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COMMENT: MICHIGAN'S RIGHT TO FARM ACT: HAVE REVISIONS GONE TOO FAR?

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LEXISNEXIS SUMMARY:
... In this case, the pig farm was not there first, yet the farm owner used the statute as a successful defense to the nuisance suit. ...

TEXT:
[*213]

Introduction

So there you are - you finally made it. After thirty years of stamping metal in the factory, you moved out of the city and into your retirement home. Built with your own hands, it sits on five acres surrounded by trees, with only a few potato farmers as neighbors.

Although you have not been out of the city long, lately you notice that something strange is in the air - literally. On hot breezy days the foul smell of manure is almost overpowering. The odor reminds you of the hog farm you used to drive by on your way to work, but you are sure there are none nearby. **[*214]** One of the very reasons you chose to retire in this rural township was its ordinance restricting the number of animals allowed on a farm.

Nonetheless, the smell continues to linger, so you call the township clerk hoping for an answer. She informs you that several thousand hogs have recently been brought onto the farm over the hill. Your neighbor, she explains, just could not make ends meet farming potatoes, so he sold out to a pork processor from down South. "How can this be," you ask, "when the township ordinance prohibits such a facility?" "It doesn't anymore," she replies, "because the state passed a law that voids our zoning power over farms." Your heart sinks. What can you do now that your entire life savings is invested in this property?

On June 1, 2000, this scenario became a possibility in Michigan. On that date, significant revisions to Michigan's Right to Farm Act [n1] (the Act) took effect. The state legislature modified the Act to support the state's farmers who were struggling to survive against the pressures of suburbanization and the challenges associated with the changing nature of farming. [n2] This latest change in the Act marks the second major expansion of protection given to farmers since the

statute's original passage in 1981. [n3]

Every state in the nation has enacted some form of right to farm statute to aid farmers dealing with the effects of residential encroachment and a changing marketplace. [n4] In recent years, several state right-to-farm statutes have faced constitutional challenges. [n5] In light of such challenges and the recent revisions to Michigan's statute, the time is ripe to examine whether the **[*215]** Michigan Right to Farm Act, as amended, passes constitutional muster and represents sound public policy.

The purpose of this Comment is to analyze Michigan's Right to Farm Act and to examine whether the statute might survive a constitutional challenge. Part I explains the evolution of the Act to its current state through the examination of statutory language and related case law. Part II focuses on Fifth Amendment takings law and the possible outcome of legal challenges to the Act. In this section, particular emphasis is placed upon a 1998 Iowa Supreme Court decision that struck down that state's right-to-farm law as creating an unconstitutional taking of property. [n6] Comparing the relevant statutory provisions of Iowa and Michigan and applying a takings law analysis, Part II concludes that Michigan's revised Act probably would survive a constitutional takings challenge. However, this Comment argues in Part III that, as revised, the statute goes far beyond its original purpose of granting limited protections to farmers. As such, this Comment explains that the Act amounts to bad public policy because it creates an uneven balance of rights between farmers and nonfarm property owners, and it encourages the development of industrial-sized operations over the preservation of the family farm. Ultimately, this Comment suggests that, in light of the pressures brought on by the changing nature of farming, the statute should be reexamined and revised.

I. The Historical Context

A. Michigan's Right to Farm Act

Every state in the United States has some form of right-tofarm law, a statutory form of protection for farmers against nuisance suits. [n7] Right-to-farm statutes, along with property tax relief, mark the most widespread form of farmland protection in the nation. [n8] Most states passed right-to-farm laws between 1978 and 1983 to prevent the methodical elimination of farmland as urban areas expanded into traditionally rural land. [n9] This barrage of legislation came during a period of nationwide response to the alarming rate of shrinkage in the number of family-run farms and the consolidation of many of those farms into large-scale agribusinesses. [n10] The 1977 publication of the National Agricultural Lands Study, which warned of a national crisis over the loss of **[*216]** traditional farmland and recommended that states enact right to farm laws, also influenced lawmakers. [n11]

State right-to-farm laws protect farmers from common-law nuisance suits, although they reach this end by a variety of means. [n12] In their most general form, these laws give farmers a "coming to the nuisance" defense against subsequent residential encroachment and the nuisance suits regarding farm-related noise, dust, and smells that typically follow. [n13] Michigan is no different, having passed its right-to-farm act in 1981, [n14] essentially a codification of the common law "coming to the nuisance" defense. [n15] The original version of the Act stated that so long as an established farm was operated in conformance with generally accepted agricultural and management practices (GAAMPs), the farmer could not be found to be creating a public or private nuisance. [n16]

The statute has been revised significantly on two separate occasions since its enactment in 1981. [n17] In its present form, Michigan's Right to Farm Act is relatively uncomplicated, consisting of a section of definitions, [n18] a section on the substantive aspects regarding nuisance, [n19] and two sections regarding procedure and administration. [n20] The core substance of the Act, found in section 286.473, is divided into three parts. [n21] Subsections one and two reflect the 1981 version of the statute, and provide a simple protection for farmers **[*217]** against nuisance suits. [n22] Subsection one sets forth the nuisance defense by declaring that if a farm is in compliance with GAAMPs, it shall not be found to be a public or private nuisance. [n23] The second subsection codifies the "coming to the nuisance" defense, stating that a farmer is protected from nuisance suits if the farm existed prior to a change in land use or occupancy within one mile of the farm. [n24]

The difficulty with any analysis of the Michigan Right to Farm Act and its development lies in the fact that the legislature did not include a statement of intent to clarify the purpose of the Act when it was originally passed. However, over the past twenty years, courts have provided some interpretation of the purpose and scope of the Act. Although case law regarding the Act is not abundant, [n25] court decisions are helpful for identifying issues concerning the statute and shedding some light on its evolution. An examination of Michigan's Right to Farm Act begins by looking at early court cases that followed its passage in 1981.

B. Early Case Law, 1986-1993

Between 1986 and 1993, the Michigan Court of Appeals decided four cases that substantially involved the Right to Farm Act. [n26] Because these cases were the first in which the Act was tested, the opinions largely affirm and **[*218]** illustrate the basic concepts set forth in the statute. However, they also reveal some of the issues that eventually led to future statutory revisions.

The first case to reach the court of appeals affirmed one of the fundamental components of the original version of the statute that it had no effect on zoning laws. In Village of Peck v. Hoist, [n27] the village had passed an ordinance requiring all property owners to tap into a newly-constructed public sewer system. [n28] Hoist, a farmer, claimed inter alia that the Right to Farm Act exempted his property from the ordinance. [n29] The Michigan Court of Appeals quickly dispatched defendant Hoist's claim, explaining that "because the Michigan Right to Farm Act does not 'affect the application of state and federal statutes,' it is not a defense to this action." [n30]

In the first successful use of Michigan's right-to-farm statute as a defense in an appellate-level case, the Michigan Court of Appeals elaborated on the purpose of the Act as it was written in 1981. In Northville Township v. Coyne, [n31] the court explained:

The Legislature undoubtedly realized that, as residential and commercial development expands outward from our state's urban centers and into our agricultural communities, farming operations are often threatened by local zoning ordinances and irate neighbors. It, therefore, enacted the Right to Farm Act to protect farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits. [n32]

This is the first pronouncement on the purpose of the Act, and it is important to note that the court both emphasized and affirmed the coming to the nuisance aspect of the statute.

In Northville Township, the defendant Coyne used the Act successfully to preserve a barn he built on his property. [n33] Coyne constructed the building without having received the required zoning permits, and the township notified him that the structure would have to be razed under an order of demolition from the circuit court. [n34] The township claimed that the barn was a nuisance per se as an accessory building placed in the front yard without a **[*219]** permit. [n35] Coyne argued that the building, as a barn, was exempted from any nuisance claims by the Right to Farm Act. [n36]

In its opinion, the court of appeals found that the barn's construction and use appeared to conform to GAAMPs, [n37] and held that Coyne therefore had a valid defense under the statute. [n38] The court remanded the issue of the permit violation, stating that if Coyne were found in violation of the ordinance, the appropriate remedy would be the imposition of a fine or imprisonment, but not the demolition of the barn as a nuisance per se. [n39] In this case, the Right to Farm Act saved the barn from demolition.

The next case to reach the court of appeals further demonstrates the importance of the "coming to the nuisance" component of the Act. In Jerome Township v. Melchi, [n40] defendant Melchi owned two parcels that had been zoned for residential use since 1965. [n41] Prior to 1965, the land was zoned for farming. [n42] In 1979, Melchi captured a bee swarm and established a commercial apiary. [n43] By 1987, Melchi was tending 1.5 million bees and selling bee byproducts and bait on the property. [n44] That year, the township filed suit against Melchi, claiming that the apiary, as an inconsistent agricultural use, was a per se nuisance and that retail sales were not permitted under the residential zoning classification.

[n45] The trial court ruled in favor of Melchi. [n46]

On appeal, the court of appeals examined Melchi's defense under the Right to Farm Act. [n47] Although the court held that Melchi's business qualified as a "farm" under the statute, the defendant could not use the Act as a defense because the apiary did not exist before the 1965 change in land use. [n48] As such, the court held that the township was entitled to injunctive relief through removal of the business, as the business was operating in violation of the zoning ordinance. [n49] **[*220]**

Here, because the apiary did not exist prior to the rezoning, the statute provided no defense to the farmer. [n50] The court's opinion demonstrates two important limitations to a farmer's defense under the Act in its original form. First, the Act required that the farm be in place prior to any changes in land use and, more importantly, that provisions of the Act did not affect local zoning regulations. [n51] In Jerome Township, because the court found that the defendant was in violation of the zoning ordinance, the Right to Farm Act offered no defense.

The final case heard by the court of appeals during this period also examined the "coming to the nuisance" aspect of the Act, but with different results. Steffens v. Keeler [n52] illustrates yet another limitation regarding the nuisance defense - that a farmer must be operating according to GAAMPs to receive the nuisance protection. [n53] In Steffens, the defendant Keeler moved into a home located on property also containing a vacant dairy barn and shortly thereafter began purchasing pigs. [n54] Plaintiff Steffens had moved into the house across the street two years prior, when Keeler's house was vacant. [n55] The land including and surrounding both properties was zoned agricultural/residential, and the surrounding properties were a mixture of residential and agricultural uses at that time. [n56] When Steffens sued Keeler in nuisance, the trial court found that the Right to Farm Act was not a valid defense. [n57] That court held that Keeler was not operating consistently with any GAAMPs, and further stated that the statute did not apply because the surrounding land had become predominantly residential. [n58]

On appeal, the Michigan Court of Appeals found for defendant Keeler, reversing the trial court. [n59] First, it explained that the pig farm, although initially out of compliance with GAAMPs, ultimately did receive approval. [n60] Next, the court held that the fact that Keeler started the pig farm after Steffens **[*221]** had been living across the street was irrelevant to the case. [n61] It declared that, under the statute, the relevant change in land use was "that which occurred within one mile of the property in question before defendants' use of their land as a pig farm." [n62] The court found that, notwithstanding the existence of plaintiff's residence, the proofs failed to demonstrate that the land within one mile had changed to residential use. [n63] Therefore, it granted summary disposition for the defendant farmer. [n64]

Steffens demonstrates the problems created when the legislature fails to clarify its intent when creating a statute. Here, the underlying and surrounding land had been zoned for both agricultural and residential use, which was the mix in the actual use surrounding Keeler's farm property. [n65] The court determined that even though the pig farming began after the neighbors across the street put their land to residential use, this was irrelevant because the overall change in the land use had not been altered within one mile of the property. [n66] This begs the question of whether the legislature meant a literal change in zoning use or more of a "coming to the nuisance" interpretation when it wrote "change in the land use or occupancy of land" into the Act. [n67] In this case, the pig farm was not there first, yet the farm owner used the statute as a successful defense to the nuisance suit.

Judge Kelly issued a dissenting opinion in Steffens, explaining that there was not enough on the record to grant summary disposition to the farmer Keeler. [n68] Taking issue with the majority, he stated that "it is a justiciable issue whether defendants' operation of a pig farm in an agricultural area, where the only animal for thirty years was a pet pony, constituted a nuisance." [n69] Here, Judge Kelly took a different interpretation of the statute, arguing that the court should consider the type of farming operation going on within one mile. [n70] Had the legislature expressed a clear intention that the Act's purpose was to protect against nuisance suits only from plaintiffs that arrived after the farm was established, the case may have had a different result.

Judge Kelly's dissent in Steffens raised an important point about the problem of discerning changes in land use and

their relation to alterations in **[*222]** farm types. How was a court to rule if the only difference in surrounding land was a farmer's change from a greenhouse to a dairy operation? Would such a change constitute a new use of land for that farmer, leaving him or her unable to use the Act as a shield against subsequent nuisance suits? Before the courts would have to decide this issue, the legislature amended the statute in 1995 to protect any changes in ownership or farm type against nuisance claims. n71

C. The 1995 Amendments

The 1995 amendments to the Act clarified that the statute was intended to protect farming operations where any change in ownership, size, or type of farming occurred. n72 This new provision marked a significant change and expansion of protection under the statute. Not only did it codify the idea that a change in ownership or size was irrelevant, but it explicitly stated that a change in farm type also did not exclude that farmer from the statute's protection. n73 Allowing a statutory defense for a change in farm type is not insignificant to nearby landowners. Under the statutory definition, a change in the type of farming operation could be as drastic as a conversion from growing flowers to raising hogs. n74

Even though the 1995 amendment clarified the issues surrounding changes in size, ownership and use, giving farmers broader protection than the initial version of the statute, zoning still would cause a problem for those who **[*223]** sought to use the Act as a complete shield. The roots of such limitations go as far back as 1986, in the very first case under the Act to reach the court of appeals, Village of Peck. n75

The courts considered the relation of the Act to local zoning more fully in the 1997 case City of Troy v. Papadelis. n76 At issue in the case was defendant Papadelis' use of two adjacent parcels that he had purchased in the 1970s. n77 His residence occupied one parcel; commercial greenhouses rested on the other. n78 In 1956, long before Papadelis purchased the land, the city rezoned both parcels from agricultural to residential use. n79 However, since the time of rezoning, defendants utilized the greenhouse parcel as a legally nonconforming commercial use. n80 In 1980, Papadelis expanded his business by building a new barn and greenhouse to replace seven old greenhouses. n81 Later, in 1988, due to the ongoing success of his business, he constructed a parking lot on the residential parcel. n82

Plaintiff City of Troy filed suit objecting to the commercial use of the parking lot on the residential parcel. n83 The trial court, noting that Papadelis' business had grown from a few hundred dollars per year to nearly one million dollars per year, denied the city's request for an injunction and abatement of the nuisance. n84 That court found the greenhouse and nursery to be a legal nonconforming use and held that Papadelis had a right to operate his business under the provisions of the Right to Farm Act. n85

On appeal, the decision was reversed in part. n86 The court of appeals agreed with the trial court that the business on the greenhouse parcel was a valid nonconforming use, but it held that the Right to Farm Act did not provide a defense regarding the expansion of the farm business into the residential parcel, because the commercial expansion onto that parcel came after the zoning change. n87 Papadelis appealed to the Michigan Supreme Court, **[*224]** which vacated the opinion and remanded the case for reconsideration in light of the 1995 amendments to the Act. n88

On remand, the court of appeals affirmed its prior decision that the Act provided no defense to the expansion of the business onto the residential parcel. n89 The court explained that because the nonconforming practice on the parcel did not exist before the zoning change, it was not a legal nonconforming use. n90 The court further explained that the Act failed as a defense, in spite of the revision that included expansion of farming (a change in size), because the statute "specifically provides that it 'does not affect the application of state statutes and federal statutes,' including [the zoning enabling acts]." n91 Therefore, the court ruled in favor of the city, holding that because the case involved a zoning matter, the Right to Farm Act did not apply. n92

The implications of the court's decision were significant for Papadelis and his business. The agricultural aspect of the business was allowed to expand on the parcel that was used in a nonconforming manner because the 1995 revisions

to the Act explicitly allowed for a change in farm size. [n93] However, Papadelis could not expand the parking for his business onto the adjacent residential parcel because the zoning codes prohibited it. [n94] In this case, the statute only worked as a partial shield for the farmer.

Although this was the only reported case under the 1995 revisions to the Act, it can be assumed that other farmers were faced with similar circumstances during this period. For farmers in Papadelis' situation, the latest revisions to the statute did not go far enough. Under the new provisions, farmers would be protected from nuisance suits as they expanded or changed their operations while suburbs grew around them. However, at the same time, they faced the distinct possibility that their new neighbors would pass anti-farm zoning laws and limit their ability to adapt and/or grow as the economy required. This left farmers in an insecure "no-man's land" where the Right to Farm Act protected them from nuisance claims if their businesses changed, but pro-suburbanite zoning codes inhibited their ability to adapt freely to the demands of a changing economy. This paradox is precisely what the legislature sought to remedy by amending the Act again in 1999. **[*225]**

D. The 1999 Amendments

In the fall of 1999, the state legislature passed a second major revision to the Right to Farm Act to address the matter of zoning constraints on farm operations. [n95] Unlike earlier versions of the Act, the core subsection of this latest revision includes a strong statement of legislative intent:

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. [n96]

As a check on this wide-reaching addition, the Act's new provisions place some limitation on the preemption of local zoning laws by requiring that GAAMPs be created and satisfied for siting new or expanding existing livestock-related operations. [n97]

With the 1999 revision, farmers in compliance with the GAAMPs not only continue to receive immunity from nuisance suits, but they also are granted an exemption from local zoning laws. [n98] The additional GAAMPs for the 1999 revisions relate specifically to site selection and expansion of new livestock facilities. [n99] Under these new GAAMPs, livestock operations cannot be established or expanded or receive the Act's shielding provisions without satisfying GAAMPs, which set basic criteria for where such farms are best sited. [n100] The Act states that the purpose for establishing the new GAAMPs is to protect the environment and to make sure that livestock farming takes place at the right location for soils, drainage, and related concerns, [n101] but **[*226]** undoubtedly the siting GAAMPs also were included to prevent acrimony and related litigation between farmers and nonfarmers living in close proximity. [n102]

The new revisions providing for zoning preemption took effect on June 1, 2000. [n103] Although there has been no direct attack on the revised statute since that time, no less than two reported cases have been affected by the new provisions.

In Belvidere Township v. Heinze, [n104] defendant Heinze purchased thirty-five acres on which he intended to start a hogfarming operation, raising between six and seven thousand hogs. [n105] After the land purchase, the township passed an ordinance specifying that any more than two hundred animal units required a special use permit as a concentrated livestock operation. [n106] Accordingly, the township ordered Heinze to cease and desist from preparing the land for farming and, after Heinze refused to comply, filed suit alleging nuisance and seeking an injunction. [n107] The trial court granted a preliminary injunction, but the trial court held that there was sufficient progress on the site to constitute a legal nonconforming use. [n108] Because this hearing took place before the effective date of the revision to the Act, the court

did not reach the issue of whether the revised Act applied to the nuisance claim. [n109]

On appeal, the court of appeals held that there was not sufficient activity on the property to constitute a legal nonconforming use. [n110] Therefore, by removing the zoning component of the case, the appeals court had to address the applicability of the Right to Farm Act. [n111] The court noted that at the time the dispute commenced, the defendant had no statutory defense because the case involved a zoning action; but, since the time of the hearing, the Act had **[*227]** been revised to preempt zoning ordinances in conflict with its provisions. [n112] Citing the defendant's claim that the statute "preempts the Township from zoning out of existence farms that operate in compliance with generally accepted agricultural and management practices," [n113] the court remanded the case for reconsideration. [n114]

Finally, the most recent right-to-farm case to reach the Michigan Court of Appeals offered the court a better opportunity to address the revised statute in a farm odor dispute that included an alleged violation of a zoning ordinance. [n115] In Travis v. Preston, [n116] the plaintiffs alleged that the defendant farmer's hog operation, in addition to creating a nuisance, violated the local township's zoning ordinance prohibiting obnoxious fumes. [n117] At the time of the bench trial, the Act had not yet been revised to supercede the authority of local ordinances, and the court found that a violation of the ordinance had occurred. [n118] However, by the time of the appeal, the 1999 revisions to the Act had gone into effect. On appeal, the court, addressing the issue of retroactivity, held that because there was no clear intent expressed by the legislature, the statute should not be applied retroactively. [n119] Therefore, to date, the courts have not had the opportunity to address the latest revisions to the Act in a substantive manner.

Although the courts have yet to fully consider the current incarnation of Michigan's Right to Farm Act, the decisions in Belvidere Township and Travis portend that it will not be long before the courts reexamine the Act's status in light of its two significant reworkings. The scope of Michigan's Right to Farm Act has broadened tremendously in almost twenty years, and the question raised is whether it has been broadened so far as to tip the balance of property rights too much in favor of farmers as regarding nearby property owners. This question is particularly important in the nation in light of a recent Iowa Supreme Court decision that struck down that state's right-to-farm law as unconstitutional [n120] an unexpected decision that raised an alarm around the country. The issues raised by the Iowa Supreme Court bring into question whether Michigan's Right to Farm Act, which has been similarly broadened, is susceptible to a constitutional takings challenge. Therefore, in **[*228]** light of the Iowa decision, it is timely to undertake an examination of the constitutional soundness of Michigan's statute.

II. Is Michigan's Right to Farm Act Unconstitutional?

In the twenty-plus years since right-to-farm acts have been implemented nationwide, they have consistently withstood legal challenges - that is until a startling decision in 1998 in which the Iowa Supreme Court struck down that state's statute as unconstitutional. [n121] At the same time, right-to-farm laws are being attacked on constitutional grounds in other states. [n122] In light of Michigan's recent statutory amendments, the questions that must be asked are whether Michigan is next, and what the likely outcome of a constitutional challenge would be.

A. Iowa's Statute Is Declared a Taking: Bormann v. Board of Supervisors

In Bormann v. Board of Supervisors, [n123] the plaintiffs were property owners adjacent to a 960-acre area that the Board of Supervisors had declared an "agricultural area" under Iowa's right-tofarm statute. [n124] According to the provisions of that statute, as an agricultural area the farm would be immune from nuisance suits. [n125] The neighbors filed suit, among other reasons, on the grounds that the board's decision amounted to an unconstitutional taking of their property without due process or just compensation under both the United States and Iowa constitutions. [n126]

In its analysis of the case, the Iowa Supreme Court first held that the nuisance immunity granted under the statute amounted to an easement in favor of the farmer's land. [n127] The court then applied a constitutional takings analysis, focusing on the United States Supreme Court's holding in Lucas v. South Carolina Coastal Council [n128] that a per se taking exists when state action **[*229]** constitutes a permanent physical invasion of property. [n129] The court elaborated

that although it had been firmly established that an actual physical occupation amounted to a taking, [n130] United States Supreme Court precedent did not require a physical invasion on the surface of the land. [n131]

Ultimately, the Iowa Supreme Court held that there was a per se taking and declared unconstitutional the portion of the statute providing for immunity against nuisance suits. [n132] The court found that the granting of nuisance immunity by the board amounted to the unconstitutional creation of an easement, reasoning that although the nuisance would not constitute a physical occupation of the land, a direct physical invasion was not required to comprise a per se taking under prior Supreme Court holdings. [n133]

B. Overview of Takings Law

The Fifth Amendment to the United States Constitution provides that government shall not take property for public use without just compensation. [n134] The Supreme Court has struggled to define the threshold of a government taking for the better part of the last century. Regarding governmental regulation, there are three contexts in which the takings issue arises. The first two are considered categorical or per se takings, because there is no case-by-case inquiry and compensation is automatic. These occur when a physical invasion of property is compelled by government or where the regulation denies any economically beneficial or productive use of land. [n135] In instances where it is not clear whether a taking has occurred, the courts **[*230]** must balance various factors to determine if government regulation has gone too far and requires compensation to the property owner. [n136]

The first kind of categorical taking occurs where the government regulation leads to or causes a permanent physical invasion of property. The Supreme Court established this per se rule in Loretto v. Teleprompter Manhattan CATV Corp., [n137] where a New York statute required owners to permit the placing of cable television facilities on apartment buildings. [n138] Loretto, an apartment building owner, claimed that the regulation amounted to a taking of her property without compensation. [n139] The Court agreed, holding that any permanent physical occupation of property authorized by government, no matter how small, was an unconstitutional taking of property. [n140]

The second type of categorical taking takes place where governmental regulation renders a property economically valueless. In Lucas v. South Carolina Coastal Council, [n141] the Court considered the plight of an owner of two oceanfront lots who was unable to build because of a South Carolina law designed to limit beach erosion. [n142] The Court held that a taking occurs whenever a regulation deprives a property owner of all economically beneficial uses of his property. [n143] However, the court also established an exception to this per se rule if the government can establish that the regulation does no more to restrict the use than would be allowable under state property or nuisance law. [n144]

In cases where there is no physical invasion of property and the diminution in value caused by the regulation is less than total, courts must undertake a balancing test to determine if the government action amounts to a taking. The Court established a multi-factor test in Penn Central Transportation Co. v. New York City, [n145] where it considered the effect of historic landmark designation on the plaintiff's property. The Penn Central Court held that partial deprivation cases require a balancing of state interests against the private loss, focusing on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, **[*231]** and (3) the extent to which the regulation has interfered with distinct, investment-backed expectations. [n146]

Like the U.S. Constitution, the Michigan Constitution prohibits a taking of property for public use without compensation. [n147] Moreover, the Michigan Supreme Court has established that there is no substantive difference between considering a takings claim under the federal or state constitutions. [n148] Therefore, an analysis of a takings issue in Michigan is indistinguishable from an analysis under the federal constitution.

C. Is the Michigan Right to Farm Act Susceptible to a Takings Challenge?

Given the Iowa Supreme Court's holding in Bormann, [n149] the question raised is whether Michigan's Right to Farm Act could be declared unconstitutional under a similar challenge. This requires an examination of two relevant factors: a comparison of statutory language, and an analysis of the reasoning the court is likely to apply to the case.

The first part of the analysis involves an examination of the relevant differences in statutory language. The statute struck down in Iowa differs from Michigan's current Right to Farm Act in at least two important respects. First, the Iowa statute had no "coming to the nuisance" component. [n150] Second, it did not require that a farm operate under GAAMPs, stating only that a negligently operated farm would not receive nuisance immunity. [n151]

The Iowa statute that the Bormann court struck down stated that "a farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." [n152] This differs significantly from the Michigan statute. In Michigan, a farm is only to be protected from nuisance suits if the farm was there first. Under the Michigan statute, nuisance protection is only afforded to those properties "if the farm or farm operation existed before a change in the land use or occupancy of land **[*232]** within 1 mile of the boundaries of the farm land." [n153] This language difference is significant under the law because the elimination of the "coming to nuisance" premise in Iowa's statute caused a substantial shift in the balance of the rights of the subsequent farmer and those of prior adjacent residential occupants.

Similarly, the Iowa statute did not require operation under GAAMPs, requiring only that the farm not be operated negligently. [n154] Requiring farmers to follow the provisions in GAAMPs provides another safeguard for the rights of the party bringing suit against the farmer. In Michigan, GAAMP compliance is a requirement for nuisance protection. [n155] This at least requires a defendant farmer in a nuisance action to have a higher standard of operation than simply nonnegligence. As with the lack of a prior occupancy aspect, not requiring a farm to operate under generally accepted practices to receive nuisance protection was another important shift in the balance of the rights of farmers against the rights of other landowners under Iowa's statute.

The combination of these two factors may have been enough to cause the Iowa Supreme Court to reach its conclusion that the statute was unconstitutional. That court impliedly found that the balance of rights had shifted too much to the side of the farmer because the law contained no prior use or affirmative operating provisions. [n156] Thus, it appears that the court wanted to send a message to the legislature that this kind of statute goes too far. To the contrary, Michigan's statute does not have such blatant rights-shifting provisions, and as such it is not as susceptible to the Bormann court's analysis and conclusion. Even though the 1995 revisions to the Michigan statute effectively allow for changed or expanded use of an existing farm, this provision does not reach as far as the Iowa statute, which would have allowed a statutorily protected farm to be created where no farm had ever been. [n157]

The second part of the takings analysis involves an examination of the Bormann court's reasoning to determine if a Michigan court is likely to follow Iowa's lead. The Bormann court's conclusion that a per se or categorical taking had occurred was key to its holding that Iowa's statute was **[*233]** unconstitutional. [n158] This determination can be easily criticized and is not likely to be followed. The statutory protections against nuisance in any right-to-farm law do not specifically create a physical occupation of property, nor do they deprive others of all economically viable use of their property. One of these outcomes must be present for a court to find a per se taking under Supreme Court precedent. [n159]

Under the Supreme Court's pronouncement in Lucas, a per se taking occurs when government regulation causes a physical occupation of property or destroys all economically beneficial uses for the owner. [n160] The Bormann opinion focused entirely on the physical occupation portion of the per se takings analysis. [n161] The Bormann court agreed that, under the Supreme Court's decision in Loretto a physical occupation of land constitutes a taking, but it reasoned that a direct physical occupation was not always required. [n162] In reaching this conclusion, the Iowa Supreme Court cited a number of Supreme Court decisions. [n163] However, it specifically relied upon Richards v. Washington Terminal Co., [n164] where the emission of smoke and ash from a railroad tunnel was held to be a taking. [n165] The court's reliance on this case is problematic, and as discussed below, such an analysis is not likely to be followed in Michigan.

The flaw in the Bormann court's analysis lies in the fact that it applied a string of decisions on non-direct occupation that, although held to be takings, were not held to be per se takings. One need only look to the Richards case itself, where the intrusion of smoke and ash was held not to be a per se taking, but rather "special and peculiar damage" resulting in diminution of the value of plaintiff's property. [n166] Perhaps wanting to make a statement on the patent

unfairness it found in the statute, the Iowa Supreme Court jumped to a conclusion under the takings test without going through the entire analysis. [n167] **[*234]** Instead of making a series of difficult leaps from nuisance defense to easement to per se taking, the Bormann court should have gone into the Penn Central balancing test analysis, since Bormann involved a partial deprivation of property. [n168] There, it would look to balance certain costbenefit factors to determine whether a taking arose from the application of the statute. [n169] This is not necessarily to say that the Iowa Supreme Court would have come to a different conclusion had the Penn Central test been applied, but only that it should have gone on to that step of the takings analysis.

The Bormann decision is likely to be limited to the specific facts of that case. Although it is possible that a Michigan court could agree that the granting of nuisance immunity may constitute an easement, under a constitutional takings analysis it would be unusual for a court to find that the farming-related easement amounts to the equivalent of a physical invasion of property. [n170] As discussed above, if there is no physical invasion of property, there is no per se taking, and the Penn Central balancing test must be applied. [n171]

Under the Penn Central balancing test, a court must make an inquiry into the following factors: (1) the character of the government action; (2) the economic effect of the regulation on the property; and (3) the extent to which the regulation has interfered with distinct, investment-backed expectations. [n172] Although the outcome of the Penn Central analysis depends on the facts of a given case, it might be argued in advance that the character of the Michigan Legislature's action does not fall on the side of a taking, as it amounts to a rational legislative attempt to support an important state industry. Similarly, although the economic effect of Michigan's statute on adjacent nonfarm property could be substantial, it likely would not reduce property value **[*235]** severely because of the GAAMP requirement, which serves to limit the negative impacts of farming operations on nearby properties. In addition, Michigan's statute, unlike Iowa's, includes a "coming to the nuisance" component that diminishes a possible claim regarding a taking of investment-backed expectations because most property owners would be aware, at the time they purchased their property, that a farm was being operated on adjacent or nearby land.

The Iowa statute went too far in giving farmers protections against other community concerns. That is why it was overturned. It is quite possible that the Iowa court looked at the overall balance of rights and saw that the statute gave too much to farmers. Because of the unique features of Iowa's statute, it is not likely that the Bormann decision will have an effect in Michigan where GAAMPs and "coming to the nuisance" provide a degree of protection for the rights of nearby landowners. Additionally, a Michigan court is likely to skip over the per se takings analysis and move on to the ad hoc balancing test of Penn Central and likely would find, except in possibly the most extreme situation, that no takings occur under Michigan's Act.

Even though Michigan's Right to Farm Act likely would survive a constitutional takings challenge, it does not necessarily follow that it is a good law. Even if the statute were to pass constitutional muster, the question remains whether the statute, as amended, amounts to sound public policy for the state.

III. Public Policy Issues

Even if Michigan's Right to Farm Act were to be deemed constitutional by the courts, it does not necessarily follow that it serves the best interests of the public. As explained in Part I, the statute has been significantly revised and broadened twice since its initial passage in 1981. The cumulative effect of these revisions raises a number of issues related to the statute's overall impact, particularly whether it still functions to serve the ends originally intended. This section provides a brief discussion of issues supporting the argument that the expansion of rights for farmers under the Michigan's right-to-farm law may have gone too far, and that the statute in its present form does not amount to sound public policy.

A. The Act May Unfairly Infringe on Property Rights

The most problematic byproduct of the Act's revisions is the impact on nonconforming farm uses. As passed in

1981, the statute protected existing **[*236]** farms from nuisance suits where new residences sprung up around the farm. n173 At that time, the legislature sought to remedy some of the pressure placed on small farmers as suburban sprawl swallowed them up. n174 From a zoning standpoint, these farms were protected as legally nonconforming uses, and they could continue to operate despite their new surroundings and be shielded from nuisance claims. n175

The 1995 and 1999 revisions greatly altered the balance of rights in favor of the farmer who had a nonconforming use in a residentiallyzoned area. The 1995 revisions allowed that farmer to expand the operation or even change entirely what was being produced on the property. n176 However, from 1995 through 1999, a zoning ordinance still could limit farmers from changing their operations from, for example, beans to cows through either the outright prohibition of livestock or the effective restriction of such operations by outlawing offensive smells. Thereafter, the 1999 revisions even removed the zoning limitations, n177 creating a climate that may permit the situation described in the introduction to this Comment.

Although the introductory scenario of this Comment represents an extreme version of what could happen under the Act, it is not altogether improbable. The revisions that the legislature passed in the 1990s may have serious implications for neighbors and communities. Not only does the Act allow a nonconforming farm to entirely change or expand its operations, but it also insulates that operation from local efforts to protect the health, safety, and welfare of its citizens via zoning controls. n178 This not only appears to be unsound public policy, but it works contrary to the state's policies on nonconforming uses. n179

A staple of zoning practice is to allow a lawful nonconforming use to continue after a zoning change. n180 It is a fair means to protect the rights and investments of a property owner who is put in a difficult position when designated land uses change. However, Michigan's Right to Farm Act **[*237]** expands this concept too far. In Norton Shores v. Carr, n181 the Michigan Court of Appeals explained the policy of the law regarding nonconforming uses in this state. The court explained that:

Expansion of a nonconforming use is severely restricted. One of the goals of zoning is the eventual elimination of nonconforming uses, so that growth and development sought by ordinances can be achieved. Generally speaking, therefore, nonconforming uses may not expand. The policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion. n182

The nearly unbridled changes allowed to farms under the revised statute run contrary to this policy. The state is already open to criticism for not having codified an amortization provision for nonconforming uses, n183 and the revised Act further erodes the ability of a local government unit to plan effectively for future land use.

In the hypothetical case where a nursery is converted to a hog farm under the sheltering provisions of the Act, odor alone can have a tremendous impact on a community and its property values. n184 Although the legislature included GAAMPs for site selection and expansion as a provision of the 1999 revisions, these do not necessarily protect all farm neighbors from unwanted intrusions because they only establish minimal standards.

Essentially, the GAAMPs for site selection are simple. Potential sites for livestock farms are separated into three categories: Category One consists of those sites that normally are acceptable for livestock production facilities; Category Two includes sites where special technologies or management practices are needed to make the site acceptable; and Category Three includes sites where a livestock operation would be unacceptable. n185 Determining which category is implicated for a given site requires a determination of the number of nonfarm residences within a specified radius (one-quarter or one-half mile) of the proposed livestock operation, n186 and an accounting of the total animal units proposed for the site. n187 Category One, or acceptable sites, **[*238]** require that there be less than five nonfarm residences within the area. n188 Category Two sites, where additional technologies or practices are needed, are distinguished according to whether the farm is new or expanding. n189 For expanding farms, there cannot be more than twenty nonfarm residences within the area for it to be acceptable; for new operations there cannot be greater than

thirteen nonfarm residences within the area. [n190] Again, in order for Category Two sites to be approved, the farm must utilize additional technologies or practices to limit the severity of the impact. [n191] Finally, if there are more than twenty residences within the area, the site is labeled Category Three and is unacceptable for the siting of a livestock operation. [n192] In addition to the number of nonfarms and number of animals factors, there is an additional setback requirement. However, the allowable setback varies only by a few hundred feet from the smallest to the largest operations. [n193]

The primary problem with the GAAMPs is that they do not take into account the type of property that is beyond the one-quarter or halfmile area limits, especially with regard to prevailing winds and the effect that windborne smells and dust have beyond such small distances. These are concerns that should be discussed in concert with local planners, yet the revisions to the Act greatly remove local and regional planners from the livestock location or expansion process. [n194] Although the GAAMPs for site selection include a provision for input from local governments, ultimately it is the Michigan Department of Agriculture, not the local government unit, that possesses final approval authority. [n195]

The siting of livestock production facilities is an issue of tremendous public concern. Notwithstanding this fact, the newest provisions of the Act largely insulate the installation or expansion of these operations from the local decision making process. This is poor public policy, and is not in keeping with the democratic spirit of having local issues settled at the local level. On a more practical note, the end result could be detrimental to both the community and the farmer because a lack of planning coordination could cause related traffic problems and dilemmas regarding site location of other **[*239]** community resources. [n196] Local units of government are best suited to respond to the unique circumstances and needs of their citizens. As such, government policy should be based on the coordination of land-use planning between the state and its subdivisions, not by the imposition of such planning by the state. [n197]

B. The Act May Encourage a "Race to the Bottom" [n198]

The provisions added to the Right to Farm Act also constitute poor policy because they create a regulatory atmosphere that could easily become a "race to the bottom." By relaxing its restrictions on farm operations, Michigan could find itself attracting unwanted farming operations from states that are more tightly regulated.

When the legislature revised the Act in 1999, it included GAAMPs for site selection and expansion to address what many see as a threat from corporate-scale hog farms. This is an industry that is not only growing, but has been the recipient of much criticism and disfavor in other states. [n199] For example, in North Carolina, the nation's second leading hog producer, [n200] the state legislature recently took bold steps to limit the rights of large-scale hog farms under its right-to-farm statute. [n201] Following a devastating 1995 hog **[*240]** waste spill, the legislature mandated a two-year moratorium on the construction or expansion of hog farms. [n202] In addition, the North Carolina legislature amended that state's right-to-farm law, which had originally preempted local zoning, as Michigan's does now, to allow for the restrictive zoning of hog farms with four thousand or more animals. [n203] In light of concerns raised over the increasing size of hog operations, other states are considering tighter restrictions on these enterprises. [n204]

Loosening restrictions in Michigan could attract undesirable livestock operations from elsewhere. This is especially likely considering that the Act protects the largest farms mostly because these facilities are more likely to be the source of nuisance complaints. At the same time, the GAAMPs for site selection, which are intended to safeguard nonfarmers from the imposition of livestock operations, in practice are very limited in their protective reach. The combination of these factors could work to create a situation that many citizens would find undesirable.

C. The Act May Accelerate the Demise of the Family Farmer

Although it was not specifically stated as a legislative purpose in the original version of the Right to Farm Act, the legislature clearly had some intention to protect the state from a loss of family farms. However, the revisions to the statute may actually encourage the expansion or consolidation of small farms into agribusinesses, or similarly may attract such farm businesses from elsewhere to replace existing family farms. The question that must be asked is whether the Act, as amended, will operate in the future to preserve the family farm or to accelerate a new

industrial-scale era in farming. The likely answer poses an irony in that the revisions could actually hasten the demise of the family farm.

One of the ironies of the statute's protections is that they work against the rights of neighboring farmers just the same as nonfarmers perhaps even **[*241]** more so. In extreme cases, the operation of the Act could cause a small farmer to "sell-out" or move because of the nuisance of a hog farm next door. Because the statute only addresses changes in land use not occurring between farmers, and the GAAMPs for site selection only consider the proximity and quantity of nonfarm residences in the vicinity, [n205] the family farmer effectively has no protection from a hog farm moving next door because the minimal site selection GAAMPs do not directly address proximity to other farms. [n206] The irony illustrated here points out a serious flaw in the Act. If the revisions serve to encourage and attract larger-scale farming, as is arguably the case, what does this mean for the family farmer? Instead of being a shield for the small farmer as originally intended, the present Act could function more as a sword for the industrial livestock concern against suburbanites and family farmers. For this reason, the legislature should consider limiting the provisions of the Right to Farm Act by allowing local government units to exercise zoning authority over farms of a specified size and type.

Conclusion

The scope and effect of Michigan's Right to Farm Act has changed drastically in recent years. The changes grant considerable new protections to farmers within Michigan as well as some of those considering relocation to the state. Although it is likely that the statute soon will be challenged in the courts, the shifting of the balance of rights in favor of farmers probably does not go so far as to warrant nullification on constitutional grounds. Nonetheless, there remain serious policy issues that the legislature should address.

The Right to Farm Act was a good law in its original form. Recognizing the tensions associated with suburban growth, the statute gave homeowners **[*242]** a means to have farms monitored and gave farmers some protection from lawsuits if they operated under certain standards. However, with two major revisions, the scope of the Act has been expanded too far. It is no longer a simple "coming to the nuisance" statute and, with its added provisions allowing significant farming changes and preemption of zoning, the Act creates a number of potential problems for neighboring residents, communities, and regional land planning authorities. In light of changes in the statute and farming's shift toward agribusiness, it is time to rethink the law altogether.

The legislature should reconsider whether its recent action to revise the Right to Farm Act has created more problems than it solved by restricting the effectiveness of local governments and encouraging livestock operations to expand and relocate. At the same time, the legislature must clarify the policy matter of whether the intent of the statute is to protect family farmers, encourage agribusiness, or both. There is some irony in that the statute was originally passed to reduce farming-related lawsuits yet, because of its revisions, it may actually encourage more lawsuits in the future. As such, the legislature should take appropriate steps to ensure that the interpretation of the statute is not left entirely to the courts in the future.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceDefensesPriority of OccupationReal Property LawTortsNuisanceDefensesStatutory AuthorizationReal Property LawTortsNuisanceTypesNuisance Per Se

FOOTNOTES:

n1 See Mich. Comp. Laws Ann. § § 286.471-.474 (West 1996 & Supp. 2001).

n2 See Margaret Rosso Grossman & Thomas G. Fischer, Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer, 1983 Wis. L. Rev. 95, 98 (1983); Alexander A. Reinert, Note, The Right to Farm: Hog-Tied and NuisanceBound, 73 N.Y.U. L. Rev. 1694, 1718 (1998).

n3 In addition to the revisions that took effect in 2000, the Act also was significantly revised in 1995. See infra Part I.

n4 See Reinert, supra note 2, at 1695. Reinert provides a complete listing of individual state statutes. See id. at 1706 n.76; see also Jesse J. Richardson, Jr. & Theodore A. Feitshans, Nuisance Revisited After Buchanan and Bormann, 5 Drake J. Agric. L. 121, 128 (2000). Richardson and Feitshans separate right-to-farm laws into six general types: (i) traditional laws protecting farms that existed before residential encroachment; (ii) laws requiring the use of generally accepted agriculture and management practices (GAAMPS); (iii) laws listing specific protected agricultural activities; (iv) laws protecting animal feedlots; (v) laws requiring creation of agricultural districts; and (vi) local ordinances. See id.

n5 See Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998); Buchanan v. Simplot Feeders Ltd. P'ship, 952 P.2d 610 (Wash. 1998); Texas Natural Res. Conservation Comm'n v. Accord Agric., Inc., No. 96-00159, 1999 WL 699825 (Tex. Ct. App. Sept. 10, 1999); see also infra Part II.A.

n6 See Bormann, 584 N.W.2d 309; see also infra Part II.A.

n7 See Reinert, supra note 2, at 1695.

n8 See id.

n9 See Grossman & Fischer, supra note 2, at 118.

n10 See id. at 99.

n11 See Reinert, supra note 2, at 1696-97.

n12 See Richardson & Feitshans, supra note 4, at 128.

n13 See id. at 125; Grossman & Fischer, supra note 2, at 118; Terence J. Centner, Anti-Nuisance Legislation: Can the Derogation of Common-Law Nuisance Be a Taking?, 30 Envtl. L. Rep. 10253 (2000). The "coming to the nuisance" defense essentially states that the first one to arrive has certain rights to use of the land regardless of the desires and uses of later adjacent landowners. This principle was elaborated in the well known case of Spur Industries, Inc. v. Del E. Webb Development Co., 494 P.2d 700 (Ariz. 1972), where the court found a feedlot to be a nuisance when a developer established an adjacent residential community on cheap land that was far from the City of Phoenix. See Spur Indus., 494 P.2d at 706. The court held that the developer had come to the nuisance, and although it found in favor of the developer, the court required that it pay the costs of moving the plaintiff's feedlot to a new location. See id. at 708.

n14 See Mich. Comp. Laws Ann. § § 286.472-.474 (West 1996 & Supp. 2001).

n15 See Mich. Comp. Laws Ann. § 286.473.

n16 See Mich. Comp. Laws Ann. § 286.473(1). The standards for the GAAMPs are established by the Michigan Commission of Agriculture. See id.

n17 The major revisions were in 1995 and 1999. See Mich. Comp. Laws Ann. § § 286.471-.474; see also infra Part I.CD.

n18 See Mich. Comp. Laws Ann. § 286.472.

n19 See Mich. Comp. Laws Ann. § 286.473.

n20 See Mich. Comp. Laws Ann. § 286.474.

n21 See Mich. Comp. Laws Ann. § 286.473. This Comment discusses the third part of the statute in Part I.B.

n22 See id.

n23 See Mich. Comp. Laws Ann. § 286.473(1).

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. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.

Id.

n24 See Mich. Comp. Laws Ann. § 286.473(2).

A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.

Id.

n25 In fact, there are no Michigan Supreme Court opinions regarding the Act. This comment discusses all of the significant Michigan Court of Appeals decisions. See infra Part I.BD.

n26 See Vill. of Peck v. Hoist, 153 Mich. App. 787, 396 N.W.2d 536 (1986); Northville Township v. Coyne, 170 Mich. App. 446, 429 N.W.2d 185 (1988); Jerome Township v. Melchi, 184 Mich. App. 228, 457 N.W.2d 52 (1990); Steffens v. Keeler, 200 Mich. App. 179, 503 N.W.2d 675 (1993).

n27 153 Mich. App. 787, 396 N.W.2d 536 (1986).

n28 See Vill. of Peck, 153 Mich. App. at 788, 396 N.W.2d at 537.

n29 See id. at 791, 396 N.W.2d at 538.

n30 Id. (citing Mich. Comp. Laws Ann. § 286.474) (citation omitted).

n31 170 Mich. App. 446, 429 N.W.2d 185 (1988).

n32 Northville Township. 170 Mich. App. at 448-49, 429 N.W.2d at 187.

n33 See id. at 449, 429 N.W.2d at 187.

n34 See id. at 447-48, 429 N.W.2d at 186.

n35 See id.

n36 See id.

n37 Conformance is a prerequisite to nuisance protection. See Mich. Comp. Laws Ann. § 286.473(1).

n38 See Northville Township, 170 Mich. App. at 449, 429 N.W.2d at 187.

n39 See id. at 449-50, 429 N.W.2d at 187.

n40 184 Mich. App. 228, 457 N.W.2d 52 (1990).

n41 See Jerome Township, 184 Mich. App. at 229, 457 N.W.2d at 53.

n42 See id.

n43 See id.

n44 See id.

n45 See id. at 230, 457 N.W.2d at 53.

n46 See id.

n47 See Jerome Township, 184 Mich. App. at 232, 457 N.W.2d at 54-55.

n48 See id. at 233, 457 N.W.2d at 55.

n49 See id.

n50 See id.

n51 The Act did not preempt local zoning laws until the 1999 revision. See infra Part I.D.

n52 200 Mich. App. 179, 503 N.W.2d 675 (1993).

n53 See Mich. Comp. Laws Ann. § 286.473(1).

n54 See Steffens, 200 Mich. App. at 180, 503 N.W.2d at 676-77.

n55 See id.

n56 See id. at 180, 503 N.W.2d at 677.

n57 See id.

n58 See id.

n59 See id. at 183, 503 N.W.2d at 678.

n60 See Steffens, 200 Mich. App. at 181, 503 N.W.2d at 677. The State Department of Agriculture gave the defendants a deadline of May 30, 1990 to comply with GAAMPs, but the plan was not approved until July 16, 1990. See id. The court stated that backlogs and technical problems with the plan's documentation caused the delay. See id. at 181 n.1, 503 N.W.2d at 677 n.1.

n61 See id. at 182, 503 N.W.2d at 677.

n62 Id.

n63 See id. at 182, 503 N.W.2d at 677-78.

n64 See Steffans, 200 Mich. App. at 182, 503 N.W.2d at 678.

n65 See id. at 183, 503 N.W.2d at 677-78.

n66 See id.

n67 Mich. Comp. Laws Ann. § 286.473(2).

n68 See Steffens, 200 Mich. App. at 183, 503 N.W.2d at 678 (Kelly, J., dissenting).

n69 Id.

n70 See id.

n71 See Mich. Comp. Laws Ann. § 286.473(3).

n72 The addition of section 286.473(3) embodies this clarification and reads:

A farm or farm operation that is in conformance with subsection (1) [operating under a GAAMP] shall not be found to be a public or private nuisance as a result of any of the following: (a) A change in ownership or size. (b) Temporary cessation or interruption of farming. (c) Enrollment in governmental programs. (d) Adoption of new technology. (e) A change in type of farm product being produced.

See id.

n73 See Mich. Comp. Laws Ann. § 286.473(3)(e).

n74 See Mich. Comp. Laws Ann. § 286.472(c). The full definition states:

"Farm Product" 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.

Id.

n75 153 Mich. App. 787, 396 N.W.2d 536 (1986). See supra text accompanying notes 27-30.

n76 226 Mich. App. 90, 572 N.W.2d 246 (1997).

n77 See City of Troy v. Papadelis, 226 Mich. App. 90, 92, 572 N.W.2d 246, 248 (1997).

n78 See City of Troy, 226 Mich. App. at 92, 572 N.W.2d at 248.

n79 See id.

n80 See id. A nonconforming use is a use "that would be unlawful if established after the passage of an ordinance." Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Control Law § 4.31 (1998).

n81 See City of Troy, 226 Mich. App. at 92-93, 572 N.W.2d at 248.

n82 See id. at 93, 572 N.W.2d at 248.

n83 See id.

n84 See id.

n85 See id. at 93, 572 N.W.2d at 248-49.

n86 See id. at 94, 572 N.W.2d at 249.

n87 See City of Troy, 226 Mich. App. at 93-94, 572 N.W.2d at 249.

n88 See id. at 94, 572 N.W.2d at 249.

n89 See id. at 96, 572 N.W.2d at 250.

n90 See id.

n91 Id. (quoting Mich. Comp. Laws Ann. § 286.474).

n92 See id.

n93 See Mich. Comp. Laws Ann. § 286.473(3)(a).

n94 See City of Troy, 226 Mich. App. at 98, 572 N.W.2d at 250.

n95 See Mich. Comp. Laws Ann. § 286.474.

n96 Mich. Comp. Laws Ann. § 286.474(6).

n97 See Mich. Comp. Laws Ann. § 286.474(8). "By May 1, 2000, the commission shall issue proposed generally accepted agricultural and management practices for site selection and odor controls at new and expanding animal livestock facilities." Mich. Comp. Laws Ann. § 286.474(8)(a).

n98 See Mich. Comp. Laws Ann. § 286.474(6).

n99 See id.

n100 See Michigan Commission of Agriculture, Generally Accepted Agricultural and Management Practices for Site Selection and Odor Control for New and Expanding Livestock Production Facilities § III (July 2001), at http://www.mda.state.mi.us/right2farm/siteselection.html [hereinafter M-GAAMPs]; see also infra Part III.A.

n101 The statute explicitly directs the commission to "consider groundwater protection, soil permeability, and other factors determined necessary." Mich. Comp. Laws Ann. § 286.474(8)(b).

n102 This is not made explicit in the statute itself; however, the introduction to the actual GAAMPs states a threefold purpose. See M-GAAMPs, supra note 100, § I. This fulfills the objectives of environmental protection, social considerations (ie., neighbor relations), and economic viability. See id. The GAAMPs elaborate on these goals by stating that "when all three of these objectives are met, the ability of a farm operation to achieve agricultural sustainability is greatly increased." Id.

n103 See Mich. Comp. Laws Ann. § 286.474(6). However, the other revisions were made effective on March 10, 2000. See Mich. Comp. Laws Ann. § 286.474.

n104 241 Mich. App. 324, 615 N.W.2d 250 (2000).

n105 See Belvidere Township v. Heinze, 241 Mich. App. 324, 326, 615 N.W.2d 250, 252 (2000).

n106 See Belvidere Township, 241 Mich. App. at 326, 615 N.W.2d at 252.

n107 See id.

n108 See id. at 327, 615 N.W.2d at 252.

n109 See id. at 327, 331, 615 N.W.2d at 252, 254.

n110 See id. at 330, 615 N.W.2d at 254.

n111 See id. at 331, 615 N.W.2d at 254.

n112 See Belvidere Township, 241 Mich. App. at 331, 615 N.W.2d at 254.

n113 Id. at 332, 615 N.W.2d at 254-55.

n114 See id. at 332, 615 N.W.2d at 255.

n115 See Travis v. Preston, 247 Mich. App. 190, 192, 635 N.W.2d 362, 364 (2001).

n116 247 Mich. App. 190, 635 N.W.2d 362 (2001).

n117 See Travis, 247 Mich. App. at 192-93, 635 N.W.2d at 364.

n118 See id. at 193, 635 N.W.2d at 365.

n119 See id. at 197-98, 635 N.W.2d at 367.

n120 See Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998); see also infra Part II.A.

n121 See Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998).

n122 See, e.g. Buchanan v. Simplot Feeders Ltd. P'ship, 952 P.2d 610 (Wash. 1998); Texas Natural Res. Conservation Comm'n v. Accord Agric., Inc., No. 96-00159, 1999 WL 699825 (Tex. Ct. App. Sept. 10, 1999) (dismissing plaintiff's challenge to Texas' right to farm law on standing grounds due to lack of injury).

n123 584 N.W.2d 309 (Iowa 1998).

n124 See Bormann, 584 N.W.2d at 311.

n125 See id. at 313.

n126 See id. at 312.

n127 See id. at 315-16.

n128 505 U.S. 1003 (1992).

n129 See Bormann, 584 N.W.2d at 316 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

n130 See id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

n131 See id. at 317-20. The Iowa Supreme Court cited several U.S. Supreme Court cases as authority for its reasoning including United States v. Causby, 328 U.S. 256 (1946) (regular flights of government planes over chicken farm); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (statutory prohibition of mining of coal under dwelling); and Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (gases and smoke from railroad tunnel emissions). See Bormann, 584 N.W.2d at 317-20.

n132 See Bormann, 584 N.W.2d at 321.

n133 See id. at 320. The court in Bormann never explicitly stated that it was a per se takings case. However, this is the only conclusion that can be reached by reading the opinion. The court explained that Bormann was not a case of total economic deprivation under Lucas, and although the court recognized the balancing test of Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the court never applied any part of the test in reaching its conclusion. See Bormann, 584 N.W.2d at 316-17. See also discussion infra Part II.C.

n134 See U.S. Const. amend. V.

n135 See Lucas, 505 U.S. at 1015.

n136 See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978).

n137 458 U.S. 419 (1982).

n138 See Loretto, 458 U.S. at 421.

n139 See id. at 424.

n140 See id. at 426.

n141 505 U.S. 1003 (1992).

n142 See Lucas, 505 U.S. at 1007-08.

n143 See id. at 1019.

n144 See id. at 1027-29.

n145 438 U.S. 104 (1978).

n146 See Penn Cent. Transp. Co., 438 U.S. at 124.

n147 Compare the U.S. Constitution, "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, with Michigan's constitution, "private property shall not be taken for public use without just compensation . . . . " Mich. Const. art. X, § 2.

n148 See K & K Constr., Inc. v. Dep't of Natural Res., 456 Mich. 570, 576, 575 N.W.2d 531, 534-35 (1998); Adams Outdoor Adver. v. City of East Lansing, 463 Mich. 17, 23, 614 N.W.2d 634, 638 (2000), cert. denied, U.S. , 121 S. Ct. 1356 (2001).

n149 See supra Part II.A.

n150 See Bormann, 584 N.W.2d at 314 (discussing elements of Iowa statute).

n151 See id.

n152 Id. (quoting Iowa Code § 352.11(1)(a) (1993) (emphasis added)).

n153 Mich. Comp. Laws Ann. § 286.473(2) (West 1996 & Supp. 2001). Although Michigan's statute essentially codifies the "coming to the nuisance" defense in this section, originally passed in 1981, the 1995 and 1999 revisions seriously compromise this premise. See infra Part III.

n154 See Bormann, 584 N.W.2d at 314; see also supra text accompanying note 151.

n155 See Mich. Comp. Laws Ann. § 286.473(1).

n156 See Bormann, 584 N.W.2d at 322.

n157 The statute struck down in Bormann only required that the farm be designated as an "agricultural area" by the Board of Supervisors. It did not require that a farm already exist on the site to receive such designation. See supra note 152 and accompanying text.

n158 See Bormann, 584 N.W.2d at 316-21.

n159 See supra Part II.B.

n160 See Lucas, 505 U.S. at 1015, 1019.

n161 See Bormann, 584 N.W.2d at 317-21; see also discussion supra Part II.A.

n162 See Bormann, 584 N.W.2d at 317.

n163 See supra note 131.

n164 233 U.S. 546 (1914).

n165 See Bormann, 584 N.W.2d at 319 (citing Richards v. Wash. Terminal Co., 233 U.S. 546, 557 (1914)).

n166 Richards, 233 U.S. at 557.

n167 The Bormann court acknowledged that it was not a loss of all economically beneficial use case, and it did not discuss the Penn Central test under which the defendant Board of Supervisors contested it would win. See Bormann, 584 N.W.2d at 313; see also supra Part II.A. Instead, the court relied on an analogy to Richards and quoted an 1886 New Jersey case which stated:

Whether you flood a farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

Bormann, 584 N.W.2d at 320 (quoting Pa. R.R. Co. v. Angel, 7 A. 432, 433-34 (N.J. 1886)).

n168 See supra Part II.B.

n169 See supra Part II.B.

n170 See Richardson & Feitshans, supra note 4, at 136. The authors note that many easements, including all negative easements, appear to involve no physical invasion. See id. They further explain that the reasoning of the Iowa Supreme Court in Bormann is not clear. See id.; see also Centner, supra note 13, at 10254. Centner also criticizes the Bormann court's conclusion that a per se taking occurred. See id.

n171 See supra Part II.B.

n172 See Penn Cent. Transp. Co., 438 U.S. at 124.

n173 This remains the core function of the statute. However, in its original form, it was relatively simple in concept and application because the revisions regarding changes in size and use, and preemption of local zoning, had not yet been added. See supra Part I.

n174 See supra notes 21-24 and accompanying text. Since there is no explicitly stated purpose in the language of the statute, it must be inferred from the language itself and from the circumstances surrounding its enactment. See Grossman & Fischer, supra note 2, at 153.

n175 See Mich. Comp. Laws Ann. § 286.473(1) (West 1996 & Supp. 2001).

n176 See supra Part I.C.

n177 See supra Part I.C.

n178 This is because of the zoning preemption of the revised statute.

n179 See Norton Shores v. Carr, 81 Mich. App. 715, 720, 265 N.W.2d 802, 805 (1978).

n180 See Juergensmeyer & Roberts, supra note 80, § 4.31.

n181

81 Mich. App. 715, 265 N.W.2d 802 (1978).

n182 Norton Shores, 81 Mich. App. at 720, 265 N.W.2d at 805 (citations omitted).

n183 See, e.g., Michael A. Lawrence, A Proposal to Amend the Michigan Zoning Enabling Act to Allow Amortization of Nonconforming Uses, 1998 L. Rev. M.S.U.-D.C.L. 653. Lawrence explains that Michigan is one of few states that still does not permit amortization and argues that the policy is far outdated. See id. at 655-56.

n184 However, values likely will not be reduced to such an extent to be considered a taking. See supra Part II.C.

n185 See M-GAAMPs, supra note 100, § III.

n186 See id. The area may be either one-quarter or one-half mile of the proposed facility, depending on the number of animal units at the facility. See id.

n187 See id. Animal units are defined by federal regulations and vary greatly according to the animal type. See id. For example, groups of 350 mature dairy cattle and 50,000 laying hens are each considered 500 animal units. See id.

n188 See M-GAAMPs, supra note 100, § III.

n189 See id.

n190 See id.

n191 See id.

n192 See id.

n193 See id. The range is from 250 feet for the smallest operations to 600 feet for farms with over 1000 animal units. See MGAAMPs, supra note 100, § III.

n194 This is due to the lack of ability to plan predictably through zoning controls.

n195 See M-GAAMPs, supra note 100, § V.

n196 For example, traffic engineers have no planning tool, such as zoning, with which to predict future truck levels and routes because a large farm could potentially "spring up" anywhere. Even more simply, communities cannot completely plan zoning uses for transportation corridors, loading sites (high-density truck), school routes, hospital locations, etc. for public safety because of the possibility of anomalous land uses as farms grow and change.

n197 As a side note, it was for precisely these reasons that the Right to Farm Act provided added fodder to the supporters of Proposal Two in the November 2000 state elections.

n198 This term has been commonly used in the field of environmental studies for at least some twenty years. It apparently was popularized by Richard Stewart in an article in which he explained that governments generally are reluctant to tighten any environmental regulations for fear of driving away affected businesses. See Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1212 (1977). Stewart explained that:

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.

Id. For a discussion of the history and debate over the term "race to the bottom," see Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210 (1992).

n199 See Jonathan R. Watts Hull, Hogging the Debate, St. Gov't News, Aug. 1998, at 14.

n200 See id.

n201 See Aaron M. McKown, Hog Farms and Nuisance Law in Parker v. Barefoot: Has North Carolina Become a Hog Heaven and Waste Lagoon?, 77 N.C. L. Rev. 2355, 2357 (1999).

n202 See id.

n203 See id. at 2367.

n204 See Hull, supra note 199. Mississippi recently passed a two-year moratorium on new permits for hog operations. A recent opinion by the Kentucky Attorney General opened the door to local regulation of large-scale hog operations in that state. See Neil D. Hamilton, Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective, 3 Drake J. Agric. L. 103, 112 (1998). The opinion states that "'the experience of North Carolina persuades us that the practice of industrialscale hog farming is neither reasonable nor prudent' and thus is not protected." Id. (quoting 97 Ky. Op. Att'y Gen. 31, at 8 (Aug. 21, 1997)).

n205 See M-GAAMPs, supra note 100, § III.

n206 The GAAMPs only define a "non-farm residence" which is "a residence that is habitable for human occupation and is not affiliated with the specific livestock production system." Id. Although adjacent farmers of a different type of operation fall under this definition, there is no indication that the Michigan Department of Agriculture considered the potential problem of farmers encroaching on other farmers in the formulation of this definition. This problem is illustrated by the fact that in both the Bormann decision from Iowa and the Buchanan opinion from Washington, it was long-term local farmers who were bringing actions against large-scale agribusinesses. See Bormann v. Bd.

of Supervisors, 584 N.W.2d 309 (Iowa 1998); Buchanan v. Simplot Feeders Ltd. P'ship, 952 P.2d 610 (Wash. 1998); see also Juergensmeyer & Roberts, supra note 80, § 13.3. Juergensmeyer and Roberts note that most right-to-farm laws do not give an adjacent farmer any nuisance protection against other farmers. See id. This, they explain, demonstrates the extent to which these statutes are designed to encourage farmers to keep their land in farm use. See id.