CHAPTER 93A: RIGHT-TO-FARM PROTECTION FOR IOWA

I. Introduction

America is losing its farmland. Urbanization, transportation needs, water resource development and other non-farm uses are contributing to a continuous withdrawal of land from agricultural activities at a rate of approximately three million acres each year.[1] Such a pattern of transformation over past decades has both citizens and government officials alike questioning the once seemingly inexhaustible supply of agricultural land.[2] The reality of such concerns is "that good farmland is a finite resource which is necessary for survival."[3] "Survival" to America means sustaining an institution that feeds not only the American people, but also provides food and fiber for the growing world population; it means sustaining the many local economies that are entirely dependent upon agriculture in one form or another, as well as contributing significantly to the national economy; and it means sustaining a particular lifestyle and environment that is healthy for all of America.[4]

The conversion of agricultural lands to non-agricultural uses "is a complex process, often taking place over a period of fifteen or twenty years."[5] Generally, farmland is converted to other uses when the alternatives are such that a higher value, either economic or social, places the farmer in a position to remove his land, either voluntarily or involuntarily, from agricultural use. Such factors contributing to this kind of a conversion include "farm profitability, . . . land values, personal decisions about work and retirement, community expectations, taxes and government programs, incentives and regulations."[6] The process continues until it becomes irreversible, with farm after farm falling by the wayside.[7]

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1. National Agricultural Lands Study, The Protection of Farmland: A Reference Guidebook for State and Local Governments, Introduction (1981) [hereinafter cited as "N.A.L.S."]. The N.A.L.S. was jointly sponsored by the U.S. Department of Agriculture and the President's Council on Environmental Quality to educate "all citizens who seek practical guidance in ways to halt the loss of agricultural lands." *Id.* at 4.

2. Hanna, *"Right to Farm" Statutes — The Newest Tool in Agricultural Land Preservation*, 10 Fla. St. U.L. Rev. 415, 415 (1982) [hereinafter cited as Hanna]; Antham, *Vanishing Acres*, Des Moines Register, (reprint of seven articles appearing July 8-13 and July 15, 1979).

3. N.A.L.S., *supra* note 1, at 16.

4. Batie & Looney, *Preserving Agricultural Lands: Issues and Answers*, 1979-80 Agric. L.J. 600, 604-05.

5. N.A.L.S., *supra* note 1, at 16.

6. *Id.*

7. *Id.*

Both state and local governments have adopted a variety of protective measures to minimize the conversion of agricultural land to non-agricultural uses. Among the most common methods include the tax relief incentives of differential assessment,[8] property tax credits,[9] and inheritance or death tax benefits.[10] It has long been recognized by government officials that the ability for farmers "to earn a reasonable living" is the most important factor "in a farmer's decision whether or not to keep farming."[11] It is not surprising, therefore, that tax relief has been widely utilized as a tool by legislators to positively influence a farmer's decision to maintain his farm and farm operation, thereby protecting America's farmland.[12] The land use controls of agricultural zoning,[13] purchase development rights,[14] and transfer development

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8. Differential assessment tax relief programs, including preferential assessment, deferred taxation, and restrictive agreements, all seek to reduce the burden of real property taxes on farmers, which often consume up to twenty percent of a farmer's net farm income. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119, 137 (1979). As of 1981, only Georgia, Kansas and Mississippi had not adopted some form of value assessment program for farmlands. *See Hanna, supra* note 2, at 421 n.48. The one element that is common to most differential assessment programs is that the eligible land is taxed on its "farm use" value rather than its "fair market" value, thus offering needed and deserved tax reductions to those areas where land has a high speculative value (i.e. proposed lands for industrial and commercial purposes, lands on the edge of urbanization, etc.). N.A.L.S., *supra* note 1, at 56-59.

9. Property tax credits "allow a farmer to apply some or all of his local real property taxes as dollar-for-dollar credits against his state income tax." N.A.L.S., *supra* note 1, at 19.

10. Death tax benefits, initiated by the Tax Reform Act of 1976 and the Economic Recovery Tax Act of 1981, have given states the ability to soften the impact of estate taxes on farm families through federal legislation. N.A.L.S., *supra* note 1, at 64-72. By raising the threshold at which estates become liable for estate and gift taxation, executors are not so easily "forced" to sell part or all of the farm to satisfy a large estate tax. I. J. WERSHOW, FLORIDA AGRICULTURAL LAW, ch. 10, 7 (1981) [hereinafter cited as WERSHOW]. Such a policy aids in preventing "the family of the deceased" from being deprived "of its main source of income and it may [prevent the removal of] productive land from agricultural use" by encouraging families to remain in agriculture. Hanna, *supra* note 2, at 417.

11. N.A.L.S., *supra* note 1, at 56.

12. *Id.*

13. Agricultural zoning is the most common method used to save farmland. Juergensmeyer, *Introduction: State and Local Land Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463, 464-65 (1980). Generally, agricultural zoning legally binds the use to which land may be put, including type, size, location and amount. N.A.L.S., *supra* note 1, at 104. Though zoning can significantly change the expectations of both farmers and potential developers, it is also vulnerable to shifts in political power. *Id.* at 73.

14. Purchase of development rights allows local governments to buy "the development rights to a parcel of land owned by the farmer," while leaving "the farmer free to work the land at its current use." Hanna, *supra* note 2, at 419. Such a public "easement" restrains efforts to develop the land for other non-agricultural purposes; but the community pays the price of compensation to the farmer for foregoing more intensive development of his land. Peterson & McCarthy, *Farmland Preservation By Purchase of Development Rights: The Long Island Experiment*, DE PAUL L. REV. 447 (1977)

rights[15] have been successfully utilized by jurisdictions around the country. Comprehensive planning[16] and the development permit system[17] are also useful tools to aid in protecting agricultural lands. Two incentive programs, agricultural districting[18] and right-to-farm legislation,[19] are relative newcomers to jurisdiction arsenals for promoting agricultural land preservation. The subject of this Note will be Iowa's right-to-farm law, Iowa Code chapter 93A, the tool which the Iowa Legislature has developed to promote and preserve the agricultural land within its domain.

II. Chapter 93A: Land Preservation and Use

Responding to many of the concerns mentioned above, the 1982 Session of the 69th General Assembly of the State of Iowa adopted chapter 1245, the 1982 Iowa Acts, effective July 1, 1982 as Iowa Code chapter 93A, Land Preservation and Use (Act).[20] The Act is actually two separate and distinct statutes combined into one chapter.[21] First, the Act requires the individual counties to prepare land use "inventories" while also authorizing counties to

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15. Transfer of development rights is a private market equivalent to purchase of development rights where landowners of farm lands "transfer the development rights of their property to landowners in development areas who wish to engage in high density development." Hanna, *supra* note 2, at 420. Such a method of preservation is "intended to maintain designated land in open spaces and compensate the owners of the preserved land for the loss of their right to develop it." N.A.L.S., *supra* note 1, at 174.

16. Comprehensive planning is a process leading to a set of policies regarding land use, transportation, public facilities, etc., along with economic and social considerations. N.A.L.S., *supra* note 1, at 17. The "plan" is not legally binding in most states, it is very useful for structured and orderly growth goals due to the fact that many jurisdictions require that zoning and large development must be consistent with the comprehensive plan. *Id.*

17. The development permit system is simply an additional permit that must be obtained from a state or local agency beyond the "normal local zoning and building permits." *Id.* The permit will ensure an evaluation of the effect of the development upon agricultural land, thus providing helpful protection to questionable conversions of agricultural lands.

18. Agricultural districting offers a voluntary retention program for one or more producers to form an agreement with the local government to retain their land for agricultural purposes in exchange for tax and other incentives. N.A.L.S., *supra* note 1, at 20. The acts are designed to "keep farmland in production, to protect farmers from rising taxes, and to insure the economic feasibility of farming by releasing some of the farmer's capital investment — all while allowing the landowner to retain his ownership of the land." Wershow, *supra* note 10, at ch. 1, 4.

19. Right-to-farm legislation prevents local ordinances from being enacted which restrict normal farming practices unless they endanger public health or safety, and providing farmers with some protection against nuisance lawsuits. N.A.L.S., *supra* note 1, at 98-103.

20. Now Iowa Code § 93A (1985).

21. "[Chapter 93A] fosters the notion that agricultural areas and land preservation plans and ordinances are two separate methods of promoting agricultural land preservation." Op. Att'y Gen. No. 83-2-5 § I (B) (February 9, 1983) (Weeg to Beine). Also, the disjunctive language "or" in section 93A.1 between county land preservation plans and agricultural areas establishes the independence intended by the legislature. *Id.*

develop land use "plans."[22] Second, the Act contains provisions for the establishment of "agricultural areas."[23]

The purpose of the Act focuses on the need "to provide for the orderly use and development of land and related natural resources in Iowa . . . through processes that emphasize the participation of citizens and local governments."[24] The tools of land use "inventories" and land use "plans" allow such language to be given substantive meaning. The purpose of the Act also acknowledges that Iowa's farmland is not inexhaustible or infinite, and that the increasingly rapid conversion of land from agricultural to non-agricultural uses threatens to "undermine agriculture as a major economic activity in Iowa."[25] Such language "does express a strong policy in favor of preservation of agricultural land, a policy which is generally promoted by creation of agricultural areas."[26]

A. *County Commissions and their Activities*

Chapter 93A is first concerned with the establishment of county land preservation and use commissions and their activities.[27] Each county is required to create a land preservation and use commission.[28] Each commission

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22. IOWA CODE § 93A.3-.5 (1985).
23. IOWA CODE § 93A.6-.11 (1985).
24. IOWA CODE § 93A.1 (1985):

> It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystems of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.
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> The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other non-farm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.
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> It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from non-agricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

Id.

25. *Id.*
26. *See supra* note 21.
27. *See supra* note 22.
28. IOWA CODE § 93A.3 (1985):

is to be comprised of five members from specified areas of concern,[29] with terms lasting four years.[30] Also, the state agricultural extension service is required to provide the commissions with technical, informational and clerical assistance.[31]

Every commission was required to have compiled a land use "inventory" of the unincorporated areas of their respective counties by January 1, 1984.[32] Only fifty-eight of Iowa's ninety-nine counties (fifty-nine percent)

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1. In each county a county land preservation and use commission is created composed of the following members:

a. One member appointed by and from the county agricultural extension council.

b. Two members appointed by the district soil conservation commissioners, one of whom must be a member of the district soil conservation board of commissioners and one must be a person who is not a commissioner, but is actively operating a farm in the county.

c. One member appointed by the board of supervisors from the residents of the county who may be a member of the board.

d. One member appointed by and from a convention of the mayors and councilpersons of the cities of the county. If a participating city contains fifty percent or more of the total population of the participating cities, that city may appoint the member appointed under this paragraph.

However, if a city contains more than fifty percent of the population of a county which has a population exceeding fifty thousand persons, that city shall not participate in the convention of mayors and councilpersons and the members appointed under paragraph "d" shall be one member appointed by and from the mayor and councilpersons of that city and one member appointed by and from the convention of mayors and councilpersons and the member appointed under paragraph "c" shall be a resident of the county engaged in actual farming operations appointed by the board of supervisors.

2. The county commission shall meet and organize by the election of a chairperson and vice chairperson from among its members by October 1, 1982. A majority of the members of the county commission constitutes a quorum. Concurrence of a quorum is required to determine any matter relating to its official duties.

3. The state agricultural extension service shall provide county commissions with technical, informational, and clerical assistance.

4. A vacancy in the county commission shall be filled in the same manner as the appointment of the member whose position is vacant. The term of a county commissioner is four years. However, in the initial appointments to the county commission, the members appointed under subsection 1, paragraphs "a" and "b" shall be appointed to terms of two years. Members may be appointed to succeed themselves.

Id.

29. *Id.* at § 93A.3(1)(a-d).

30. *Id.* at § 93A.3(4).

31. *Id.* at § 93A.3(3).

32. IOWA CODE § 93A.4 (1985):

1. Each county commission shall compile a county land use inventory of the unincorporated areas of the county by July 1, 1984. The county inventories shall where adequate data is available contain at least the following:

a. The land available and used for agricultural purposes by soil suitability classifications or land capability classification, whichever is available.

b. The lands used for public facilities, which may include parks, recreation areas,

met the deadline set by the legislature, necessitating a six month extension to allow full compliance.[33] The inventories were to consider and examine lands used for agricultural purposes, lands used for public facilities and commercial uses, lands converted from agricultural to residential uses, and lands inside city limits and private open spaces.[34] A variety of state agencies are to be available, upon request, to provide each commission with pertinent land use information while compiling their inventories.[35] It is the duty of the Inter-Agency Resource Council to receive the county inventories and compile a state-wide summary of the information, and to serve as a source of technical assistance for counties and land use planners.[36]

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schools, government buildings and historical sites.
c. The lands used for private open spaces, which may include woodlands, wetlands and water bodies.
d. The land used for each of the following uses: commercial, industrial including mineral extraction, residential and transportation.
e. The lands which have been converted from agricultural use to residential use, commercial or industrial use, or public facilities since 1960.
2. In addition to that provided under subsection 1, the county inventory shall also contain the land inside the boundaries of a city which is taxed as agricultural land.
3. The information required by subsection 1 shall be provided both in narrative and map form. The county commission shall provide a cartographic display which contrasts the county's present land use with the land use in the county in 1960 based on the best available information. The display need only show the areas in agriculture, private open spaces, public facilities, commercial, industrial, residential and transportation uses.
4. The state department of agriculture, office for planning and programming, department of soil conservation, state conservation commission, department of water, air and waste management, geological survey, state agricultural extension service, and the Iowa development commission shall, upon request, provide to each county commission any pertinent land use information available to assist in the compiling of the county land use inventories.

Id.

33. Johnson, *Extension Sought For County Land Use Reports*, Iowa Farm Bureau Spokesman, April 21, 1984, at _ [hereinafter cited as Johnson]. As of April 1, 1985, there were a few counties that had not completed their inventories. Telephone interview with James Gulliford, Iowa Department of Soil Conservation and Inter-Agency Resource Council (March 22, 1985) [hereinafter cited as Gulliford]. The overall compliance and quality of information, however, has been encouraging. *Id.*

34. IOWA CODE § 93A.4(1)(a-e) (1985). *See supra* note 32.

35. IOWA CODE § 93A.4(4) (1985). *See supra* note 32.

36. IOWA CODE § 93A.13 (1985):
The state interagency resource council shall:
1. Serve as a center to gather information from various resources and agencies and disseminating this information to the county commissions.
2. Receive the county inventories and compile a statewide summary of the information contained in the inventories and submit the summary to the general assembly.
3. Distribute information beneficial to the county commissions for preparing the county plan.
4. Disseminate beneficial information or procedures developed by one or more counties to other counties.

It has been opined that a comprehensive zoning plan could be acceptable as the county inventory, provided that sections 93A.4(1), (2) & (3) are included and the commission concludes that the comprehensive plan satisfies the inventory requirements.[37] It has also been submitted that what constitutes "adequate data" under section 93A.4(1) is initially determined by the county commission.[38] The board of county supervisors, however, have oversight authority to make a final determination when deciding whether to adopt, reject, or modify the subsequent land use plan submitted by the commission.[39]

Following the inventory process, each commission was to have proposed to its county board of supervisors (board) a county land use "plan" for the unincorporated areas in the county, or in the alternative, submit the inventory together with a set of "written findings" by September 1, 1984.[40] This

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5. Receive and maintain a record of individual county plans.

Id. The information collected was to have been stored and evaluated in a computerized "land bank" under the direction of the Inter-Agency Resources Council and Iowa State University. Johnson, *supra* note 33. The "land lab" would serve as a source of technical assistance for counties and for land use planning. *Id.* It appears, however, the funding for such a program is not upon the Iowa Legislature's current appropriations list. Gulliford, *supra* note 33. Approximately $25,000 would need to be earmarked for such a project. *Id.* Thus, the inventories will be available at the Inter-Agency Resources Council office as well as with the individual county commissions. *Id.*

37. Op. Att'y Gen. No. 83-6-7 (June 16, 1983) (Weeg to Stueland).

38. *Id.*

39. *Id.*

40. IOWA CODE § 93A.5 (1985):

1. By September 1, 1985, after at least one public hearing, a county commission shall propose to the county board a county land use plan for the unincorporated areas in the county, or it shall transmit to the county board the county use inventory completed pursuant to section 93A.4 together with a set of written findings on the following factors considered by the county commission:

a. Methods of preserving agricultural lands for agricultural production.

b. Methods of preserving and providing for recreational area, forests, wetlands, streams, lakes and aquifers.

c. Methods of providing for housing, commercial, industrial, transportational and recreational needs.

d. Methods to promote the efficient use and conservation of energy resources.

e. Methods to promote the creation and maintenance of wild-life habitat.

f. Methods of implementing the plan, if adopted, including a formal countywide system to allow variances from the county plan that incorporates the examination of alternative land uses and a public hearing on such alternatives.

g. Methods of encouraging the voluntary formation of agricultural areas by the owners of farmland.

h. Methods of considering the platting of subdivisions and its effect upon the availability of farmland.

2. Upon receipt of the inventory and findings, the county board may direct the county commission to prepare a county land use plan for the consideration of the county board.

3. Upon receipt of a plan, the county board may refer the plan to the county commis-

requirement was also given a six month extension to allow full compliance.[41] The land use plans and written findings concern themselves with methods of preserving, promoting, and providing for the subject matter within the individual inventories (i.e., agricultural land, recreational areas, commercial areas, natural resources, etc.).[42] The board, as stated earlier, is the ultimate overseer of the county land use plan.[43] The board may direct the commission to prepare a land use plan even after receiving the inventory together with written findings.[44] Such a two-tier system ensures that each land use plan contains the "adequate data" necessary to fully utilize the land use inventory and planning process.[45] If the board approves the plan, however, it is to be considered the land use policy of the county, and will be reviewed periodically by the commission to consider amendments to it.[46]

B. *Agricultural Areas*

The second area of concern under chapter 93A is the creation of "agricultural areas"[47] and their implementation into the Iowa land planning network.[48] The formation of an agricultural area is purely an affirmative action by the owner of "farmland,"[49] who is required to submit a proposal to the

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sion for modification, reject the plan or adopt the plan either as originally submitted or as modified.

If the plan is approved by the county board, it shall be the land use policy of the county and shall be administered and enforced by the county in the unincorporated areas. The county commission shall review the county plan periodically for the purpose of considering amendments to it. If the commission proposes amendments to the plan, it shall forward the proposal to the county board which may refer the amendments to the commission for modification or reject or adopt the amendments.

4. Within thirty days after the completion of the county land use inventory compiled pursuant to section 93A.4 or any county land use plan or set of written findings completed pursuant to this section, the county commission shall transmit one copy of each to the interagency resource council.

Id.

41. Johnson, *supra* note 33. As of April 1, 1985, a significant percentage of land use plans or written findings had not been completed. Gulliford, *supra* note 33. Such delays can be expected due to varying interest, time and funding commitments. *Id.*

42. IOWA CODE § 93A.5(1)(a-h) (1985). *See supra* note 40.

43. *See supra* note 39 and accompanying text.

44. IOWA CODE § 93A.5(2) (1985). *See supra* note 40.

45. *See supra* note 37.

46. IOWA CODE § 93A.5(3) (1985). *See supra* note 40.

47. *See* IOWA CODE § 93A.2(1) (1985) (" 'Agricultural area' means an area meeting the qualifications of section 93A.6 and designated under section 93A.7.").

48. *See supra* note 23 and accompanying text.

49. "Farmland" is defined as "those parcels of land suitable for the production of farm products." IOWA CODE § 93A.2(9) (1985). "Farm products" are defined as:

> [T]hose plants and animals and their products which are useful to people and includes but is not limited to forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, fruits, vegetables, flowers, seeds, grasses, trees, fish, honey, and other similar products, or any other plant,

county board of supervisors for consideration.[50] Initially, an agricultural area must be at least five hundred acres of farmland.[51] A smaller acreage, however, may be utilized if such "farmland is adjacent to farmland subject to an agricultural land preservation ordinance pursuant to Iowa Code chapter 358A.27."[52] The acreage is to be "as compact and as nearly adjacent as feasible."[53] Such land need not be "strictly adjacent" to be included into an agri-

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animal, or plant or animal product which supplies people with food, feed, fiber, or fur.

IOWA CODE § 93A.2(6) (1985).

50. IOWA CODE § 93A.6 (1985):

> An owner of farmland may submit a proposal to the county board for the creation of an agricultural area within the county. An agricultural area, at its creation, shall include at least five hundred acres of farmland, however, a smaller area may be created if the farmland is adjacent to farmland subject to an agricultural land preservation ordinance pursuant to section 358A.27. The proposal shall include a description of the proposed area, including its boundaries. The territory shall be as compact and as nearly adjacent as feasible. Land shall not be included in an agricultural area without the consent of the owner. Agricultural areas shall not exist within the corporate limits of the city. Agricultural area may be created in a county which has adopted zoning ordinances. Except as provided in this section, the use of the land in agricultural areas is limited to farm operations.
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> 1. The following shall be permitted in an agricultural area:
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> a. Residences constructed for occupation by a person engaged in farming or in a family farm operation. Nonconforming preexisting residences may be continued in residential use.
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> b. Property of a telephone company, city utility as defined in section 390.1, public utility as defined in section 476.1, or pipeline company as defined in section 479.2.
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> 2. The county board of supervisors may permit any use not listed in subsection 1 in an agricultural area only if it finds all of the following:
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> a. The use is not inconsistent with the purposes set forth in section 93A.1.
>
> b. The use does not interfere seriously with farm operations within the area.
>
> c. The use does not materially alter the stability of the overall land use pattern in the area.

Id. " 'Farm' means the land, buildings, and machinery used in the commercial production of farm products." IOWA CODE § 93A.2(4) (1985).

> "Farm operation" means a condition or activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the marketing of products at roadside stands or farm markets, the creation of noise, odor, dust, fumes, the operation of machinery and irrigation pumps, ground and aerial seeding and spraying, the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides, and the employment and use of labor.

IOWA CODE § 93A.2(5) (1985).

51. IOWA CODE § 93A.6 (1985). *See supra* note 50.

52. *Id.*

> If a county adopts an agricultural land preservation ordinance under this chapter which subjects farmland to the same use restrictions provided in section 93A.6 for agricultural areas; sections 93A.10 to 93A.12 and section 472.3, subsection 6, shall apply to farms and farm operations which are subject to the agricultural land preservation ordinance.

IOWA CODE § 358A.27 (1985).

53. IOWA CODE § 93A.6 (1985). *See supra* note 50.

cultural area, but the ultimate factual determination remains at the discretion of the board.[54]

The proposal itself must "include a description of the proposed area, including its boundaries."[55] The amount of detail required is left to the discretion of the board.[56] Although the board is not required under the Act to verify ownership and check the legal description of the land to be included in an agricultural area, pursuant to its home rule powers[57] the county may (and should) require such verification before accepting a proposal for an agricultural area.[58] Also, land to be included in an agricultural area must have the consent of the owner(s),[59] and such consent must be in writing.[60] "Owner" has been interpreted to include one's spouse[61] and, both a contract seller and contract buyer, absent contrary language in the contract itself.[62] A mortgage holder, on the other hand, is not considered to be an "owner," thus negating the need for a mortgagee's consent to form an agricultural area.[63]

An agricultural area may not exist within a municipality's corporate limits.[64] A municipality, however, is not prohibited from annexing land from an agricultural area.[65] The remaining agricultural area stays intact, absent the annexed land.[66] Agricultural areas are not forbidden in counties that have already adopted zoning ordinances.[67] In fact, it has been opined that if there is a conflict between the two provisions which cannot be reconciled,[68] the more recent and specific provisions of the Act would prevail.[69]

With express exceptions (i.e., farming residences, preexisting nonconforming residences and utility easements), the use of agricultural area land is restricted to "farm operations."[70] The board is authorized to allow any use within an agricultural area as long as the use does not interfere with, materi-

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54. Op. Att'y Gen. No. 83-3-70 (March 23, 1983) (Weeg to Osterberg).

55. IOWA CODE § 93A.6 (1985). *See supra* note 50.

56. *See supra* note 21.

57. The county has authority to "set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." IOWA CODE § 331.301(6) (1985).

58. *See* Op. Att'y. Gen. No. 83-2-5 § II(D) (Feb. 9, 1983) (Weeg to Beine).

59. IOWA CODE § 93A.6 (1985). *See supra* note 50.

60. Op. Att'y. Gen. No. 83-2-5 § II(C) (Feb. 9, 1983) (Weeg to Beine).

61. *Id.* at § II(A).

62. *Id.* at § II(B).

63. *See supra* note 54.

64. IOWA CODE § 93A.6 (1985). *See supra* note 50.

65. Op. Att'y Gen. No. 83-5-1 § V (May 4, 1983) (Weeg to Richards).

66. *Id.*

67. IOWA CODE § 93A.6 (1985). *See supra* note 50.

68. "[T]he likelihood of conflict . . . is not great given the fact that agricultural land while used for farm purposes is exempt from zoning requirements pursuant to Iowa Code § 358A.1 (1985)." Op. Att'y Gen. No. 83-2-5 § III(A) (February 9, 1983) (Weeg to Beine).

69. *Id.*

70. *See supra* note 50.

ally alter, or prove inconsistent with the purpose of the general land use pattern.[71] Although there is no statutory duty upon the county board to enforce use restrictions on agricultural areas,[72] it may pursue an informal resolution of the matter or take legal action against an alleged violator by way of injunctive or monetary relief.[73] It has also been submitted that because there is no mandatory duty to enforce use restrictions, a county would not be liable for failure to invoke such a discretionary duty.[74] Failure to comply with use restrictions is lessened by the potential revocation of the Act's incentive provisions that are the main impetus for creating an agricultural area in the first place.[75]

As stated previously, the county board of supervisors is the ultimate determinant of the Act's provisions. The board has a wide range of duties and discretions, but it also must work within certain limitation. Once a proposal for an agricultural area has been received by the board, notice of such must be published in a "newspaper of general circulation in the county."[76] Also, the board is required to hold a public hearing within forty-five days after receiving an agricultural area proposal.[77] Both the notice and hearing time schedules are to be strictly enforced.[78] This is true regardless of whether a land preservation and use plan has been adopted by the county, despite no legislative intent, express or implied, that land use plans and agricultural areas depend upon each other.[79]

The board is required to adopt an agricultural area proposal or any modification thereof within sixty days of receipt, "unless to do so would be inconsistent with the purpose of this chapter."[80] This requirement has been construed to allow the board to reject a proposal only if it "conflicts with the express purposes of the Act."[81] As to when the policy of agricultural land preservation in a given instance is "outweighed by other policy considera-

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71. Iowa Code § 93A.6(2)(a-c) (1985).

72. Op. Att'y Gen. No. 83-2-5 § IV(A) (February 9, 1983) (Weeg to Beine).

73. *Id.* at IV(B).

74. *Id.* at IV(C). This is so regardless of whether the county has adopted county zoning. *See supra* note 54.

75. Op. Att'y Gen. No. 83-2-5 § IV(A) (February 9, 1983) (Weeg to Beine).

76. "Within thirty days of receipt of a proposal for an agricultural area which meets the statutory requirements, the county board shall provide notice of the proposal by publishing notice in a newspaper of general circulation in the county." Iowa Code § 93A.7(1) (1985).

77. "Within forty-five days after receipt, the county board shall hold a public hearing on the proposal." *Id.*

78. Op. Att'y Gen. No. 83-2-5 (Feb. 9, 1983) (Weeg to Beine).

79. *Id.*

80. Iowa Code § 93A.7(2) (1985).

81. Op. Att'y Gen. No. 83-2-5 at § II(B). This is the only reason a proposal may be rejected. *Id.* As long as the Act's requirements have been satisfied, technical errors and the like may be modified to allow approval. *See supra* note 54. A county board, however, would be in a better position to hold that a proposal is not consistent with the purposes of the Act if a county plan was in effect under Iowa Code Chapter 358A previous to receiving a questionable proposal.

tions" remains a matter of board discretion.[82] The board also has the option to utilize the county's comprehensive zoning plan (if one exists) as one factor in determining whether an agricultural area would serve the purposes of the Act in a given situation.[83] Once an agricultural area has been created, the board must file a description of the area with the county auditor and county recorder.[84]

Once an agricultural area has been created, the owner cannot withdraw the land from such a designation for at least three years, and then only at the discretion of the county board.[85] The owner, however, may withdraw his land at any time after six years from the date of creation by giving descriptive notice to the board of the land intended to be withdrawn.[86] An owner need not withdraw the entire agricultural area if it is not desired, for the agricultural area will remain in existence even though it is smaller than five hundred acres.[87] It has been submitted that withdrawal prior to the completion of the minimum three year period is impossible,[88] thus acknowledging the legislative seriousness of commitment to agricultural land preservation.

In order to accomplish the purposes of the Act, a number of incentives and protections have been provided by the Iowa Legislature to promote agricultural land preservation. First, the agricultural area owner is given protection from special public assessments on frontage, acreage, or value unless such assessments are imposed prior to the agricultural area's existence or, unless the assessment is equitably imposed upon others receiving a particu-

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82. Op. Att'y Gen. No. 83-2-5 at § I(B).

83. *Id.* at III(B).

84. "Upon the creation of an agricultural area, its description shall be filed by the county board with the county auditor and placed on record in the office of the county recorder." IOWA CODE § 93A.8 (1985). If any filing fees are incurred, the board may pass such costs to the owner of the agricultural area as long as the fees are expressly authorized by statute. Op. Att'y Gen. No. 83-2-5 at § II(E).

85. IOWA CODE § 93A.9 (1985):

> At any time after three years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a request for withdrawal containing a legal description of the land to be withdrawn and a statement of the reasons for the withdrawal. The county board shall, within sixty days of receipt of the request, approve or deny the request for withdrawal. At any time after six years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a notice of withdrawal containing a legal description of the land to be withdrawn.
>
> The board shall cause the description of that agricultural area filed with the county auditor and recorded with the county recorder to be modified to reflect any withdrawal. Withdrawal shall be effective on the date of recording. The agricultural area from which the land is withdrawn shall continue in existence even if smaller than five hundred acres after withdrawal.

Id.

86. *Id.*

87. *Id.*

88. Op. Att'y Gen. No. 83-2-5 at § V.

lar service.[89] Second, rules adopted by state agencies after July 1, 1982, affecting farms or farm operations may contain less restrictive standards for such operations within agricultural areas and not violate basic state equal protection and due process discriminatory practices.[90] Third, applications for permits "to divert, store, or withdraw water and in the allocation of available water resources" will be given priority to agricultural area operations except when there are competing uses of water for household purposes.[91] The final and most important incentive to form an agricultural area is the protection a farm or farm operation will receive against public or private nuisance actions.[92] Such protection exists "regardless of the established

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89. IOWA CODE § 93A.10 (1985):

> A political subdivision or a benefited district providing public services such as sewer, water, or lights or for nonfarm drainage shall not impose benefit assessments or special assessments on land used primarily for agricultural production within an agricultural area on the basis of frontage, acreage, or value, unless the benefit assessments or special assessments were imposed prior to the formation of the agricultural area, or unless the service is provided to the landowner on the same basis as others having the service.

Id.

90. IOWA CODE § 93A.12 (1985):

> In order to accomplish the purposes set forth in section 93A.1, a rule adopted by a state agency after July 1, 1982 which would restrict or regulate farms or farm operations may contain standards which are less restrictive for farms or farm operations inside an agricultural area than for farms or farm operations outside such an area. A rule containing such a discrimination shall not for the fact of such discrimination alone be found or held to be unreasonable, arbitrary, capricious, beyond the authority delegated to the agency, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id.

91. IOWA CODE § 93A.11(2) (1985):

> In the application for a permit to divert, store, or withdraw water and in the allocation of available water resources under a water permit system, the department of water, air and waste management shall give priority to the use of water resources by a farm or farm operations, exclusive of irrigation, located in an agricultural area over all other uses except the competing uses of water for ordinary household purposes.

Id.

92. IOWA CODE § 93A.11(1) (1985):

> A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. The subsection does not apply if the nuisance results from the negligent operation of the farm or farm operation. This subsection does not apply to actions or proceedings arising from injury or damage to person or property caused by the farm or farm operation before the creation of the agricultural area. This subsection does not affect or defeat the right of a person to recover damages for injury or damage sustained by the person because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion onto another person's land.

Id. " 'Nuisance' means a public or private nuisance as defined either by statute, administrative rule, ordinance, or the common law." IOWA CODE § 93A.2(7) (1985).

date of operation or expansion of the agricultural activities of the farm or farm operation."[93] The Act's nuisance language does not protect the agricultural area owner from negligence, injuries or damage to persons or property which arose prior to the formation of the area, or injuries or damage caused by water pollution, water-run-off, and excessive soil erosion.[94] Thus, the protection afforded agricultural area owners is aimed to allow farm operation activities to continue, and even expand, without the cloud of nuisance litigation hanging over their every move.

It appears that the Iowa Legislature has found it necessary to offer the Iowa agricultural community a program to promote agricultural land awareness and preservation.[95] The need for such protection, however, has been left to the discretion of the individual land owner,[96] thus indicating a legislative posture between complete ignorance of the loss of agricultural land on one hand, and total paranoia of an immediate threatening situation of loss of agricultural land on the other hand. Apart from withdrawal stipulations,[97] the Act is relatively easy to implement as long as acreage and use limitations have been satisfied, the county board of supervisors is more or less required to adopt any agricultural area proposal that is consistent with the Act's purpose.[98]

III. Codifying Agricultural Common Law Nuisance

Because of a situation where agricultural land is continually being threatened by nonagricultural development, "the number and severity of land use conflicts between farms and nonfarming neighbors" can only increase.[99] This is true because there is a basic incompatibility between many types of agricultural activity and nonfarming uses. Examples include nauseous odors from animal waste, herbicides, pesticides and other chemicals, overbearing noises from animals and machinery, pollution of water and air resources, and of course, ever present flies.[100] Such incompatibility often results in a complaint by the nonfarming neighbor, who may try to persuade the local government to pass an ordinance limiting various farm activities; or, report the alleged offender to local and state agencies that are responsible for enforcing the alleged violation; or, as a last resort, sue the alleged offender, claiming there to be a nuisance. The farmer, in turn, finds himself defending his right to farm through expensive, time-consuming, and aggra-

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93. *See* Iowa Code § 93A.2(7) (1985).
94. *Id.*
95. *See supra* note 24.
96. *See supra* note 50.
97. *See supra* note 85.
98. *See supra* note 81 and accompanying text.
99. Note, *Agricultural Law: Suburban Sprawl and the Right to Farm*, 22 Washburn L.J. 448, 454 (1983).
100. *Id.*

vating litigation.

For the lack of a more appropriate name, chapter 93A and statutes using similar language have been labeled as "right to farm" acts.[101] The key ingredient in such legislative enactments has been to prevent "the conversion of farmland to nonagricultural uses by insulating farmers and farming operations from nuisance liability."[102] As can be readily seen from the language of chapter 93A, the foremost incentive to create an "agricultural area" is the statutory protection a farmer is given to shield himself against public and private nuisance actions.[103] This section of this Note will explore the codifying of agricultural nuisance law, the legal and constitutional issues of such protective legislation, and the overall effectiveness of such legislation in achieving the central goal of protecting the farmer against unnecessary and disruptive nuisance actions and government regulations, while at the same time protecting the public health, safety and general welfare.

A. *Common Law Nuisance*

The right of an individual to seek a legal remedy against one who has interfered with the use and enjoyment of his property, even though there has been no physical entry upon the land, dates back to the thirteenth century.[104] Although the nuisance action is a well-established legal concept, "it is incapable of any exact or comprehensive definition."[105] A confusing doctrine at times, common law nuisance action's have historically been divided into two separate legal categories — public and private nuisances.[106]

A public nuisance is "an unreasonable interference with a right common to the general public."[107] Public authority is given to abate an activity which is found to be injurious to the health, safety or general welfare of a community.[108] Examples historically have included: "interference with public health (maintenance of a hogpen), to public safety (storage of explosives), public morals (maintenance of a house of prostitution), public peace . . .

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101. Hanna, *supra* note 2, at 430.

102. Grossman & Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 118 [hereinafter cited as Grossman & Fischer].

103. *See supra* note 92.

104. McCarty & Matthews, *Foreclosing Common Law Nuisance for Livestock Feedlots: The Iowa Statute*, 2 AGRIC. L.J. 186, 193 (1980-81) (initially called an "assize of nuisance") [hereinafter cited as McCarty & Matthews]. *See also* Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 190-92 (1931) [hereinafter cited as Winfield].

105. W. PROSSER, LAW OF TORTS 571 (4th ed., 1971) [hereinafter cited as W. PROSSER]. "It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." *Id.*

106. *Id.* at 572.

107. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1977).

108. W. PROSSER, *supra* note 105, at 583-86.

and public comfort."[109] Such examples indicate that public nuisance offenses may go beyond the direct use or enjoyment of land.[110]

To determine whether an activity is "unreasonable" and hence a public nuisance, Iowa courts generally consider "the public nature of the wrong and the unreasonableness of conducting it in the manner, at the place, and under the circumstances in question."[111] Such considerations, however, are relevant only to the finding of damage to the public; for once harm has been established, "the utility of the defendant's conduct is irrelevant."[112]

A public nuisance action may be brought by a private individual as well as a public official. Private individuals, however, must prove damages suffered are different in kind, rather than degree, from damages suffered by the public.[113] Also, individuals as "public representatives," either in citizens' actions or class actions, have recently been allowed to maintain public nuisance actions.[114]

A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[115] Though "the right to the physical integrity of the property itself [along with] the right to use that property in reasonable physical comfort" are legally protected, such rights are not absolute.[116] Again, the "reasonableness" of the interference is examined by the Iowa courts,[117] balancing the rights of both parties to use their respective properties with the inconvenience that each party will endure.[118] Factors generally considered by the courts include: the extent and character of the alleged harm involved, the character of the locality, the social value of each party's position, and the possibilities of preventing or avoiding the alleged harm.[119] Thus, private nuisance actions are decided upon the factual context from which they arise, there being no conduct, otherwise lawful, that is a nuisance under all circumstances.[120]

Remedies to redress nuisances generally include damages in the form of

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109. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 299-300 (1984) [hereinafter cited as Hand].

110. *Id.*

111. Note, *"Ill Blows the Wind that Profits Nobody": Control of Odors from Iowa Livestock Confinement Facilities*, 57 IOWA L. REV. 451, 465 (1971).

112. McCarty & Matthews, *supra* note 104, at 196.

113. W. PROSSER, *supra* note 105, at 587.

114. Hand, *supra* note 109, at 300.

115. RESTATEMENT (SECOND) OF TORTS § 821D (1977).

116. Hand, *supra* note 109, at 300-01.

117. *See* Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 109 N.W.2d 695 (1961).

118. McCarty & Matthews, *supra* note 104, at 194. "The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both." W. PROSSER, *supra* note 105, at 596.

119. Hand, *supra* note 109, at 302. *See also* RESTATEMENT (SECOND) OF TORTS §§ 827-28 (1977).

120. McCarty & Matthews, *supra* note 104, at 194.

monetary compensation or enjoinment of the activity altogether.[121] The amount of actual damages will depend upon the duration of the nuisance, whether or not it can be abated, and whether or not there are special damages incurred.[122] If monetary compensation cannot satisfy the harm caused by the nuisance, equitable relief in the form of an injunction may be obtained.[123] Obviously, an injunction is a very serious remedy to a nuisance action, and the courts will grant such relief only on proof that the nuisance cannot be abated or reasonably conducted.[124]

Both public and private nuisance actions allow the trier of fact to balance and weigh "the many factors which determine the relative merits of two conflicting uses of land."[125] The trier of fact is given broad discretion and flexibility in tailoring the remedy to each situation.[126] Such flexibility however results in a "lack of predictability inherent in such a broad balancing test."[127] The ever increasing rate of land use conflicts has resulted in the slow withdrawal of land from America's agricultural land base and, combined with the aggravation and inherent unpredictability of common law nuisance, has given numerous state legislatures good reason to codify common law nuisance application to agriculture. By enacting right to farm laws, "the balance between agriculture and other uses . . . [is] tipped toward agriculture."[128] Such a legislative posture indicates the importance to society that farmers keep farming, even if the rights of others might be infringed upon to some extent.[129]

While right to farm legislation is of recent vintage,[130] as of December 1983, forty-seven states have adopted right to farm laws in some form to protect farmers and their operations from nuisance litigation.[131] Chapter 93A, however, is not Iowa's first right to farm statute. Iowa was the first state in the nation to specifically enact right to farm legislation.[132] Iowa Code chapter 172D was enacted in 1976[133] to provide livestock feedlot operators with an absolute defense to public as well as private nuisance actions as long as they complied with the regulations of the Iowa Department of

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121. Note, *Agricultural Law: Suburban Sprawl and the Right to Farm*, 22 WASHBURN L.J. 448, 456 (1983).

122. *Id.*

123. *Id.*

124. *Id.* at 457.

125. Hand, *supra* note 109, at 304.

126. *Id.*

127. *Id.* at 305.

128. *Id.*

129. *See infra* notes 139-72 and accompanying text.

130. Grossman & Fischer, *supra* note 102, at 117-18. Only three states, Iowa, Louisiana and Wyoming, had such legislation by 1978. *Id.* at 118 n.107.

131. Hand, *supra* note 109, at 297-98 n.46.

132. Hanna, *supra* note 2, at 435 n.141.

133. 1976 Iowa Acts Ch. 1121.

Environmental Quality and zoning ordinances.[134] The statute was passed to protect a major industry in the Iowa economy from potentially adverse judicial proceedings initiated by subsequent owners of realty up to the established date of the operation of the feedlot.[135] If legal proceedings had continued, certain feedlot operations would have been forced to close down.[136] The bottom line confronting the Iowa legislature was the reality that livestock feedlots must exist somewhere, and that somewhere should be Iowa.

The Iowa Attorney General, on the other hand, questioned the constitutionality of the proposed statute, stating that "[chapter 172D] could be construed as an attempt to abrogate the common law on nuisance and deprive certain portions of society of their constitutional rights of due process of law."[137] Despite such a negative opinion, the Iowa legislature enacted chapter 172D.[138]

B. *Constitutional Challenges to the Codifying of Agricultural Nuisance*

While right to farm legislation is undoubtedly a good faith effort upon the state legislatures to "mitigate the pressures to convert farmland to other uses," such enactments also deprive certain parties from bringing nuisance actions against farmers and their operations.[139] Serious questions concerning whether or not such statutes are constitutionally valid must be addressed before holding them out as effective tools in the overall effort to preserve America's farmland.[140] The fifth amendment,[141] through the fourteenth amendment,[142] provides several limitations upon the scope of governmental action, as does Article I of the Constitution of Iowa.[143] The following discus-

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134. IOWA CODE § 172D.2 (1985).

135. McCarty & Matthews, *supra* note 104, at 187.

136. *Id.* at 186-87. To date there has not been a successful nuisance action against livestock feedlots where the operators conformed with the prescribed regulations.

137. Op. Att'y Gen. 451, 455 (Iowa 1976).

138. McCarty & Matthews, *supra* note 104, at 198. "The decision [by the Iowa legislature] may have resulted, in part, from the weakness of the opinion itself." *Id.*

139. Hand, *supra* note 109, at 329.

140. *Id.*

141. U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

142. U.S. CONST. amend. XIV, § 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

143. The pertinent parts of Article I of the Constitution of Iowa provide as follows:

> Sec. 1. 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.

sion focuses on three independent constitutional arguments which challenge legislative authority to enact right to farm legislation: procedural due process, substantive due process, and the taking theory.

In limiting governmental procedures to reach and enforce its decisions, procedural due process, as required by the fourteenth amendment, ensures that an individual is allowed proper notice and an opportunity to be heard when subjected to governmental action.[144] A right to farm statute, like any other legislative action preceded by hearings and debates, satisfies such procedural requirements because "the legislative process itself is due process."[145] Such a view recognizes the futility of allowing every individual affected by legislation to voice his opinion; and it also encourages the use of the electoral process as a tool of protest.[146] Apart from satisfying the legislative process requirements of hearings and debates, chapter 93A additionally requires public notice and comment before an agricultural area may be created (and with its approval the attendant nuisance protections).[147] It would seem, then, that any procedural due process attack upon chapter 93A could be dismissed fairly readily.

The fourteenth amendment also requires substantive due process.[148] This ensures that government regulation is supported by a rational basis.[149] The rational basis test involves establishing that a statute has a legitimate public purpose and that the statute has a reasonable relationship to that purpose.[150] Generally, state legislatures are given wide deference in such policy making procedures.[151] In terms of chapter 93A, defending a substantive due process attack should not be very difficult. The purpose of chapter 93A is to help prevent the conversion of farmland to non-agricultural uses.[152] It is fairly easy to demonstrate that agriculture is important to the welfare and

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> Sec. 6. All Laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.
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> Sec. 9. . . . but no person shall be deprived of life, liberty, or property, without due process of law.

IOWA CONST. art. I, §§ 1, 6 & 9.

144. Grossman & Fischer, *supra* note 102, at 135 n.174; McCarty & Matthews, *supra* note 104, at 197. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (involving the content of procedural due process).

145. McCarty & Matthews, *supra* note 104, at 200 (citing Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915)). *See* Rendleman, *The New Due Process: Right and Remedies*, 63 KY. L.J. 531, 559-60 (1975).

146. Hand, *supra* note 109, at 330.

147. *See supra* notes 76-77 and accompanying text.

148. *See supra* notes 141-43.

149. McCarty & Matthews, *supra* note 104, at 199-200 (unless a fundamental right or interest is involved). *See* United States v. Carolene Products Co., 304 U.S. 144, 152, 154 (1938).

150. Hand, *supra* note 109, at 332-33.

151. United States v. Carolene Products Co., 304 U.S. at 152.

152. *See supra* note 24 and accompanying text.

prosperity of Iowa. While chapter 93A is not an all-encompassing solution to the problem of farmland conversion, it appears that protecting farmers from nuisance actions is a rational means to promote the health, safety, and general welfare of Iowa's citizens, clearly within the purview of legislative discretion.

Although the procedural and substantive due process challenges upon chapter 93A appear unlikely to succeed, the taking issue may be more significant. Almost every governmental action appears to adversely affect some individual's property interest, and chapter 93A is no exception. The language of the statute expressly denies certain parties from asserting a nuisance action against an agricultural area owner.[153] The question raised is whether the operation of the statute "takes" an individual's property rights without just compensation, thereby violating the fifth amendment.[154]

Determining when a property interest loss rises to the level of constitutionally protected property is not predicated upon a given standard. In fact:

> [t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty . . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that . . . injuries caused by public action be compensated.[155]

Generally, each case is analyzed in terms of its particular circumstances by a balancing process.[156] In Iowa, "the test is whether 'collective benefits [to the public] outweigh the specific restraints imposed [on the individual].' "[157] Factors which are considered include: the goals sought by the state and the means employed to accomplish them, the attendant benefits to society, whether the claimant's interest is an actual property interest, and, if so, how important the interest is compared to the state's interest in furthering public health, safety, or general welfare.[158]

The main concern under the takings clause is whether chapter 93A places an undue burden upon the individual property owner by being unduly oppressive.[159] The main guideline used by the courts has been the "diminution in value" test,[160] but usually a number of preliminary determi-

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153. *See supra* note 92.

154. *See supra* note 141. The fifth amendment applies to the states by way of incorporation through the fourteenth amendment. Missouri P. R.R. v. Nebraska, 164 U.S. 403, 417 (1896).

155. Penn Central Transp. v. City of New York, 438 U.S. 104, 123-24 (1978).

156. McCarty & Matthews, *supra* note 104, at 202.

157. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979). *See also* Iowa Natural Resources Council v. Van Zee, 261 Iowa 1287, 158 N.W.2d 111 (1968); Benschoter v. Hakes, 232 Iowa 1354, 8 N.W.2d 481 (1942).

158. McCarty & Matthews, *supra* note 104, at 202. *See* Penn Central Transp. v. City of New York, 438 U.S. at 124.

159. Lawton v. Steele, 152 U.S. 133, 137 (1894).

160. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1972). The test, however, has

nations are utilized to evaluate the regulation's impact.[161]

Property "denote[s] the group of rights [sticks of a "bundle"] inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."[162] A cause of action may result when one or more sticks of the bundle is lost; as applied to chapter 93A, where the elimination of a right to bring nuisance actions against agricultural areas might deny one the use and enjoyment of his property. Public nuisance actions pose no difficulty with the theory because a legislative decision to authorize an act as chapter 93A reflects a policy determination that the benefits of the activity outweigh the burdens it imposes upon the public as a whole. Private nuisance actions, however, are not as lightly conferred; they must fall within the strictures of the takings clause.[163] Specifically, the activity must not be inappropriate or unreasonable.[164]

The ability of the legislature to modify common law nuisance is wide-ranging, but it is subject to the same strictures as any other legislation.[165] Without such flexibility the system of law making would be unable to respond to the changes in society.[166] The "benefits and burdens of economic life to promote the common good" are merely being adjusted.[167]

While the codifying of common law nuisance could be taxing if the burden placed on an individual was unduly oppressive, the cause of action is only one stick of the total bundle of rights in the property, and the allegation of undue burden must be evaluated considering the property "as a whole."[168] As applied to chapter 93A, in order for a neighboring landowner to challenge the statute as denying just compensation, the landowner must show that the inability to secure a remedy for the nuisance diminished the value of his property "as a whole."[169] This is obviously a very difficult standard to satisfy the taking challenge under chapter 93A.

There is, however, a final fact relevant to an evaluation of the severity of the economic impact of chapter 93A. This concerns a neighboring land-

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not produced predictable results. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1191 (1967).

161. Hand, *supra* note 109, at 338-39.

162. United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

163. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914).

164. *Id.*

165. Commonwealth v. Parks, 155 Mass. 531, 30 N.E. 174 (1892) (Holmes, J.):

> [W]ithin constitutional limits not exactly determined the legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by doing it affects the use or value of property.

Id.

166. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

167. Penn Central Transp. v. City of New York, 438 U.S. at 124.

168. *Id.* at 130-31.

169. Hand, *supra* note 109, at 345 (examples of not fulfilling the standards).

owner's "distinct investment backed expectations."[170] The test considers whether the landowner "reasonably relied to his financial detriment on his expectation that the property in question could be used in a manner prevented by the regulation."[171] The language of chapter 93A might be weak on this point in that the established date of operation of an agricultural area is only dependent upon initial application and board approval.[172] This allows for the "possibility" of an agricultural area to come very close to an area that would be greatly burdened by an agricultural operation next door. The safety mechanisms of public notice and comment, the potential of city annexation, and final board approval should be able to ensure that such a situation does not exist. All in all, except where an individual has been unduly burdened by peculiar circumstances, chapter 93A is going to withstand most every constitutional attack based upon the takings clause of the fifth amendment.

IV. Conclusion

Chapter 93A has not received the legal dissection that results from being applied by the courts to concrete factual situations. This result is in part due to the newness of the statute, but it is also indicative that chapter 93A for the most part is legislatively strong enough and clear enough to prevent misinterpretation by those who may utilize or be affected by the statute. In short, chapter 93A reflects a reasoned judgment by the Iowa legislature that the traditional preference for development over a less intensive use of land should be reversed in order to ensure the availability of agricultural land for future generations.

It must also be remembered that chapter 93A does not work in a vacuum. By itself, it serves as no more than a pat on the back. The use of land inventories and land use plans will help to direct the development of land in a direction that is both safe and productive for all of Iowa. Also, farm organizations and agricultural extension programs must play an important role in developing the kinds of protections that farmers are demanding. The statute must be part of an overall farmland preservation program including preferential taxation, agricultural zoning, development rights programs, and districting. Chapter 93A is simply one of many ways to limit the withdrawal of agricultural land from Iowa's agricultural land base. All things considered, chapter 93A appears to at least alleviate one factor that induces farmers to sell their land while at the same time bringing awareness to the people of Iowa that preventative, rather than corrective measures are the best way to preserve Iowa's number one resource.

C. Andrew Scheiderer

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170. Penn Central Transp. v. City of New York, 438 U.S. at 124.
171. Hand, *supra* note 109, at 345.
172. *See supra* notes 50 & 80 and accompanying text.