

THE MICHIGAN RIGHT TO FARM ACT
RENDERS MANY ZONING REGULATIONS INVALID

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In Michigan, municipalities (townships, cities, and villages) have broad zoning authority over most uses, structures, and buildings. However, given that it was the Michigan Legislature that granted those broad zoning powers to municipalities in the first place, the Legislature can also take away or “preempt” local zoning authority regarding certain subjects or topics.

Prior to 2000, the Michigan Right to Farm Act, MCL 286.471 *et seq.* (the “RTFA”) applied only to private nuisance lawsuits against farms or agricultural operations. Before 2000, municipal zoning regulations could extensively regulate farms and agricultural operations in addition to countless other topics and uses. However, in 2000, the RTFA was formally amended to preempt most zoning regulations (as well as police power ordinances) regarding farming and agricultural operations.

The RTFA does not completely preempt or prevent zoning regulations from applying to all farms and agricultural operations in all situations. Unfortunately, however, the RTFA’s preemption language is poorly drafted and ambiguous. It is not always clear what is preempted and what is not. Furthermore, Michigan appellate court decisions (i.e., decisions by the Michigan Supreme Court and Court of Appeals) are contradictory regarding the preemptive effect of the RTFA under different circumstances.

The RTFA preempts local ordinances in two different ways. First, if a zoning regulation (either on its face or in its application to a particular farm or agricultural operation) conflicts in any way with a specific Generally Accepted Agricultural Management and Practices (“GAAMPS”) adopted by the Michigan Department of Agriculture (more specifically, the Michigan Commission of Agricultural and Rural Development), the zoning regulation is preempted or precluded. Although the Department of Agriculture has promulgated GAAMPS for many types of farm products, livestock, and crops (as well as certain farm or agricultural structures, practices, and activities), it has not done so for all farming topics. Furthermore, most of the GAAMPS are not drafted as detailed and numerical regulations, but rather tend to be vague and overly general. Accordingly, in many cases, it is difficult to ascertain whether a given zoning regulation “conflicts with” a particular GAAMPS.

The second source of preemption is found in language in the RTFA that states:

“Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act.... 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”

However, it is unclear what that means. Although the courts have addressed GAAMPS preemption somewhat, the courts have not definitively dealt with this second type of preemption. It is possible that it is just another way of indicating that a local zoning or ordinance regulation cannot conflict with the GAAMPS. Others view the second type of preemption as simply being a lawful nonconforming use clause, while other legal experts believe that the second statutory clause effectively preempts all zoning and ordinance regulations in all instances where a farm or agricultural operation is involved. Until and unless the courts fully and expressly address this second type of preemption in more detail, its applicability is subject to speculation.

If a municipality mistakenly applies its zoning regulations to a farm or agricultural operation and it is later determined in court that the zoning regulation was preempted by the RTFA, it is not simply a matter of the municipality losing in court. Rather, the RTFA provides that should the farm or agricultural operation prevail in court under the RTFA, the municipality must reimburse the prevailing party for its attorney fees and costs. For example, in *Webber Township v Austin*, unpublished decision by the Michigan Court of Appeals dated April 22, 2014; Case Nos. 313479 and 315050; 2014 WL 1614613, the trial court ordered Webber Township to pay the operator of a horse rescue facility the sum of \$36,679.78. The Court of Appeals reversed and remanded the case back to the trial court due to several errors by the trial court, but indicated that the attorney fees and costs imposed against Webber Township would stand if on remand it were determined that the horse rescue facility is a commercial farming operation.

The following are answers to some frequently asked questions regarding the RTFA and ordinance preemption:

1. *Can we still limit new farms and agricultural operations to specific zoning districts? What about minimum parcel size requirements for new farms?*

Response: Probably not. If a commercial farming operation is involved and there is a GAAMPS which protects it, it is likely that zoning regulations such as prohibited uses within certain zoning districts and minimum lot size requirements will not survive a preemption court challenge. See *Shelby Township v Papesh*, 267 Mich App 92 (2005) (minimum lot size requirement likely invalid); *Papadelis v Troy*, unpublished decision by the Michigan Court of Appeals dated September 16, 2006; Case No. 268920; 2006 WL 2683385 (however, was that portion of the Court of Appeals decision reversed by the Michigan Supreme Court in *Papadelis v City of Troy*, 478 Mich 938 (2007)? – it is unclear); and *Woodland Hills Homeowners Assn of Thetford Township v Thetford Township*, unpublished decision by the Michigan Court of Appeals dated May 20, 2008; Case No. 275315; 2008 WL 2117147.

2. *The Township has a zoning district within which farms and agricultural operations are allowed, but they cannot commence or expand without special land use approval. Can we require a farm applicant to go through that process?*

Response: If the proposal involves a *bona fide* commercial farm and there is a GAAMPS which is applicable, probably not. However, there have been a significant number of farmers and agricultural operation managers who have been willing to go through rezoning, special land use, and other discretionary zoning approvals so long as their proposals are ultimately approved

or approved with conditions that the applicant can live with. Quite often in those situations, the applicant will indicate in writing that their application or agreement to go through the zoning process is without prejudice to their rights to later assert the RTFA. In *Milan Township v Jaworski*, unpublished decision by the Michigan Court of Appeals dated December 4, 2003; Case No. 240444; 2003 WL 22872141, conducting a fenced-in quail hunting preserve in the agricultural district required a special use approval. The Court of Appeals held that the zoning regulations at issue were preempted by the RTFA because the operation involved breeding, raising, and selling game birds as well as the “harvesting” of the same. The Court of Appeals found that the township’s ordinance provision requiring a special use permit conflicts with the RTFA to the extent that it allows the township to preclude a protected farm operation.

3. *Which municipal official makes the determination regarding whether or not a particular farm or agricultural operation proposal has the benefit of preemption under the local zoning ordinance?*

Response: Neither the Michigan Zoning Enabling Act nor the RTFA answers this question. It is likely that the municipal zoning administrator would make that determination. In many cases, the zoning administrator would consult with other municipal officials before making a final decision. Also, given the legal complexities and uncertainties involved regarding RTFA preemption, it is normally prudent to consult with the municipality’s attorney.

Although I have not seen it done yet, a municipality could insert language into its zoning ordinance expressly indicating that should an issue of preemption arise under the RTFA for a particular farm or agricultural operation, it would be the zoning administrator who would decide for the municipality whether or not the zoning regulation at issue is preempted by the RTFA.

4. *Does the RTFA preempt regulations regarding buildings and structures such as setback requirements, maximum height limits, maximum lot coverage, and similar regulations?*

Response: To date, the Michigan case law is unclear regarding these issues. However, again, if a commercial farming or agricultural operation is involved and there is a GAAMPS which appears to cover the area, there very well could be a preemption of those areas. See *Papadelis v City of Troy*, 478 Mich 934 (2007). Municipal construction codes also contain specific exemptions for farm buildings.

5. *Assume that there is a GAAMPS for the particular type of farming operation involved, but it is vague and we cannot tell whether or not it preempts the zoning regulations our township would like to apply. How do we decide whether or not there is a preemptive effect?*

Response: That is a common problem. A few GAAMPS do expressly address topics such as specific agricultural buildings, setbacks, etc. However, most GAAMPS do not. Furthermore, if a GAAMPS is very general or vague, the farmer or agricultural operator can argue that the language is so broad that it preempts all zoning regulations regarding the topic. For instance, suppose that a GAAMPS states “horses are allowed where conditions regarding their upkeep and use are reasonable.” Could one reasonably argue that since that GAAMPS

statement does not specifically regulate the size, location or setback of horse barns or arenas, the municipality could then regulate those items? Or would the courts likely accept the argument that the GAAMPS is so broad and general that it preempts all zoning regulations regarding horses, horse barns, etc.? The Michigan appellate courts have not addressed this matter.

It should also be remembered that more than one GAAMPS can apply to a particular farm or agricultural operation.

6. *What do we tell neighbors or nearby property owners who are upset when our municipality will not enforce a zoning or ordinance regulation against a farm or agricultural operation due to the RTFA?*

Response: Certainly, the preemptive effect of the RTFA is often frustrating for municipal officials, area residents and property owners alike. However, this problem was not created by municipalities. Rather, it was the Michigan Legislature that adopted the vague and over-reaching preemption language to the RTFA in 2000. Concerned citizens should express their anger and frustration to their local state senator and representative.

7. *What constitutes a commercial farm or agricultural operation for purposes of GAAMPS? How much revenue or income must be generated?*

Response: In order to benefit from the RTFA, a farm or agricultural operation must be “commercial.” The appellate courts have indicated that virtually any income or revenue derived from farming or agricultural operations qualifies the farm or agricultural operation involved for preemption protection under the RTFA. See *Shelby Township v Papesh*, 267 Mich App 92 (2005); *Brown v Summerfield Township*, unpublished decision by the Michigan Court of Appeals dated August 23, 2012; Case No. 304979; 2012 WL 3640330; and *Township of Webber v Austin*, unpublished decision by the Michigan Court of Appeals dated April 22, 2014; Case Nos. 313479 and 315050; 2014 WL 1614613. Furthermore, although not made clear by the appellate court decisions, it is likely that any commercial use of a given crop, animal or farm product “cloaks” the noncommercial aspects of the farm or agricultural operation also with preemptive effect.

8. *Can we require a zoning permit for a new or expanded farm or agricultural operation, even if our municipality does not apply the substantive zoning regulations to the farm or agricultural operation?*

Response: If there is preemption in a particular case, it is likely that a zoning permit cannot be required.

9. *Are farm and agricultural operation buildings exempt from the construction codes?*

Response: Generally, yes. However, it is possible that municipalities can require building and other permits for any portion of a barn or other agricultural business not used for farming (i.e., storage of a farmer’s non-farming items such as boats, antique cars, etc.). The same is true with regard to the applicability of construction codes. It is also possible that once such buildings and structures are no longer used for farming or agricultural operations that the municipality can require that the appropriate construction code permits be obtained at that time

and that the buildings and structures involved (where farming and agricultural operations have ceased) would then have to be brought up to code.

10. *What about farming operations on a small scale in residential neighborhoods?*

Response: One of the few bright spots from the perspective of municipalities regarding RTFA preemption has occurred with regard to the new GAAMPS for farm siting in residential neighborhoods and areas adjoining those neighborhoods. The new GAAMPS for site selection and odor control for new and expanded livestock facilities dated April 2014 contains a new classification called “Category 4 sites.” Category 4 sites are defined by the GAAMPS as locations that are primarily residential and do not allow agricultural uses under the local zoning ordinance or other ordinances by right. Such areas are sites with more than 13 non-farm homes within one-eighth of a mile of the livestock facility or a non-farm home within 250 feet of a livestock facility. Farming and agricultural operations can occur on a Category 4 site, but only if the local municipal zoning ordinance or other ordinances so allow.

11. *Cannot municipalities take some solace from the fact that RTFA preemption occurs only if there is an applicable GAAMPS and the farm or agricultural operation involved complies with that GAAMPS?*

Response: Probably not, for two reasons. First, no one can determine whether or not a particular new or expanded farm or agricultural operation will comply with the applicable GAAMPS until relevant farm structures or buildings are built, the land is modified accordingly, and the crops, livestock or other farm products at issue are being raised or grown. Accordingly, a municipality must generally approve such an operation “before the fact” based on GAAMPS without actually seeing the final outcome. Second, the Michigan Department of Agriculture tends to not only be very pro-farming and agriculture, but many municipal officials also believe that the Department of Agriculture is generally inclined to find compliance with the GAAMPS in the field. Furthermore, even if a farm or agricultural operation is found by the Department of Agriculture not to comply with the GAAMPS, if it later comes into compliance with the GAAMPS, ordinance preemption is probably then reinstated.

12. *Are the GAAMPS mandatory for farms and agricultural operations?*

Response: No. However, by voluntarily complying with the GAAMPS, a farm or agricultural operation gains the liability shield or protection of the RTFA. Or, put another way, in order to have a local municipal zoning or other ordinance be preempted by the RTFA, the farm or agricultural operation probably has to comply with the applicable GAAMPS before preemption occurs. It is interesting to note, however, that is not what the RTFA says. The RTFA simply indicates that if an applicable GAAMPS exists, there is preemption (implying that even if the farm or agricultural operation is not in compliance with the GAAMPS, preemption still occurs).

13. *Is the GAAMPS an “all or nothing” proposition? That is, does a particular GAAMPS allow everything or nothing?*

Response: Generally not. Some GAAMPS are drafted in a broad fashion and seemingly preempt all zoning regulations regarding a particular topic on their face. However, other

GAAMPS generally support local zoning or other regulations, but indicate that preemption occurs under certain circumstances if a farm or agricultural operation does something. Accordingly, all of the GAAMPS must be carefully studied and reviewed to determine whether preemption may be present in a particular case.

14. *Who bears the burden of proving that a particular GAAMPS applies and that a farm or agricultural operation is complying with that GAAMPS in order to trigger preemption?*

Response: In *Lima Township v Bateson*, 302 Mich App 487 (2013), the Court of Appeals held that since the RTFA is an affirmative defense to be used by a farm or agricultural operation in litigation, the operator of the farm or agricultural use has the burden of proving by a preponderance of the evidence that a particular GAAMPS applies and that the farm itself or the agricultural operations are complying with the applicable GAAMPS.

15. *Can a zoning or other local ordinance simply require that a farm or agricultural operation comply with the applicable GAAMPS?*

Response: Unknown. This issue has not been addressed by the Michigan appellate courts. However, since compliance with the GAAMPS is optional under the RTFA for a farm or agricultural operation, requiring compliance with the applicable GAAMPS could be an unlawful extension of the RTFA, thus triggering preemption.

16. *Given all the problems associated with preemption under the RTFA, would it be prudent for our municipality to simply delete all regulations regarding farms and agricultural operations and allow them as of right everywhere?*

Response: Probably not. Keep in mind that the RTFA only applies to commercial farms and agricultural operations, such that zoning regulations regarding noncommercial farms and agricultural operations would generally not be preempted by the RTFA. Furthermore, it is possible that in a given situation, no GAAMPS may apply or the farm or agricultural operation may not be in compliance with the GAAMPS. In addition, in a few situations where the GAAMPS does apply, the GAAMPS expressly allows or authorizes certain zoning regulations or the equivalent (for example, the new Category 4 farm operations) to be applicable.