

IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-1006

Wapello County District Court No. LALA105144 – Division A

**Morgan Honomichl, Robin Honomichl, Timothy Honomichl, Deb
Chance, Jason Chance, Kara Chance, Karen Jo Frescoln, and Q.H.,
Plaintiffs - Appellees,**

vs.

**Valley View Swine, LLC and JBS Live Pork, LLC,
Defendants - Appellants**

**BRIEF OF AMICUS CURIAE
IOWA PORK PRODUCERS ASSOCIATION AND
IOWA FARM BUREAU FEDERATION**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the attorneys of record for the parties by email on November 7, 2016, and filed with the Clerk of the Iowa Supreme Court.

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STATEMENT OF THE CASE

As was noted in the Brief filed by Appellants JBS Live Pork, LLC and Valley View Swine, LLC, the underlying case in this matter involves 9 bellwether plaintiffs who have brought nuisance claims against the owner and operator of a swine finishing operation, Valley View Swine, LLC (Valley View) and the owner of the pigs, JBS Live Pork, LLC (JBS). In their answers to the Plaintiffs' Petition, Valley View and JBS both raised Iowa Code 657.11 as an affirmative defense. Subsequently, both Valley View and JBS filed Motions for Summary Judgment based on Iowa Code 657.11 alleging that the Plaintiffs have not met the exception outlined in the nuisance defense statute and therefore Plaintiffs' claims were barred. Plaintiffs filed a cross Motion for Summary Judgment alleging that Iowa Code Section 657.11 was unconstitutional. The District Court, Hon. Judge Annette Sciezinski, in her ruling on the Motions for Summary Judgment, found that Iowa Code 657.11 was unconstitutional as to each of the bellwether Plaintiffs without looking at the individual facts of each Plaintiff. The District Court's ruling was inconsistent with this Court's ruling in *Gacke v. Pork Xtra* in which the Court found the statute unconstitutional as to the Gackes only after looking at the specific facts and circumstances relevant to the Plaintiffs. Valley View and JBS filed an Application for

Interlocutory Appeal of the District Court rulings on the Motion for Summary Judgment. At the time the interlocutory appeal was granted, there were fourteen nuisance cases on file in Iowa. There are currently seven nuisance cases on file in Iowa and in each of those cases, the Defendants have raised Iowa Code 657.11 as an affirmative defense. In a majority of those cases, the Plaintiffs challenge the constitutionality of section 657.11 in their Petition, making 657.11 and the constitutionality of the statute a central issue in nearly all of the nuisance cases currently on file and most likely in all nuisance cases to be filed in the future without some kind of clarity as to the constitutionality and application of 657.11.

AMICI CURIAE IDENTIFICATION

The Iowa Pork Producers Association (“IPPA”) is a grassroots commodity organization representing Iowa’s pork producers. The members of IPPA include both members who own pigs and producer members who own the barns and feed and care for pigs across the state of Iowa. The members of IPPA are similarly situated to the Defendants in this matter and the Court’s ruling will impact the statutory protections afforded to livestock producers in the state. The threat of recurring and abundant lawsuits against pork producers who are following the letter of the law threaten the financial stability and the very existence of pork producers in rural communities

throughout the state of Iowa. IPPA possesses a unique perspective and a wealth of information regarding pork production in the state of Iowa that will assist the court in assessing the ramifications of any decision rendered in this case. IPPA seeks the proper construction and interpretation of Iowa Code Section 657.11 as intended by the Iowa legislature in enacting the law.

The Iowa Farm Bureau Federation (“IFBF”) is an independent, non-governmental, voluntary organization of farm families united with the freedom to analyze their problems and formulate action to achieve educational improvement, economic opportunity, and social advancement. With over 159,000 members, IFBF is dedicated to helping farm families prosper and improve their quality of life. Our members include livestock farmers whose farms are the subject of pending or threatened nuisance lawsuits. Our members also have significant investments in their crop and livestock farms which will both be affected by the outcome of this case.

IFBF’s interest in this case spans far beyond this case. Iowa is blessed with much arable land on which to grow food, feed, fiber, and fuel. Of the approximately thirty-six million (36 million) acres within our state borders, over thirty million (30.6 million) acres is used for farming. *See U.S. Dept. of Ag. 2012 Census of Agriculture*, https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_

Chapter 1 State Level/Iowa/ (last visited Nov. 3, 2016). With eighty-five percent (85%) of our state's land included in the state's 88,637 farms, Iowa has the largest percentage of land area that is utilized for agriculture among the fifty states. *Id.* Iowa is the nation's leader in producing corn, soybeans, pork and eggs and is in the top ten of all states for producing silage, oats, alfalfa hay, beef, wool, and lambs. *Id.* Agriculture and agriculture-related industries are important to Iowa's economy, accounting for thirty-three percent of the state's economic output in 2012, the last year for which complete data is available, and is responsible for one out of five jobs in Iowa. Decision Innovation Solutions, 2014 Ag Economic Contributions Study, <http://www.supportfarmers.com/resources/ag-economic-contribution-analysis> (last visited Nov. 3, 2016).

ARGUMENT

I. HISTORY OF IOWA CODE 657.11

Iowa Code 657.11(2) was originally enacted in 1995 and amended in 1998 to read as follows:

2. An animal feeding operation, as defined in section 459.102, shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or

property under any other cause of action. However, this section shall not apply if the person bringing the action proves that an injury to the person or damage to the person's property is proximately caused by either of the following:

a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.

b. Both of the following:

(1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property.

(2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.

Iowa Code § 657.11(2) (2015).

In 2004, the constitutionality of 657.11 was challenged in *Gacke v. Pork Xtra*, 684 N.W.2d 168 (Iowa 2004). Following their reasoning in the *Bormann* case, the Court in *Gacke* determined that the statute was an unconstitutional taking of property finding that the statute allowed an easement of Plaintiffs' property by allowing the continuation of a nuisance. *Bormann v. Bd. Of Supervisors*, 584 N.W.2d 309 (Iowa 1998); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 175 (Iowa 2004). However the Court found that "because the recovery of diminution-in-value damages fully compensates the burdened property owners for the unlawful taking, the restrictions of the Takings Clause end at that point." *Gacke*, 684 N.W.2d at

175. The Court acknowledged that the statute may be constitutional as to some damages and in some cases. The Court stated,

The general assembly sought “to protect and preserve animal agricultural production operations” in Iowa by sheltering them from the costs of nuisance lawsuits. Iowa Code § 657.11(1). That intent is promoted by giving effect to section 657.11(2) to the extent it is constitutional. In other words, giving animal producers limited immunity from nuisance suits, requiring them to pay only for the value of the easement resulting from their creation of a nuisance, improves their economic position as envisioned by the legislature.

Id.

The plaintiffs in *Gacke* also challenged section 657.11 as a violation of the inalienable rights clause of the Iowa Constitution. The Court then looked to the specific circumstances of the Gackes, specifically, how long they had resided in their homes prior to the hog facility being constructed, the distance from the hog facility, the improvements or money invested in their home prior to the hog facility and whether the Gackes received any benefit from the hog facility. Based on these facts, the Court found that the statute violated the inalienable rights clause, as to the Gackes, but the Court expressed “no opinion as to whether the statute could be constitutionally applied under other circumstances.” *Id.* at 179.

II. SECTION 657.11 IS CONSTITUTIONAL AND REFLECTS A VALID BALANCE OF INTEREST BY THE LEGISLATURE.

The Iowa Pork Producers Association (IPPA) and Iowa Farm Bureau Federation (IFBF) join in the arguments raised by Appellants regarding the constitutionality of 657.11 as a valid exercise of the state police power that is not unduly oppressive to neighboring property owners. The statute does benefit neighboring property owners, as briefed both by the Appellants and as contained herein and therefore the statute should not be deemed unconstitutional pursuant to the inalienable rights clause. Nevertheless, if the Court were to determine that *Gacke* is still good law and section 657.11 is constitutional on after an as applied analysis, IPPA and IFBF urge the court to determine a more workable standard based on the current regulatory framework because the circumstances present in *Gacke* are not repeatable. Iowa's district court's need a workable standard based on current statutory and regulatory requirements for applying Iowa Code section 657.11 to effectuate the legislative intent.

III. IOWA CODE 657.11 IS CONSTITUTIONAL AND ANY AS APPLIED ANALYSIS OF THE CONSTITUTIONALITY OF THE STATUTE SHOULD BE BASED ON THE CURRENT REGULATORY FRAMEWORK WITH WHICH LIVESTOCK OPERATIONS MUST COMPLY

In light of the changed statutory and regulatory conditions since *Gacke*, as fully briefed below, and in light of recent opinions in other states assessing similar statutes, IPPA and IFBF urge the Court to find that section 657.11 is presumed constitutional and set forth criteria based on the current statutory and regulatory framework governing livestock operations.

The legislature clearly intended to protect livestock operations and producers from frivolous lawsuits in enacting section 657.11.

1. The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.

Iowa Code § 657.11(1).

The Court in *Gacke* found that as long as the statute did not deprive property owners for the decrease in their property value, it was not a violation of the takings clause. *Gacke* 684 N.W.2d at 175. The statute allows for Plaintiffs in a nuisance suit to recover for the diminution in their property value. Iowa Code 657.11(2). The *Gacke* court also found that 657.11 and the protections provided by it are within the state's police power

even though individual producers are the direct beneficiaries of the statutory defense. *Gacke*, 684 N.W.2d 168, 178 (Iowa 2004). Therefore, the sole question with regard to the constitutionality of 657.11 is whether the statute is a reasonable exercise of the state's police power. The concern lies in the fact that the *Gacke* facts are no longer workable for comparison of current Plaintiffs and the Iowa district courts have no guidance as to when the statute may be constitutionally applied.

While there is uncertainty regarding the availability of section 657.11 as a defense in these nuisance cases, a couple things are certain, the only case law available regarding constitutionality of 657.11, requires an as applied evaluation and that was not done in the underlying case and second, the statutory and regulatory framework for livestock operations has changed dramatically and the applicability of the defense in section 657.11 should change with it. The Motions for Summary Judgment in this action, upon which the Court deemed the statute unconstitutional, were devoid of factual information as to each of the Plaintiffs. Because the district court did not have the factual information with regard to each plaintiff, the Plaintiffs failed to meet their burden in proving that the statute was unconstitutional as applied to the Plaintiffs in this action.

A. Iowa's Inalienable Rights Clause and the Legal Standard for Declaring a Statute Unconstitutional Pursuant to the Inalienable Rights Clause.

Article I of the Iowa Constitution states, "all men are, by nature, free and equal, and have certain inalienable rights - among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1. . Courts review constitutional challenges to statutes de novo. *Iowa Supreme Court Bd. Of Prof'l Ethics & Conduct v. Ramey*, 639 N.W.2d 226, 233 (Iowa 2002) (citing *State v. Keene*, 629 N.W.2d 360, 363 (Iowa 2001)). Statutes are presumed constitutional and must be proven unconstitutional by the challenger beyond a reasonable doubt. *Keene*, 629 N.W.2d at 364. Additionally, if a statute is capable of more than one interpretation, one of which is constitutional, the Courts must adopt that construction or interpretation of the statute. *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001). This Court has recently addressed the standard for analysis of the inalienable rights clause where the court essentially adopted a substantive due process clause analysis. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015). Under a substantive due process clause analysis, the Court must first determine if there is a fundamental right involved. The Court in Gacke found that Section 657.11 is not an

unconstitutional taking if the plaintiff receives damages for diminution in property value. *Gacke v. Pork Xtra*, 684 N.W.2d 168, 175 (Iowa 2004).

Because section 657.11 doesn't constitute a taking, no fundamental right is implicated, and therefore the test then becomes one of a rational basis. *City of Sioux City*, 862 N.W.2d 335 at 340. Thus the question is not whether the court thinks the statute is a reasonable exercise of the state's police power, but rather the test is whether a rational legislator could conclude that the statute will accomplish a legitimate goal. *Id.* Based on the language present in section 657.11, the legislature in enacting the legislation clearly felt that the statute would accomplish a legitimate goal of protecting livestock producers from frivolous nuisance lawsuits and protecting the state's competitive position in livestock production. Iowa Code Section 657.11(1). Therefore, section 657.11 is constitutional under the inalienable rights clause when the rational basis test is utilized. However, because the *Gacke* court used the substantive due process analysis, the amicus filers argue the same constitutionality of section 657.11 using the same standard set forth in *Gacke*. Under the substantive due process analysis, the court must determine whether the statute is a reasonable exercise of the state's police power. *Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 664 (Iowa 2004) (citing *Gacke*, 684 N.W.2d at 177-178). More specifically, the court

must determine whether “the means chosen by the State to interpose its regulatory authority are ‘reasonably necessary’ and not ‘unduly oppressive’ on individuals by balancing the public interest in the enforcement of the statute against the burden on the individual.” *Id.* (citing *Gacke*, 684 N.W.2d at 178). The balancing of public interest against the burden on the individual is a fact specific determination. *Id.* In *Gacke*, in performing this balancing of the public interest against the burden on the individual, the Court looked at how far the Gackes lived from the livestock farm, whether the Gackes received a benefit from 657.11 statutory protections granted to the livestock operation, how long the Gackes lived in their residence prior to the livestock facility being constructed, where the Gackes lived in proximity to the livestock operation and how much the Gackes had invested in their property prior to construction of the livestock facility. *Gacke*, 684 N.W.2d at 178. The Gackes lived right across the street, approximately one-quarter mile from the livestock facility. The Gackes had lived at their residence for nearly twenty-three (23) years prior to the livestock facility being constructed and the court found that they had spent significant sums of money in improvements to their property. *Id.*

Ultimately the Court in *Gacke* found that section 657.11 promoted the interests of the public generally and had a reasonable relationship to the

statute's legislative purpose but as to the Gackes was unduly oppressive. In reaching this conclusion, the Court relied on their opinion in *Gravert v. Nebergall* in which the Plaintiff was required to install a portion of a partition fence to keep neighboring livestock off his property. 539 N.W.2d 184, 188 (Iowa 1995). The Court in *Gravert* found that the Plaintiff did receive a benefit from the statute requiring him to build a partition fence, namely the protection of his crops from the neighbors livestock. *Id.*

However, in *Gacke*, the court distinguished the Gackes from the Graverts, finding that the Gackes received no benefit from section 657.11 other than the benefit to the public in general. *Gacke*, 684 N.W.2d at 179. However, the Court did not consider the benefit to the Gackes that is similar to the plaintiffs in *Gravert*. The Gackes and other Plaintiffs in nuisance actions receive a benefit from 657.11. That benefit being the protections that 657.11 provide to neighboring property owners. Pursuant to section 657.11, nuisance actions are only available if the nuisance is created by a failure to comply with a state or federal statute or regulation. Additionally, a nuisance claim can only be successful if the livestock operation unreasonably and for substantial periods of time interferes with the Plaintiff's comfortable use and enjoyment of their life or property when the livestock operation fails to

use existing prudent generally accepted management practices. Iowa Code § 657.11(2) (2015).

All of these limitations on the availability of the nuisance defense statute limit the potential impact on Plaintiffs living near a livestock operation. The limitations in section 657.11 paired with the regulatory requirements established in connection with enactment of section 657.11 protect neighboring landowners from the potential impact of nuisance from a livestock facility. As discussed in more detail below, statutory setback distances were also established with the passage of section 657.11 and set forth the distance that the livestock operation must be located from a residence. This setback distance provides protection for neighboring landowners from potential impact from nuisances associated with livestock operations. While the setback distances are not a part of 657.11, they were established in the same legislative bill as 657.11, namely House File 519, 1995 Iowa Acts Chapter 195.

B. The regulatory framework under which livestock operations are constructed, permitted and operated has dramatically changed since the *Gacke* case such that the circumstances present in the *Gacke* case are no longer possible.

The regulatory framework under which the Pork Xtra facility in the *Gacke* case was built has changed so dramatically such that a situation like

the Gackes experienced would no longer be possible. Because of the change in regulatory framework, it is no longer viable to assume plaintiffs in current lawsuits are substantially similar to the Gackes for purposes of determining whether 657.11 is constitutional.

At the time the livestock facility was built in the *Gacke* case, the applicable statutory setback distance for the Pork Xtra facility to a residence was 750 feet. Iowa Code §459.202 (2015).. Today, the required setback distance to a residence for the same size facility is 1,875 feet, two and a half times the applicable setback at the time of the *Gacke* case. *Id.*¹ The separation distance increases to 2,500 feet for the same size operation if the residence is located within a city.

Secondly, since the Pork Xtra facilities were built in the *Gacke* case, the legislature has enacted requirements for the concrete used in the construction of animal feeding operations. Iowa Code § 459.307 (2015). Today, in most cases, prior to constructing formed manure storage structures which are commonly used in animal feeding operations, a construction design statement or professional engineer certification must be filed with the Iowa Department of Natural Resources (DNR) certifying that the construction of the formed manure storage structure complies with Iowa

law. Iowa Code §459.303(5)(b)(2015). In conjunction with this the DNR, based on legislative direction, set standards for formed manure storage structures which complied with the American Society for Testing and Material Standards. Iowa Admin. Code r. 567-65.15(14)(2014). The standards, promulgated through regulation, set specific standards on concrete compressive strength, use of reinforcement, depth of concrete footings, thickness of footings, floor and walls, etc. *Id.* All of these more stringent regulations help to ensure containment of the manure and odor associated with the manure in the storage structure.

Probably the most notable change since the *Gacke* case is the increase in public participation in the permitting process through implementation of the master matrix. The purpose of the master matrix is to “provide a comprehensive assessment mechanism” to determine whether or not an application for the construction, or expansion of a facility requiring a construction permit should be approved. Iowa Code § 459.305 (2015). Each county can adopt a master matrix through action of the county board of supervisors for purposes of assessing construction permit applications,

¹ In the underlying case, the closest Plaintiff residence to the Valley View livestock farms is nearly double the applicable setback distance.

but a county is not required to adopt a master matrix.² Today, once a construction permit application is submitted, the DNR requires the applicant to provide a copy of the permit application to the county board of supervisors in the county where the livestock facility is proposed to be constructed. Iowa Code §459.304(2015); Iowa Admin. Code r. 567-65.10(2014). The county may then provide comments to DNR regarding the construction permit application regardless of whether the county has adopted a master matrix. *Id.* The county must also provide the residents in the county with an opportunity to comment on the proposed construction by posting a notice in the newspaper of general circulation in the county. *Id.* Most counties also hold a public hearing to receive additional public comment. If the county has adopted a master matrix, the county must conduct an evaluation of the construction permit application and based on the evaluation or comments received, the county must recommend to DNR to either approve or disapprove of the application. *Id.* If the county recommends that the application be disapproved, the IDNR will disapprove the application if the IDNR's assessment of the county's master matrix does not produce a satisfactory rating. Iowa Code § 459.304(2015). This level

² The underlying case in this matter is situated in Wapello County, a county which chose not to adopt a master matrix. In 2016, eighty-eight (88) of Iowa's counties adopted the master matrix. See The Iowa Department of Natural Resources' map of county adoption of the master matrix,

of county participation and the ability of the local government, to evaluate a facility and make recommendations to the DNR based on their own evaluation was not available at the time the Pork Xtra facility was permitted in the *Gacke* case.

Because of the drastic changes in statutory and regulatory requirements for livestock facilities since the *Gacke* case, it is no longer workable or effective to compare plaintiffs in today's nuisance cases to the *Gackes* in determining constitutionality of the statute because the *Gacke* facts would be impossible to repeat under the current statutory and regulatory requirements. Therefore, both livestock producers and potential plaintiffs in nuisance type lawsuits are left with no criteria or way to evaluate the availability of section 657.11 as a defense.

V. CONCLUSION

Because of the far-reaching changes in the regulatory framework with which livestock facilities in Iowa are now constructed, comparing Plaintiffs in current lawsuits to the *Gackes* for purposes of determining constitutionality of section 657.11 is no longer a valid or effective

comparison. Additionally, the district court in this action erred by failing to perform an analysis as to the constitutionality of 657.11 as applied to each Plaintiff. For these reasons, the IPPA and IFBF support the arguments made by appellants JBS Live Pork, LLC and Valley View Pork, LLC and respectfully request that this court reverse the district court's ruling on the motion for summary judgment finding 657.11 facially unconstitutional as to the bellwethers. In the alternative, IPPA and IFBF, respectfully request that this court remand with guidance to the district courts as to the applicability of section 657.11 based on the current statutory and regulatory framework in place for livestock operations.

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/s/ Julie Vyskocil
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