STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP
Plaintiff,

v.

HARVEY HANEY and
RUTH ANN HANEY,
Defendants
_____/

Case No.: 16-3272-CH
Honorable Harry P. Gill

BRIEF

MARK J. BRISSETTE (P26982)
BIRCHLER, FITZHUGH, PURTELL, &
BRISSETTE, PLC
Attorney for Plaintiff
900 Center Ave
Bay City, MI 48708
(989) 892-0591

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
Attorney for Defendants
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 – fax
pellison@olcplc.com

DEFENDANTS' SUPPLEMENTAL BRIEFING

NOW COMES Defendants HARVEY HANEY and RUTH ANN HANEY, by counsel, and provides this supplemental brief. The Court requested additional briefing regarding the effect of the 1999 legislative amendment adding MCL 286.474(6) upon the existing parts of MCL 286.473(1) and (2). In short, these provisions all work in perfect harmony together, see diagram below. As an initial matter, this Court is not the Legislature. Courts may not inquire into the wisdom or fairness of a statute enacted by the Legislature, *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420, 430; 617 NW2d 536 (2000), and instead Courts must apply the law <u>as written</u>, *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). Legislature is presumed to have intended the meaning it plainly expressed. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

The *Right to Farm Act* has been in place since the early 1980s. It is an affirmative defense. *Lima Twp v Bateson*, 302 Mich App 483 (2013). Prior to 2000, a farm or farm operation was required to comply with all state and federal regulations, and also either 1.) be GAAMP compliant or 2.) been a pre-existing farm (with conditions) to enjoy the legal protections provided under the Act. Had Fraser Township brought this case *before* 2000, fulfillment of zoning requirements by the Haneys was required.

In 2000, everything changed. The Legislature took away the local government's power to preclude farms or farm operations if GAAMP compliant. MCL 286.474(6) provides that

> 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.

The days of local townships being able to prohibit, preclude, or otherwise locally control farms via its zoning power is gone, provided that the farmer fulfilled the legal prerequisites under the *Right to Farm Act* (i.e. fulfilling GAAMPs). Several cases after the 1999 amendment explain this: "Under the RTFA, a farm or farming operation cannot be found to be a nuisance if it meets certain criteria, *such as* conforming to 'generally accepted agricultural management practices.'" *Charter Twp of Shelby v Papesh*, 267 Mich App 92, 99; 704 NW2d 92 (2005). On June 1, 2000, different jurisdictions had full, partial, or no zoning ordinances in effect as to farms and farm operations in their respective territorial borders. The Legislature accounted for them all: "a local unit of government shall not [1.] enact, [2.] maintain, or [3.] 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." MCL 286.474(6). In other words, no more legislating new, continuing old, or suing over "any" local ordinances, like zoning, regarding farms and farm operations protected by the *Right to Farm Act*. If an ordinance is needed that contradicts the Act prohibitions, it must be preapproved by the MDA Director and the state commission before enforcement can occur. MCL 286.474(7).

So, the question becomes whether the Township has a 'Right to Farm'-compliant ordinance? According to Fraser Township, the Haneys' piggery is in violation of the local zoning ordinance as existing in the C-3 zoning district which has no carve out for RTA farms or farm operations. As such, the Fraser Township Zoning Ordinance (which the township claims has been in place since 1976) became illegal on June 1, 2000. The problem for the Fraser Township is that the Haneys are alleging GAAMP-compliance as to their piggery. As a GAAMP-compliant farm and/or farm operation, Fraser Township is <u>barred</u> from maintaining or otherwise enforcing its once-legal but now-illegal zoning ordinance when making no exception for GAAMP-compliance. Case law is clear: "[u]nder the RTFA, a farm or farming operation cannot be found to be a nuisance [i.e. a zoning violation] if it meets certain criteria, such as conforming to `generally accepted agricultural management practices." *Papesh*, *supra*. All GAAMP-compliant farms are exempt from "<u>*any*</u> local ordinance, regulation, or resolution" including zoning ordinances. *Papesh, supra*, at 99. Stated another way by the Court of Appeals, "the RTFA <u>*no longer*</u> allows township zoning ordinances to preclude farming activity [i.e. banning a piggery in C3 zoning districts] that would otherwise be protected by the RTFA." *Id.*, at 107.

Additionally, the local government cannot use the doctrine of gradual elimination to effectuate farming prohibitions by using backdoor methodologies like changes in ownership or size; temporary cessation or interruption of farming; enrollment in governmental programs; adoption of new technology; or change in type of farm product being produced. MCL 286.473(3)(a)-(e).

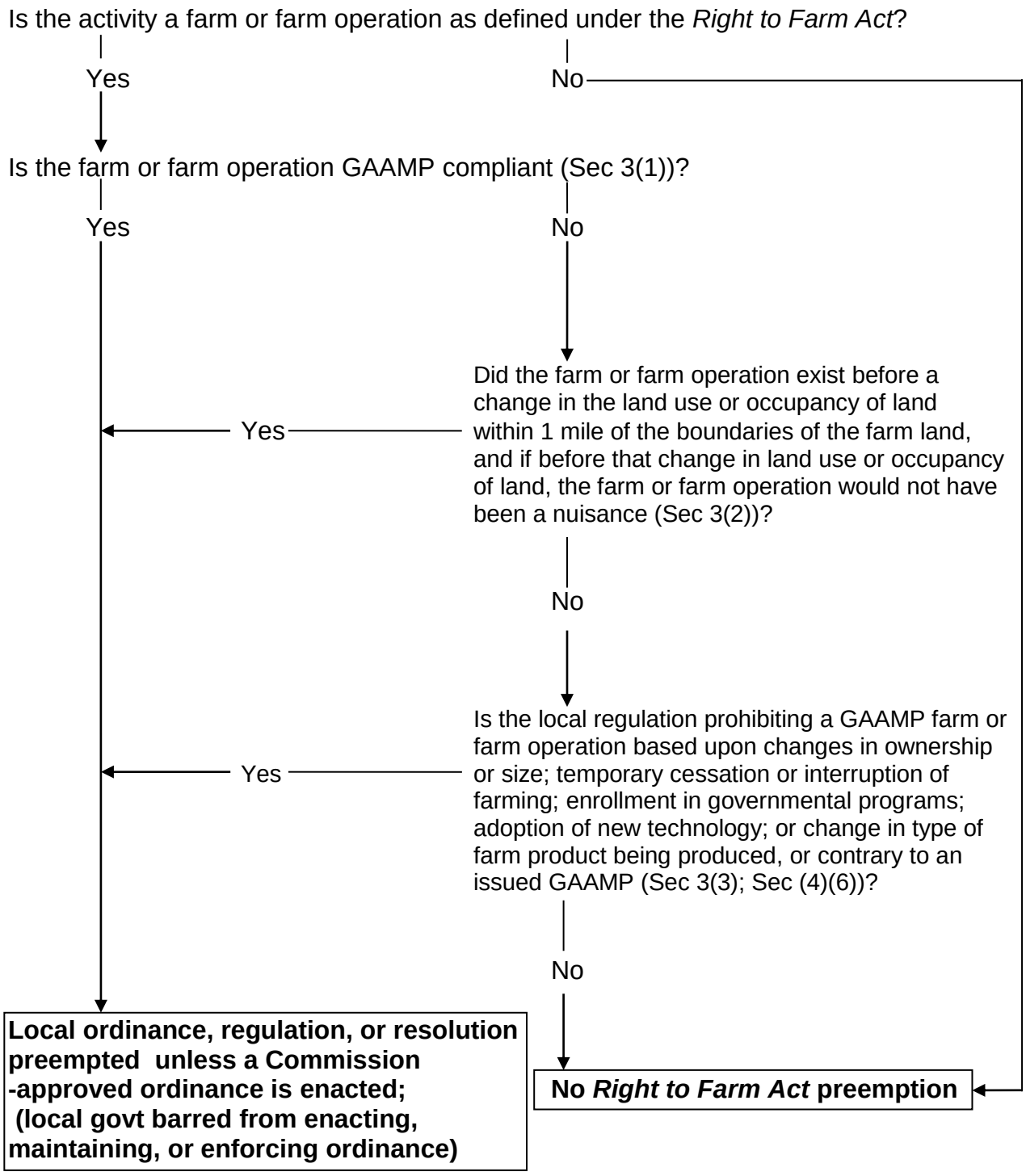
Now, separately, there are other farms that not GAAMP-compliant but have been in existence for some time before a change in the local law. The Legislature further preempted any local control by local governments these farms "if the farm or farm operation existed before a change in the land use or occupancy 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." These types of farms, Section 3(2) 'grandfathered' farms, need not be GAAMP-compliant but are also exempted from local government ordinances, regulations, or resolutions.

Under either farm type, i.e. a GAAMP-compliant farm under Section 3(1) or a Grandfathered farm under Section 3(2), the legal handcuffing upon the local government is the same—the *Right to Farm Act* "preempt[s] 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" after June 1, 2000. The *Right to Farm Act* also makes it illegal for any local unit of government" to "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" after June 1, 2000. All subparts work together in harmony.

So, how can we be sure this is what the Legislature intended by its plain language? The legislative history supports this reading. The Enroll Analysis explains:

> Originally enacted in 1981, the Michigan Right to Farm Act is designed to protect farmers from lawsuits brought by neighboring residents who are not used to the noise, odor, and dust that accompany typical farming activities. Under the Act, a farm or farm operation may not be found to be a public or private nuisance (something that interferes with a person's enjoyment of his or her life or property) if the farm meets certain criteria, such as conformity to generally accepted agricultural and management practices (GAAMPS). The Act also provided, however, that it did not affect the application of Federal and State statutes, including local zoning ordinances. As a result, even though a farm might have a defense to a nuisance lawsuit, it still could be found in violation of a local ordinance.
>
> The application of local zoning ordinances apparently has been problematic and costly for some farmers, particularly when they wanted to expand operations. A township ordinance, for example, might limit the number of animals allowed per acre, prohibit noxious odors, or restrict noise levels. Since the Right to Farm Act did not supercede local land use laws, a farmer could be denied a permit necessary to expand, or, after expanding, could find himself or herself subject to a lawsuit brought by displeased residents. **To remedy this situation, it was suggested that the Right to Farm Act generally should preempt local ordinances.**
>
> ***
>
> The bill prohibits a local unit of government from enacting, maintaining, or enforcing an ordinance, regulation, or resolution that conflicts in any manner with the Act or GAAMPS. A local unit of government, however, may submit to the MDA Director a proposed ordinance prescribing standards different from those contained in GAAMPS if adverse effects on the environment or public health will exist within the local unit.

Exhibit A. So, the way this Court should review this analysis is clear via a simple flow chart.



The Court need go no further than steps 1 and 2 because the Haney Defendants are claiming GAAMP compliance for their piggery as a farm or farm operation.

Date: May 10, 2017

RESPECTFULLY SUBMITTED:

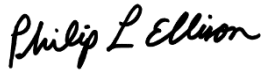
OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Defendants
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
(888) 398-7003 - fax
pellison@olcplc.com

***Electronic signature authorized by MCR 2.114(C)(3) and MCR 1.109(D)(1)-(2)*

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

10th day of May, 2017.



PHILIP L. ELLISON
Attorney at Law

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 205 (as enrolled) **PUBLIC ACT 261 of 1999**
Sponsor: Senator Joel D. Gougeon
Senate Committee: Farming, Agribusiness and Food Systems
House Committee: Agriculture and Resource Management

Date Completed: 1-4-00

RATIONALE

Originally enacted in 1981, the Michigan Right to Farm Act is designed to protect farmers from lawsuits brought by neighboring residents who are not used to the noise, odor, and dust that accompany typical farming activities. Under the Act, a farm or farm operation may not be found to be a public or private nuisance (something that interferes with a person's enjoyment of his or her life or property) if the farm meets certain criteria, such as conformity to generally accepted agricultural and management practices (GAAMPS). The Act also provided, however, that it did not affect the application of Federal and State statutes, including local zoning ordinances. As a result, even though a farm might have a defense to a nuisance lawsuit, it still could be found in violation of a local ordinance.

The application of local zoning ordinances apparently has been problematic and costly for some farmers, particularly when they wanted to expand operations. A township ordinance, for example, might limit the number of animals allowed per acre, prohibit noxious odors, or restrict noise levels. Since the Right to Farm Act did not supercede local land use laws, a farmer could be denied a permit necessary to expand, or, after expanding, could find himself or herself subject to a lawsuit brought by displeased residents. To remedy this situation, it was suggested that the Right to Farm Act generally should preempt local ordinances.

CONTENT

The bill amended the Michigan Right to Farm Act to do the following:

- **Prohibit local units from enacting or enforcing ordinances that conflict with the Act or GAAMPS.**
- **Allow a local unit, with the approval of the Agriculture Commission, to enact an ordinance differing from GAAMPS if adverse effects on the environment or public health will exist within the local unit.**
- **Replace provisions concerning the investigation of complaints involving a farm or farm operation.**
- **Require the Commission to adopt GAAMPS for site selection and odor controls at new and expanding animal livestock facilities.**
- **Require the Michigan Department of Agriculture (MDA) to report annually to the Legislature on the Act's implementation.**

Local Ordinances

Previously, the Act provided that it did not affect the application of State and Federal statutes, and specified that "state statutes" included local zoning laws. The bill deleted these provisions.

The bill states "the express legislative intent", beginning June 1, 2000, and except as otherwise provided in the bill, that the Act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of the Act or generally accepted agricultural management practices developed under the Act.

The bill prohibits a local unit of government from enacting, maintaining, or enforcing an ordinance, regulation, or resolution that conflicts in any manner with the Act or GAAMPS. A local unit of government, however, may submit to the MDA Director a proposed ordinance prescribing standards different from those contained in GAAMPS if adverse effects on the environment or public health will exist within the local unit. A proposed ordinance may not conflict with existing State or Federal laws. The bill defines "adverse effects on the environment or public health" as any unreasonable risk to human beings or the environment based on scientific evidence and taking into account the economic, social, and environmental costs and benefits and specific populations whose health may be adversely affected.

At least 45 days before a proposed ordinance is enacted, the local unit must submit a copy of it to the Director. The Director then must hold a public meeting in that local unit to review the proposed ordinance. In conducting its review, the Director must consult with the Department of Environmental Quality (DEQ) and the Department of Community Health, as well as consider any recommendations of the county health department of the county where the adverse effects on the environment or public health allegedly will exist. Within 10 days after the public meeting, the Director must make a recommendation to the Commission on whether the ordinance should be approved.

A local unit may not enforce an ordinance enacted under these provisions until it has been approved by the Commission.

Investigation of Complaints

The bill repealed and replaced Section 3a of the Act, which prescribed the process for investigating complaints (MCL 286.473a). The bill requires the MDA Director to investigate all complaints involving a farm or farm operation, including those involving the use of manure and other nutrients, agricultural waste products, dust, noise, odor, fumes, air or water pollution, food and agricultural processing by-products, care of farm animals, and pest infestations. (Under Section 3a, the Commission was required to request the Director to investigate all such complaints.)

The bill provides that, within seven business days of receiving a complaint, the Director must conduct an on-site inspection of the farm or farm operation. The Director must give written notice of the complaint to the city, village, or township and the county in which the farm or farm operation is located.

If the Director finds upon investigation that the person responsible for the farm or farm operation is using GAAMPS, the Director must given written notice of the finding to that person, the complainant, and the city, village, or township and the county in which the farm or farm operation is located. (Section 3a required this notice to the person responsible and the complainant.) As previously required, if the Director finds that the source or potential source of the problem was caused by the use of other than GAAMPS, the Director must advise the person responsible that necessary changes should be made to resolve or abate the problem and to conform with GAAMPS. The bill also requires the Director to advise the person that, if those changes cannot be implemented within 30 days, the person must submit to the Director an implementation plan including a schedule for completing the necessary changes. When the Director conducts a follow-up on-site inspection to verify whether the changes have been implemented, the Director must give written notice to the city, village, or township and the county in which the farm or farm operation is located of the time and date of the follow-up inspection, and allow a representative of the city, village, or township and the county to be present during the inspection.

If the changes have been implemented, the Director must given written notice of this determination to the person responsible, the complainant, and the city, village, or township and the county. (Section 3a required such notice to the person responsible and the complainant.) If not, the Director must give written notice to the complainant and the city, village, or township and the county that the changes have not been implemented and whether a plan for implementation has been submitted. Upon request, the Director must provide a copy of the implementation plan to the city, village, or township and the county.

Section 3a required the MDA Director and the Agriculture Commission to enter into a memorandum of understanding with the Department of Natural Resources (DNR) and the Natural Resources Commission, and required the investigation and resolution of environmental complaints to be conducted in accordance with the memorandum of understanding. Under the bill, the Agriculture Commission and the MDA Director must enter into a memorandum of understanding with the DEQ Director, and the investigation and resolution of environmental complaints concerning farms or farm operations must be conducted in accordance with the memorandum of understanding. The Director must notify the DEQ of any potential violation of the Natural Resources and Environmental Protection Act (NREPA) or a rule promulgated under it. The bill specifies that activities at a farm or farm operation are subject to the applicable provisions of the NREPA and the rules promulgated under it.

As provided under Section 3a, the Agriculture Commission and the MDA Director must develop procedures for the investigation of other farm-related complaints.

Also, as provided under Section 3a, a complainant who brings more than three unverified complaints against the same farm or farm operation within three years may be ordered, by the Director, to pay to the MDA the full costs of investigating any fourth or subsequent unverified complaint against the same farm or farm operation. ("Unverified complaint" means a complaint in response to which the Director determines that the farm or farm operation is using GAAMPS.)

Site Selection & Odor Control/Manure Management

Under the bill, by May 1, 2000, the Commission must issue proposed GAAMPS for site selection and odor controls at new and expanded animal livestock facilities. The Commission must adopt such GAAMPS by June 1, 2000. In developing them, the Commission must establish an advisory committee to provide it with recommendations. The committee must include two individuals representing townships, one representing counties, and two representing agricultural industry organizations, as well as the entities who may make recommendations for GAAMPS under the Act. (The Act requires the Commission, in defining GAAMPS, to give due consideration to written recommendations from the Michigan State University College of Agriculture and Natural Resources Extension Service and the Agricultural Experiment Station in cooperation with the U.S. Department of Agriculture Natural Resources Conservation Service and the Consolidated Farm Service Agency, the DNR, and other professional and industry organizations.)

In addition, for the site selection GAAMPS, the Commission must consider groundwater protection, soil permeability, and other factors determined necessary or appropriate by the Commission.

The bill provides that, if GAAMPS require the person responsible for the operation of a farm or farm operation to prepare a manure management plan, the person must give a copy of that plan to the city, village, or township or the county in which the farm or farm operation is located, upon request. A manure management plan is exempt from disclosure under the Freedom of Information Act.

MDA Responsibilities

The bill requires the MDA to submit an annual report on the Act's implementation to the standing committees of the Senate and House of Representatives with jurisdiction over issues pertaining to agriculture and local government.

The MDA also must make current GAAMPS available on the Department's website, and establish a toll-free telephone number to receive information on noncompliance with GAAMPS.

MCL 286.474

BACKGROUND

Under the Michigan Right to Farm Act, a farm or farm operation may not be found to be a public or private nuisance if either of the following applies:

-- The farm or farm operation conforms to GAAMPS according to policy determined by the Agriculture Commission.

-- The farm or farm operation existed before a change in the use or occupancy of land within one mile of the farm's boundaries, and would not have been a nuisance before that change in use or occupancy.

In addition, if a farm or farm operation conforms to GAAMPS, it may not be found to be a nuisance as a result of any of the following: a change in ownership or size; temporary cessation or interruption of farming; enrollment in governmental programs; adoption of new technology; and/or a change in the type of farm product being produced.

If a farm or farm operation successfully defends a nuisance lawsuit, it may recover from the plaintiff the actual costs incurred in defending the action, including attorney fees.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Right to Farm Act apparently has been successful in reducing the number of nuisance lawsuits brought against farmers, and enabling farmers to defend these lawsuits; however, the Act's failure to preempt local ordinances has been a serious shortcoming. This issue is one of many addressed by the Senate Agricultural Preservation Task Force, which was created in the spring of 1999 and held eight hearings at various locations across the State. At these hearings, many individuals, including hog farmers and vintners, expressed their belief that local ordinances were limiting economic opportunities for farm families, blocking expansion, and making it difficult to keep land in agriculture. According to the Task Force's report (issued in September 1999), restrictive regulations even have the potential to eliminate certain types of farming, such as hog and dairy farms, given their need to increase the size of operations.

People testifying at the hearings also pointed out that fewer and fewer local officials have a farming background, which means that land use policies are being made by individuals who do not understand the problems and needs of farm operations. Another complaint involved the inconsistency of regulations from one local unit to another, which can be particularly confusing for farmers who operate in more than one jurisdiction.

This bill strengthens the Right to Farm Act by preempting local ordinances that expand or in any way revise the Act or GAAMPS. The bill represents an opportunity to protect property rights and help farms stay profitable. At the same time, the bill allows a local unit to propose standards different from GAAMPS if adverse effects on the environment or public health will exist. The bill creates an opportunity for the MDA to receive input on a proposed ordinance from residents of the community and interested parties, the DEQ, and the State and local health departments. The MDA then must make a recommendation to the Agriculture Commission, which must give its approval before the ordinance may be enforced. These provisions are similar to existing requirements in the NREPA regarding pesticide and fertilizer ordinances (MCL 324.8328 and 324.8517).

Opposing Argument

The Right to Farm Act creates a defense against nuisance lawsuits and a process for investigating complaints. The Act does not actually regulate farming practices or even require farms to use GAAMPS. In fact, conformity with GAAMPS is entirely voluntary and remains voluntary under the bill. No one officially knows whether a farm conforms to GAAMPS unless there is a complaint and an investigation. Also, GAAMPS themselves are constantly evolving. Currently, the practices cover five specific areas: 1) manure management/use; 2) pesticide use/pest control; 3) nutrient use; 4) care of farm animals; and 5) cranberry production. The Agriculture Commission must first determine that there is a need for a generally accepted practice, and each GAAMP must be reviewed and reapproved annually; however, GAAMPS are not promulgated as rules under the Administrative Procedures Act. While this process might be adequate for the purpose of determining whether something qualifies as a nuisance, GAAMPS are neither broad enough to cover all aspects of farming nor specific enough to accommodate local conditions. Also, GAAMPS do not differentiate between small farms and industrial-sized operations. Because the Commission can always add, modify, and discontinue GAAMPS, they will be a moving target for any local unit of government that attempts to enact an ordinance that does not expand or otherwise revise GAAMPS.

Response: The bill strengthens the process for investigating complaints in a number of ways. The bill makes it clear that the MDA must investigate a complaint and conduct an on-site investigation. The bill also brings local units into the process by requiring the MDA to give the city, village, or township and the county notice of a complaint, of a determination that the person responsible for the farm is using GAAMPS, of a follow-up on-site inspection (at which a local representative may be present), whether necessary changes have been implemented, and whether a plan for implementation has been submitted. The bill creates a timetable for inspections and the implementation of necessary changes. In addition, the bill requires the MDA to notify the DEQ of any potential violation of the NREPA and makes it clear that farm activities are subject to that Act. As before, the DEQ can take action if a farm's nonconformity to GAAMPS raises an environmental concern, and a farm that is not conforming to GAAMPS will have no protection under the Right to Farm Act against a nuisance lawsuit.

Opposing Argument

Each local unit of government must respond to its own needs and circumstances, such as topography and demographics, and is in the best position to determine appropriate land uses. Instead of taking away local control, the State should strengthen local units by assisting with recommended site location and design standards. Such standards could help provide the consistency sought by the agricultural community but still leave locals with the ability to choose the most suitable and safe sites. In addition, if local planning is not coordinated with agricultural land uses, farmers actually might face increased difficulties--such as having to depend on inadequate road systems to transport their produce to market.

Opposing Argument

In order to balance the needs of farming and the interests of communities, the bill should preempt only family farms and small operations from local ordinances. This would enable families to continue farming without interference from neighbors who are unaccustomed to agricultural odor and noise. On the other hand, farms that are over a certain size, such as 1,000 units of livestock, should remain subject to local control. By removing nearly all regulatory authority from local government, however, the bill will make Michigan a haven for industrial-sized farming operations, such as hog farms. Reportedly, the number of hogs in this State has declined in recent years, but the bill will reverse that movement, particularly since the preemption is contrary to national trends. Other businesses must comply with local zoning and land use regulations, and factory farms also should do so.

Response: Regardless of its size, every farm is a business and should be subject to (or exempt from)

the same regulations as other farms.

Opposing Argument

Despite the need to protect agriculture, it is important to consider the impact of farming operations on neighboring property owners. Expanding a family farm to an industrial-sized operation can have serious ramifications, even if it does conform to generally accepted practices. Furthermore, if a farm conforms to GAAMPS, it cannot be found to be a nuisance as a result of a change in size or a change in the type of farm product being produced. Presumably, for example, this means that a sod farmer could convert his or her acreage to a diary farm and remain free from a nuisance lawsuit. In terms of odor alone, however, the farm would have a considerably different impact on its neighbors' enjoyment of their own property, and possibly on the value or marketability of that property. In this type of situation, local land use regulations might help balance the needs of an intensive livestock operation and the interests of residential property owners.

Response: The bill requires the Commission to adopt GAAMPS regarding site selection and odor controls at new and expanding animal livestock facilities.

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bill will have an indeterminate impact on State Department of Agriculture administrative costs associated with the requirements for the Department to conduct inspections within seven days of a complaint, to notify local units of government, and to conduct a public hearing. The magnitude of the costs and the extent to which they can be absorbed within existing Department resources will depend on the number of investigations the MDA will have to conduct in response to complaints received by the Department, and the number of public hearings the Department will have to conduct on proposed local ordinances prescribing standards different from GAAMPS in response to adverse effect on the environment or public health. It might be noted that under similar hearing requirements in the Pesticide Control and Fertilizers parts of the Natural Resources and Environmental Protection Act, the Department of Agriculture has conducted one public hearing in the past five years in response to a local resolution identifying a health threat

Fiscal Analyst: P. Graham

A9900\s205ea