



The National Agricultural Law Center
The Nation's Leading Source of Agricultural and Food Law Research and Information

Agricultural Law Update
Bonus Continuing Education Opportunity
5/22/18



United States Department of Agriculture
National Agricultural Library

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Upcoming Events

- **5th Annual Mid-South Agricultural and Environmental Law Conference**
 - Memphis, TN
 - June 7-8, 2018
 - 6 hours CLE approval (1 ethics)
 - <http://nationalaglawcenter.org/midsouthcle2018/>
- **Ag Technology & The Law: Advancing American Agriculture**
 - Little Rock, AR
 - August 15-16, 2018
 - 12 hours CLE approval in AR (2 ethics)
 - NALC in partnership with the National Association of Attorney Generals
 - <http://nationalaglawcenter.org/agtechcle/>

Outline of Today's Presentations

- **Ag & Food Law Update for the Mid-South (11am – 12pm)**
 - Elizabeth Rumley, *Sr. Staff Attorney, National Agricultural Law Center*
 - Ross Pifer, *Director, Center for Agricultural & Shale Law, Penn State Law*
 - Stephanie Showalter Otts, *Director, National Sea Grant Law Center, University of Mississippi School of Law*
- **Local Land Use Law & Issues for Rural Practitioners (12pm – 1pm)**
 - Peggy Kirk Hall, *Director, Agricultural & Resource Law Program, The Ohio State University*

Right-to-Farm Statutes, Generally

- **Purpose:** provides an affirmative defense to agricultural operations facing nuisance suits if certain requirements are met
 - Passed in all 50 states, but different specifics everywhere.
 - <http://nationalaglawcenter.org/state-compilations/right-to-farm/>
- **Nuisance** - substantial interference with another's use and enjoyment of his land
 - 2 types:
 - Public nuisance: Affects an entire group of people
 - Private nuisance: Affects a single family, or smaller group.
- **Elements**
 - *Fault* -defendant intentionally, negligently, or recklessly interfered with plaintiff's use and enjoyment of their property
 - *Substantial and ongoing* (not petty...)
 - *Reasonableness* (utility vs. harm)

Smithfield Foods (N.C.)

- 26 lawsuits filed against subsidiary of Smithfield Foods-alleging nuisance
 - Jury returned verdict in first case, others still pending.
 - Second case set for trial this month
- "No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began." *NC Gen Stat § 106-701 (2013)*
 - Ruling: RTF statute did not apply. Reasoning: some of the residents lived in the area before the hog farm was established so there was no "coming to the nuisance"
 - "At bottom, plaintiffs' nuisance claims have nothing to do with changed conditions in the area, and therefore, as a matter of law, the right-to-farm law does not bar those claims." – Ruling on motion

Smithfield Case

- **Jury verdict of \$75K for each of the 10 plaintiffs with a further \$50 million added as punitive damages**
 - Reduced by the judge to a total of \$3.25 million
 - Punitive damages capped at "three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater."
 - NC Gen Stat § 1D-25 (2015)

Takeaways

- Plaintiffs did not prove that the farms were operating in violation of any permit, law or regulation.
- The grower was not a named party in the lawsuit
 - Even though it's likely that their contract made them responsible for the manure
- Limiting damages in RTP
 - N.C. Gen. Stat. § 106-702 (Effective 5/2017)
 - Passed after overriding governor's veto
 - Similar statute – MO. Rev. Stat. § 537.296
 - Compensatory damages where “the alleged nuisance emanated from an agricultural or forestry operation” are limited to
 - Permanent nuisance: “measured by the reduction in the fair market value of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property.”
 - Temporary nuisance: “limited to the diminution of the fair rental value of the plaintiff's property caused by the nuisance.”
 - A provision in the bill that would have made the law apply retroactively was voted down.
- Smithfield has already announced plans to appeal verdict

Farm Bill/King Amendment

- “Protect Interstate Commerce Act”
- “...the government of a State or locality therein shall not impose a standard or condition on the production or manufacture of any agricultural product sold or offered for sale in interstate commerce if—
 - (1) such production or manufacture occurs in another State; and
 - (2) the standard or condition is in addition to the standards and conditions applicable to such production or manufacture pursuant to—
 - (A) Federal law; and
 - (B) the laws of the State and locality in which such production or manufacture occurs.”
- Aimed at California's follow-up to Prop 2
 - Opponents argue that it could undermine states' abilities to protect air and water quality, workers' rights, community health, consumer safety, animal welfare, etc.
- Proffered as an amendment to the Farm Bill, which died in the House last Friday

Farm Protection/“Ag-Gag”: Laws & Challenges

- Anti-whistleblower laws that
 - Prohibit taking a photo or video of an agricultural operation without permission.
 - Prohibit applying for a job at an agricultural operation under false pretenses.
 - Require mandatory reporting to law enforcement within a short period of time.
- Challenges: When/Where?
 - Idaho (2013)
 - Utah (2014)
 - North Carolina (2016)
- Why?
 - Claims laws are overbroad, constitutes content-based discrimination and violates animal protection groups' equal protection and due process

Challenges

- Utah
 - Sept 2017- Struck down as unconstitutional on free speech grounds.
 - No appeal was taken
- North Carolina
 - Federal lawsuit filed in January 2016 challenging constitutionality of the North Carolina law.
 - Dismissed in May, 2017 for lack of standing.

N.C.G.S.A. 99A-2

- Prohibits whistleblowing in private businesses, which may include agricultural facilities, hospitals, elder care facilities, and schools
- Allows an employer to sue an employee who goes into non-public areas and “captures or removes” documents from the premises or records images or sound, and then uses those materials “to breach the employee's duty of loyalty to the employer,
- Potential remedies:
 - Equitable relief.
 - Compensatory damages
 - Costs and fees, including reasonable attorneys' fees.
 - Exemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars (\$5,000) for each day, or portion thereof, that a defendant has acted in violation

Challenges: Idaho

- August 2015: Law struck down as unconstitutional on First Amendment grounds by the ID DC
- Jan 2018: Ruling by 9th Circuit.
 - Animal Legal Defense Fund v. Wasden, No. 15-35960 (9th Cir. 2018)
 - Findings
 - Unconstitutional:
 - Prohibiting an audio or visual recording of agricultural operations
 - Prohibiting people from gaining access to a farm through misrepresentation
 - Constitutional
 - Prohibition on the use of misrepresentation to obtain agricultural production facility records
 - Prohibition on gaining employment through misrepresentation
- Feb 2018: Motion for declaratory judgment filed with ID DC
 - Arguing that prohibition on gaining employment through misrepresentation should not apply to undercover investigative activities that seek to reveal animal abuse or other wrongdoing

RCRA: The Basics

- Resource Conservation Recovery Act (RCRA)
- Enacted by Congress in 1976
- Purpose:
 - Protect human health and the natural environment from the potential hazards of waste disposal.
 - Reduce the amount of waste generated
 - Ensure the management of waste in an environmentally sound manner.
- Long story short:
 - Focuses on current hazardous waste production
 - Goal – “management”
 - Preventing environmental damages before they occur

Case: *Cow Palace*

- Background:
 - Large dairy operations in eastern Washington
 - High levels of nitrates found in ground water surrounding the area.
 - Plaintiff brought a citizen suit against defendant/dairy
- Core argument: The dairy operation engaged in the “handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment”
 - *Community Association for the Restoration of the Environment (CARE) and Center for Food Safety, Inc., v. Cow Palace, LLC*

Case Law: “Solid Waste” under RCRA

- “Solid waste” is “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from . . . agricultural operations.”
- Previous court decisions: Manure is not solid waste.
 - Instead, considered a “beneficial by-product”
- Cow Palace Plaintiffs argued, in part, that dairy manure was “discarded” when (1) “over-applied” to fields as fertilizer, and (2) leaked from lagoons

Case Law: *Cow Palace* Results

- In a SJ motion, the judge ruled against the dairy
- After the ruling, the case was settled
 - Significantly limited application of manure
 - Use double liners in storage lagoons/concrete pads surrounding lagoons
 - Provide clean drinking water to area residents until the contamination is eradicated

Mountaire Farms Processing Plant

- Delaware case involving a poultry processing plant with claims that they have contaminated groundwater with nitrates.
- Notice of intent to sue alleges:
 - Application of manure to the spray fields at above the agronomic rate
 - Allegations of sprayed water containing up to 41 times the legally permitted level of nitrates as recently as the summer of 2017
 - The handling, storage, transportation and disposal of solid waste constitutes an “open dump”

Mountaire Farms Processing Plant

- Claims are extremely similar to *Cow Palace* case
 - Counsel includes Public Justice, Food and Water Watch
- Formal notice of intent to sue was dated March 27, 2018
 - Must wait 90 days to file a RCRA citizen suit
- Seeking injunctive relief to prevent future dumping as well as remediation of existing harms.



Center Work Products

Agricultural Law Weekly Review

Agricultural Law Brief

Agricultural Law Podcast

Website

- Agricultural Law Library Guides
- Current Issues in Ag Law

Social Media

- Twitter @AgShaleLaw
- Facebook



Penn State Agricultural Law Blog

A research and education program of the Center for Agricultural and Shale Law (CASL)

Agricultural Law Blog Shale Law Blog

Thursday, April 12, 2018

Agricultural Law Weekly Review—April 12, 2018

Written by: M. Sean High—Staff Attorney

The following information is an update of recent local, state, national, and international legal developments relevant to agriculture:

Antitrust: U.S. Approves Bayer Monsanto Merger

On April 11, 2018, *Fortune* reported that the U.S. Justice Department has approved Bayer AG's \$62.5 billion acquisition of Monsanto Co. The anticipated merger will result in a company that controls over one quarter of the world's seed and pesticide market. To gain U.S. approval, *Fortune* stated that Bayer will sell certain assets to its German competitor BASF. These assets "include the company's soybean and cottonseed businesses as well as its glyphosate weedkillers, which is a direct competitor to Roundup, a central element of Monsanto's business."

Right to Farm Laws: Alaska Supreme Court Rules Storage Lagoons not protected Under Right to Farm Law

On April 6, 2018, the Supreme Court of Alaska held that a farmer's septic storage lagoons were not protected by the state's Right to Farm Act (RTFA) (*Booth v. Lonsner*, Supreme Court No. 1215—April 6, 2018). Under Alaska's RTFA, "an agricultural facility or an agricultural operation at an agricultural facility used for commercial purposes cannot become a nuisance based on changes in surroundings if it was not a nuisance when it started" (AS 09.42.235(a)).

The court held that the RTFA did not apply because the farmer's septic lagoons were not used as part of the farmer's agricultural operation. Instead, the lagoons were used to store sewage from the farmer's separate septic pumping and storage business. The court held that even if the storage lagoons eventually became part of the agricultural operation, the lagoons were not used, or intended to be used, "in any farming capacity until after the lagoons had already become a nuisance."

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EPCRA / CERCLA Reporting Exemptions

- CERCLA
 - Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)
 - Address problems caused by release of hazardous substances
 - Require responsible parties to pay for harm
- EPCRA
 - Emergency Planning and Community Right to Know Act
 - Provide public access to information
 - Enable local emergency response and planning



EPCRA / CERCLA General Notification Requirements

- CERCLA
 - Immediate notification when release of hazardous substance greater than reportable quantity
 - Notification to National Response Center
- EPCRA
 - Immediately report releases of CERCLA substances or extremely hazardous substances in excess of reportable quantity
 - Report to state and local emergency officials



EPCRA / CERCLA General Notification Requirements

- Relevant substances to be reported:
 - Ammonia
 - Hydrogen sulfide
 - Volatile organic compounds



EPCRA / CERCLA EPA Proposed Rule

- Issued on December 28, 2007
- Provided for relevant exemptions to reporting requirements for both statutes
- Provided for 90-day comment period
 - 12,900 comments submitted



EPCRA / CERCLA EPA Final Rule

- Issued on December 18, 2008
- Reporting exemptions for farms:
 - Complete exemption from CERCLA reporting
 - Partial exemption from EPCRA reporting



EPCRA / CERCLA EPCRA Reporting Exemption

- What releases are exempt:
 - "Any release to the air of a hazardous substance from animal waste at farms that stable or confine fewer than"
 - 700 mature dairy cows
 - 1000 cattle
 - 2500 swine weighing more than 55 pounds
 - 500 horses



EPCRA / CERCLA Legal Challenge to Final Rule

- April 11, 2017 – Court of Appeals for DC Circuit vacated EPA Final Rule
 - Thus, agricultural exemptions were no longer in place
- Compliance Date will be established when court issues a mandate enforcing the decision.
 - Issued May 2, 2018



EPCRA / CERCLA Legislative Action

- March 23, 2018 – Consolidated Appropriations Act, Title XI – Fair Agricultural Reporting Method (FARM) Act
 - Air emissions "from animal waste at a farm" are now exempt from CERCLA reporting requirements.



EPCRA / CERCLA EPCRA Reporting Requirements

- EPA interprets statutory reporting obligation to exclude "routine agricultural operations."
 - Intends to conduct rulemaking to clarify exemption



Mandatory GMO Labeling California Proposition 37

- November 6, 2012 General Election
- The California Right to Know Genetically Engineered Food Act
 - "Commencing July 1, 2014, any food offered for retail sale in California is misbranded if it is or may have been entirely or partially produced with genetic engineering and that fact is not disclosed."



Mandatory GMO Labeling

Vermont Act 120

- Signed into law on May 8, 2014
- Scheduled to become effective on July 1, 2016
- Labeling required if food is “entirely or partially produced with genetic engineering.”
- Label must indicate “produced with genetic engineering”, “partially produced with genetic engineering”, or “may be produced with genetic engineering.”



Federal Legislation

National Bioengineered Food Disclosure Standard

- July 29, 2016 – Senate Bill 764 signed into law as Public Law 114-216
- Establishes National Mandatory Bioengineered Food Disclosure Standard
- Provides for Federal Preemption of state labeling or disclosure requirements



Federal Legislation

National Bioengineered Food Disclosure Standard

- Within 2 years of enactment, USDA shall develop standards.
- Within 1 year of enactment, USDA shall conduct study to identify technological challenges to disclosure methods.



USDA AMS Activity

National Bioengineered Food Disclosure Standard

- 9/1/16 – Request issued for information on study design
- 10/19/16 – Request issued for proposals to conduct study
- 9/6/17 – Study completed



USDA AMS Activity

National Bioengineered Food Disclosure Standard

- 5/4/18 – Proposed Rule published in Federal Register
- Comment period open until 7/3/18
- For more information:
 - www.ams.usda.gov/rules-regulations/gmo



USDA AMS Activity

National Bioengineered Food Disclosure Standard





Waters of the United States 2015 Final Rule

- Definition of "Waters of the United States" Under the Clean Water Act
 - EPA and Army Corps of Engineers
 - Federal Register – June 29, 2015



Waters of the United States Included under Proposed Rule

- Traditionally navigable waters
- Interstate waters
- Territorial seas
- Impoundments of water
- Tributaries of above waters
 - Newly defined
- Adjacent waters, including wetlands
- Other waters, on a case by case basis with significant nexus to above



Waters of the United States Proposed Definition of Tributary

- "... water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either directly or through another water to a [wotus]. In addition, wetlands, lakes, and ponds are tributaries if they contribute flow to a [wotus]."



Waters of the United States Rescission of 2015 Final Rule

- Feb. 28, 2017 – Executive Order directing review of WOTUS
- Mar. 6, 2017 – Notice published of intent to rescind or revise
- July 27, 2017 – Proposed Rule issued



Waters of the United States Delayed Implementation of 2015 Rule

- Feb. 6, 2018 – Applicability date of 2020 added to 2015 Final Rule
- Feb. 6, 2018 – Litigation filed over delayed implementation of 2015 Final Rule



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U.S. ASSOC. OF REPTILE KEEPERS V. ZINKE, 852 F.3D 1131 (D.C. CIR. 2017)

- D.C. CIRCUIT COURT OF APPEALS HELD THAT THE FWS DOES NOT HAVE THE AUTHORITY TO RESTRICT **INTERSTATE TRANSPORT** OF INJURIOUS SPECIES UNDER TITLE 18 OF THE LACEY ACT (18 U.S.C. § 42).
- FWS MAY ONLY RESTRICT IMPORT OF INJURIOUS SPECIES INTO U.S. AND THEIR SHIPMENT BETWEEN U.S. AND LISTED JURISDICTIONS (HAWAII, ETC.).
 - NO LACEY ACT VIOLATION IF BAIT SHIPMENT CONTAINING ASIAN CARP TRANSPORTED ACROSS STATE LINES.
- RULING HAS NO IMPACT ON TITLE 16 – WILDLIFE TRAFFICKING PROVISION.
 - IF POSSESSION OR TRANSPORT PROHIBITED BY STATE LAW, FEDS CAN STILL PROSECUTE UNDER TITLE 16.

CATFISH TRADE DISPUTE BREWING

- ON FEBRUARY 22, 2018, VIETNAM REQUESTED CONSULTATIONS UNDER WTO DISPUTE RESOLUTION PROCEDURES CONCERNING U.S. MEASURES AFFECTING THE IMPORT, DISTRIBUTION, AND SALE OF VIETNAMESE CATFISH.
- IN MARCH, CONGRESS PASS THE OMNIBUS SPENDING BILL. OBSCURE PROVISION MANDATED THAT USDA FOOD SAFETY AND INSPECTION SERVICE ISSUE EQUIVALENCE DETERMINATIONS FOR COUNTRIES WISHING TO EXPORT CATFISH TO THE U.S. WITHIN 180 DAYS OF PASSAGE.
- IN APRIL, US TRADE REPRESENTATIVE ISSUED A REQUEST FOR PUBLIC COMMENTS REGARDING ISSUES RAISED BY VIETNAM. ONLY ONE PUBLIC COMMENT RECEIVED.
- IF CONSULTATIONS DON'T RESOLVE MATTER, VIETNAM COULD REQUEST ESTABLISHMENT OF A DISPUTE RESOLUTION PANEL.

ROUGH WATERS FOR FINFISH AQUACULTURE MAY PROVIDE OPPORTUNITIES FOR FARMERS

- IN 2016, NOAA NATIONAL MARINE FISHERIES SERVICE ISSUED RULE THAT WOULD ALLOW COMPANIES TO APPLY FOR PERMITS TO FARM FISH IN FEDERAL WATERS OF GULF OF MEXICO. NO COMPANIES HAVE APPLIED.
- FOLLOWING NET PEN COLLAPSE AT SALMON FARM IN 2017, WASHINGTON STATE PASSES LEGISLATION TO PHASE OUT FINFISH AQUACULTURE BY 2025.
- INCREASING CALLS FOR LAND-BASED OPERATIONS FOR MARINE SPECIES.
 - WHITE PACIFIC SHRIMP GROWN BY SHRIMP GUYS IN MINNESOTA.
 - LAND-BASED SALMON FARMS IN DEVELOPMENT IN FLORIDA AND MAINE.



Local Land Use Law and Issues for Rural Practitioners

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A few observations about local land use law

- Rural land use parties are not typically well-trained in land use law.
- Rural land use ordinances are not always well-written or updated.
- A good first question is often “do they have the authority to do this?”
- A good second question is often “did they do this right?”
- Land use law ≠ environmental law.

Rural agricultural land use

“States have increasingly adopted regulations in the area of agricultural activities, sometimes supporting the farming industry (e.g., right to farm laws, agricultural use exemptions) and other times regulating farming operations out of public health and safety concerns.”

Nolon, Salkin, Miller and Rosenbloom, Land Use and Sustainable Development Law: Cases and Materials (9th Ed. 2017), West Academic Publishing, at 660.

The authority question

- **Dillon's rule:**

A municipal corporation possesses and can exercise the following powers and no others:
 first, those granted in express words;
 second, those necessarily implied or necessarily incident to the powers expressly granted;
 third, those absolutely essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable;
 any fair doubt as to the existence of a power is resolved by the courts against the corporation, against the existence of the power.

Merriam v. Moody's Ex'rs, 25 Iowa 163, 170, 1868 WL 253 (1868)

- **Inherent home rule authority arguments don't fare well for local governments and land use actions.**

The authority question

- **Preemption by federal/state law**
 - Environmental regulation and CAFOs
- **Agricultural exemptions in state law**
 - What is agriculture?
 - Commercial
 - CAFOs
 - Supplementary
 - Agritourism

Questioning authority

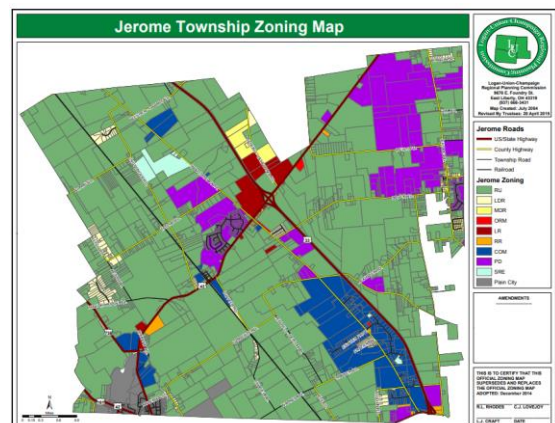
- Is this land use preempted by state or federal law?
- Is this land use exempted by state law?
 - Definitional issues
- How does Dillon's rule apply to the use of authority?

Questioning authority

- **Comprehensive planning**
 - Most state zoning enabling acts require that zoning be based upon a comprehensive plan.
 - Advisory, conform to, consistent with...
 - Validity of zoning
 - Conflicts between planning and zoning
 - What is a "comprehensive plan"?
 - Statutory elements v. open ended

Zoning

- Zoning map
- Zoning resolution/code/ordinance
 - Preamble
 - Authority and purpose
 - Definitions
 - Agriculture
 - Zoning districts
 - Agricultural/rural, residential, commercial, industrial, institutional, special use, mixed use
 - District standards
 - Dimensional; lot sizes, setbacks, side yards, building sizes and heights
 - General development standards
 - Parking, signs, lighting, landscaping, open space, preservation.
 - Administration and enforcement
 - Procedural



OFFICIAL SCHEDULE OF DISTRICT REGULATIONS

Zoning districts

- Permitted or “as of right” uses
 - Allowed to take place
- Special or conditional uses
 - May be allowed if use meets certain conditions
 - Requires permit application and proof that land use complies with standards
- Prohibited uses
 - Not permitted

Zoning Districts (Symbols as used on the Official Zoning Map)	Permitted Uses (Accessory Uses and essential services are included)	Conditional Uses (Permitted upon issuance of a Conditional Use Permit by the Board of Zoning Appeals)
1	2	3
U-1 RURAL	Agriculture; Very low density residential; Animal hospital; Clinic; Home occupation; Non-commercial recreation; Public & quasi-public uses; Wind Power Generating Facilities (WPGF) pending compliance with Section 1037.	Kennel; Public service facility; Service business; Mineral extraction; Food processing; Light & heavy manufacturing; Junk storage & sales; Commercial recreation; Mobile homes individually.
R-1 LOW DENSITY RESIDENTIAL	Single-family dwellings; Home occupation; Public & quasi-public use; Permanent foundation sited manufactured dwelling; Modular & sectional units; Wind Power Generating Facilities (WPGF) pending compliance with Section 1037.	Personal services; Service business; Multi-family dwellings; Mobile home individually; Telecommunication towers.
B-2 LOCAL BUSINESS	Convenience-type retail; Personal services; Offices; Service business; Eating & drinking establishments; Commercial recreation; Single-family dwellings; Public & quasi-public uses; Farm implement sales & service.	Public service facility; Mobile homes individually; Adult Entertainment.
M-1 LIGHT MANUFACTURING	Light manufacturing & directly related offices & retail sales; Public quasi-public uses; Service business; Farm implement sales & service.	Wholesale & warehousing; Storage facilities; Transport terminals; Public service facility; Very low density residential; Mobile homes individually.

	MINIMUM LOT SIZE		FRONT AGE	MAXIMUM % OF LOT TO BE OCCUPIED	MINIMUM FLOOR AREA	MAXIMUM HEIGHT		MINIMUM YARD DIMENSIONS (ft.)					
	With sewage on-site treatment	With group or central sewage treatment	Minimum			Sq. ft.	# of Stories	# of Feet	Front	Side Yards	Rear		
			Width/ Feet	Principal and Accessory Buildings				One side yard	Sum of side yards				
	4	5	6	7	8	9	10	11	12	13	14		
U-1	65,400	----- 10,800	150 80	25	1,200*	2.5	35	50	20	40	40		
R-1	65,400	----- 10,800 2,700 (multi)	150 80 60	25	1,200*	2.5	35	35	20	40	40		
B-2	65,400	----- none	150 60	50	none*	3	40	30	none**	none**	30**		
M-1	80,000	-----	200	50	none*	4	50	80	20**	50**	50		

Zoning districts

- Variances
 - Authorized deviations from zoning resolution.
 - Use variance
 - Use is not permitted or conditional
 - Use variance v. rezoning
 - Area variance
 - Variance of dimensional/physical standards
- Standard for granting a variance
 - “Practical difficulty” test
 - “Unnecessary hardship” test
 - Impact on the surrounding community

Zoning districts

- Nonconforming uses/grandfathered/vested
 - Lawfully existed prior to zoning resolution but now violates zoning resolution
 - Land use or buildings can be nonconforming
 - Immediate termination of nonconforming use is often an unconstitutional taking
 - Gradual phasing out over period of time or termination under certain conditions is typically reasonable.

Zoning districts

- Vested rights
 - Continuance of a land use that has begun before a zoning ordinance is adopted or changes
 - Majority rule: can continue if there was a significant affirmative governmental act upon which landowner relied in good faith and significant expenditure or commitments in reliance on act.
 - Once vested, becomes nonconforming

Zoning districts

- **Rezoning**
 - Requesting a change of zoning district classification
 - Ability to use property
 - Changes in neighborhood
 - Mistakes
 - “Spot zoning” challenges
 - Singling out a use that is totally different than the surrounding area, to benefit of landowner but detriment of surrounding area.

Did they do this right?

- **Administration and review**
 - How and what did they adopt?
 - Planning department
 - Planning commission
 - Governing body (trustees, council, etc.)
 - Zoning inspector
 - Enforcement of zoning code
 - Board of Zoning Appeals
 - Review of enforcement actions

Did they do this right?

- **Judicial review**
 - **Legislative decisions**
 - Zoning map changes
 - Zoning text changes
 - Rezoning decisions
 - **Non-legislative decisions**
 - Permits
 - Conditions
 - De novo review?
 - Local v. expanded record?

Did they do this right?

- **Constitutional challenges**
 - Due process
 - Arbitrariness
 - Equal protection
 - Arbitrariness with reference to other similarly situated land uses
 - Dormant commerce clause
 - Economic protectionism

Did they do this right?

- **Constitutional challenges**
 - **Takings by local**
 - Deprivation of all economically beneficial use of property
 - Economic impact on claimant
 - Interference with distinct investment-backed expectations
 - Character of the action
 - Penn Central balancing test
 - **Exactions**
 - Conditions in exchange for positive decision
 - Must serve the same purpose and be roughly proportional to applicant's impact on community –Nollan and Dolan tests

Hot rural land use issues

- **Agritourism**
- **Confined animal feeding operations**
- **Energy infrastructure**
 - And on-farm energy
- **Residential development/farmland preservation**
- **Drainage/water**



Local Land Use Law and Issues for Rural Practitioners

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