

# Special Feature



## Urban farming and the Michigan Right to Farm Act

As initially enacted in 1981, the Michigan Right to Farm Act (RTFA), Public Act 93 of 1981, MCL 286.471, *et seq.*, was intended to protect farms and certain agricultural activities from nuisance lawsuits brought by the owners of adjoining or nearby properties. From 1981 to 2000, the RTFA did not prohibit townships from adopting or enforcing zoning or police power ordinances applicable to farming activities. However, beginning in 2000, various amendments to the RTFA partially preempted (or precluded) township zoning and police power ordinances that regulate farms and certain agricultural activities. Unfortunately, even under the amended RTFA, it is not entirely clear in all situations when a township may enforce an ordinance that applies to farming, and when such an ordinance is preempted by the RTFA.

Section 4(6) of the RTFA, MCL 286.474(6), contains express preemption provisions that can thwart township ordinances. It provides that the RTFA preempts “any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of [the RTFA] or generally accepted agricultural and management practices developed under [the RTFA].” It also states that with limited exceptions, “a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with [the RTFA] or generally accepted agricultural and management practices developed under [the RTFA].” Thus, a local ordinance cannot preclude what is allowed under the RTFA, nor can it extend, revise or conflict with the RTFA, or the generally accepted agricultural and management practices (GAAMPs) developed under the act.

The Michigan Department of Agriculture and Rural Development drafts and adopts the various GAAMPs. While there are several categories of GAAMPs covering various aspects of farming—from site selection to care of farm animals, to use of nutrients and pesticides, and other areas—GAAMPs do not cover all types of farming that may occur within a township. Further, while many township officials assume that the GAAMPs are drafted with great precision and specificity (much like a building code or a regulatory code with highly technical provisions), that is not

always the case. While state preemption of local ordinances may not be frustrating to municipal officials in an area of the law where the state has adopted extensive and thorough regulations, the GAAMPs are sometimes read as being vague or overly broad, or even silent on particular issues. Thus, townships continue to struggle with preemption issues under the RTFA and GAAMPs.

### THE QUESTION OF URBAN FARMING

Townships, for example, may struggle with the applicability of local zoning and other ordinances to so-called “urban farming.” Where urban farming involves only gardening and crops, few township ordinances attempt to regulate or prohibit such horticulture. However, disputes may arise when a landowner attempts to raise farm animals (such as chickens, goats, sheep, pigs, rabbits or turkeys) in urban areas or residential subdivisions. The odors, noise and waste products associated with such animals are often incompatible with an urban or neighborhood setting, which causes some townships to consider regulating or prohibiting such activities.

Many urban farm advocates assert that urban farming is fully protected by the RTFA. However, to receive protection under the RTFA, the farming operation must be for-profit or commercial in nature. Accordingly, to the extent a local ordinance pertains only to an urban landowner who is raising farm animals for pleasure or personal use only, the RTFA would not preempt the local ordinance requirements.

### COURTS AND THE AG WEIGH IN

Recent court decisions and the Michigan attorney general have indicated that the RTFA does not prevent local regulation of urban farms. (It should be noted that, to date, neither the Michigan Court of Appeals nor the Michigan Supreme Court has definitively addressed this issue.)

The Michigan attorney general has addressed local regulation of urban farming in two informal opinions. An Oct. 31, 2006, informal opinion addressed a local zoning ordinance requiring all farming to be conducted on 10 acres of land. The opinion stated that if the farm at issue met all of the standards of the relevant GAAMPs, then the RTFA would preempt the local ordinance. However, the attorney general also cautioned that compliance with GAAMPs must be determined on a case-by-

case basis. For example, site selection GAAMPs require new livestock production facilities to be zoned agricultural. Thus, if the new farm had livestock production facilities on land zoned residential, then it would not comply with the GAAMPs, and the RTFA would not preempt the local zoning ordinance. But if the new farm would be located on land zoned agricultural, and if it complied with all applicable GAAMPs, then local zoning would be preempted to the extent it conflicted with the RTFA.

An informal opinion issued Feb. 9, 2011, reemphasized that the RTFA does not preempt local zoning ordinances that prohibit the raising of poultry, deer and livestock in residential districts. The opinion said that, “[a] livestock facility would not comply with the GAAMP if the local zoning ordinance excludes agriculture uses, including ‘the raising of poultry, corvidae, and livestock.’ Under those circumstances, the Right to Farm Act would not preempt the local zoning ordinance.”

Several trial court decisions have also upheld local regulation of urban farming in the face of RTFA challenges. In *City of Ypsilanti v Peter Thomason* (Docket No. 09-1227-AV), the Washtenaw County Circuit Court held that the City of Ypsilanti ordinance provisions regulating animals (including farm animals) within residential areas did not conflict with GAAMPs or the RTFA. In fact, the court held that the farming activities at issue actually violated the site selection and odor control GAAMPs because they were located in a residential district.

In *Everett Township v Howard Lee Pursey* (Case Nos. 09-4665-ON through 09-4670-ON), the 78th District Court (Newaygo County) held that a landowner with a five-acre parcel zoned Agricultural-Low Density Residential could not use the presence of chickens on the property as a means to escape liability for blight and other zoning ordinance violations related to the defendant’s trailer, vehicles and sheds. The court’s decision—which concluded that the activities and uses in question were not protected under the RTFA—was upheld on appeal.

In *The People of Charter Township of Georgetown v Sutton* (Case No. 705-1652), the 58th District Court (Ottawa County) held that the defendant could not keep goats and chickens in a residential subdivision that was zoned for low-density residential uses only. After noting that it was not clear whether the RTFA even applied, as the defendant may have been keeping the animals as pets or for personal rather than commercial use, the court concluded that the keeping of farm animals would be a Category 3 use under the site selection GAAMPs. Because site selection GAAMPs prohibit Category 3 uses in low-density residential areas (or within 1,500 feet of areas zoned for residential use where agricultural uses are excluded, unless approved by the local unit of government), the defendant’s activities were not entitled to protection under the RTFA.

The state Court of Appeals decision in *Charter Twp of Shelby v Papeshe*, 267 Mich App 92 (2005), also addressed the RTFA and GAAMPs. In that case, the Papeshes purchased a 1.074-acre “farm,” with a farm house and two chicken coops. The township zoning ordinance permitted farming, but it contained a minimum lot size of three acres. At the time the Papeshes purchased the

property, the surrounding area was largely undeveloped. Within a few years, neighbors began to complain about the chickens. The township filed a lawsuit alleging that the chickens violated the zoning regulations and constituted a nuisance. The Papeshes responded that their farming operations were protected under the RTFA and GAAMPs. The trial court summarily ruled in the township’s favor, finding that the use violated the township’s three-acre minimum lot size requirement. The trial court also concluded that the RTFA was inapplicable because the sales revenues generated by the Papeshes’ poultry operations were trivial and, thus, it was not commercial in nature.

The Michigan Court of Appeals reversed the trial court’s decision and remanded the case to the trial court for further proceedings. The Court of Appeals held that even a small poultry operation that produces very little revenue can be deemed commercial in nature and may be entitled to protection under the RTFA.

The Court of Appeals also held that the site selection GAAMPs did not apply to the Papeshes’ farm because their farm was in operation before the site selection GAAMPs were first adopted in 2000. Nonetheless, the court found that there was a genuine issue of fact for the trial court to decide regarding whether the poultry operation complied with all applicable GAAMPs. Finally, the Court of Appeals concluded that because a local ordinance that conflicts with either the RTFA or the GAAMPs is preempted by state law, and since no GAAMPs imposed a three-acre minimum lot size on poultry farms, the township’s three-acre minimum lot size requirement conflicted with the RTFA.

The precedential impact of the *Papeshe* case on the local regulation of urban farming is unclear. Even though the *Papeshe* case involved a challenge under the RTFA, it could be considered more of a lawful nonconforming use rights case than an RTFA case. Further, the Court of Appeals in *Papeshe* did not fully explain why a three-acre minimum lot size requirement for a farm conflicts with the RTFA or the GAAMPs, when both are silent regarding minimum acreage requirements. Under the court’s reasoning, any local regulation could be deemed preempted if it addresses a concern that is not addressed in the RTFA or GAAMPs.

## THE EFFECT ON LOCAL ORDINANCES

Overall, it appears that Michigan townships can regulate the keeping of farm animals in association with urban farming notwithstanding the RTFA and the currently existing GAAMPs. However, it is possible that the Michigan appellate courts might decide differently in the future. Furthermore, the extent to which new GAAMPs are adopted (or existing GAAMPs altered) could have a new preemptive effect on local regulations. ■

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