

Animal Agriculture and the Environment

Land Use Planning and the Right to Farm Act

After the passage of Public Act 261 in 1999, two substantial changes were made in Michigan's Right-to-Farm Act:

1. The preemption of local zoning regulations that conflict with the Right-to-Farm Act or associated generally accepted agricultural and management practices (GAAMPs).
2. The development of generally accepted agricultural and management practices for site selection and odor control for new and expanding livestock production facilities as required by statute.
 - a) Since that time, the Michigan Department of Agriculture has developed a detailed process of implementing the livestock siting GAAMPs requirements for site verification. Meanwhile, several Michigan Court of Appeals decisions have cut to the heart of the intent and application of Michigan's Right-to-Farm Act as a whole.

Who is eligible for protection from nuisance suits under the Right-to-Farm Act?

All states have some form of right-to-farm law. Early right-to-farm laws were developed to help stem the conversion of farmland to nonagricultural uses by protecting farmers from nuisance lawsuits filed by neighbors. Most right-to-farm laws essentially codify the "coming to the nuisance" defense. To address the issue of "coming to the nuisance," right-to-farm laws establish the right of farm operations to continue without legal threats from individuals who build homes in traditionally agricultural areas and should expect to face certain noises, odors or other agriculture-related annoyances.

Michigan's Right-to-Farm Act (RTFA) was passed in 1981 (Public Act 93 of 1981) and codified in Chapter 286 of Michigan Compiled Laws (M.C.L.). M.C.L. 286.473 is the provision of Michigan's RTFA that gives farmers protection from nuisance suits. It provides:

1. 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. Generally accepted agricultural and

management practices shall be reviewed annually by the Michigan Commission of Agriculture and revised as considered necessary.

2. A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.
3. A farm or farm operation that is in conformance with subsection (1) shall not be found to be a public or private nuisance as a result of any of the following:
 - a) A change in ownership or size.
 - b) Temporary cessation or interruption of farming.
 - c) Enrollment in governmental programs.
 - d) Adoption of new technology.
 - e) A change in type of farm product being produced.

This provision suggests a series of questions that must be answered before eligibility for nuisance protection can be determined.

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Who is eligible for protection from nuisance suits under the Right to Farm Act?

(1) Is the activity a “farm or farm operation”?

“Farm” defined as: the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment and other appurtenances used in the *commercial production of farm products*.

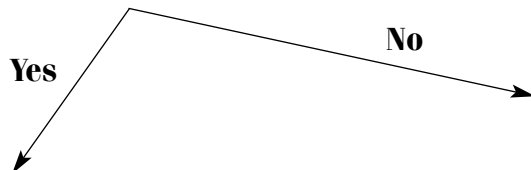
“Farm operation” defined as: the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the *commercial production, harvesting and storage of farm products...*

(1a) Is it producing a “farm product”? **No** —————> Not protected

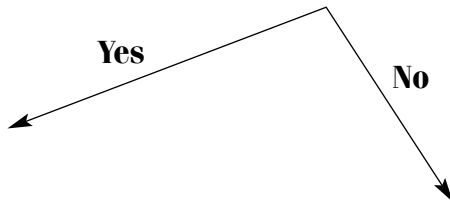
(1b) Is it engaged in “commercial production”? **No** —————> Not protected

Yes to both —————> It is a “farm or farm operation.” A farm operation may include but is not limited to the activities listed at M.C.L. 286.472(b).

(2) Does the farm or farm operation comply with GAAMPs?



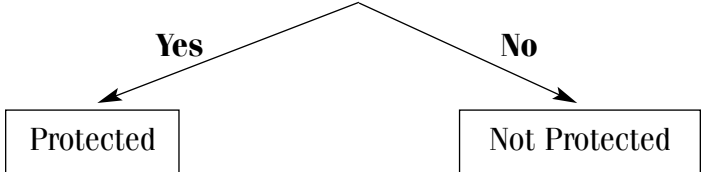
(2a) Does the farm or farm operation change practices to comply with GAAMPs?



(3) Did the farm or farm operation exist and not constitute a nuisance before any change in the land use or occupancy of land within 1 mile of the boundaries of the farm land?

Protected
Remains protected even if:

- Change in ownership or size
- Temporary cessation or interruption of farming
- Enrollment in governmental programs
- Adoption of new technology
- A change in the type of farm product being produced



Question 1: *Is the activity in question a farm or farm operation?*

M.C.L. 286.472(a) defines “farm” as:

...the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the *commercial production of farm products*.

M.C.L. 286.472(b) defines a “farm operation” as:

...the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the *commercial production*, harvesting, and storage of *farm products*, and includes, but is not limited to:

- i) Marketing produce at roadside stands or farm markets.
- ii) The generation of noise, odors, dust, fumes, and other associated conditions.
- iii) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway as authorized by the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.
- iv) Field preparation and ground and aerial seeding and spraying.
- v) The application of chemical fertilizers or organic materials, conditioners, liming materials, or pesticides.
- vi) Use of alternative pest management techniques.
- vii) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.
- viii) The management, storage, transport, utilization, and application of farm by-products, including manure or agricultural wastes.
- ix) The conversion from a farm operation activity to other farm operation activities.
- (x) The employment and use of labor.

The Michigan Court of Appeals has provided a number of judicial clarifications or interpretations of what constitutes a farm or farm operation. In a 1998 unpublished opinion dealing primarily with procedural questions, the Court of Appeals rejected the defendant's contention that her breeding and boarding kennel was “akin to a farming operation” (*Twp. of Groveland v. Bowren* [1998], unpublished).

In a 2003 opinion (*Milan Twp. v. Jaworski* [2003], unpublished), the Court of Appeals determined that an operation where game birds were bred, raised and hunted (or sold as live birds for customers to take home) did constitute a farm operation. The court highlighted the reference to game bird producers in the generally accepted agricultural and management practices for the care of farm animals, and a Commission of Agriculture resolution recognizing game bird hunting preserves as “an agricultural activity and a value-added farm opportunity.”

In an unpublished 2004 opinion, the Court of Appeals concluded that a riding stable is a farm operation because the definition of farm operation includes the “use, handling and care of farm animals,” and because GAAMPs include provisions for “boarding stables, pleasure horse operations and riding stables.” (*Village of Rothbury v. Double JJ Resort Ranch* [2004], unpublished).

The *Jaworski* and *Double JJ Resort* opinions provide some insight into how the Court of Appeals is likely to respond in the future to questions about whether other types of activities constitute farming and are, as a result, eligible for protection under the RTFA. Apparently a reference to the activity or product in GAAMPs, regardless of the extent to which GAAMPs address such activity, will bring the activity or product within the scope of “farm operation.”

The definitions of “farm” and “farm operation” both include the terms “farm product” and “commercial production.” Much of the litigation over whether an activity constitutes a farm or farm operation has focused on the meanings of “farm product” and “commercial production.”

Question 1a: *Is the farm or farm operation producing a farm product?*

M.C.L. 286.472(c) defines a farm product as:

...those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products, cervidae, livestock, including breeding and grazing, equine, fish, and other aquacultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan Commission of Agriculture.

In a 1992 case, the Court of Appeals concluded that wood pallets are not farm products when the majority of wood used for the pallets originates from outside the owner's property (*Richmond Twp. v. Erbes* 195 Mich.App. 210, 489 N.W.2d 504[1992]).

In *Village of Rothbury v. Double JJ Resort Ranch* cited above, the Court of Appeals concluded that a corn maze is a farm product, in part because "the definition of a farm product is not limited to agriculturally produced products that are edible.

Question 1b: *Is the farm or farm operation engaged in commercial production?*

The term "commercial production" is not defined in the RTFA; however, in 2005, the Court of Appeals moved its focus to that part of the farm operation definition that refers to *commercial production*, harvesting, and storage of farm products. In *Charter Township of Shelby v. Papesh* (267 Mich. App. 92, 704 N.W.2d 92 [2005]), the Court defined commercial production as "the act of producing or manufacturing an item intended to be marketed and sold at a profit" while stating that there is no minimum level of sales that must be reached before the RTFA is applicable. The *Papesh* decision established that if a farm is to be protected by the RTFA, it must be engaged in production "...for commercial purposes..." Additionally, in *Papadelis v. City of Troy* (2006, unpublished), the Court of Appeals wrote: "...a farming operation must be at least partially commercial in nature for the RTFA to apply."

Question 2: *Does the farm or farm operation comply with GAAMPs?*

Since 1981, seven sets of GAAMPs have been adopted by the Michigan Commission of Agriculture.

- Manure management and utilization
- Pesticide utilization and pest control
- Nutrient utilization
- Care of farm animals
- Cranberry production
- Site selection and odor control for new and expanding livestock production facilities
- Irrigation water use

The GAAMPs were developed by committees appointed by the Commission of Agriculture as required by the RTFA. The GAAMPs are updated annually to reflect new information and developments in technology.

In general, questions about whether a farm operation is complying with GAAMPs are raised by complaints made to the Michigan Department of Agriculture (MDA). M.C.L. 286.474(1) provides:

...the director shall investigate all complaints involving a farm or farm operation, including, but not limited to, complaints involving the use of manure and other nutrients, agricultural waste products, dust, noise, odor, fumes, air pollution, surface water or groundwater pollution, food and agricultural processing by-products, care of farm animals and pest infestations. Within 7 business days of receipt of the complaint, the director shall conduct an on-site inspection of the farm or farm operation.

M.C.L. 286.474(3) describes the process to be followed if the farm is using GAAMPs:

...If the director finds upon investigation under subsection (1) that the person responsible for a farm or farm operation is using generally accepted agricultural and management practices, the director shall notify, in writing, that person, the complainant, and the city, village or township and the county in which the farm or farm operation is located of the finding.

A farm operation using GAAMPs is eligible for protection from nuisance suits under the RTFA.

Question 2a: *If a farm does not comply with GAAMPs does it change practices to comply with GAAMPs?*

M.C.L. 286.474 (3) also describes the process by which a farm or farm operation can modify its farm practices, begin using GAAMPs and become eligible for protection from nuisance suits.

...If the director identifies that the source or potential sources of the problem were caused by the use of other than generally accepted agricultural and management practices, the director shall advise the person responsible for the farm or farm operation that necessary changes should be made to resolve or abate the problems and to conform with generally accepted agricultural and management practices and that if those changes cannot be implemented within 30 days, the person responsible for the farm or farm operation shall submit to the director an implementation plan including a schedule for completion of the necessary changes.

The farm operation that was the subject of the nuisance complaint in *Steffens v. Keeler* 200 (Mich. App. 179, 503 M.W.2d 675 [1993]) was not initially found by MDA to be using GAAMPs. However, the farm operation was modified and practices consistent with GAAMPs were adopted. Subsequently, MDA concluded that the farm was in compliance with GAAMPs, and the Court of Appeals concluded that the farm was immune from a nuisance complaint under the RTEFA.

Question 3: *Did the farm or farm operation exist and not constitute a nuisance before any change in the land use or occupancy of land within 1 mile of the boundaries of the farm land?*

M.C.L. 286.473(2) presents this third question for determining nuisance protection. The fact that the inquiry does not end with Question 2 (compliance with GAAMPs) is a recent and somewhat unsettling outcome of recent Court of Appeals activity. In earlier articles we have assumed that parts (1) and (2) of M.C.L. 286.473 both must be met for a farm to receive nuisance protection. This assumption was recently addressed by the Michigan Court of Appeals in *Papadelis v. City of Troy* (2006, unpublished). The court wrote:

“The legislature did not require both subsections to be met in order for a farm or farming operation to qualify for protection under the RTEFA.... A farm or farm opera-

tion that conforms to generally accepted agricultural and management practices is entitled to the protection provided by the RTEFA without regard to the historic use of the property in question.”

These decisions give farm operations the right to move into areas, including residential areas, and qualify for nuisance protection under RTEFA by using GAAMPs. The Court of Appeals acknowledged this in a footnote in the *Papadelis* case:

“We are aware that, under M.C.L. 286.473(1), a business could conceivably move into an established residential neighborhood and start a farm or farm operation in contravention of local zoning ordinances as long as the farm or farm operation conforms to generally accepted agricultural and management practices. Although we might personally disagree with the wisdom of the policy choice codified under M.C.L. 286.473(1), we are without the authority to override the clearly expressed intent of the legislature. M.C.L. 286.473(1) is simply not ambiguous and, therefore, must be enforced as written.”

Perhaps the more unsettling implication of these decisions is that reading (1) and (2) of M.C.L. 286.473 independently suggests that a farm operation that existed prior to surrounding land use changes and that did not constitute a nuisance prior to these changes *need not comply with GAAMPs in order to receive nuisance protection under the RTEFA*. Right-to-farm laws in most states are codifications of the “coming to the nuisance” defense; that is, most provide farm operations with nuisance immunity if they existed prior to changes in surrounding land uses. However, these right-to-farm laws also specify that the protection does not apply if the nuisance results from negligent or improper operation of the farm or if the farm fails to use prudent generally accepted management practices reasonable for the operation. By severing the connection between parts (1) and (2) of M.C.L. 286.473, the Michigan Court of Appeals may have taken away this important *quid pro quo* protection provided to neighboring landowners in exchange for their lost ability to bring private rights of action. Whether the court in *Papesh* and *Papadelis* correctly extrapolated this to be the “clearly expressed intent” from the language of the RTEFA can (or should) be debated.

The series of court cases cited above raises questions about the implementation of the RTEFA siting GAAMPs. If a livestock facility chooses to expand its operation, and it

pre-dates land use changes surrounding it (within 1 mile of its boundaries), then the recent Court of Appeals decision suggests the farm operation will receive Right to Farm protection regardless of whether it uses the siting GAAMPs in evaluating its chosen expansion site. Therefore, adopting GAAMPs at the local level would undoubtedly be seen as being in conflict with state law.

To what extent does local zoning retain any control over agricultural land uses?

The statutory provisions we have been discussing (M.C.L. 286.473, 286.474[1] and 286.474[3]) address only eligibility for nuisance immunity. Following considerable debate and several legal challenges addressing the extent to which local zoning could or should be used to restrict both the location and operation of agricultural operations – especially large livestock operations – the RTFA was amended in 1999 to include new language preempting local zoning. M.C.L. 286.474(6) and (7) now provide:

(6) Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that *purports to extend or revise* in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, 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.

(7) A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government. A proposed ordinance under this subsection shall not conflict with existing state laws or federal laws. At least 45 days prior to enactment of the proposed ordinance, the local unit of government shall submit a copy of the proposed ordinance to the director. Upon receipt of the proposed ordinance, the director shall hold a public meeting in that local unit of government to review the proposed ordinance. In conducting its review, the director shall consult with the departments

of environmental quality and community health and shall consider any recommendations of the county health department of the county where the adverse effects on the environment or public health will allegedly exist. Within 30 days after the public meeting, the director shall make a recommendation to the commission on whether the ordinance should be approved. An ordinance enacted under this subsection shall not be enforced by a local unit of government until approved by the commission of agriculture.

In 2003, the court of Appeals filed the unpublished opinion *Milan Twp. v. Jaworski* in which it concluded that a Milan Township ordinance requiring a special use permit for hunting preserves located in areas zoned agricultural conflicted with the RTFA “to the extent that it allows the township board to preclude this protected farm operation.”

Since 2003 the Court has rendered three decisions that are consistent with *Jaworski*. In *Village of Rothbury v. Double JJ Resort Ranch*, the Court of Appeals concluded that an agricultural operation was exempt from local zoning, even though it was located in an area zoned for residential use:

“Hence, because an ordinance provision that only permits single family dwellings, playgrounds, and parks would prohibit farming operations, the ordinance provision conflicts with the RTFA and is unenforceable.”

In *Papesh*, the Court of Appeals wrote:

“... the RTFA no longer allows township zoning ordinances to preclude farming activity that would otherwise be protected by the RTFA. Rather, any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the RTFA.”

Most recently, in *Papadelis*, the Court of Appeals wrote:

“As this Court determined in *Papesh*, a zoning ordinance restricting agricultural activity to parcels containing a minimum number of acres conflicts with the RTFA. Thus, defendants’ ordinance limiting such activity to parcels with an area no less than five acres is preempted by the RTFA and is not enforceable.”

Judicial precedent, then, suggests that farms and farm operations that qualify for nuisance immunity may be undertaken in any location. Zoning ordinances that restrict agricultural activity, even in areas designated solely for residential use, are unenforceable.

Livestock operations of greater than 50 animal units may provide an exception to the court's preemption pronouncements. The GAAMPs for site selection and odor control for new and expanding livestock production facilities themselves specify: "New and expanding livestock production facilities should only be constructed in areas where local zoning allows for agriculture uses." Thus, locating a 50-animal-unit livestock operation in a residential zone would not likely be an activity protected by the RTFA.

That said, some communities have adopted rural residential zones that include agriculture as a permitted use but limit the type of agriculture to minimize conflicts with rural residents. The cases reviewed here suggest that such limitations are not likely to be enforceable. While the rural residential zone is not an agricultural zone per se, the local zoning allows for agriculture uses (the language used in the GAAMPs).

Does Michigan's Right-to-Farm Act continue to provide protection for the environment and minimize negative impacts on surrounding land users?

From its inception, Michigan's RTFA was hailed as an important tool both to protect farmers and to protect environmental quality and minimize negative impacts on surrounding land users. Should Michigan's citizens be concerned with the direction the courts are heading in interpreting the RTFA? What are the implications of the court's decisions relative to environmental protection and the rights of neighboring landowners?

The RTFA does not affect the application of state and federal statutes. Included with the 1999 amendments was clarification that environmental regulations are not affected by the RTFA. M.C.L. 286.474(2), provides:

Activities at a farm or farm operation are subject to applicable provisions of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.101 to 324.90106, and the rules promulgated under that act.

In addition, the amended RTFA requires that the Michigan Department of Agriculture notify the Michigan Department of Environmental Quality if, in investigating a Right-to-Farm complaint, it finds "any potential violation of the [Michigan] Natural Resources and Environmental Protection Act."

The court decisions discussed above do not appear to undercut the basic structure of the GAAMPs themselves, the application of state or federal statutes, or the enforcement activities of MDA. Keep in mind, however, that employing GAAMPs is strictly voluntary. The primary motivation for compliance with GAAMPs is nuisance protection under M.C.L. 286.473. If the Court of Appeals' logic holds and farm operations in existence prior to changes in surrounding land uses are provided nuisance immunity without regard to GAAMPs, the legal incentive for many farmers to follow GAAMPs will disappear.

The outlook for neighboring landowners is not promising. While protecting farm operations from those who "come to the nuisance" is justified, those landowners who do come to the nuisance should nevertheless be able to expect farm operations to employ a certain level of responsible management practices. Indeed, the vast majority of farmers do act responsibly in this regard. For the handful of operators who do not follow responsible practices, the court decisions do nothing to provide incentives for a change in behavior.

The *Papesh* and *Papadelis* decisions have the effect of not only conferring nuisance immunity on certain farm operations but also exempting them from local zoning regulations. In growing areas, this seriously undermines planning, negatively affects property values, and sanctions land use conflicts for which compensation is no longer possible. For years, Iowa has exempted agricultural operations from the reach of county zoning regulations (Iowa Code 335.2). This has polarized rural communities. The battle over the agricultural exemption is regularly brought to the Iowa legislature, but agricultural interests have, thus far, been able to protect the exemption. The situation emerging in Michigan has the potential to be even more serious. In Iowa, the exemption is limited by statute to county zoning. In Michigan, on the other hand, the implication of the court cases extends to counties, townships and cities. As the venues for the court cases discussed above (Shelby Township, Milan Township, City of Troy, Mason County) illustrate, the zoning exemption declared by the Court of Appeals will affect the entire Michigan landscape.

Additional information can be obtained from the Norris and Taylor article, "Questions about Intent and Application of Michigan's Right to Farm Act", in the March 2007 issue of *Planning and Zoning News*.

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