**Chapter Six – Nuisance Law**

Nuisance is a legal topic most landowners are aware of - it involves disputes between neighboring landowners over activities one believes interfere with the use of their land. This chapter explains the basics of nuisance law and what a landowner needs to understand about it. It also discusses the Iowa “right to farm” laws designed to protect certain agricultural activities.

Nuisance is a legal term for an activity causing unreasonable and substantial interference with another person’s quiet use and enjoyment of their property. In other words, a nuisance is an activity making it difficult for a neighbor to live on and enjoy their land. The doctrine is based on two corresponding and reciprocal legal principles: first, all land owners have the right to use and enjoy their property free of unreasonable interferences by others, and second, land owners must use their own property so as not to injure or interfere with the property of adjacent owners. The doctrine of nuisance is a common law concept, meaning it developed over the centuries as judges resolved disputes between individuals. The law of nuisance was created to protect individual property rights and to address disputes involving different land uses. Because nuisance law reflects the needs and values society as reflected by the actions of judges, the concept continues to evolve as courts resolve new nuisance disputes. Many states have enacted laws to codify certain principles of nuisance and setting the procedures for resolving disputes. Because nuisance laws are largely judge-made, the legal rules will vary between states – as they do for many topics of property law. Nuisance is of special importance to agriculture because historically many cases have involved farming, often involving allegations concerning odors from livestock production.

Nuisance law makes it possible to sue a neighbor whose actions adversely affect the complaining party’s property. However, not everything a neighbor may find objectionable is legally a nuisance. Only those activities a court or jury finds to be “unreasonable” and which cause a “substantial interference” with the property are treated as nuisances. Whether a complained of activity, such as spreading manure near a home, results in a “substantial” and “unreasonable” interference with another’s property will depend on the facts of each case and the legal rules used in the state.

What are the keys to understanding nuisance law?

The **first key** to understanding nuisance is the basic principle as a landowner you may not use your property to injure the property of another. Without the nuisance doctrine, your property rights would not be protected from a neighbor’s actions making it difficult for you to use and enjoy your property. Without the protection of nuisance law, the neighbor could make your property unlivable, in effect taking your property without paying for it. When viewed this way nuisance law is an important protection for all property owners and is essentially a component of what we understand as owning private property. While nuisance is an important protection for property rights it can also restrict economic activities. Property uses having the potential to negatively impact a neighbor’s land are more susceptible to nuisance suits than activities that do not. This is why livestock operations have often been the subject of nuisance complaints.

A **second key** to nuisance law is to recognize just because an activity is legal or licensed by the state does not mean it can’t function in such a manner as to be a nuisance. An otherwise legal activity can be operated so as to cause substantial and unreasonable interference with another’s property and can be declared a nuisance. For example, even if you have all of the state permits needed to operate your feedlot, it can still be declared a nuisance if odors or run-off from it unreasonably interfere with your neighbor’s property. This is true because nuisance law is a private legal remedy between individual landowners rather than being a matter of regulatory compliance.

A **third key** to understand is “nuisance” and “negligence” are not the same thing. When someone acts negligently they are said to have violated a standard of care the law imposes on a person to act reasonably and not cause harm to others. For example, it would be negligent to fail to inspect your waste lagoon to keep it from getting so full it overflows onto your neighbor’s land. The impact of the spill, the odors and water pollution, would result from your negligence and you could be ordered to pay damages. The same lagoon, even if operated properly and not overflowing, could result in odor problems that could lead to a nuisance suit but it would not be based on your negligence, instead it would be the result of the impact your conduct has on the land of another. This means the **fourth key** point to understand about nuisance is even if your conduct is reasonable and lawful a court or jury could still find it to be a nuisance if the interference it causes a neighbor is substantial.

A **fifth key** point about nuisance is reflected in the examples of odors or run-off from the feedlot. As will be discussed in Chapter Nine, these activities are probably violations of the environmental laws and could be subject to enforcement by the public authorities. But this does not mean the same conduct might not also be subject to a nuisance suit brought by private citizens living nearby. As discussed later in this chapter nuisance law recognizes two main types of actions – the first is private nuisances involving a limited number of landowners’ ability to use their property. The second is known as a public nuisance and involves either a larger number of landowners impacted across a geographic area – or the activity impacted by the alleged nuisance has a public dimension – such as people having access to clean water from a nearby lake or stream or to clean air. Lawsuits involving activities impacting many people or “public goods” can be brought by the public officials, such as the county attorney, rather than by a private attorney. State law will provide more detail about the possible distinctions between public and private nuisance.

If I file a nuisance suit what remedies can a court impose?

Why would a person go to the trouble and expense of filing a nuisance suit against a neighbor? The answer is found in the remedies courts can use to resolve nuisance disputes. Most nuisance suits are filed because the plaintiffs (the parties filing suit) feel they have a legitimate complaint. They believe their property is being adversely affected and reduced in value by the nuisance. Many common complaints concern odors and include allegations such as:

* the odors make them physically ill,
* they have to stay inside and the children can’t go out to play,
* they have to use air conditioners and can’t open the windows, and
* they can’t invite friends to visit because the odors are so bad.

The complaints usually involve claims the property value has been reduced or the property can’t even be resold due to the nuisance.

The purpose of filing the nuisance suit is to ask a court for relief from the interference. The remedy most commonly requested is for the court to order the activity stopped. This relief, known as an injunction, means the court will order the defendant to stop the activity to eliminate the nuisance. An alternative to an injunction is to request money damages to compensate for the harm caused. Damages may be claimed for the reduction in property value or for the expenses of minimizing the effects of the nuisance. Of course, to get any form of relief the plaintiff must prove the activity is a nuisance.

Defending a nuisance suit represents a serious economic cost. If you are sued for nuisance defending the case will mean you need to hire an attorney and obtain expert witnesses concerning the reasonableness of your actions. It could take several years before the case goes to trial, all the while the attorney fees and your costs will be increasing. Even if your defense proves successful, the money you spend on the lawsuit will be a significant cost, perhaps one you can’t afford. In hindsight you might feel it would have been better to take the money you spent on legal fees and move to a property somewhere else – or tried to negotiate a settlement with the complaining neighbor. The high cost of defending lawsuits is one reason many cases are settled before they go to trial. These high potential costs from nuisance suits, even when successful defended, make them a serious threat to farming. The costs and risks of nuisance suits are the reasons why all 50 states including Iowa have passed some form of “right to farm” law, as discussed later.

What factors do courts consider in resolving nuisance disputes?

Courts in the United States have resolved hundreds of cases involving nuisance claims. The cases identify important factors courts will consider in determining whether an activity is a nuisance. While there are no universal rules, the main factors courts consider, and the questions commonly asked, include:

* the character of the complained of activity. Is it a reasonable use? It is common to the area or is it unsuited there?
* the nature, frequency, duration, and intensity of the interference. Is it a minor inconvenience which happens only once a year, or is it a serious interference happening regularly?
* the nature of the property use being disturbed. Does the interference have a significant impact on the owner’s use of the property, does it prevent them from living in their home? Is the use an important part of the local economy?
* the priority of location. What was there first and was the complained of activity obvious when the complaining party moved there?
* the nature of the area where the property is located. Is the area suited to the complained of use, for example, is it a rural area where livestock are commonly raised?
* the relative economic and social benefits of the conflicting property uses. What is the value to society of the use in question, does it add jobs and income to the economy? Does its social value outweigh the negative impacts it causes?
* the effect of issuing an injunction. Would an injunction seriously harm the defendant? Will damages adequately compensate the complaining party?

What remedies can courts order in nuisance cases?

The most common remedy a party complaining of a nuisance requests is for the court to stop the complained of activity. This type of order, referred to as abatement or an injunction, means the court orders the party to stop or limit the activity to eliminate the nuisance. When courts decide nuisance cases they are said to be acting in “equity,” meaning the court has discretion to fashion the remedy it believes most appropriate to the circumstances. The discretion to develop individual remedies explains why there is so much variety in the remedies imposed in nuisance cases.

Injunctions have traditionally been the remedy courts employ to resolve nuisance suits. By granting an injunction the court removes the cause of the nuisance and restores the parties to the condition existing before the nuisance began. While injunctions can be a satisfying remedy for plaintiffs, they can be a harsh and costly remedy for defendants who may have invested much time and money in the activity being enjoined. An injunction can greatly reduce or destroy the value of owning a property.

Injunctions are commonly used but many courts consider them to be an extraordinary remedy to be used only in limited circumstances. For example, the Iowa Supreme Court uses what it calls the “balancing of the hardships” test to weigh the impact a proposed injunction would have the individuals and on society, before deciding whether to grant an injunction. The court will consider other remedies, such as awarding damages, if they are an adequate remedy.

Iowa: Hog Farmer Ordered to Incorporate Waste and Not Use Fields Near Homes

In a 1987 Iowa case *Valasek v. Baer*, 401 N.W.2d 33, the neighbors sued a farmer alleging the spreading of hog confinement waste was a nuisance. They did not ask for an injunction to close the farm but instead asked the court to order the farmer not to spread the waste on the fields nearest their homes. The trial court ruled the farm was a nuisance but decided an injunction was not appropriate because it was in a rural area where raising hogs was common. The Iowa Court of Appeals agreed, but the Iowa Supreme Court reversed and ruled spreading confinement waste near the neighbor’s homes was unreasonable and a nuisance. The court said the farmer had other fields he could use. The fact the neighbors had lived there long before the hog operation began was also important to the Court. It said in balancing the parties’ interests, restricting how and where the manure was spread was reasonable, if doing so removed the harm to the neighbors and still allowed the farm to operate. The court order prohibited the spreading of wastes on the fields within a quarter mile of the homes and required any wastes be turned under the day spread. Three years later the Iowa Supreme Court issued a similar order restricting when and where hog waste can be spread, in *Michael v. Michael*, 461 N.W.2d 334 (Iowa 1990), involving a dispute between two cousins.

Could a court award only money damages rather than grant an injunction?

In recent decades American courts have become more willing to award money damages as a remedy in nuisance suits, as seen in Iowa cases discussed above. The purpose of awarding damages is to compensate for the injury caused by the nuisance. Damages require the person whose conduct is a nuisance to pay the costs inflicted on neighboring landowners. In some cases, the damages may be so high the person will have to cease operating, even though no injunction is granted.

Damages may be awarded either alone or in addition to an injunction. If damages are awarded with an injunction, they are to compensate for past interference with the property. When only damages are awarded they are to pay for past and future injury. If the damages are paid, the complained of activity may continue, meaning the nuisance will continue. This relief is referred to as paying “permanent” damages. The damages compensate the property owner for both past and future interference. Once permanent damages are paid the party no longer has a legal right to complain about the same conduct being a nuisance. Paying permanent damages essentially allows the neighbor to buy the right to cause the nuisance on the nearby property.

Can a court stop a planned activity as a nuisance before it begins?

When people learn a neighbor plans to begin an activity they believe will be a nuisance, such as expanding a livestock facility, they will often threaten to file a nuisance suit. One important question is: are such threats realistic, can courts stop an operation before it even begins? The general rule is a court will not decide a proposed use will be a nuisance in advance of its operation. Instead the nuisance determination must wait until it begins operating and the impact on the neighbors can be measured. One exception to this rule is for conduct courts hold is always a nuisance in certain places, known as a nuisance *per se.*

The common law identifies different categories of nuisances for when injunctive relief is available. One distinction courts make is between nuisance *per se* and nuisance *per accidens*. Nuisances *per se* are activities treated as nuisances by their very existence in certain locations, for example storing hazardous materials near a populated area is a nuisance *per se*. In contrast, a nuisance *per accidens* is an activity which becomes a nuisance only by the way it is operated, or “by accident”, not merely by existing. Most nuisance suits involving agricultural land are nuisances *per accidens*, with the focus on how the activity is conducted.

The distinction between nuisances *per se* and *per accidens* is important for two reasons. First, an activity classified as a nuisance per se can only be remedied by an injunction, damages are not sufficient. On the other hand, for a nuisance *per accidens* an injunction may be granted but only to correct the conduct causing the nuisance. Often courts will grant a partial injunction and damages for past conduct as a remedy. Second, a nuisance *per se* can be stopped prior to beginning operation, but activities which are nuisances *per accidens* are typically not subject to preliminary injunctions preventing their operation. Instead, these nuisances can only be enjoined on the basis of how they affect neighbors, and this can only be determined after operation begins. If conduct is not a nuisance *per se,* a court can’t as a matter of law or fact conclude in advance the activity will be conducted so as to be a nuisance.

I have heard the expression something is a “public” nuisance, is there a difference between a public and private nuisance?

The law does make a distinction between private and public nuisances. A private nuisance is what you generally think of in a conflict between two neighbors, such as a dispute over odors. The nuisance is called private because it concerns private individuals and their property rights. The decision to file a private nuisance suit is entirely at the discretion of the party who feels offended. Each party is responsible for developing the facts of the case and paying the costs of the lawsuit. In contrast, a public nuisance is an activity endangering public safety or affecting a common property interest shared by the public. A good example of a public nuisance is an activity that threatens the public health, such as spreading contagions or polluting the water supply of a town. Public nuisances can exist when a public property right is affected, for example, when someone builds a dike flooding a road preventing its use by the public. Public nuisance suits are brought by state or county officials representing the public rather than by private individuals. This distinction is important because the public will bear the cost of the suit and the public officials will be dedicated to resolving the dispute.

In some cases conduct that is a private nuisance, such as odors, may also be treated as a public nuisance if many people are affected of if the public health is threatened. Because the state pays the costs of public nuisance suits, it is common for neighbors concerned about an activity to contact state officials and request they bring the action. If they do, this saves the neighbors from paying the legal costs themselves. Most states have laws defining what conduct is a public nuisance. These laws may also provide some statutory guidelines for a private nuisance law.

Conduct that is a public nuisance may violate other state laws. Polluting water to make it unfit to drink is a public nuisance but also violates environmental laws protecting water quality. The doctrine of public nuisance was developed long before modern environmental laws were enacted; however, public nuisance law developed for the same reasons – to protect public health and welfare and protect natural resources from waste. The doctrine of public nuisance is therefore the forerunner and basis of modern environmental protection laws.

Is there any defense available for farmers or agricultural landowners facing nuisance suits?

Under the common law, courts did not create special rules to protect agriculture from nuisance disputes. The number of nuisance cases involving livestock odors demonstrates that no special common law defenses are available just because the conduct in question is farming. But the courts do consider a variety of factors to determine if conduct is a nuisance, several of which can be beneficial in protecting existing farms from nuisance complaints. For example, courts give weight to the priority of location, that is, who was their first. Courts also consider the reasonableness of the conduct for the area. A court may determine farming is a reasonable use for a rural area and rule a homeowner trying to close the farm doesn’t have a claim. The court may consider the nature of the area in deciding what remedy to apply if a nuisance is found.

The factors of priority of location and reasonableness of the operation have led courts to develop a defense known as “coming to the nuisance.” This defense means if people move to an area they should know is not suited for their intended use they can not argue the existing uses are nuisances. The court will hold the new use “came to” the nuisance and therefore is not protected. The most famous “coming to the nuisance” cases involved a large Arizona feedlot and nearby senior citizen housing. In *Spur Industries v. Del E. Webb Development Co.,* 494.P.2d 700 (1972), the Arizona Supreme Court held the cattle feeding operation was a public and private nuisance because of the impact odors and flies had on hundreds of property owners who had moved nearby. The court ruled the operation must shutdown or move; however, the court determined the developer, who had been responsible for the people moving nearby, was responsible for the feedlot becoming a nuisance. The court ordered the developer to pay the cost of either moving the feedlot or closing it down.

The case is one of the few reported cases in which the coming to the nuisance defense was used to protect agriculture, even though the defense is recognized in most states. Perhaps the most important value of the coming to the nuisance defense is it provided the legal basis for right to farm laws. These laws, which attempt to protect farmers from people who move nearby and then claim a nuisance, work much like the coming to the nuisance defense by shifting who has the right to continue their conduct.

So what is a right to farm law and does Iowa have one?

Right to farm laws are designed to protect existing agricultural operations by giving farmers who meet certain legal requirements a defense in nuisance suits. Right to farm laws were developed in the 1970’s as state lawmakers because concerned about the loss of agricultural land due to the movement of conflicting uses, such as residential developments, into farm areas. The fear was non-farm people moving into farm area might result in lawsuits against existing farms, such as claims odors from livestock were nuisances. Without some legal protection a court can rule a farm, which had been in operation for years, is a nuisance and order it closed. The effect of such suits would be not just the loss of farmland to other uses but possibly the loss of the farm operation as well. Even if a suit failed, the costs of defending it and the threat of future complaints would threaten the stability of the farm. In the 1990’s I wrote a book on Nuisance and Right to Farm laws so these are a familiar topic.

As you might imagine, the “right to farm” idea was popular with Iowa lawmakers and over time Iowa adopted three different versions of right to farm laws:

* Chapter 172D to protect feedlots;
* the nuisance protection for lands within an “agricultural area” as created under Chapter 352 – discussed in Chapter Six and
* the protection in §567.11 applying to any livestock facility meeting the Iowa environmental rules.

All three of the laws are still in the Code however it is widely believed the laws are not useable because of constitutional concerns with how they impact the property rights of people who can no long bring nuisance actions to protect their land. The Iowa Supreme Court in a 1989 decision in *Bormann v. Kossuth County* unanimously held by granting a landowner protection from nuisance suits with creating of an agricultural area under Chapter 352 the effect was an unconstitutional taking of the property rights of the neighboring landowners. While the case only involved one of Iowa’s right to farm laws the accepted wisdom is the legal ruling applied equally to the other two.