

Symposium on Land Use Law: Rights with Responsibilities

Whole Hog: The Preemption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act

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Note

WHOLE HOG: THE PRE-EMPTION OF LOCAL CONTROL BY THE 1999 AMENDMENT TO THE MICHIGAN RIGHT TO FARM ACT

*"I got a girl, a peach; we save up and go on a farm and
raise pigs and be the boss ourselves." ¹*

I. INTRODUCTION

Although agreement on the details remains elusive, there appears to be a growing consensus on the importance of effective laws and public policy in achieving sustainable agriculture – the preservation of resources and the development of practices that safeguard the environment while maintaining the economic viability of farming.² More than 375 years ago, American colonial governments initiated efforts to preserve land and agriculture.³ Today, significant transformations in the economics and technologies of the agricultural industry have challenged governmental approaches to farmland preservation.⁴ Current estimates of the annual loss of agricultural land in the United States vary from one to three million acres.⁵ Michigan,

¹ CARL SANDBURG, *Smoke and Steel*, in COMPLETE POEMS 154 (1950).

² See generally Neil D. Hamilton, *The Role of Law in Promoting Sustainable Agriculture: Reflections on Ten Years of Experience in the United States*, 3 DRAKE J. AGRIC. L. 423 (1998).

³ 9 Zoning & Land Use Controls (MB) § 56.01 (July 1999) [hereinafter Zoning & Land Use Controls]. In 1626, the Plymouth Colony adopted an ordinance that regulated the cutting and sale of timber on colony lands. *Id.* In 1681, William Penn issued a decree that one acre must be left forested for every five acres of land cleared in Pennsylvania. *Id.*

⁴ See generally Neil D. Hamilton, *A Changing Agricultural Law for a Changing Agriculture*, 4 DRAKE J. AGRIC. L. 41 (1999) (reviewing some of the developments of recent years within the structure and operation of the food and agricultural system and defining what these changes may mean for the practice and refinement of agricultural law issues within society); see also Wayne Falda, *Cass County, Mich., Hog Farmers Weather Lean Years of Thin Pork Prices*, S. BEND TRIB., Dec. 29, 2000, available at 2000 WL 31021714 (describing the 1998 "cataclysm" when the United States hog industry's worst decline in history drove tens of thousands of hog farmers out of the business).

⁵ ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 279 (1999); Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1698 (1998). In 1981, The National Agricultural Lands Study (NALS) asserted that three million acres of agricultural land is converted annually to urban and other nonfarm uses. U.S. DEP'T OF AGRIC. & COUNCIL ON ENVTL. QUALITY, NATIONAL AGRICULTURAL LANDS STUDY: FINAL REPORT 25 (1981) [hereinafter NALS]. However, the Urban Land Institute challenged the NALS figures as "exaggerated or unimportant" because lost acreage is either being

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second only to California in the diversity of its agricultural industry, is losing about ten acres of farmland every hour.⁶ Conversion of farmland to residential, commercial, and industrial uses is propelled by escalating land values.⁷ The demand provides farm owners with a strong incentive to sell.⁸

Twenty years ago, most states adopted right to farm statutes to protect agriculture from land use changes in which the suburban fringe sprawled outward and rural areas became increasingly attractive to relocating urban dwellers.⁹ Today, large-scale animal feedlot operations, particularly in the swine industry, are replacing the traditional family farm on the American landscape.¹⁰ As a result, right to farm law amendments must be drafted with careful consideration of whether protecting industrial-scale animal feedlots serves the statutes' original purpose of preserving farmland and agriculture.¹¹

The preservation of farmland represents more than a sentimental longing for the agrarian America of yesteryear.¹² The production of each American farmer feeds more than 120 people and does so by using land resources that are extremely difficult to replace once they are converted to non-farm uses.¹³ Although most people equate urbanization with

replaced by land not previously farmed or is not needed due to production surpluses from increases in yield through science and technology. Teri E. Popp, *A Survey of Agricultural Zoning: State Responses to the Farmland Crisis*, 24 REAL PROP. PROB. & TR. J. 371, 375 (1989).

⁶ TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND 1 (1997); MICH. SOC'Y OF PLANNING OFFICIALS, PATTERNS ON THE LAND 24 (1995). Land use modeling projections performed by Michigan universities predict that by 2040 the state could lose twenty-five percent of its land currently used for fruit production. Kathy Barks Hoffman, *Development Eating Up Available Michigan Land*, S. BEND TRIB., Sept. 11, 2001, at A1.

⁷ See FREILICH, *supra* note 5, at 279. The less than one-third of America's farmland considered prime for production is, unfortunately, the same land most suitable to residential development. Reinert, *supra* note 5, at 1699.

⁸ See FREILICH, *supra* note 5, at 279.

⁹ SARAH E. REDFIELD, VANISHING FARMLAND 95, 97 (1984); *see also infra* note 52.

¹⁰ See Neil Hamilton, *Agriculture Without Farmers*, SUCCESSFUL FARMING, Apr. 1, 1994, at 28 (discussing how industrialization is restructuring American food production); Dave Mowitz, *Readers Respond to Changes in Pig Industry*, SUCCESSFUL FARMING, Jan. 1, 2000, at 60 (relating farm owners' reactions to the consolidation and vertical integration of the pig industry); *see also infra* notes 77-81 and accompanying text.

¹¹ Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 221 (1993) ("The change to an industrialized agriculture, from the traditional model of independent family farms, may mean the question of whether there is a right to farm is reopened for legitimate inquiry.").

¹² See generally NALS, *supra* note 5, at 62.

¹³ DANIELS & BOWERS, *supra* note 6, at 9; *see also* FREILICH, *supra* note 5, at 280; Zoning & Land Use Controls, *supra* note 3, § 56.01[1]-[2].

development and, progress, preserving farmland is also good for economic development.¹⁴ The agricultural industry remains an important source of jobs, income, investment, taxes, and economic diversification.¹⁵ Agricultural preservation also represents sound fiscal policy.¹⁶ As land is converted from agriculture to other uses, particularly residential, property tax receipts increase but do not equal the additional costs of new services that become necessary, such as infrastructure, schools, and law enforcement.¹⁷ Agricultural land requires only pennies on the dollar for public services in relation to the taxes collected.¹⁸ Preservation of agricultural land is also valued by those who simply appreciate open space and rural character.¹⁹

This Note examines how right to farm statutes that displace local land use controls, such as zoning, weaken legislative solutions to the loss of farmland. Specifically, this Note addresses the need to repeal the 1999 amendment to the Michigan Right to Farm Act, which pre-empted local control, and replaced it with a statute that allows local control if there is satisfactory land use planning. Part II of this Note briefly discusses the traditional role of zoning in farmland preservation, the introduction of right to farm laws as an additional tool for protecting agriculture, and the development of concentrated animal feedlot operations, which

¹⁴ See DANIELS & BOWERS, *supra* note 6, at 17-18; FREILICH, *supra* note 5, at 280; Zoning & Land Use Controls, *supra* note 3, § 56.01[1]-[2].

¹⁵ See DANIELS & BOWERS, *supra* note 6, at 17-18; FREILICH, *supra* note 5, at 280; Zoning & Land Use Controls, *supra* note 3, § 56.01[1]-[2]. One illustration of the economic diversification of the agricultural industry is agricultural tourism, which includes "pick-cut-grow your own" operations, agricultural festivals, wineries, maple syrup processing, farm bed and breakfasts, wildflower farms, paid hunting and fishing preserves, specialty dining, agricultural museums and historical attractions, tours, and educational experiences. Lynn Waldsmith, *Councils View Agricultural Tourism as Untapped Mine*, DETROIT NEWS, Oct. 12, 1997, available at 1997 WL 5600698. Some agricultural operations have developed "entertainment farming" businesses, which provide family-oriented attractions such as cider mills, pumpkin patches, bakeries, other food concessions (i.e., donuts, caramel apples, ice cream, etc.), gift shops, hay rides into orchards to pick produce, and other amusements such as petting zoos, musicians, story tellers, and arts and crafts. See Louise Knott Ahern, *Metro Farm Family Diversifies: Farmers Use Tourism to Save Heritage*, DETROIT NEWS, Oct. 15, 2000, available at 2000 WL 3495065; Kathy Bush, *Market Your Heritage: Farmers Told to Sell Themselves and Their Lifestyle Along with Produce*, GRAND RAPIDS PRESS, Jan. 18, 1996, available at 1996 WL 8094324. Tourists to Michigan, from as far away as Florida and Texas, have planned vacations around the "you-pick" season. Ahern, *supra*.

¹⁶ DANIELS & BOWERS, *supra* note 6, at 15.

¹⁷ See Mark A. Wyckoff, *Townships Can Use Planning & Zoning Tools to Control Land Division*, MICH. TOWNSHIP NEWS, June 1997, at 12.

¹⁸ *Id.*

¹⁹ See FREILICH, *supra* note 5, at 280; Zoning & Land Use Controls, *supra* note 3, § 56.01[1]-[2].

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brought new conflicts between zoning and the right to farm.²⁰ Next, Part III describes the status of local control in Michigan and the 1999 Right to Farm Act amendment's effect on the balance between state and local governmental authority.²¹ Part IV analyzes the amendment's potential for adverse effects on farmland preservation goals.²² Finally, Part V presents an alternative amendment to the Michigan Right to Farm Act, which would retain local control and better serve the purpose of protecting agricultural land uses.²³

II. PRESERVING AGRICULTURE WITH ZONING AND RIGHT TO FARM LAWS

This Part discusses the historical role of government in the preservation of farmland and agriculture, specifically through zoning and right to farm laws. Local units of government generally support farmland preservation efforts as a response to the growing number of conflicts between existing agricultural land uses and burgeoning residential neighborhoods.²⁴ A national study found that population growth pressures are most severe in areas that produce the highest value of farm products sold.²⁵ The current desire for larger residential lots and the resultant increase in the amount of land used per person means that non-farm housing continues to encroach upon farms.²⁶

Until recently, residential uses were thought to be compatible with family farms and agriculture.²⁷ Now, the nature of agriculture is understood to be more similar to industrial land uses with its odors, dust, chemical sprays, heavy and slow-moving equipment, noise, long hours of operation, and, to some, unappealing aesthetics.²⁸ Likewise, suburban-style homes burden agriculture with traffic, trespassing, vandalism, pets harassing or attacking livestock, soil erosion,

²⁰ See *infra* Part II.

²¹ See *infra* Part III.

²² See *infra* Part IV.

²³ See *infra* Part V.

²⁴ See DANIELS & BOWERS, *supra* note 6, at 19.

²⁵ NALS, *supra* note 5, at 43. One-third of the top one hundred agricultural value-producing counties are in metropolitan areas. *Id.*

²⁶ DANIELS & BOWERS, *supra* note 6, at 10.

²⁷ MICH. ST. UNIV. EXTENSION, PLANNING AND ZONING FOR ANIMAL AGRICULTURE 1-1 (1999) (depicting Americans' perception of farms as a Grandma Moses painting, i.e., on a one-quarter section of land with a small truck, a garden, fields of corn and beans, and a pasture with Holsteins grazing peacefully).

²⁸ See NEIL D. HAMILTON & GREG ANDREWS, EMPLOYING THE "SOUND AGRICULTURAL PRACTICES" APPROACH TO PROVIDING RIGHT TO FARM NUISANCE PROTECTIONS TO AGRICULTURE 2 (1993).

competition for water resources, restrictions on chemical applications, and the migration of weeds from the unmaintained areas of large lots.²⁹

Americans' zealous esteem of owning property and the right to use it as one pleases creates many individual desires that contribute to the conflict.³⁰ Residential newcomers hasten the loss of open space and rural character for which they moved out of the city, while farm owners encourage residential development by selling off portions of their property for non-farm uses.³¹ The agricultural community often supports government measures to preserve farmland when it helps them continue their operations but objects to the same restrictions when there are no family successors to the farm and it hampers their ability to sell the property and retire on the proceeds.³²

A. *The Traditional Role of Zoning*

Few land use controls existed in nineteenth century America.³³ By the 1920s, many municipalities had enacted zoning ordinances, and the United States Supreme Court upheld the validity of municipal zoning in the landmark case of *Village of Euclid v. Ambler Realty Co.*³⁴ However, zoning was not used in rural areas until the 1970s.³⁵ Zoning creates districts within which varying limits are placed on the use of the land, the height of buildings and structures, and the area occupied by

²⁹ DANIELS & BOWERS, *supra* note 6, at 4; Zoning & Land Use Controls, *supra* note 3, § 56.01[2].

³⁰ See ERIC T. FREYFOGLE, BOUNDED PEOPLE, BOUNDLESS LANDS 91-113 (1998) (discussing the American tradition of private property rights and its effect on land use).

³¹ DANIELS & BOWERS, *supra* note 6, at 5.

³² *Id.* at 109; Zoning & Land Use Controls, *supra* note 3, § 56.01[4]. Farm owners may have a variety of personal reasons for selling the farm and leaving agriculture: lower profit margins; less per capita earnings than non-farm workers; no control of climate, international politics, domestic policy and other factors affecting income; increasing production costs; higher taxes; age; health; disability; or the opportunity to finance retirement. Popp, *supra* note 5, at 374.

³³ Reinert, *supra* note 5, at 1703. Prior to zoning, land use conflicts between property owners were solved in court under the theory of nuisance law. *Id.*; see also *infra* notes 54-55 and accompanying text (discussing nuisance law). Zoning provided a tool with which to anticipate and prevent conflicts. Reinert, *supra* note 5, at 1703.

³⁴ 272 U.S. 365 (1926). The suit was brought by the owner of unimproved land within the corporate limits of the village, who sought to have the ordinance declared invalid because the building restrictions reduced the normal value of his property and deprived him of liberty and property without due process of law. *Id.* at 379-83. The zoning ordinance was upheld as a valid exercise of police power to protect the health, morals, safety, and general welfare of the community. *Id.* at 387, 397.

³⁵ DANIELS & BOWERS, *supra* note 6, at 42; Reinert, *supra* note 5, at 1704.

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buildings or structures.³⁶ Land use planning and zoning were designed to anticipate and resolve conflicts between incompatible land uses, such as the location of industry or agricultural production near residential or recreational areas.³⁷ Although zoning restricts the use of private property, it has gained wide acceptance because it works to preserve property values.³⁸

Today, zoning has become the most common land use planning technique for farmland preservation efforts.³⁹ Traditionally, rural zoning ordinances placed land in agricultural zones unless and until it was needed for another use.⁴⁰ Now, zoning identifies the farmland that is to be preserved and allows agricultural activities to exist with less threat of conflicts from non-farm uses.⁴¹ The two methods used for agricultural zoning are exclusive and non-exclusive.⁴² Exclusive agricultural zoning prohibits the location of non-farm dwellings or other non-farm business uses.⁴³ Non-exclusive agricultural zoning allows limited non-farm

³⁶ 1 ANDERSON'S AMERICAN LAW OF ZONING § 1.13 (4th ed. 1996) [hereinafter 1 ANDERSON'S]. The legal power for local governments to establish zoning comes through the states' plenary power under the Tenth Amendment and state enabling statutes that grant implementation authority to their local political subdivisions. See U.S. CONST. amend. X; Charles W. Abdalla & John C. Becker, *Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game?*, 3 DRAKE J. AGRIC. L. 7, 15 (1998).

³⁷ HAMILTON & ANDREWS, *supra* note 28, at 2.

³⁸ See John M. Hartzell, *Agricultural and Rural Zoning in Pennsylvania: Can You Get There from Here?*, 10 VILL. ENVTL. L.J. 245, 258 (1999); Reinert, *supra* note 5, at 1704. Local units of government use zoning because it is inexpensive to implement and provides great flexibility to respond to changing land use patterns. DANIELS & BOWERS, *supra* note 6, at 106.

³⁹ DANIELS & BOWERS, *supra* note 6, at 106; Popp, *supra* note 5, at 371, 381. Other land use planning implementation techniques, such as agricultural districts, were also created to aid in the preservation of farmland. E. F. ROBERTS, *THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND* 73-76 (1982). Agricultural districts generally offer farmland owners protection from nuisance suits in exchange for an agreement to restrictions on converting the land to non-farm uses. *Id.* State law enables the availability of agricultural districting while actual districts are created locally by the petition of farmers and the approval of the local governing body, such as a county board of supervisors. *Id.*

⁴⁰ Popp, *supra* note 5, at 381.

⁴¹ Hartzell, *supra* note 38, at 258; Zoning & Land Use Controls, *supra* note 3, § 56.01[3]. Placing land in an agricultural zone is based on the concept of identifying the highest and best use for that land and protecting prime agricultural soils. See MICH. TOWNSHIPS ASS'N, *THE TOWNSHIP GUIDE TO PLANNING AND ZONING* 204 (1998) [hereinafter TOWNSHIP GUIDE].

⁴² DANIEL R. MANDELKER, *LAND USE LAW* § 12.10 (3d ed. 1993).

⁴³ Hartzell, *supra* note 38, at 259; Zoning & Land Use Controls, *supra* note 3, § 56.02. Because it places significant limitations on the use of land, exclusive zoning is least likely to withstand a legal challenge and is, therefore, rarely used. Popp, *supra* note 5, at 382. Typical permitted uses include agriculture, forestry, farm dwellings, nurseries and greenhouses, wildlife refuges, and fish hatcheries. DANIELS & BOWERS, *supra* note 6, at 112.

development but requires large lot sizes.⁴⁴ This approach is designed to retain parcels in acreages ample enough for agricultural operations while keeping the cost of such parcels high enough to discourage the construction of single homes upon them.⁴⁵ Another method of non-exclusive agricultural zoning is an area-based allocation, which limits development based on the total size of the parcel.⁴⁶

Unfortunately, zoning can be unpopular with farm owners because it imposes restrictions on the use of their land.⁴⁷ Farmers typically place a high value on the right to use their property as they see fit, particularly when they wish to sell it.⁴⁸ Nevertheless, zoning represents a constitutionally valid restriction on property rights that has been demonstrated to minimize the conflicts between incompatible land uses.⁴⁹

Because land use controls are outside the domain of the federal government, the loss of agricultural lands to development is perceived as primarily a state and local problem.⁵⁰ While zoning is an authority

Special exceptions or conditional uses include roadside stands for farm product sales, temporary housing for farm workers, accessory housing, feedlots, farm-related businesses, home occupations, churches, and schools. *Id.*; see also MICH. TOWNSHIPS ASS'N, SAMPLE ZONING ORDINANCE AND PROCEDURE FOR ADOPTION 9 (rev. 1990) [hereinafter SAMPLE ZONING ORDINANCE]; Hartzell, *supra* note 38, at 259.

⁴⁴ Hartzell, *supra* note 38, at 259; Zoning & Land Use Controls, *supra* note 3, § 56.02[1].

⁴⁵ Hartzell, *supra* note 38, at 259; Zoning & Land Use Controls, *supra* note 3, § 56.02[1]. The disadvantage of using large lot sizes is that in many areas ten-acre parcels are still sufficiently inexpensive to purchase for the location of a single house, which removes the acreage from agricultural production and leaves most of it unused. See REDFIELD, *supra* note 9, at 102; Wyckoff, *supra* note 17, at 11-13.

⁴⁶ Hartzell, *supra* note 38, at 259. Area-based allocation uses a fixed system or sliding scale system. *Id.* at 260. A fixed system allows one dwelling per a specified acreage amount. *Id.* A sliding scale system provides for a number of dwelling units per acre that decreases as the size of the parcel increases. *Id.* Other methods of agricultural zoning include conditional use zoning, quarter/quarter zoning, percent of land zoning, and limiting the number of subdivisions. *Id.* at 261; see also MANDELKER, *supra* note 42, § 12.11.

⁴⁷ Popp, *supra* note 5, at 381.

⁴⁸ *Id.*

⁴⁹ *Id.* Zoning has been challenged on constitutional grounds under the Due Process, Equal Protection, and Takings Clauses. *Id.*

⁵⁰ Hartzell, *supra* note 38, at 247. In the 1970s, Congress tried unsuccessfully to pass legislation for national land use planning. Popp, *supra* note 5, at 376. However, the federal Tax Reform Act of 1976 provides farm owners a special use valuation to reduce estate tax liability and defer tax payments for five years after a farm owner's death if the Act's restrictions are met. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2032A, 90 Stat. 1856 (amend. 1978, 1981). Additionally, the Farmland Protection Policy Act of 1981 was enacted for the purpose of minimizing the impact of federal programs on farmland conversion. See 7 U.S.C. §§ 4201-4209 (2000); see also DANIELS & BOWERS, *supra* note 6, at 75-85.

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granted to local governments through state enabling legislation, the states created an additional tool for farmland preservation by establishing right to farm statutes.⁵¹

B. *The Advent of Right to Farm Laws*

Most states enacted right to farm statutes between 1978 and 1983, and currently all fifty states have some type of right to farm legislation in place.⁵² The acts were adopted for the purpose of protecting farmland from the threats of residential development moving outward from urban areas into traditionally rural areas.⁵³ Right to farm laws shield

⁵¹ MANDELKER, *supra* note 42, § 12.09.

⁵² See ALA. CODE § 6-5-127 (1993); ALASKA STAT. § 09.45.235 (Michie 2000); ARIZ. REV. STAT. ANN. § 3-112 (West 1995); ARK. CODE ANN. §§ 2-4-101 to -107 (Michie 1996); CAL. CIV. CODE §§ 3482.5-6 (West 1997); COLO. REV. STAT. ANN. §§ 35-3.5-101 to -103 (1998); CONN. GEN. STAT. ANN. § 19a-341 (West 1997); DEL. CODE ANN. tit. 3, § 1401 (1993); FLA. STAT. ANN. § 823.14 (West 2000); GA. CODE ANN. § 41-1-7 (1997); HAW. REV. STAT. §§ 165-1 to -6 (1993); IDAHO CODE §§ 22-4501 to -4504 (2000); 740 ILL. COMP. STAT. ANN. 70/1-5 (West 1993 & Supp. 1998); IND. CODE ANN. § 34-19-1-4 (West 1999); IOWA CODE ANN. § 352.11 (West 2000); KAN. STAT. ANN. §§ 2-3201 to -3203 (1991); KY. REV. STAT. ANN. § 413.072 (Banks-Baldwin 1991); LA. REV. STAT. ANN. §§ 3:3601-3612 (West 1987 & Supp. 2001); ME. REV. STAT. ANN. tit. 17, § 2805 (West 1983 & Supp. 2001); MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (1998); MASS. GEN. LAWS ANN. ch. 243, § 6 (West Supp. 2001); MICH. COMP. LAWS ANN. §§ 286.471-474 (West 1996 & Supp. 2001); MINN. STAT. § 561.19 (2000); MISS. CODE ANN. § 95-3-29 (1994); MO. ANN. STAT. § 537.295 (2000); MONT. CODE ANN. § 27-30-101(3) (2001); NEB. REV. STAT. §§ 2-4401 to -4404 (1997 & Supp. 2000); NEV. REV. STAT. 40.140(2) (1996 & Supp. 1999); N.H. REV. STAT. ANN. §§ 432:32-35 (1991 & Supp. 2001); N.J. STAT. ANN. §§ 4:1C-1 to 1C-10 (West 1998 & Supp. 2001); N.M. STAT. ANN. §§ 47-9-1 to -7 (Michie 1995); N.Y. AGRIC. & MKTS. LAW §§ 308, 308-a (McKinney Supp. 2001); N.C. GEN. STAT. §§ 106-700 to -701 (1999); N.D. CENT. CODE §§ 42-04-01 to -05 (1999 & Supp. 2001); OHIO REV. CODE ANN. § 929.04 (West 1994); OKLA. STAT. tit. 50, § 1.1 (2000 & Supp. 2002); OR. REV. STAT. §§ 30.930-947 (1999); 3 PA. CONS. STAT. ANN. §§ 951-957 (West 1995 & Supp. 2001); R.I. GEN. LAWS §§ 2-23-1 to -7 (1998); S.C. CODE ANN. §§ 46-45-10 to -60 (Law. Co-op. 1987 & Supp. 2000); S.D. CODIFIED LAWS §§ 21-10-25.1-.6 (Michie Supp. 2001); TENN. CODE ANN. §§ 43-26-101 to -104 (2000); TEX. AGRIC. CODE ANN. §§ 251.001-.006 (West 1982 & Supp. 2001); UTAH CODE ANN. §§ 78-38-7 to -8 (1996); VT. STAT. ANN. tit. 12, §§ 5751-53 (Supp. 2001); VA. CODE ANN. §§ 3.1-22.28-.29 (Michie 1994); WASH. REV. CODE ANN. §§ 7.48.300-310 (West 1992 & Supp. 2001); W. VA. CODE §§ 19-19-1 to -5 (2001); WIS. STAT. § 823.08 (1994 & Supp. 2001); WYO. STAT. ANN. §§ 11-44-101 to -103 (Michie 2001). Only eight right to farm statutes were enacted after 1983. Reinert, *supra* note 5, at 1707. Oregon, in 1993, was the last state to pass right to farm legislation. OR. REV. STAT. §§ 30.930-947 (1999).

⁵³ See Reinert, *supra* note 5, at 1695; Zoning & Land Use Controls, *supra* note 3, § 56.03[2][a]. In 1981, the NALS recommended state legislation in response to what it deemed a national crisis in farmland preservation and the lack of federal action to address it. See NALS, *supra* note 5. Reported cases do not support the assumption that right to farm laws were enacted in response to any increase, particularly a large one, in the number of nuisance cases being filed. See Reinert, *supra* note 5, at 1715. Furthermore, the NALS was greatly criticized by

agricultural operations from both private and public nuisance lawsuits.⁵⁴ This strategy is based on the belief that it is unfair for people to move next to an existing farm operation and then have it declared a nuisance.⁵⁵ Complaints are typically related to odor, dust, smoke, noise, flies, slow-moving equipment, pesticide drift or other use of farm chemicals, purported water contamination, aesthetic concerns, and farm activities that generate traffic, such as roadside produce stands.⁵⁶ Most nuisance suits are filed by people who believe that they have a legitimate complaint; however, others rise to the level of harassment or threats.⁵⁷ Nuisance law was developed as a worthwhile protection of property

some, using other evidence that suggested a farmland crisis did not exist. *Id.* at 1716; see also *supra* note 5 and accompanying text.

⁵⁴ See Hartzell, *supra* note 38, at 248-49; Reinert, *supra* note 5, at 1695, 1712. A nuisance is an activity that unreasonably and substantially interferes with another's quiet use and enjoyment of property. HAMILTON & ANDREWS, *supra* note 28, at 2. The concept is based on two underlying legal principles: first, the right to use and enjoy property free of unreasonable interference, and, second, the right to use property without injury to others. *Id.* Whether the potential nuisance is unreasonable or substantial depends on the facts of each case, state statutory definitions, and common law precedent. *Id.* Nuisance law was used as early as the fifteenth century to resolve conflicts arising from the location of hog farms. Reinert, *supra* note 5, at 1699; see also *supra* note 33 and accompanying text. Traditional nuisance law is based on the concept of property as a natural right that is independent of legal or social institutions. Reinert, *supra* note 5, at 1699-1700. Modern nuisance law replaces this value judgment with an economic efficiency analysis or a balancing of the activity's value against its resulting harm. *Id.* at 1700. Nuisance suits are either private, brought by an individual such as a neighbor, or public, brought by government officials representing the public in response to a public safety issue or common property interest. HAMILTON & ANDREWS, *supra* note 28, at 30. Examples of public suits are pollution of the water supply or the flooding of numerous properties. *Id.* Public nuisance law, which provided protection of public health and welfare and natural resources, was the precursor to modern environmental laws. *Id.* Right to farm laws do not shield farm operations from applicable environmental laws. *Id.* Additionally, right to farm statutes that prevent nuisance suits do not preclude legal actions based on theories of trespass, tort, or interference with business activities. *Id.* at 4.

⁵⁵ HAMILTON & ANDREWS, *supra* note 28, at 6. Known as "coming to the nuisance," this approach provided little or no relief for those who had moved next to an existing nuisance. Reinert, *supra* note 5, at 1700-01. Superior rights were afforded to the farmer who was there first. HAMILTON & ANDREWS, *supra* note 28, at 6.

⁵⁶ HAMILTON & ANDREWS, *supra* note 28, at 2. Odors emanate from animal wastes at their source, in collection sites, or disposed of or used on farmland; dust arises from field tillage; smoke is discharged from burning crop residues or trash; noise from livestock or machinery is considered unwelcome because of its volume or the time of day; flies surround animal waste or certain production; appearance concerns relate to the outside storage of farm machinery or dilapidated buildings. *Id.* Water pollution will usually be considered a trespass, not a nuisance. *Id.*

⁵⁷ *Id.* at 3, 5. Whether legitimate or intended to harass, most farm nuisance suits arise where people live and, therefore, often involve an emotional response and may be very intense. *Id.* at 5.

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rights because, without it, the actions of nearby owners could make a property unlivable.⁵⁸ However, nuisance law can also restrict important economic activities by forcing landowners to either stop the offending activity or incur the heavy costs of defending lawsuits or paying damages.⁵⁹ It was this threat to the viability of agricultural operations that prompted the passage of right to farm laws.⁶⁰

Right to farm laws vary by state but share many common characteristics.⁶¹ All of the statutes include operations in the production of agricultural products, such as crops and livestock.⁶² Most right to farm laws protect agricultural operations regardless of size.⁶³ Many states limit application of right to farm laws to operations already in existence for some period of time, unless a significant change in the operation warrants starting the period anew.⁶⁴ One type of right to farm legislation, like the Michigan statute, provides that a farm will not be found to be a nuisance if it is being operated within sound agricultural practices, either reasonably or non-negligently.⁶⁵ Some states even

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* Remedies involve either an injunction to cease the activity in question or damages to compensate for any steps necessary to minimize the impact or reduction in property value. *Id.* at 4. An activity that is legal or licensed by the state can still be declared a nuisance. *Id.* at 3. Right to farm laws do not protect nuisances created by negligence. *Id.*

⁶⁰ See REDFIELD, *supra* note 9, at 97-98.

⁶¹ See *supra* note 53 and accompanying text.

⁶² See Reinert, *supra* note 5, at 1708. An Indiana case extended right to farm protection to a bleach manufacturer. See Erbrich Prod. Co., Inc. v. Green, 509 N.E.2d 850 (Ind. Ct. App. 1987). A Mississippi case found that right to farm protection could extend to a paper mill. See Leaf River Forest Prod., Inc. v. Ferguson, 662 So. 2d 648 (Miss. 1995). In contrast, the Michigan Court of Appeals held that the production of wood pallets does not constitute a farm product under the Michigan Right to Farm Act. See Richmond Township v. Erbes, 489 N.W.2d 504, 510 (Mich. Ct. App. 1992). The court reasoned that the vast majority of the wood did not originate from the defendants' property and the pallets were only assembled on the farm. *Id.* The court stated that to give the words "any other product which incorporates the use of food, feed, fiber, or fur" the broad meaning argued by the defendants would allow practically anyone to claim protection under the act when constructing, for example, flooring or furniture, which are arguably products incorporating fiber. *Id.* at 510-11 ("Statutes are to be construed to avoid absurd or unreasonable results.").

⁶³ See Reinert, *supra* note 5, at 1709.

⁶⁴ See *id.* at 1710, 1712.

⁶⁵ Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 106 (1998); Reinert, *supra* note 5, at 1712. All fifty states' right to farm laws reference some type of reasonableness standard in determining which activities are protected. HAMILTON & ANDREWS, *supra* note 28, at 12. In thirty-one states, the courts must determine what is reasonable. *Id.* In thirteen of these states, the statutes refer to "generally accepted agricultural practices" but provide no further definition, and, in the other eighteen states, the statutes provide a procedure for determining reasonableness. *Id.* Nine of the states

award farm owners the costs of defending a suit if successful.⁶⁶ Many right to farm statutes also inhibit local governments from enacting ordinances that zone out farms or that make certain agricultural practices a nuisance per se.⁶⁷

It is not possible to determine how many nuisance suits have been prevented by right to farm laws, but there is general agreement among commentators that such legislation is an important tool in protecting and preserving agriculture.⁶⁸ The greatest impact of right to farm laws is thought to be from "setting the tone" by placing a public priority on agriculture.⁶⁹ Right to farm laws put suburbanites on notice that their rights may be subordinated to existing farm operations.⁷⁰ Right to farm laws also protect economic investments and provide certainty for agricultural operators.⁷¹

C. New Challenges - Intensive Livestock Operations

Drafters of right to farm legislation, however, could not have anticipated the changes in the agricultural industry that created new challenges for statutory solutions to farmland preservation.⁷² Agricultural operations are becoming more intensive in order to stay

providing a procedure, including Michigan, establish regulations that specifically define reasonableness or outline an administrative procedure for making the determination. *Id.*; see also CONN. GEN. STAT. ANN. § 19a-341 (West 1997); KAN. STAT. ANN. § 2-3202 (1991); ME. REV. STAT. ANN. tit. 17, § 2805 (West 1983 & Supp. 2001); MICH. COMP. LAWS. ANN. § 286.472 (West 1996); N.J. STAT. ANN. §§ 4:1C-10, 4:1C-26 (West 1998 & Supp. 2001); N.Y. AGRIC. & MKTS. LAW § 308 (McKinney Supp. 2001); OHIO REV. CODE ANN. § 3767.13(D) (West 1998); OKLA. STAT. ANN. tit. 50, § 1.1 (West 2000 & Supp. 2002); TENN. CODE ANN. § 43-26-103 (2000).

⁶⁶ See Hartzell, *supra* note 38, at 249; Reinert, *supra* note 5, at 1695, 1712.

⁶⁷ Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 157 (1983). Such a provision does not prevent administrative actions or citizen suits to enforce applicable environmental laws. HAMILTON & ANDREWS, *supra* note 28, at 4.

⁶⁸ Hamilton, *supra* note 65, at 104.

⁶⁹ HAMILTON & ANDREWS, *supra* note 28, at 15.

⁷⁰ Hamilton, *supra* note 65, at 104.

⁷¹ HAMILTON & ANDREWS, *supra* note 28, at 30. Large corporations benefit from uniformity and stability in government policies and regulations because it reduces uncertainty and costs. Abdalla & Becker, *supra* note 36, at 11-12. This is particularly important to corporations whose facilities span jurisdictional boundaries or are located in numerous jurisdictions. *Id.* at 11. There is also an argument for the economic benefit of a level playing field among competitors. *Id.* at 12. Government stability is essential to the sizeable investments needed for large-scale facilities, which often depend on outside investors who seek an appropriate level of investment risk. *Id.* at 29.

⁷² See Patricia E. Norris, *Townships Can Plan for Animal Agriculture*, MICH. TOWNSHIP NEWS, July 1999, at 11-12.

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profitable while costs of capital are soaring.⁷³ Of the nearly two million farms in the United States, the top twenty percent produce ninety percent of all farm output.⁷⁴ One reflection of this change in the agricultural industry is the growth in the number of concentrated animal feedlot operations (CAFO).⁷⁵ CAFOs are currently considered an agricultural use for both zoning and right to farm laws.⁷⁶

CAFOs are becoming the standard in the hog industry.⁷⁷ Swine production now uses vertical integration, a system in which a farmer contracts with a large corporation in the hog processing industry to breed, feed, and house the corporation's hogs.⁷⁸ The farmer usually must mortgage other assets, such as home and property, to get the financing, often from the corporation, to buy the sizeable confinement barns and other necessary equipment.⁷⁹ This approach integrates one corporate entity "from feed supplier, to production facility, through processing, and finally to wholesale."⁸⁰ As a result of the increased intensity, the traditional family farm becomes much more akin to a very large industrial processing facility.⁸¹

⁷³ *Id.* at 12 ("The greatest factor driving the movement toward larger farm size has been the introduction of new technologies that are more cost-effective when used on a large scale.").

⁷⁴ DANIELS & BOWERS, *supra* note 6, at 11.

⁷⁵ Norris, *supra* note 72, at 11.

⁷⁶ FREILICH, *supra* note 5, at 288.

⁷⁷ Norris, *supra* note 72, at 12.

⁷⁸ John D. Burns, Comment, *The Eight Million Little Pigs-A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. 851, 854 (1996). Prior to vertical integration, hog farmers raised a much smaller number of swine, which were sold to a local market co-operative. Norris, *supra* note 72, at 12. In 1995, seventy percent of hog farmers were independent; by 2001, eighty-three percent were under contract with a meat packer. Wayne Falda, *The Changing Times in Agriculture*, S. BEND TRIB., May 19, 2001, at B7.

⁷⁹ Burns, *supra* note 78, at 854.

⁸⁰ *Id.* The advantages of CAFOs are reduced costs, greatly increased production, and higher product uniformity. *Id.* Less labor-intensive and more centralized, CAFOs represent a challenge for the traditional independent grower who is potentially unable to survive the current economic pressures of high feed prices and low wholesale value. *Id.* at 857.

⁸¹ See Jerome M. Organ & Kristin M. Perry, *Controlling Externalities Associated with Concentrated Animal Feeding Operations: Evaluating the Impact of H.B. 1207 and the Continuing Viability of Zoning and the Common Law of Nuisance*, 3 MO. ENVTL. L. & POL'Y REV. 183, 185 (1996). Experts predict the demise of the family farm, due to the expansion of large hog facilities, as the farmer becomes merely a worker for a "megacorporation that controls the food supply, huge acreages of land, and the people they employ." *Id.* Some existing farm owners are expanding their operations or forming cooperatives in order to compete. *Id.* However, the recent depressed hog market may force many of these owners to seek a more attractive economic option in selling their land to the corporations. *Id.*

In CAFOs, hogs are grown inside large barns with floors that allow the manure to fall through and be periodically discharged to an outdoor lagoon.⁸² The manure is kept in the lagoon until it can be used as fertilizer.⁸³ The odors from swine production facilities are primarily from manure decomposition in the lagoons, which is more offensive than the odor of fresh manure.⁸⁴ When later used as fertilizer, the waste is applied using sprinkler systems that put ammonia gas into the air.⁸⁵ Water pollution problems arise when run-off and seepage of nutrients and chemicals flow into surface water and groundwater from leaks in the lagoons, overflowing of the lagoons, or applications of fertilizer.⁸⁶ Studies indicate an increasing destruction of plant and animal life from such pollution.⁸⁷

The potential for agricultural pollution expands in relation to the growing magnitude of animal feedlots as previous methods of waste management are unable to keep pace with the volume of waste produced.⁸⁸ The problem of hog odor did not start with large-scale operations, but the concentration of large numbers of animals affects a much larger geographic area than small operations did.⁸⁹ Additionally, the environmental impacts from hog waste are much better understood

⁸² *Id.* at 184-85. Each hog produces four times the waste of a human. Burns, *supra* note 78, at 852.

⁸³ Organ & Perry, *supra* note 81, at 185.

⁸⁴ *Id.*

⁸⁵ Burns, *supra* note 78, at 860; Organ & Perry, *supra* note 81, at 185.

⁸⁶ Burns, *supra* note 78, at 860. Agriculture is the primary source of water quality impairment in various water bodies in the United States. Terence J. Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 COLUM. J. ENVTL. L. 219, 223 (2000) (noting that over seventy percent of impaired river miles and forty-nine percent of water quality problems in lakes, other than Great Lakes, are attributable to agriculture); *see also* Burns, *supra* note 78, at 860 (stating that federal, state, and local studies have found agriculture to be the United States' greatest source of nonpoint pollution, representing more than half of the pollutants that enter the nation's rivers and lakes). For more information on nonpoint pollution, *see infra* note 95.

⁸⁷ Burns, *supra* note 78, at 863.

⁸⁸ *Id.* at 860-61. The most well-known example of CAFOs' potential impact is the 1995 North Carolina spill in which twenty-five million gallons of excrement burst from a broken dam out of an eight-acre manure lagoon into the New River. *Id.* at 851. Running two-feet deep for two hours and more than twice the size of the Exxon Valdez spill, it killed virtually all aquatic life in a seventeen-mile stretch of the river. *Id.* Additional spills in North Carolina that summer resulted from significant increases in livestock numbers along with heavy rains. *Id.* In 1993, cattle farm and slaughterhouse run-off was thought to be the source of the contamination in Milwaukee's water supply, which killed several people and sickened between 183,000 and 281,000. *Id.* at 859-60.

⁸⁹ *See* Organ & Perry, *supra* note 81, at 186.

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than in the past.⁹⁰ Therefore, many recognize that modern animal feedlot operations create more conflicts with neighboring property owners than traditional family farms did due to their more intensive nature.⁹¹

The government is responding to this growing concern.⁹² In 1999, the United States Department of Agriculture and the United States Environmental Protection Agency issued a Unified National Strategy for Animal Feeding Operations regarding run-off water pollution and other public health impacts.⁹³ The effort signaled the federal government's awareness of the problem but provided no new federal regulations nor a substitute for existing federal regulations.⁹⁴ The federal Clean Water Act generally regulates the discharge of pollutants into waters from sources including CAFOs.⁹⁵ Nonetheless, no federal law or regulation, including the Clean Water Act and the Clean Air Act, addresses the issue of odor.⁹⁶

State governments have also responded to increasing public concern about CAFOs where the hog industry is already located or is expanding.⁹⁷ Some states, such as Missouri and Kansas, have pursued legislative amendments that dictate better measures to prevent releases

⁹⁰ *Id.*

⁹¹ See Norris, *supra* note 72, at 11-12.

⁹² In addition to government response, some of the same attorneys who sued tobacco companies may join forces to deluge the swine industry with lawsuits in order to curtail the associated pollution. *Big City Attorneys Attack Hog Farming*, DETROIT NEWS, Dec. 23, 2000, at 10C.

⁹³ U.S. DEP'T OF AGRIC. & U.S. ENVTL. PROTECTION AGENCY, UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS (1999) [hereinafter STRATEGY]. The strategy provides a set of guiding principles for further government activity with mandatory and voluntary programs related to poultry, pork, and dairy operations. *Id.* President Clinton proposed the strategy as legislation, which would have required compliance by 2003 for the largest livestock facilities and compliance by 2008 for smaller operations. See FREILICH, *supra* note 5, at 288.

⁹⁴ See STRATEGY, *supra* note 93.

⁹⁵ Organ & Perry, *supra* note 81, at 186-87. Most animal feedlot operations are not CAFOs and fall under the definition of nonpoint source pollution in the Clean Water Act. See 33 U.S.C. §§ 1251-1387 (1994). Nonpoint source pollution is defined as "without a single point of origin," such as run-off from agricultural areas, urban areas, and forestry operations. Centner, *supra* note 86, at 224-25. Nonpoint pollution of all types accounts for seventy-six percent of lake pollution and sixty-five percent of stream pollution. Burns, *supra* note 78, at 867. While nonpoint source pollution is covered by the Clean Water Act, the Act provides the EPA with almost no power to enforce the provisions of nonpoint pollution control. *Id.* The EPA has the authority for enforcement of effluent limitations and mandating discharge permits for point sources. *Id.*

⁹⁶ Organ & Perry, *supra* note 81, at 187.

⁹⁷ See, e.g., KAN. STAT. ANN. § 65-171d (West 1992 & Supp. 2000); MO. ANN. STAT. §§ 640.700-.755 (2000).

of hog waste into bodies of water.⁹⁸ Also, out of concern for water quality, North Carolina enacted a statute that requires farms to prove they are safe before they receive a permit necessary to operate.⁹⁹ Kansas and Oklahoma adopted provisions for public notice regarding location of a CAFO.¹⁰⁰ To minimize the impact of odors on residents near CAFOs, Missouri's statute imposes buffer zones.¹⁰¹ Minnesota also addressed air quality concerns when its legislature ordered development of a compliance monitoring plan to enforce the ambient hydrogen sulfide standard at feedlots across the state.¹⁰² In January 1999, the first action under the new mandate transpired when the Minnesota Pollution Control Agency assessed a penalty for air pollution against a hog feedlot.¹⁰³

In Michigan, the lack of a state response to CAFOs prompted numerous local governments to hurriedly adopt ordinances and zoning ordinance amendments to control or preclude the location or expansion of CAFOs.¹⁰⁴ Some of these measures prohibited CAFOs altogether,

⁹⁸ KAN. STAT. ANN. § 65-171d (West 1992 & Supp. 2000); MO. ANN. STAT. §§ 640.700-755 (2000). Kansas now requires permitting, separation distances between the facilities and surface waters, manure management plans, and nutrient utilization plans. See Dustin W. Mullin, Note, *Old McDonald Had a Government-Regulated-Confined-Swine-Operation; A Substitute for H.B. 2950*, 38 WASHBURN L.J. 655, 663-75 (1999). Other provisions in the legislation include lagoon closure permitting, emergency response plans, operator certification, odor control plans, inspection guidelines, and the proper handling of dead swine. *Id.* at 675-76.

⁹⁹ N.C. GEN. STAT. § 106-805 (1999).

¹⁰⁰ KAN. STAT. ANN. § 65-171d (West 1992 & Supp. 2000); OKLA. STAT. tit. 2, § 9-205.1 (West Supp. 2002).

¹⁰¹ MO. ANN. STAT. §§ 640.700-755 (2000).

¹⁰² See Trevor Oliver, Comment & Note, *Fighting Corporate Pigs: Citizen Action and Feedlot Regulation in Minnesota*, 83 MINN. L. REV. 1893, 1894 (1999).

¹⁰³ *Id.*

¹⁰⁴ *Belvidere Township v. Heinze*, 615 N.W.2d 250 (Mich. Ct. App. 2000); see *infra* notes 157-67 and accompanying text (discussing *Heinze*); see also *Schoolcraft Egg v. Schoolcraft Township*, No. 216268, 2000 WL 33409627 (Mich. Ct. App. Aug. 11, 2000) (remanding for further consideration a local zoning ordinance that limited the number of animal units as a potential regulatory taking due to necessary economies of scale and a violation of substantive due process and equal protection because the number of units did not bear a rational relationship to a legitimate governmental purpose); Sue Stuever Battel, *Farmer Calls for Right-to-Farm Law Change*, MICH. FARM NEWS, Aug. 15, 1999, at 1 (reporting on a \$58,000 civil judgment entered against a dairy and hog farm found in violation of a township ordinance that prohibited obnoxious glare, dust, odors, fumes, and smoke from leaving property lines). The award of damages was overturned on appeal, and the case was remanded because the court held that if the ordinance was found to be violated, the only remedy available was an abatement of the nuisance. *Travis v. Preston*, 635 N.W.2d 362, 370 (Mich. Ct. App. 2001). In a July 2000 case, the United States Court of Appeals affirmed a district court decision and held that a local zoning ordinance that limited the number of

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while others provided for significant setback distances from other land uses.¹⁰⁵

III. LOCAL CONTROL AND THE RIGHT TO FARM IN MICHIGAN

This Part reviews Michigan's tradition of local government control as provided in the state's original Right to Farm Act and as generally upheld by Michigan courts prior to the 1999 amendment.¹⁰⁶ In addition, this Part discusses the 1999 amendment to Michigan's Right to Farm Act and the first relevant appellate court case, which presented a fact pattern typical of the situation that the amendment sought to address.¹⁰⁷ Michigan's Right to Farm Act originally respected local land use control through zoning, and, with one exception, the courts interpreted it as such.¹⁰⁸ For twenty years, this balance of power provided agricultural operations protection from private nuisance suits but did not allow farm owners to use the Right to Farm Act as a defense to local governments' enforcement of zoning ordinances.¹⁰⁹ In response to a growing number of conflicts over concentrated animal feedlots and an increasing number

animal-unit equivalencies for livestock based on waste odor production did not violate substantive or procedural due process. *Richardson v. Township of Brady*, 218 F.3d 508 (6th Cir. 2000). A zoning ordinance does not violate substantive due process where there is a rational relationship between the provisions of the ordinance and a legitimate government purpose. *Id.* at 513. The court dismissed the due process challenge because the plaintiff did not establish the existence of a protected property interest. *Id.* at 518. The decision did not contemplate the right to farm statute. *Id.* at 510; *see also* James R. Brown & Daniel C. Brubaker, *Court Upholds Validity of Zoning Ordinance Regulating Intensive Livestock Operations*, MICH. TOWNSHIP NEWS, July 1999, at 16 (discussing the district court decision in *Richardson v. Township of Brady*).

¹⁰⁵ *See generally supra* note 104. Properly sited buildings with enough setback distance to allow the atmosphere to dilute odor is one very effective odor control strategy. A. J. Heber, *Setting a Setback*, NAT'L HOG FARMER, Jan. 30, 1998, available at 1998 WL 15097368. Determining setbacks for livestock facilities is a very difficult and complicated statistical endeavor. *Id.* The repercussions from swine odor depend on highly variable factors, such as odor production at the facility, odor transport between the facility and its neighbors, and odor tolerance by the neighbors. *Id.* A one-size-fits-all setback tends to meet the needs of the worst odor emission problem, the worst dispersion characteristics, and the most sensitive neighborhoods. *Id.* The American Society of Agricultural Engineers recommends setbacks of one mile from housing developments and one-quarter to one-half mile from neighboring residences. *Id.* Other engineers recommend one-quarter mile setbacks in all directions from neighboring residences and a one-half mile setback for units with more than 1000 pigs. *Id.* Several states have incorporated setbacks into their environmental regulations. *Id.*

¹⁰⁶ *See infra* Part III.A.

¹⁰⁷ *See infra* Part III.B.

¹⁰⁸ MICH. COMP. LAWS § 286.473a (repealed 1999); *Northville Township v. Coyne*, 429 N.W.2d 185 (Mich. Ct. App. 1988).

¹⁰⁹ *See infra* notes 117-26 and accompanying text.

of local governments acting to minimize the impact on their communities, the Michigan legislature amended the Right to Farm Act in 1999 to pre-empt local zoning control.¹¹⁰

A. Local Government Control

The cities, villages, and townships of Michigan have traditionally been vested with local governance, including the authority to adopt and implement zoning ordinances.¹¹¹ Local governments in the United States are creatures of the states and, as such, depend on state legislation to authorize their incorporation and define their authority.¹¹² In the early 1900s, some states adopted a new form of legislation known as “home rule,” which allowed local governments broad power to adopt ordinances without state intervention but subject to state statutes and constitutions.¹¹³ In 1908, Michigan became the seventh state to adopt home rule for its cities and villages.¹¹⁴ Although home rule status is not afforded to Michigan townships, they are similarly endowed by the state constitution as a separate municipal entity with powers to govern.¹¹⁵

¹¹⁰ MICH. COMP. LAWS ANN. §§ 286.471-.474 (West 1996 & Supp. 2001); see also David Bertram, *The Right to Farm Act and Local Zoning Often Conflict*, MICH. TOWNSHIP NEWS, July 1999, at 17.

¹¹¹ The Michigan Constitution provides for the formation and operation of counties, townships, cities, and villages. MICH. CONST. art. VII, §§ 17, 22, 34 (1963); see also MICH. COMP. LAWS ANN. §§ 125.271-.310 (West 1997 & Supp. 2001) (township zoning enabling statute); MICH. COMP. LAWS ANN. §§ 125.581-.600 (West 1997 & Supp. 2001) (city and village zoning enabling statute).

¹¹² MICHIGAN MUNICIPAL LAW § 1.01 (Fred S. Steingold & John L. Etter eds., 1980). Local governments are legally termed municipal corporations, which are public corporations formed by charter, legislative act, court order, or election to implement the government for a particular geographic area and its inhabitants. *Id.* The authority of local governments in the United States has been strictly construed according to Dillon’s Rule. *Id.* Their powers included only “those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objectives and purpose of the corporation — not simply convenient but indispensable.” J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 173 (1872).

¹¹³ MICHIGAN MUNICIPAL LAW, *supra* note 112, § 1.01. States may also remove specific powers unless to do so would be in violation of the United States Constitution. *Id.* § 1.04.

¹¹⁴ MICH. CONST. art. VII, §§ 20-25 (1908). The Michigan Supreme Court has found that the home rule authority of cities and villages is to be construed liberally. See, e.g., *People v. Sell*, 17 N.W.2d 193 (Mich. 1945). Thirty-five states now have home rule legislation. MICHIGAN MUNICIPAL LAW, *supra* note 112, § 1.06.

¹¹⁵ MICH. CONST. art. XI, § 2 (1850). The authority of townships has been recognized by the Michigan Supreme Court. See *Baxter v. Robertson*, 23 N.W. 711, 711 (Mich. 1885) (recognizing that townships are separate municipal entities with such powers and immunities as prescribed by law).

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The specific authority to enact and enforce zoning ordinances was granted to cities, villages, and townships by state enabling legislation.¹¹⁶

The Michigan courts' inconsistent decisions regarding local zoning authority and the state's Right to Farm Act foreshadowed the need for legislative intervention.¹¹⁷ In 1988, a Michigan Court of Appeals case allowed a barn, which was built in violation of a local zoning ordinance, to survive a nuisance challenge from the township by holding that the Right to Farm Act was a valid defense.¹¹⁸ The court reasoned that the legislature's concern with local governments' regulation of land use and its impact on farming operations prompted enactment of the Right to Farm Act to protect farmers from the threat of extinction from nuisance suits under alleged violations of zoning ordinances.¹¹⁹

In 1990, the Court of Appeals held that the Right to Farm Act was not a valid defense to a nuisance suit by a township against expansion of a nonconforming use in violation of the township's zoning ordinance.¹²⁰

¹¹⁶ MICH. COMP. LAWS ANN. § 125.201 (West 1997) (enabling zoning by counties for unincorporated areas without zoning); MICH. COMP. LAWS ANN. § 125.271 (West 1997) (granting townships the authority to be exempt from county zoning by enacting their own); MICH. COMP. LAWS ANN. § 125.581 (West 1997) (granting zoning authority to cities and villages). Zoning is a police power derived from the state. See 1 ANDERSON'S, *supra* note 36, §§ 2.01, 7.01. In 1920, the Michigan Supreme Court held that neither the Michigan Constitution nor statutes authorized zoning ordinances. *Clements v. McCabe*, 177 N.W. 722, 725 (Mich. 1920). The zoning enabling acts were enacted in response to this ruling. MICHIGAN MUNICIPAL LAW, *supra* note 112, § 15.06.

¹¹⁷ See *infra* notes 118-26 and accompanying text.

¹¹⁸ *Northville Township v. Coyne*, 429 N.W.2d 185, 187 (Mich. Ct. App. 1988). The barn, used for storage of farm machinery and implements, seeds, supplies, and produce, was built on farmland that had been in agricultural production since at least the early 1970s. *Id.* at 186-87. Because it had been erected without a building permit, the township notified the defendant of the need to apply for a permit and a zoning variance because the barn was an accessory use in the front yard. *Id.* Both applications were denied. *Id.* The defendants were told to raze the barn, and, when they refused, the township got a demolition order from the circuit court. *Id.* at 186.

¹¹⁹ *Id.* at 187. Even where its language is ambiguous, the primary rule in interpreting a statute is to ascertain and give effect to the legislative intent or general purpose sought to be accomplished by the legislature. *Vill. of Peck v. Hoist*, 396 N.W.2d 536, 537 (Mich. Ct. App. 1986). Construction of the barn was found to be in conformance with "generally accepted agricultural and management practices." *Northville Township*, 429 N.W.2d at 187. The court's decision leaves it unclear whether the state's GAAMPs were specifically being cited or whether it referenced a more general concept. *Id.* The court did not address the Right to Farm Act as a valid defense in relation to the township building code because the trial court did not reach this issue. *Id.*

¹²⁰ *Jerome Township v. Melchi*, 457 N.W.2d 52, 54 (Mich. Ct. App. 1990). The property had been zoned residential since 1965, when the ordinance was enacted. *Id.* at 53. The defendant established a commercial apiary with a swarm of over 1.5 million bees and

Although generally used as a farm prior to enactment of the zoning ordinance, the defendant's beekeeping operation did not then exist, and the court reasoned that the Right to Farm Act was not intended to protect expansion of nonconforming uses.¹²¹ In 1997, the court likewise declared that the Right to Farm Act was not a defense to a cause of action to enforce a zoning ordinance because the language of the statute does not affect the application of state statutes, including the Township Rural Zoning Act.¹²²

A trial court decision against a Branch County farm family drew attention to the growing conflict between local ordinances and agricultural operations.¹²³ The Preston brothers, operators of a 4000-head hog facility that opened in 1997, were ordered to pay a \$58,000 judgment to neighbors for violation of a township ordinance prohibiting "obnoxious" glare, dust, odors, fumes, and smoke from leaving property lines.¹²⁴ Precisely to avoid potential odor problems, the farm had followed an extensive manure management plan that was developed with the advice of state agricultural experts.¹²⁵ The potential negative impact on agriculture from local ordinances is further illustrated by the

engaged in retail sales of related products. *Id.* Neither such use was allowed in a residential zone. *Id.* Although the existing agricultural operation of fruit and vegetable crops was allowed as a nonconforming use, the expansion of a nonconforming use is greatly limited, and its continuation must be substantially within the same size and essential nature as the use existing at the enactment of the zoning ordinance. *Id.* at 54. The court found the apiary to be a change in the essential nature of the use. *Id.* The purpose of restrictions on the expansion of nonconforming uses is to achieve their gradual and eventual elimination. *Id.*; see also *Norton Shores v. Carr*, 265 N.W.2d 802 (Mich. 1978); *City of Madison Hgts. v. Manto*, 102 N.W.2d 182 (Mich. 1960).

¹²¹ *Jerome Township*, 457 N.W.2d at 55.

¹²² *City of Troy v. Papadelis*, 572 N.W.2d 246, 250 (Mich. Ct. App. 1997). The use of a residential parcel for ancillary operations of a nursery (including storage, display of farm products, and parking for customers and employees) was found to be a nonconforming use because no commercial activity took place there before the defendant's purchase of it in 1974. *Id.* at 250. The defendant owned an additional parcel, also zoned residential, which was a valid nonconforming use as a greenhouse in agricultural use since 1939. *Id.* at 248. The ordinance was enacted in 1956. *Id.*; see also MICH. COMP. LAWS ANN. §§ 125.271-.310 (West 1997 & Supp. 2001) (Township Rural Zoning Act).

¹²³ *Battel*, *supra* note 104, at 1.

¹²⁴ *Id.* The award of damages was overturned on appeal, and the case was remanded because the court held that if the ordinance was found to be violated, the only remedy available was an abatement of the nuisance. *Travis v. Preston*, 635 N.W.2d 362, 370 (Mich. Ct. App. 2001).

¹²⁵ See *Battel*, *supra* note 104, at 5. The plan filled a three-inch binder. *Id.*

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more than \$100,000 the Prestons incurred in legal costs to defend the lawsuit.¹²⁶

B. *The 1999 Amendment to the Michigan Right to Farm Act*

The Michigan Right to Farm Act, enacted in 1981, provides guidelines under which a farm or farm operation will not be found to be a public or private nuisance.¹²⁷ In order to have this protection, the farm must conform with certain scientifically based Generally Accepted Agricultural and Management Practices (GAAMP).¹²⁸ The GAAMPs are reviewed annually and adopted by the Michigan Commission of Agriculture.¹²⁹ Nothing in the GAAMPs forces compliance; the only enforcement mechanism is for a local government or private citizen to file a complaint.¹³⁰ Within seven days of a complaint, the Michigan Department of Agriculture conducts an on-site inspection and notifies the local government of the complaint.¹³¹ If the farm operation is found to be operating within the GAAMPs, the complainant and local

¹²⁶ See *id.*

¹²⁷ MICH. COMP. LAWS ANN. §§ 286.471-.474 (West 1996 & Supp. 2001).

¹²⁸ See David Bertram, *New Standards for Livestock Site Selection and Odor Control Restrict Township Authority*, MICH. TOWNSHIP NEWS, July 2000, at 4. The Right to Farm Act protects farm operations that existed before a change in the land use or occupancy of land within one mile of the boundaries of the farm land if, before that change, the farm would not have been a nuisance. MICH. COMP. LAWS ANN. § 286.473(3)(2) (West Supp. 1996). Protection is not forfeited by a change in ownership or size, a temporary cessation or an interruption of farming, enrollment in government programs, adoption of new technology, or a change in the type of farm product being produced. MICH. COMP. LAWS ANN. § 286.473(3)(3) (West Supp. 1996). Regardless of voluntary compliance with the GAAMPs, an agricultural operation must be in compliance with all state and federal environmental and agricultural laws. MICH. COMP. LAWS ANN. § 286.474(4)(2) (West 1996 & Supp. 2001); see also MICH. COMP. LAWS ANN. §§ 324.101-90106 (West 1999 & Supp. 2001) (containing applicable provisions of the natural resources and environmental protection act).

¹²⁹ The Michigan Commission of Agriculture sets policy for the Michigan Department of Agriculture, which is the official state agency charged with serving, promoting, and protecting the food, agriculture, and agricultural economic interests of the people of the State of Michigan. Press Release, Michigan Department of Agriculture, State Ag Director Reports Site Selection, Odor Control GAAMPs Committee Making Good Progress (Apr. 10, 2000) (on file with author).

¹³⁰ MICH. COMP. LAWS ANN. § 286.474 (West 1996 & Supp. 2001); Bertram, *supra* note 128, at 4. The Act defines complaints as 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. MICH. COMP. LAWS ANN. § 286.474(4)(1). Michigan's non-mandatory compliance differs from other states that use GAAMPs as required environmental protection measures. See KAN. STAT. ANN. § 47-1505 (2000); ME. REV. STAT. ANN. tit. 17 § 2805 (West 1983 & Supp. 2001); HAMILTON & ANDREWS, *supra* note 28, at 18.

¹³¹ MICH. COMP. LAWS ANN. § 286.474 (West 1996 & Supp. 2001).

government are notified in writing.¹³² If the farm operation is found to be operating outside the GAAMPs, the farm operator is advised of the changes necessary to resolve or abate the problem.¹³³ The person responsible for the farm has thirty days to make the changes or submit an implementation plan with a schedule.¹³⁴ Even then, the only penalty for noncompliance is the risk of a nuisance suit.¹³⁵

Currently, Michigan has six sets of GAAMPs to define farm operators' roles and responsibilities.¹³⁶ They address manure management and utilization, pesticide utilization and pest control, nutrient utilization, care of farm animals, cranberry production, and, the most recent, site selection and odor controls at new and expanding animal livestock facilities.¹³⁷ All of the GAAMPs were developed by

¹³² MICH. COMP. LAWS ANN. § 286.474(4)(3).

¹³³ MICH. COMP. LAWS ANN. § 286.474(4)(3).

¹³⁴ MICH. COMP. LAWS ANN. § 286.474(4)(3).

¹³⁵ MICH. COMP. LAWS ANN. § 286.474; Bertram, *supra* note 128, at 4.

¹³⁶ Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for the Care of Farm Animals (June 2001); Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for Cranberry Production (Mar. 2000); Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for Manure Management and Utilization (Dec. 2000); Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for Nutrient Utilization (Dec. 2000); Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for Pesticide Utilization and Pest Control (Jan. 2001); Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for Site Selection and Odor Control for New and Expanding Livestock Production Facilities (July 2001) [hereinafter GAAMPs for Site Selection].

¹³⁷ MICH. COMP. LAWS ANN. § 286.474(4)(8) (West 1996 & Supp. 2001). Manure management and utilization GAAMPs were first adopted in June 1988 to address barnyard run-off control, odor management, manure storage facility design, and manure application to land. Mich. Dep't of Agric., *The Right to Farm Act Affects Everyone*, at <http://www.mda.state.mi.us/right2farm/farm.htm> (last visited April 15, 2002) [hereinafter MDA]. Pesticide utilization and pest control GAAMPs, first adopted in 1991, address worker safety, application procedures, transportation, storage, disposal of unused pesticides and containers, and record keeping with emphasis on using pesticides only as needed to achieve desired crop quality and yield with minimal affects to people, non-target organisms, and the environment. *Id.* Nutrient utilization GAAMPs concern on-farm fertilizer storage and containment, land application of fertilizer, soil conservation, irrigation management, and container-grown (greenhouse) plants. *Id.* GAAMPs addressing the care of farm animals, adopted in 1995, cover eighteen species of animals and nutrition, manure management and sanitation, animal handling and restraint, transportation, facilities and equipment, health care and medical procedures, and recommendations for the environment. *Id.* Cranberry GAAMPs were developed in 1996 because, as a wetland crop, cranberry production needs specific practices for sound pesticide utilization and pest control, nutrient utilization, and other technical management practices to minimize environmental risks. *Id.*

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committees of scientific experts at Michigan State University with input from the public and various stakeholders representing state and local government and the agricultural industry.¹³⁸ The purpose of each of the GAAMPs is to provide a balance of sound environmental protection measures and economically feasible agricultural practices for livestock and crop production.¹³⁹

In 1995, the legislature first amended the Right to Farm Act to expressly provide that agricultural operations were subject to local zoning ordinances.¹⁴⁰ In 1999, Public Act 261, which took effect on March 10, 2000, repealed that provision and provided express legislative intent that the Act pre-empt any conflicting local ordinance, regulation, or resolution.¹⁴¹ The amendment does provide a mechanism by which a local government may submit for approval by the Michigan Department

¹³⁸ See MDA, *supra* note 137.

¹³⁹ *Id.* The GAAMPs for site selection add social considerations, i.e., neighbor relations, as a primary objective. See GAAMPs for Site Selection, *supra* note 136, at 1.

¹⁴⁰ MICH. COMP. LAWS ANN. § 286.473a (repealed 1999).

¹⁴¹ MICH. COMP. LAWS ANN. § 286.474(6) (West 1996 & Supp. 2001).

Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act pre-empt any local ordinance, regulation or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural 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 GAAMPs developed under this act.

Id. Let Local Votes Count, a statewide petition drive, successfully placed a proposal on the November 7, 2000, election ballot to amend the Michigan Constitution to protect the home rule authority of the state's cities, villages, and townships. Patricia McAvoy, *Is a Constitutional Amendment Needed to Save Local Control?*, MICH. TOWNSHIP NEWS, June 2000, at 4. The amendment was defeated by a sixty-seven percent to thirty-three percent margin. *Voters Decisively Refuse to Take Clout Away from Legislature*, GRAND RAPIDS PRESS, Nov. 8, 2000, at A21. If passed, the amendment would have required a two-thirds vote, instead of a simple majority, of each chamber of the legislature on any bill that restricted, pre-empted, or diminished any existing local government authority. *Id.* The ballot proposal's language applied to laws enacted on or after March 1, 2000. *Id.* The measure would not have affected the Right to Farm amendment because it was enacted on December 28, 1999, although it did not take effect until March 10, 2000. Letter from Ingrid Sheldon, Chair, Let Local Votes Count, to Michigan Township Supervisors (April 19, 2000) (on file with author). The Michigan Municipal League, representing cities and villages, supported the measure, while the Michigan Townships Association opposed it due to its potential restraining effects on legislation that would be favorable to townships, particularly funding. *MTA Board Opposes Ballot Proposal 00-2*, CAPITOL CURRENTS (Mich. Townships Ass'n, Lansing, Mich.), Sept. 2000, at 1. The Michigan Townships Association prefers to maintain local control through its traditional advocacy activities and member support of specific legislation. *Id.* at 3.

of Agriculture a proposed ordinance to address specified local impacts on the environment or public health.¹⁴² A local government could also duplicate the language of the GAAMPs for its ordinance.¹⁴³ The amendment to the Right to Farm Act came directly in response to the number of local governments that were passing ordinances designed to severely limit the development of intensive livestock operations.¹⁴⁴

The amendment also required development of new GAAMPs, effective June 1, 2000, for site selection and odor control at new and expanding livestock facilities.¹⁴⁵ These GAAMPs identify site setback distances, review procedures, and notification requirements within three categories and based on the number of animal units.¹⁴⁶ Category One sites are those traditionally used for agriculture and located in an area of relatively low residential density.¹⁴⁷ In this category, 50 to 499 animal units requires that the facility be set back a minimum of 250 feet from the property line, 500 to 999 animal units requires a minimum 400-foot setback, and 1000 or more animal units requires a minimum 600-foot setback.¹⁴⁸ In Category Two are sites where limitations by environmental, social, or economic conditions require, and can be mitigated by, development of a site plan and a manure management system plan.¹⁴⁹ Setbacks in Category Two range from 250 feet for less than 250 animal units to 600 feet for 1000 or more animal units where six to twenty non-farm residences are within a half mile.¹⁵⁰ Category Three sites are those that exceed the maximum number of nearby non-farm residences in Category Two, are within a wetland, or are on a flood

¹⁴² MICH. COMP. LAWS ANN. § 286.474(4)(7) (West 1996 & Supp. 2001).

¹⁴³ *New Livestock GAAMPs Implemented*, CAPITOL CURRENTS (Mich. Townships Ass'n, Lansing, Mich.), July 2000, at 2.

¹⁴⁴ See *supra* notes 104-05 and accompanying text.

¹⁴⁵ MICH. COMP. LAWS ANN. § 286.474(8) (West 1996 & Supp. 2001). The GAAMPs for site selection were subsequently revised and reissued in July 2001. GAAMPs for Site Selection, *supra* note 136.

¹⁴⁶ See GAAMPs for Site Selection, *supra* note 136, at 5-9. The defined animal units are based on federal guidelines. See 40 C.F.R. § 122.23 (2001).

¹⁴⁷ See GAAMPs for Site Selection, *supra* note 136, at 5. Low-density residential is defined as five or fewer non-farm residences within one-quarter mile from a livestock production facility with less than 1000 animal units or one-half mile from a facility with more than 1000 animal units. *Id.*

¹⁴⁸ *Id.* at 6. The actual number of hogs is 2.5 times higher than the number of animal units. *Id.* at 5. For example, 50 animal units is the equivalent of 125 hogs, 500 animal units is 1250 hogs, and 1000 animal units is 2500 hogs. *Id.*

¹⁴⁹ *Id.* at 7. The limitations are not defined nor are examples provided. *Id.*

¹⁵⁰ *Id.*

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plain.¹⁵¹ In Category Three, new facilities are prohibited, but expanding livestock production facilities are acceptable in residential zones, areas of high public use, and wellhead protection areas if odor control technologies and agricultural management practices are adequate.¹⁵²

A facility with the lowest range of animal units in Categories One and Two is subject to Michigan Department of Agriculture (MDA) review of its plans only upon the operator's request.¹⁵³ All other ranges of animal units in Categories One and Two require MDA review of the operator's plans.¹⁵⁴ Notification to the local unit of government is required for all new and expanding facilities.¹⁵⁵ The GAAMPs also state that new and expanding livestock production facilities *should* not (not *shall* not) be constructed in areas where local zoning does not allow for agricultural uses.¹⁵⁶

In 2000, a case was heard by the Michigan Court of Appeals that illustrates the conflict between farm operators and local governments desiring to regulate concentrated animal feedlots.¹⁵⁷ In 1997, Gregory Heinze bought thirty-five acres of land in Belvidere Township on which he planned to raise between 6000 and 7000 hogs.¹⁵⁸ At that time, the township's zoning ordinance did not restrict large-scale livestock operations.¹⁵⁹ In 1998, the township passed a revised zoning ordinance, which provided that any livestock operation in excess of 200 animal units operating for more than forty-five days required a special use

¹⁵¹ *Id.* at 8. A wetland is defined under Michigan's Natural Resources and Environmental Protection Act. See MICH. COMP. LAW ANN. § 324.30301 (West 1999).

¹⁵² GAAMPs for Site Selection, *supra* note 136, at 8-9. Control technologies can include filtering, manure storage covers, and composting. *Id.* at 3. New facilities shall not be constructed within 1500 feet of areas zoned residential where agricultural uses are excluded, but expanding facilities are permissible with local government approval. *Id.* at 7. High public use areas are defined as within 1500 feet of hospitals, churches, licensed commercial elder or child care facilities, school buildings, parks, or campgrounds. *Id.* at 9. Expansion of animal facilities in high public use areas is acceptable upon MDA review. *Id.* A wellhead protection area is defined as one with a ten-year time-of-travel zone as established under the Michigan Safe Drinking Water Act. See MICH. COMP. LAWS ANN. §§ 325.1001-.1023 (West 1999). Expanding facilities are permitted in wellhead protection areas upon review of the local government administering the Wellhead Protection Program. GAAMPs for Site Selection, *supra* note 136, at 8.

¹⁵³ See GAAMPs for Site Selection, *supra* note 136, at 6-7.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 8.

¹⁵⁷ *Belvidere Township v. Heinze*, 615 N.W.2d 250 (Mich. Ct. App. 2000).

¹⁵⁸ *Id.* at 252.

¹⁵⁹ *Id.*

permit as a "concentrated livestock operation."¹⁶⁰ Mr. Heinze refused to apply for a special use permit and continued to develop his operation.¹⁶¹ In response, the township filed a nuisance suit seeking an injunction.¹⁶² Mr. Heinze argued, as an affirmative defense, that the ordinance violated the Michigan Right to Farm Act and asserted, as a counterclaim, that he had a legal nonconforming use.¹⁶³ The trial court granted summary judgment in favor of Mr. Heinze, reasoning that the operation was a legal nonconforming use established prior to the adoption of the ordinance.¹⁶⁴ On appeal by the township, the Michigan Court of Appeals reversed the trial court's decision and held that Mr. Heinze had failed to establish a legally cognizable pre-existing nonconforming use because the activities he completed prior to the enactment of the ordinance were "merely preliminary in nature."¹⁶⁵ After finding that the operation was not a nonconforming use, the court addressed a potential defense under the Right to Farm Act.¹⁶⁶ The court found that, at the time the case was decided, the Michigan Right to Farm Act did not exempt farming operations from local zoning ordinances; therefore, the court remanded

¹⁶⁰ *Id.* Under the township's ordinance, one hog is equal to 0.40 animal units, and, therefore, 480 hogs would be a concentrated livestock operation. *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* Mr. Heinze also failed to seek the required building permit. *Id.* A preliminary injunction was granted barring Mr. Heinze from any further excavation or construction. *Id.*

¹⁶³ *Belvidere Township v. Heinze*, 615 N.W.2d 250, 252 (Mich. Ct. App. 2000). A prior nonconforming use is a vested right in the use of a particular property that does not conform to zoning restrictions but is protected because it lawfully existed before the zoning regulation's effective date. *Heath Township v. Sall*, 502 N.W.2d 627 (Mich. 1993).

¹⁶⁴ *Belvidere Township*, 615 N.W.2d at 252. The trial court, prior to the 1999 amendment to the Michigan Right to Farm Act, found that the zoning ordinance was not pre-empted by the Right to Farm Act, nor did the Act exempt Mr. Heinze from complying with the zoning ordinance. *Id.*

¹⁶⁵ *Id.* at 254. To constitute a legally cognizable nonconforming use, work of a substantial nature beyond mere preparation must materially and objectively change the land itself. *Id.* at 253 (citing *Heath Township*, 502 N.W.2d at 627). Mr. Heinze argued that he established a nonconforming use by purchasing the land, hiring a designer for the farm and manure pits, obtaining quotes for the buildings and materials, entering into contracts with suppliers, purchasing insurance, grading the site, staking the location of the barns and manure pits, applying for well and sediment control permits, constructing the manure pits and sewage system, and installing an access road and culvert. *Id.* The court found that, of these activities, only the construction of the manure pits and sewage system was relevant, and, in considering the total construction of a large-scale hog operation, the activities were preliminary and did not change the substantial character of the land. *Id.* at 254.

¹⁶⁶ *Id.*

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the case for further consideration under the 1999 Amendment to the Right to Farm Act.¹⁶⁷

A Michigan Court of Appeals decision in August 2001 further complicated the impact of the amended Right to Farm Act.¹⁶⁸ In considering whether the Right to Farm Act provided a defense to a nuisance suit against a swine operation, the court found that the amendment could not be applied retroactively without the express intent of the legislature.¹⁶⁹ At the time that the trial court action was decided, the Act did not pre-empt local zoning ordinances, such as the one under which the nuisance suit was brought.¹⁷⁰ The court remanded the case for analysis under the statute as it existed prior to the amendment.¹⁷¹ The decision left unclear whether the court's finding that the amendment does not have retroactive application pertains only to suits filed prior to the amendment's effective date, or whether it will also sustain local ordinances that existed prior to the amendment.

IV. ANALYSIS OF THE MICHIGAN RIGHT TO FARM ACT AMENDMENT

To address the conflict between the Right to Farm Act and local zoning ordinances, the state legislature can select one of three approaches to the problem: the Right to Farm Act can provide no restraints on local control, the Right to Farm Act can preclude all local action, or the Right to Farm Act can achieve a balance between state and local interests.¹⁷² The preservation of agriculture, including large-scale animal feedlots, would appear to justify a change in Michigan's right to farm legislation from its existing restraint on local control. This Part assesses the difficulties created by the 1999 amendment to the Michigan

¹⁶⁷ *Id.* at 254-55. Upon remand, no further action was pursued in the trial court. Telephone Interview with Montcalm County Circuit Court Clerk (Feb. 8, 2001).

¹⁶⁸ *Travis v. Preston*, 635 N.W.2d 362 (Mich. Ct. App. 2001).

¹⁶⁹ *Id.* at 365-67. "There is nothing in the language of the RTFA suggesting a legislative intent that M.C.L. § 286.474(6) be retroactively applied. . . . In fact, the amended language . . . explicitly states that the RTFA will pre-empt any local ordinance . . . '[b]eginning June 1, 2000.'" *Id.* at 366.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 367-69.

¹⁷² See Abdalla & Becker, *supra* note 36, at 15 (discussing conflicts between any higher or lower levels of government). No federal constitutional protection is recognized by the courts under equal protection or due process rights for local governments fending off incursions by state government. *Id.* at 19. Any grant of authority by the state to local governments can be general, specific, or implied. *Id.* The outcome of a conflict between two spheres of governmental authority is often more reflective of a desired solution to the substantive problem rather than a strict consideration of the authority to act. *Id.* at 15.

Right to Farm Act and the state's pre-emption of local control, which did not provide an effective solution to the problem.¹⁷³

The principle weakness in the 1999 amendment to Michigan's Right to Farm Act arose, in part, because the original statute contained no statement of purpose.¹⁷⁴ The Act left the courts without guidance as to whether the legislature intended to protect agricultural operations from all nuisance actions or only from the threats posed by increasing residential development in rural areas.¹⁷⁵ In *Steffens v. Keeler*,¹⁷⁶ the Michigan Court of Appeals found it irrelevant that a hog farm was developed after the plaintiffs established their residence nearby because there had been no change in the surrounding land uses.¹⁷⁷ The Right to Farm Act states that a nuisance shall not be found if the "farm operation existed before a change in land use or occupancy of land within one mile of the boundaries of the farm land."¹⁷⁸ By this language, it might be

¹⁷³ See *infra* notes 174-226 and accompanying text.

¹⁷⁴ See MICH. COMP. LAWS ANN. §§ 286.471-.474 (West 1996 & Supp. 2001).

¹⁷⁵ See Reinert, *supra* note 5, at 1718 (discussing the difficulties in judicial interpretation that render protection too broadly where it is not triggered only where there are changed conditions in the vicinity or "coming to the nuisance"); see also *supra* note 55 and accompanying text. Twenty-five other states' right to farm statutes contain no statement of purpose. See ALA. CODE § 6-5-127 (1993); ALASKA STAT. § 09.45.235 (Michie 2000); ARIZ. REV. STAT. ANN. § 3-112 (West 1995); CAL. CIV. CODE §§ 3482.5-.6 (West 1997); COLO. REV. STAT. ANN. § 35-3.5-102 (1998); CONN. GEN. STAT. ANN. § 19a-341 (West 1997); DEL. CODE ANN. tit. 3, § 1401 (1993); IOWA CODE ANN. § 352.11 (West Supp. 2000); ME. REV. STAT. ANN. tit. 17, § 2805 (West 1983 & Supp. 2001); MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (1998); MASS. GEN. LAWS ANN. ch. 243, § 6 (West Supp. 2001); MINN. STAT. § 561.19 (2000); MISS. CODE ANN. § 95-3-29 (1994); MO. ANN. STAT. § 537.295 (2000); MONT. CODE ANN. § 27-30-101(3) (2001); NEB. REV. STAT. §§ 2-4401 to -4404 (1997 & Supp. 2000); NEV. REV. STAT. § 40.140(2) (1996 & Supp. 1999); N.H. REV. STAT. ANN. §§ 432:32-35 (1991 & Supp. 2001); N.Y. AGRIC. & MKTS. LAW §§ 308, 308-a (McKinney Supp. 2001); N.D. CENT. CODE §§ 42-04-01 to -05 (1999 & Supp. 2001); OHIO REV. CODE ANN. § 929.04 (West 1994); OKLA. STAT. tit. 50, § 1.1 (2000 & Supp. 2002); TENN. CODE ANN. §§ 43-26-101 to -104 (2000); UTAH CODE ANN. §§ 78-38-7 to -8 (1996); WYO. STAT. ANN. §§ 11-44-101 to -103 (Michie 2001). Although they create fewer interpretation problems, statutes with a provision for protection only where changed conditions exist are subject to litigation to determine what constitutes changed conditions. See Reinert, *supra* note 5, at 1721.

¹⁷⁶ 503 N.W.2d 675 (Mich. Ct. App. 1993).

¹⁷⁷ *Id.* at 677. The plaintiffs moved into their house in 1985, while two years later the defendants relocated to the vacant house and dairy barn across the street and began a hog farm. *Id.* at 676-77. The trial court found in favor of the plaintiffs. *Id.* at 677. In addition to the change in use finding, the appellate court found the trial court in error because, after development and implementation of a waste utilization plan, the defendants were deemed by the Michigan Department of Agriculture to be in compliance with the GAAMPs. *Id.* The court also refused to consider the trial court's factual finding of nuisance due to the protection of the Right to Farm Act. *Id.* at 678.

¹⁷⁸ MICH. COMP. LAWS ANN. § 286.473(3)(2) (West 1996).

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inferred that the Right to Farm Act was intended to protect agricultural operations from new residents who move next to a farm with knowledge of its existence.¹⁷⁹ However, the court construed this provision of the statute to require a general change in land use within one mile rather than any change in land use or occupancy.¹⁸⁰ Under this interpretation, if no general change in land use is apparent, the statute precludes any legal remedy for existing residents when an agricultural operation locates next door.¹⁸¹ Without a statement of purpose in the Right to Farm statute, it is impossible to ascertain whether the legislature intended this result.

By not protecting existing residents from new agricultural operations, the Michigan Right to Farm Act dismisses the traditional justification of "coming to the nuisance" for prohibiting nuisance suits.¹⁸² When introduced, right to farm legislation was allowed to usurp an individual's right to bring a nuisance action based on the reasoning that it was unfair to allow those who "came to the nuisance" to enjoy a greater right than an established agricultural operation.¹⁸³ Under *Steffens*, however, Michigan's Right to Farm Act protects agricultural operations regardless of whether the complainants just arrived or already had a vested interest in their location.¹⁸⁴ Therefore, local zoning and other ordinances, prior to the 1999 amendment, were the only mechanisms for safeguarding the interests of existing residents.¹⁸⁵ The amendment's

¹⁷⁹ See *supra* note 55 and accompanying text.

¹⁸⁰ *Steffens*, 503 N.W.2d at 677-78.

¹⁸¹ In *Steffens*, the land was zoned agricultural/residential. *Id.* at 677. This designation is commonly used by local governments where non-agricultural residential uses have already been allowed to develop, or where they intend to allow future development in expectation that their community is becoming more residential than agricultural. See MICH. ST. UNIV. EXTENSION, *supra* note 27, at 3-16. This classification is very problematic because it creates unrealistic expectations among new residents about the current nature of the area, it provides agriculture no protection, and it contributes to a mistaken belief that agricultural uses are completely compatible with residential uses. *Id.*; see also SAMPLE ZONING ORDINANCE, *supra* note 43.

¹⁸² See *supra* note 55 and accompanying text.

¹⁸³ See *supra* notes 54-55 and accompanying text.

¹⁸⁴ See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing "property for personhood" theories and property rights favoring those with higher personal value and less fungible interest in property). Property for personhood is when one's identity is linked to maintaining a relationship with the property. *Id.* For application of this theory to agriculture and right to farm laws, see Reinert, *supra* note 5, at 1729-33.

¹⁸⁵ See Abdalla & Becker, *supra* note 36, at 10-11 (discussing the mobility of citizens as an influence on government decision making). If already residing in a particular location, it is not easy to "vote with one's feet" and relocate. *Id.* Additionally, because local control is pre-empted by state-wide legislation, it provides no true choice among jurisdictions, which

preclusion of local control is particularly disturbing for residents given that today's "new" farms are likely to be CAFOs.¹⁸⁶

The next most critical weakness in the amendment to Michigan's Right to Farm Act is that it treats CAFOs as agricultural operations rather than industrial operations.¹⁸⁷ Large-scale hog facilities do not manifest the same characteristics as a traditional family farm and merit little of the protection necessary to smaller operations.¹⁸⁸ The Right to Farm law is neutral on its face, but in practice it overprotects industrial-scale feedlots because the size of the operations determines which are most likely to generate nuisance complaints.¹⁸⁹ Case law reveals that livestock operations, not crop farms, are the target of most nuisance suits in the United States, and most actions are brought by long-time rural residents rather than the new suburbanites.¹⁹⁰ The Michigan Right to Farm Act was drafted twenty years ago when established family farms were being threatened by encroaching suburbanization.¹⁹¹ The 1999

might provide different levels of protection among which potential residents could choose.
Id.

¹⁸⁶ See MICH. AGRIC. STATISTICS SERV., MICHIGAN AGRICULTURAL STATISTICS 62 (2000). From 1995 to 1999, the total number of hog operations in Michigan declined from 4700 to 2000. *Id.* This change reflected a decrease in the number of smaller operations while the number of larger operations increased. *Id.* The number of operations with under 100 hogs went from 3200 to 1100, the number of operations with 100 to 499 hogs went from 1000 to 500, but the number of operations with 2000 to 4999 hogs went from 100 to 130, and the number of operations with over 5000 hogs went from 30 to 40. *Id.*; see also Norris, *supra* note 72, at 12 (discussing the movement toward larger farms with higher animal densities and regional clustering of animal production close to other economic opportunities, such as processing plants or growing market areas).

¹⁸⁷ See *supra* notes 82-91 and accompanying text.

¹⁸⁸ See *Durham v. Britt*, 451 S.E.2d 1 (N.C. Ct. App. 1994), *appeal denied*, 456 S.E.2d 828 (N.C. 1995); Burns, *supra* note 78, at 881 (discussing a North Carolina case in which the appellate court refused to apply the Right to Farm Act to a contract hog farm due to its fundamentally different nature of agricultural activity as previously protected by the Act). Experts also acknowledge that traditional zoning ordinances with a single agricultural district do not address the disparate effects of crop and animal agriculture and suggest use of a multi-tiered agricultural zoning system to distinguish operations by size and nature of the operation. MICH. ST. UNIV. EXTENSION, *supra* note 27, at 4-5.

¹⁸⁹ See Hamilton, *supra* note 65, at 112 (basing this conclusion on the logical application of more manure means more smell and more environmental impact).

¹⁹⁰ See Reinert, *supra* note 5, at 1715. Evidence suggests that urbanization is actually lending more political support to farmland measures. *Id.* at 1716 (referencing an Iowa survey that showed metropolitan area residents are more concerned than farmers about land use issues). Livestock operations, particularly hog farms, are most likely to use right to farm acts as an affirmative defense. *Id.* at 1725. It is likely that livestock operations also represent the greatest informal use of right to farm protection, i.e., suits are not even filed. *Id.* at 1727. However, there is no way to measure this effect. *Id.*

¹⁹¹ MICH. COMP. LAWS ANN. § 286.471 (West 1996); see also *supra* notes 5-9 and accompanying text.

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amendment, however, shields the new CAFOs, which are as threatening to rural quality of life as any other intensive industry.¹⁹² In fact, this change in Michigan's law may attract even more industrial-scale operations as other hog-producing states are enacting more rigorous regulation of CAFOs.¹⁹³ The amendment may also insulate large corporate operations from internalizing the costs of reducing nuisances through technology or buffer zones.¹⁹⁴ The industrialization of agriculture may be creating as many agricultural land use conflicts in rural areas as the encroaching urbanization.¹⁹⁵ Farmers are as much opposed to industrial-scale hog operations as other residents, in part because CAFOs are often owned by outside investors or corporations.¹⁹⁶ In consideration of the industrial nature of CAFOs, Michigan's Right to Farm Act amendment affords such operations too much protection without local control.

¹⁹² See Burns, *supra* note 78, at 881; Reinert, *supra* note 5, at 1722. Minnesota right to farm laws expressly identify large hog (over 1000 animals) and cattle (over 2500 animals) operations as not deserving protection. Reinert, *supra* note 5, at 1709-10. Kentucky's Attorney General issued an opinion in 1997 that, given the experience of North Carolina, industrial-scale hog operations met neither the reasonable nor prudent standard under Kentucky's right to farm law and, therefore, were not protected. 97 Ky. Op. Att'y Gen. 31 (1997); see Hamilton, *supra* note 65, at 112, 118 (arguing caution against protective economic legislation where technology and attitudes are changing rapidly); see also *supra* note 88 (discussing the North Carolina experience).

¹⁹³ House Action on SB 205 Stalled, CAPITOL CURRENTS (Mich. Townships Ass'n, Lansing, Mich.), Nov. 1999, at 1 [hereinafter *House Action*]. Michigan is the only state in Region 5 of the United States Environmental Protection Agency (EPA) that does not require permits for CAFOs. *Id.* Region 5 encompasses Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. U.S. Env'tl. Prot. Agency, About EPA, at <http://www.epa.gov/epahome/aboutepa.htm> (last visited Apr. 15, 2002). As of November 1999, Michigan had 125 animal feedlot operations considered CAFOs under EPA guidelines. *Id.* The EPA defines a CAFO as containing over 1000 animal units, which is the equivalent of 2500 hogs, 1000 beef cows, 750 dairy cows, or 100,000 chickens. *Id.*; see also *supra* notes 97-103 and accompanying text (discussing other states' legislative actions in response to CAFOs).

¹⁹⁴ Reinert, *supra* note 5, at 1722. This effect would result in a regressive subsidy as costs would be externalized against neighbors in the form of a nuisance. *Id.*

¹⁹⁵ Jonathan Kalmakoff, "The Right to Farm": A Survey of Farm Practices Protection Legislation in Canada, 62 SASK. L. REV. 225, 226 (1999). Canada, without the same residential pressures, is experiencing a similar escalation in nuisance complaints, litigation, and the use of restrictive municipal by-laws to curtail agricultural development. *Id.* These forces led to a right to farm movement in Canada in the 1990s. *Id.* All provinces but Newfoundland have now adopted right to farm legislation. *Id.* While the statutes vary by province, they provide protection from nuisance suits and, in some provinces, provide exemption from municipal by-law restrictions. *Id.*

¹⁹⁶ MICH. ST. UNIV. EXTENSION, *supra* note 27, at 1-4; Hamilton, *supra* note 65, at 112; see also *supra* notes 78-80 and accompanying text.

Because the State of Michigan does not directly regulate intensive livestock operations, the opportunity for local control provided in the original statute represented the only constraint on decisions to locate CAFOs.¹⁹⁷ The 1999 amendment, which pre-empted local control, was adopted as a reaction to a perceived shift in political influence at the local level from farmers to new residents.¹⁹⁸ Agricultural interests argued that they could be prevented from expanding or locating in an area because local governing bodies were now more likely to respond to the influence of an increasing number of new residents.¹⁹⁹ However, the amendment cannot be justified by the alleged political vulnerability of agriculture because large corporate interests either own or have a significant financial interest in the CAFOs.²⁰⁰ This corporate presence

¹⁹⁷ Brown & Brubaker, *supra* note 104, at 16 (noting that nuisance suits brought by adjoining landowners have historically been the only limitation on intensive livestock operations). In April 2001, the Sierra Club, a national environmental group, brought its first lawsuit against the Michigan Department of Environmental Quality claiming that the state agency was hindering enforcement of the federal Clean Water Act against a large dairy and beef farm by not issuing permits. Dee-Ann Durbin, *Sierra Club Sues MDEQ over Farm*, S. BEND TRIB., July 10, 2001, at D3. The Sierra Club claimed that the farm operation had repeatedly contaminated the Grand River with illegal discharge of manure and other pollutants. *Id.* Other state and national environmental groups are also criticizing the state for not issuing permits, arguing that the permits would obligate state oversight, enforcement of state laws, and public review of large agricultural operations. Malcolm Johnson, *Farm Pollution: Agricultural Waste Dispute Environmental, Political*, S. BEND TRIB., July 30, 2001, at C3. The state claims that discharge of such pollution is rare and does not pose a significant concern for Michigan's waterways. *Id.* In July 2001, a large dairy farm agreed to pay a \$28,000 fine to settle a lawsuit brought by the state Attorney General's office for a discharge in May 1999, which caused an almost total fish kill over several miles of a creek. *Michigan Settles Farm Pollution Lawsuit*, S. BEND TRIB., Aug. 1, 2001, at D4.

¹⁹⁸ See SENATE FISCAL AGENCY, SFA BILL ANALYSIS, S. 90-205, Reg. Sess., at 3 (2000) (reporting testimony from hearings of the Senate Agricultural Preservation Task Force arguing 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) [hereinafter SENATE FISCAL AGENCY]; see also MICH. ST. UNIV. EXTENSION, *supra* note 27, at 1-2, 1-4 (describing "new" rural residents as wealthier, more educated, having higher expectations for environmental protections, more politically savvy, and having no connections to or knowledge of agriculture).

¹⁹⁹ See SENATE FISCAL AGENCY, *supra* note 198, at 3. At hearings of the Senate Agricultural Preservation Task Force, many individuals, including hog farmers, expressed their belief that local ordinances were limiting economic opportunities for farm families, blocking expansion, and making it difficult to keep land in agriculture. *Id.* According to the Task Force's report, 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. *Id.*

²⁰⁰ Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 667-68 (1994) ("The integration of production agriculture into the processing and marketing phases of food and fiber production is expanding the 'industrialization' of

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represents a markedly different situation than that of the individual farmer or family farm.²⁰¹ Furthermore, the shift from local control to state authority reflects a serious imbalance because large corporations have more influence at the state level.²⁰² Political vulnerability is also a questionable justification given the traditional political power of farmers and the agricultural community.²⁰³ The Michigan amendment is actually evidence of the political power of the agricultural community and its economic interest in CAFOs.²⁰⁴ Thus, local control supplies an important counterbalance.

The Right to Farm Act's pre-emption of zoning authority prevents the promulgation of local legislation that is designed to protect the general welfare and, therefore, is counter-majoritarian.²⁰⁵ Local governments are closer to local conditions and preferences and more likely to make decisions that satisfy citizens' needs and wants.²⁰⁶ Local government officials are more responsive than lesser-known persons in the state legislature far from home.²⁰⁷ Furthermore, individuals are more likely to have influence at the local level, whereas industrial interests and organized groups are more likely to have influence at the state level.²⁰⁸ The economic benefits of industrial-scale operations are regional or greater, but the adverse impacts are felt locally.²⁰⁹

agriculture, and this expansion . . . will have a significant long-term effect on farm policy . . . the family farmer—will begin to erode.”).

²⁰¹ *Id.*; see also FREYFOGLE, *supra* note 30, at 79 (discussing the inseparable connection between the family farm and the family).

²⁰² See Abdalla & Becker, *supra* note 36, at 10 (“It is the intention of groups to move policies and decisions to higher levels to gain advantage.”).

²⁰³ Paul B. Thompson, *Globalization, Losers and Property Rights*, 9 MINN. J. GLOBAL TRADE 602, 608 (2000) (“Political theorists dating back to antiquity have argued that the loyalty of agricultural producers is crucial to the success of any regime.”).

²⁰⁴ See generally SENATE FISCAL AGENCY, *supra* note 198, at 3 (2000).

²⁰⁵ See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 931 (1988) (“The conventional response has been to look to relatively small units of government, localities, to serve as the forums for public participation.”).

²⁰⁶ Abdalla & Becker, *supra* note 36, at 10 (stating the maxim that the best government is the one closest to the people).

²⁰⁷ *Id.* at 30 (arguing that government representatives away from local communities may be influenced by non-local factors or feel other pressures).

²⁰⁸ *Id.* at 12; see also *supra* note 202.

²⁰⁹ Abdalla & Becker, *supra* note 36, at 30 (asking, “[i]s this result fair?”).

Local zoning is essential because it deals comprehensively with land uses while right to farm statutes only address resulting conflicts.²¹⁰ Right to farm legislation can supplement but not replace zoning because only zoning prevents or minimizes conflicts.²¹¹ Disallowing a nuisance suit does not prevent the conflict – it only suppresses a remedy potentially more damaging than the conflict itself.²¹² The Michigan Farm Bureau acknowledged the role of zoning in protecting agriculture through districts and setbacks for non-farm housing near agricultural uses: “We need the local government to play a role in this area because it cannot be addressed through the Right to Farm Act.”²¹³ Zoning, as part of a comprehensive land use planning effort, is important to the economic viability of farms because it also protects the location of agricultural related services and other uses important to agricultural economics.²¹⁴ Agricultural operations even benefit from certain planned urban effects, such as access to specialized markets, off-farm employment, and higher farm equity due to higher property values.²¹⁵ Zoning distinguishes industrial from agricultural uses, which allows concentrated feedlots to be treated as industrial uses and provided for accordingly.²¹⁶ Protecting industrial CAFOs through the Right to Farm Act will not protect agriculture or a rural quality of life.²¹⁷

The amendment’s pre-emption of local control through use of an administrative guidance document, the GAAMP, poses additional concerns. GAAMPs are reviewed and, potentially, amended annually.²¹⁸

²¹⁰ See Kalmakoff, *supra* note 195, at 249. Because a court will not declare a proposed use a nuisance in advance, the only way to prevent its location is through local land use controls such as zoning. See HAMILTON & ANDREWS, *supra* note 28, at 29.

²¹¹ See Kalmakoff, *supra* note 195, at 249; Reinert, *supra* note 5, at 1704. Most Canadian provinces’ right to farm legislation require compliance with municipal zoning by-laws. Kalmakoff, *supra* note 195, at 249. Some provinces go further and integrate the right to farm into provincial land use policy. *Id.* Only Ontario exempts farm operations from zoning by-laws that restrict normal farm practice. *Id.*

²¹² FREILICH, *supra* note 5, at 287 (advocating the creation of exclusive agricultural districts that prohibit all residential uses and the enforcement of relevant environmental laws).

²¹³ Jennifer Vincent, *Farmers Say Quarter-Mile Setback is Sufficient*, MICH. FARM NEWS (Mich. Farm Bureau, Lansing, Mich.), May 15, 2000, at <http://www.michiganfarmbureau.com/publications/farmnews/mfn05152000/setback.html> (last visited Apr. 18, 2002).

²¹⁴ Hamilton, *supra* note 65, at 118; see also Wyckoff, *supra* note 17, at 11 (“As more farms are divided, agricultural support services are less viable—the grain elevator, seed dealer and farm implement dealer are all increasingly at risk.”).

²¹⁵ See DANIELS & BOWERS, *supra* note 6, at 19.

²¹⁶ See generally Hamilton, *supra* note 65, at 112-13 (arguing in favor of treating large-scale animal feedlots as industrial uses).

²¹⁷ See *supra* note 192 and accompanying text.

²¹⁸ House Action, *supra* note 193, at 1.

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This could impose a burden on local governments, particularly small ones, to review and perhaps revise their ordinances annually to eliminate any conflicts.²¹⁹ Governmental officials may not even know that their ordinances are in conflict with the GAAMPs until challenged in court.²²⁰ Local governments can duplicate the GAAMPs in their ordinances, which might provide an enforcement mechanism, but most lack the resources necessary to administer such technical standards.²²¹ GAAMPs are also problematic because, to minimize the impact of CAFOs, they rely exclusively on setbacks that lack adequate scientific evidence to support the distances specified.²²² Michigan's GAAMPs were developed in part from anecdotal testimony of farmers and other industry representatives at public hearings.²²³ GAAMPs, as an administrative document, should not be used to pre-empt local control.

The importance of agriculture and the advent of large-scale concentrated animal feedlots raise numerous concerns in which both the state government and local communities must be involved.²²⁴ Michigan's local governments are responsible for land use planning, which can only be effective where citizens feel fully empowered to make decisions about their communities.²²⁵ Nevertheless, widespread land use concerns, such as pollution, usually can be better addressed at the state level.²²⁶ As a result, the Right to Farm Act should neither pre-empt nor

²¹⁹ Bertram, *supra* note 128, at 4.

²²⁰ House Action, *supra* note 193, at 1.

²²¹ Smaller local units of government probably lack the capacity to develop or implement appropriate or effective regulations. See Abdalla & Becker, *supra* note 36, at 29.

²²² See Centner, *supra* note 86, at 230 (stating that setbacks are often used because they have public support); Vincent, *supra* note 213; see also *supra* notes 105, 146-50 and accompanying text.

²²³ Vincent, *supra* note 213.

²²⁴ See FREYFOGLE, *supra* note 30, at 164 ("[T]he promotion of a healthy land will involve all levels of government.").

²²⁵ See *id.* at 129 ("Suspensions are exacerbated when land-use rules emanate from distant governments, far from the local scene, and residents rightfully wonder whether local conditions and options have been duly weighed in their formulation."). Residents need "powerful and orderly ways of organizing their efforts as a community to promote the health of their chosen natural home . . . and in defending themselves against . . . the sheer power of the commodity-focused market." *Id.* at 167.

²²⁶ *Id.* at 164-66. State involvement is essential because environmental issues, like air and watersheds, cross jurisdictional boundaries. *Id.* at 164. Higher levels of government are needed to protect local governments from outside influences, such as large corporations. *Id.* at 166. Environmental laws should be enacted at higher levels of government because local communities are hampered by the threat that businesses would relocate from their community to another and the possibility of unconstitutionally interfering with interstate commerce. *Id.*

entirely release local control, but instead should achieve a balance between state and local interests.

V. AN ALTERNATIVE AMENDMENT TO THE MICHIGAN RIGHT TO FARM ACT

By precluding local control of CAFOs, the state legislature has eroded the importance of community involvement in making sound land use choices. As the powerlessness and apathy of citizens grow, degradation of our land and other natural resources will follow as decisions will be made solely by economic interests. The solution to the conflict between local land use controls and the right to farm need not be a pre-emption of local decision making. Instead, the state has an opportunity to ensure more effective local land use planning by requiring a certain standard of planning proficiency in exchange for local control. The 1999 amendment to the Michigan Right to Farm Act should be repealed and replaced with the amendment below, which allows local zoning control if the local government follows the model planning process statute incorporated by reference.

Chapter 286. Agricultural Industry

Michigan Right to Farm Act

286.474. Environmental complaints involving farms or farm operations

Sec. 4. (6) Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act pre-empt any local ordinance, regulation, or resolution that purports to revise in any manner the provisions of this act or generally accepted agricultural management practices developed under this act. This act shall not pre-empt any ordinance, regulation, or resolution enacted, maintained, or enforced by a local unit of government that has met the requirements of the Land Health Planning Act.²²⁷

²²⁷ See *id.* at 48-51 (defining land health as “the kind of durable, flourishing, self-recreating communal life that is the mark of a lasting link between people and place”). Freyfogle posits that the goal of land health is “the well-being of the overall land community, broadly understood to include the soil, water, and air, as well as resident humans, other animals, and plants.” *Id.* at 49. Freyfogle distinguishes land health from the popular concept of sustainable development, which is advanced by many including the United Nations. *Id.* at 50. Sustainable development represents the limitless continuation and drive of human and economic activities without direct reference to or interaction with the health of ecosystems. *Id.* at 50-51. Freyfogle also argues that “[p]roperty law . . . could improve greatly if it paid

Commentary:

This revised amendment to the Michigan Right to Farm Act provides an incentive to local units of government to adopt sound land use planning techniques as set out below in the model Land Health Planning Act.²²⁸ This approach, obviously, does not guarantee that animal feedlot operations would be allowed to locate anywhere. It does, however, accomplish two goals. First, existing and future animal feedlot operations will still be protected from nuisance suits. Second, it helps achieve broader policy aspirations of more effective land use decisions and cooperation between state and local government. This mechanism helps ensure that local decisions will be made with careful, long-range thinking and solid information rather than as a knee-jerk reaction to the fears generated by the potential location of a large-scale animal production facility.

Chapter 125. Planning, Housing, and Zoning

*Land Health Planning Act*²²⁹

125.61 Local Government Plans

*Sec. 1. (1) Subject to the requirements of this chapter, a planning commission shall prepare a land health plan for the jurisdictional area of the planning commission.*²³⁰

more attention to the land and didn't focus so exclusively on the competing interests of people." *Id.* at 136.

²²⁸ This amendment would also render unnecessary the provision for submitting a local ordinance that addresses specific effects on the environment or public health to the Michigan Department of Agriculture for approval. See MICH. COMP. LAWS ANN. § 286.474(4)(7) (West 1996 & Supp. 2001).

²²⁹ Portions of this statute were adapted from House Bill 6124, the major bill in a package of bills that would have created a state land use planning act and coordinated planning process. See generally H.B. 6124, 90th Leg., Reg. Sess. (Mich. 2000). The last action on these bills was their referral to the Committee on Local Government and Urban Policy. H.R. 90-63, Reg. Sess., at 2323-24 (Mich. 2000). Using a comparable approach, the State of Wisconsin adopted a measure that provides financial assistance as an incentive to encourage comprehensive planning by local governments. See WIS. LEGIS. REFERENCE BUREAU, SMART GROWTH, Budget Brief 99-12 (1999).

²³⁰ A municipal plan adopted under this act would supersede a plan for that municipality adopted under the city and village or township planning acts. MICH. COMP. LAWS ANN. §§ 125.31-45 (West 1997); MICH. COMP. LAWS ANN. §§ 125.321-.333 (West 1997 & Supp. 2001). A county plan adopted under this act would supersede a plan for that county adopted under the county planning act. MICH. COMP. LAWS ANN. §§ 125.101-.107 (West 1997).

(2) *The purpose of a plan is to promote public health, safety, and general welfare through the creation of economically and environmentally sustainable communities whose plans are compatible with plans of other local units of government and state agencies and with plans prepared pursuant to other state enabling legislation.*²³¹ *The purpose of a plan shall also include all of the following:*

(a) *The embodiment of a common future vision of preservation, redevelopment, and new development for at least twenty years after adoption of the plan and the identification of feasible steps to achieve that vision.*

(b) *The coordinated and harmonious long-range physical, social, environmental, and economic health of the community in a fiscally sound and feasible manner in consideration of the character of each community and its suitability for particular*

²³¹ See MICH. COMP. LAWS ANN. §§ 46.351-.367 (West 1991 & Supp. 2001) (county or regional park or recreation plan adopted by a county or regional commission); MICH. COMP. LAWS ANN. §§ 124.251-.262, 124.281-.294 (West 1991 & Supp. 2001) (water supply system plan adopted by a local unit or authority); MICH. COMP. LAWS ANN. §§ 124.281-.294 (West 1991 & Supp. 2001) (sewer system or sewage disposal plan adopted by a local unit or authority); MICH. COMP. LAWS ANN. §§ 124.651-.729 (West 1991 & Supp. 2001) (capital facility or other plan prepared by a metropolitan area council); MICH. COMP. LAWS ANN. §§ 125.1231-.1237 (West 1997) (plan adopted by a county or regional economic development commission); MICH. COMP. LAWS ANN. §§ 125.1601-.1636 (West 1997) (project plan adopted by an economic development corporation); MICH. COMP. LAWS ANN. §§ 125.1651-.1681 (West 1997 & Supp. 2001) (development plan adopted by a downtown development authority); MICH. COMP. LAWS ANN. §§ 125.1801-.1830 (West 1997 & Supp. 2001) (development plan adopted by a tax increment finance authority); MICH. COMP. LAWS ANN. §§ 125.2101-.2123 (West 1997 & Supp. 2001) (comprehensive development plan under the enterprise zone act); MICH. COMP. LAWS ANN. §§ 125.2151-.2174 (West 1997 & Supp. 2001) (development plan adopted by a local development finance authority); MICH. COMP. LAWS ANN. §§ 125.2521-.2546 (West 1997) (development plan adopted by an international trade port development authority); MICH. COMP. LAWS ANN. §§ 125.2561-.2591 (West 1997) (a strategic plan under the empowerment zone development corporation act); MICH. COMP. LAWS ANN. §§ 125.2651-.2672 (West 1997 & Supp. 2001) (a brownfield plan adopted by a brownfield redevelopment authority); MICH. COMP. LAWS ANN. §§ 125.651-.709c (West 1997 & Supp. 2001) (plan adopted by a housing commission); MICH. COMP. LAWS ANN. §§ 125.71-.84 (West 1997) (blighted area rehabilitation plan); MICH. COMP. LAWS ANN. §§ 125.901-.922 (West 1997 & Supp. 2001) (development plan approved under the urban redevelopment corporations law); MICH. COMP. LAWS ANN. §§ 125.941-.952 (West 1997) (neighborhood area improvement plan); MICH. COMP. LAWS ANN. §§ 125.981-.987 (West 1997 & Supp. 2001) (plan for redevelopment of principal shopping areas); MICH. COMP. LAWS ANN. §§ 259.431-.465 (West 2001) (airport approach plan adopted by the aeronautics commission); MICH. COMP. LAWS ANN. §§ 324.11501-.11550 (West 1999) (solid waste management plan); MICH. COMP. LAWS ANN. §§ 399.201-.215 (West 1997) (plan adopted by a historic district commission).

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uses in relation to the physical features of existing buildings and landscapes in a community.

(c) Promoting land use patterns that prevent unreasonable inequities between communities, races, income groups, or generations.

(3) A land use plan shall serve as the principal general policy guide for future land use and capital facilities within the municipality or county. A land use plan shall also serve as the legal basis for zoning, land division, subdivision, condominium, redevelopment ordinances and rules, capital improvement programs, and other programs recognized in the plan as being related to the development or redevelopment of the jurisdictional area if required by law to be based on a plan.

Commentary:

This section broadly sets out the purpose of the land health plan. First, this language retains the legally recognized basis for planning and its implementation through zoning and other land use controls by promotion of the public health, safety, and general welfare. Additionally, it provides a new emphasis on the confluence of the physical, social, environmental, and economic health of the community. This section also includes recognition of the need for land use plans to be compatible with neighboring jurisdictions, state agencies, and other community planning processes.

Sec. 2. (1) A land use health plan shall address land use at least twenty years into the future and shall include all of the following elements:

(a) The arrangement of future land uses, as well as the intensity and density of such uses and the degree to which they are or are not compatible with the future land use plans and zoning regulations of adjoining jurisdictions or the management plans of state or federal agencies with public lands within the jurisdictional area. Future land uses shall be described in the text and depicted on a future land use map showing the general location and arrangement of future land uses.

(b) Maps depicting the boundaries for provision of public services by local units during the period of the plan and the

maximum density of land use based on available public services and facilities and specified level of service standards for those services and facilities.

(c) Provisions for environmental protection and management of natural resources including, but not limited to, each of the following, if it exists within the local unit: agricultural lands, forest lands, mineral resources, water quality, wetlands, flood plains, watersheds, headwater areas, coastal zones, sand dunes, areas at high risk of erosion, other sensitive areas, soil conservation, solid waste management, energy conservation, air quality, endangered or threatened species habitat, and land use related to preserving biodiversity.

(d) To the extent permissible by law, as applicable, a program for the purchase of development rights or transfer of development rights.

(e) A future transportation network, including, as appropriate, roads and streets, bridges, railroads, airports, bicycle paths, and pedestrian ways.

(f) Provision for a network of electronic communication facilities.

(g) Expansion or replacement of capital facilities or public services.

(h) An analysis of existing conditions and strategies to address identified problems and opportunities in income, employment, housing, education, recreation, crime, and human services (including, but not limited to, child care services, senior citizen programming, and mental health services) and recommendations for public and private measures to rectify disparities. The strategy should link future jobs, housing, and transportation in mutually supportive ways.

(i) Measures to protect, enhance, develop, or change community character, including, but not limited to, open space protection, historic preservation, annexation, and, as necessary, a strategy for land assembly and redevelopment.

(j) A program of implementation that shall identify the amount and source of the fiscal and other resources to be used

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to implement the recommendations in the plan. The implementation program shall, wherever possible, consider intergovernmental coordination.

(k) A zoning plan for the control of the height, area, bulk, density, location, and use of buildings and premises for current and future zoning districts and an explanation of their relationship to the future land use plan. The zoning plan shall provide specific guidance for the zoning map and other short-term zoning decisions over a period of not more than the next five years.²³² The text shall describe how the community intends to move from present conditions illustrated on the current zoning map and described in the zoning plan to the proposed future relationship of land uses illustrated on the future land use map.

(2) Each of the elements of a future land use plan listed in subsection (1) shall incorporate goals, objectives, policies, and strategies to be employed in fulfilling the plan. Each element of a future land use plan shall utilize maps and be accompanied by explanatory text.

Commentary:

This section presents a delineation of the factors that communities need to show were considered in developing a land health plan upon which land use control decisions would be based. Two provisions are of particular importance. First, the community is required to develop boundaries for delivery of public services, such as water and sewer utilities. This process aids in solidifying the community's intent to allow the identified area to develop while preserving, most likely for agriculture, those areas beyond the service boundaries. This reduces the opportunity for conflicts between residential and agricultural uses and protects investments in agricultural operations and facilities. Second, this planning process requires preparation of a zoning plan that has a clearer association to the comprehensive planning than is currently

²³² A zoning map adopted as part of a zoning ordinance by the governing body of a local unit under the zoning acts is not a future land use map; neither would a zoning map nor the text of a zoning ordinance constitute a land use plan under this act. See MICH. COMP. LAWS ANN. §§ 125.201-240 (West 1997 & Supp. 2001) (the county zoning act); MICH. COMP. LAWS ANN. §§ 125.271-310 (West 1997 & Supp. 2001) (the township zoning act); MICH. COMP. LAWS ANN. §§ 125.581-600 (West 1997) (the city and village zoning act).

required by the state's zoning enabling acts.²³³ This condition ensures that zoning ordinances, including those which restrict CAFOs, will be based on more careful contemplation because the zoning plan must identify how it aids in achieving the elements of the land health plan. It also helps prevent the hasty enactment of ordinances in reaction to a proposed animal production facility.

Sec. 3. (1) After preparing a proposed plan, the proposing planning commission shall submit a copy of the proposed plan to the Michigan Land Health Planning Commission (the Commission).

(2) Not more than sixty days after the date of submittal of the proposed plan, the Commission may submit to the proposing planning commission any questions, suggestions, or other comments on the plan.

(3) The Commission shall be considered to consent to a proposed plan unless the Commission objects to the plan within the time provided under subsection (2) and does not withdraw its objection in writing before final adoption of the plan, the objection includes specific facts supporting the objection, and the objection is based on failure of the plan or an element of the plan to satisfy one or more of the following requirements:

(a) The proposed plan and each element thereof shall conform to the requirements of this act.

(b) The proposed plan and each element of the proposed plan shall be feasible. A proposed plan or element is feasible if the jurisdiction for which the plan is being proposed has sufficient authority and resources including, but not limited to, finances, personnel, and facilities to carry out the program of implementation in the proposed plan.

(c) The proposed plan and each element of the proposed plan shall be sound. A proposed plan or element is sound if both of the following apply:

²³³ See MICH. COMP. LAWS ANN. §§ 125.201-.240 (West 1997 & Supp. 2001) (the county zoning act); MICH. COMP. LAWS ANN. §§ 125.271-310 (West 1997 & Supp. 2001) (the township zoning act); MICH. COMP. LAWS ANN. §§ 125.581-.600 (West 1997 & Supp. 2001) (the city and village zoning act).

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(i) The facts, statistics, maps, analysis, and other information included or referred to in the proposed plan or element are substantially correct and substantially reflect present and future conditions in the jurisdictional area of the proposing planning commission, as described in the proposed plan.

(ii) Based on professionally accepted planning principles, the goals and policies of the proposed plan or element are an appropriate response to the facts, statistics, maps, analysis, and other information included or referred to in the proposed plan or element.

(d) The proposed plan shall be consistent. A proposed plan is consistent if both of the following apply:

(i) The goals, policies, and program of implementation for each element of the plan would further, or at least not interfere with, the goals, policy, and program of implementation of other elements of the same plan.

(ii) The goals, policy, and program of implementation of the plan and each element thereof would further, or at least not interfere with, the goals, policy, and program of implementation of a plan of the State. Circumstances that violate the requirements of this subparagraph include, but are not limited to, all of the following:

(A) If land use intensity, land use density, or capital facilities in the jurisdictional area of the proposing planning commission and near a common border are incompatible with or would conflict with land use intensity, land use density, or capital facilities in the jurisdictional area of another planning commission and near the common border.

(B) If the proposed plan would create one or more specific, verifiable threats to the health or safety of individuals within the local unit or region.

(C) If the cumulative effects of the proposed plan or element are likely to reduce the existing or planned quality of life in the proposed local unit or region in reasonably identifiable and verifiable ways.

(4) This section does not prohibit the Commission, when formulating its response to the proposed plan based on the criteria set forth in this section, from considering the comments and objections of any other person including, but not limited to, any local unit of government.

Commentary:

This section provides for a state planning commission with the authority to review and approve local land health plans.²³⁴ This step represents the essential balancing of interests between the state's need to ensure that beneficial but unpopular land uses, such as CAFOs, are not unreasonably eliminated and local governments' responsibility for effective land use planning within its jurisdictional boundaries. State involvement in local planning represents a new presence in the process, but the statute provides clear standards upon which the state must base its approval of local plans. It also provides the opportunity for a greater sense of cooperation in addressing issues surrounding the planning process, such as economic development and the environment.

VI. CONCLUSION

By restricting nuisance suits, right to farm legislation initially provided states with effective means for safeguarding agriculture as the rural landscape increasingly converted to residential uses. Recent changes in the economics of the agricultural industry have led to the development of concentrated animal feedlot operations. Because these facilities manifest the potential for much greater air and water pollution than the traditional family farm, they created new conflicts between Michigan's Right to Farm Act and local zoning ordinances. The 1999 amendment to Michigan's Right to Farm Act pre-empted local governmental authority, specifically to protect CAFOs. By overprotecting a land use that is more industrial than agricultural, the Right to Farm Act has an adverse effect on farmland preservation. A revised amendment to the Michigan Right to Farm Act, which allows local zoning control if land use decisions are based on a state-approved

²³⁴ The statute should also provide for a public hearing and approval of the plan by the governing body of the county or municipality. See MICH. COMP. LAWS ANN. §§ 125.101-107 (West 1997) (county planning act); MICH. COMP. LAWS ANN. §§ 125.31-45 (West 1997 & Supp. 2001) (municipal planning act); MICH. COMP. LAWS ANN. §§ 125.321-333 (West 1997 & Supp. 2001) (township planning act). It should also require periodic review of the plan and a detailed process for adoption of any amendments.

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land health plan, would better serve the purpose of protecting agriculture and rural character.

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