

# Here We Go Again: A Third Legislative Attempt to Protect Polluting Iowa CAFOs from Neighbors' Nuisance Actions

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## I. INTRODUCTION

On March 29, 2017, in one of his last acts before leaving office, Iowa Governor Terry E. Branstad signed into law Iowa Code § 657.11A, thereby giving immediate effect to a carefully targeted amendment to Iowa’s statutory nuisance law.<sup>1</sup> The new amendment was passed by the Iowa General Assembly for the express purpose of providing Iowa’s confined animal feeding operations (“CAFOs”) with a unique level of legal protection from neighbors’ nuisance claims.<sup>2</sup> This was the third time in the past three decades that Iowa’s Legislative and Executive Branches have attempted to insulate Iowa CAFOs from liability for neighbors’ nuisance actions.<sup>3</sup> The first two attempts conferred a broad immunity from nuisance liability,<sup>4</sup> but were nullified when the Judicial Branch struck them down as unconstitutional, somewhat controversially.<sup>5</sup> This Essay examines the latest attempt to confer on Iowa CAFOs special legal privileges as nuisance defendants not enjoyed by any other Iowa business entity or person.

In this Essay, I will document the remarkable CAFO growth in Iowa over the past two decades, and identify the types of health threats and environmental harms CAFOs can pose to neighbors and to the public, if they are not sited with care and operated responsibly. I will document the lack of effective public regulation of CAFOs in Iowa at the federal, state, and local level, and will argue that this weakness of current regulation is the primary reason Iowa’s private nuisance law plays such a vital role in protecting the property rights of neighbors grievously harmed by poorly sited or

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1. Press Release, Office of the Governor, Gov. Branstad Signs Senate File 447 into Law (Mar. 29, 2017), <https://content.govdelivery.com/accounts/IACIO/bulletins/190cbc4>.

2. See IOWA CODE ANN. § 657.11A(1)(b) (West 2018).

3. See *id.* § 257.11A (West 2014); *id.* § 657.11 (West 1995); *id.* § 352.11 (West 1993).

4. See *id.* § 657.11 (West 1995) (declaring that “there shall be a rebuttable presumption that an [Iowa CAFO] is not a public or private nuisance under this chapter or under principles of common law,” but the rebuttable presumption would not apply if it failed to comply with federal and state laws regulating animal feeding operations); *id.* § 352.11 (West 1993) (forbidding all nuisance actions against CAFOs unless they were in violation of state or federal law or negligently run).

5. See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 171 (Iowa 2004) (finding Iowa Code § 657.11 unconstitutional); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998) (finding Iowa Code § 352.11 unconstitutional).

irresponsibly managed CAFOs. I will highlight the Iowa courts' long commitment to protecting private property rights threatened by nuisance invasions, and will trace the recent history of special legislation to protect CAFOs failing to pass constitutional muster with the Iowa Supreme Court. I will then examine the new 2017 legislation in detail, devoting particular attention to the question of whether this latest legislative initiative will survive the constitutional challenges that invalidated the two earlier Iowa statutes privileging CAFOs with special nuisance defenses. Finally, I will evaluate other provisions of the new law that differ significantly from traditional Iowa nuisance law and litigation practices, and consider how these disruptive changes will be implemented by Iowa courts.

## II. THE PROLIFERATION OF CAFOs IN IOWA

Iowa raises more hogs than any other U.S. state.<sup>6</sup> The number of hogs being raised in Iowa annually was recently reported at almost 50 million.<sup>7</sup> This is twice as many hogs on farms in Iowa as are raised annually in the two other largest hog producing states combined.<sup>8</sup> Nearly all these Iowa hogs are raised indoors in CAFOs, using science-based and government-approved waste management practices.<sup>9</sup> This method of livestock production is sometimes referred to as "Factory Farming" or "Industrial Agriculture."<sup>10</sup> Raising large numbers of hogs in confined indoor facilities is a \$6 billion industry in Iowa

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6. See James Merchant & David Osterberg, *CAFO Explosion Affects Water, Health in Iowa*, DES MOINES REG., Jan. 25, 2018, at 13A; *State Rankings by Hogs and Pigs Inventory*, PORK CHECKOFF (June 14, 2018), <https://www.pork.org/facts/stats/structure-and-productivity/state-rankings-by-hogs-and-pigs-inventory>.

7. *Iowa Pork Facts*, IOWA PORK PRODUCERS ASS'N, <http://www.iowapork.org/news-from-the-iowa-pork-producers-association/iowa-pork-facts> (last visited June 28, 2018).

8. Editorial, *Hog Wild: Iowa Must Tap the Brakes on Record Growth of Pork Industry*, DES MOINES REG. (Sept. 29, 2017, 12:59 PM), <https://www.desmoinesregister.com/story/opinion/editorials/2017/09/29/hog-wild-iowa-pork-industry-growth/716489001/>. North Carolina is number two in hog production and Minnesota is number three. Editorial, *Iowa Puts Pigs over People: State Must Reset the Direction of Pork Industry Amid Record Growth*, DES MOINES REG., Oct. 1, 2017, at 10P. On October 1, 2017, the *Des Moines Register* ("DMR") published a long editorial entitled, *Iowa Puts Pigs Over People*. *Id.* The gravamen of the editorial was that at any point in time, not only does Iowa have over seven times more pigs in CAFOs than the total number of people living in the state, but governmental regulation of this large—but highly decentralized—agricultural industry is woefully lax in relation to the serious health threats and environmental harms that CAFOs can impose on neighbors. *Id.* The DMR editorial strongly urged Iowa legislators and environmental administrators to step up the regulation of CAFOs in an effort to slow down the rapid rate at which they are proliferating across the Iowa countryside—an expansion that is causing increasing health problems and environmental harms to neighboring landowners and to the public. *Id.*

9. See Lynne Rossetto Kasper, *Inside the Factory Farm, Where 97% of U.S. Pigs Are Raised*, SPLENDID TABLE (May 6, 2015), <https://www.splendidtable.org/story/inside-the-factory-farm-where-97-of-us-pigs-are-raised>.

10. See *id.*

that is economically important and politically powerful.<sup>11</sup> It is also an industry that poses potentially serious health and environmental threats to neighbors and their properties, and to the public, if the CAFOs are not properly sited and carefully managed.<sup>12</sup> As a result of lax to nonexistent state-level public health regulations and weak enforcement of environmental controls on CAFOs, Iowa has become a magnet for establishing new CAFO operations. Currently Iowa not only leads the nation in CAFOs, but their numbers are growing at a rate of around 200 per year.<sup>13</sup>

### III. PUBLIC HEALTH CONCERNS AND ENVIRONMENTAL PROBLEMS CAUSED BY CAFOs

Animal feeding operations produce up to 20 times more manure as waste than the sanitary wastes produced by the same-sized population of humans.<sup>14</sup> By law, human sanitary wastewater is required to be treated by either municipal wastewater treatment plants<sup>15</sup> or by private septic systems in rural

11. JAMES MERCHANT & DAVID OSTERBERG, *THE IOWA POLICY PROJECT, THE EXPLOSION OF CAFOs IN IOWA AND ITS IMPACT ON WATER QUALITY AND PUBLIC HEALTH* i (2018), <https://www.iowapolicyproject.org/2018docs/180125-CAFO.pdf>. As evidence of the political power of the hog industry in Iowa, see IOWA CODE § 657.11 (1) (2017), stating the purpose of the section: “to protect animal agricultural producers.” This section of the code stresses the importance of “animal agricultural producers” to the state-wide economy, to farm employment, and to the general wellbeing of the State of Iowa. See *id.*

12. See CARRIE HRIBAR, NAT’L ASS’N OF LOCAL BDS. OF HEALTH, *UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES* 16 (Mark Shultz ed., 2010), [https://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf) (“Concentrated animal feeding operations or large industrial animal farms can cause a myriad of environmental and public health problems. While they can be maintained and operated properly, it is important to ensure that they are routinely monitored to avoid harm to the surrounding community.”).

13. See Donnelle Eller, *Under the Radar: Iowa Discovers Thousands More Hog and Cattle Operations, Adding Fire to Confinement Debate*, DES MOINES REG., Sept. 5, 2017, at 1D. See also James Merchant & David Osterberg, *DNR Scoring System for Hog Farms Fails to Protect Our Health*, DES MOINES REG. (Sept. 18, 2017) (noting that “[i]n 2001, before the Master Matrix, there were 722 large DNR-permitted CAFOs of all types, 93 percent of which were hog CAFOs. Today, there are more than 3,000 large, DNR-permitted CAFOs. But the real number of CAFOs of all sizes, according to the DNR’s 2016 report to the EPA, is more than 14,000 with more than 5,000 ‘new’ CAFOs recently identified only via satellite imagery”).

14. See HRIBAR, *supra* note 12, at 2 (“Annually, it is estimated that livestock animals in the U.S. produce each year somewhere between 3 and 20 times more manure than people in the U.S. produce, or as much as 1.2–1.37 billion tons of waste.” (citation omitted)); Merchant & Osterberg, *supra* note 6 (“Numerous studies in the last decade also have documented the impact of CAFO air emissions on the health of neighbors, finding significant increases in childhood asthma, adult asthma, airway obstruction, and irritant-linked eye and upper airway symptoms. Other studies have documented negative impacts of CAFO air emissions on mood (more tension, depression, fatigue, confusion and less vigor), other psychosocial measures, and between odor and multiple quality-of-life measures.”).

15. The Clean Water Act of 1972 requires publicly owned treatment works to employ treatment technologies beyond secondary treatment, if necessary to meet applicable water quality

areas, which are certified as safe and effective by County Health Officials.<sup>16</sup> In contrast, under current regulations and prevailing “prudent and generally utilized” manure management practices, animal wastes from CAFOs are simply collected raw on site and then drained into large wastewater lagoons where they are stored, and from which they are removed periodically to be spread, untreated, on agricultural land as natural fertilizer.<sup>17</sup> While in these storage lagoons, as the wastes slowly decompose, they release a variety of odorific compounds into the local atmosphere.<sup>18</sup> Unless CAFOs are properly sited and carefully operated, the voluminous animal wastes they generate can produce extremely unpleasant emissions of ammonia, hydrogen sulfide, methane, bacteria and particulate matter.<sup>19</sup> These pungent odors are emitted while the wastes are collected in the confined facility, stored in open-air lagoons, and also when they are spread on land surfaces as fertilizer.<sup>20</sup> Overflows and leakage from the storage lagoons can also pollute surface waters and seep into underground aquifers, contaminating them for decades.<sup>21</sup> CAFOs pose a particular water pollution threat in sections of Iowa dominated by karst terrain, a topography that allows surface contamination easy access into groundwater aquifers.<sup>22</sup>

As dramatically demonstrated by the factual findings in a series of successful Iowa nuisance lawsuits by CAFO neighbors, the pungent emissions from CAFOs have the potential to make daily life nearly unbearable for residents of nearby properties.<sup>23</sup> These emissions cause more than just unpleasant odors: airborne contaminants emanating from CAFOs can cause serious health problems, including chronic respiratory ailments.<sup>24</sup> Improperly

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standards set by the Environmental Protection Agency. Federal Water Pollution Control Act, 33 U.S.C. § 1311(b)(1)(C) (2012).

16. See IOWA CODE ANN. §§ 455B.172(3)–(4) (West 2018) (delegating power to county boards of health to regulate “private sewage disposal facilities.”).

17. See IOWA DEP’T OF NAT. RES., APPENDIX C MASTER MATRIX, <http://www.iowadnr.gov/Portals/idnr/uploads/forms/5428043.pdf>.

18. See HTRIBAR, *supra* note 12, at 7–8; MERCHANT & OSTERBERG, *supra* note 11, at 3–6.

19. See HTRIBAR, *supra* note 12, at 5.

20. See Valasek v. Baer, 401 N.W.2d 33, 37 (Iowa 1987) (holding an improper spreading of CAFO waste too close to neighbor’s home was a nuisance, and ordering defendant to move location of field spreading).

21. See HTRIBAR, *supra* note 12, at 2–10.

22. Karst is a porous limestone substrata that readily allows surface contamination to reach underground water tables. See MERCHANT & OSTERBERG, *supra* note 11, at 23 (“Building a CAFO in the karst region of Northeast Iowa is something that should hardly ever happen.”); *Karst*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/karst-geology> (last visited July 2, 2018) (describing the formation of karst terrain).

23. See, e.g., Weinhold v. Wolff, 555 N.W.2d 454, 459–60 (Iowa 1996) (“[V]isitors to the home who experienced burning eyes and phlegmonous irritation. . . . [T]he odor drove the couple from their home. . . . One witness . . . described the smell as ‘lagoon odor’ . . . . At times the odor was so strong that she and her husband would quit working and leave the fields.”); see *infra* Part V (discussing nuisance statutory and case law in Iowa).

24. See MERCHANT & OSTERBERG, *supra* note 11, at 4–6.

operated CAFOs can also discharge dangerous pollutants into adjacent waterways and ground water aquifers.<sup>25</sup> Because of these serious environmental problems, every other state with significant livestock production imposes more strict state and local regulations on the siting and operation of CAFOs than Iowa does.<sup>26</sup>

#### IV. INADEQUACY OF PUBLIC REGULATION OF CAFOs

Theoretically, three possible levels of government regulation (federal, state, and local) could be brought to bear to impose effective controls over potential health risks and environmental threats posed by CAFOs. For various reasons, however, none of these governmental levels exert meaningful regulatory control over CAFOs in Iowa. It is this lack of effective public regulation of CAFOs that forces property owners harmed by CAFOs to seek redress through litigation based on Iowa's private nuisance law.

At the federal level, CAFOs are specifically designated as having the potential to become "point sources" of water pollution under the 1972 Clean Water Act.<sup>27</sup> Since the beginning of the enhanced federal powers granted by the 1972 Act, the Environmental Protection Agency ("EPA") has elected to assert direct regulatory authority over only very large CAFOs located in sensitive flood plains and CAFOs directly discharging polluting effluents into navigable waters of the U.S.<sup>28</sup> Regulation of all other CAFOs is delegated to state water pollution control programs, which are authorized to issue National Pollutant Discharge Elimination System ("NPDES") permits as required by federal law.<sup>29</sup> In many states this delegation is accepted conscientiously and permits are issued only after careful consideration of the proposed CAFO site and the likely effectiveness of the planned pollution control measures.<sup>30</sup> Iowa is definitely not one of the states with rigorous regulation of CAFOs under federal law at the state level.<sup>31</sup>

In 2002, after years of spirited disputes between state and county regulators over which government had the primary authority to regulate health-related dangers and potential environmental harms caused by local

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25. *Id.* at 13–14.

26. *See, e.g., id.* at 22–23 (discussing new North Carolina projects utilizing anaerobic digesters to reduce the odors from lagoons storing wastes from hog CAFOs); *see infra* notes 47–48 and accompanying text.

27. *See* HRIBAR, *supra* note 12, at 1.

28. *See id.* at 1–2.

29. *Id.* at 1.

30. *Id.*; JULIA CHARLES, CTRS. FOR DISEASE CONTROL & PREVENTION, MENU OF STATE LAWS REGARDING ODORS PRODUCED BY CONCENTRATED ANIMAL FEEDING OPERATIONS 2–3 (Alia Hoss & Matthew Penn eds., 2016), <https://www.cdc.gov/phlp/docs/menu-environmentalodors.pdf>.

31. For example, as of 2016, Iowa had issued only 170 NPDES Permits for its total of 3505 CAFOs. U.S. ENVTL. PROT. AGENCY, NPDES CAFO PERMITTING STATUS REPORT (2016), [https://www.epa.gov/sites/production/files/2017-04/documents/tracksum\\_endyear2016\\_v2.pdf](https://www.epa.gov/sites/production/files/2017-04/documents/tracksum_endyear2016_v2.pdf). By comparison, Minnesota had issued 598 NPDES Permits for its total of 1300 CAFOs. *Id.*

CAFOs, the Iowa Legislature settled the matter in favor of exclusive state regulation.<sup>32</sup> The legislature designated the Iowa Department of Natural Resources (“DNR”) as the state agency to approve and monitor CAFOs, and sketched out statutorily the outline of a Master Matrix to guide the DNR in its regulatory work.<sup>33</sup> One of the most contentious aspects of the Master Matrix system as it has developed in practice is the fact that, although the input of county officials is routinely invited on CAFO proposals in their county, their advice does not have to be followed by the DNR, and often it is clearly rejected.<sup>34</sup>

For years environmental groups and county leaders have strongly criticized the rigor and effectiveness of the DNR’s administration of the Master Matrix as much too lax on several key points. The most frequent complaints focus on the minimum siting distances being set far too short between CAFOs and neighboring homes and other sensitive sites,<sup>35</sup> the lack

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32. See IOWA CODE ANN. § 459.305 (West 2017). This code section lays out the criteria to be included in the Master Matrix, but charges the DNR to “adopt rules for the development and use of a master matrix.” *Id.*

33. See *id.* The Master Matrix sets forth 44 factors requiring consideration before approving construction of a new CAFO, but compliance with only 50% of the items on the Master Matrix produces a passing grade. *Master Matrix*, IOWA DEP’T OF NAT. RESOURCES, <http://www.iowadnr.gov/Environmental-Protection/Land-Quality/Animal-Feeding-Operations/Confinements/Construction-Requirements/Permitted/Master-Matrix> (last visited June 29, 2018) (providing a downloadable Master Matrix score sheet). DNR records show that 97% of proposed CAFOs were approved. MERCHANT & OSTERBERG, *supra* note 6; see also Merchant & Osterberg, *supra* note 13 (“More than 97 percent of proposed facilities get approved, even when counties object because of community complaints and/or adverse environmental impacts on vulnerable land and waterways.”). CAFOs that fail to gain approval the first time are coached by DNR officials about how to improve their score on the Master Matrix to gain state approval. DEP’T NAT. RESOURCES, OPEN FEEDLOT CONSTRUCTION PERMIT MANUAL 5 (2006) <http://www.iowadnr.gov/Portals/1dnr/uploads/forms/5421427%20manual.pdf>.

34. See Donnelle Eller, *Battle Over Animal Confinements Moves to Capitol*, DES MOINES REG., Jan. 17, 2018, at A.4. Twenty County Boards of Supervisors petitioned the Iowa General Assembly in January 2018 to impose a moratorium on new CAFO construction until such time as problems with the Master Matrix could be repaired. See *id.*

35. See IOWA DNR, MASTER MATRIX, Appendix C, <http://www.iowadnr.gov/Environmental-Protection/Land-Quality/Animal-Feeding-Operations/Confinements/Construction-Requirements/Permitted/Master-Matrix> (last visited Sept. 6, 2018) (link on page). Current DNR regulations on siting of CAFOs require minimum distances from other CAFOs, homes, and specified other protected land uses, such as parks, waterways, and schools. See IOWA CODE ANN. § 459.202 (West 2017); IOWA ADMIN. CODE r. 567-65, app. D, Table 6. The minimum distances vary depending on the size of the CAFO, ranging from 2500 feet of separation for the largest CAFOs, 1250 feet of separation for medium-sized CAFOs feeding between 1250 and 2500 pigs, and zero separation requirements for smaller CAFOs feeding under 1250 pigs. See IOWA ADMIN. CODE r. 567-65, app. C. Similar lines are drawn for the requirements of DNR approval of building construction plans and manure management plans, as CAFOs feeding more than 2500 pigs must obtain DNR approval of both building plans and manure management plans. CAFOs feeding between 1250 and 2500 pigs only require DNR approval for a manure management plan. See IOWA CODE ANN. § 459.312. Meanwhile, smaller CAFOs feeding fewer than 1250 pigs basically escape regulation as to siting, construction plans, operation, but must still file manure management plans.

of control over the escape of noxious odors from both the facilities and their animal waste lagoons, and the spreading of liquid manure at inopportune times in relation to climatic conditions and winds.<sup>36</sup> It is apparent from litigated nuisance cases against Iowa CAFOs that farmers proposing approval of new CAFOs have learned how to game this system by proposing CAFOs that are just a few animals under the size of CAFO that requires greater regulation.<sup>37</sup> Another troubling common practice allowed by the DNR under this regulatory regime can result in a virtually unregulated clustering of small or moderately-sized CAFOs.<sup>38</sup> Typically, the clustered CAFOs are all owned by different members of the same family and are located on the same farm.<sup>39</sup>

In September, 2017, the ease with which proposed new CAFOs qualify for approval under the Master Matrix and DNR's lack of responsiveness to local input led two environmental groups<sup>40</sup> to submit a formal petition to the Iowa Environmental Protection Commission requesting the agency support upgrading key requirements of the Master Matrix and requiring a higher score for a proposed new CAFO to gain the DNR's approval.<sup>41</sup>

At the hearing, the DNR recommended denial of the petition, and the Commission declined to support it, stating that, if the petitioners want changes in the Master Matrix, they must take their proposals to the Iowa General Assembly.<sup>42</sup> In January 2018, the petitioners acted on this advice. Joining forces with twenty-five other environmental and farm groups working together as the Iowa Alliance for Responsible Agriculture, the petitioners asked the General Assembly to adopt a moratorium on new CAFOs, to substantially strengthen the requirements of the Master Matrix, raise the

36. See Donnelle Eller, *Does Air Coming From Hog Confinements Contain Manure?*, DES MOINES REG. (Jan. 24, 2018, 3:39 PM), <https://www.desmoinesregister.com/story/money/agriculture/2018/01/24/iowa-department-natural-resources-hog-confinement-air-emissions-manure/1055615001>.

37. See, e.g., *McIlrath v. Prestage Farms of Iowa, L.L.C.*, No. 15-1599, 2016 WL 6902328, at \*1-2 (Iowa Ct. App. 2016) (involving a CAFO feeding 2496 hogs, which is only four hogs under the 2500 level that would require much more serious regulation).

38. Here is how this practice works: First, the DNR approves an initial proposal by an LLC for a CAFO housing a few hogs under 1250 or under 2500 cutoffs, the specific numerical levels at which more intense regulation applies. This approval is soon followed by sequential approval of proposals for a second, third or fourth CAFO of the same size, each CAFO formally owned by a different LLC. This cluster of "under-sized" or "medium-sized" CAFOs is subject either to no regulation or only partial regulation, even though they are allowed to feed up to almost 10,000 hogs on a single site.

39. See Donnelle Eller, *Group Urges Moratorium As Producer Adds 90,000 Hogs*, IOWA CITY PRESS-CITIZEN, Oct. 27, 2017, at 3A; *Iowa Pork Facts*, IOWA PORK PRODUCERS ASS'N, <http://www.iowapork.org/news-from-the-iowa-pork-producers-association/iowa-pork-facts> (last visited July 1, 2018).

40. See Eller, *supra* note 39. The environmental groups filing the petition were Iowa Citizens for Community Improvement and Food and Water Watch. *Id.*

41. See *id.*

42. See Donelle Eller, *Petition to Tighten Rules on Livestock Facilities Fails*, DES MOINES REG. (Sept. 18, 2017, 5:17 PM), <https://www.desmoinesregister.com/story/money/2017/09/18/petition-make-harder-build-livestock-facilities-iowa-fails/677775001>.



passing score for new CAFOs, and pay greater heed to the views of county governments.<sup>43</sup> The General Assembly did not act on any of these proposals.<sup>44</sup>

As further evidence of the ineffectiveness of the current regulation of CAFOs by the DNR, an October 1, 2017 *Des Moines Register* editorial reported that, although Iowa is now the nation's leading pork producing state by a wide margin, until completion of a recent statewide aerial survey ordered by EPA, the Iowa DNR was not even aware of nearly half of the CAFOs operating in the state (roughly 5000),<sup>45</sup> let alone monitoring them in any serious way. Iowa DNR officials claimed most of the newly discovered CAFOs were small and not subject to regulation, and that the agency was already aware of the larger CAFOs the aerial survey uncovered.<sup>46</sup>

In other states producing large numbers of hogs, state environmental agencies exert substantial control over emissions and effluents emanating from CAFOs.<sup>47</sup> Local government officials, typically county boards of supervisors and county boards of health, also exercise substantial regulatory authority over the siting and operation of CAFOs.<sup>48</sup> This is definitely not the case in Iowa. As documented above, state regulation of CAFOs in Iowa is very weak and is primarily designed to encourage their expansion in the interest of economic growth and the creation of new jobs. As to local regulation, since the outset of county zoning laws, the Iowa General Assembly has consistently denied Iowa counties the power to regulate any type of agricultural activity through exercise of their zoning powers.<sup>49</sup> Further limiting county authority, in 1998 the legislature expressly preempted all Home Rule powers of local governments to assert any air quality control over CAFOs or the air sheds around them.<sup>50</sup> This legislation was adopted shortly after the Iowa Supreme Court adopted a new "implied preemption" doctrine to rule that vague language in the state Air Pollution Control Act denied county health boards any authority to limit airborne pollutants escaping from local CAFOs.<sup>51</sup> Thus, Iowa county governments' only involvement in the regulation of CAFOs consists of offering advice to the DNR about the siting and operation of CAFOs proposed for location in the county, but their advice need not be heeded. As CAFOs proliferate around the state, it is easy to understand why

43. See Eller, *supra* note 34.

44. See William Petrowski & Brianne Pfannenstiel, *The Iowa Legislature Said "No" to These Ideas Proposed for the 2018 Session*, DES MOINES REG., May 8, 2018, at 3A.

45. See Donnelle Eller, *Under the Radar: Iowa Discovers Thousands More Hog and Cattle Operations, Adding Fire to Confinement Debate*, DES MOINES REG., Sept. 5, 2017, at 1D.

46. *Id.*

47. See, e.g., MO. CODE REGS. ANN. tit. 10, § 20-6.300 (2018); 15A N.C. ADMIN. CODE 2T.1307 (2018).

48. See HRIBAR, *supra* note 13, at 11-13.

49. See IOWA CODE ANN. § 335.2 (West 2018) (denying Iowa counties zoning authority over all agricultural land uses and activities).

50. See *id.* § 331.304A(2).

51. See *Goodell v. Humboldt County*, 575 N.W.2d 486, 502-03 (Iowa 1998).

an increasing number of counties joined the Coalition that petitioned the General Assembly for a moratorium on new hog CAFOs and major reform of the operation of the Master Matrix system for approving them.<sup>52</sup>

Every other legal business in Iowa operates under a network of regulations by local authorities, state agencies, and the federal entities that are specifically designed to protect the public and private citizens against health hazards, environmental harms, and dangerous waste water discharges and air emissions. This public regulation must be generally effective because nuisance actions are rarely filed against ordinary Iowa businesses for producing health problems or environmental damages to neighboring land owners.<sup>53</sup> This is not so for Iowa's multi-billion-dollar animal feeding industry. It is exempt from local regulation; is subject only to a thin layer of friendly regulations at the state level; and is more or less ignored at the federal level. By contrast to other Iowa businesses, access to the protection of Iowa courts in a nuisance suit is often the only viable recourse for a neighboring Iowa land owner wanting to escape unreasonable burdens caused by corruption of the ambient air or dangerous water pollution emanating from a nearby CAFO.

The rapid expansion of CAFOs in Iowa since 2001<sup>54</sup> predictably led to an increase in nuisance complaints by their rural neighbors. When these complaints cannot be resolved amicably, the adversely affected neighbors look to Iowa courts for relief through filing a nuisance action against the offending CAFO.<sup>55</sup> Nuisance actions against animal feeding operations have seen a substantial uptick over the past 25 years,<sup>56</sup> and the Iowa Supreme Court has generally treated nuisance suits against CAFOs favorably in the face of legislative attempts to curtail them.<sup>57</sup> The adoption of Iowa Code § 657.11A was almost certainly the result of continuing concern on the part of the hog

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52. See Eller, *supra* note 34; Eller, *supra* note 39.

53. During over 150 years of Iowa nuisance law, occasional suits have been brought against such businesses as slaughter houses, funeral homes, creameries, asphalt plants, and landfills. The latest major nuisance suit against an Iowa business that was not a CAFO was against a large corn processing plant. See *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 63 (Iowa 2014).

54. See *Merchant & Osterberg*, *supra* note 6.

55. The first nuisance suit against a CAFO was *Patz v. Farmegg Prods., Inc.*, 196 N.W.2d 557 (Iowa 1972).

56. Since *Farmegg* in 1972, nuisance suits against CAFOs have reached the Iowa Supreme Court every few years. Since *Weinhold v. Wolff*, 555 N.W.2d 454 (Iowa 1996), the Court has heard seven nuisance cases with CAFOs as defendants. See *Valasek v. Baer*, 401 N.W.2d 33 (Iowa 1987); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173 (Iowa 2004); *Miller v. Rohling*, 720 N.W.2d 562 (Iowa 2006); *Simpson v. Kollasch*, 749 N.W.2d 671 (Iowa 2008); *McIlrath v. Prestage Farms of Iowa, L.L.C.*, No. 15-1599, 2016 WL 6902328 (Iowa Ct. App. Nov. 23, 2016); *Honomichl v. Valley View Swine, LLC*, No. 16-1006, 2018 WL 3083982 (Iowa June 22, 2018).

57. See Jennifer De Kock, *New CAFO Law Goes into Effect July 2017*, IOWA LAW., July 2017, at 17, [https://cymcdn.com/sites/www.iowabar.org/resource/resmgr/iowa\\_lawyer/3230\\_IowaLawyer\\_July2017NEW.pdf](https://cymcdn.com/sites/www.iowabar.org/resource/resmgr/iowa_lawyer/3230_IowaLawyer_July2017NEW.pdf).

feeding industry, that in the absence of protective legislation, nuisance suits against CAFOs would continue to be brought and won.

#### V. PREVAILING IOWA NUISANCE LAW

Iowa has recognized and applied a robust private nuisance law since statehood. Iowa Code § 657.1(1), adopted in 1851, codifies this legal tradition in about as clear and unambiguous terms as can be imagined.

Iowa Code § 657.1(1):

1. Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance.<sup>58</sup>

Iowa Code § 657.2 outlines in detail the variety of potential sources of unreasonable interference addressed by Iowa nuisance law.<sup>59</sup> Considering that this statute is unchanged since it was written in the middle of the 19th Century, the first two sections of § 657.2 track remarkably closely the types of harms about which neighbors of modern CAFOs most frequently complain today.

Iowa Code § 657.2. What deemed nuisances.

The following are nuisances:

1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.
2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.<sup>60</sup>

In a long line of cases prior to the 1990s, the Iowa Supreme Court repeatedly embraced an analysis under which nuisances in Iowa were determined by a three-part test. That test asked: (1) who first occupied their land and used it for its present purpose; (2) is the activity complained about suitable for the character of the neighborhood; and (3) how severe is the harm caused by the claimed nuisance?<sup>61</sup> In assessing the degree of harm, the standard applied is the impact the claimed nuisance would have on “normal

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58. IOWA CODE ANN. § 657.1(1) (West 2018).

59. *See id.* § 657.2.

60. *Id.* § 657.2(1)–(2).

61. *See* *Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 129 (Iowa 1974).

persons living in the community.”<sup>62</sup> It is a rare CAFO nuisance case in which the “suitability” element of the Iowa test comes into play.<sup>63</sup> This is because both competing uses usually are suitable for the neighborhood in which they are located.<sup>64</sup> In a typical CAFO case, for example, traditional farming, outdoor recreation, rural residences, and CAFOs are reasonably well suited to the locale, as they are properly sited. Thus, the priority of occupation factor and the gravity of harm factor receive the most serious consideration—and in CAFO cases, where the harm is usually substantial, the priority of occupation factor tends to decide the case.

Before the landmark *Riter v. Keokuk Electro-Metals Co.* case in 1957,<sup>65</sup> winning nuisance plaintiffs in Iowa generally were entitled to abate the offending nuisance through an injunction, if they sought it.<sup>66</sup> Starting with the *Riter* case, the Iowa Supreme Court adopted the Restatement (Second) of Torts “Relative Hardship” test<sup>67</sup> when considering the possibility of injunctive relief. This test requires the court to answer the question: *How great will be the hardship imposed on the defendant if an injunction is granted?* versus *How great will be the hardship imposed on the plaintiff if an injunction is denied?*<sup>68</sup> For an Iowa court to grant the plaintiff an injunction, these two different theoretical hardships must be weighed against each other, and the hardship to the plaintiff in denying an injunction must outweigh the hardship to the defendant if an injunction is granted.<sup>69</sup> In only one CAFO case has a winning Iowa plaintiff ever been awarded injunctive relief.<sup>70</sup> In most Iowa CAFO nuisance cases, the winning plaintiff sought an injunction, but equitable relief

62. *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996) (quoting RESTATEMENT (SECOND) OF TORTS § 821F cmt. d (AM. LAW INST. 1977)).

63. *Schlottfelt v. Vinton Farmers' Supply Co.*, 109 N.W.2d 695 (Iowa 1961), is such a case. In *Schlottfelt*, a grain grinder operated by a feed supply business created vibrations, noise and chaff was found to be a nuisance because it was mislocated in a primarily residential neighborhood. *Id.* at 696, 699–700.

64. *See id.*

65. *See generally* *Riter v. Keokuk Electro-Metals Co.*, 82 N.W.2d 151 (Iowa 1957) (holding that in a nuisance case injunctive relief should not be granted until the “benefits or injuries” that would ensue are compared).

66. *See* *State ex rel. Harris v. Drayer*, 255 N.W. 532, 534 (Iowa 1934) (enjoining a rendering plant operating within city); *Higgins v. Decorah Produce Co.*, 242 N.W. 109, 113 (Iowa 1932) (enjoining the operation of a produce company causing annoyance to city neighbors).

67. *See Riter*, 82 N.W.2d at 159; RESTATEMENT (SECOND) OF TORTS § 941 (AM. LAW INST. 1979).

68. RESTATEMENT (SECOND) OF TORTS § 941.

69. *See Riter*, 82 N.W.2d at 161–62.

70. *Valasek v. Baer*, 401 N.W.2d 33, 37 (Iowa 1987) (requiring the CAFO owner to spread liquid manure a greater distance from plaintiff's home and avoid spreading liquid manure on days when wind was blowing toward plaintiff's land).

was denied on the ground that abating the nuisance-causing activity would impose too great a relative hardship on the defendant.<sup>71</sup>

As to the recovery of compensatory damages by a winning nuisance plaintiff, the *Weinhold v. Wolff*<sup>72</sup> case is most instructive. Once the court finds an actionable nuisance, but injunctive relief is denied, the task then is to award the plaintiff appropriate compensatory damages. Iowa nuisance law recognizes three distinct types of compensatory damages: (1) Permanent damages measured by the diminution in the value of the plaintiff's land cause by the nuisance.<sup>73</sup> "This measure of damages compensates the injured landowner for an interference that is tantamount to a permanent taking."<sup>74</sup> (2) Personal injury damages to persons rightfully occupying the affected land, including medical expenses, including mental suffering and emotional distress, and any other losses associated with health-related expenses.<sup>75</sup> Iowa decisions make clear that a nuisance plaintiff does not have to suffer a physical injury that is medically confirmed in order to claim this type of personal injury damages.<sup>76</sup> (3) Other special damages based on inconvenience, annoyance, discomfort, and losses suffered because of inability to experience full enjoyment of the property.<sup>77</sup> Losses from missing work, the expense of temporary housing, and extra travel expenses are examples of this type of special damages.<sup>78</sup>

Punitive damages are theoretically an available remedy to nuisance plaintiffs who can show a court that the harms imposed on them were reprehensible and were the result of "willful and wanton" conduct by the defendant.<sup>79</sup> Although punitive damages have been sought in several cases against nuisance-producing CAFOs, no Iowa court has yet awarded punitive damages to a winning plaintiff. However, the possibility of punitive damages is always on the horizon. In a particularly egregious Iowa case, where the

71. See, e.g., *Patz v. Farmegg Prods., Inc.*, 196 N.W.2d 557, 562–63 (Iowa 1972) (awarding permanent damages although harm to plaintiff from large exhaust blowing poultry waste odor toward his home was severe).

72. *Weinhold v. Wolff*, 555 N.W.2d 454, 465–66 (Iowa 1996).

73. *Id.* at 465 ("The diminution in value refers to 'the diminution of the market value of the property for any use to which it might be appropriated, and not merely the diminution in value for the purpose to which the plaintiff dedicated it.'" (citing 58 AM. JUR. 2D *Nuisances* § 289 (1989)).

74. *Id.*

75. *Id.* at 465–66.

76. *Id.* at 466. See also *Duncanson v. City of Fort Dodge*, 11 N.W.2d 583, 584, 586 (Iowa 1943).

77. *Weinhold*, 555 N.W.2d at 466 ("Our case law is clear that these are elements of damages to be separately compensated.").

78. See *id.* at 465 ("Special damages in nuisance cases are not subject to any precise rule for ascertaining damages because these damages are not susceptible of exact measurement . . . . If therefore there is any reasonable basis in the record to support the award, we will not disturb it.").

79. See *Earl v. Clark*, 219 N.W.2d 487, 491 (Iowa 1974); see also IOWA CODE ANN. § 668A.1(1) (West 2018). Depending on whether the malicious conduct was directed to the claimant or elsewhere, 75% of the punitive damages awarded may be claimed by the State of Iowa. *Id.* § 668A.1(2)(b).

CAFO owner was clearly on notice of the severe harm suffered by a neighbor and stubbornly refused to correct the ineffective waste management practices causing it, punitive damages likely would be awarded to the plaintiff. For example, in a 2018 nuisance case in North Carolina, a federal jury awarded winning plaintiffs \$50 million in punitive damages against a very large hog CAFO whose improper waste management practices seriously harmed neighboring homeowners.<sup>80</sup>

Finally, but importantly, Iowa courts have consistently held that neither conducting a legal business in strict accordance with relevant laws and regulations, nor adhering to rigorous industry standards in operating that part of the business that is claimed to produce a nuisance, will insulate a business from nuisance liability.<sup>81</sup> This latter position was recently reaffirmed in a decision where the Court held<sup>82</sup> a lawful business that was operating according to state of the art industry standards, but was nevertheless causing unreasonable harm to the neighbors' use and enjoyment of their property, was subject to nuisance liability.<sup>83</sup>

This principle was consistently applied to nuisance claims against agricultural activities prior to the adoption of Iowa Code §§ 352.11 and 657.11.<sup>84</sup> Iowa Code § 657.11A, the latest legislative attempt to insulate farm operations from nuisance liability, is the third such attempt to give much more favorable legal treatment to this specific type of agricultural business than the legislature has given to any other type of Iowa business. The two prior efforts to confer immunity on CAFOs that were inflicting serious nuisance harm on their neighbors were both struck down by the Iowa Supreme Court as unconstitutional.<sup>85</sup>

## VI. FATE OF PRIOR LEGISLATION TO PROTECT CAFOs FROM NUISANCE CLAIMS

The Iowa legislature first started down the road to exempting agricultural activities from ordinary nuisance liability when it adopted Iowa Code § 352.11

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80. See Order at 1, 3, *McKiver v. Murphy-Brown LLC*, No. 7:14-CV-180-BR (E.D.N.C., May 7, 2018). However, a subsequent order reduced the amount of damages to \$2.5 million. *Id.* at 3.

81. See *Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 130 (Iowa 1974); *Claude v. Weaver Const. Co.*, 158 N.W.2d 139, 146 (Iowa 1968).

82. *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 84 (Iowa 2014).

83. *Id.* at 84 ("We have made clear that a lawful business, properly conducted, may still be a nuisance. For instance, in *Simpson* we noted in the context of the proposed construction of a hog-confinement facility that compliance with DNR regulations was not a defense to a nuisance action.").

84. See, e.g., *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996); *Patz v. Farmegg Prods., Inc.*, 196 N.W.2d 557, 560–61 (Iowa 1972); *Schlotfeldt v. Vinton Farmers' Supply Co.*, 109 N.W.2d 695, 701 (Iowa 1961).

85. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998).

in 1982.<sup>86</sup> This so-called “Right to Farm” legislation was included in an authorization to county boards of supervisors to designate specific land areas within the county as “agricultural areas.”<sup>87</sup> Once an agricultural area had been designated, § 352.11 provided that a farm operation within the area could not be found liable in a nuisance action unless the harm resulted from the violation of a state or federal statute or from negligent operation of the agricultural activity.<sup>88</sup> The first challenge to this nuisance exemption reached the Iowa Supreme Court in *Weinhold v. Wolff*, but the Court declined to consider the constitutional claim because it found the defendant’s agricultural area designation came one year after the nuisance damage started.<sup>89</sup> Later, in the 1998 case, *Bormann v. Board of Supervisors*,<sup>90</sup> the Court, in a unanimous opinion, struck down § 352.11, holding the statute was an unconstitutional taking of the plaintiff’s property without just compensation.<sup>91</sup> The Court reasoned that before the statute was enacted, neighbors next to farming operations had the right to insist that the comfortable use and enjoyment of their land not be unreasonably disturbed by noxious emissions or effluents emanating from the nearby farm.<sup>92</sup> After the statute, these neighbors no longer enjoyed such legal protection of their property, because the statute functionally granted the offending farm owner the equivalent of an easement to harm neighbors with impunity, because they were no longer subject to the obligations imposed by nuisance law.<sup>93</sup> The Court characterized the effect of the statute as the state government effectively transferring an easement to pollute to the CAFO owner, without providing any just compensation to the adversely affected neighbor, as required by the Fifth Amendment.<sup>94</sup> The Court went on to note that, under nuisance law, allowing permanent damages to plaintiffs—who were harmed by an actionable degree of nuisance interference with the use and enjoyment of their land—constituted the type of “just compensation” required by constitutional takings law.<sup>95</sup> Imposing such an easement legislatively against the will of the landowner without any compensation, however, was a “flagrantly unconstitutional” taking under both the U.S. and Iowa Constitutions.<sup>96</sup>

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86. IOWA CODE § 352.11 (1982).

87. *Id.* See also *Bormann*, 584 N.W. 2d at 316.

88. IOWA CODE § 352.11(1)(b).

89. *Weinhold*, 555 N.W.2d at 457.

90. *Bormann*, 584 N.W. 2d at 321.

91. *Id.*

92. *Id.* at 314, 321.

93. *Id.* at 315.

94. *Id.* at 315–16, 321.

95. See *id.* at 321.

96. *Id.* at 322.

In 1995, three years prior to the *Bormann* decision, the Iowa General Assembly added a controversial amendment to chapter 657 that was expressly stated as intended to promote the growth of CAFOs in Iowa by insulating them from nuisance liability.<sup>97</sup> Iowa Code § 657.11 declared flatly that an Iowa CAFO “shall not be found to be a public or private nuisance under this chapter or under principles of common law,” if it was in compliance with federal and state laws regulating animal feeding operations and was using “prudent generally accepted management practices.”<sup>98</sup> These requirements to qualify for immunity from nuisance suits were much less onerous than they might appear on their face. As discussed earlier, there is little, if any, effective direct federal regulation of Iowa CAFOs, and repeated initiatives to expand the jurisdiction of the EPA in regulating CAFOs have been rejected.<sup>99</sup> Iowa’s statewide legislation dealing with CAFOs is toothless, and is primarily concerned with promoting their growth, and with preempting local Iowa governments from exerting any meaningful control over their siting or operation.<sup>100</sup> Iowa DNR’s regulations under the Master Matrix governing the siting and operation of CAFOs are very weak compared to such regulations in other states with large numbers of CAFOs.<sup>101</sup> Similarly, conventional “prudent generally accepted management practices” with respect to CAFOs are largely directed at improving profitability and not at avoiding public health hazards or environmental degradation.<sup>102</sup>

The generally accepted management practice for handling feedlot wastes is to construct a large manure storage lagoon downhill from the CAFO to which the wastes from the confinement facility are regularly drained.<sup>103</sup> Periodically, partially digested wastes are removed from the storage lagoon and spread on nearby fields as fertilizer.<sup>104</sup> It is the malodorous emissions and other negative externalities generated by this conventional waste

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97. See IOWA CODE ANN. § 657.11(1) (West 1995).

98. See *id.* § 657.11(2).

99. See HRIBAR, *supra* note 12, at 1–2.

100. See *supra* Part D (discussing state regulation of CAFOs in Iowa).

101. See *e.g.*, 15A N.C. ADMIN. CODE 2T.1307 (2018).

102. The five-word phrase describing the level of CAFO management expected by the General Assembly are not defined in the Iowa Code or in DNR Regulations, and they have never been applied directly by an Iowa court. Judging from the cases where CAFOs were sued for nuisance, in practice they mean handling huge amounts of animal wastes in the same way thousands of other Iowa CAFOs handle them.

103. See generally U.S. ENVTL. PROT. AGENCY, MANAGING MATURE NUTRIENTS AT CONCENTRATED ANIMAL FEEDING OPERATIONS (2004), [https://www.epa.gov/sites/production/files/2015-08/documents/cafo\\_manure\\_guidance.pdf](https://www.epa.gov/sites/production/files/2015-08/documents/cafo_manure_guidance.pdf) (explaining the uses and limitations of, and alternatives to, various types of storage lagoons).

104. See *id.* ch. 4.



management practice that are responsible for most of the harms triggering nuisance suits against Iowa CAFOs.<sup>105</sup>

In the 2004 *Gacke v. Pork Xtra, L.L.C.* case,<sup>106</sup> the Iowa Supreme Court directly addressed the immunity from nuisance liability intended to be conferred on CAFOs by Iowa Code § 657.11. The Court unanimously reaffirmed its “easement-based taking” analysis adopted in the *Bormann* case,<sup>107</sup> but in a surprising move limited its application to the loss in value suffered by the land itself.<sup>108</sup> The Court went on, however, to sustain a claim for personal injuries suffered by the landowner and his family against an immunity defense raised by the CAFO under the statute.<sup>109</sup> To justify its ruling, the Court invoked the reference in the Preamble to the Iowa Constitution in which all citizens’ “inalienable rights” with respect to “acquiring, possessing and protecting property” were explicitly recognized and preserved.<sup>110</sup> The Court reasoned that because the common law of nuisance was widely recognized in Iowa before the Iowa Constitution was adopted, the right to recover for personal injuries caused by an actionable nuisance was one of the inalienable rights the Iowa Constitution was intended to protect.<sup>111</sup> The Iowa General Assembly could possibly legislate away this constitutional protection through exercise of the police power, but only if such legislative action was reasonable and necessary to advance some important state interest, and not “unduly oppressive” on a citizen’s property rights.<sup>112</sup> The Court held the legislative exercise in this case was unreasonable, did not substantially advance an important state interest, and was unduly oppressive on the rights of the Gackes.<sup>113</sup> Therefore the nuisance law

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105. See PEW COMM’N ON INDUS. FARM ANIMAL PROD., PEW CHARITABLE TRS., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 27, 69 (2008), <http://www.pewtrusts.org/~media/legacy/uploadedfiles/peg/publications/report/pcifapfinalpdf.pdf>.

106. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004).

107. See *id.* at 172–74; *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 315 (1998) (“(1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been ‘taken’ by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?”).

108. *Gacke*, 684 N.W.2d at 174–75.

109. *Id.* at 179–81.

110. *Id.* at 175–76 (quoting IOWA CONST. art. I, § 1).

111. *Id.* at 175–77. In ruling in favor of the Gackes, the Court recognized three factual findings that it held made § 657.11 an unreasonable violation of Gacke’s ‘inalienable’ constitutional rights: (1) Gackes gained no benefit from the statute different than other members of the general public; (2) Gackes suffered significant hardship from the defendant’s continuing nuisance; and (3) Gackes clearly demonstrated priority in location, having occupied and invested in substantial improvements of their home for many years before defendant’s CAFO began operation nearby. Iowa courts subsequent to *Gacke* have dubbed these three factual findings the ‘Gacke Three Prong Test.’ See *Honomichl v. Valley View Swine, LLC*, No. 16-1006, 2018 WL 3083982, at \*8–9 (Iowa June 22, 2018).

112. *Gacke*, 684 N.W.2d at 177 (quoting *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (1995)).

113. *Id.* at 179.

immunity granted CAFOs by § 657.11 was unconstitutional as it applied to the right of the Gackes to recover personal damages caused by conduct found to be a legal nuisance.<sup>114</sup> The Court clearly indicated that its ruling on the personal damages question was based on the special facts of the Gacke's case and not a general holding that § 657.11 was unconstitutional on its face as applied to all nuisance plaintiff's damages claims.<sup>115</sup>

## VII. THE NEW LAW: IOWA CODE § 657.11A

New Iowa Code § 657.11A was acted upon quickly by the General Assembly in March 2017. It was approved by the Iowa Senate on March 14, passed the Iowa House on March 22, and was signed into law by Governor Branstad on March 29.<sup>116</sup> In this somewhat controversial amendment, the Iowa Legislature again attempted to provide CAFOs special legal protection against neighbors' nuisance actions.<sup>117</sup> The new law sought to avoid the constitutional problems that doomed the earlier immunity statutes by carefully threading the needle to fit comfortably within the jurisprudence of the *Bormann* and *Gacke* rulings. Instead of granting a qualifying CAFO total immunity from nuisance actions, § 657.11A adopts a different approach. Its primary objective was to place maximum limits on the compensatory damages available to a winning nuisance plaintiff, but it also adjusted several traditional nuisance principles in ways intended to benefit CAFOs.<sup>118</sup>

Section 1 of § 657.11A serves as a preamble to the substantive provisions that follow and contains three subsections titled "Findings," "Purpose," and "Declaration."<sup>119</sup> The gist of these three subsections is that the General Assembly finds the expansion of "responsible animal agricultur[e]" advances important public interests, the purpose to the new law is to protect animal agricultural production from "certain types of nuisance actions," and declares the legislative intent to "preserve and enhance responsible animal agricultural production," presumably by limiting nuisance actions against them, although this is not expressly stated.<sup>120</sup>

Section 2 of § 657.11A then provides that if an animal feeding operation is found to be a nuisance, it "shall be conclusively presumed to be a permanent nuisance and not a temporary or continuing nuisance."<sup>121</sup> The reasons for—and effect of—this conclusive presumption will be taken up in a

114. *Id.*

115. *Id.* ("We express no opinion as to whether the statute might be constitutionally applied under other circumstances.").

116. See *Bill History for Senate File 447*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/legislation/billTracking/billHistory?billName=SF%20447&ga=87> (last visited July 13, 2018).

117. IOWA CODE § 657.11A(1) (2017).

118. *Id.* § 657.11A(2)–(3). Five of these changes are discussed in detail *infra* Section IX.

119. *Id.* § 657.11A(1).

120. *Id.*

121. *Id.* § 657.11A(2).

later discussion in Section IX of this Essay.<sup>122</sup> Suffice it to say here that for sound and practical reasons, generally Iowa nuisance law recognized three types of nuisances: temporary nuisances, continuing nuisances, and permanent nuisances.<sup>123</sup> Section 2 goes on to provide that if an animal feeding operation is found to be a nuisance, it “shall be subject to compensatory damages only as provided in subsection 3.”<sup>124</sup> How a court should interpret the word “only” in this context is also the subject of extensive discussion in section VIII.<sup>125</sup>

Section 3 of § 657.11A imposes three limits on a winning nuisance plaintiff’s compensatory damages awarded against an animal feeding operation.<sup>126</sup> First, § 657.11A(3)(a) builds on the Iowa Supreme Court’s easement analysis in the *Bormann* and *Gacke* cases. It sets the one-time permanent damages award for loss of value of plaintiff’s affected land attributable to the CAFOs nuisance at the dollar amount a market transfer of this easement to pollute would produce between a willing seller and a willing buyer.<sup>127</sup> As discussed later in Section IX, this method of establishing a permanent damages award differs somewhat from the way Iowa courts normally calculate the plaintiff’s loss, and it is not clear what purpose is served by embracing what appears to be an “eminent domain” approach to calculating the permanent damages.<sup>128</sup> It hardly appears to be in the interests of the animal feeding industry to emphasize the “private taking” aspect of a court awarding a plaintiff permanent damages and thereby conferring on the losing defendant an easement to continue to pollute the plaintiff’s land in perpetuity.

Section 3 also codifies a recent ruling of the Iowa Court of Appeals<sup>129</sup> limiting the damages recovery of a winning nuisance plaintiff who happens to own the land in co-tenancy with another person.<sup>130</sup> Most Iowa farmsteads and rural residential properties are owned in some form of co-tenancy, typically between a husband and wife.<sup>131</sup> Therefore, as is discussed later in Section IX,

122. See *infra* Section IX.C.

123. See *Weinhold v. Wolff*, 555 N.W.2d 454, 462 (1996) (quoting 58 AM. JUR. 2d *Nuisances* §§ 273–75 (1989)).

124. IOWA CODE § 657.11A(2).

125. See discussion *infra* Section VIII.

126. IOWA CODE § 657.11A(3).

127. *Id.* § 657.11A(3)(a).

128. See *infra* Section IX.D.

129. See *McIlrath v. Prestage Farms of Iowa, L.L.C.*, No. 15-1599, 2016 WL 6902328, at \*7 (Iowa Ct. App. Nov. 23, 2016).

130. IOWA CODE § 657.11A(3)(a).

131. See N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 606, 617 (1966). Perhaps, based in part on the strong empirical evidence of the prevalence of joint tenancy ownership by Iowa married couples discovered in this study, in 2014 the Iowa Legislature amended Iowa Code § 557.15 to adopt a statutory presumption in favor of joint tenancy when the co-owners are married to each other. See IOWA CODE § 557.15.2(a) (2017).

this recent court holding and its codification in § 657.11A could have wide-reaching impact on organizing the plaintiffs in future nuisance cases.<sup>132</sup>

New § 657.11A(3)(b) provides that compensatory personal injury damages related to adverse health effects are provable by “only objective and documented medical evidence that the nuisance . . . was the proximate cause of the person’s adverse health condition.”<sup>133</sup>

This language is more restrictive than the evidentiary standards followed in most Iowa nuisance cases, where the courts generally admit the testimony of other neighbors and knowledgeable lay persons concerning the severity of the nuisance effects and their direct impact on persons occupying the affected land.<sup>134</sup> Where overpowering or sickeningly severe stench is often the most serious nuisance complaint against a CAFO, requiring objective medical evidence to prove that corruption of the air is the proximate cause of plaintiff’s illness or disabling respiratory issues may be difficult for courts to enforce.

New § 657.11A (3)(c) also requires that other compensatory special damages “including without limitation, annoyance and the loss of comfortable use and enjoyment of real property” are recoverable only if they are “proximately caused by the animal feeding operation.”<sup>135</sup> Prior Iowa cases involving nuisance suits against CAFOs suggest the special damages contemplated here could be such items as loss of wages (when plaintiffs could not get to their employment), travel and lodging expenses incurred when they could not safely live in their home, and various foregone economic opportunities.<sup>136</sup> Under the new law, these compensatory special damages are capped at a figure that is 150% of the total damages recovered under subsection 3(a) for the loss in land value and under subsection 3(b) for the health-related personal injuries.<sup>137</sup> Except for this somewhat arbitrary 150% cap, the damages recovery provisions set forth in the new law track fairly closely the customary damages received by winning nuisance plaintiffs in prior Iowa nuisance cases involving CAFOs as defendants.<sup>138</sup> But that is not the end of the story.

Section 4 of § 657.11A<sup>139</sup> imports into the new act existing sections 4 and 5 of § 657.11. Reenacting § 657.11(4) appears to tinker with another central element of private nuisance law as it has evolved in Iowa courts. In what may be the most disruptive aspect of the new law, § 657.11A(4) incorporates by

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132. See *infra* Section IX.E.

133. IOWA CODE § 657.11A(3)(b).

134. See *Weinhold v. Wolff*, 555 N.W.2d 454, 460 (Iowa 1996).

135. IOWA CODE § 657.11A(3)(c).

136. See *Weinhold*, 555 N.W.2d at 461.

137. IOWA CODE § 657.11A(3).

138. See *Weinhold*, 555 N.W.2d at 462–63.

139. IOWA CODE § 657.11A(4).

reference a provision found in existing § 657.11 (4),<sup>140</sup> that has never yet been interpreted or applied by the Iowa Supreme Court in an Iowa nuisance suit. Section 657.11A(4) expressly incorporates existing § 657.11(4), which provides “This section shall apply regardless of the established date of operation or expansion of the animal feeding operation.” Section 4 is the only part of § 657.11A not part of original Senate File 447.<sup>141</sup> Senate File 3122, which embodied Section 4, was proposed by the Committee Chair and approved as an amendment on the Senate floor. Opponents of the amendment argued vigorously—but unsuccessfully—that it represented a major change in Iowa nuisance law in favor of CAFOs.<sup>142</sup>

As noted earlier, long-standing Iowa nuisance law emphasizes three factors in determining whether a nuisance claim will be upheld, with “priority in occupation” being a critical inquiry. On its face, reenactment of this provision in § 657.11 appears to abrogate the “priority in occupation” factor, that has been the most determinative criterion in Iowa CAFO nuisance cases. How courts will interpret and apply this seeming direct conflict with traditional Iowa nuisance law is discussed later in Section IX.

The reenactment in Section 4 of the content of existing § 657.11 (5) was intended to replace subsection 4 in the original S.F. 447, which adopted a punitive unqualified “loser pay” rule for plaintiffs who failed to win a nuisance suit against a CAFO. The provision incorporated by reference from § 657.11 (5) imposes a more conventional “loser pay” penalty that applies only if a court determines that the nuisance suit was frivolous. The wording of § 657.11 (5) is little different from Rule 1.413(2) of the Iowa Rules of Civil Procedure,<sup>143</sup> and should cause no serious concern to the typical plaintiff with an actionable nuisance claim against a CAFO that is clearly not frivolous.

Subsection 5 of § 657.11A<sup>144</sup> reintroduces another problematic element of § 657.11 in stating a specific exception to the protections afforded CAFOs by the rest of the amendment. Subsection (5) (b) provides that the protections of the new statute will not apply if the defendant is “fail[ing] to use existing prudent generally utilized management practices reasonable for the animal feeding operation.”<sup>145</sup> This is virtually the same language used throughout § 657.11 and elsewhere in new § 657.11A to describe the level of management responsibility the legislature expects CAFO operators to employ, but it is not

140. *Id.* § 657.11 (4).

141. Section 4 was added to the Bill as an amendment when the Senate voted 29 to 20 to approve S.F. 3122. The amendment was stated to be primarily intended to remove a “loser pay” provision from the original Bill, but it did more. S. FILE 447, COMMITTEE ON AGRICULTURE, at 1 (Iowa 2017), <https://www.legis.iowa.gov/docs/publications/LGI/87/SF447.pdf>.

142. See *Senate Video* (2017-03-14), IOWA LEGISLATURE, <http://www.legis.state.ia.us/dashboard?view=video&chamber=S&clip=s20170314163649480&dt=2017-03-14&bill=SF%20447&status=I> [hereinafter *Senate Video*].

143. Compare IOWA CODE § 657.11 (5), with IOWA R. CIV. P. 1.413(2).

144. IOWA CODE § 657.11A(5).

145. *Id.* at § 657.11A(5)(b).

defined anywhere in either statute, or in § 459.604,<sup>146</sup> which deals with “habitual violators” of environmental regulations.<sup>147</sup> This lack of a meaningful statutory definition for this wordy requirement/exception was discussed in the Senate’s floor debate on the amendment. Several senators predicted likely problems posed by the lack of a succinct and officially agreed upon standard of performance for CAFOs’ management.<sup>148</sup> They identified it as a serious deficiency in the future regulation of Iowa CAFOs and proposed several solutions.<sup>149</sup> One such suggestion was embodied in a proposed amendment S.F. 3154. This amendment sought to define the satisfactory level of management performance contemplated in § 657.11A by tying it to a set of research-based recommendations from the Iowa State University Extension Service for the siting and operation of the CAFOs.<sup>150</sup> ISU’s Extension Service recommends its Community Assessment Model (“CAM”), which is based on research conducted by the College of Agriculture on best practices for protecting neighbors from annoying odors emanating from CAFOs. This amendment failed on the Senate floor, as did a suggestion to at least recommend that anyone proposing to build a new CAFO should be advised to seek assistance from a volunteer group, the Coalition in Support of Iowa Farmers,<sup>151</sup> which was reported to rely on ISU’s CAM in their advisory work.<sup>152</sup> This was one of several instances where the overt partisanship exhibited in the floor debate on S.F. 447 operated to block serious consideration of what appeared to be good ideas for the improvement of the proposed legislation.

#### VIII. DOES § 657.11A MEET THE CONSTITUTIONAL PRINCIPLES ESTABLISHED IN THE *BORMANN* AND *GACKE* CASES?

No matter how the Court construes the new statute, it will create a major difference between the remedies available to nuisance plaintiffs winning suits

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<sup>146.</sup> *Id.* § 459.604.

<sup>147.</sup> In the Senate floor debate on SF-447, Senator R. Hogg raised questions about the reference to the habitual violator provisions of § 459.604. He pointed out that no one could cite a record in DNR files of there ever having been a modern CAFO operator cited for violating the CAFO regulations, yet the relevant statute requires three citations of wrongdoing before one is designated as a habitual violator. *See Senate Video, supra* note 142.

<sup>148.</sup> *See Senate Video, supra* note 142 (Floor statements of Senator Hart, Senator Johnson, and Senator Peterson).

<sup>149.</sup> *Id.*

<sup>150.</sup> *See Manure Storage and Handling—Siting*, IOWA ST. UNIV.: EXTENSION AND OUTREACH, <http://www.agronext.iastate.edu/ampat/storagehandling/siting/homepage.html> (last visited July 15, 2018); *see generally* IOWA STATE UNIV.: COLL. OF AGRIC. AND LIFE SCIS. UNIV. EXTENSION, MITIGATING AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS (Ember Muhlbauer et al. eds., 2008).

<sup>151.</sup> CSIF is described as a collaborative effort by the Iowa Farm Bureau and Iowa Pork Producers Assoc. to provide helpful advice to Iowa farmers considering construction of a CAFO. CSIF promotes use of ISU’s CAM for the siting of new Iowa CAFOs. *Manure Storage and Handling—Siting, supra* note 150.

<sup>152.</sup> An offer by Senator Hart to put this suggestion forward in the form of a new amendment received no support from other senators. *See Senate Video, supra* note 142.

against CAFOs and the remedies available to nuisance plaintiffs winning suits against all other types of defendants. No other Iowa person or business entity causing an actionable nuisance will enjoy the damages limits and other special rules that the new act applies exclusively to CAFOs.

Most concerning about this disparity, Iowa case law and Iowa Code § 657.1 clearly contemplate that one of the most important remedies available to an Iowa landowner adversely affected by a neighboring nuisance is the opportunity “to enjoin and abate the nuisance.”<sup>153</sup> The language of § 657.11A(2) raises a fascinating question about where the remedy of injunctive relief now stands in Iowa with respect to nuisance plaintiffs asking a court to abate a CAFO. Logically, most victims of CAFO nuisances would much prefer to be granted an injunction requiring the CAFO to stop the specific activities that are harming them. Indeed, in nearly every recent Iowa CAFO nuisance suit to reach the Court, the plaintiff has sought injunctive relief—though it is rarely granted.<sup>154</sup>

The key language in the new statute is as follows:

Except as otherwise provided by this section, an animal feeding operation, as defined in section 459.102, found to be a public or private nuisance under this chapter or under principles of common law, or found to interfere with another person’s comfortable use and enjoyment of the person’s life or property under any other cause of action, shall be conclusively presumed to be a permanent nuisance and not a temporary or continuing nuisance under principles of common law, and shall be subject to compensatory damages *only* as provided in subsection 3.<sup>155</sup>

The new statute says nothing, one way or another, about the continued availability of injunctive relief to winning nuisance plaintiffs or the possibility of punitive damages. Could its language possibly be interpreted as ruling out injunctions or punitive damages against CAFOs losing nuisance suits?<sup>156</sup>

Answering this question requires considering what placement of the word “only” in this context means. Note that the text of the provision does

153. IOWA CODE § 657.1 (2017).

154. See, e.g., *Simpson v. Kollasch*, 749 N.W.2d 671, 672 (Iowa 2008); *Miller v. Rohling*, 720 N.W.2d 562, 566 (Iowa 2006); *Weinhold v. Wolff*, 555 N.W.2d 454, 467 (Iowa 1996).

155. IOWA CODE § 657.11A(2) (emphasis added).

156. Although rarely awarded, punitive damages are another traditional remedy possibly precluded by one possible reading of the term “only” in § 657.11A. It is not unusual for a nuisance plaintiff against a CAFO to seek punitive damages as a remedy. Typically, the plaintiff claims that the defendant knew of the egregious harms caused by the nuisance activity, and nevertheless proceeded to inflict them with reprehensible “wanton disregard” of the plaintiff’s rights. The Iowa Supreme Court has not awarded punitive damages in nuisance suits against a CAFO. If ever presented with an egregious enough set of facts, however, punitive damages are certainly a viable legal possibility, unless the new law is read to preclude them. The new law expressly refers to limiting “compensatory” damages, so interpreting the term “only” to preclude punitive damages appears even more of a stretch than arguing it precludes injunctive relief.

not insert a comma before or after “only.” A comma in either position presumably would have removed much of the ambiguity. As subsection 2 is written, does it just require that, if compensatory damages are awarded, they are subject to the limitations set forth in subsection 3, leaving the availability of other remedies like an injunction or punitive damages unaffected? This would certainly be a sensible construction of the ambiguous statutory language, but it is not without doubt, given the obvious legislative desire to confer the most beneficial legal status on CAFOs as possible. Or does it possibly mean that the only remedy available to a winning plaintiff in a nuisance action against an Iowa CAFO is a compensatory damages award, as specifically capped by the new statute, and that no other remedies are authorized?

A brief look at the legislative history of § 657.11A reveals that the new law’s impact on injunctive relief was actively considered in the Senate floor debate on amendments to S.F. 447, the Senate bill that became Iowa Code § 657.11A. On March 14, 2017, Senator David Johnson introduced S-3152, an amendment to S.F. 447 that was intended to make clear that the continued availability of injunctive relief was not affected by the bill.<sup>157</sup> Johnson and Senator Hogg, both lawyers, stated that they interpreted the proposed statute to limit a winning nuisance plaintiff against a CAFO strictly to compensatory damages, thereby foreclosing a court from ordering abatement as injunctive relief.<sup>158</sup> In response, Senator Zumbach, the Chair of the Senate Agriculture Committee and floor manager of proposed S.F. 447, stated on the Senate floor his opposition to S-3152 on the ground that it was an “unnecessary” amendment.<sup>159</sup> Senator Zumbach explained that he understood the relevant language in S.F. 447 to deal only with capping the remedy of compensatory damages, and that it had no effect, one way or the other, on the continued availability of injunctive relief or other remedies.<sup>160</sup> After this brief exchange, the Senate voted 29-20 along party lines to reject S-3152 as an amendment.<sup>161</sup>

It is difficult to decipher the effect of the exchange reported above as meaningful legislative history. On its face, a formal Senate vote against an amendment preserving injunctive relief as a remedy would appear to buttress the argument that § 657.11A eliminates the remedy of injunctive relief against a CAFO found to be a nuisance. On the other hand, it is hard to ignore the

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157. See S. JOURNAL, 87th Gen. Assemb., 1st Sess. 598 (Iowa 2017).

158. See *Senate Video*, *supra* note 142 (expressing this reading of S. 447 at 6:47 PM and 6:52 PM). S-3152 provided as follows: “This section does not prohibit a party from seeking or a court from ordering any form of prohibitory or mandatory relief that is appropriate under principles of equity, including but not limited to the issuance of a permanent or temporary injunction.” S. 3152, 87th Gen. Assemb., 1st Sess. (Iowa 2017).

159. See *Senate Video*, *supra* note 142 (expressing this opinion at 6:48 PM).

160. *Id.* (responding to a question from Senator Hogg at 6:50 PM).

161. See S. JOURNAL, 87th Gen. Assemb., 1st Sess. 598–99 (Iowa 2017); *Bill History for Senate File 447*, IOWA LEGISLATURE (May 21, 2018), <https://www.legis.iowa.gov/legislation/billTracking/billHistory?ga=87&billName=SF447>; *Senate Video*, *supra* note 142.



fact that the Chair of the Senate Agriculture Committee sponsoring the legislation, who was floor manager of the proposed legislation, stated unequivocally on the Senate floor that eliminating injunctive relief was not the intended result of the new law.<sup>162</sup> An Iowa court will almost certainly have to decide the operative legal effect of this legislative history on the meaning of the new statute.

Without regard to this ambiguous legislative history, is the likelihood too farfetched, given the extraordinary constitutional jurisprudence of the *Bormann* and *Gacke* cases, that the Iowa Supreme Court would possibly interpret the term “only” as intended to remove injunctions and punitive damages from the remedies legally available to successful nuisance plaintiffs suing CAFOs? In earlier cases where statutes relaxing nuisance rules for CAFOs were under review, the Court appeared loathe to remove any aspect of Iowa property owners’ nuisance protections.<sup>163</sup>

In a very recent case, the Iowa Supreme Court construed the word “only” in a criminal law context involving completion of an official form under oath that was required for the issuance of a firearms permit.<sup>164</sup> In *State v. Downey*, the Court held that, when used in a statute as an adverb and positioned before an express listing of information required to be submitted by an applicant for a firearms permit, the term “only” meant that only submission of the information following the “only” was legally required.<sup>165</sup> Thus, a deliberate failure to comply with an administrative request for additional information, not specified by the relevant statute, could not form the basis for a criminal charge for failing to provide the additional information. Note that in subsection 2 of the new nuisance statute, the position of the adverb “only” falls immediately after the express statutory reference to “compensatory damages” and before reference to the damage caps created later in subsection 3 of the act.<sup>166</sup>

The possibility that this problematic language in the new statute could be construed to eliminate the remedy of injunctive relief is bolstered by the recent history of legislative efforts to immunize CAFOs from nuisance liability completely, as well as the legislature’s statement of purpose in the new act.

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162. See *Senate Video*, *supra* note 142 (expressing this opinion at 6:48 PM).

163. See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 174–79 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321–22 (Iowa 1998); *Weinhold v. Wolff*, 555 N.W.2d 454, 461–65 (Iowa 1996).

164. *State v. Downey*, 893 N.W.2d 603, 606 (Iowa 2017).

165. *Id.* at 607.

166. See IOWA CODE § 657.11A(2) (2017). It would have been very helpful to the understanding of the meaning of subsection 2 had the drafters of the law simply placed a comma before or after the word “only.” A comma before “only” would presumably lead to the conclusion that the word referred to the limits on compensatory damages created in subsection 3. A comma after “only” would tend to buttress the argument that the new law was intended to restrict nuisance plaintiff’s remedies to compensatory damages alone, foreclosing the possibility of other remedies.

The “immunity from suit” language in the statutes struck down in the *Bormann* and *Gacke* cases would definitely have done away with injunctive relief and punitive damages along with compensatory damages. Would owners of CAFOs that may possibly be sued by their neighbors as nuisances want protection from a court granting injunctive relief and/or punitive damages to a winning plaintiff? Of course they would. The Purposes and Declaration sections of the new law make clear that the legislature intended to “protect” CAFO owners from “certain types of nuisance actions,” and to “preserve and enhance responsible [CAFO] production.”<sup>167</sup> Barring injunctive relief and punitive damages while capping possible compensatory damages would offer the best-case scenario for Iowa CAFO owners worried about nuisance liability, if they cannot be granted total immunity from all nuisance actions.<sup>168</sup>

If, as one commentator knowledgeable about Iowa nuisance law asserted,<sup>169</sup> it was the intent of the new statute to bar injunctive relief (and punitive damages) as possible remedies for a plaintiff who wins a nuisance suit against an Iowa CAFO, the statute is probably unconstitutional under the *Bormann* and *Gacke* decisions. Like those cases, the statute would commit an uncompensated “regulatory taking” under the easement analysis applied by the Iowa Supreme Court in both prior cases. The Court would presumably reach this conclusion because § 657.11A removes a vital element (the equitable entitlement to judicial nuisance abatement) from the bundle of rights associated with plaintiff’s real property ownership, without requiring just compensation for the resulting loss. Similarly, because punitive damages were clearly recognized as a legal remedy for egregious nuisances at the time the Iowa Constitution was adopted, the same “inalienable rights” analysis announced in the *Gacke* case for legislation barring special compensatory damages would appear to apply to § 657.11A. Granted, punitive damages may not command the same respect as a remedy as an injunction or compensatory damages, it is still not clear whether the State exercising its police power to eliminate punitive damages in cases of CAFO nuisances substantially advances any important public interest.<sup>170</sup>

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167. See *id.*

168. Consider also that the new statute purports to cover both public and private nuisances. Money damages of any type are rarely the remedy awarded a winning plaintiff seeking relief from public nuisances. Completely stopping the nuisance through a judicial abatement order is almost always the remedy sought and granted. It simply is not clear what effect the new statute was intended to have in this sphere. Interestingly, the earlier statutes struck down in the *Bormann* and *Gacke* cases also purported to cover both public and private nuisance suits against CAFOs, and the court did not so much as mention the protective role of public nuisance law in ruling the statutes unconstitutional. If a 90,000-head hog CAFO, like that recently proposed for northwest Iowa, was blanketing a nearby city with a cloud of ammonia, it is difficult to imagine the Iowa Supreme Court treating it as exempt from abatement as a public nuisance under § 657.11 or § 657.11A.

169. See De Kock, *supra* note 59, at 18.

170. See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 179 (Iowa 2004).

The foregoing analysis suggests, however, that a court interpreting how the word “only” was intended to operate, within the structure of § 657.11A, might be inclined to give it a less exclusionary reading as to injunctions and punitive damages to avoid finding a possible constitutional violation.<sup>171</sup> If the new statute is interpreted to simply place limits on the amount of compensatory damages awarded to winning nuisance plaintiffs, and not to adversely affect the possibility of such plaintiffs receiving injunctive relief or having punitive damages awarded against a CAFO, then the statute will almost certainly survive a constitutional challenge. Reasonable damages caps on compensatory and punitive damages have been upheld in all manner of torts and civil rights litigation in many states, including Iowa.<sup>172</sup>

Interestingly, it is not at all certain what position proponents of special nuisance protections for CAFOs will take on these issues in court. They may prefer to try to force a reconsideration of the *Bormann* and *Gacke* holdings in an effort to restore the full immunity defense originally conferred by § 657.11. Perhaps providing a clue, the general applicability of the “inalienable rights” rationale of the *Gacke* case was under attack in *Honomichl*.<sup>173</sup>

From the standpoint of a CAFO sued for nuisance, there may be a possible downside to imposing caps on compensatory damages. They may prefer to avoid murky constitutional issues by interpreting 657.11A to affect only compensatory damages, and try instead to force a reconsideration of the unconventional constitutional holdings in the *Bormann* and *Gacke* cases in an effort to validate the full immunity defense intended to be conferred by 657.11. Perhaps providing a clue in this regard, the general applicability of the ‘inalienable rights’ basis of the *Gacke* case was challenged in a case recently decided by the Iowa Supreme Court. In *Honomichl v. Valley View Swine, LLC*,<sup>174</sup> the Court rejected this challenge and reaffirmed its commitment to the holdings of the *Bormann* and *Gacke* cases. Two concurring justices argued that *Gacke* was outdated because so much had changed in the regulation of CAFOs since that decision.<sup>175</sup> This point was argued forcefully in an amicus brief from the Iowa Pork Producers and the Farm Bureau, but as documented earlier, the regulatory changes cited by the concurring judges have not operated to slow down the growth of CAFOs in Iowa.<sup>176</sup> Such limits would appear to make it more likely for a plaintiff to seek injunctive relief and/or punitive damages.

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171. See *City of Eagle Grove v. Cahalan Invs., L.L.C.*, 904 N.W.2d 552, 558–61 (Iowa 2017). The Court stretched mightily to deem § 657A.10 valid against a constitutional challenge based on the 5th Amendment “taking” clause.

172. See DAN B. DOBBS, ET AL., *THE LAW OF TORTS* § 486 (2d ed., 2011).

173. *Honomichl v. Valley View Swine, LLC*, No. 16-1006, 2018 WL 3083982 (Iowa June 22, 2018).

174. *Id.*

175. *Id.* at \*239 (Waterman, J., concurring).

176. See *id.*

This is because, as to injunctive relief, a key factor in the “relative hardship”<sup>177</sup> balance applied by Iowa courts is the “adequacy of the remedy at law.”<sup>178</sup>

As to nuisance plaintiffs, statutory limits on compensatory damages almost certainly make the remedy at law less adequate than it was before section 657.11A was enacted. Therefore, injunctive relief should be easier to obtain.<sup>179</sup> Similarly, to the extent punitive damages sometimes are sought to make up for perceived deficiencies in compensatory damages, capping compensatory damages might also incentivize more punitive damages claims.

#### IX. OTHER SPECIAL PROVISIONS IN § 657.11A

##### A. “PRIORITY IN TIME OF OCCUPATION” V. “REGARDLESS OF THE ESTABLISHED DATE OF OPERATION OR EXPANSION”

Section 657.11A borrows two sections from the existing provisions in section 657.11. Section 4 of the new law incorporates by reference section 5 of section 657.11 in dealing with frivolous law suits against CAFOs. This provision is so close to the general Iowa law applying the Iowa Rules of Civil Procedure to penalize frivolous law suits that it is probably innocuous.<sup>180</sup>

The incorporation of section 4 of existing section 657.11 is more problematic. This section of section 657.11 adds to section 657.11A the declaration that the new law will apply to nuisance litigation “regardless of the established date of operation or expansion of the animal feeding operation.”<sup>181</sup> This provision is substantive, and it is contrary to conventional Iowa nuisance law governing the determination of whether a claimed invasion of the reasonable use and enjoyment of one’s property constitutes a legal nuisance. One of the three primary determinants of this legal question in Iowa is “priority of occupation” which entails a finding about which conflicting use was in place first.<sup>182</sup> Recent Iowa CAFO cases have stressed the fact that the CAFO lacked priority in occupation because it moved in on an established rural residential or agricultural use.<sup>183</sup> The statutory language in section 4 strongly suggests that the traditional nuisance question of who was there first is no longer part of the legal analysis with respect to CAFOs.

The Iowa Supreme Court’s most recent CAFO nuisance decision raises serious doubts about how much credence Iowa courts will give to the radical language in 657.11A(4). In *Honomichl v. Valley View Swine, LLC*, although the

177. RESTATEMENT (SECOND) OF TORTS § 941 (AM. LAW. INST. 1979).

178. *Id.* at 941, 944.

179. See generally Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE LAW REV. (forthcoming 2018).

180. See IOWA R. CIV. P. 1.413(2) (2018). This was the conclusion reached by Senator Hogg in discussing the merits of Section 5 in the Senate Floor Debate on S.F. 447. See *Senate Video*, *supra* note 142.

181. Iowa Code § 657.11(4) (2017).

182. See *Bates v. Quality Ready Mix*, 154 N.W. 2d 852, 858 (Iowa 1967). The other two factors are the nature of the neighborhood and the severity of the harm complained of.

183. See, e.g., *Weinhold v. Wolff*, 555 N.W. 2d 454 (Iowa 1996).

Court upheld the defendant's claim that the constitutionality of 657.11(2) could not be determined in a Summary Judgment proceeding, it strongly reaffirmed its *Bormann* and *Gacke* holdings, and remanded the case to allow the plaintiffs to try to convince a jury that their evidence met all three prongs of the *Gacke* test.<sup>184</sup> Based on the facts reported in the Court's opinion, on remand plaintiffs will presumably have little trouble making their case to a jury. As the Court observed in this latest CAFO case, "the fact that the *Gacke* factors seemingly tilt in favor of the plaintiffs does not render them unsound or unjust."<sup>185</sup> Accepting 657.11 A(4) at face value would mean changing both Iowa's traditional nuisance law and the prevailing interpretation of the "inalienable rights" clause, but only as applied to CAFO nuisances. Among other constitutional concerns, such special treatment could also raise equal protection issues.<sup>186</sup>

Generally, good law reform practice suggests that when the legislature intends to abrogate a well-established common law rule, it should at least acknowledge the existence of the existing law to be changed and explicitly change it.<sup>187</sup> The drafters of section 657.11 A.4 were seemingly oblivious to its effect in abrogating an important element of the standard nuisance analysis performed by Iowa courts with respect to the key "priority of location" factor. In the floor debate on S.F. 447 two lawyer senators introduced an amendment to delete this part of section 4 from the bill on the ground that it allowed CAFOs to cause egregious harm by moving in on existing rural residential or agricultural uses with legal impunity, which uses were already well established in their location.<sup>188</sup> The floor manager of the bill retorted that he was not interested in a game of "Who's on First, What's on Second."<sup>189</sup> The Iowa nuisance law factor, "priority of occupancy" was never mentioned in this floor debate and the proposed amendment that would have preserved it was soundly defeated.<sup>190</sup>

If section 657.11 A.4 is applied as written in nuisance litigation, it may raise the same type of constitutional issue resolved in the plaintiff neighbor's favor in the *Gacke* case. Disregarding the "priority in occupancy" factor will, in most cases, effectively eliminate a neighbor's valuable nuisance law protection without just compensation. It will be interesting to see how Iowa courts react

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184. *Honomichl v. Valley View Swine, LLC*, No. 16-1006, 2018 WL 3083982, at \*237-39 (Iowa June 22, 2018).

185. *Id.* at \*237.

186. *Id.*

187. See Sen. Hogg's arguments, *Senate Video*, *supra* note 142. See generally Norman J. Singer & J.D. Shambie Singer, *STATUTES AND STATUTORY CONSTRUCTION* ch. 61 (7th ed. 2008); cf. Iowa Code § 4.2 (2017).

188. See *Senate Video*, *supra* note 142.

189. *Id.*

190. *Id.*

to what appears to be a fundamental change in the state's nuisance law, but only as it applies to CAFOs.

*B. DEFENSE THAT A CAFO IS APPLYING "PRUDENT AND GENERALLY UTILIZED MANAGEMENT PRACTICES"*

One principle of Iowa nuisance law that has been well settled for many years is that an otherwise lawful business can be guilty of inflicting actionable nuisance harms on its neighbors. In Iowa law, it is no defense to a nuisance action for the defendant to demonstrate full compliance with all relevant federal and state laws, or to prove it is applying state of the art technology to control the emissions and effluents that are responsible for the nuisance claim.<sup>191</sup> Thus the provisions in sections 657.11A(2) and (5) that condition a CAFO's eligibility for the statute's special protective nuisance rules appear to fly in the face of this traditional Iowa nuisance law principle.

If it were the case that Iowa CAFOs employed the best available technology to process the animal wastes produced by their facilities, this special exception to ordinary Iowa nuisance law would, perhaps, be understandable. But, as noted earlier, the waste management system used almost universally by Iowa CAFOs is the modern-day equivalent of the 19th-century cesspool, to which human wastes were simply dumped outdoors and allowed to run downhill until they collected in a depression and slowly decomposed. To legislatively bless this primitive waste treatment practice—and make its adoption the precondition to CAFOs raising potent new defenses to nuisance actions—beggars common sense. Yet this is exactly what section 657.11A does, as did section 657.11 before it. They embrace a crude and relatively inexpensive method for handling gigantic volumes of animal wastes and thereby shift it to neighbors to suffer the burden of this inevitable bothersome side effect of concentrated animal feeding operations.

*C. "CONCLUSIVE" PRESUMPTION THAT A CAFO NUISANCE IS PERMANENT*

Section 657.11A(2) declares that all nuisance impacts of a CAFO defendant are "conclusively presumed" to create a permanent nuisance, and not a temporary or continuing nuisance.<sup>192</sup> The point of this legislative determination is obviously to make sure a successful nuisance suit against a CAFO is settled fully in one litigation, and that a new nuisance suit cannot be filed as soon as sufficient damages are suffered to support another action (which could presumably be allowed if the nuisance was temporary or continuing, but not permanent). This change from usual Iowa nuisance law

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191. See *Claude v. Weaver Constr. Co.*, 158 N.W.2d 139, 146 (Iowa 1968); *Riter v. Keokuk Electro-Metals Co.*, 82 N.W.2d 151, 161–62 (Iowa 1957).

192. IOWA CODE § 657.11A(2) (2017).

may offer the benefit of enhancing judicial efficiency, but it does not comfortably reflect the facts in many nuisance cases.<sup>193</sup>

This new provision in section 657.11A was discussed in the Senate floor debate on the bill, but the only explanation forthcoming was a statement by the Agriculture Committee Chair that this amendment was intended to create “one and done” litigation when a CAFO is sued for nuisance.<sup>194</sup> Not stated in the debate, but an obvious result of making all CAFO nuisances permanent, is that it allows a losing CAFO owner to pay for the one-time reduction in the value of a neighbors land and thereby gain a permanent easement to continue to cause the same degree of harm without further liability. This result may be the plaintiff’s only practical remedy in the case of a continuing nuisance of unlimited duration, but not for a temporary nuisance. Temporary nuisances ordinarily do not yield permanent damages to the winning plaintiff for loss of the use of the land. It is not clear what an Iowa court will do with what is clearly a temporary CAFO nuisance that must be conclusively presumed to be a permanent nuisance.<sup>195</sup>

If what is in fact a temporary or continuing nuisance is treated as a permanent nuisance, but no payment of permanent damages is required because the nuisance is not in fact permanent, the offending CAFO will be entitled to inflict further personal and special damages on the plaintiff without having to pay for the nuisance harms suffered.<sup>196</sup> If this is the effect of the artificial conclusive presumption that all nuisances caused by CAFOs are permanent in nature, victims of temporary or continuing nuisances will be denied justice with regard to actual harms caused them in the future for which they will be denied recovery.

#### D. CALCULATION OF PERMANENT DAMAGES

The provisions of section 657.11A(3) also appear to somewhat change the way Iowa courts have traditionally calculated the amount of permanent damages to which a winning nuisance plaintiff is entitled.<sup>197</sup> In making this calculation, Iowa courts have compared the value of plaintiff’s land prior to damage by the nuisance with the value of the land when it is subject to the permanent nuisance. The difference between these two figures is the amount awarded as permanent damages. Section 657.11A(3) instructs a court to

193. For example, in *Bates v. Quality Ready-Mix Co.*, 154 N.W. 2d 852, 859 (Iowa 1967), the Iowa Supreme Court held that damages to land in the case of a continuing nuisance were limited to the loss in rental value of the land.

194. See *Senate Video*, *supra* note 144 (statement of Senator Zumbach).

195. For example, the construction of the CAFO facility or the waste lagoon may cause unwanted soil or other materials to temporarily erode on a neighbor’s land. This type of short-term, but time-limited, damage classically would be classified as a temporary nuisance.

196. This is the logical conclusion drawn from the lengthy explanation of the different legal effects of temporary, continuing, and permanent nuisances in *Weinhold v. Wolff*, 555 N.W. 2d 454, 462–63 (Iowa 1996).

197. IOWA CODE § 657.11A(3).

engage in a somewhat different inquiry based upon a simulated arms-length exchange of the property for a selling price.<sup>198</sup> The method ordained by the new statute is more or less the way in which eminent domain damages are calculated. More on this peculiar change later, as well as section 657.11A(2) embracing a recent Iowa Supreme Court holding regarding damages collectible by one co-tenant when the other co-tenant is not a party to the nuisance litigation.

Section 657.11A(3)(a) adopts a somewhat different method for valuing the permanent reduction in the value of a plaintiff's real property for purposes of a permanent damages award. Technically, this formulation of the calculation for permanent damages appears to use a "comparable sales" method common to eminent domain awards, which varies from the usual formulation employed by Iowa courts in establishing a permanent damages award in a nuisance case.<sup>199</sup> The conventional nuisance inquiry asks what would the plaintiff's land be worth without the burden of this continuing harm, and what would it be worth if it is subjected indefinitely to continuing harm from the nuisance effects?<sup>200</sup> The difference between these two amounts constitutes the permanent loss suffered by plaintiff's land. It is doubtful the verbal difference in these two formulations concerning the calculation of a permanent damages award will generate significant differences in results, but it is curious why the drafters of the legislation chose this eminent domain-based formulation of the proper method for fixing these nuisance damages. If nothing else, it lends credence to critics' claim that the effect of this new legislation is to confer "private condemnation" powers on CAFOs.<sup>201</sup>

*E. LIMITATION OF RECOVERY WHEN PLAINTIFF IS NOT THE FULL OWNER OF THE AFFECTED LAND*

Another curious provision included in section 657.11A(3)(a) applies to cases where the plaintiff is not the sole owner of the land at issue, either legally or equitably. Under this new provision, such a winning nuisance plaintiff can recover only his/her proportionate share of damages.<sup>202</sup> This new rule runs contrary to ordinary Iowa joint ownership law, which authorizes any co-tenant to sue for injury to the land and to recover the damages in full, subject to an obligation to share the proceeds with the other co-tenants.<sup>203</sup> This new rule

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198. *Id.*

199. See IOWA CODE § 657.11A(3)(a) (2017).

200. The explanation of how to compute permanent damages can be found in *Weinhold v. Wolff*, 555 N.W. 2d 454, 459 (Iowa 1996).

201. See Brief for Iowa Association for Justice as Amici Curiae Supporting Appellees, *Dovico v. Valley View Swine, LLC et al.*, No. 16-1006 at 10 (Iowa Jan. 24, 2017), <https://www.iowaappeals.com/wp-content/uploads/2017/05/Dovico-Amicus-Curiae-Iowa-Association-for-Justice-Brief.pdf>.

202. IOWA CODE § 657.11A(3)(a).

203. See N. William Hines, *Joint Tenancies in Iowa Today*, 98 IOWA L. REV. 1235 (2013).



appears to be an attempt to codify the result in a recent Iowa nuisance case where a husband and wife owned the affected land as co-tenants, and the Iowa Supreme Court ruled that the wife could recover only 50% of the nuisance damages when health reasons prevented the husband from actively participating as a party in the litigation.<sup>204</sup> This holding by the Iowa Supreme Court is subject to the same criticism as not accurately reflecting long standing Iowa co-tenancy law.<sup>205</sup> The new statutory “total ownership” requirement also raises questions about how to handle damages for nuisance violations to land owned by a trust, land held in a legal life estate/remainder, and land owned by family farm corporations.

## X. CONCLUSION

This latest attempt to protect Iowa CAFOs from neighbors’ nuisance actions is hardly an exemplar of impressive legislative reform; it is neither well thought through nor carefully drafted. Parsing the language of Iowa Code section 657.11A and reviewing its legislative history inevitably raises questions about how familiar the drafters of the new law were with well-established nuisance principles in Iowa law. There is little evidence in the statute or from the recorded floor debate in the Senate that proponents of section 657.11A were fully aware of the degree to which the new statute created a number of nuisance rules that deviated significantly from conventional Iowa nuisance law. At no point in the words of the statute or in its discussion, for example, was there an effort to identify the prevailing Iowa nuisance principles directly relevant to CAFOs and state an explicit intent to overturn them, let alone to justify the legal changes made by the statute, other than as being generally good for the state’s farm economy.<sup>206</sup>

One thing that can be said with confidence about Iowa Code § 657.11A is that it will almost certainly produce a good deal of additional contentious litigation in Iowa courts. The central issues Iowa judges will be trying to determine are how closely the new law satisfies the constitutional principles established in *Bormann* and confirmed in *Gacke*, and how best to implement its new provisions that deviate substantially from longstanding Iowa nuisance law. Until the Iowa Supreme Court rules on these questions, it is uncertain

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204. See *McIlrath v. Prestage Farms of Iowa, LLC*, No. 15-1599, 2016 WL 6902328 (Iowa Nov. 23, 2016).

205. See WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 203-14 (3d ed. 2000). The logical inference is that if a co-tenant must account to other co-tenants for income received by wrongfully removing value from the freehold, it must follow that if a third party commits a tortious act that removes value and one co-tenant sues to recover damages for the loss, any recovery must be shared with the other co-owners. See generally N. William Hines, *Joint Tenancies in Iowa Today*, 98 IOWA L. REV. 1233, 1246-49 (2013) (discussing co-tenancy recovery).

206. Generally, the Iowa Supreme Court looks to common law to construe undefined statutory terms, and examines the context of words used in a statute that lack a statutory definition or an established meaning in the law. See *In re W. Iowa Limestone, Inc.*, 538 F.3d 858, 863 (8th Cir. 2008).

how effective this new legislation will actually be in reducing the risk of nuisance suits brought by rural neighbors to remedy harmful emissions and effluents emanating from Iowa CAFOs.