in agricultural farm lending." Press Release No. 0332.07 (November 8, 2007).

The FSA is also in the process of making the entire system more user friendly. The number of loan forms will be cut in half, six handbooks will replace the forty loan manuals currently used in the loan programs, and procedures will be streamlined. FSA will also make the handbooks and forms available on the web at www.fsa.usda.gov. The changes are effective December 31, 2007.

—Anthony Schutz, University of Nebraska College of Law

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—Janie Hipp, CSREES/USDA

SWMA definition are "precisely the same activities which the Hapchuks contend are agricultural" (*Hapchuk*, at 180). Recognizing that the SWMA definition is not dispositive but only persuasive, the court also pointed to a long history of jurisprudence in Pennsylvania that used "agricultural" and "farm" interchangeably (*Id.* citing *Commonwealth v. Wetzel*, 435 Pa. 468, 257 A.2d 538 (1969)). Additionally, the township did not argue that the Hapchuk's use of biosolids on the part of their property zoned agricultural failed to conform to town zoning regulations but agreed that the use of biosolids on such property was permitted (*Id.*, at 180). As such, the court held that the Hapchuk's previously conforming use had not altered and was protected as a grandfathered use on the now residentially zoned portion of their farm (*Id.*, at 181). The Supreme Court of Pennsylvania denied the township's appeal (*Hempfield Township v. Hapchuk*, 537 Pa. 643, 644 A.2d 165 (1994)).

In New York, a strong home rule state, right to farm laws appear to be the only constraint on local regulation of biosolids (*Town of Butternuts v. Davidsen*, 686 N.Y.S.2d 239 (App.Div. 1997)). In 1971, New York adopted the Agriculture and Markets Law [AML], which provides for the creation of agricultural districts and the reduced taxation of lands outside agricultural districts that meet certain criteria, and grants the Commissioner of Agriculture of Markets the power to review farming practices (Harrison and Eaton, 2001, *supra*). The law also gives the State Department of Agriculture and Markets the power to review local laws and determine if they "unreasonably restrict or regulate farm operations within agricultural districts" (*Id.*, citing New York Agric. & Mkts. Law § 305-a(1)). This review can be initiated by the Department or by a request from someone within an agricultural district (Harrison and Eaton, 2001). The Department utilizes four criteria to determine if a local law exceeds its bounds: 1) whether the farm is in an agricultural district; 2) whether the regulated activity "encompass[es] farm operations;" 3) whether the local law is reasonable under the circumstances; and 4) whether it can be shown that the public health or safety is threatened (*Id.*).

In *Town of Butternuts*, the court upheld the Commissioner of Agriculture and Markets' finding that the town's local law prohibiting an industrial waste collector from spreading biosolids on a farmer's fields was in breach of New York's AML. Specifically, the local law prohibited the operation or maintenance of "dumps for the disposal of garbage and rubbish" in the town (*Town of Butternuts*, citing Town of Butternuts Local Law No. 2 of 1993). In 1996, the State Department of Environmental Conservation issued a permit to Van Houten Contracting Services, Inc. to spread biosolids on 40 acres of Bruce Guida's farmland (*Id.*, at 886). The town determined that the spreading of biosolids violated Local Law No. 2. Guida then petitioned the State Department of Agriculture and Markets to investigate the dispute (*Id.*, at 887).

The town argued that to make such an order the Commissioner was required to commence an action rather than merely conduct an investigation (*Id.*). The court found that while section 305(2) provides that the Commissioner may bring an action to enforce the provisions of the AML, section 305-a(1) contained no such provision (*Id.*). Further, AML section 36(1) allows the Commissioner to issue a compliance order after an investigation "if it is determined that any person, association or corporation has failed to comply with or is guilty of a violation of such provisions or regulation" (*Id.*, at 888). The court considered the Town of Butternuts as a corporation to fall within section 36(1), pursuant to New York General Construction Law sections 65(a)(1) and 66(1)(2), which deems municipalities to be corporations (*Id.*). Since the Commissioner's pronunciation followed an investigation in accordance with AML section 36(1) and since section 305-a(1) does not mandate the manner in which the Commissioner must seek enforcement of the AML, the court held that the Commissioner's order was within its power (*Id.*). Therefore, even in a strong home rule state like New York, "right to farm" laws still protect the land application of biosolids.

One of Virginia's two right to farm acts proves to be unique in at least two ways. Virginia Code Ann. § 3.1-22.28 provides that local governments may not require a special use permit or special exception for production agriculture in an area zoned agricultural. However, the statute explicitly excludes "the above ground application or storage of sewage sludge" from the definition of "production agriculture". Therefore, land application of biosolids receives no protection under this provision. The other Virginia right to farm act (Virginia Code Ann. § 3.1-22.29) provides more traditional protection of generally accepted agricultural practices and may cover land application of biosolids. However, the exclusion of the practice from Virginia Code Ann. § 3.1-22.28 may indicate legislative intent. No court cases interpret these provisions.

Conclusions

The land application of biosolids provides farmers with a low-cost or no-cost means of boosting production and profits. Although several concerns have been raised with respect to the human health and pollution effects of land application, no scientific evidence exists that conclusively proves harmful effects. However, the objectionable odors prompt vehement objections from nearby landowners and further research is necessary.

Nuisance consists of an interference with another's reasonable use of their property. Odors may rise to the level of a legal nuisance. In part due to state right to farm laws, no cases in the United States address whether land application of biosolids can amount to a legal nuisance.

State right to farm laws, raised in the context of objecting to local regulation of land application of biosolids, offer an alternative lens with which to examine the nuisance issue. Most court cases consider land application of biosolids as an agricultural activity protected by state right to farm acts. These rulings imply that, lacking right to farm protection, farmers could face successful nuisance challenges to this practice.

One of the two Virginia right to farm laws (Virginia Code Ann. § 3.1-22.28) provides an interesting contrast to the case law. This statute excludes land application of biosolids from the protection, while the case law generally holds that land application constitutes a protected agricultural activity. The exclusion from the Virginia statute may indicate political compromise or legislative intent.

Although land application of biosolids may pose inconveniences to nearby landowners, even to the point of a legal nuisance, the consensus in state case law appears to be that the value of the practice in agriculture outweighs the burden imposed by the odors.

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Land application of biosolids: nuisance or agriculture?

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Biosolids, also known as municipal sewage sludge, or solid residuals (Magesan, Gujja N., Wang, Hailong (2003). "Application of Municipal and Industrial Residuals in New Zealand Forests: An Overview". *Australian Journal of Soil Research*. 41 (3), 557-569) derive from the solid waste product of municipal wastewater treatment plants (Rostagno, César M., Sosebee, Ronald E. (2001). "Biosolids Application in the Chihuahan Desert: Effects on Runoff Water Quality". *Journal of Environmental Quality*. 30, 160-170). In 1996 the United States Environmental Protection Agency (US EPA) officially adopted the term biosolids to better illustrate both the positive aspects of the product and the progress made during the past 20 years in cleaning up the nation's waters through amelioration of the nation's vast wastewater treatment program (Frewerd, Brian (2001). "Biosolids: A New Road to Successful Recycling". *Environmental Protection*. December, 17-20, 45).

Biosolids consist mainly of biodegradable organic matter, but inorganic materials are also present in large amounts, such as heavy metals (Harris-Pierce, R.L., Redente E.F., Barbarick, K.A. (1995). "Sewage Sludge Application Effects on Runoff Water Quality in a Semiarid Grassland." *Journal of Environmental Quality*. 24(1), 112-115). The US EPA estimates that 6.9 million US dry tons of biosolids were produced in this country in 1998. United States Environmental Protection Agency. Forty-one percent of this total, or 2.8 dry tons, were land applied (Id.).

Because of the large concentrations of heavy metals and nutrients often present in biosolids, the disposal and recycling of municipal sewage sludge can be rather difficult from an environmental and economic perspective (Harris-Pierce et al., 1995, *supra)*. Increasing environmental awareness and increased costs associated with sludge disposal have led to an increased emphasis on beneficially reusing and recycling this material (Sumner, Malcolm E. (2000). "Beneficial Use of Effluents, Wastes and Biosolids". *Commun. Soil Sci. Plant Anal.* 31 (11-14), 1701-1715), in addition to the use and development of more advanced treatment processes (Davis, R.D. PhD, Glennie, E.B. PhD, Hobson, J.A. MA, Sivil, D (2000). "Environmental Implication of Incineration and Other Advanced Sludge Treatment Processes". *Water and Environmental Management: Journal of the Institution of Water and Environmental Management.* November, 158-163).

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Examples of advanced treatment processes include thermophilic aerobic or anaerobic digestion, composting, thermal drying, autothermic processes (lime treatment), and other pasteurization processes that eliminate pathogens from the sludge. Additional methods of disposal exist as well that are based on thermal destruction with energy recovery. These methods include incineration, co-combustion (in power stations or cement works), gasification, pyrolysis, and wet-air oxidation. Use in oil production also disposes of biosolids through thermal destruction with energy recovery. Advanced treatment tends to instill confidence in the use of biosolids. The high microbiological quality of biosolids after advanced treatment allows and encourages its use for agricultural land application with minimal land-use limitations (Davis et al., 2000, *supra*).

Land application of biosolids

Biosolid disposal methods include land application, landfilling, or digestion in lagoons (Harris-Pierce et al, 1995, *supra*). This paper focuses on land application.

Land application consists of a controlled method of spreading the sludge into or onto the soil surface (*Id.*). Land application of biosolids is an extensive and ingrained practice (Maguire et al., 2000, *supra*). Because of growing environmental awareness and the increased costs associated with the disposal of municipal sludge, emphasis on beneficial reuse and recycling of this material has increased. This method is becoming increasingly more common as it has been proven to be environmentally safe and economically efficient (Harris-Pierce et al., 1995, *supra*).

Land application of biosolids occurs on agricultural lands, rangelands, forestlands, and many other types of landscapes. The technique proves effective for fertilizer and mulch purposes on agricultural lands and on degraded grasslands. Biosolids have been used in mined-land reclamation efforts on coal spoils and on a copper-tailings dam (Harris-Pierce et al., 1995, *supra*).

Limitations have been imposed on biosolids disposal in recent years, including a 1992 ban on biosolids ocean disposal These restrictions, combined with a heightened social awareness regarding the necessity of recycling organic wastes, make land application of biosolids a very practical option (Rostagno et al., 2001, *supra*). The relatively new priority of recycling organics comes from an understanding of the direct relationships between increased productivity, environmental sustainability, and biosolids recycling.

However, barriers exist to wide-spread land application of biosolids. Land application generates odors that nearby landowners find objectionable. Consequently, the practice is extremely controversial. Area residents raise several objections. The question arises as to whether land application of biosolids rises to the level of a legal nuisance.

Concerns over land application of biosiolids

The initial fear when one learns of land application of biosolids often focuses on pathogen contamination to the food supply. In truth, pathogens are not a major threat. The contamination of groundwater and surface waters by heavy metals and nutrients contained within biosolids poses a more serious threat to environmental and human health (Glanville, Thomas D., Richard, Tom L., Persyn, Russell A. (2003). "Evaluating Performance of Compost Blankets". *Biocycle.* 44 (5), 48-54). The potentially toxic elements in biosolids include lead, nickel, and cadmium, while high nutrient concentrations of nitrogen and phosphorus can pose a threat to water quality (Rostagno et al., 2001, *supra*). For both heavy metals and nutrients, leaching of these contaminants occurs predominately within the first two or three days after application. Leaching of both heavy metals and nutrients occurs at faster rates when native soil is absent and, thus, the existence of organic matter is crucial in reducing the initial losses of nutrients and heavy metals (Gove, L., Nicholoson, F.A., Cook, H.F., Beck, A.J. (2002) "Comparison of the Effect of Surface Application and Subsurface Incorporation of Enhanced Treated Biosolids on the Leaching of Heavy Metals and Nutrients Through Sand and Sandy Loam Soils". *Environmental Technology*. 23, 189-198).

The threat of heavy metals contaminating groundwater is low due to stringent restrictions in most countries of potentially toxic element (PTE) loadings. Studies comparing runoff from biosolids-amended soils and non-amended soils reveal no differences in heavy metal concentrations in the runoff (*Id.*).

On the other hand, the potential of heavy metal contamination of surfaces exists in some situations (*Id.*). In addition, current levels of heavy metal allowances in the soil regulated by the US EPA may be set too high for sustained productivity. Select microbial processes, such as dinitrogen fixation and nitrification, are occasionally negatively impacted by the current level of heavy metals allowed by law (Sumner 2000, *supra*).

While heavy metals form a concern in groundwater and surface water contamination, the risk of contamination is low. The application of biosolids aids the ability to stabilize soil surfaces and reduce erosion, and therefore, reduces the total amount of heavy metal contaminants entering surface waters (Gove et al., 2002, *supra*).

The high levels of phosphorus found in biosolids, combined with the increasing concern over non-point source pollution, have led to many concerns over the use of biosolids as fertilizers and composts (Maguire et al., 2000, *supra*). Long-term applications of biosolids, combined with traditional over-application of phosphorus, may lead to the buildup of phosphorus in the soil (*Id.*). The risk of runoff with high levels of phosporus is greatest when rainfall events or irrigation occur directly following biosolids application.

Biosolids contain a large amount of plant macro- and micronutrients that stimulate vegetation growth. Macronutrients include nitrogen, phosphorus, and potassium, while micronutrients include copper, manganese, iron, and zinc (Rostagno et al., 2001, *supra*). Application rates are generally determined based on estimates of two indicators: potentially available nitrogen, found by using biological or chemical tests, and heavy metal concentrations in the material. Estimates of potentially available nitrogen range from 25 to 40% (Sumner, 2000, *supra*).

Nitrogen-based nutrient management fails to account for the discrepancy in the levels of phosphorus present in the biosolids and the phosphorus requirements of vegetation and crops. The application of biosolids based solely on nitrogen-based nutrient management leads to an oversupply of phosphorus in the soil, resulting in phosphorus present in excess of that necessary for optimum crop growth (Maguire et al., 2000, *supra*).

A phosphorus-based nutrient management approach, one in which application rates were based on crop-phosphorus removal, allows for significantly lower application rates than a nitrogen-based approach. On the other hand, biosolids application based on the phosphorus needs of the crops entail larger land areas, additional nitrogen fertilizer supplements, and increased transportation costs to move biosolids outside phosphorus-sensitive watersheds (Brandt, R.C., Elliot, H.A., O'Connor, G.A. (2004). "Water Extractable Phosphorus in Biosolids: Implications for Land-Based Recycling". *Water Environment Research*. 76 (2), 121-128). All of these factors make phosphorus-based nutrient management application problematic from an economic feasibility standpoint. To address the concerns over excess phosphorus in the soil and runoff, the United Kingdom (UK) has developed a phosphorus-based nutrient management plan (Gove et al. 2002, *supra*).

By definition, biosolids contain little or no pathogens, making the fear of pathogen contamination minimal. However, in the UK consumer concern over pathogen contamination when biosolids are used as fertilizers in agriculture led to the development of the Safe Sludge Matrix. The Matrix, "a mechanism for phasing out the use of untreated sewage sludge in favor of enhanced treated biosolids", simultaneously recognizes two opposing needs: beneficially reusing biosolids and addressing the risk of pathogen transfer to food (Gove et al. 2002). Enhanced biosolids are those which go through a treatment process that virtually eliminates all pathogens that may have been present in the original sludge (Gove et al. 2002, *supra*, p189).

Benefits of land application

Land application generally increases agricultural yields, while decreasing costs to farmers. Farms around Baltimore, Maryland that use the city's sludge as fertilizer saw a 25 percent increase in yields of wheat, soybeans, and corn ("Baltimore Cuts Costs With Sludge Recycling". *Public Works*. August 1998. 129 (9), 46-48). Namely, the addition of biosolids to farmland increases the water-holding capacity of the soil, reduces compaction, and increases microbial activity, all of which encourage plant growth (*Id.*).

In some areas of the country, farmers using biosolids as fertilizer receive free agronomic consultation from the municipality or an outside contractor hired to dispose of the sludge. Farmers in specific regions of the country, such as outside Baltimore, pay nothing for the biosolids, and, as a result, the application of 6 dry tons per acre saves the farmer about $100 per acre (*Id.*).

Regulation of the land application of biosolids in the United States

The United States Congress regulates the land application of biosolids under the Clean Water Act and the Part 503 Rule, "Standards for the Use and Disposal of Sewage Sludge," 40 C.F.R. Pt.503 (1993). In addition, most states regulate the land application of biosolids. States hold the authority to regulate land application of biosolids under the broad umbrella of the "police power", the power to regulate to protect the health, safety, welfare, and morals of the people.

Local governments increasingly tread into this area of regulation. However, local governments derive all authority from the state. The state delegates powers to the local governments through the state constitution, the local charter or specific enabling legislation (*See, e.g.*, Richardson, Jr., Jesse J., Meghan Zimmerman Gough and Robert Puentes (2003), *Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management*, Brookings Institution).

Local government authority to regulate land application of biosolids remains uncertain and differs from state-to-state. Farmers and biosolids applicators challenge local regulations on various grounds. Federal constitutional challenges include assertions that the ordinances violate the Commerce Clause, Equal Protection, and Due Process. These claims are uniformly rejected by the courts, although two courts recently allowed Commerce Clause claims to survive Rule 12(b)(6) motions to dismiss (*O'Brien v. Appomattox County, Va.*, 2002 WL 31663277 (W.D.Va. 2002); *Synagro-WWT, Inc., v. Rush Township, Pa.*, 204 F.Supp.2d 827 (M.D.Pa 2002)). A motion of Rule 12(b)(6) seeks to dismiss the lawsuit as failing to state a claim upon which relief may be granted (Federal Rules of Civil Procedure, Rule 12(b)(6).

O'Brien and *Rush Township* are also the only two cases to raise equal protection claims. The complainants failed in both instances.

Similarly, *O'Brien* and *Rush Township* are the only cases to raise Substantive Due Process claims. Both attempts failed. Assertions that federal law preempts local ordinances regarding biosolids so far have met a similar fate. *Welch v. Board of Supervisors of Rappahannock County, Va.*, 888 F.Supp 753 (W.D. Va. 1995) (Clean Water Act) and *Rush Township* (Surface Mining Control Reclamation Act) represent the only decided cases, and the federal preemption claim was rejected in both. However, the claim has survived Rule 12(b)(6) motions in two pending cases, *O'Brien* and *Azurix North America Residuals Management, Inc. v. Desoto County, Fla.* No. 2-01-CV-428-FRM-29DNB (Sept. 7, 2001) (M.D.Fla.) (unreported).

The most litigated and most successful claim for challengers is state preemption. The court decisions in this area rely heavily on particular state statutes. State law at least partially preempts local regulation of land application of biosolids in Florida, Georgia, Maryland, Ohio, and Virginia. State preemption claims failed in California, Massachusetts, Minnesota, and Wisconsin. The issue remains uncertain.

Claims that local ordinances are ultra vires survived preliminary motions in *O'Brien* and *Rush Township*. Finally, local ordinances restricting land application of biosolids have been attacked as violating the state right to farm act, discussed later.

Nuisance

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'… Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem…" (Keeton, W. Page (General Editor), Dan B. Dobbs, Robert E. Keeton, and David G. Owen *Prosser and Keeton on The Law of Torts*, Fifth Edition, West Publishing Co., 1984 (supplement, 1988), p. 616).

"Nuisance" may be defined as interference with an owner's reasonable use and enjoyment of his property by means of smoke, odors, noise or vibration, obstruction of private easements and rights of support, interference with public rights, such as free passage along streams and highways, enjoyment of public parks and places of recreation, and, in addition, activities and structures prohibited as statutory nuisances (*Black's Law Dictionary*, Fifth Edition, West Publishing Co., 1979).

A nuisance may be classified as a "public nuisance" or a "private nuisance" (Restatement of the Law Second, Torts, Sect. 821). A public nuisance consists of an unreasonable

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interference with a right common to the general public (*Id.*). Land application of biosolids is unlikely to amount to a public nuisance, so this article focuses on private nuisance.

A non-trespassory interference with another's interest in the private use and quiet enjoyment of land constitutes a private nuisance (*Id.*). To subject one to liability for private nuisance, his conduct must be a legal cause of the interference in another's interest in the private use and quiet enjoyment of his land (Restatement of the Law Second, Torts, Sect. 822). In addition, the interference must be either: (i) intentional and unreasonable; or, (ii) unintentional, but otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities (*Id.*).

An intentional interference with another's interest in the use of land is unreasonable if: (i) the gravity of the harm outweighs the utility of the actor's conduct; or, (ii) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible (Restatement of the Law Second, Torts, Sect. 826). In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: (i) the extent of the harm involved; (ii) the character of the harm involved; (iii) the social value that the law attaches to the type of use or enjoyment invaded; (iv) the suitability of the particular use or enjoyment invaded to the character of the locality; and, (v) the burden on the person harmed of avoiding the harm (Restatement of the Law Second, Torts, Sect. 827). The following factors weigh heavily in determining the utility of the conduct that causes the invasion of another's interest in the use and enjoyment of land: (i) the social value that the law attaches to the primary purpose of the conduct; (ii) the suitability of the conduct to the character of the locality; and, (iii) the impracticability of preventing or avoiding the invasion (Restatement of the Law Second, Torts, Sect. 828)

"The law of nuisance plys between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation" (*Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752(1947)).

Right to farm

No cases directly address the land application of biosolids as a nuisance. However, legal challenges to local ordinances limiting or banning the land application of biosolids prove analogous. Such challenges proved successful in Illinois, New York, Pennsylvania, and Ohio. In contrast, one of the two right to farm acts in Virginia explicitly excepts land application of biosolids from its definition of "production agriculture". *Virginia Code Ann.* § 3.1-22.28.

State "right to farm" laws seek primarily to protect farmers from nuisance actions for engaging in generally accepted agricultural practices, so long as the farmers take due care in such activities (Richardson, Jesse J., Jr., and Theodore A. Feitshans, "Nuisance Revisited After Buchanan and Bormann", *Drake University Journal of Agricultural Law*, Volume 5, Spring 2000, pp. 121-136). In light of the reality of farmer's declining political power in developing areas, "right to farm" laws provide support to farmers by preempting local regulation of a broad range of farming activity (Harrision, Ellen Z. and Malaika M. Eaton, *The Role of Municipalities in Regulating the Land Application of Sewage Sludges and Septage,* 41 Nat. Resources J. 77 (Winter 2001)). All fifty states have enacted "Right to Farm" statutes in some form (Hamilton, Neil D. *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective,* 3 Drake J. Agric. L. 103, 103 (1998)).

The question then becomes whether farmland application of biosolids falls under the protection of these statutes. "Right to Farm" laws, as stated above, generally encompass a broad spectrum of agricultural activities, including biosolids application (Goldfarb, William, Uta Grogmann and Christopher Hopkins, *Unsafe Sewage Sludge or Beneficial Biosolids?: Liability, Planning, and Management Issues Regarding the Land Application of Sewage Treatment Residuals*, 26 B.C. Envtl. Aff. L.Rev. 687, 719 (1999)). When the statutes fail to expressly protect biosolids application, the cases usually turn on whether the application of biosolids is in fact an agricultural use of the land (*Id.*).

In *County of Grundy v. Soil Enrichment Materials Corporation*, 9 Ill.App.3d 746, 292 N.E.2d 755 (1973), the court found that the spreading of biosolids as a liquid organic fertilizer and soil conditioner on farmland was for an agricultural purpose and, as such, was not subject to local zoning control. The plaintiff, Soil Enrichment Materials Corporation [SEMCO], had a contract for $2.5 million to remove biosolids from the Calumet Sewage Treatment Plant of the Metropolitan Sanitary District of Greater Chicago and to then apply the removed biosolids to a number of farmers within Grundy County (*Id.*, at 747). Grundy County, under its zoning ordinance, required that a zoning certificate and occupancy certificate be issued before biosolids could be used on farms within the county (*Id.*). SEMCO began land application of biosolids on land zoned "agricultural" without first obtaining the certificates. The county then filed an action for an injunction to stop the land application (*Id.*, at 748). SEMCO then counterclaimed, requesting an injunction against the County and contending that since the use of biosolids on the land was an agricultural purpose under the 1971 Illinois Revised Statutes, ch. 34 s 3151 (a "Right to Farm" law), it was exempted from the zoning laws (*Id.*, at 747).

SEMCO presented unchallenged evidence that biosolids provide beneficial fertilizers and soil conditioners and save farmers $30 per acre in fertilizer costs since biosolids are supplied free of charge (*Id.*, at 748-749). The county did not contest this evidence, but argued that the primary purpose of SEMCO's operation was not an agricultural use but a method of disposal (*Id.*, at 749). The county also argued that since biosolids were in an experimental phase, the county had the right to regulate their use (*Id.*). Several experts testified for SEMCO that the application of biosolids was clearly an agricultural use as it provided necessary nutrients to the soil (*Id.*).

The court ruled that if SEMCO was engaged only in the dumping or storing of biosolids, the outcome of the case would be different (*Id.*). However, SEMCO's spreading of biosolids in a reasonable manner as fertilizer was, according to the court, obviously a use for agricultural purposes (*Id.*) The court dismissed the county's "experimental stage" argument on the grounds that nothing in the Illinois statute denied experimental uses exemption from local zoning laws (*Id.*, at 752). Further, the court held that the issue was whether land application of biosolids is an agricultural use, not whether land application was SEMCO's main business interest (*Id.*, at 753). Therefore, the Court found that the laws of Illinois protect the land application of biosolids on farmland from local zoning control.

In Ohio, a "right to farm" law also protects biosolids application within the state (*Perry v. Providence Township*, 63 Ohio App.3d 377, 578 N.E.2d 886 (1991). The Perrys owned a farm within the township and leased a portion of it to S & L Fertilizer Co., Inc. [S & L], which does business as a hauler of biosolids from wastewater treatment plants (*Id.* at 378). S & L then either land applied the biosolids, landfilled them, or used them in land reclamation projects (*Id.* at 379). S & L had applied biosolids on the Perry farm for ten years (*Id.*). In 1989, Providence Township passed a zoning resolution banning the land application of biosolids within the township. The plaintiffs filed a complaint for declaratory judgment and injunctive relief against the township, arguing that the resolution was preempted by state law and also exceeded the township's authority since the spreading of biosolids was an agricultural use of the land (*Id.*).

Zoning authority amongst localities in Ohio is restricted to what the General Assembly expressly confers upon them (*Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.*, 55 Ohio St.3d 106, 563 N.E.2d 717 (1990)). An Ohio statute, *Ohio Revised Code*, Chapter 519, proscribes localities from prohibiting the use

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of any land for agricultural purposes (*Id*., at 381). As such, the plaintiffs argued that Perry Township did not have the authority to enact a zoning resolution banning an agricultural use of the land.

As in *County of Grundy, supra,* the township argued that the plaintiffs' use of biosolids was not wholly for an agricultural purpose but rather, the plaintiffs were more in the business of biosolids removal (*Id*.). The Court pointed out that at issue was whether the application of biosolids was an agricultural use of the land, not whether the plaintiffs' use of biosolids was mainly for agricultural purposes (*Id*.). The township then relied upon an Ohio Attorney General's opinion, in which the Attorney General was asked if the disposal of waste on a piece of land that was also used to grow some crops was a use incident to agriculture (*Id*., at 382). More specifically, the Attorney General was asked whether the *specific* use of land by a *specific* individual was an agricultural use (*Id*., emphasis added) The court distinguished the opinion on the grounds that in the instant case, they were being asked "to determine whether *any* land application of sludge can be a use of land incidental to agriculture" (*Id*., emphasis in original). Moreover, the court stated that the township's zoning resolution banned all spreading and dumping of biosolids, including arguably protected agriculturally related uses (*Id*.). The court accepted the trial court's determination that the spreading of biosolids was an agricultural use of the land (*Id*.). As such, the court found that the township's zoning resolution exceeded their limited zoning authority under Ohio Revised Code § 519.21, and therefore, the township could not ban the land application of biosolids (*Id*., at 382-383).

In *Hempfield Township v. Hapchuk,* 153 Pa.Cmwlth. 173, 620 A.2d 668 (1993), Pennsylvania's "right to farm" laws protected landowners' utilization of biosolids on a farm zoned both agricultural and residential. The 107-acre property, which had been farmed for the past fifty years, was originally zoned agricultural (*Hapchuk,* at 175). A 1980 amendment to the township's zoning ordinance rezoned part of the property, on which biosolids were applied, for residential uses (*Id*., at 175, n.1). Upon learning of the farmers' state permit to spread biosolids, the township filed suit, requesting an injunction against the application of biosolids on the portion of the property zoned residential (*Id*., at 175). The trial court granted the injunction, denying the Hapchuks' claims that the Pennsylvania Solid Waste Management Act [SWMA] preempted the zoning ordinance and that the ordinance was an impermissible exercise of the township's zoning power (*Id*., at 176). The court found no state preemption by the SWMA, but overturned the trial court's ruling on the basis that the farm's application of biosolids was both grandfathered and an agricultural use of the land (*Id*., at 177-178).

Zoning regulations only apply prospectively (*Id*., at 179). Therefore, a previously existing conforming use may survive a change in zoning regulations (*Hanna v. Board of Adjustment,* 408 Pa. 306, 183 A.2d 539 (1962)). This "grandfather" rule protects a now nonconforming use under changed zoning regulations as long as the use is no different than the previously conforming use (*Hanna*, 408 Pa. at 313, 183 A.2d at 543-544).

The Hapchuks argued that because their entire farm was originally zoned agricultural, their agricultural use of the now residentially zoned portion of their property should be grandfathered (*Hapchuk,* at 178). In order to make that argument, the Hapchuks had to prove that their use of the land had not altered. In other words, they needed to show that the application of biosolids was still an agricultural use of the property in order to fit within the historically protected use (*Id*., at 179).

To determine whether biosolids application was an agricultural use, the court looked at section 103 of the SWMA, which includes the use of biosolids in its definition of "normal farming operations" (*Id*., at 179-180, citing 35 Pennsylvania Statutes § 6018.103). The court found that uses covered by the

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