

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.,

Plaintiff(s)-Appellee(s),

v.

Valley View Swine, LLC and JBS Live Pork, LLC,

Defendant(s)-Appellant(s).

BRIEF OF AMICUS CURIAE

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INTRODUCTION

Iowa Code § 657.11 provides legal protection to all livestock farmers from homeowners who “move to the nuisance.” Appellants/Defendants and Industry Amicus now seek a license to “move the nuisance” to pre-existing homes.

Appellants/Defendants and Industry Amicus seek a privilege to privately condemn the homes of others for personal economic gain. Homes are more than investments. Homes are more than houses; homes are “the social unit formed by a family living together.” <https://www.merriam-webster.com/dictionary/home>.

Families expect their homes to offer comfort. A home overwhelmed with odor and flies is not comfortable. When a home is so impaired that a family can no longer live there in comfort, the logical alternative is to move.

Appellants/Defendants and Industry Amicus seek a license to disrupt a core foundation of Iowa society. Appellants/Defendants and Industry Amicus seek a roll back of the *Gacke* rule, which will allow them to privately condemn houses and homes – with no responsibility, except for the investment value of the home. Although the state government cannot seek forcible population transfers of rural residents, a small group of individual – mainly absentee owners – who seek a

license to effectuate the same result by overwhelming pre-existing rural homes with odor and flies from harmfully sited livestock manure storage facilities.

AMICI CURIAE IDENTIFICATION

In compliance with Iowa Rule of Appellate Procedure 6.906(3)(c), the Iowa Association for Justice hereby states that its interest in this case is the recognition on behalf of the individual citizens of the State of Iowa, including the Plaintiffs. Headquartered in Des Moines, the Iowa Association for Justice serves the legal profession and the public through its efforts to strengthen the civil justice system.

ARGUMENT

I. WHETHER IOWA CODE § 657.11 IS UNCONSTITUTIONAL AS APPLIED, SHOULD NOT BE BASED ON A REGULATORY ANALYSIS.

Protection of Private Property

Private property rights are fundamental to a free society. *Thomas v. Bowen*, 791 F.2d 730, 736 (9th Cir. 1986). “Rights in property are basic civil rights.” *Lynch v. Household Finance*, 405 U.S. 538, 552 (1972).

Prosperity and property rights are inextricably linked.

www.libertarianism.org/publications/essays/property-rights-key-economic-

development. The importance of having well-defined and strongly protected property rights is widely recognized among economists and policymakers. *Id.* The most important protection afforded to the individual by law is the protection of his or her property. *Id.*

Bundle of Rights

Courts have described a “bundle of rights” which comprise the “fundamental attributes of ownership” of property. *Phillips v. King County*, 1998 WL 34348167, 4-5 (Wash.) The bundle includes the right to possession and to exclude others, the right to use and enjoyment, and the right to dispose of the things itself. *Id.*

Right to Use and Enjoyment of Property

Use and enjoyment of property are the chief incidents of ownership of property. *Id.* “We have identified the chief incidents of ownership of property as the right to its possession, use and enjoyment, and to sell or otherwise dispose of it according to the will of the owner.” *Wasser & Winters Co. v. Jefferson County*, 528 P.2d 471, 599 (Wa. 1974). “The chief incidents of ownership of property are the rights of possession, of use and enjoyment, and of disposition.” *Rhoades v. State*, 70 N.E.2d 27, 29 (Ind. 1946). “As we have noted, this right to exclude

others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

Protection of the Home

The ability to look to one’s home as a refuge from the noise and stress associated with the outside world is a right to be jealously guarded. *Rose v. Chaikin*, 453 A.2d 1378, 1383 (N.J. 1982). Before that right can be eroded in the name of social progress, the benefit to society must be clear and the intrusion must be warranted under all of the circumstances. *Id.*

Some states have even codified the lengths that citizens are allowed to go to protect their private property. A “Stand Your Ground” law is identified in the South Carolina Code as the “Protection of Persons and Property Act.” S.C. Code Ann. § 16–11–410 (Supp. 2010). “It is the intent of the General Assembly to codify the common law Castle Doctrine, which recognizes that a person's home is his castle.” *Id.*

Protection of the Home Under Iowa Law

A person’s abode has a long and protected history under Iowa law. In the context of governmental action, courts grant “maximum constitutional protection” against invasions of “the sanctity of a man's home and the privacies of life” from “government and its employees.” *State v. Short*, 851 N.W.2d 474, 495 (Iowa

2014). In noting the “historic importance of protecting the home”, many state and federal courts have cited William Pitt's famous speech in the House of Commons:

“The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement[.]”

Id. at 495-496.

Iowa law protects a home’s occupant from invasions. *McClurg v. Brenton*, 123 Iowa 368, 371–72, 98 N.W. 881, 882 (1904). Although not a search, odor or insect invasions of citizens’ homes, constitutes a violation of property rights. *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (Imposing an odor easement constitutes invasion of property rights).

The parent, worker, or student who experiences a stressful day, is harassed at work, or humiliated at school may still retreat to the safety and comfort of their abode, that is, unless it is overwhelmed by putrid odors and swarms of flies from a manure basin that an absentee investor has constructed and “moved in” just across the road. Industry Amicus urges this Court to roll back the constitutional protections articulated in *Gacke* by granting the livestock industry private condemnation privileges.

If every livestock producer would simply abide by a rule of common courtesy, that which requires construction of new livestock facilities be located by the owner's homes, rather than by the neighbor's home, there would be little need for application of the Iowa Code § 657.11 immunities. Industry Amicus seeks to grant immunity to those producers who violate this custom and penalize those producers who honor it.

“Chuck Gipp, Director of the Iowa Department of Natural Resources, who favors working with producers to correct problems, said some "bad actors" are misusing the law.” 6/17/16 *The Des Moines Register*; Iowa's Hog Confinement Loopholes Causing A Stink; 2016 WLNR 19099204. “They are creating industry enemies, he said, even among one-time advocates.” *Id.* “There's an intolerance out there – a disregard by a few,” said Gipp, adding that he knows a couple who had to move from their rural home after a small pig confinement set up across the street.” *Id.*

Iowa Nuisance Law

Iowa nuisance law action recognizes the importance of property and its protection. The purpose of nuisance actions is to protect the use and enjoyment of property. *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 84 (Iowa 2014). Parties must use their own property in a manner that will not interfere with their

neighbors. *Weinhold v. Wolff*, 555 N.W.2d 454, 458-459 (Iowa 1996). Parties may sue for damages and to enjoin a nuisance:

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.

Iowa Code § 657.1(1)

The statutory definition of nuisance does not modify the application of common law to nuisances. *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 660 (Iowa 2002). The existence of a nuisance does not depend on the intention of the party who created it. *Id.* It depends on: "... priority of location, nature of the neighborhood, and the wrong complained of." *Id.* Who was there first is a circumstance of considerable weight. *Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 129 (Iowa 1974).

A party may sue for damages and to abate/enjoin a nuisance. *Weinhold v. Wolff*, 555 N.W.2d 454, 458 (Iowa 1996); Iowa Code § 657.1(1). Whether a nuisance exists and whether it is temporary or permanent is a question of fact. *Id.* at 462. Even a lawful business may be a nuisance. *Id.*

In addition to diminution in property, Plaintiffs may obtain special nuisance damages, which include personal inconvenience, annoyance, discomfort and loss of full enjoyment of the property caused by Defendants' nuisance. *Id.* Special damages in nuisance cases are not subject to any precise rule for ascertaining damages because these damages are not susceptible to exact measurement. *Id.* at 465. There is no requirement that these nuisance special damages be attributable from a physical injury or medically confirmed. *Id.* at 466.

Livestock Production

“No one wants to live near a hog confinement operation.” *Simpson v. Kollasch*, 749 N.W.2d 671, 672 (Iowa 2008). Odors arising from farming operations can give rise to a private nuisance, even in a predominantly agricultural area. *Earl v. Clark*, 219 N.W.2d 487, 490 (Iowa 1974).

“The fact that a residence is in a rural area does not require excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property.” *Weinhold*, 555 N.W.2d at 460.

Conditions surrounding hog raising facilities often include noxious odors, vermin, and air and water pollution that make their way onto neighboring properties. 93 ALR 5th 621 (1999).

The Industry Amicus Brief reports that there are 88,637 farms in Iowa and 6,266 hog operations. www.iowapork.org/news-from-the-iowa-pork-producers-association/iowa-pork-facts/. There are 82,000 farmers, who for whatever reason, have decided not to raise hogs or construct a hog facility by their own home.

Gacke and Iowa Code Section 657.11

Iowa Code § 657.11 purports to grant animal feeding operations immunity from liability.¹ *Gacke* held that Iowa Code § 657.11 is unconstitutional, under the Iowa Inalienable Rights Clause, when the immunity is applied to those who have “priority of location.” *Gacke v. Pork Xtra*, 684 N.W.2d 168, 179 (Iowa 2004). *Gacke* held that the constitutional protection embodied in Iowa's Inalienable Rights Clause “is not a mere glittering generality without substance or meaning.” *Id.* at 176. These rights include the “right to acquire, possess, and enjoy property.” *Id.* Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision. *Id.*

Gacke articulates a rule that is uncomplicated in its application. If a rural homeowner moves to the nuisance, the livestock producer receives all of the Iowa Code Section 657.11 protections. Conversely, if a rural livestock producer sites a

¹ Iowa Code § 657.11(2) still imposes liability when the operation fails to use existing prudent generally accepted management practices or violates State or Federal law.

livestock facility near a preexisting home and creates a nuisance, the homeowner has a right to protect his property with a nuisance suit.

***Industry Amicus Seeks Private Condemnation Privileges
for the Livestock Industry***

What the Industry seeks is a rule that grants a small number of livestock producers with private eminent domain powers to condemn rural homes, including the homes of other farmers - and then be responsible only for diminution in property value, which is the only measure of damages in a condemnation case. Iowa Unif. Civ. Jury Inst. 25003. Unfettered application of the Iowa Code § 657.11 immunities grants livestock owners the privilege to condemn a homeowner's property by imposition of a nuisance of property without paying just compensation, and without due process (procedural and substantive) or equal protection.²

This Court recently reiterated the importance of protecting private property rights against condemnation by private entities.

² The Legislature exceeded its authority and infringed on the rights of homeowners by allowing the creation of a nuisance without the payment of just compensation. These statutory provisions are an unreasonable exercise of police power and violate the Inalienable Rights Clause. Art. I, § 1, 6, 9, and 18 of the Iowa Constitution, and the Takings Clause, 5th and 14th Amendments of the United States Constitution.

The sovereign power to take private property from citizens without their consent is limited by our State and Federal Constitutions and legislative enactments. Property owners are entitled to strict compliance with legal requirements when a government entity wields the power of eminent domain. These legal requirements help protect against abuse of the eminent domain power. We strictly construe statutes delegating the power of eminent domain and note the absence of a clear legislative authorization for a joint public-private entity to condemn private property.

Clarke Cnty. Reservoir Comm'n v. Robins,
862 N.W.2d 166, 168 (2015).

Iowa citizens who acquire homes and invest their life savings are seeking a place to raise their families in comfort. The same Iowa citizens are not expending their emotional, physical, and financial capital to see their home condemned by any livestock producer who chooses to build a manure basin across the road.

Iowa citizens expect more home security than that provided by a rule which grants a private party – the livestock industry – the power to constructively evict any Iowa homeowner, by odor and flies, simply in exchange for payment of diminution damages. *Gacke* articulates the rule that Iowa citizens have a constitutional right to protect their property, lives, and lifestyles.

The *Gacke* rule provides reasonable protections to homeowners – who were first in time - from Industry parties who engage in harmful siting practices.

Compliance with Regulations is Not a Defense to a Nuisance Case

The Industry urges the Court to reconsider *Gacke* in light of a regulatory updates including setbacks. However, “setback requirements were not one of the factors cited by the Supreme Court in discussing the constitutionality of § 657.11(2).” *McIlrath v. Prestage Farms*, 2016 WL 6902328, 3 citing *Gacke*. Further, there are no odor or insect rules that govern any livestock producer so the assertion that livestock producers are following the letter of the law is inaccurate, if not misleading.

The Industry suggests that its alleged compliance with regulations should immunize it from nuisance suits. However, this assertion is without merit and is contrary to decades of Iowa legal precedent. A lawful business may be a nuisance even if it has complied with all laws and regulations. *Kriener v. Turkey Valley Community School District*, 212 N.W.2d 526, 535 (Iowa 1973).

Iowa law prevents local zoning regulation of animal confinements. *Goodell v. Humboldt County*, 575 N.W.2d 486, 508 (Iowa 1998).

The Industry points to the matrix system. However, the matrix system has been called a farce and a rubber stamp by those who are familiar with the process: “Anyone who doubts that the county-level master matrix review process is anything but a rubber stamp for livestock confinements (CAFOs) need only look to

last week's Boone County Board of Supervisors meeting.”

www.desmoinesregister.com/story/opinion/readers/2015/03/08/county-board-discounts-residents-cafo-concerns/24571493/.

The state's animal confinement matrix system has started losing counties one by one and at least one county supervisor says the matrix system is a “farce.”

www.ottumwacourier.com/news/local_news/more-counties-are-leaving-the-matrix/article_07ff91ba-bdb1-5cb1-995a-7a6f4b739653.html.

One commentator described the matrix as being compromised to death and too little, too late in protecting Iowa's air and environment. 2/27/03 *The Des Moines Register* (Des Moines, Iowa) A19; 2003 WLNR 17783866. One supervisor called the county's role "largely irrelevant" as the DNR can still approve the confinement without a supervisor recommendation. 3/4/15 *Clinton Herald* (Clinton, Iowa); 2015 WLNR 65219.

Most Department of Natural Resources' “restrictions don't apply to facilities with fewer than 2,500 pigs – and some pork producers are using that cutoff to their advantage.” 6/17/16 *The Des Moines Register*; Iowa's Hog Confinement Loopholes Causing A Stink. “The state has even fewer restrictions on facilities with 1,250 or few hogs, another threshold that some producers have exploited at the expense of neighbors and water quality.” *Id.*

CONCLUSION

Industry Amicus seeks, through the privilege of private condemnation, to transform Iowa homeownership rights back in time to the English feudal system with livestock facility owners being appointed “Lord of the Manor.” Iowa citizens have an inalienable right to protect their property from private condemnation. Iowa citizens have a constitutional right to protect their property, lives and lifestyles. The *Gacke* rule provides reasonable protections to homeowners – who were first in time - from Industry parties who engage in harmful siting practices.

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