

**LAND USE CONTROL AND ENVIRONMENTAL
PROTECTION ISSUES IN MICHIGAN'S
RIGHT TO FARM PROGRAM**

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Local Land Use Control and Environmental Protection Issues in Michigan's Right to Farm Program

Introduction

Michigan's Right to Farm Law was first passed in 1981 to protect farms or farm operations from nuisance suits brought by people or businesses moving into agricultural areas. The Right to Farm Law has been amended several times, most recently in late 1999. With the most recent amendment, the state legislature was responding to industry concerns about how local zoning has affected agriculture in Michigan, especially animal agriculture.

Legislative debate, as well as discussions after the amendment was passed, focused on two primary issues: 1) the apparent erosion of local control in land use and 2) the attempt to substitute Right to Farm requirements for a more comprehensive regulation of environmental impacts from animal agriculture in Michigan.

This paper provides a brief history of land use regulation in Michigan, including an overview of local government structure in the state. Elements of Michigan's Right to Farm Law are summarized, and the recent amendment of the law is reviewed. Then, the implications of the amended law and its enforcement for local land use regulation and for environmental protection in the state are discussed.

A Brief Lesson in Michigan History and Government

Local Government and Land Use Regulation

Michigan has 83 counties and 1242 townships. Michigan townships, like counties, date to the Northwest Ordinance of 1787. Township boundaries were originally drawn on maps to facilitate surveying and conveyance of land. Original townships were to be 36 square miles, but townships of today vary widely in size, from less than one square mile to more than 600 square miles (Moore).

Townships were made governmental units in 1827. The legislative authority for townships covers almost all aspects of local government. While some counties have adopted and enforce zoning ordinances, most areas outside of cities and villages are subject to township zoning. In fact, townships have jurisdiction over approximately 95 percent of Michigan's total land (Moore).

Michigan's townships have held zoning authority since the 1940s. In zoning, as in all areas of local control, townships (and their Michigan Townships Association, an education and lobbying organization) work diligently to prevent the state from reducing or restricting the areas within which townships exercise governmental authority. In January 2000, Michigan Townships Association adopted a resolution on land use that states, in part, "Through comprehensive planning and zoning, local government enacts reasonable land use policies that balance the needs of their constituents. However, these efforts are often restricted or prevented by state and federal regulators who seek to usurp local authority for the perceived benefit of the greater good. The Michigan Townships Association opposes all efforts that attempt to undermine local authority, which can best guarantee the community's growth is in accordance with sound land use planning (Michigan Townships Association)".

Michigan's Right to Farm Law

Michigan's Right to Farm Law (Act 93 of 1981) was passed to protect farms or farm operations from nuisance suits brought by people or businesses moving into agricultural areas. The law provides protection from nuisance suits as part of a broader social contract - in exchange for nuisance protection, farmers are expected to adopt management practices that protect environmental quality and minimize negative impacts on surrounding land users. Specifically, the law states that:

“A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan Commission of Agriculture.”¹

Farmers are not required, by law, to follow the generally accepted agricultural and management practices (GAAMPs). However, they do not receive the protection from nuisance suits if they are not using GAAMPs. GAAMPs have been established by the Michigan Department of Agriculture (MDA), with assistance from Michigan State University Extension. The guidelines are updated annually to reflect new information and developments in technology.

The Right to Farm Law (RTFL) also provides for the investigation, by MDA, of complaints involving agricultural operations and concerns about use of manure and other nutrients, agricultural waste products, dust, noise, odor, fumes, air pollution, surface or ground water pollution, food and agricultural processing by-products, care of farm animals, and pest infestations. In addition, the RTFL requires MDA to cooperate with the Michigan Department of Environmental Quality (MDEQ) in developing the procedures for investigating and resolving complaints when environmental (specifically water quality) problems are involved. The MDA investigation is intended to determine whether the farm operation is using GAAMPs. Until recently, MDEQ was not contacted unless a producer refused to adopt the indicated GAAMPs - a process that implicitly assumes that use of GAAMPs would eliminate environmental risks.

A 1988 Michigan Court of Appeals decision prompted a 1995 amendment to the RTFL clarifying the implications of the RTFL for local zoning authority. In Charter Township of

¹ The law provides protection from nuisance suits related to changes in nearby land uses, changes in farm ownership or size, interruptions in farming activities, federal farm program participation, changes in technology, and changes in farm product. None of these aspects of the law were affected by the 1999 amendment.

Northville v Coyne, 170 Mich App 446 (1988), the court held that the RTFL was a valid defense to a township’s nuisance suit based on an alleged zoning setback violation of an accessory farm building. The legislature subsequently amended the RTFL, specifically noting that:

“This act does not affect the application of state statutes and federal statutes... 'state statutes' includes, but is not limited to, any of the following: the county rural zoning enabling act, the township rural zoning act...”

Recent Changes in Michigan’s Right to Farm Law

In late 1999, Michigan’s Right to Farm Law was amended in response to agriculture industry concerns about local ordinances that increase operating costs for farmers and problems arising from differing local ordinances that impact a farmer whose operation crosses political boundaries. In particular, criticism was leveled at local ordinances that limit expansion of a farming enterprise or otherwise restrict agricultural activities. Much of the discussion in favor of amending the RTFL showcased recent legal battles related to such local ordinances.²

During the legislative debate on the proposed amendments to the RTFL, several key issues dominated the discussion (Moore, Norris and Taylor):

§ *Size of farming operation* - There were suggestions that the provisions of the bill should only apply to “family farms”; there was discussion about the danger of large farming operations (“factory farming”); and there was an effort (unsuccessful Senate amendment) to set specific limits on the size of a farming operation.

² A local farmer brought an unsuccessful challenge to an ordinance in Brady Township (Kalamazoo County) that limits the number of animals in a farm operation. An ordinance in Algansee Township (Branch County) prohibits land uses from causing odors that interfere with neighbors’ enjoyment of their property. A farmer was found in violation of that ordinance and neighbors were awarded damages. In a third case, a farmer in Otisco Township (Ionia County) was granted a special land use permit for construction of a swine feeding facility. When the local government revoked the permit under pressure from local residents, the case went to court. The farmer prevailed but has been very vocal about the costs associated with his battle.

- § *Differing regulations among governmental units* - Farmers raised concerns about needing to comply with varying local ordinances when their farm boundaries cut across more than one unit of local government.
- § *Issues of local control* - Local governments raised concerns about losing the ability to make decisions on issues that reflect the interests of their constituents.
- § *Air and water quality* - Concerns were related to the size of the farming operation and the ability of state government to regulate farming practices and to prevent pollution. The fact that farmers are not required to use the management practices described in the GAAMPs was a particularly contentious issue.

Following considerable debate, the RTFL was amended to reflect three main areas of change:

- § The RTFL now preempts any local ordinance, regulation or resolution that extends, revises or conflicts with the Act or the GAAMPs developed under the Act.
- § The amended RTFL required that GAAMPs be developed for site selection and odor control for new and expanding livestock production facilities.
- § The RTFL, as amended, explicitly notes that use of GAAMPs does not exempt farmers from environmental protection requirements established by the state’s Natural Resource and Environmental Protection Act (NREPA).

Preemption of Local Ordinances

The amended RTFL expressly states that a local unit of government “shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.” Prior to amendment of the RTFL, farmers following GAAMPs were immune from nuisance suits, but they were not immune from citations for ordinance violations if the standards set out in the ordinance differed from those set out in the GAAMPs. A major thrust of the amended RTFL is to set a uniform standard throughout the state for assessing responsible agricultural management prac-

tices. For example, a local zoning ordinance that sets standards for odors, manure storage and application, or animal care would be prohibited because GAAMPs have been developed to address these issues. However, a local zoning ordinance that establishes zoning districts, the location of those districts, and the types of activities that can be carried on within those districts (without setting management standards) are acceptable.

Despite this preemption, the revisions to the RTFL provide for greater local government involvement in the process for investigating complaints about farm operations. MDA is required to notify the local unit of government when an initial complaint about an operation is received. If a follow-up site investigation is required, a local government representative is entitled to be present. At any point during the process when the Department makes a finding of whether an operation is or is not using GAAMPs, a copy of that finding must be sent to the local government. In addition, if a manure management plan is required, the local government is entitled to a copy upon request.

The amended law provides for one exception to the preemption of local ordinances. A local unit of government may petition the Commission of Agriculture for approval of requirements or restrictions beyond those included in GAAMPs. Approval for such ordinances requires that the local government prove that use of GAAMPs alone would be insufficient to protect environmental or human health.

New GAAMPs

Prior to the 1999 amendment of the RTFL, the Commission of Agriculture developed and adopted GAAMPs covering five specific areas of production agriculture.³ Standards in GAAMPs

³ Those areas are (1) Manure Management and Utilization; (2) Pesticide Utilization and Pest Control; (3) Nutrient Utilization; (4) Care of Farm Animals; and (5) Cranberry Production.

are based on available technology and scientific research. GAAMPs are reviewed and revised annually by the Commission.

The amended RTFL required the Commission to adopt (no later than June 1, 2000) new GAAMPs for site selection and odor controls at new and expanding livestock production facilities. The new GAAMPs establish requirements for separation distances, site plans, and manure management plans, and they require MDA review of construction and expansion plans for facilities larger than a specified size. Only with MDA “verification” of these plans can a facility be assured protection against nuisance complaints. Compliance with all GAAMPs is still voluntary - a producer can decide to forego MDA review and verification and risk future legal ramifications. The new GAAMPs are subject to annual review and revision by the Commission.

Environmental Protection Requirements

Until amendment of the RTFL, MDA carried out all inspections of farms about which complaints were received. Under the memorandum of agreement signed by MDA and MDEQ, MDA would contact MDEQ about environmental problems if a farmer refused to adopt the management practices recommended in GAAMPs. Implicitly, if a farmer adopted the appropriate management practices, environmental (primarily water quality) problems would be alleviated.

In response to considerable criticism during the legislative debate, the amended RTFL now explicitly recognizes that use of GAAMPs does not indemnify a farmer against environmental complaints. Also in response to the criticism, MDA and MDEQ have modified their agreement. Now, if MDA investigates a complaint and observes a water quality problem, MDEQ is notified immediately. However, MDA and MDEQ work together to resolve the problem, and adoption of GAAMPs is still considered the appropriate mechanism for preventing water quality problems.

Implications for Local Land Use Control

General consensus appears to be that, with the amendment of the RTFL, local authorities retain the ability to establish agricultural zoning districts and to determine what agricultural land uses may occur in what districts. However, mitigation-type ordinances which would restrict management practices are no longer an option for the local unit. In addition, the new GAAMPs on site selection and odor control limit where, within agricultural zones, livestock facilities can be sited. The GAAMPs contain specifics on setbacks and separation distances, so local governments will not be able to enforce distances that differ from those in the GAAMPs.

Despite adoption of the new GAAMPs, there are still many unanswered questions and considerable dissatisfaction among farm and non-farm populations alike. As one example, the new GAAMPs are not clear as to whether a local unit of government can identify more than one type of agricultural zoning district, with livestock facilities permitted in one type of district but not in another. This is an increasingly popular approach for separating large livestock operations from other land uses.

A major concern on the part of local governments is that farmer conformance with the siting restrictions in the new GAAMPs, as with all other GAAMPs, is voluntary - farmers need only conform if they want the protection from nuisance complaints. As a result, local governments may be faced with some landowners who choose to ignore the GAAMPs guidelines. Their recourse, of course, should the non-conforming operation become a nuisance, is to initiate a nuisance suit against the offending operation. However, township governments are concerned about the expense of requiring a tort solution to such problems. (Representatives of the agriculture industry have said that a local government would go to court if a farm violated zoning ordinances anyway, suggesting that the potential outcome of the changes in the RTFL do not really

change how local governments will be affected. However, legal recourse for zoning violations involves simpler, less costly civil procedures.)

Most recently, a ballot proposal for the November election would amend Michigan's constitution and modify the ability of the state legislature to pass laws restricting local control. Called *Proposal 2*, the constitutional amendment would require a 2/3 majority of the state legislature to enact any law that addresses a matter which a local unit of government, under its governing powers, would otherwise address. If passed, the change would be retroactive to March 1, 2000. This would not, however, affect the amended Right to Farm Law.

Implications for Environmental Protection

Michigan's approach to regulation of large livestock operations for environmental protection is unique. Despite the fact that the federal Clean Water Act requires that all concentrated animal feeding operations (CAFOs) should be permitted under the National Pollutant Discharge Elimination System (NPDES), Michigan has, to date, refused to initiate such a permitting program. The official position of the Michigan Department of Environmental Quality (MDEQ) is that it cannot legally, under state statute, issue discharge permits to livestock operations since the state environmental code prohibits discharges from livestock operations.

Response to this position by the U.S. Environmental Protection Agency and by citizen groups in Michigan has been predictably heated. The primary concern is that Michigan has no formal program of inspection and enforcement in place. Instead, MDEQ has relied largely on referrals from the Michigan Department of Agriculture (MDA). If MDA receives a Right to Farm complaint about an operation and, upon inspection, finds that a discharge is occurring, MDA is required to report the discharge to MDEQ. To date, most actions against discharging

farms have amounted to requiring offending farms to conform with GAAMPs and verifying that they have, in fact, done so.

Michigan has been a leader in the push by a number of states for EPA to approve their CAFO programs as *functionally equivalent* to the NPDES permitting required by federal law. To that end, a task force in Michigan is developing the Michigan Agricultural Environmental Assurance Program (MAEAP), a training and certification program that would certify participating participants as “permitted” under the functionally equivalent banner. Much of the MAEAP program would rely upon existing GAAMPs. There has been no indication that MDEQ would develop any kind of on-going inspection or enforcement program. EPA has issued guidelines for what it would consider functionally equivalent to NPDES permitting of CAFOs, and, to date, it does not appear that approval of Michigan’s proposed program would be forthcoming.

Most recently, a group of environmental organizations filed a petition with EPA requesting that Michigan’s NPDES permitting authority be revoked since Michigan has not enforced the CAFO permitting requirement of the law. A review of Michigan's programs is underway. A preliminary report suggests that EPA will, in fact, remove NPDES permitting authority from MDEQ if the CAFO issue is not addressed.

Concluding Comments

Michigan’s Right to Farm Law has undergone recent changes in response to concerns about how local governments are using zoning ordinances to restrict agricultural production. These changes have limited local governments' use of zoning to minimize conflicts between large animal production facilities and surrounding land uses. While local governments have expressed concerns about this erosion of local control, they also have questioned whether residents of rural areas are protected from environmental risks by a Right to Farm program that does not

require farmers to use recommended practices. However, Michigan's ability to continue using its Right to Farm Law, and associated voluntary conformance guidelines, as its primary environmental enforcement mechanism has been called into question by recent EPA inquiries. Experiences in other states (Iowa, for example) suggest that broadening the role of Right to Farm Laws beyond protecting farmers from complaints by neighbors who “come to the nuisance” may be called into question if challenged in court (Centner). Michigan’s Right to Farm Law, especially in terms of its implications for local land use control authority and state agricultural environmental programs, faces an uncertain legal future.

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