STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

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MIKE COX
ATTORNEY GENERAL

October 31, 2006

Honorable Bob Emerson
State Senator
The Capitol
Lansing, MI

Dear Senator Emerson:

Attorney General Cox has asked me to respond to your letter in which you ask five questions concerning the Michigan Right to Farm Act (Act), MCL 286.471 *et seq*. According to its title, the Act's purposes are "to define certain farm uses, operations, practices, and products" and to "provide for circumstances under which a farm shall not be found to be a public or private nuisance." Due to the subject matter of your request, I asked staff in the Environment, Natural Resources, and Agriculture Division to review your letter. The following represents their findings.

From the materials accompanying your request, it is clear that your questions focus on situations where lot owners bring new farming uses into residential areas and then invoke the Act to shield themselves from local zoning ordinances. This is a broad category of potential facts, and, therefore, the answers will necessarily be broad as well.

Turning to your first question, you ask whether a person may move into a community that only allows farming on lots over ten acres in size and then farm on a lot smaller in size than ten acres. The Act contains two provisions of possible relevance to the new farm. The first states:

> A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture. [MCL 286.473(1).]

The second potentially relevant section of the Act states:

> 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, 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).]

In the recent case of *Charter Twp of Shelby v Papesh*, 267 Mich App 92; 704 NW2d 92 (2005), the Court of Appeals explained the effect of the Right to Farm Act on local zoning ordinances. The *Papesh* Court concluded that "[t]he language of the [Right to Farm Act] is unambiguous." *Id*., at 106. According to the Court, the Act "clearly states that a local ordinance is preempted when it purports to extend or revise" the Right to Farm Act or the generally accepted agricultural and management practices (commonly known as "GAAMPs") issued pursuant to the Right to Farm Act. *Id*. The *Papesh* Court explained that the Act "further plainly states that a local unit of government shall not enforce an ordinance that conflicts in any manner" with it or the GAAMPs. *Id.,* at 107.

The *Papesh* Court observed that some believed its interpretation would "prevent local municipalities from '[get]ting their arms around' farms operating in existing or developing residential areas." *Id.,* at 107. The Court refused to engage in "judicial construction," however, because "[t]he wisdom of a statute is for the determination of the Legislature, and the law must be enforced as written." *Id*.

An informational letter from then Deputy Attorney General William J. Richards to Representative Mark H. Schauer, p 4, dated March 29, 2000, similarly explained that in MCL 286.474(6), "the Legislature has expressly and clearly stated its intention to preempt conflicting local ordinances under specified circumstances." In addition, while Michigan courts do not generally rely on legislative analyses to ascertain legislative intent, the Senate Legislative Analysis, SB 205, January 4, 2000, on the enrolled Right to Farm Act nevertheless provides helpful context regarding the Act's preemption provision:

> The application of local zoning ordinances apparently has been problematic and costly for some farmers, particularly when they wanted 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 did not supercede local land use laws, a farmer could be denied a permit necessary to expand, or, after expanding, could find himself or herself subject to a lawsuit brought by displeased residents. To remedy this situation, it was suggested that the Right to Farm Act generally should preempt local ordinances.

The question before the *Papesh* Court was whether the Right to Farm Act or a GAAMP preempted a local zoning ordinance prohibiting the raising of poultry on a parcel smaller than three acres. *Papesh*, 267 Mich App at 106. The Court held that if a poultry farm of one acre complied with the relevant GAAMPs, which did not include a three-acre requirement, then "[t]he ordinance conflicts with the [Right to Farm Act] to the extent that it allows plaintiff [the local government] to preclude a protected farm operation by limiting the size of a farm." *Id.,* at 106.

Applying the *Papesh* ruling to your first question makes clear that if the new farm met all the standards of the relevant GAAMPs, then the Right to Farm Act would preempt the local ordinance requiring all farming to be conducted on ten acres. Compliance with relevant GAAMPs must be determined, however, on a case-by-case basis. For example, the GAAMP describing accepted site selection practices for new or expanding livestock production facilities require new and expanding uses to be zoned agricultural. Michigan Department of Agriculture, *GAAMP for Site Selection and Odor Control for New and Expanding Livestock Production Facilities,* (Lansing: Michigan Commission of Agriculture, June 2006), pp 5, 6, and 8. If the new farm has livestock production facilities on land zoned residential, then it would not comply with this GAAMP, and the Right to Farm Act would not preempt the local zoning ordinance. But if the new farm were located on land zoned agricultural and complied with all applicable GAAMPs, then local zoning would be preempted to the extent it conflicted with the Right to Farm Act.

Your second question is whether farming or agriculture can be blocked by a deed restriction that purports to limit a property's use to "single family dwellings only." There is nothing in the Right to Farm Act that preempts a private, contractual relationship requiring property to be used for single family dwellings only. Generally, deed restrictions are property rights that the courts will protect if they are of value to the property owner asserting the right and if the owner is not estopped from seeking enforcement. *Rofe v Robinson*, 415 Mich 345, 349; 329 NW2d 704 (1982). A law or local ordinance that attempted to override a deed restriction could be subject to challenge under US Const, art I, § 10, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.,* at 351.

Your third question is whether a local zoning ordinance can restrict farming or agricultural use by prohibiting commercial use. The Right to Farm Act applies to farm operations "in connection with the commercial production, harvesting, and storage of farm products." MCL 286.472(b). As discussed before, section 4 of the Right to Farm Act expressly preempts 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" or that conflicts "in any manner with this act or generally accepted agricultural and management practices developed under this act." MCL 286.474(6). Since the Right to Farm Act expressly applies to commercial production, harvesting, and storage of farm products, any zoning ordinance that purports to limit a farming operation engaged in commercial production that complies with relevant GAAMPs is preempted by the plain language of the Right to Farm Act. *Charter Twp of Shelby v Papesh*, 267 Mich App at 101.

Your fourth question asks who determines whether a new use is commercial and by what process the determination is made. The Michigan Court of Appeals has interpreted the term "commercial production" in the Right to Farm Act as meaning "the act of producing or manufacturing an item intended to be marketed and sold at a profit." *Charter Twp of Shelby v Papesh*, 267 Mich App at 100. Local units of government with the power to zone would have the authority, in the first instance, to determine under their ordinances whether a use is commercial. This could include the local government utilizing conditional use permits to ensure that the new use is commercial. In the event of a challenge, however, a court would have the

ultimate authority to decide whether the use is commercial. Moreover, section 4 of the Right to Farm Act would prohibit a local unit of government from applying a definition of the term "commercial" to a farming operation that conflicted with the construction of the term "commercial production" provided by the Court in the *Papesh* case.

Your fifth question is whether the Department of Agriculture can limit its site selection GAAMP to a certain number of animal units and, if so, whether a local government can enforce its zoning ordinance when the use involves fewer than that number. The Department has recently expanded the site selection GAAMP to operations with any number of animal units, thus rendering this question moot. The most recent site selection GAAMP is available at the Department of Agriculture's web site at http://www.michigan.gov/mda/0,1607,7-125-1567_1599_1605---,00.html**.**

Sincerely yours,

Carol L. Isaacs
Chief Deputy Attorney General