House
Legislative
Analysis
Section

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PREEMPT LOCAL ZONING OF FARM OPERATIONS

Senate Bill 205 (Substitute H-4)
First Analysis (10-28-99)

Sponsor: Sen. Joel D. Gougeon
House Committee: Agriculture and Resource Management
Senate Committee: Farming, Agribusiness and Food Systems

THE APPARENT PROBLEM:

The Michigan Right to Farm Act (Public Act 93 of 1981) is designed to protect farmers from nuisance lawsuits by non-farm neighbors (often former urban dwellers) unused to the kinds of smells, sounds, and dust that are generated by farms. Under the act, a farming operation can't be found to be nuisance (generally, something that interferes with a person's enjoyment of his or her property) if it meets certain criteria, such as conforming to "generally accepted agricultural management practices" (GAAMPS). However, the act doesn't exempt farming operations from applicable federal, state, and local laws, including local zoning ordinances, so farming operations may be found to be in violation of local zoning ordinances even while being otherwise protected from nuisance lawsuits. Since the Right to Farm Act doesn't supersede local land use laws, a farmer might be denied a permit necessary to expand his or her farming operation or, after expanding, might be subject to a lawsuit brought by neighbors.

Some people believe that the state government can help farmers, who continue to face difficult economic times, by reducing local regulatory burdens on farm operations. Legislation has been introduced to do this by preempting local zoning ordinances under the state Right to Farm Act.

THE CONTENT OF THE BILL:

The bill would amend the Right to Farm Act (public Act 93 of 1981) to say that it was "the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purport[ed] to duplicate, extend, or revise in any manner the provisions of this act, or generally accepted agricultural and management practices developed under this act." Further, and unless otherwise specified, the bill would explicitly prohibit a local unit of government from enacting, maintaining, or enforcing an ordinance, regulation, or resolution that conflicted in any manner with the act or "generally accepted agricultural and management practices" (GAAMPS) developed under the act.

Commission approval of local ordinances. The bill would allow local units of government to enact an ordinance prescribing standards different from those contained in GAAMPS if "adverse effects on the environment or public health" would "exist" within the local unit of government. However, the local unit of government could not enforce such an ordinance (1) unless the ordinance did not conflict with existing state or federal laws and (2) until the Commission of Agriculture "approved" the ordinance. (No process or deadline for approval is specified in the bill.)

If the commission disapproved such an ordinance, it would have to provide a detailed explanation (presumably to the local unit of government) of the basis of its disapproval within 60 days (presumably from the time the resolution described below was submitted to the department).

Department determination of alleged adverse effects. Within 45 days after a local unit of government submitted a resolution identifying adverse effects on the environment or public health (from standards contained in GAAMPS developed by the department under the act) the Department of Agriculture would be required to hold a public meeting in that local unit of government to determine the nature and extent of the adverse effects on the environment or public health. In making its determination (of the nature and extent of the adverse effects, and presumably, whether they actually would "exist"), the department would be

required to consider any recommendations of the county health department of the county where the adverse effects on the environment or public health would allegedly exist. Within 30 days after the local public meeting, the department would be required to issue a detailed opinion regarding the existence of adverse effects on the environment or public health (from the standards contained in GAAMPS developed by the department under the act) as identified by the local unit of government's resolution. (Note: Although the bill does not specify, presumably the Commission of Agriculture then would base its approval or disapproval of the local ordinance on the department's opinion.)

Appeals. The bill specifies that "appeals to ordinances enacted under" the bill would have to be filed with the Commission of Agriculture in writing. Although the bill does not specify a time limitation on appeals, it would require the commission to render a decision on an appeal within 60 days after its filing.

Required GAAMPS . The bill would require the Department of Agriculture to issue "generally accepted agricultural and management practices" (GAAMPS) for (1) site selection [without further specification] and (2) control of manure odors by April 1, 2000.

"Adverse effects on the environment or public health." The bill would define "adverse effects on the environment or public health" to mean "any unreasonable risk to human beings or the environment based on scientific evidence and taking into account the economic, social, and environmental costs and benefits and specific populations whose health may be adversely affected."

MCL 286.474

HOUSE COMMITTEE ACTION:

The House Committee on Agriculture and Resource Management substituted the bill as passed by the Senate, making the following changes from the Senate-passed version:

** The commission (of agriculture) would "disapprove" rather than "deny" local ordinances submitted to it;

**The department would have to hold a public meeting within 45 days (instead of 60 days) after a local unit of government (instead of a local public health department) submitted a resolution that identified "adverse effects";

** "Adverse effects" could be not just to the public health but also to the environment, and would have to be based on scientific evidence;

**Instead of requiring that the determination (of whether adverse effects on public health would exist) "take into consideration specific populations whose health may be adversely affected within that local unit of government," the definition of "adverse effects on the environment or public health" would include taking into account not only the economic, social, and environmental costs and benefits but also "specific populations whose health may be adversely affected";

**To make a determination of "the nature and extent of adverse effects on the environment or public health" (after the submission to the department of a resolution by a local unit of government identifying adverse effects on the environment or public health that would exist within the local unit of government), the department would have to consider any recommendations of the county health department of the county where the adverse effects would allegedly exist; and

**The department would have to issue two specific "generally accepted agricultural and management practices" (one for site selection and one for control of manure) by April 1, 2000.

BACKGROUND INFORMATION

According to the National Council of State Legislatures, 12 states enacted legislation in 1998 regarding "confined/concentrated animal feeding operations" (CAFOs).

**Indiana limits county zoning of agricultural land under certain conditions.

**Kansas imposes restrictions on construction and expansion of CAFOs distinguishing between those for livestock in general and those for swine. Swine facilities must have water pollution control permits, while swine facilities with at least 1,000 animal units must submit manure management plans, conduct soil and wastewater tests, and have odor control. Closure requirements are specified for facilities with an animal unit capacity of 3,725 or more. The Kansas Department of Health and Environment is required to conduct periodic inspections of permitted swine facilities, and the secretary may deny or revoke permit applications for habitual or intentional violators of

environmental laws of Kansas or any other state. There are criminal penalties for certain violations.

**Kentucky adopted emergency administrative regulations to update the state's environmental permitting program, especially regarding permits for swine feeding operations.

**In an omnibus bill, Minnesota established a license program that requires proof of financial responsibility, and prohibits the management or application of animal waste for hire without a valid commercial animal waste technician's license. Minnesota's Pollution Control Agency (PCA0 can refuse to authorize or transfer a feedlot permit based on an applicant's expertise, competence, experience, and past record. The PCA is require to issue a National Pollutant Discharge Elimination System Permit for feedlots with 1,000 or more animals, and counties can adopt standards for animal feedlots that are more stringent than PCA rules. After January 1, 2001, a county that has not accepted delegation of the feedlot permit program must hold a public meeting prior to the PCA issuing a feedlot permit for a feedlot facility with 300 or more animal units. Any state or local unit that conducts an inventory or survey of livestock feedlots in its jurisdiction must publicize notice of the inventory in a newspaper of general circulation in the affected area. Local units conducting a feedlot survey must conduct at least one public hearing, while a state agency must hold at least four public hearings outside of the Twin Cities metropolitan area. Until June 30, 2000, neither the PCA nor a county board may issue a permit for the construction of an open-air clay, earthen, or flexible membrane liner swine water lagoon. The commissioner of the PCA, in consultation with others, must report on the need for an animal waste liability account, improved animal waste incident reporting, and a contingency action plan for animal waste sites. The Commissioner of Labor and Industry, in consultation with others, was required to report to the legislature by January 1, 1999, about any changes needed to exposure standards for hydrogen sulfide exposure levels in livestock confinement facilities and at distances up to 5,000 feet from animal waste storage facilities (according to the NCSL, hydrogen sulfide may cause miscarriages and other problems).

**Oklahoma imposed a one-year moratorium on the construction or expansion of large (5,000 swine over 55 pounds or 20,000 weaned swine under 55 pounds) swine feeding operations, added well monitoring requirements and odor abatement plans in new applications, and requires waste education and training for all persons involved in the treatment, storage or application of animal waste from licensed facilities. The Department of Agriculture is authorized to assess an 80 cent-per-animal unit fee for facilities with a capacity exceeding 1,000 animal units.

**New York expanded its Cooperative Corporations law to authorize formation of cooperative corporations for the purpose of handling livestock waste and other organic agricultural waste as well as the formation of agricultural cooperative corporations for the purpose of processing or disposal of agricultural waste products or agricultural compost.

**Mississippi gave county supervisors until June 1, 1998, to enforce local hog farm regulations, and, if they did so, operators could not apply for a state permit in another county. No new permits would be granted for two years, other than those filed before February 28, 1998, or those that could demonstrate that they were innovative, technologically advanced hog farms. CAFO air and water quality monitoring programs were to be established and findings reported to the legislature on January 1, 1999.

**Under Nebraska's Livestock Waste Management Act, a permit from the Department of Environmental Quality is required before a person can construct or operate a livestock waste control facility when there is a potential for discharge into the waters of the state. Monitoring of ground or surface water can be a condition for a permit if there is significant risk to waters of the state. Permit applicants may be determined unsuitable for a number of reasons, including habitual or intentional violation of environmental laws of any state, the U.S., or any country if the violation had resulted in significant and material environmental damages, or if the applicant had had a permit revoked by any jurisdiction for a violation of environmental laws. County boards must be notified when an application for a livestock waste control facility has been submitted, and public notice must be given of permit applications for facilities with at least 5,000 animal units. All permit fees go to the Livestock Waste Management Cash fund. Permits are valid for as long as the operation continues, but the permit may be modified as needed. Anyone who owns or operates a livestock facility without a permit must request an inspection, and post-construction inspection of all livestock waste control facilities is required. Criminal penalties apply.

**South Dakota imposes legal responsibility and tort liability for environmental damages caused by the negligent entrustment of livestock to another or

negligent control or specification of design, construction or operation of livestock facilities, has established an environmental livestock cleanup fund, and prohibits certain discharges associated with livestock operations. (Voters in South Dakota also passed a ballot initiative in November 1998 that strengthens its anti-corporate farm law and supports family farms.)

**Virginia requires pollution abatement permits for defined confined animal feeding operations and requires its Department of Environmental Quality to annually inspect all confined animal feeding operations facilities covered by a permit. Approved nutrient management plans are required for facilities of 300 or more animal units, and after July 1, 2000, all CAFOs with 300 or more animal units that use a liquid manure collection and storage system must submit a registration statement or be covered by an individual permit. Civil penalties apply.

**Iowa has allowed no new earthen manure storage basins to be constructed or expanded since July 1, 1998, and defines requirements for expansion of CAFOs. Permits are required for the construction and operation of CAFOs, and CAFO operators must have manure management plans. Habitual violators may not obtain new permits for five years after being classified as such, and penalties are provided for non-compliance. Indemnity fees are assessed, and money from the general fund can be used to supplement the manure storage indemnity fund monies if they prove insufficient. Counties cannot regulate agricultural operations unless expressly authorized by state law, but counties that provide cleanup may make claims on the manure storage indemnity fund under certain conditions. Sellers must disclose the fact that the property they are selling is within the separation distance of a CAFO, and that the CAFO may be able to expand and may be protected by law. Penalties are provided for non-compliance.

**Maryland's Water Quality Improvement Act of 1998 applies to all agricultural operations with either gross annual incomes over $2,500 or livestock operations with more than eight animal units (where an animal unit equals 1,000 pounds). The act requires nutrient management plans and evaluation of those plans by the Department of Agriculture, as well as providing for fertilizer applicator requirements, poultry feed amendments, a cost share assistance for nutrient management plan development, technical assistance, tax incentives to promote and facilitate the transfer of poultry litter, and an Animal Waste Technology Fund to develop and demonstrate alternative uses and markets for animal wastes.

**Pennsylvania's Senate Resolution 91 of 1997 calls for a checklist of existing requirements for Livestock Intensive Operations (LIOs), a report on animal agricultural trends, an LIO management certification course to be developed by Penn State University for LIO operators, and a community dispute resolution process for communities with disputes over LIO sites.

**In addition to the above state legislation, in the November 1998 election, Colorado's ballot measure 13 was defeated and ballot measure 14 was passed. Ballot measure 13 would have banned the regulation of swine facilities in any manner that would be unique among other livestock regulations, while ballot measure 14 calls for swine facility regulation, specifies certain areas to be regulated, and includes a requirement for anaerobic lagoon covers.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have an indeterminate fiscal impact. The Department of Agriculture would incur administrative costs due to the requirement to conduct public hearings. (10-27-99)

ARGUMENTS:

For:

The bill is part of a package of bills introduced as a result of a report by the Senate Agricultural Task Force. Proponents of the bill say that some local units of government have passed local ordinances that have the effect, if not the intent, of preventing farmers from expanding their operations or even to drive them out of business altogether. As an August 1998 article in the Council of State Governments magazine, *State Government News*, points out, farm consolidation is a long-standing trend, and the number of farms of all kinds is shrinking, even as the amount of food produced is at record levels. Large farms benefit from economies of scale and small producers often are eliminated, which means that farmers will be forced by the market to get bigger or get out. This has been true in the poultry industry, which has been followed by the hog industry, and which is being followed by the beef and dairy industries. For example, according to the U.S. Census of Agriculture, in the past 30 years hog production increased by six percent while the number of hog operations involved in production deceased by more than 80 percent. Although confinement barns and the associated lagoons, mills, storage facilities and

annex buildings require substantial capital investments, the hog industry has become profitable by using highly advanced technology. However, the technology, too, is expensive, and to recoup costs, size is imperative, including ample land to dispose of the large volumes of manure generated. Thus, in order to survive, farming operations will have to get bigger. But many people in the livestock industry believe that local ordinances are limiting their economic opportunities by blocking their expansion.

As the Senate Fiscal Agency's analysis points out, according to the Senate Agricultural Preservation Task Force's report, issued in September 1999, restrictive local regulations even have the potential to eliminate certain types of farming operations in the state – particularly hog and diary operations – by limiting their ability to increase in size. Proponents of the bill also say that fewer and fewer local officials have farming backgrounds, which leads to land use policies being made by people who don't understand the problems and needs of farming operations. Farmers who operate in more than one jurisdiction also complain that regulations very from one local unit of government to another, making it difficult for the farming operation to meet these often inconsistent regulations.

The bill would protect farming operations by amending the Right to Farm Act to preempt local ordinances that duplicated, expanded, revised, or in any way conflicted with the act or the generally accepted agricultural practices (GAAMPS) developed under the act. At the same time, and if approved by the Commission of Agriculture, the bill would protect the environment and public health by allowing local units of government to enact ordinances prescribing standards different from those in GAAMPS if adverse effects on the environment or public health would exist. (This language resembles the language in the Natural Resources and Environmental Protection Act regarding local pesticide and fertilizer ordinances.) It would be up to the Department of Agriculture, after a public hearing in the local unit of government and after considering any recommendations of the local health department, to determine the nature and extent of adverse effects on the environment or public health. The bill also would require that adverse effects on the environment or public health be based on sound scientific evidence, not just subjective impressions. Finally, the bill would require that the Commission of Agriculture issue the required site selection and control of manure odors in GAAMPS by April 1, 2000, the projected effective date of the bill.

Against:

Not only would the bill take away from local units of government control over their local land use planning if the land in question fell under the Right to Farm Act, the extremely limited ability the bill would give local units to enact ordinances prescribing standards differing from the "generally accepted agricultural and management practices" developed by the Department of Agriculture does not even provide for appeals to the department. This seems not only unfair, but bad public policy.

Response:

The bill is unclear. The subsection referring to appeals says that "appeals to ordinances enacted under subsection (3) shall be filed with the commission of agriculture in writing" and that the commission would have to render a decision within 60 days after the filing of the appeal. While this provision presumably is directed to those cases where, say, a farmer is unhappy with a locally enacted ordinance (and the bill does allow local units of government to enact ordinances without approval of the Commission of Agriculture; local units just couldn't enforce such ordinances until the commission approved them), conceivably it also could apply to local units of government who wished to appeal when the commission disapproved a local ordinance. In addition, no process or deadline for approval of proposed local ordinances is provided for in the bill, nor are some of the deadlines, when given, clearly delineated. The bill also does not specify what the "site selection" that the department would be required to issue a GAAMP for refers to, though, presumably, it is directed at the existing furor over the siting of large-scale livestock - and, particularly, hog - operations.

Against:

A representative of the Department of Agriculture testified before the House Committee on Agriculture and Resource Management that an adequate process for developing GAAMPS - from consulting with Michigan State University and the soil conservation districts, to public hearings, to approval by the Commission of Agriculture - takes a year. And yet the bill was amended in committee to require the department to develop the two required GAAMPS not by November 1, 2000, but by April 1, 2000, cutting seven months off the earlier proposed time. Reportedly, farming interests have asked that the bill be enacted by this spring so that "farmers can't be sued," so instead of delaying implementation of the bill until the year-long process for developing new GAAMPS can take place in a thorough manner, that crucial process is being sacrificed for questionable goals. In fact, rather than rush through a bill that will have detrimental effects on local units of government throughout the state and questionable impact on preserving family farms, as its proponents claim, the process should be given the time necessary for careful

consideration, including sufficient time for the dozens of individual citizens, many of whom are small family farmers, to testify. Many who were present for the House committee meeting were not able to express their views in testimony before the committee because the process is being moved forward so quickly. Such an important bill deserves more time and public input than it has received.

Against:

An August 1998 article in *State Government News* notes that as the trend toward corporate farming and farm industry consolidation continues, public concern and even outrage has grown over air and water quality issues. The hog industry, following a trend first established in the poultry industry, has increasingly moved to large-scale operations. According to the article, the largest such operation so far reportedly is a giant 600,000-hog a year operation – that plans to turn out 2.5 million hogs annually in a few years – built by Four Circles Farms in the tiny town of Milford, Utah, at the invitation of local officials, who sought out the hog operation as a solution to the town's declining fortunes. Although in the past counties courted these large-scale livestock operations with reduced property taxes and assistance with roads, water (large-scale hog operations require huge amounts of water), and permitting, the public often has been given little say in whether such operations were located. In fact, the article points out, "In close-knit rural communities, farmers and long-time residents have raised the strongest opposition to the new operations and their odors" and [t]here is growing public sentiment in rural states to restrict corporate farms and treat the largest farms in a manner consistent with industry" (that is, rather than as traditional small family farms). Nationwide, in fact, many rural communities reportedly want to use zoning to keep large farms out of their areas, and some states – like North Carolina – have even gone so far as to impose a moratorium on new and expanded operations. (See BACKGROUND INFORMATION.) In North Carolina, where large-scale hog farming saw amazing growth in a short period, the article says that a good share of the furor over hog operations came after Purvis Farms planned to build two large hog operations in Moore County, home to several retirement communities and numerous world-class golf courses, including the Pinehurst Golf Course. The articles says, "Moore County residents protested to the Legislature, which eventually enacted a two-year moratorium. The location of hog facilities near churches, schools and populated areas has raised serious concerns in many rural communities."

Large-scale hog operations also have been a source of considerable public concern for the past decade in Michigan, where the state's response, unfortunately, has been to preempt citizens' ability to adequately contest serious adverse impacts on their quality of life from large-scale livestock operations. In 1987, for example, in response to an air pollution lawsuit brought by a group of residents in Jackson County against a 25,000-hog operation in Parma Township, the legislature expedited an amendment to the Right to Farm Act (Public Act 218 of 1987) that exempted farming operations from the Air Pollution Control Act. Thus, odors such as the kind of debilitating odors from large, intensive livestock facilities that can destroy a homeowner's quality of life cannot even be contested by homeowners, whether farmer or non-farmers. In 1995, a series of laws enacted by the legislature further disadvantaged individual citizens by, among other things, requiring people to pay the court costs (including attorney fees) of farmers who are alleged to have engaged in illegal activities but are subsequently found by the Department of Agriculture to have used "generally accepted agricultural management practices" (known as "GAAMPS"). However, the law does not require farmers who lose such lawsuits to pay the plaintiffs's court costs, which hardly seems just.

The bill would further this erosion of protections for individual citizens from the serious adverse effects of large-scale livestock facilities by taking away even their right to recourse through local zoning and planning ordinances. There could be an appeal of ordinances enacted by local units of government, but there is no process for local units – much less individual citizens – to appeal if the Commission of Agriculture disapproved an ordinance (all the commission would be required to do if it disapproved an ordinance would be to provide "a detailed explanation of the basis of the disapproval within 60 days").

The effect, if not the intent, of the bill would be to entirely insulate the influx and expansion of large-scale livestock facilities – some of which may choose to relocate from states with more stringent regulation – from reasonable local decision making by residents of the areas into which such facilities decide to locate.

Against:

The bill would turn the Right to Farm Act on its head. As originally conceived, Michigan's Right to Farm Act, like those of many states, was enacted to protect existing farms from urban sprawl and the nuisance lawsuits brought by new neighbors who moved to rural areas from urban areas and who were unused to the odors, noise, and dust produced in the course of ordinary farm operations. But huge livestock facilities are more like large manufacturing plants than they are like small family farms, and the noise and pollution they produce is not the "ordinary" odors, noise, or dust produced by small family

farms. Instead of protecting existing traditional farms from nuisance lawsuits brought by newly-arrived non-farming neighbors, the bill would prevent existing residents in an area – whether farmer or non-farmer – from reasonable regulation of new (or major expansion of existing) large-scale livestock facilities. As the *State Government News* article points out, "Public outrage over hog farms and concern over their effects on the quality of air, water, and life is not likely to dissipate quickly," and the bill would do little, if anything, to address that public outrage or, in fact, to protect family farms.

Against:

Emerging case law is beginning to define the kinds of exemptions afforded farming operations (including large-scale livestock operations) under the "right-to-farm" laws as uncompensated government "takings" for private purposes. In a landmark September 1998 decision, the Iowa Supreme Court ruled (in Bormann v Kossuth County, No. 192/96-2276) that by protecting farming operations from lawsuits, the Iowa "right-to-farm" act diminishes the value of neighbors' land and amounts to taking their land without compensation. And in February of 1999, the U.S. Supreme Court let the Iowa ruling stand. Thus, "right-to-farm" laws, rather than decreasing litigation, may well soon result in an increase in litigation, particularly as the exemptions in these laws are broadened, as the bill proposes. Conceivably, this could eventually lead to Michigan's Right to Farm Act being similarly challenged and invalidated. Rather than invite such litigation and the possible overturning of the entire act by exempting farming operations from local zoning and planning ordinances, in order to promote more certainty and consistency in regulatory programs the state should work with and provide assistance to local units of government, regarding them as allies rather than obstacles to the Department of Agriculture's efforts to support the agriculture industry in the state. As the Senate Fiscal Agency analysis points out, each local unit of government must respond to its own needs and circumstances, and is in the best position to determine appropriate land uses. Instead of taking away local control, the state should strengthen local units by assisting, for example, with site location and design standards. Such standards could not only help provide the consistency sought by the agricultural industry, but also still leave local communities with the ability to choose the most suitable and safe sites for large-scale livestock operations. In addition, if local land use planning is not coordinated with agricultural land uses, farming operations could actually face increased, rather than decreased, problems, such as inadequate roads necessary to transport their products to market.

Against:

The bill is only one of a series of bills this session that would significantly reduce the state's longstanding traditions of local control over local issues. The principle of local control of local affairs is embedded in the Michigan constitution, where Article VII, Section 34 says, *"The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by the constitution and by law shall include those fairly implied and not prohibited by this constitution."* Michigan has a long tradition of honoring the democratic principle that local issues are best decided by local governments, and the bill flies in the face of this tradition. Despite statements to the contrary, the effect, if not the intent, of the bill would be to force people to travel to the state capitol in order to petition for relief from local quality of life problems that would be far better decided at the local, not the state, level. The bill is bad public policy and possibly subject to constitutional challenge.

POSITIONS:

The Department of Agriculture supports the bill. (10-27-99)

The Michigan Pork Producers Association supports the bill. (10-27-99)

The Michigan Farm Bureau supports the bill. (10-27-99)

The Michigan Farmers Union opposes the bill. (10-27-99)

The Michigan Land Use Institute opposes the bill. (10-27-99)

The Mackinac Chapter of the Sierra Club opposes the bill. (10-27-99)

Analyst: S. Ekstrom

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.