

What sorts of local regulations are preempted by the Right to Farm Act (RTFA)?

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Extension

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A local unit of government has the option to submit a proposed local ordinance to the state so that the local government can enforce an ordinance which would otherwise not be allowed under the Right to Farm Act (RTFA). If the local unit of government has submitted to the Director of the Michigan Department of Agriculture and Rural Development (MDARD) its proposed ordinance (and a showing that adverse effects on the environment or public health will exist within the local unit of government without such an ordinance) prescribing standards different from those contained in the RTFA and/or Generally Accepted Agricultural and Management Practices (GAAMPs) and the ordinance has been approved by the Michigan Commission on Agriculture and Rural Development¹, then there is no need to go further with this decision tree.

Otherwise, start with the series of questions in box number 1.

[START] 1

Establishing Jurisdiction

1.1. Is the land use that may be subject to the regulation a farm or farm operation?

"Farm" defined as: the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the *commercial production of farm products*.²

"Farm operation" defined as: the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the *commercial production*, harvesting, and storage of *farm products*....³

1.2. Is it producing a "farm product"?⁴

1.3. Is it engaged in "commercial production"?⁵

↓ Yes to all three questions.

↓ No to any one, or more, of the three questions.

Yes (To all three questions):

1A. RTFA jurisdiction for the land use activity might apply. Further questions are needed to determine if local regulation is preempted or not.

NO. (To any one, or more):

1B. RTFA jurisdiction does not apply, so local regulation can take place. [END]

↓

2.

Establishing Jurisdiction

Does the farm or farm operation comply with GAAMPs?⁶ (all found at web site www.michigan.gov/gaamps)

(Note: Current adopted GAAMPs include:

Manure Management and Utilization,
Pesticide Utilization and Pest Control,
Nutrient Utilization,
Care of Farm Animals,
Cranberry Production,

Site Selection and Odor Control for New and Expanding
Livestock Production Facilities,
Irrigation Water Use, and
Farm Markets⁷.)

May want to have MDARD review the specific operation to make a finding if all applicable GAAMPs are complied with. The municipality (zoning administrator) or the farmer may initiate this process.

Use of GAAMPs to establish jurisdiction can be problematic if local regulation results in unequal treatment of two neighbors in the same zoning district (farmer "A" that follows GAAMPs and farmer "B" that does not) and lack of adherence to Michigan Supreme Court' guidance to determine state preemption of local regulation.⁸

↓ Yes

↓ No

Go to Box 2A. on next page.

Go to Box 2B. on next page.

YES:

2A. RTFA jurisdiction for the land use activity might apply. Further questions are needed to determine if local regulation is preempted or not.

(Michigan Court of Appeals decisions reflect a view that farm operations following GAAMPs are not subject to some local regulations.)

NO:

2B. RTFA jurisdiction for the land use activity might apply. Further questions are needed to determine if local regulation is preempted or not.

(Michigan Court Appeals decisions reflect a view that some local regulations cannot be enforced for farm operations that pre-exist surrounding land use changes regardless of whether GAAMPs are followed or not.)



3.

Establishing Jurisdiction

Did the land use activity exist prior to changes in surrounding land uses?



NO:

3A. RTFA jurisdiction for the land use activity might apply. Further questions are needed to determine if local regulation is preempted or not.

YES:

3B. The local regulation contravenes RTFA, so the local regulation is preempted. **[END]**



4.

Preemption

Does the local ordinance, regulation, or resolution (local regulation) extend, revise, or conflict in any manner (contravene) with the provisions of the RTFA?

4.1. Does the local regulation modify the immunity for farmers from public or private nuisance suit?

4.2. Does the local regulation modify the MDARD enforcement or investigation process, or provide an investigative process for complaints involving a farm or farm operation?

↓ No to both questions.

↓ Yes to one, or both questions.

NO (to both questions):

4A. Further questions are needed to determine if local regulation is preempted or not.

YES (to one, or both questions):

4B. The local regulation contravenes RTFA, so the local regulation is preempted. **[END]**



5.

Preemption

Does the local regulation restrict farms or farm operations to certain zoning districts?

↓ No

↓ Yes (The outcome, here is uncertain because there is disagreement between MDARD and Michigan Court of Appeals Opinions. Pick which reflects level of risk or safety your community finds acceptable)

↓ (more risk)

↓ (more risk)

↓ (less risk)

Go to Box 5A.
on next page.

Go to Box 5B. on next page.

Go to Box 5C. on next page.

Go to Box 5D.
on next page.

NO: 5A. Further questions are to determine if local regulation is preempted or not.	YES: 5B. RTFA jurisdiction does not apply, so local regulation to allow farms in only certain zoning districts is appropriate. (According to the MDARD, a farm being allowed in a zoning district is specifically mentioned as a prerequisite in certain GAAMPs (livestock sitting, farm markets). Further questions may be needed to determine if local regulation is preempted or not.) [Consult with your municipal attorney]	YES: 5C. As long as zoning does not try to restrict certain types of farms (that is “farm” automatically includes all types of farms) RTFA jurisdiction does not apply, so local regulation allowing farms in only certain zoning districts is appropriate. Further questions may be needed to determine if local regulation is preempted or not. (According to MDARD and training materials prepared for a Michigan Townships Association annual conference. ⁹) [Consult with your municipal attorney]	YES: 5D. The local regulation restricting farms to only certain zoning districts contravenes RTFA, so the local regulation is preempted. (According to analysis of case law on RTFA and <i>Michigan State Law Review</i> article. ¹⁰)
↓	← → (less risk)	← → (less risk)	↓
6. Preemption Does the zoning ordinance restrict “Livestock production facilities” (50 animal units or more) and “farm markets” from zoning districts where agriculture is otherwise permitted. ¹¹			
↓ No		↓ Yes	
NO: 6A. Further questions are needed to determine if local regulation is preempted or not.	YES: 6B. The local regulation contravenes RTFA, so the local regulation is preempted.		→
↓			↓
7. Preemption Does the local regulation apply to accessory activities (farm sales stand, processing, etc.) for “farm products” ³ grown at that farm? (Note: sales, processing of products harvested elsewhere can be regulated if they are over 50% of the products offered at the farm market.)			
↓ No		↓ Yes	
NO: 7A. Further questions are needed to determine if local regulation is preempted or not.	YES: 7B. The local regulation contravenes RTFA, so the local regulation is preempted.		→
↓			↓
Go to Box 8. on next page.			Go to Box 10.

8.

Preemption

Does the local regulation contravene any of the GAAMPs? (E.g., does local regulation include any of the topics covered in any of the Generally Accepted Agricultural and Management Practices (GAAMPs)?) (all found at web site www.michigan.gov/gaamps) (Note: Current adopted GAAMPs include:

Manure Management and Utilization, 1988
Pesticide Utilization and Pest Control, 1991
Nutrient Utilization, 1993
Care of Farm Animals, 1995
Cranberry Production, 1996

Site Selection and Odor Control for New and Expanding
Livestock Production Facilities, 2000
Irrigation Water Use, 2003
Farm Markets, 2010.⁷⁾

GAAMPs can change each year, usually in January or February. Review of GAAMPs to accurately answer this question should be done annually.

For example: Setback regulations are in GAAMPs for “Livestock Production Facilities” so local zoning setbacks in compliance with those GAAMPs can occur. Various types of Farm Market regulation are possible where zoning allows for agriculture.

↓No

↓Yes

NO:

8A. Further questions are needed to determine if local regulation is preempted or not.

YES:

8B. The local regulation contravenes RTFA, so the local regulation is preempted.

→

↓

↓

NO 9.

Preemption

Does the local ordinance/zoning only require the farm or farm operation to comply with adopted (written) GAAMPs?

↓No

↓Yes

NO:

9A. Local regulation is appropriate **[END]**.

YES:

9B. The local regulation to require compliance with published GAAMPs may contravene RTFA as compliance with GAAMPs are voluntary, and requiring compliance with GAAMPs would be an extension of RTFA.

(According to analysis of case law on RTFA and *Michigan State Law Review* article¹⁰ and MDARD position.)

Further questions are needed to determine if local regulation is preempted or not.

↓

10.

Preemption

Are local regulation(s) only about urban agriculture and are all three of these conditions are met?¹²

10.1. It is within a municipality with 100,000 or more population.

10.2. The municipality has adopted an urban agriculture zoning amendment.

10.3. That urban agriculture zoning ordinance amendment includes a provision to recognize and the ordinance regulation(s) do not apply to farming operations in existence prior to adopting the urban agriculture zoning ordinance amendment. (The urban agricultural zoning ordinance amendment cannot be enforced with those operations.)

↓No

↓Yes

NO:

10A. The RTFA preempts local regulation. **[END]**

YES.

10B. Farms starting up pursuant to an urban agriculture zoning ordinance amendment can be subject to local regulation of scale and type of agricultural use. **[END]**

There is yet a question as to whether MDARD has the authority to implement such an exception – arguing the state statute preemption trumps a GAAMP or action of the Michigan Commission on Agricultural and Rural Development.

[Consult with your municipal attorney]

The RTFA, its interpretation, and application regularly changes. This decision-tree is up to date to February 13, 2012. Please regularly check for updates at www.msue.msu.edu/lu/. **Consult with your municipal attorney.**

(Endnotes are below.)

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Endnotes:

1. M.C.L. 286.474(7), (Section 4(7) of the Right to Farm Act, P.A. 93 of 1981, as amended.).
2. M.C.L. 286.472(a), (Section 2(a) of the Right to Farm Act, P.A. 93 of 1981, as amended).
3. Farm Operation: (M.C.L. 286.472(b), (Section 2(b) of the Right to Farm Act, P.A. 93 of 1981, as amended.)) means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products, and includes, but is not limited to:
 - (i) Marketing produce at roadside stands or farm markets.
 - (ii) The generation of noise, odors, dust, fumes, and other associated conditions.
 - (iii) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway as authorized by the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.
 - (iv) Field preparation and ground and aerial seeding and spraying.
 - (v) The application of chemical fertilizers or organic materials, conditioners, liming materials, or pesticides.
 - (vi) Use of alternative pest management techniques.
 - (vii) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.
 - (viii) The management, storage, transport, utilization, and application of farm by-products, including manure or agricultural wastes.
 - (ix) The conversion from a farm operation activity to other farm operation activities.
 - (x) The employment and use of labor.
4. "Farm product" (M.C.L. 286.472(c), (Section 2(c) of the Right to Farm Act, P.A. 93 of 1981, as amended.)) means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products, cervidae, livestock, including breeding and grazing, equine, fish, and other aquacultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.
5. "Commercial" or "for commercial purposes" does not have any minimum level of sales, so it can include even the smallest amount of commercial activity (*Shelby Township v Pepesh*, 2005), but must be at least partly commercial in nature (*Papadelis v City of Troy*, 2006) and M.C.L. 286.472(b) and (a), (Section 2(b) and 2(a) of the Right to Farm Act, P.A. 93 of 1981, as amended.).
6. *Shelby v Papesh* (Mich. Ct. App. 704 N.W.2d at 102 (quoting *Retail Prop. Owners Ass'n. Of Kent County v City of Grand Rapids*, 566 N.W.2d (Mich. 1997)).
7. The GAAMP sets forth that a farm market is an "area" where transactions between a farm market operator and customers take place (not necessarily but might be a building). At least 50 percent of the products marketed/offered for sale (measured over a five year timeframe) must be from the affiliated farm. The "50 percent" is measured by use of floor space.

The farm market must be "affiliated" with a farm, meaning a farm under the same ownership or control (e.g. leased) as the farm market, but does not have to be located on the same property where the farm production occurs. The market must be located on land where local land use zoning allows for agriculture and its related activities.

Marketing is part of a farm market, and can include Community Supported Agriculture (CSA), U-Pick operations (also known as pick your own (PYO)), and associated activities and services to attract and entertain customers (e.g., cooking demonstrations, corn mazes, tours, fishing pond, hay rides, horseback riding, petting farms, picnic areas, etcetera (a much longer list is in the GAAMP)). Services to attract and entertain customers are subject to local zoning ordinances, state, federal laws, and associated rules and regulations.

If in a building/structure, the structure must comply with the Stille-Derosset-Hale Single State Construction Code Act (MCL 125.1501 *et seq.*) and placement of the structure shall comply with local zoning, including set-backs from property lines and right-of-ways. Parking may be on grass, gravel, or pavement; one vehicle parking space for every 200 sq. ft. of interior retail space or 1,000 sq. ft. of outdoor activity space. Driveways must have a Michigan Department of Transportation (MDOT), county road commission, or village/city street agency permits. Signs outside the farm market must comply with sign regulations of MDOT, and all applicable local regulations. External lighting must comply with all applicable local, state, and federal regulations for lighting outside the farm market.

All details in the GAAMP are not covered here.

8. *Llewellyn, supra*, 401 Michigan 323-324 Michigan Supreme Court (See appendix B of *Land Use Series* “Restrictions on Zoning Authority”, www.msue.msu.edu/lu/).

9. Kaufman, Catherine BAUCKHAM, SPARKS, LOHRSTORFER, THALL, & SEEGER P.C.; *Right to Farm Act* PowerPointTM; presented at Michigan Townships Association Educational Conference, January 27, 2011. This was also an interpretation in earlier versions of this decision tree prepared by MSU Extension.

10. Norris, Patricia, Gary Taylor and Mark Wyckoff; “When Urban Agriculture Meets Michigan’s Right To Farm Act: The Pig’s in the Parlor”; *Michigan State Law Review*; 2011 MICH ST. L. REV. 365; and *Shelby Township v. Papesh* 704 N.W.2d 92, 96 (Mich. Ct. App. 2005); and *Papadelis v. Troy III*, No. 268920, 2006 LEXIS 2748 (Mich. Ct. App. Sept. 19, 2006).

11. GAAMPs for Site Selection and Odor Control reads “New and Expanding Livestock Production Facilities should only be constructed in areas where local zoning allows for agriculture uses.” GAAMPs for Farm Markets reads “the market must be located on land where local land use zoning allows for agriculture and its related activities.”

12. Preface paragraph of each published GAAMP (all found at web site www.michigan.gov/gaamps).