

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 205 (Substitute S-3 as passed by the Senate)
Sponsor: Senator Joel D. Gougeon
Committee: Farming, Agribusiness and Food Systems

Date Completed: 12-16-99

RATIONALE

Originally enacted in 1981, the Michigan Right to Farm Act is designed to protect farmers from lawsuits brought by neighboring residents who are not used to the noise, odor, and dust that accompany typical farming activities. Under the Act, a farm or farm operation may not be found to be a public or private nuisance if the farm or farm operation meets certain criteria, such as conformity to generally accepted agricultural and management practices (GAAMPS). The Act also provides, however, that it does not affect the application of Federal and State statutes, including local zoning ordinances. As a result, even though a farm might have a defense to a nuisance lawsuit, it still can be found in violation of a local ordinance. (Generally speaking, a "nuisance" is something that interferes with a person's enjoyment of his or her life or property.)

The application of local zoning ordinances apparently can be problematic and costly for farmers, particularly when they want to expand operations. A township ordinance, for example, might limit the number of animals allowed per acre, prohibit noxious odors, or restrict noise levels. Since the Right to Farm Act does not supercede local land use laws, a farmer might be denied a permit necessary to expand, or, after expanding, might find himself or herself subject to a lawsuit brought by displeased residents. To remedy this situation, it has been suggested that the Right to Farm Act generally should preempt local ordinances.

CONTENT

The bill would amend the Michigan Right to Farm Act to specify "the express legislative intent" that the Act preempt any local ordinance, regulation, or resolution that purported to duplicate, extend, or revise in any manner the provisions of the Act or generally accepted agricultural management practices developed under the Act. The bill also would prohibit a local unit of government from enacting, maintaining, or enforcing an ordinance, regulation, or resolution that contradicted or conflicted in any

manner with the Act or GAAMPS.

The bill would permit a local unit of government, however, to enact an ordinance prescribing standards different from those contained in GAAMPS if unreasonable adverse effects on public health would exist within the local unit. The determination that such effects would exist, would have to take into consideration specific populations whose health could be adversely affected within that local unit. For purposes of these provisions, "unreasonable adverse effects on public health" would mean any unreasonable risk to human beings taking into account the economic, social, and environmental costs and benefits.

An ordinance enacted under the bill could not conflict with existing State or Federal laws. The local unit could not enforce the ordinance until it was approved by the Michigan Agriculture Commission. If it denied the ordinance, the Commission would have to provide a detailed explanation of the basis of the denial within 60 days.

Upon a local unit's identification of unreasonable adverse effects on public health as evidenced by a resolution submitted to the Michigan Department of Agriculture (MDA), the Department would have to hold a local public meeting within 60 days after the resolution was submitted, in order to determine the nature and extent of such adverse effects. Within 30 days after the public meeting, the MDA would have to issue a detailed opinion regarding the existence of unreasonable adverse effects on public health as evidenced by the resolution.

Appeals to ordinances enacted under the bill would have to be made to the Agriculture Commission in writing. The Commission would have to render a decision within 60 days.

Currently, the Act provides that it does not affect the application of State and Federal statutes, and specifies that "state statutes" includes local zoning

laws. The bill would delete these provisions.

MCL 286.474

BACKGROUND

Under the Michigan Right to Farm Act, a farm or farm operation may not be found to be a public or private nuisance if either of the following applies:

- The farm or farm operation conforms to generally accepted agricultural and management practices according to policy determined by the Michigan Agriculture Commission.
- The farm or farm operation existed before a change in the use or occupancy of land within one mile of the farm's boundaries, and would not have been a nuisance before that change in use or occupancy.

In addition, if a farm or farm operation conforms to GAAMPS, it may not be found to be a nuisance as a result of any of the following: a change in ownership or size; temporary cessation or interruption of farming; enrollment in governmental programs; adoption of new technology; and/or a change in the type of farm product being produced.

The term "generally accepted agricultural and management practices" means those practices as defined by the Michigan Agriculture Commission. The Commission is required to give due consideration to available MDA information and written recommendations from the Michigan State University College of Agriculture and Natural Resources Extension Service and the Agricultural Experiment Station in cooperation with the United States Department of Agriculture Natural Resources Conservation Service and the Consolidated Farm Service Agency, the Michigan Department of Natural Resources (DNR), and other professional and industry organizations.

The Act requires the Agriculture Commission to request the MDA Director to investigate all complaints involving a farm or farm operation, including those involving the use of manure and other nutrients, agricultural waste products, dust, noise, odor, fumes, air or water pollution, food and agricultural processing by-products, care of farm animals, and pest infestations. The Director must give notice of his or her finding to the complainant and the person responsible for the farm or farm operation, notify that person of changes that should be made if practices other than GAAMPS are used, and determine whether the changes are implemented.

The Act requires the Agriculture Commission and the

MDA Director to enter into a memorandum of understanding with the Natural Resources Commission and the DNR Director. (Responsibilities of the DNR under the Act currently are performed by the Department of Environmental Quality.) The investigation and resolution of environmental complaints must be conducted in accordance with the memorandum of understanding. The Agriculture Commission and the MDA Director are required to develop procedures for the investigation and resolution of other farm-related complaints.

If a farm or farm operation successfully defends a nuisance lawsuit, the farm or farm operation may recover from the plaintiff the actual costs incurred in defending the action, including attorney fees.

The Act also states that certain real property is subject to disclosures described in Section 7 of the Seller Disclosure Act (which requires the disclosure of whether residential property is, among other things, in the vicinity of a farm or farm operation). In addition, a seller of real property may voluntarily disclose that the property is located within one mile of a farm or farm operation where GAAMPS might be used, that GAAMPS may generate noise, dust, odors, and other associated conditions, and that these practices are protected by the Right to Farm Act.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Right to Farm Act apparently has been successful in reducing the number of nuisance lawsuits brought against farmers, and enabling farmers to defend nuisance lawsuits; however, the Act's failure to preempt local ordinances is a serious shortcoming. This issue is one of many addressed by the Senate Agricultural Preservation Task Force, which was created last spring and held eight hearings at various locations across the State. At these hearings, many individuals, including hog farmers and vintners, expressed their belief that local ordinances are limiting economic opportunities for farm families, blocking expansion, and making it difficult to keep land in agriculture. According to the Task Force's report (issued in September), restrictive regulations even have the potential to eliminate certain types of farming, such as hog and dairy farms, given the need to increase the size of operations.

People testifying at the hearings also pointed out 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. Another complaint involves the inconsistency of regulations from one local unit to another, which can be particularly confusing for farmers who operate in more than one jurisdiction.

This bill would strengthen the Right to Farm Act by preempting local ordinances that would duplicate, expand, or in any way revise the Act. The bill represents an opportunity to protect property rights and help farms stay profitable. At the same time, the bill would allow a local unit to enact standards different from GAAMPS if unreasonable adverse effects on public health would exist. The local unit would have to hold a public meeting on an ordinance, and receive the approval of the Agriculture Commission. These provisions closely parallel existing language in the Natural Resources and Environmental Protection Act regarding pesticide and fertilizer ordinances (MCL 324.8328 and 324.8517).

Opposing Argument

The bill would preempt local ordinances that would “duplicate, extend or revise in any manner” the provisions of the Right to Farm Act or GAAMPS. The Right to Farm Act, however, creates a defense against nuisance lawsuits and a process for investigating complaints. The Act does not actually regulate farming practices or even require farms to use GAAMPS. In fact, conformity with GAAMPS is entirely voluntary. No one officially knows whether a farm conforms to GAAMPS unless there is a complaint and an investigation, and the Act provides for no recourse if a farmer fails, refuses, or chooses not to use GAAMPS.

Also, GAAMPS themselves are constantly evolving. Currently, the practices cover five specific areas: 1) manure management/use; 2) pesticide use/pest control; 3) nutrient use; 4) care of farm animals; and 5) cranberry production. The Agriculture Commission must first determine that there is a need for a generally accepted practice, and each GAAMP must be reviewed and reapproved annually; however, GAAMPS are not promulgated as rules under the Administrative Procedures Act. While this process might be adequate for the purpose of determining whether something qualifies as a nuisance, GAAMPS are neither broad enough to cover all aspects of farming nor specific enough to accommodate local conditions. Also, GAAMPS do not differentiate between small farms and industrial-sized operations. Because the Commission can always add, modify, and discontinue GAAMPS, they would be a moving target for any local unit of government that attempted to enact an ordinance that did not duplicate, expand, or revise GAAMPS.

Response: Although GAAMPS are voluntary, if the MDA conducts an investigation and determines that a farm is not conforming to GAAMPS, the farm will have no protection under the Right to Farm Act against a nuisance lawsuit. If the farm's nonconformity raises an environmental concern, such as a danger to water quality, the DEQ can take action. Also, although GAAMPS are not promulgated as rules, meetings of the Agriculture Commission are open to the public.

Opposing Argument

Each local unit of government must respond to its own needs and circumstances, such as topography and demographics, 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 with recommended site location and design standards. Such standards could help provide the consistency sought by the agricultural community but still leave locals with the ability to choose the most suitable and safe sites. In addition, if local planning were not coordinated with agricultural land uses, farmers actually could face increased difficulties--such as having to depend on insufficient road systems to transport their produce to market.

Opposing Argument

In order to balance the needs of farming and the interests of communities, the bill's preemption should be limited to family farms. By exempting relatively small operations from local regulation, the bill would enable families to continue farming without interference from neighbors who are unaccustomed to agricultural odor and noise. On the other hand, farms that are over a certain size, such as 1,000 units, should remain subject to local control. By removing nearly all regulatory authority from local government, however, the bill would make Michigan a haven for industrial-sized farming operations, such as hog farms. Reportedly, the number of hogs in this State has declined in recent years, but the bill would reverse that movement, particularly since the proposed preemption would be contrary to national trends. Other businesses must comply with local zoning and land use regulations, and factory farms also should do so.

Response: Regardless of its size, every farm is a business and should be subject to (or exempt from) the same regulations as other farms.

Opposing Argument

Despite the need to protect agriculture, it is important to consider the impact of farming operations on neighboring property owners. Expanding a family

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farm to an industrial-sized operation can have serious ramifications, even if it does conform to generally accepted practices. Furthermore, if a farm conforms to GAAMPS, it cannot be found to be a nuisance as a result of a change in size or a change in the type of farm product being produced. Presumably, for example, this means that a sod farmer could convert his or her acreage to a dairy farm and remain free from a nuisance suit. In terms of odor alone, however, the farm would have a considerably different impact on its neighbors' enjoyment of their own property, and possibly on the value or marketability of that property. In this type of situation, local land use regulations might help balance the needs of an intensive livestock operation and the interests of residential property owners.

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bill would have an indeterminate impact on State Department of Agriculture administrative costs associated with the requirement for the Department to conduct a public hearing. The magnitude of the costs and the extent to which they could be absorbed within existing Department resources would depend on the volume of local resolutions identifying an unreasonable adverse effect on the public health that the Department would receive, and thus the number of public hearings the Department would have to conduct. It might be noted that under similar provisions in the Pesticide Control and Fertilizers parts of the Natural Resources and Environmental Protection Act, the Department of Agriculture has conducted one public hearing in the past five years in response to a local resolution identifying a health threat.

Fiscal Analyst: P. Graham