

WHEN URBAN AGRICULTURE MEETS MICHIGAN'S RIGHT TO FARM ACT: THE PIG'S IN THE PARLOR

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INTRODUCTION

The city of Troy, Michigan, a second-ring suburb of Detroit, saw explosive population growth in the mid-twentieth century. During the twenty-year period from 1960 to 1980, Troy grew by 246%, from a population of 19,402 to 67,102.¹ According to the 2010 U.S. Census, Troy is the largest city in Oakland County and the eleventh largest city in Michigan, with a population of 80,980.²

Shelby Township, in Macomb County, is located immediately to the north and east of the city of Troy. Like Troy, Shelby Township is one of the suburban communities receiving the lion's share of southeast Michigan's population growth. Shelby Township's population grew by about 188% from 1950 to 1960, and in the subsequent forty years it grew in population by an average of forty-two percent per decade.³ Shelby Township's population in 2010 was 73,804,⁴ making it the fourth largest township and seventeenth largest community in Michigan.

The city of Troy has a population density of 2,409 persons per square mile.⁵ Shelby Township has a similar population density of 2,096 persons per square mile.⁶ Population statistics aside, to even the most casual observer, both Shelby Township and the city of Troy are "urban," with resi-

1. SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS (SEMCOG), HISTORICAL POPULATION AND EMPLOYMENT BY MINOR CIVIL DIVISION, SOUTHEAST MICHIGAN 5 (2002) [hereinafter HISTORICAL POPULATION].

2. 2010 Census Data for Michigan, MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET, http://www.michigan.gov/cgi/0,1607,7-158-54534_51713_51716-252541--,00.html (scroll down to "Counts of Total Population for 2000 and 2010," and click on "Population of Michigan Cities, Villages, Twps., and Remainders of Twps.") (last visited Aug. 8, 2011); see also *American Fact Finder, 2010 Census*, U.S. CENSUS BUREAU, available at <http://factfinder2.census.gov> (offering a more extensive database for examining census data) (last visited Aug. 8, 2011).

3. HISTORICAL POPULATION, *supra* note 1.

4. 2010 Census Data for Michigan, *supra* note 2; see also *American Fact Finder*, *supra* note 2.

5. SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS (SEMCOG), COMMUNITY PROFILES, CITY OF TROY, <http://www.semco.org/Data/Apps/comprof/people.cfm?cpid=2270> (2010 population divided by land area of 33.6 square miles) (last visited Aug. 8, 2011).

6. SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS (SEMCOG), COMMUNITY PROFILES, SHELBY CHARTER TOWNSHIP, <http://www.semco.org/Data/Apps/comprof/people.cfm?cpid=3110> (2010 population divided by land area of 35.2 square miles) (last visited Aug. 8, 2011).

dential, commercial, and industrial development patterns typical of most intensively-developed suburban communities in the United States. Why is it, then, that in 2005, Shelby Township found itself unable to enforce its zoning regulations against the owner of two chicken coops? Similarly, why has the city of Troy been locked in a years-long battle over the city's ability to regulate the activities of a landowner with a barn, two greenhouses, and a retail nursery operation conducting business on two residentially-zoned parcels within the city limits?⁷

The answer lies in Michigan's Right to Farm Act (RTFA).⁸ Like most other states, Michigan adopted its RTFA during a time when public concern about the loss of productive farmland in the U.S. to non-agricultural uses was high on the national policy agenda.⁹ Both Oakland and Macomb counties boasted significant agricultural land in 1950: fifty-one percent of the land area of Oakland County was in farmland, and sixty-four percent of the land area of Macomb County was in farmland.¹⁰ Yet, by 1978, farmland accounted for less than fourteen percent of the land area of Oakland County and only twenty-nine percent of the land area of Macomb County.¹¹ State-wide, Michigan lost almost thirty-four percent of its agricultural land between 1950 and 1978.¹²

Steady encroachment of non-agricultural land uses—especially residential development—into traditionally agricultural areas meant conflicts between farmers and non-farm neighbors became increasingly common. Nuisance complaints also became more common, levied by individuals who built homes in rural areas and then objected to noises, odors, dust, chemical use, and slow-moving machinery.¹³ Michigan, like other states, recognized that the threat of nuisance complaints, with their associated legal costs, combined with other factors to make farming more difficult and less lucra-

7. This case has found its way into Michigan's courts numerous times since 1996. A brief history and summary of decisions rendered over the years are provided in *Papadelis v. City of Troy*, No. 286136, 2009 Mich. App. LEXIS 2588 (Dec. 15, 2009).

8. MICH. COMP. LAWS §§ 286.471-286.474 (2011).

9. See, e.g., W. WENDELL FLETCHER & CHARLES E. LITTLE, *THE AMERICAN CROPLAND CRISIS: WHY U.S. FARMLAND IS BEING LOST AND HOW CITIZENS AND GOVERNMENTS ARE TRYING TO SAVE WHAT IS LEFT* (1982); R. NEIL SAMPSON, *FARMLAND OR WASTELAND: A TIME TO CHOOSE* (1981); UNITED STATES DEPARTMENT OF AGRICULTURE, *UNITED STATES NATIONAL AGRICULTURAL LANDS STUDY FINAL REPORT* (1981).

10. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, U.S. CENSUS OF AGRICULTURE, 1950, MICHIGAN, VOLUME 1, PART 6, 45, 46 (1952).

11. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, U.S. CENSUS OF AGRICULTURE, 1978, MICHIGAN, VOLUME 1, PART 22, 439, 504 (1981).

12. *Id.* at 1.

13. Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 292 (1984).

tive.¹⁴ Amidst concerns about loss of farmland and agricultural production capacity, the RTFA and its protection of farms against nuisance suits became an important component of Michigan's efforts to stem the loss of productive farmland. In its first look at Michigan's RTFA, the Court of Appeals addressed the basis for the law: "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. . . . It, therefore, enacted the Right to Farm Act to protect farmers from the threat of extinction caused by nuisance suits"¹⁵

Since its original adoption in 1981,¹⁶ the RTFA has been amended three times,¹⁷ each in response to an observed need to clarify intent, respond to changing characteristics of agriculture, or strengthen protections afforded to farms and farmers. Agriculture in Michigan continues to evolve, but some of the most recent changes call into question the role and application of the RTFA. Where some urban areas contain vestiges of the agriculture that once was (Troy and Shelby Township, for example), many urban communities are increasingly interested in new urban agriculture opportunities. However, cities are raising questions about whether embracing urban agriculture in the shadow of the RTFA is in the best interest of their citizens.

Taken together, each successive amendment to Michigan's RTFA and a recent series of appellate court decisions suggest that Michigan's RTFA has strayed from its original intent—to slow "the 'parlor' . . . encroaching on the barnyard"¹⁸ and stem the loss of agricultural land—and is now, in fact, the vehicle being used to bring the pig into the parlor.¹⁹ In this article, we contend that judicial interpretations of the RTFA and the changing nature of Michigan agriculture—in particular, the rapidly-growing interest in urban agriculture—have raised several concerns and presented potential conflicts that suggest it is time, once again, to revisit the RTFA. Specifically:

14. Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1697 (1998).

15. *Northville v. Coyne*, 429 N.W.2d 185, 187 (Mich. Ct. App. 1988).

16. 1981 Mich. Pub. Acts 93.

17. 1987 Mich. Pub. Acts 240; 1995 Mich. Pub. Acts 94; 1999 Mich. Pub. Acts 261.

18. Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97 (1983).

19. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

- The RTFA affords nuisance protection to those farms using generally accepted agricultural and management practices (GAAMPs); however, judicial interpretations arguably have expanded the scope of GAAMPs beyond that envisioned by the Michigan legislature. Yet, the applicability of GAAMPs for urban environments has not been explicitly considered.²⁰
- The RTFA was originally adopted to protect farms and farmland in rural areas from encroachment by those “coming to the nuisance;” however, the RTFA now affords farms the right to bring the nuisance to town.²¹
- The RTFA preempts local laws that extend, revise, or conflict with its provisions; however, judicial interpretations have led to the preemption of even the most basic zoning regulations designed to minimize land use conflicts and protect the public health and safety of urban residents.²²

The balance of this article addresses these concerns, describes in more detail the conflicts created, and proposes potential legislative responses that could ameliorate the potential dampening effect of the RTFA on the burgeoning urban agriculture movement in Michigan.

Part I provides a look at growing interest and participation in food production within urban areas. Part II describes Michigan’s RTFA and an analysis of its application in the protection of farm operations from nuisance complaints. Part III focuses on the implications of the most recent amendment to the RTFA for the application of local zoning. Part IV examines the implications of restrictions on local zoning and reliance on GAAMPs to address nuisance concerns in urban agricultural settings. Finally, Part V suggests legislative responses that could rebalance the protection of agriculture provided by the RTFA with the protection of social and property interests provided by local zoning in urban areas.

We note at the outset that we are forced to rely upon several unpublished opinions of the Michigan Court of Appeals to elucidate our understanding of the Michigan appellate courts’ interpretation of the RTFA.²³ Despite the fact that the 1999 amendments made significant changes to the nuisance protection and local ordinance preemption provisions of the

20. See *infra* Section II.B and Section IV.B.

21. See *infra* Section II.C.

22. See *infra* Part III.

23. MICH. R. OF CT. § 7.215(C)(1) provides that unpublished opinions are “not precedentially binding under the rule of stare decisis.” Unpublished opinions generally are given little attention in law review articles; however, with a dearth of published opinions interpreting the RTFA, we believe it is appropriate and necessary to resort to unpublished decisions to arrive at a better understanding of what the Court of Appeals believes to be well-settled questions of law associated therewith.

RTFA, the Court of Appeals nevertheless has chosen to resolve a number of cases addressing those provisions through unpublished opinions. Michigan Court Rules require publication of an opinion that “(1) establishes a new rule of law; (2) construes a provision of a constitution, statute, ordinance, or court rule; (3) alters or modifies an existing rule of law or extends it to a new factual context.”²⁴ The decision to issue unpublished decisions implies that the justices believe either many of the questions associated with interpreting the RTFA are well-settled or the statutory provisions themselves are unambiguous;²⁵ yet, as will be pointed out in several of the following sections, the Court of Appeals has given insufficient attention to the question of whether the legal rules announced in these cases are establishing new rules of law—to the point that the Michigan Supreme Court in 2007²⁶ implicitly overruled one of these well-settled interpretations of the RTFA.

I. EMERGENCE OF URBAN AGRICULTURE

Urban agriculture, in simplest terms, involves growing, processing, and distributing food in an urbanized area.²⁷ It can include, but is not limited to, residential vegetable gardens, community gardens, hoop houses, large-scale nurseries, greenhouses, and aquaculture.²⁸ In big cities with large tracts of vacant land, like Detroit, Flint, and Cleveland, even conversion of whole vacant city blocks to row crops has been proposed.²⁹ Not surprisingly, definitions of urban agriculture are many and varied. They include straightforward, dictionary-like definitions focused principally on

24. *Id.* § 7.215(B).

25. The issues associated with the use of unpublished opinions in the federal courts have been hotly debated over the last decade, since the 8th Circuit Court of Appeals determined in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) that its own rule of appellate procedure prohibiting the use of unpublished opinions as precedent was unconstitutional. Subsequently in 2006 the U.S. Supreme Court adopted Federal Rule of Appellate Procedure 32.1(a), which requires all U.S. courts of appeals to permit litigants to cite to unpublished opinions decided after January 1, 2007.

26. See discussion of *Papadelis v. City of Troy*, No. 268920, 2006 Mich. App. LEXIS 2748 (Sept. 19, 2006), *rev'd*, 733 N.W.2d 397 (Mich. 2007); *infra* notes 151-52 and accompanying text.

27. See Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, ZONING PRACTICE, March 2010, at 1, available at <http://www.planning.org/zoningpractice/2010/pdf/mar.pdf> (“Urban agriculture can include a number of food production and distribution-related activities, which for our purposes include food production through plant cultivation or animal husbandry, as well as some nonindustrial processing and distribution of that food.”).

28. KIMBERLEY HODGSON ET AL., URBAN AGRICULTURE: GROWING HEALTHY, SUSTAINABLE PLACES, PLANNING ADVISORY SERV. REPORT 563 13-19 (2011).

29. Hantz Farms proposes to convert seventy acres of vacant lots in Detroit to farms, as the first phase of an effort to ultimately create the largest urban farm in America. HANTZ FARMS DETROIT, <http://hantzfarmsdetroit.com> (last visited May 28, 2011).

activities³⁰ and also more complex descriptions that focus on systems³¹ and processes³² that are part of urban agriculture. These definitions illustrate a wide range of activities with an even wider range of impacts, depending on the scale and intensity of the use.³³

As urban settlement has evolved, so has the relationship between urban settlements and agricultural production. Early settlements incorporated land for food production. However, increasing size and density of urban populations, technological changes in agricultural production, development of transportation networks that reduced costs, and greater competition for land from commercial and industrial enterprises (as well as residential uses) pushed agriculture further and further from population centers.³⁴ Eventual-

30. Urban agriculture is:

'an industry located within or on the fringes of a town, a city or a metropolis which grows and raises, processes and distributes a diversity of food and non-food products, (re)using largely human and material resources, products and services found in and around that urban area, and in turn supplying human and materials resources, products and services largely to that urban area.' It includes community and private gardens, fruit trees, food-producing green roofs, aquaculture, farmers markets, small-scale farming, beekeeping, and food composting.

Michael Broadway, *Growing Urban Agriculture in North American Cities: The Example of Milwaukee*, 52 FOCUS ON GEOGRAPHY 23, 23 (2009) (internal quotations and citations omitted).

31. Urban agriculture is:

a complex system encompassing a spectrum of interests, from a traditional core of activities associated with production, processing, marketing, distribution, and consumption, to a multiplicity of other benefits and services that are less widely acknowledged and documented. These include recreation and leisure activities, economic vitality and business entrepreneurship, individual health and well-being, community health and well-being, landscape beautification, and environmental restoration and remediation.

COUNCIL FOR AGRICULTURE SCIENCE & TECHNOLOGY TASK FORCE REPORT NO. 138, URBAN AND AGRICULTURAL COMMUNITIES: OPPORTUNITIES FOR COMMON GROUND 14 (2002).

32. Urban agriculture is:

a network of cultivation spaces and production activities in which food is produced by and for the local community and around which city government and administrative departments, the private sector, non-profit coalitions and neighborhood groups are involved in order to expand, support and integrate these activities into the life of the city.

Kathryn J. A. Colasanti, *Growing Food in the City: Two Approaches to Exploring Scaling up Urban Agriculture in Detroit* (2009) (unpublished M.S. thesis, Michigan State University) (on file with the Michigan State University Library).

33. See Mukherji & Morales, *supra* note 27, at 5 (identifying four categories of urban agriculture as (1) extensive in area/intensive in use; (2) extensive in area/less intensive in use; (3) less extensive in area/intensive in use; and (4) less extensive in area/less intensive in use).

34. Early considerations of spatial relationships between agricultural and residential land uses were put forth by J.H. von Thünen in 1826. A description of the von Thünen model and a more modern interpretation can be found in J. Richard Peet, *The Spatial Expansion*

ly, agricultural production became almost completely separated from urban settlements and regulated separately with agricultural zones in rural areas.³⁵ As a result, until recently “urban agriculture” came to mean apartment dwellers with tomato plants, lettuce, and flowers on porches and balconies, and detached single family homes with small gardens in the front, back or side yards.³⁶ In the United States, urban and suburban zoning ordinances have also permitted large-scale nurseries and greenhouse operations in warehouse and industrial zones and sometimes in agricultural zones at the undeveloped edge of the community.³⁷ Where impacts of these agricultural activities require mitigation, the uses have been permitted only when there is adherence to defined standards clearly stated in the zoning ordinance.³⁸

Conflicts of agricultural uses with the quiet use and enjoyment of adjoining property usually arise when the scale of the agricultural operation increases or when operations include animals. Common negative impacts associated with agricultural activities that have special relevance in urban neighborhoods include smells from compost, animals, and animal waste; chemical sensitivity to airborne fertilizers and pesticides; the exterior appearance of agricultural buildings, waste, or dirt piles; farm equipment and animal shelters; and the sounds of animals and machinery.³⁹ These characteristics of some agricultural activities lead to related concerns that are typically addressed when local planning and zoning land use classification decisions are being made, including:

- Security: concern about squatters, criminal hiding places, vandalism, theft of garden produce, animals, or equipment;
- Traffic: where product sales are permitted, how much traffic there will be, where customers will park, need for adequate space, and how vehicles access the sales area or location;
- Signs: the number, type, size, and kind of signs; whether they will be lit at night; and where lighting is directed.

of Commercial Agriculture in the Nineteenth Century: A von Thünen Interpretation, 45 *ECON. GEOGRAPHY* 283 (1969).

35. Eric Damian Kelly, *Zoning*, in *THE PRACTICE OF LOCAL GOVERNMENT PLANNING* 272 (Frank S. So & Judith Getzels eds., 2d ed. 1988).

36. See Mukherji & Morales, *supra* note 27, at 3 (“Retail grocers have displaced the decentralized food production of urban gardening efforts. . . . [G]ardening became the suburbanite’s hobby.”).

37. For example, the Detroit Zoning Ordinance as amended April 1, 2010, allows greenhouse operations in all five industrial zones by right. DETROIT, MICH., ZONING ORDINANCE art. XII, div. 1, subsec. E, § 61-12-61 (2010), available at <http://www.detroitmi.gov/Portals/0/docs/legislative/cpc/pdf/Ch%2061%20Apr%2001,%202010.pdf>.

38. TOM DANIELS & DEBORAH BOWERS, *HOLDING OUR GROUND: PROTECTING AMERICA’S FARMS AND FARMLAND* 111 (1997).

39. See HODGSON ET AL., *supra* note 28, at 21-22.

Each of the above concerns has an urban counterpart for a variety of different land uses—criminal activity in vacant buildings, highway traffic noise near residential neighborhoods, and spillover of lighting from commercial to residential areas—but those are typical urban sights and sounds that are commonly addressed through local ordinances.

Urban agriculture brings sights and sounds that are associated with rural areas and are not expected in urban places, especially residential neighborhoods. As a result, urban residents may object and complain to local zoning authorities. Then, the community is forced to examine the extent to which it desires, as a matter of public policy, to permit such uses, in which zones such activities should be permitted, and under what circumstances they should be allowed. These decisions are often driven by the scale of activity, the number of people affected, and the distance between the activity and people affected.⁴⁰ Local planning and zoning processes involve community residents in making these kinds of decisions and seek appropriate balances among different interests. Different communities take different approaches, reflecting local values and community visions. In contrast, state-level land use controls tend to apply a one-size-fits-all approach. Michigan's RTFA is one example of such a state-level policy, and with its overly general application it brings a host of problems for the future success of urban agriculture in Michigan.

II. RIGHT TO FARM NUISANCE PROTECTION FOR AGRICULTURAL ACTIVITIES IN MICHIGAN

Right to farm laws codify the common law defense of “coming to the nuisance.”⁴¹ Most such laws specifically assert that, if an agricultural operation was not a nuisance prior to changed conditions (e.g., non-farm residential development) in the surrounding area, then it cannot become a public or private nuisance because of changing conditions.⁴² Many right to farm laws frame the right to farm as a social contract in which protection from nuisance actions carries with it a responsibility to manage the farm in such a

40. Communities commonly require setbacks or separation distances between different land uses that are likely to conflict with one another. Where potential negative spillovers would affect more people, separation distances are often larger. See, for example, the zoning ordinance of Superior Township, Michigan, which specifies separation distances between a variety of different land uses (e.g., day care and large group homes, industrial operations, composting centers, extractive and earth removal operations) that vary from 300 to 500 to 1500 feet, depending upon other land uses in zones where these uses are permitted. SUPERIOR TOWNSHIP, MICH., ZONING ORDINANCE no. 174, art. 5 (2001), available at http://superior-twp.org/zoning/4_1_2011_art%205.pdf.

41. Grossman & Fischer, *supra* note 18, at 118.

42. See, e.g., N.C. GEN. STAT. §§ 106-700 to 106-701 (2009), GA. CODE ANN. § 41-1-7 (West 2008), NEB. REV. STAT. ANN. §§ 2-4401 to 2-4404 (West 2011).

way that the health and safety of neighboring landowners who are barred from bringing nuisance actions are not threatened. In such states, right to farm protection is not available if a farmer is negligent in conducting his farm operation or violates state or federal environmental regulations.⁴³

Michigan adopted a social contract framework when the RTFA was created in 1981.⁴⁴ The RTFA offers protection to neighboring residents through farmers' use of GAAMPs, while at the same time the use of those GAAMPs protects farms from nuisance complaints lodged by those who would come to the nuisance.⁴⁵ With an amendment in 1995, the conditions under which nuisance protection is provided were expanded.⁴⁶

The provisions for nuisance protection in the RTFA suggest a series of questions that must be answered before eligibility of an activity for nuisance protection can be determined. A decision-tree construct that can be followed to answer these questions is described in the following sections.

A. Is the Activity in Question a Farm or Farm Operation?

The RTFA defines a farm as: "the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products."⁴⁷ A farm operation is defined as:

the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products, and includes, but is not limited to:

- (i) Marketing produce at roadside stands or farm markets.

43. See, e.g., N.Y. AGRIC. & MARKETS L. § 308 (McKinney Supp. 2011), KAN. STAT. ANN. §§ 2-3201 to 2-3204 (West 2011); FLA. STAT. ANN. § 823.14 (West 2006).

44. 1981 Mich. Pub. Acts 644.

45. MICH. COMP. LAWS ANN. § 286.473(1) (West 2003) provides in part: "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."

46. 1995 Mich. Pub. Acts 1065 added MICH. COMP. LAWS ANN. § 286.473(3) (West 2003), providing that a farm using GAAMPs shall not be a public or private nuisance as a result of any of the following:

- "A change in ownership or size."
- "Temporary cessation or interruption of farming."
- "Enrollment in governmental programs."
- "Adoption of new technology."
- "A change in type of farm product being produced."

47. MICH. COMP. LAWS ANN. § 286.472(a) (West 2003). 1995 Mich. Pub. Acts 1065 added "plants," "animals," "structures, including ponds used for agricultural and aquacultural activities, machinery, equipment and other appurtenances." The original 1981 definition of "farm" was simply "land, buildings and machinery used in the commercial production of farm products." 1981 Mich. Pub. Acts 644.

- (ii) The generation of noise, odors, dust, fumes, and other associated conditions.
- (iii) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway as authorized by the Michigan vehicle code.
- (iv) Field preparation and ground and aerial seeding and spraying.
- (v) The application of chemical fertilizers or organic materials, conditioners, liming materials, or pesticides.
- (vi) Use of alternative pest management techniques.
- (vii) The fencing, feeding, watering, sheltering, transportation, treatment, use, handling and care of farm animals.
- (viii) The management, storage, transport, utilization, and application of farm by-products, including manure or agricultural wastes.
- (ix) The conversion from a farm operation activity to other farm operation activities.
- (x) The employment and use of labor.⁴⁸

In addition, the Michigan Court of Appeals has provided broad interpretations of what constitutes a farm or farm operation. In an unpublished 2003 decision, *Milan Township v. Jaworski*,⁴⁹ the Court of Appeals determined that an operation where game birds were bred, raised, and hunted—or sold as live birds for customers to take home—constituted a farm operation because it was “used for breeding, raising and selling game birds for commercial purposes,”⁵⁰ and the game birds were farm products “because they are useful to human beings and produced by agriculture.”⁵¹ Additionally, hunting game birds on the defendant’s property constituted a farm operation because it involved the “harvesting of farm products.”⁵² The Court noted that the GAAMPs specifically addressed game birds,⁵³ and a Michigan Commission of Agriculture⁵⁴ (the Commission) resolution recognized game bird hunting preserves as “an agricultural activity and a value-added farm opportunity.”⁵⁵

48. MICH. COMP. LAWS ANN. § 286.472(b) (West 2003).

49. No. 240444, 2003 Mich. App. LEXIS 3105 (Dec. 4, 2003).

50. *Id.* at *11.

51. *Id.*

52. *Id.* at *12 (quotations omitted).

53. *Id.* at *14.

54. Renamed the Michigan Commission of Agriculture and Rural Development as of March 13, 2011.

55. *Jaworski*, 2003 Mich. App. LEXIS 3105, at *15.

In *Village of Rothbury v. Double JJ Resort Ranch, Inc.*,⁵⁶ another unpublished opinion issued the following year, the Court of Appeals concluded that a riding stable is a farm operation because horses are farm animals, and “activities involving the use, handling, and care of farm animals qualify as a farm operation.”⁵⁷ Further, the Court noted that GAAMPs for care of farm animals contained provisions specifically for horses and riding stables.⁵⁸

The *Jaworski* and *Double JJ Resort* decisions suggest that a reference to an activity or product in GAAMPs will bring the activity or product within the scope of “farm operation.” However, the definitions of “farm” and “farm operation” both refer to “farm product” and “commercial production,” requiring that a farm or farm operation be engaged in commercial production of farm products to be eligible for nuisance protection.⁵⁹ In fact, much of the litigation over whether an activity is a protected farm or farm operation has focused on the meanings of “farm product” and “commercial production,” so additional components of the first question must be addressed in the decision tree.

1. *Is the Farm or Farm Operation Producing a Farm Product?*

Farm product is defined in the RTFA as:

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.⁶⁰

In *Richmond Township v. Erbes*, the Court of Appeals concluded that wood pallets produced on defendant’s farm were not farm products because the majority of wood used for the pallets was grown elsewhere and transported to the owner’s farm.⁶¹ Even though the definition of farm product includes “any other product which incorporates the use of food, feed, fiber, or fur,” the Court observed that giving those words sufficiently broad meaning to include the defendant’s pallet-building operation “would . . . allow practically anyone to claim protection under the act when constructing, for exam-

56. 2004 Mich. App. LEXIS 2172 (Mich. Ct. App. Aug. 17, 2004).

57. *Id.* at *3.

58. *Id.* at *4.

59. See notes 47, 48 and accompanying text.

60. MICH. COMP. LAWS ANN. § 286.472(c) (West 2003).

61. 489 N.W.2d 504 (Mich. Ct. App. 1992).

ple, flooring or furniture, which are arguably products incorporating fiber.”⁶²

In *Double JJ Resort*, the Court of Appeals concluded that a corn maze is a farm product, in part because

the definition of a farm product is not limited to agriculturally produced products that are edible. . . . [T]he definition also includes ‘flowers, seeds, grasses, nursery stock, trees and tree products . . . and other similar products.’ This indicates a Legislative intent to broadly define farm products to include products intended for use for pleasure. And a corn maze falls within this wide range of products used for pleasure.⁶³

These cases suggest that a farm is eligible for RTFA protection if it produces farm products on site, and farm products can include products marketed and consumed on site, not just products marketed for use elsewhere.

2. Is the Farm or Farm Operation Engaged in Commercial Production?

If a farm is producing a farm product, case law has also clarified that the production must be commercial in nature. The RTFA does not define “commercial,” but in 2005, the Court of Appeals took up this issue. In *Charter Township of Shelby v. Papesh*, the township argued that a small flock of chickens in backyard coops was a nuisance.⁶⁴ In deciding whether the poultry operation was protected by the RTFA, the Court considered whether the operation was commercial in nature. It defined commercial production as “the act of producing or manufacturing an item intended to be marketed and sold at a profit”⁶⁵ and concluded that “there is no minimum level of sales that must be reached before the RTFA is applicable.”⁶⁶ In *Papadelis v. City of Troy*,⁶⁷ an unpublished decision from 2006, the Court of Appeals logically extrapolated from the *Papesh* decision and dictionary definitions that “a farming operation must be at least partially commercial in nature for the RTFA to apply.”⁶⁸ The *Papesh* decision established that “a farm or farming operation cannot be found to be a nuisance if it is commercial in nature and conforms to GAAMPs.”⁶⁹ Thus, the next question in our decision tree addresses the use of GAAMPs.

62. *Id.* at 511.

63. 2004 Mich. App. LEXIS 2172, at *5 (citations omitted).

64. 704 N.W.2d 92, 96 (Mich. Ct. App. 2005).

65. *Id.* at 99.

66. *Id.* at 99 n.4.

67. No. 268920, 2006 WL 2683385 (Mich. Ct. App. Sept. 19, 2006), *rev'd*, 733 N.W.2d 397 (Mich. 2007).

68. *Id.* at *6.

69. 704 N.W.2d at 99.

B. Does the Farm or Farm Operation Comply with GAAMPS?

The RTFA does not formally define GAAMPS beyond describing them as “practices as defined by the Michigan commission of agriculture.”⁷⁰ The Commission has produced and adopted eight sets of published GAAMPS.⁷¹ With one exception, GAAMPS were developed at the request of the Commission in response to mounting complaints about specific farming practices. The exception is GAAMPS for “Site Selection and Odor Control for New and Expanding Livestock Operations,” which were developed and adopted by the Commission as required by a 1999 amendment to the RTFA.⁷² The RTFA describes the sources of information to be considered in defining GAAMPS⁷³ and, with the 1999 amendment, established specific membership for the committee charged with developing the Site Selection and Odor Control GAAMPS.⁷⁴

70. MICH. COMP. LAWS ANN. § 286.472(d) (West 1995). This definition was added by 1987 Mich. Pub. Acts 240.

71. GAAMPS were adopted for Manure Management and Utilization (1988); Pesticide Utilization and Pest Control (1991); Nutrient Utilization (1993); Care of Farm Animals (1995); Cranberry Production (1996); Site Selection and Odor Control for New and Expanding Livestock Production Facilities (2000); Irrigation Water Use (2003); and Farm Markets (2010). All adopted GAAMPS are available at the Michigan Department of Agriculture and Rural Development website: http://www.mi.gov/mda/0,1607,7-125-1567_1599_1605---,00.html.

72. MICH. COMP. LAWS § 286.474(8) (2000) amended by 1999 PA 261 which required: “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. The commission shall adopt such generally accepted agricultural and management practices by June 1, 2000.”

73. MICH. COMP. LAWS § 286.472(d) (1995) directs:

The commission shall give due consideration to available Michigan department of agriculture information and written recommendations from the Michigan state university college of agriculture and natural resources extension and the agricultural experiments station in cooperation with the United States department of agriculture natural resources conservation service and the consolidated farm service agency, the Michigan department of natural resources, and other professional industry organizations.

74. 1999 PA 261 § 286.474(8) added:

In developing these generally accepted agricultural and management practices, the commission shall do both of the following:

(a) Establish an advisory committee to provide recommendations to the commission. The advisory committee shall include the entities listed in section 2(d), 2 individuals representing townships, 1 individual representing counties, and 2 individuals representing agricultural industry organizations.

(b) For the generally accepted agricultural and management practices for site selection, consider groundwater protection, soil permeability, and other factors determined necessary or appropriate by the commission.

MICH. COMP. LAWS § 286.474(8) (2000).

The Commission has adopted a formal policy for carrying out its responsibilities for administering the RTFA, including the process for developing, adopting, and revising GAAMPs.⁷⁵ A standing committee is created for each set of GAAMPs to be developed. The Commission may, if deemed necessary, request a public review and comment process for each proposed set of GAAMPs.⁷⁶ The RTFA requires that GAAMPs be reviewed annually by the Commission and revised as necessary,⁷⁷ so the review and comment process is also applied annually if, following review by the standing committees, revisions to GAAMPs are recommended. Following public comment and responses by the standing committees, new GAAMPs or annual revisions are formally approved by the Commission.

Questions about whether a farm operation conforms with GAAMPs are raised through complaints made to the Michigan Department of Agriculture and Rural Development (MDARD—formerly Michigan Department of Agriculture) Right to Farm Program, according to the frameworks outlined in the RTFA.⁷⁸ If the farm operation is using GAAMPs, MDARD is to notify the farm operator, the complainant, and the local unit of government in which the farm operation is located.⁷⁹ In the event that MDARD is not provided access to a farm operation in order to carry out an investigation of air or odor complaints, the operation is assumed to not be using GAAMPs.⁸⁰

75. MICH. COMM'N OF AGRIC. & RURAL DEV., POLICY NO. 8: RIGHT TO FARM PROGRAM, in MICHIGAN COMMISSION OF AGRICULTURE AND RURAL DEVELOPMENT POLICY MANUAL (re-approved March 16, 2011), available at http://www.mi.gov/documents/mda/Commission_Policy_Manual_Update_3_16_11-Approved_348124_7.pdf (Appendices I and II to POLICY NO. 8 pertaining to the adoption and review of GAAMPs not posted on website are on file with authors) [hereinafter POLICY NO. 8].

76. *Id.*

77. MICH. COMP. LAWS § 286.473(1) (1995).

78. MICH. COMP. LAWS § 286.474(1) (2000) provides:

[T]he director shall investigate all complaints involving a farm or farm operation, including, but not limited to, complaints involving the use of manure and other nutrients, agricultural waste products, dust, noise, odor, fumes, air pollution, surface water or groundwater pollution, food and agricultural processing by-products, care of farm animals and pest infestations. Within 7 business days of receipt of the complaint, the director shall conduct an on-site inspection of the farm or farm operation.

79. MICH. COMP. LAWS § 286.474(3) (2000) describes the process to be followed if the farm operation is using GAAMPs:

If the director finds upon investigation under subsection (1) that the person responsible for a farm or farm operation is using generally accepted agricultural and management practices, the director shall notify, in writing, that person, the complainant, and the city, village or township and the county in which the farm or farm operation is located of this finding.

80.

It is the policy of the Michigan Commission of Agriculture and Rural Development to determine that a farm/farmer is not following Generally Accepted Agricultural and Management Practices if a Right to Farm complaint case involves air and/or

A farm operation that conforms with GAAMPs is eligible for protection from nuisance suits under the RTFA,⁸¹ and, as clarified in *Papesh*, the farm operation must conform with all applicable GAAMPs, not just one particular set of GAAMPs.⁸² However, references to “all applicable GAAMPs” raise considerable practical difficulties given that the Commission does not consider the eight published GAAMPs to be the complete universe of GAAMPs guiding the practices of Michigan’s agricultural producers. In its policy for the Right to Farm Program and GAAMPs,

The Commission recognizes the diversity of Michigan’s agricultural industry, which produces more than 200 commodities using a multiplicity of varied management procedures and techniques, and will strive to define specific Practices encompassing all sectors of the industry. Given the breadth of the industry, it is the policy of this Commission that Generally Accepted Agricultural and Management Practices include any traditional farming practice which is not detrimental to the environment or human and animal health.⁸³

Similarly, the Commission recognizes that the generally accepted practices contained in the GAAMPs for care of farm animals may not represent all relevant practices:

These voluntary Generally Accepted Agricultural and Management Practices (Practices) are intended to be used by the livestock industry and other groups concerned with animal welfare as an educational tool in the promotion of animal husbandry and care practices. The recommendations do not claim to be comprehensive for all circumstances; but attempt to define general standards for livestock production and well-being on farm operations.⁸⁴

Following the lead of the Commission, the Court of Appeals has granted nuisance immunity to farm operators based on accepted management practices that have not been reduced to writing in any adopted GAAMPs or other statement of policy.

odor issues, and Michigan Department of Agriculture and Rural Development staff is refused access to review practices and/or records related to the appropriate Generally Accepted Agricultural and Management Practices.

Mich. Comm’n of Agric. & Rural Dev., Policy No. 9: Generally Accepted Agricultural and Management Practices Determination of Non-compliance, in MICHIGAN COMMISSION OF AGRICULTURE AND RURAL DEVELOPMENT POLICY MANUAL (re-approved March 16, 2011), available at http://www.mi.gov/documents/mda/Commission_Policy_Manual_Update_3_16_11-Approved_348124_7.pdf.

81. See discussion *supra* note 45.

82. *Charter Township of Shelby v. Papesh*, 704 N.W.2d 92, 101 (Mich. Ct. App. 2005).

83. POLICY NO. 8, *supra* note 75.

84. MICH. DEPT. OF AGRIC. & RURAL DEV., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR THE CARE OF FARM ANIMALS 1 (Jan. 2010), available at http://www.michigan.gov/documents/MDA_Care_Farm_Animals_GAAMP_129713_7.pdf [hereinafter CARE OF FARM ANIMALS].

Almont Township v. Dome first gave legal recognition to unwritten GAAMPs.⁸⁵ Defendant parked a mobile home, which he used as an office and storage facility, on property where he operated a tree farm.⁸⁶ He sought protection from the RTFA when the township cited him for violation of three sections of the township's zoning ordinance.⁸⁷ The township argued that defendant was not entitled to protection under the Right to Farm Act because no written GAAMPs addressed tree farms.⁸⁸ Citing an earlier version of the above-referenced Right to Farm Program policy statement,⁸⁹ the Court disagreed:

We do not wish to punish defendant for engaging in what the commission of agriculture may consider to be a generally accepted practice simply because the commission did not adopt any written guidelines for tree farmers. From a practical standpoint, it would seem nearly impossible to list every generally accepted agricultural and management practice for every possible type of farm or farming operation in the state.⁹⁰

In *Jaworski*, the Court of Appeals concluded that the absence of GAAMPs on game-bird hunting was not sufficient to exclude the activity from RTFA protection. "To the extent that the GAAMPs do not address the harvesting of game birds, the commission's express policy statement that the list is not exclusive indicates that the absence of a GAAMP on this subject does not preclude application of the RTFA."⁹¹

Reliance by the Court of Appeals on unwritten GAAMPs seems misplaced in light of the statutory language of the RTFA. The fact that the RTFA requires GAAMPs to be "reviewed annually by the Michigan commission of agriculture and revised as considered necessary"⁹² and requires the MDARD to "[m]ake available on the department's website current gen-

85. No. 179297, 1997 WL 33354480 (Mich. Ct. App. Jan. 17, 1997).

86. *Id.* at *1.

87. *Id.*

88. *Id.*

89. The previous version of the MDARD policy statement read as follows:

The Commission recognizes the diversity in Michigan farm products with over 125 commodities being produced in the state. This commercial production process involves the use of a multiplicity of acceptable management techniques. *Therefore, the Practices defined using the enclosed reference procedures should not be construed as an exclusive list of acceptable practices* [emphasis added].

Quoted in *Id.* at *3. It is worth noting how the language in the last sentence of this previous version differs from the current version. The current version explicitly recognizes "any traditional farming practice which is not detrimental to the environment or human and animal health" as GAAMPs that, if followed, provide nuisance protections and renders local laws unenforceable according to current judicial interpretations. POLICY NO. 8, *supra* note 75.

90. 1997 WL 33354480, at *4.

91. *Milan Township v. Jaworski*, No. 240444, 2003 Mich. App. LEXIS 3105, at *14 (Dec. 4, 2003).

92. MICH. COMP. LAWS § 286.473(1) (1995).

erally accepted agricultural and management practices”⁹³ strongly suggests that the legislature considered only written GAAMPs to be relevant for RTFA protection.⁹⁴ The Commission does not have a process for annually reviewing unwritten GAAMPs; indeed, in the *Almont Township* case it appears that whether parking a mobile home on a tree farm is an acceptable practice would not have been considered by (then) Michigan Department of Agriculture (MDA) absent the litigation.⁹⁵

A farm operation that is not using GAAMPs (presumably written *or* unwritten) is afforded the opportunity to modify its practices in order to conform with GAAMPs and become eligible for protection from nuisance suits.⁹⁶ *Steffens v. Keeler* confirmed that changing practices to conform with GAAMPs provides for nuisance protection.⁹⁷ *Steffens v. Keeler* confirmed that changing practices to conform with GAAMPs provides for nuisance protection.⁹⁸ The swine operation that was the subject of the nuisance complaint was initially found not to be using GAAMPs by (then) MDA; however, practices consistent with GAAMPs were adopted and, subsequently, MDA concluded that the farm was in conformance with GAAMPs.⁹⁹ As a result, the Court of Appeals concluded that the farm was immune from a nuisance complaint under the RTFA.¹⁰⁰

The RTFA describes the notification requirements if a farm operation is not in conformance with GAAMPs and chooses not to adopt the necessary practices.¹⁰¹ The implications for such a farm operation are not made explicit in the RTFA, but recent case law concludes that, in some cases, the

93. MICH. COMP. LAWS § 286.474(10)(b) (2000).

94. The *Almont Township* and *Jaworski* cases in which the Court of Appeals gave legal force to unwritten GAAMPs should have been published by the Court, given the statutory language that suggests otherwise and the implications of this reasoning.

95. “At trial, the program manager for the RTFA within the department of agriculture opined that defendant’s use of the mobile home was appropriate and a generally accepted practice under the commission of agriculture’s policy.” *Almont Township v. Dome*, No. 179297, 1997 Mich. App. LEXIS 1285, at *4 (Jan. 17, 1997).

96.

[I]f the director identifies that the source or potential sources of the problem were caused by the use of other than generally accepted agricultural and management practices, the director shall advise the person responsible for the farm or farm operation that necessary changes should be made to resolve or abate the problem and to conform with generally accepted agricultural and management practices and that if those changes cannot be implemented within 30 days, the person responsible for the farm or farm operation shall submit to the director an implementation plan including a schedule for completion of the necessary changes.

MICH. COMP. LAWS § 286.474(3) (2000).

97. 503 N.W. 2d 675, 677 (Mich. Ct. App. 1993).

98. *Id.* at 677.

99. *Id.*

100. *Id.*

101. MICH. COMP. LAWS § 286.474(3) (2000).

decision not to follow GAAMPs may be immaterial to invoking nuisance protections. As a result, one final question must be addressed to determine eligibility for nuisance protection; this question captures the “coming to the nuisance” issue.

C. Did the Farm or Farm Operation Exist, and Not Constitute a Nuisance, Before Any Change in the Land Use or Occupancy of Land Within One Mile of the Boundaries of the Farm Land?

The “coming to the nuisance” protection included in RTFA¹⁰² was addressed in the 2006 *Papadelis* case.¹⁰³ Papadelis’ greenhouse and garden center was expanded onto an adjacent parcel that was zoned residential.¹⁰⁴ In response to the City’s nuisance complaint, the Court determined that the expanded activity met the “farm products” and “commercial production” tests and thus was protected by the use of GAAMPs.¹⁰⁵ The City argued that the RTFA, nevertheless, did not protect the farm operation because the farm operation did not exist before the parcel was zoned for residential use in 1956, which the city regarded as a change in land use under the “coming to the nuisance” provision of the RTFA.¹⁰⁶ In response, the Court of Appeals addressed for the first time “the issue of whether both MCL 286.473(1)¹⁰⁷ and (2)¹⁰⁸ must be met before a farm or farming operation is protected under the RTFA.”¹⁰⁹ The Court concluded that “MCL 286.473(1) and (2) are to be read separately and that protection under one subsection does not depend on a party’s satisfaction of the requirements stated in the other subsection.”¹¹⁰

Reading M.C.L. 286.473(1) and (2) independently means that a farm operation that existed prior to surrounding land use changes, and that did not constitute a nuisance prior to these changes, need not comply with

102.

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.

MICH. COMP. LAWS § 286.473(2) (1995).

103. *Papadelis v. City of Troy*, No. 268920, 2006 Mich. App. LEXIS 2748 (Sept. 19, 2006); *see supra* note 67 and accompanying text.

104. *Id.* at *3.

105. *Id.* at *7.

106. *See supra* note 102. The city was relying in part on the Court of Appeals decision in *Jerome Township v. Melchi*, in which the court refused to recognize nuisance protections for an apiary established after the township’s change in zoning that prohibited apiaries. 457 N.W.2d 52, 55 (Mich. Ct. App. 1992).

107. MICH. COMP. LAWS ANN. § 286.473(1) (West 2003).

108. MICH. COMP. LAWS ANN. § 286.473(2) (West 1995).

109. *Papadelis*, 2006 Mich. App. LEXIS 2748, at *10.

110. *Id.*

GAAMPs in order to receive nuisance protection under the RTFA. This undermines the fundamental social contract¹¹¹ created by the initial passage of Michigan's RTFA. Reading M.C.L. 286.473(1) and (2) independently, when read in conjunction with the preemption language inserted into the RTFA with the 1999 amendments,¹¹² also means that farm operators are given the right to move into urbanized residential areas by using GAAMPs. The preemption language is the subject of the following Section and also where urban agriculture meets the Right to Farm Act.

III. THE VAGARIES OF PREEMPTION UNDER RTFA

The 1999 amendments to the RTFA provided new protections to farm operations in addition to nuisance protections. These additional protections were put into place following lengthy statewide discussions about many examples of local zoning ordinances that limited various types of agricultural activities, from agricultural-tourism initiatives to creation and expansion of large animal production facilities.¹¹³ Through the 1999 amendments, the state legislature sought, for the first time, to expressly preempt local laws that could be construed to be a hindrance to farming activities.¹¹⁴

As with the previous review of the nuisance protections of the RTFA, the preemption provisions included in the 1999 amendments are amenable to a decision-tree analysis to determine whether the RTFA trumps local law. This type of analysis is useful both to guide farm operators and local governments in assessing potential RTFA situations and to critique the appellate decisions—both unpublished and published—that purport to follow the

111. See discussion *supra* note 44.

112. See *infra* Part III.

113. See MICHIGAN SENATE AGRICULTURAL PRESERVATION TASK FORCE, SENATE AGRICULTURAL PRESERVATION TASK FORCE REPORT (1999) (on file with the State Library of Michigan).

114. Prior to the 1999 amendments, the RTFA specifically recognized the authority of local governments to regulate farm operations through zoning. Prior to 1999, MICH. COMP. LAWS § 286.274(1) read: "This Act does not affect the application of state statutes and federal statutes." "State statutes" were specifically defined at MICH. COMP. LAWS § 286.272(2) to include those authorizing county zoning, township zoning, and city and village zoning. 1999 Mich. Pub. Acts 261 eliminated the references to state statutes, replacing them with MICH. COMP. LAWS ANN. § 286.474(6) (West 2011), which now provides:

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.

“plain language of the RTFA”¹¹⁵ when interpreting the preemption provisions. The analysis revealed that, although the Michigan Court of Appeals “cannot imagine any clearer expression of legislative intent”¹¹⁶ than that included in the preemption provisions of the RTFA, some of the principles employed by the Court to resolve RTFA preemption cases are hardly a necessary result of applying the RTFA language.¹¹⁷ The results have troubling implications for landowners and communities attempting to minimize land use conflicts through the reasonable application of zoning and other land use regulations.

A. Does the Local Ordinance, Regulation, or Resolution Extend, Revise, or Conflict in Any Manner With the Provisions of RTFA?

Broadly speaking, there are three major regulatory thrusts of the RTFA aside from the preemption of local ordinances, regulations, or resolutions: (1) it provides immunity for farmers from public or private nuisance suits under certain circumstances,¹¹⁸ (2) it provides an investigation process for complaints involving a farm or farm operation,¹¹⁹ and (3) it gives legal force to generally accepted agricultural and management practices developed by the Commission.¹²⁰ Regulatory areas (1) and (2) are assimilated into the preemption analysis through the statutory language that prevents local governments from adopting local laws that extend, revise, or conflict with “the provisions of this act.”¹²¹ Thus, the analysis in Section II concerning the eligibility of farm operators for protection from nuisance suits has significant relevance in a preemption analysis. Simply put, if a court has found that a farm operation meets the requirements for protection from nuisance actions, then local laws that would limit or preclude the operation in some way are unenforceable against that farming operation. Similar logic holds true for local laws that purport to establish an alternative investigation process—such as investigations of farm operations through zoning enforcement proceedings—at the local level.

Court of Appeals’ decisions confirm this relationship between preemption and the other provisions of the RTFA. In *Papesh*,¹²² not only did the Court interpret the nuisance immunity provisions to ultimately pro-

115. Charter Township of Shelby v. Papesh, 704 N.W.2d 92, 102 (Mich. Ct. App. 2005).

116. *Id.*

117. See discussion *infra* Sections III.A, III.B.

118. MICH. COMP. LAWS ANN. § 286.473 (West 2011).

119. MICH. COMP. LAWS ANN. § 286.474(1)-(4) (West 2011).

120. MICH. COMP. LAWS ANN. §§ 286.473(1), 286.474(6) (West 2011).

121. MICH. COMP. LAWS ANN. § 286.474(6) (West 2011). The preemption of local laws by GAAMPs is discussed *infra* Section III.B.

122. 704 N.W.2d 92.

tect the landowner from the township's public nuisance suit,¹²³ it also examined whether the township's zoning ordinance prohibiting the raising of poultry on parcels smaller than three acres¹²⁴ was preempted by the RTFA. To reach its conclusion, the Court dovetailed its preemption analysis with its nuisance immunity conclusion:

As we concluded above, if defendants' farm is commercial in nature and in compliance with the GAAMPs, it is a farm operation protected by the RTFA. The ordinance conflicts with the RTFA to the extent that it allows plaintiff [township] to preclude a protected farm operation by limiting the size of a farm.¹²⁵

The Court thus interpreted the "in conflict . . . with this act" language of the RTFA in a manner that renders zoning—and any and all other local laws—unenforceable against farm operations that have met the nuisance immunity tests presented in Part II of this article.

This interpretation, although plausible in light of the statutory language, is very problematic for communities attempting to control incompatible uses through zoning. It was, in fact, the situation in *Papesh* that the ordinance prohibiting the poultry farming on less than three acres was in place when the landowners bought the property and began their operation. The Court's conclusion had the effect of sanctioning a land use that immediately violated local zoning when established. This result did not go unnoticed by the Court. It conceded:

Although plaintiff argues that application of the RTFA under these circumstances will prevent local municipalities from "getting their arms around" farms operating in existing or developing residential areas, the fact that the statute appears to be unwise or unfair to plaintiff is insufficient to permit judicial construction. The wisdom of a statute is for the determination of the legislature, and the law must be enforced as written.¹²⁶

In *Papadelis*, the Court of Appeals was more direct in its assessment of the implications of its reasoning:

we are aware that . . . a business could conceivably move into an established residential neighborhood and start a farm or farm operation in contravention of local zoning ordinances as long as the farm or farm operation conforms to generally accepted agricultural and management practices. Although we might personally disagree with the wisdom of the policy choice . . . we are without the authority to override the clearly expressed intent of the legislature.¹²⁷

123. The holding of *Papesh* regarding nuisance immunity claim discussed, *supra* note 64 and accompanying text.

124. The landowner's parcel was 1.074 acres. *Papesh*, 704 N.W.2d at 96.

125. *Id.* at 102.

126. *Id.*

127. *Papadelis v. Troy*, No. 268920, 2006 LEXIS 2748 (Mich. Ct. App. Sept. 19, 2006).

Following the statutory language and the *Papesh* and *Papadelis* decisions to their logical conclusion, the RTFA now allows farm operators to use the RTFA as a sword, as well as a shield. It not only protects farmers from nuisance complaints filed by those who “come to the nuisance,” it also allows farmers to invoke the RTFA to move into densely-settled residential areas and establish farm operations in defiance of local zoning and nuisance regulations—even if those operations result in nuisances in fact and a decline in surrounding property value—as long as they meet the legal standards that confer nuisance immunity. This may be rare and somewhat more acceptable in rural agrarian areas; however, in Detroit and other cities in Michigan, where urban agriculture is emerging in practice and as a viable alternative land use, the implications of this legal outcome for existing neighborhoods are troubling.

B. Does the Local Ordinance, Regulation, or Resolution Extend, Revise, or Conflict in Any Manner With Generally Accepted Agricultural and Management Practices Developed Under the RTFA?

As discussed previously, the 1999 amendments to the RTFA placed an increased emphasis on GAAMPs promulgated by the Commission. Prior to the 1999 RTFA amendment, farm operations that adhered to GAAMPs were immune from nuisance suits, but they were not immune from citations for ordinance violations if the standards set out in the local ordinance differed from those set out in the GAAMPs that existed at the time.¹²⁸ With the 1999 amendments, GAAMPs also became a vehicle for invalidating local laws that are judged by the courts to extend, revise, or conflict with GAAMPs. Note that this is a different question than that addressed under Section III.A above. In Section III.A, the relevant inquiry is whether the farm operator’s conformance with GAAMPs has provided him with nuisance immunity. If so, then that immunity renders any local law unenforceable against his “protected farm operation.”¹²⁹ In contrast, under the present question a local law that extends, revises, or conflicts with GAAMPs on its face is unenforceable against a landowner. This is a subtle yet important distinction, for it conceivably allows a landowner to challenge a zoning enforcement action on the grounds that the zoning conflicts with GAAMPs without requiring the landowner to show that he is, in fact, complying with the GAAMPs he is raising as a defense. Although no cases have directly presented this situation, it is easy to imagine that such a case could present itself to the courts, given the recent pace of judicial activity on preemption-related questions.

128. See discussion *supra* note 114.

129. *Papesh*, 704 N.W.2d at 102.

Another important, yet unaddressed, distinction between the present question and the question posed in Section III.A is the ambiguous legal status of GAAMPs themselves. GAAMPs are not state statutes debated and passed by the legislature, and they do not go through the administrative rulemaking process or get published in the Michigan Administrative Code. As previously discussed, GAAMPs are defined in the RTFA as simply “those practices as defined by the Michigan commission of agriculture.”¹³⁰ With the exception of the “Site Selection and Odor Control for New and Expanding Livestock Production Facilities” GAAMPs, which the 1999 amendments required the Commission to develop,¹³¹ the creation and publication of GAAMPs is entirely within the discretion of the Commission.¹³² GAAMPs are not written as regulations, but rather in the style of a set of suggested best practices based on scientific literature—running from fourteen¹³³ to eighty-five¹³⁴ pages in length.

Prior to the 1999 amendments, the ambiguous legal status of GAAMPs was perhaps less problematic. GAAMPs were—and today still are—an optional practice for farm operators wishing to immunize themselves from nuisance suits. They are optional in that farm operators are free to choose to ignore GAAMPs if they are willing to assume the risk of a nuisance suit. With the 1999 amendments, however, the Michigan legislature put into place a scheme that subjects local laws to invalidation if they run afoul of GAAMPs. This places a burden on local governments to track the changes made to GAAMPs annually, be alert for new GAAMPs that the Commission may decide to adopt, and decipher best practices language to determine where conflicts with local ordinances may exist.¹³⁵ In this regard, preemption based on GAAMPs differs markedly from the common framework of preemption based on state statute.

The burden for local governments associated with the preemption and unenforceability of local laws due to GAAMPs has been compounded by

130. MICH. COMP. LAWS § 286.472(d) (2011).

131. See discussion *supra* note 59. The Commission of Agriculture is simply required to review existing written GAAMPs annually and revise as necessary. The Michigan Department of Agriculture does accept public comments as part of this review process.

132. MICH. COMP. LAWS ANN. §286.472(d) (West 2011) (GAAMPs are “those practices as defined by the Michigan commission of agriculture”); MICH. COMP. LAWS ANN. § 286.473(1) (West 2011) (nuisance protection afforded to farm or farm operation that “conforms to [GAAMPs] according to policy determined by the Michigan commission of agriculture”).

133. MICH. DEPT. OF AGRIC. & RURAL DEV., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR FARM MARKETS (Jan. 2010), available at michigan.gov/documents/mda/2010_Farm_Market_GAAMPs_-_Final_305018_7 [hereinafter FARM MARKETS].

134. CARE OF FARM ANIMALS, *supra* note 84.

135. Wendy Walker, *Whole Hog: The Preemption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 VAL. U. L. REV. 461, 493-94 (2002).

the Court of Appeals' recognition of unwritten GAAMPs.¹³⁶ The recognition of unwritten GAAMPs essentially allows farm operators to raise *post hoc* a defense to zoning enforcement actions by making a case to MDARD that their activities are traditional farming practices.¹³⁷

The RTFA allows local governments to submit to the Commission proposed ordinances that prescribe 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,”¹³⁸ and the Court of Appeals has pointed to this provision in several cases to show that local governments are not without recourse if they are dissatisfied with the results of the Court's preemption analysis.¹³⁹ However, if GAAMPs are considered by the Commission—and, by extension, the courts—to be “any traditional farming practice which is not detrimental to the environment or human and animal health,”¹⁴⁰ it is hard to imagine how such an initiative by a local government could yield any practical results.

A separate but closely related principle is the Court of Appeals' broad interpretation of the reach of GAAMPs in preempting local laws. The Court has cited with approval longstanding principles that “state law preempts a [local] ordinance whe[n] the [local] ordinance directly conflicts with a state statute or the [state law] completely occupies the field that the ordinance attempts to regulate.”¹⁴¹ Both published and unpublished Court of Appeals' decisions apply a liberal interpretation of this preemption jurisprudence by finding that local zoning provisions impermissibly extend, revise, and/or conflict with GAAMPs when the GAAMPs are, in fact, silent on the activities that the zoning provision is regulating.¹⁴²

Because the preemption of local zoning raised considerable concern among those opposed to the growth in large-scale animal agriculture in the state, the 1999 amendments required that the RTFA and GAAMPs explicitly address the siting of such operations. Specifically, the amendments required that the Commission develop a set of GAAMPs that have come to be

136. See discussion *supra* Section II.B.

137. See discussion of *Almont Township*, *supra* note 95 and accompanying text.

138. MICH. COMP. LAWS ANN. § 286.474(7) (West 2011).

139. See, e.g., *Charter Twp. of Shelby v. Papesh*, 704 N.W.2d 92, 103 n.8 (Mich. Ct. App. 2005); *Milan Twp. v. Jaworski*, No. 240444, 2003 LEXIS 3105, at *15 n.3 (Mich. Ct. App. Dec. 4, 2003).

140. POLICY NO. 8, *supra* note 75.

141. *Papesh*, 704 N.W.2d at 102 (quoting *Rental Prop. Owners Ass'n of Kent Cnty. v. City of Grand Rapids*, 566 N.W.2d 514 (Mich. 1997)).

142. *Papesh*, 704 N.W.2d at 102; *Vill. of Rothbury v. Double JJ Resort Ranch, Inc.*, No. 246596, 2004 LEXIS 2172, at *5 (Mich. Ct. App. Aug. 17, 2004); *Jaworski*, 2003 Mich. App. LEXIS 3105, at *12; *Almont Twp. v. Dome*, No. 179297, 1997 LEXIS 1285, at *4 (Mich. Ct. App. Jan. 17, 1997).

titled “Site Selection and Odor Control for New and Expanding Livestock Production Facilities.”¹⁴³ These GAAMPs prescribe property line setback distances based on the number of animal units in the farm operation and the number of non-farm residences within a specified radius.¹⁴⁴ These GAAMPs are not the final word on site selection for large-scale animal agriculture uses, however, because the GAAMPs also specifically allow local governments to determine, through zoning, where within the jurisdiction such uses should be located. The GAAMPs simply restrict, to a degree, the location of individual facilities within the permitted zones.

Aside from the Site Selection and Odor Control GAAMPs and the Farm Market GAAMPs,¹⁴⁵ however, location issues—the types of issues zoning is precisely designed to address—are only referenced in passing in other GAAMPs. Nevertheless, the Court has interpreted the mere existence of GAAMPs addressing the type of farming operation in question as sufficient to preempt local zoning. In *Jaworski*, the Court found the reference to “gamebirds” in the Care of Farm Animals GAAMPs and a Commission policy statement that game preserves are an agricultural activity sufficient to preempt the township’s zoning provisions regulating hunting preserves.¹⁴⁶ The Care of Farm Animals GAAMPs document is eighty-five pages long.¹⁴⁷ It contains a four-page subsection dedicated to “broilers, turkeys and gamebirds.”¹⁴⁸ The exclusive list of topics addressed in this subsection are nutrition, beak trimming, toe trimming, transportation, chick and poultry delivery, adult and gamebird delivery, range rearing, ventilation and lighting, housing, and euthanasia and dead animal disposal.¹⁴⁹ The physical sizes of gamebird farms or hunting preserves, or their locational relationship to surrounding properties or residences, are nowhere addressed in the Care of Farm Animals GAAMPs. From this, the Court nevertheless found that the Care of Farm Animals GAAMPs usurped the prerogative of the township to determine the appropriate locations of private hunting preserves so as to minimize the potential conflicts with surrounding residential and agricultural land uses.¹⁵⁰ It is an extremely broad reading of the scope of GAAMPs—

143. MICH. DEPT. OF AGRIC. & RURAL DEV., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR SITE SELECTION AND ODOR CONTROL FOR NEW AND EXPANDING LIVESTOCK PRODUCTION FACILITIES (Jan. 2009), available at https://www.michigan.gov/documents/MDA_SITE_SELECTION_133281_7.pdf.

144. *Id.* at 5-9.

145. “[T]he market must be located on property where local land use zoning allows for agriculture and its related activities.” FARM MARKETS, *supra* note 133, at 3.

146. *Jaworski*, 2003 Mich. App. LEXIS 3105, at *16.

147. CARE OF FARM ANIMALS, *supra* note 84.

148. *Id.* at 52-55.

149. *Id.*

150. It is worth explicitly pointing out that in the *Jaworski* decision the Court of Appeals never reached the question of whether the defendants’ operation *utilized acceptable management practices* as defined in the Care of Farm Animals GAAMP. *Jaworski*, 2003

the vast majority of which address agricultural practices completely unrelated to the types of activities regulated by local zoning—when they are construed to occupy the field generally reserved for local zoning.

Despite being presented with the opportunity to do so, the Michigan Supreme Court has failed to clearly address both the issue of unwritten GAAMPs and the Court of Appeals' broad interpretation of the scope of RTFA preemption. In *Papesh*, the Court of Appeals invalidated the minimum lot size provisions of local zoning after observing that

[T]he relevant GAAMPs provide for the proper management practices for poultry farming, including, but not limited, to facilities, manure management and care of chickens and turkeys. Plaintiff has not produced, and we are unable to find, any GAAMP that limits poultry farming to property consisting of more than three acres.¹⁵¹

Relying on its reasoning in *Papesh*, the Court of Appeals held in its 2006 unpublished *Papadelis* decision that the RTFA preempted the City of Troy's zoning ordinances "regarding building size and permit requirements,"¹⁵² because "[t]his Court is unaware of any such requirements contained in the RTFA."¹⁵³ The case was appealed to the Michigan Supreme Court, and the Supreme Court reversed the Court of Appeals in a one paragraph Order.¹⁵⁴ Regarding the preemption of Troy's ordinances by the RTFA, the Supreme Court stated, "As no provisions of the RTFA or any published generally accepted agricultural and management practice address the permitting, size, height, bulk, floor area, construction, and location of buildings used for greenhouse or related agricultural purposes, no conflict exists between the RTFA and the defendant city's ordinances. . . ."¹⁵⁵ This single sentence would seem to indicate that the Supreme Court disapproves of the Court of Appeals' broad interpretation of what GAAMPs preempt, the reliance on unwritten GAAMPs to preempt local ordinances, or perhaps both. Rather than take the opportunity to clarify and/or explicitly disavow the Court of Appeals' reasoning in *Papesh* and related cases, however, the Supreme Court simply left farm operators and local government officials to speculate on the import of its order. The cumulative effect of the Court of Appeals' decisions regarding preemption effectively is to close the door on

Mich. App. LEXIS 3105, at *14-15. The Court preempted local zoning based simply on the finding that the defendant was engaged in something that MDARD recognizes as an *agricultural activity*. *Id.* The principle underlying the use of GAAMPs—to minimize the negative impacts of farm operations on nearby landowners—is seriously undercut when a court fails to consider a farm operator's compliance with the management practices themselves.

151. Charter Twp. of Shelby v. Papesh, 704 N.W.2d 92, 102 (Mich. Ct. App. 2005).

152. Papadelis v. City of Troy, No. 268920, 2006 LEXIS 2748, at *22 (Mich. Ct. App. Sep. 19, 2006).

153. *Id.*

154. Papadelis v. City of Troy, 733 N.W.2d 397 (Mich. 2007).

155. *Id.*

any local regulation of farming operations in both rural and urban areas, a result that should be addressed by the Supreme Court and then, if necessary, adjusted by the Michigan Legislature.

IV. THE RISKS OF RTFA FOR THE URBAN AGRICULTURE MOVEMENT

The RTFA and its provision of nuisance immunity and local ordinance preemption described in Parts II and III create special problems for urbanized places. These problems arise largely because the RTFA does not, nor was it intended to, address agricultural activities introduced into areas of dense population. Increasingly, though, agricultural enterprises are finding their way into residential neighborhoods in cities, villages, and densely populated parts of suburban and rural townships.¹⁵⁶ Agriculture in urban communities offers an array of public benefits, but those benefits could bring with them activities that neighbors find objectionable. Agricultural activities most associated with neighbor conflicts in urbanized areas are not traditional row crops, orchards, or concentrated animal feeding operations—because they are rarely proposed near dense neighborhoods—but rather the crowing of a single rooster, the waste or smell of a small number of animals, or the appearance of a hoop house or similar structure next to a neighbor's well kept home. Without authority to use traditional local planning and zoning tools to minimize such conflicts, local governments may seek to forego the benefits and eliminate opportunities for the expansion of urban agriculture altogether.

A. Goals and Objectives of Urban Agriculture

Given that agriculture has been found in urban areas in some form since cities began, why is there more attention now, and how is it different from before? The renewed focus on urban agriculture can be tied to a number of trends and social movements. These include:

- *Access to fresh, healthy, and nutritious food.*¹⁵⁷ The principal goal of many in the urban agriculture movement is to improve the availability of more fresh and nutritious food to urban residents, especially low-income residents and those with limited mobility. Many neighborhoods in urban areas are in documented food deserts,¹⁵⁸

156. See Mukherji & Morales, *supra* note 27 (arguing that the nuisance-like impacts of agriculture increase with the intensity of the activity and the area of land involved).

157. See generally Kimberley Hodgson, *Where Food Planning and Health Intersect*, PLANNING, August/September 2009, at 9.

158. See generally U.S. DEP'T. OF AGRICULTURE, ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD—MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR

these are areas where a full range of fresh food is either unavailable or not easily accessible to residents. Growing awareness of the importance of fresh vegetables in a healthy diet, along with concerns about equal food access for all citizens (not just suburbanites who have the easiest access to full service grocery stores and other sources of healthy food), often support these efforts. Other supporters include participants in the slow food movement which focuses on preparing meals at home using fresh, locally grown ingredients.

- *Food safety and food security.*¹⁵⁹ With a world in which terrorist threats and dependency on foreign oil dominate the evening news and in which food production and transportation systems are global in scale, it should be no surprise that people in many nations have begun to look inward and pay more attention to issues of domestic food safety and security. Even as food-importing and exporting-countries compete for global food market access and grapple with diverse food inspection regulations and emerging food safety risks, increasingly consumers are asking where their food is produced, what production practices are used, and what measures are taken to ensure food safety. These questions reflect the view that increasing locally grown food as a percentage of the total food supply reduces food safety and security risks. Additionally, connecting local food systems to delivery models that have documented success in increasing healthy food access should reduce food safety and security concerns.¹⁶⁰
- *Sustainability.* Each of the above movements arguably is part of the larger global sustainable communities¹⁶¹ and sustainable agriculture movements.¹⁶² Community sustainability initiatives commonly focus on interrelated goals of viable local economies that emphasize social equity and environmental health, including minimizing energy consumption and reducing carbon footprint. Sustainable agriculture goals include satisfaction of food, feed, and fiber needs; enhancement of environmental quality and the resource base; econom-

CONSEQUENCES: REPORT TO CONGRESS, PUB. NO. AP-036, (2009). The USDA provides an interactive food desert map available at: <http://maps.ers.usda.gov/FoodAtlas/foodenv5.aspx>.

159. See generally LAURIAN J. UNNEVEHR, INT'L FOOD POLICY RESEARCH INST., *FOOD SAFETY IN FOOD SECURITY AND FOOD TRADE* (2003).

160. ANDREA KING COLLIER & CELESTE RABAUT, MICHIGAN GOOD FOOD WORK GROUP, *GOOD FOOD ACCESS FOR FAMILIES AND COMMUNITIES: MICHIGAN GOOD FOOD WORK GROUP REPORT NO. 2 OF 5 17* (2011), available at http://www.michiganfood.org/assets/goodfood/docs/Good_Food_Access_Report.pdf.

161. See generally SIM VAN DER RYN & PETER CALTHORPE, *SUSTAINABLE COMMUNITIES: A NEW DESIGN SYNTHESIS FOR CITIES, SUBURBS AND TOWNS* (1986).

162. See generally NATIONAL SUSTAINABLE AGRICULTURE INFORMATION SERVICE, available at <http://attra.ncat.org/fundamental.html>.

ic viability of agriculture; and enhanced quality of life for farmers, farm workers, and society as a whole.¹⁶³

- *Green space.*¹⁶⁴ The urban agriculture movement is also driven partly by opportunities created in shrinking cities.¹⁶⁵ Large tracts of open vacant land in many big cities have left local governments looking for ways to reduce blight and make productive use of the space. Many urban residents see these vacant parcels as an opportunity for creating more urban green space, and some propose using at least some of that land for agriculture as a temporary or even permanent use.¹⁶⁶

To the extent they are achieved, these goals and objectives of urban agriculture will help improve the nutrition of urban residents; expose more of them to agriculture and the connection between food production, preparation, and consumption; and provide a variety of personal and societal benefits to those who participate in urban agricultural activities. Likewise, this period of experimentation could contribute to urban revitalization and produce lasting lessons for urban sustainability. However, these lessons are likely to be positive only if state and local governments work together to foster urban agriculture activities while accounting for the interests and concerns of urban residents.

The urban agriculture movement is maturing rapidly, evidenced by nationally recognized examples in Philadelphia,¹⁶⁷ Seattle,¹⁶⁸ San Francisco,¹⁶⁹ and Cleveland.¹⁷⁰ In Michigan, local governments have responded to the urban agriculture movement in a variety of ways. For example, the City of Flint has adopted zoning amendments to its residential accessory structure

163. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., COMM. ON TWENTY-FIRST CENTURY SYSTEMS AGRICULTURE, TOWARD SUSTAINABLE AGRICULTURAL SYSTEMS IN THE 21ST CENTURY 23 (2010).

164. SOJI ADELAJA, ET AL., LAND POLICY INST., MICHIGAN STATE UNIV., CHASING THE PAST OR INVESTING IN OUR FUTURE: PLACEMAKING FOR PROSPERITY IN THE NEW ECONOMY 26, 48 (2009).

165. ALAN MALLACH, BROOKINGS INST., FACING THE URBAN CHALLENGE: THE FED. GOV'T AND AMERICA'S OLDER DISTRESSED CITIES 28 (2010).

166. See Hantz Farms, *supra* note 29.

167. Web site consolidating material on urban agriculture in the Philadelphia region is available at <https://sites.google.com/site/urbanagriculturephiladelphia/>.

168. LEAH ERICKSON, ET AL., CITY OF SEATTLE DEPT. OF NEIGHBORHOODS, URBAN AGRICULTURE IN SEATTLE: POLICY AND BARRIERS (2009), available at http://www.urbanfarmhub.org/wp-content/uploads/2009/12/Urban-Agriculture-in-Seattle-Policy-and-Barriers-8_11_09.pdf.

169. Web site consolidating material on urban agriculture in the San Francisco region is available at <http://www.sfuaa.org/>.

170. Collection of articles on the wide scope of urban agriculture activities in Cleveland is available at <https://www.examiner.com/urban-agriculture-in-cleveland>.

requirements to permit hoop houses in certain circumstances.¹⁷¹ The City of Ann Arbor¹⁷² and nonagricultural portions of Ingham County¹⁷³ permit a limited number of chickens (and in some cases other fowl) in backyard coops. In contrast, a similar effort to permit backyard chickens in Grand Rapids failed in the face of strong opposition.¹⁷⁴ Detroit has many local initiatives underway but has not yet addressed local zoning issues.¹⁷⁵ What is remarkable about these examples is how different they are from one another and how, in some locations, urban agriculture has been allowed to exist in concert with, and not in spite of, local planning and zoning.

B. Risks From a One-Size-Fits-All RTFA

The preemption of local ordinances by the RTFA allows urban agricultural enterprises to be conducted without consideration of community interests served by the ordinances. Local master plans, zoning ordinances, and land use regulations created by communities are rooted in nearly a century's worth of efforts to minimize conflicts arising from incompatible land uses.¹⁷⁶ Planning and zoning activities reflect lengthy community conversations about long-term community visions and land use goals. The regulations (ordinances) created to implement those visions are drafted by a locally-appointed board and officially adopted by a locally-elected legislative body (city or village council, township board of supervisors, or county board of commissioners). In some areas, local plans, and ordinances make space for urban agriculture, but the locations of agricultural activities and the way in which they are carried out are agreed upon at the community level.¹⁷⁷ As a result, conflicts with neighboring land uses are minimized. In contrast, the RTFA preemption of zoning ordinances presumes, generally,

171. Erin Caudell & Megan Masson-Minock, *Making Flint Edible – Creating a Legal Framework for Urban Agriculture in Flint*, MICHIGAN PLANNER, November/December 2009, at 6.

172. Ann Arbor Chicken Ordinance is available at http://library.municode.com/HTML/11782/level2/TITIXPORE_CH107AN.html#TITIXPORE_CH107AN_9_42KECH.

173. Ingham County chicken ordinance applicable in non-agricultural portions of the county is available at <http://www.meetup.com/LansingBackyardPoultry/events/11673905/>.

174. WWMT-TV, *Urban Chicken Ordinance Voted Down in Grand Rapids*, Aug. 10, 2010, <http://www.wwmt.com/articles/rapids-1380052-grand-ordinance.html> (last visited July 14, 2011).

175. Olga Bonfiglio, *Delicious in Detroit: The City is Plowing Resources into Its Extensive Stretches of Vacant Land*, PLANNING, August/September 2009, at 32.

176. The Standard State Zoning Enabling Act and the Standard City Planning Enabling Act—upon which the majority of states' zoning and planning enabling acts are still modeled—were promulgated by the United States Department of Commerce in 1924 and 1928, respectively.

177. See Hodgson, et al., *supra* note 28 (providing extensive case examples of local plans and ordinances in Chapter 4: “Linking Urban Agriculture with Planning Practice,” at 61-104).

that agricultural activities are compatible with all neighboring land uses. Clearly this is not the case.¹⁷⁸

New urban farm operations are protected by the RTFA and exempt from local ordinances (and nuisance complaints) if they use GAAMPs. GAAMPs are “written to provide uniform, statewide standards and acceptable management practices based on sound science.”¹⁷⁹ Because the RTFA, with its emphasis on GAAMPs, was adopted when traditional agriculture in rural areas was threatened by encroaching suburban and urban land uses, the written GAAMPs have evolved to protect traditional agriculture in rural areas. GAAMPs are intended to protect the environment and human and animal health,¹⁸⁰ but, unlike local zoning, they are not intended to protect property values in the community. While some of the management practices recommended by published GAAMPs may, in fact, be suitable in urban areas, questions about the application of GAAMPs in urban agriculture are significant.

To the extent that animals are part of urban agriculture, manure management GAAMPs that focus on manure storage and the application of manures to cropland do not address problems that are likely to arise in urban neighborhoods where space may be limited and neighbors are nearby. Pesticide application methods that are appropriate in rural areas could well prove hazardous in areas of dense population. Neither pesticide application labels nor fertilizer runoff control practices in GAAMPs address the unique challenges of applying these materials in urban settings where cultivated areas are likely to drain into storm sewers that take untreated water directly to rivers. While the focus of this article is on preemption of zoning ordinances, other types of local ordinances are also preempted by the RTFA. The implications are equally problematic. Agricultural irrigation from private wells is an acceptable practice in rural areas, but the proliferation of private irrigation wells in urban communities complicates local authorities’ protection of water supplies, for example, administration of cross connection programs required by state rules.¹⁸¹ GAAMPs defer to state regulations for

178. Specific urban agricultural activities that have resulted in concerned contacts by local planners with Mark Wyckoff (one of the authors) or which the author observed in local newspaper articles include: honeybee hives; raising small numbers of chickens, ducks, pigeons, doves, and rabbits; larger animals like goats, sheep, cows, pigs, and horses; residential gardens when large relative to the size of the lot, or if hoop houses or greenhouses are involved; community gardens—especially if hoop houses are involved; neighborhood farm markets; large scale greenhouses and nurseries not in warehouse or industrial zones; conversion of large blocks of vacant land to row crops or animal production.

179. See preface of GAAMPs documents, *supra* note 71.

180. *Supra* notes 83-84, at 20.

181. MICH. ADMIN. CODE r. 325.11404 (2011). See also model ordinance provided in MICHIGAN DEPT. OF ENVTL. QUALITY, CROSS CONNECTION RULES MANUAL, OCTOBER 2008, available at http://mi.gov/deq/0,1607,7-135-3313_3675_3691---,00.html.

dead animal disposal options, including burial or composting.¹⁸² Most local governments adopt regulations that defer to standards in the state penal code¹⁸³ or adopt other ordinances that conflict.¹⁸⁴ Enforcing the RTFA in urban areas and relying on GAAMPs that are appropriate in rural locations with lower population densities poses unique risks to urban communities and their residents.

The potential land use conflicts present a problematic political dimension. Despite a host of reasons to promote urban agriculture, negative impacts from agricultural activities that cause widespread citizen complaints could result in a public backlash against such activities. Urban community leaders could well exercise the political strength that comes with population numbers and seek state-level legislative recourse.¹⁸⁵ A united effort by urban residents to significantly modify the RTFA could be detrimental to agriculture generally, not just urban agriculture, and could compromise the goals of both the RTFA and the urban agriculture movement.

GAAMPs are adopted by the Commission, which is not elected¹⁸⁶ and has no accountability to an electorate, as would a local governing body. Nor are the rules it develops reviewed by an elected body, unlike administrative rules, which are reviewed by the state legislature.¹⁸⁷ The Commission is charged, generally, to “foster and encourage the expansion and promotion of all agricultural goods and services and improve public awareness of Michigan food products.”¹⁸⁸ Consideration of broader social concerns,

182. Michigan Bodies of Dead Animals Act codified at MICH. COMP. LAWS §§ 287.651-.683 (2011).

183. Compare MICH. COMP. LAWS § 750.57 (2011) (requiring burial of dead animals at a depth of at least four feet), with MICH. COMP. LAWS §§ 287.651-.683 (requiring a minimum of two feet for burial of dead animals).

184. See, e.g., LIVONIA, MI, CODE § 13.36.245, available at http://library1.municode.com/default-now/home.htm?infobase=13598&doc_action=whatsnew (prohibiting inclusion of meat, bones, fish, dairy products, vegetable or animal fats, or carnivorous animal manure in compost piles/bins in residential zones).

185. See H.B. 6458, 95th Leg., Reg. Sess. (Mich. 2009) (introduced to exempt cities of more than 900,000 population (Detroit) from the RTFA).

183. A five member Commission is appointed by the governor with the advice and consent of the Senate. MICH. COMP. LAWS § 16.279 (2011). The term of office for commissioners is four years. MICH. CONST. 1963 art.V, § 3.

187. MICH. COMP. LAWS §§ 24.235, 24.245A, 24.250 (2011). These sections, respectively, create a joint committee on administrative rules (JCAR) made up of members of the legislature, establish the process and standards by which they review proposed rules, and the process by which other committees of the legislature are notified of rules pending before JCAR.

188. *Mich. Comm'n of Agric. & Rural Dev., Policy No. 4, Promotion of Agriculture*, in MICHIGAN COMMISSION OF AGRICULTURE AND RURAL DEVELOPMENT POLICY MANUAL (re-approved March 16, 2011), available at http://www.mi.gov/documents/mda/Commission_Policy_Manual_Update_3_16_11-Approved_348124_7.pdf.

while of importance to the Commission's decisions, is secondary. The Commission includes among its objectives protection of consumers and the environment, but there is no explicit attention to different ways in which its objectives and policies may be brought to bear in urban rather than rural communities. With respect to policy development, the Commission "recognizes that good public policy requires a balance of competing interests, social and economic values, science, and the political environment."¹⁸⁹ How such a balance is sought or achieved is not addressed and is not apparent in GAAMPS when applied in an urban setting.

A provision in the RTFA offers local governments the opportunity to propose an ordinance prescribing standards that are different from those contained in GAAMPS if environmental or public health would otherwise be adversely affected.¹⁹⁰ The proposed ordinance is subject to approval by the Commission. The Commission is charged with hosting a public meeting in the community to review the proposed ordinance;¹⁹¹ however, such a public meeting is likely to be "one-and-done," unlike the public planning and zoning processes directed by locally-elected and appointed officials, where the give-and-take of multiple meetings increases the likelihood of reaching outcomes satisfactory to multiple stakeholders. Local development of ordinances that are different from GAAMPS, but meet Commission approval, is also made difficult by the existence of GAAMPS that have yet to be discovered or articulated.¹⁹²

Municipal ordinances provide requirements that are tailored to local circumstances and reflect residents' social and property concerns. This system of addressing land use issues has been in place across Michigan for nearly a century. The successful evolution of urban agriculture in a way that results in achievement of its goals will require respect for and flexibility in local responses, which are not provided by the one-size-fits-all RTFA and its reliance on GAAMPS. Even if a set of Urban Agriculture GAAMPS were developed by the Commission, such a document is unlikely to be sufficiently comprehensive to account for the wide variety of agricultural activities that might be conducted in urban areas¹⁹³ and the wide variety of surrounding potentially-affected land uses found in a complex urban environment. If local governments are unable to plan and zone for urban agriculture in concert with urban agriculture advocates, urban residents, and local

189. *Mich. Comm'n of Agric. & Rural Dev., Overview: Policy Development*, in MICHIGAN COMMISSION OF AGRICULTURE AND RURAL DEVELOPMENT POLICY MANUAL (re-approved March 16, 2011), available at http://www.mi.gov/documents/mda/Commission_Policy_Manual_Update_3_16_11-Approved_348124_7.pdf.

190. MICH. COMP. LAWS § 286.474(7) (2011).

191. *Id.*

192. See discussion *supra* note 89.

193. See generally HODGSON ET AL., *supra* note 28.

officials, and find the best way to fit urban agriculture in with other urban land uses, a very real risk exists that additional growth in urban agriculture could be stopped cold. From the municipal perspective, removing urban agriculture uses from local land use decision-making processes reverses ninety years of efforts to keep the nuisance parts of the country out of the city and undermines the integrity of the most important local land use tool.

V. STATUTORY CHANGES TO BALANCE AGRICULTURAL AND URBAN INTERESTS

When it was adopted, the RTFA was an attempt to balance the interests of farms and their neighbors. That those neighbors would be found on a small adjacent urban lot cannot have been given much, if any, thought. The growth of urban agriculture requires that this potentiality now be explicitly considered by the legislature. In this Part, two alternative modifications to state statutes are considered to address the questions of balance raised in the previous Parts. The first approach is simple—exemption of urban places from application of the RTFA. The second approach is more complex and involves changes to Michigan’s planning and zoning enabling laws, as well as the RTFA. There are potential positive and negative results of either, yet either would also likely result in a rosier future for urban agriculture.

A. Simple Approach

The simple approach is to amend RTFA to apply different rules regarding preemption and nuisance protection in cities, villages, and the parts of townships with particularly dense populations—the appropriate density threshold would be the subject of considerable political negotiation in the state legislature. Such a differentiation acknowledges the different social, environmental, and property value dynamics that exist in our urbanized areas. This approach was recently advocated in a guest commentary in the *Detroit Free Press*.¹⁹⁴ Under this approach, the zoning and other land use regulations of cities, villages, and densely-populated areas of townships would not be preempted by the RTFA in all cases.¹⁹⁵ Farm operations that existed prior to being annexed into an incorporated city or village—or be-

194. John Mogk, *Farms Next to Neighborhoods Pose Special Challenges Only Cities Can Address*, DET. FREE PRESS, Mar. 2, 2011 (on file with author).

195. See, e.g., IDAHO CODE ANN. § 22-4504 (West 2010) (city zoning inapplicable to farms existing and operating lawfully prior to being annexed into city). For the same principle operationalized in a different manner, see N.C. GEN. STAT. § 106-701(d) (2010) (act does not preempt local ordinances when applied to agricultural operations that existed within the city limits on date RTFA enacted).

fore the township reached the defined threshold density—could continue to operate as before and be exempt from most regulations found in the local zoning ordinance, but the non-conforming use restrictions would continue to operate to limit the expansion of the operation or prohibit its reestablishment once it has been discontinued. Under this approach, the “coming to the nuisance” principle upon which the RTFA is founded remains in place, but farm operators would no longer be able to establish operations and claim protection under the RTFA preemption provisions in violation of local zoning in urban areas.

The same principle would be applied to the nuisance protection provisions. The “coming to the nuisance” protections now provided by the RTFA¹⁹⁶ would continue to apply to farming operations that existed lawfully prior to being annexed into the city or village, but the farm operator’s ability to move into such an area and claim nuisance protections by using GAAMPs would be curtailed.

Undoubtedly, this approach could be construed as an attack on agriculture in general and the RTFA in particular. While this approach would allow local governments to decide, based on local goals and preferences, the appropriate place for urban agriculture and its benefits within local communities, it would not assure that urban agriculture would be acceptable everywhere. This simple approach allows for urban agriculture, but it does not expressly promote or encourage it. It places no affirmative obligation on communities to plan and zone for agricultural uses and makes it easy for them to simply do nothing and thereby not accommodate urban agricultural activities. This approach is relatively straightforward and addresses the principal problem. However, it could limit the growth of urban agriculture in some urban communities.

B. Comprehensive Approach

The comprehensive approach goes beyond merely accommodating urban agriculture and more actively promotes the inclusion of agriculture in urban communities. This approach respects local differences and makes use of traditional land use planning and zoning tools. In this way, all affected stakeholders and property owners are provided an opportunity to participate in the process.

Since 1921, cities and villages in Michigan have had authority to adopt and enforce zoning ordinances.¹⁹⁷ Townships and counties received

196. See MICH. COMP. LAWS § 286.473(1)-(2) (2011).

197. City-Village Zoning Act, 1921 Mich. Pub. Acts 207, *repealed by* Michigan Zoning Enabling Act, 2006 Mich. Pub. Acts 110 (codified as amended at MICH. COMP. LAWS § 125.3702(1)(a) (2011)).

that authority later in the 1920s and in an updated form in 1943.¹⁹⁸ Three zoning enabling acts were consolidated into the Michigan Zoning Enabling Act (MZEA) in 2006.¹⁹⁹ Similarly, cities, townships, and counties were given the authority to adopt master plans by three separate planning enabling acts that were consolidated into the Michigan Planning Enabling Act (MPEA) in 2008.²⁰⁰ The MZEA and MPEA permit, but do not require, local planning and local zoning in cities, villages, townships, and counties.²⁰¹ Communities that choose to adopt zoning controls must first prepare a master plan with a zoning plan element.²⁰² The master plan must address a variety of land use and infrastructure considerations.²⁰³ The legislature has, on occasion, amended the planning and/or zoning enabling acts to direct local governments to specifically address emerging land use issues; the most recent example is the requirement that local governments address the provision of public transportation services²⁰⁴ and complete streets.²⁰⁵ A similar approach could be applied to clarify local governments' planning and zoning responsibilities relative to agriculture.

First, through an amendment to the MPEA, local governments could be required to address certain agricultural considerations such as urban agricultural uses in local master plans. Local zoning ordinances would then be required to include regulations consistent with the urban agriculture goals and objectives described in the master plan. With a few possible exceptions, the form, content, and extent of local zoning ordinances could be left up to local governments. This permits urban communities the flexibility to foster agricultural activities that match local goals and capacities.

MZEA amendments could require communities to address farm markets, hoop houses, nurseries, greenhouses, keeping of farm animals, etc., specifically identifying in the zoning ordinance in which zones such activi-

198. County Zoning Enabling Act, 1943 Mich. Pub. Acts 183, *repealed by* Michigan Zoning Enabling Act, 2006 Mich. Pub. Acts 110 (codified as amended at MICH. COMP. LAWS § 125.3702(1)(b) (2011)); Township Rural Zoning Act, 1943 Mich. Pub. Acts 184, *repealed by* Michigan Zoning Enabling Act, 2006 Mich. Pub. Acts 110 (codified as amended at MICH. COMP. LAWS § 125.3702(1)(c) (2011)).

199. Michigan Zoning Enabling Act, 2006 Mich. Pub. Acts 110 (codified as amended at MICH. COMP. LAWS §§ 125.3101-3702 (2011)).

200. Michigan Planning Enabling Act, 2008 Mich. Pub. Acts 33, (codified as amended at MICH. COMP. LAWS §§ 125.3801-3885 (2011)).

201. MICH. COMP. LAWS § 125.3201(1) (2011) (“A local unit of government *may* provide by zoning ordinance for the regulation of land development . . .” [*emphasis added*]). MICH. COMP. LAWS § 125.3807(1) (2011) (“A local unit of government *may* adopt, amend, and implement a master plan as provided in this act.” [*emphasis added*]).

202. MICH. COMP. LAWS § 125.3833(2)(d) (2011).

203. MICH. COMP. LAWS § 125.3833(2)(a)-(c) (2011).

204. 2010 Mich. Pub. Acts 305 (amended at MICH. COMP. LAWS § 125.3203) (2011); 2010 Mich. Pub. Acts 306 (amended at MICH. COMP. LAWS § 125.3833) (2011).

205. 2010 Mich. Pub. Acts 134 (amended at MICH. COMP. LAWS § 125.3833) (2011).

ties are allowed and the standards they must meet. Separate zoning districts could be established to regulate larger scale activities like nurseries and greenhouse operations—as is presently done in the zoning ordinances of many urban communities.²⁰⁶ GAAMPs are designed to provide uniformity for large commercial agricultural operations that cross jurisdictional boundaries. The diversity of small-scale urban agricultural operations located within a single jurisdiction removes the need for such uniformity.

Protecting urban agriculture as a legitimate set of land uses would require that MPEA and MZEA be very clear about what local master plans and zoning ordinances *must* cover and what they may *not* do as part of this option. The specific elements of new statutory language would be negotiated through the legislative process. With the structure for local planning and zoning for agriculture established in the MPEA and MZEA, as is done for all other land uses, the institutional structure that is well understood by property owners, neighborhoods, communities, and the courts will be maintained.

Under this approach, amendments to the RTFA would also be necessary to acknowledge that urban agriculture is regulated under local zoning *when the zoning ordinance is adopted consistent with local master plans under the MPEA and MZEA*.²⁰⁷ In communities with such local zoning ordinances, the protections of the RTFA would not be available to farm operations. However, as an incentive for local governments to engage in such proactive planning and zoning to accommodate urban agriculture, protections under the RTFA would still be extended to urban farm operations unless local zoning consistent with the amended MPEA and MZEA were adopted. Practically, communities would need some reasonable period of time to conform with the new requirements.²⁰⁸ Over time, communities would learn from each other and refine their approaches, but urban agricultural uses would become part of the legal framework of local community development. This active promotion of urban agriculture could result in an explosion of activity as community after community figured out what was appropriate to allow, where, and under what circumstances. The benefits of

206. See discussion *supra* note 37 (regarding zoning for greenhouses in Detroit).

207. Amending the RTFA at this juncture would offer the opportunity to clarify legislative intent, adding to the law a statement of purpose, which does not currently exist. In the spirit of this approach, such an addition could clarify that it is the intent of the legislature to see that the interests of farm operators, nearby landowners, and local governments are balanced in the application of the law. Such a statement would signal to Michigan courts that previous interpretations that have heavily favored the protection of farm operations—to the detriment of other interests—are to be rejected. The need to include a purpose statement in the RTFA was recognized by Walker, *supra* note 135, at 487.

208. See, e.g., MICH. COMP. LAWS § 125.3301(2) (2011) (giving local units of government five years to transfer the powers and duties of the zoning commission to the planning commission).

urban agriculture would then be broadly available, and urban revitalization and community sustainability goals would be furthered.

By comparison, the legislative work to implement the simple approach described above would be quicker and more straightforward. However, because it could be perceived as threatening the future of urban agriculture in some locations, debate could be lively. On the other hand, it could empower local communities to create their own agricultural areas according to their own local preferences once they are freed from the shadow of RTFA preemptions. The legislative work to implement the more comprehensive approach would be more detailed and take considerably longer. However, the comprehensive approach would better accommodate the full range of urban community types and provide space for the beneficial effects of agricultural activities in urban places. It more fairly addresses and balances farmer and neighbor interests. More importantly, all such interests will be at the table when draft plans and zoning regulations are being formulated, and a balanced result is more likely. A likely positive consequence of either alternative would be greater acknowledgement by courts of the appropriate role and purpose of the RTFA for both rural and urban areas and a more coherent state policy promoting agriculture across all regions.

VI. CONCLUSIONS AND RECOMMENDATIONS

The RTFA and Courts' interpretations of its provisions have left urban communities interested in urban agriculture in a quandary. The potential benefits from a vigorous urban agriculture are widely acknowledged; yet, the potential for conflicts with other urban land uses is great. Absent the ability of local governments to effectively manage those conflicts, the fall-back position of urban communities could well be to avoid the issue by looking for ways to prevent urban agriculture altogether. The practical reality is that ongoing disaffection and alienation among local governments and other stakeholders over RTFA preemptions is likely to result in legislative action sooner rather than later. A considered legislative response is preferable to a hurried, piecemeal approach, such as the proposal made in the last legislative session to simply exempt the City of Detroit from the RTFA preemptions.²⁰⁹

Part V presents two alternative statutory changes that could be pursued to address the problems with the RTFA identified in this article. Other proposals for legislative action have been offered elsewhere.²¹⁰ Michigan's Food Policy Council has recognized the need for policy changes to accom-

209. See *supra* note 185.

210. MICHIGAN ASSOCIATION OF PLANNING, *Right to Farm Act Policy Platform* (Feb. 19, 2010), available at http://www.planningmi.org/downloads/rta_board_adopted_policy_feb_19_2010.pdf; see also Walker, *supra* note 135, at 495.

modate urban agriculture.²¹¹ If conflicts between agricultural interests, urban communities, and stakeholders with a genuine desire to realize the special benefits of urban agriculture continue to escalate, positions will harden and effective resolution of the issues discussed in this Article becomes less likely. As a result, legislative action in the near future appears advisable. The analysis and legislative alternatives presented herein are one attempt to inform legislative debate.

211. Collier & Rabaut, *supra* note 160, at 10.