LAW DEPARTMENT

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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

To: Pro Tem James Tate

From: Sharon Blackmon

Date: March 26, 2024

RE: Right to Farm Act and Local Farm Ordinances

You are currently sponsoring an ordinance to authorize a limited number of poultry animals and beehives in Detroit's residential neighborhoods. Such an ordinance could conflict with the Michigan Right To Farm Act, MCL 286.471 *et seq*. You have directed the Law Department to review the issue of whether the proposed ordinance is preempted by the Michigan Right to Farm Act.

SHORT ANSWER

The 1999 amendments to the Michigan Right to Farm Act, broadly restricted local regulation of commercial farming operations. The amendments were clearly intended to preempt local governmental authority in this matter and have a unique preclearance mechanism to be invoked in the event a local government seeks to enact regulation conflicting with the statute.

The Michigan Commission of Agriculture and Rural Development has countered this preemption measure through its control of the General Accepted Agricultural and Management practices. This broad use of administrative authority has not been tested in court. However, so long as the current Site Selection GAAMPS are in place, the City is free to enact the urban farm ordinance as proposed.

LAW

HISTORY OF THE RIGHT TO FARM ACT

The Michigan Right to Farm Act was enacted in 1981 for the purpose of protecting farmers from nuisance litigation as residential developments pushed into previously farmed land

throughout Michigan.[1] The act provides that a commercial farm operation[2] cannot be deemed a nuisance if the operation conforms to "generally accepted agricultural and management practices" (GAAMP) or if the farm operation existed before "a change in land use or occupancy of land within 1 mile of the boundaries of the farm land . ." MCL 286.473(1) and (2). The Michigan Commission of Agriculture must annually review the GAAMP and may revise these standards as necessary. MCL 286.473(1).

1999 AMENDMENT

As originally drafted, the Act subordinated the "right to farm" to zoning regulations enacted pursuant to the county rural zoning enabling act, MCL 125.201 *et seq.,* the township rural zoning enabling act, MCL 125.271 *et seq.,* and the city and village zoning act, MCL 125.501 *et seq.* Farming interests complained that these local zoning ordinances were being used to limit agricultural operations.

In 1999, in response to these complaints, the legislature removed the language subordinating the statute to zoning regulations and installed the following language:

> (6) 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 or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance,

[1] Michigan Attorney General Bill Schuette, summed up the Act's history and impetus as follows:

> Michigan first adopted the Right to Farm Act in 1981. Michigan's Act was one of many right to farm acts adopted across the country during the late 1970s and early 1980s. 8 ALR6th 465, § 2. During that time-period, the spread of residential development into traditionally rural areas increased pressure on farm land and farmers. Id. As noted in a staff legislative analysis of the bill that became the Michigan Right to Farm Act, newcomers to traditionally agricultural areas were not accustomed to the noises, odors, and dust associated with agricultural activities. House Legislative Analysis, HB 4054 (April 7, 1981). Proponents of the legislation were concerned that farmers would face increased nuisance lawsuits seeking to enjoin agricultural activities and that such lawsuits, if successful, could result in economic ruin for those farmers. *Id.* OAG, 2018, No 7302 (March 28 2018) p 1

[2] The definitions of farms and farm operations in the RTFA both refer to "commercial" farms and operations. MCL 268.472(a),(b). The Act however, does not define establish a threshold for "commercial" activity. The Michigan Court of Appeals concluded that "there is no minimum level of sales that must be reached before the RTFA is applicable." *Charter Tp of Shelby v Papesh*, 267 Mich App 92, 101; 704 NW2d 92 (2005).

> regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act. MCL 286.474(6)

The amendment requires local jurisdictions to seek preclearance of any ordinance "prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government." MCL 286.474 (7). Such ordinances must be submitted to the director of the Michigan Department of Agriculture and Rural Development at least 45 days prior to enactment. *Id.* Such ordinances "must not be enforced by a local unit of government until approved by the commission following a hearing. *Id*.

POST-AMENDMENT

The sweeping language of MCL 286.474(6) appears to bar local government legislation restricting or eliminating the right to farm. In practice, however, this has not been the case because of the opening created by MCL 286.473(1) regarding GAAMPs. GAAMPS are administrative rules promulgated by the Michigan Commission of Agriculture and Rural Development. Commercial farming operations cannot be controlled via nuisance actions or zoning legislation if they conform to the GAAMPs or if the operations predated the encroachment of residential developments. MCL 286.473(1) and (2).[3]

This power to expand or contract the right to farm based on the contents of the GAAMPs has been employed by the Commission to mitigate the 1999 amendment's severe restrictions on local control of that right. This mitigation was accomplished in two stages.

In its 2012 revision of the GAAMP governing Site Selection and Odor Control for New and Expanding Livestock Facilities, the Commission added the following language to its preface:

> This GAAMP does not apply in municipalities with a population of 100,000 or more in which a zoning ordinance has been enacted to allow for agriculture provided that the ordinance designates existing agricultural operations present prior to the ordinance's adoption as legal nonconforming uses as identified by the Right to Farm Act for

[3] Historic farming operations protected by MCL 286.473(2) are generally not at issue in long developed urban areas such as Detroit, as few if any commercial farm operations in Detroit predate the city's zoning ordinance. See *Jerome Tp v Melchi*, 184 Mich App 228, 232–33 (1990).

> purposes of scale and type of agricultural use. (See GAAMP, Site Selection, 2012, p iii.)

Seven municipalities have populations greater than 100,000. Ann Arbor, Detroit, Flint, Grand Rapids, Lansing, Sterling Heights, and Warren and are free from the Site Selection GAAMPS because of this language. In 2013, Detroit enacted an ordinance permitting agricultural activities in residential areas, thereby availing itself of the privilege to self-regulate based on this new provision.

Much uncertainty continued to surround the expansive reach of the RTFA. Except for the 7 largest cities, jurisdictions were faced with the possibility of having no means to limit agricultural activities so long as they conformed to the GAAMPs. Because the early versions of the GAAMP contained no restrictions regarding operations with fewer than 50 animal units, small farmers asserted they were free to conduct farm operations in any jurisdiction with a population of less than 100,000.

In 2014, the Michigan Commission of Agriculture and Rural Development revised the GAAMP, Site Selection, provision to include a new category, category 4. That category was defined as:

> Sites not acceptable for new and expanding livestock facilities and livestock production facilities under the Siting GAAMPs. Sites that are primarily residential in current land use are not acceptable under the Siting GAAMPs for livestock facilities or livestock production facilities regardless of the number of animal units. The placement or keeping of any number of livestock on those sites does not conform to the Siting GAAMPs. (See GAAMP Site Selection, 2014, p 11.)

Primarily residential areas are defined as any area having "more than 13 non-farm residences within 1/8 mile of the site or have any non-farm residence within 250 feet of the livestock facility." P 4. This change by the Commission was clearly intended to close a loophole that allowed urban farmers with less than 50 animals to farm in any location.[4] Following this revision, farming sites

[4] See *Removing Michigan Right to Farm Protection from Suburban Hobby Farms 'Closes a Loophole' Agriculture Official Says*, @mlive, Jan 22, 2014, p 1-2:

> Small backyard farmers fear proposed changes in farming practices endorsed by the Michigan Agriculture Commission could strip them of state protection under Michigan's Right to Farm Act.
>
> They're right, but that protection was never intended for them in the first place, said Jim Johnson, division director of the Michigan Department of Agriculture and Rural Development's Environmental Stewardship Division in an interview Tuesday.

in "primary residential areas" throughout the state are non-GAAMP compliant and outside the shield of preemption.

This broad use of administrative authority to close legislative loopholes has, to date, not been tested in court. Michigan State University's Farm Extension newsletter of April 11, 2023, framed the issue as follows:

> There is a legal question as to if, through a GAAMP, the Michigan Commission of Agriculture and Rural Development has the authority to delegate local authority to regulate in face of statutory preemption of any local ordinance, regulation or resolution that extends or revises in any manner the provisions of the RFTA or GAAMPS. Michigan State University, MSU Extension, *Right to Farm Act Can Preempt Local Regulation Authority, But Not All Local Regulations,* April 11, 2023, p 5.

CONCLUSION

As currently drafted, the proposed ordinance would not be preempted by the RTFA because of the GAAMPs.

If you have any additional questions or concerns, please feel free to let me know.

> "People found a loophole" . . . that allowed them to force farm animals into residential areas that are not appropriate, Johnson said.
>
> The intent of the suggested changes: Close that loophole.
>
> The proposed changes allows for local governments to decide what's acceptable within their own communities and set conditions for that use," said Jennifer Holton, Director of Communications for the Michigan Department of Agriculture and Rural Development.