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June 12, 2018

VIA EMAIL

Hon. Tim Moore, Speaker of the House

Re: Senate Bill 711 – Section 10

Speaker Moore,

Because the Senate completely rewrote this section last night, this analysis replaces my letter to you of June 7, 2018. I am attaching the Senate amendment to this letter rather than the engrossed bill.

My conclusion is that Section 10 of the bill is a serious and direct threat to the private property rights of homeowners throughout the state.

G.S. § 4-1 incorporates the common law as of 1776 into the law of North Carolina. That common law was stated by Blackstone in his Commentaries on the Laws of England:

> Also if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbor sets up and exercises an offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *"sic utere tuo, ut alienum non loedas:"* this therefore is an actionable nuisance. So that the nuisances which affect a man's *dwelling* may be reduced to these three; 1. Overhanging it; which is also a species of trespass, for *cujus est solum, ejus est usque ad coelum:* 2. Stopping ancient lights: and 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling. (Blackstone's Commentaries – Book III, Ch. XIII, *739, emphases added.)

1. The principal effect of the bill, as now written, is to make punitive damages impractical in nuisance cases. In 1995 the Assembly passed tort reform, drastically limiting punitive damages. In recent litigation a jury assessed $50 million in punitive damages against Smithfield. The judge reduced these damages to $2,500,000.

   Section 10(b), amending G.S. 106-702 adds (a1) that requires for punitive damages there had to have been a previous conviction or a state civil enforcement action by DEQ within three years prior. But since Section 106-701(a)(3) requires the nuisance action to be brought within one year of the establishment of the nuisance, this will almost never be the case. Convictions in criminal court or DEQ enforcement actions just do not happen that quickly.

   The longstanding purpose of punitive damages is to deter and punish wrongful conduct, primarily when the state does not have the resources or the will to enforce its own laws. Within the last year a different federal court has had to order Smithfield to clean up operations that it had promised to do in 2006. See attached order of Judge Malcolm Howard. Since the purpose of punitives is deterrence the financial picture of the defendant is relevant. See attached May 15, 2018 report from Bloomberg on the highest compensated man in the entire world in 2017.

2. *It is imperative* that the law protect *"accrued" claims for relief* rather than only *claims for relief "commenced"* on or before the effective date. It is settled state constitutional law that accrued claims for relief for compensatory damages (but not punitive damages) are vested property rights and cannot be taken by legislation. Rhyne v. K-Mart Corp., 258 N.C. 160, 594 S.E.2d 1 (2004), citing Osborn v. Leach 135 N.C. 628, 47 SE, 811 (1904). As a consequence, Section 10(c) is unconstitutional as applied to landowners who already have an accrued nuisance claim (but not yet filed).

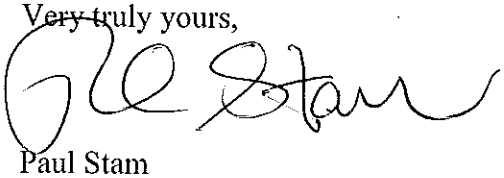
3. One of the oddest provisions is the deletion of subsection (a2) of 106-701 on lines 19-21, and similar language deleted in subsection (d). The effect is that negligent operation of the agricultural operation does not prevent it from claiming the right to farm protections from a nuisance claim of a private owner, nor of a local government.

4. The first, fourth, and fifth whereas clauses are not true and, if passed, will reflect badly on the integrity of the Assembly. They will not have any operative legal effect except to irritate the judges of the Fourth Circuit who will handle appeals.

5. I recommend completely deleting Section 10 as it is a direct attack on the private property rights of hundreds of thousands of North Carolinian property owners. Failing that, amendments are essential.

The basic rights of private property include the land, the air above it and the earth below. No matter how well-intentioned, Section 10 is partially not constitutional and is completely unjust. It is a serious matter when legislation deprives homeowners of their property rights to own and enjoy their homes.

Very truly yours,



Paul Stam

cc: Other Members of the House