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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

FORSYTH TOWNSHIP,

Plaintiff,

vs.

File No. 12-50325-CZ

RANDY and LIBBY BUCHLER,
OWNERS SHADY GROVE FARM U.P.,
LLC,

Hon. Thomas L. Solka

Defendants.
-----/

DEPOSITION OF WAYNE WHITMAN

Taken on the part of the Plaintiff, at the
Marquette County Courthouse, Room 41, 234 West Baraga
Avenue, Marquette, Michigan, on Thursday, August 30, 2012,
at about 10:01 a.m.

APPEARANCES:

For the Plaintiff: Mr. Kevin Wm. Koch (P29640)
P.O. Box 31
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22

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6 EXHIBITS

7 None.

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Marquette, Michigan

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Thursday, August 30, 2012 - 10:01 a.m.

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WAYNE WHITMAN

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having been first duly sworn, was examined and

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testified on his oath as follows:

6

EXAMINATION

7

BY MR. KOCH:

8

Q Mr. Whitman, can you please tell us your name and your

9

working address?

10

A Wayne Whitman, 525 West Allegan Street, Lansing,

11 Michigan, 48909, Constitution Hall.

12 Q What is your occupation?

13 A I am environmental manager with the Michigan Department
14 of Environment -- I am sorry, Michigan Department of
15 Agriculture and Rural Development.

16 Q Okay. You work for the State of Michigan?

17 A Yes.

18 Q The Department of Agriculture?

19 A Yes.

20 Q You are a manager. You are, on your card, an
21 environmental manager and it says Right to Farm
22 Program. How many such positions are there? Are there
23 more than one of the same position that you hold? Are
24 you the only environmental manager for the Right to
25 Farm Program?

3

1 A Yes.

2 Q All right.

3 A The Right to Farm Program.

4 Q Can you just -- This is a deposition that I wanted to
5 take, and you have obliged us by being able to come

6 here, but this deposition is intended for the trial
7 that we have coming up, Forsyth Township versus Mr. and
8 Mrs. Buchler and their L.L.C. So that we are hoping
9 that you can give the court some direction on the Right
10 to Farm Act and its application to this matter that is
11 in Marquette County Circuit Court. Now, can you
12 describe what your position is and what your duties are
13 as a environmental manager?

14 A My position is to manage the Right to Farm Program. It
15 includes environmental complaint response work, site
16 selection for new and expanding livestock facilities.
17 I supervise program staff that conduct inspections and
18 make site verification determinations. I represent our
19 department to administer the Right to Farm Law.

20 Q Can you repeat that, what you just said, you represent
21 --

22 A I represent our department to administer the Right to
23 Farm Law.

24 Q Okay. And that gets me back to my initial question.
25 You have that position. It is a solitary position?

1 A Yes.

2 Q Okay. Who do you answer to? Who is your boss?

3 A My immediate supervisor is Steven Shine. He is a
4 section manager in the Environmental Stewardship
5 Division of the Department of Agriculture and Rural
6 Development.

7 Q And does he have any role with regard to the management
8 of the Right to Farm Program, Mr. Shine?

9 A In serving as my supervisor, I consult with Mr. Shine
10 from time to time to apprise him of cases that warrant
11 that type of review.

12 Q Are you the top decision maker then with regard to
13 application or management of the Right to Farm Program
14 in the state?

15 A The day-to-day management of the program is among my
16 job duties and responsibilities.

17 Q Okay.

18 A Other -- Other staff in our department also comment on
19 or --

20 Q Assist in the management?

21 A -- assist in management of the Right to Farm Program or
22 advise in terms of the application of the law.

23 Q All right. How long have you held this position,

24 Mr. Whitman?

25 A I have been an environmental manager since 1995 in this

5

1 program.

2 Q Now, at that time, were you the only manager, as you
3 have described your position to us now?

4 A Yes.

5 Q Was that the inception -- It couldn't have been. Who
6 was your predecessor, if there was one?

7 A Dr. Kurt Thelen was my immediate supervisor, and upon
8 his promotion, I also received a promotion as program
9 manager for Right to Farm.

10 Q And what was his name?

11 A Kurt Thelen, K-U-R-T T-H-E-L-E-N.

12 Q And how long had Mr. Thelen been the environmental
13 manager for the program?

14 A Approximately eight years.

15 Q Can you summarize how your department manages the Right
16 to Farm Act, if you can do that in a relatively concise
17 fashion, because that's not entirely what we are here

18 for?

19 A Yes. Our department follows an interagency memorandum
20 of understanding with the Michigan Department of
21 Environmental Quality for the investigation and
22 resolution of environmental complaints involving farm
23 operations. Our department has the first opportunity
24 to investigate environmental and nuisance complaints
25 that are not an emergency and determine whether or not

6

1 the farm is conforming to acceptable farm management
2 practices or the Generally Accepted Agricultural and
3 Management Practices that have been adopted under the
4 Right to Farm Law.

5 Q All right. And there is an acronym for that, is there
6 not?

7 A Yes.

8 Q And that's GAAMPs?

9 A Yes.

10 Q G-A-A-M-P-S?

11 A Yes.

12 Q And can you describe the role, tell us what the GAAMPs

13 are, if you can -- I know you can -- and can you
14 describe their function?

15 A GAAMPs are science-based practices that are developed
16 by a multi-agency task force. Each task force
17 committee is chaired by Michigan State University
18 faculty, with representatives from various
19 organizations, typically representatives from the
20 Department of Agriculture, Department of Environmental
21 Quality, U.S.D.A., Natural Resource Conservation
22 Service, MSU Extension, Michigan Farm Bureau, and
23 commodity organizations, such as Michigan Milk
24 Producers, Michigan Pork Producers, and so forth. And
25 other areas of expertise, depending on the particular

7

1 set of GAAMPs.

2 The GAAMPs are written based on science,
3 based on laws, rules, regulations and are broad in
4 terms of farms being able to follow these practices to
5 prevent pollution and minimize nuisance conditions from
6 their farming activities.

7 Q Do I understand then that this process of coming up
8 with GAAMPs is an attempt to more or less standardize
9 practices which are beneficial, healthy and acceptable
10 to this panoply of agencies that is concerned with this
11 area?

12 A Yes.

13 Q So it is a cooperative effort among a number of
14 agencies that you have identified?

15 A Agencies have representatives on the task force
16 committees. Once a set of GAAMPs has been developed,
17 it is presented to the Commission of Agriculture for
18 approval or adoption. The law requires an annual
19 review of each GAAMP and approval by the commission.
20 And when these committees meet to review, typically
21 there is consensus on any proposed changes. The chair
22 of each task force committee will make those proposed
23 changes or present those proposed changes to the
24 commission for final adoption.

25 Q So the agriculture commission is the final say in terms

1 of accepting any given GAAMP?

2 A Yes.

3 Q And how is the agricultural commission composed? What
4 is that comprised of, can you --

5 A Five members, bipartisan, appointed by the governor to
6 serve as our policy board for our department.

7 Q For a defined term?

8 A Yes.

9 Q How long is each member --

10 A I think it is now four years per member, and they are
11 staggered so they are not all renewed at the same time.
12 They are bipartisan in that they are not all the same
13 party.

14 Q Yeah, okay. Did GAAMPs come into practice with the
15 enactment of the Michigan Right to Farm Act?

16 A Not initially.

17 Q They preceded the Right to Farm Act?

18 A No.

19 Q Oh, they followed it?

20 A Correct, yes.

21 Q Can you tell us anything about the development of those
22 briefly?

23 A Initially, the act in 1981 described that GAAMPs would
24 be those as defined by the director of our department,

25 and for several years the director did not define any

1 GAAMPs. When the law was amended in 1987, it changed
2 responsibility for approval to the Commission of
3 Agriculture, which turned to the university to request
4 that a task force be developed to define what are
5 generally accepted practices for manure management and
6 utilization. Interim guidelines were developed and
7 presented. In 1988 final GAAMPs were approved by the
8 commission and have been reviewed every year since.

9 When the commission identifies the need for a
10 different set of GAAMPs, they turn to the university to
11 develop a different set of GAAMPs under a different
12 subject area, such as nutrient management and the other
13 titles.

14 Q That change in the process has persisted to present
15 then? This is the current manner of preparing and
16 defining GAAMPs, that you have just described?

17 A Yes. Yes.

18 Q Thank you. How many GAAMPs have been developed?

19 A Eight since.

20 Q Eight since. Do you know them by heart?
21 A Yes.
22 Q How many of them would apply to a small farming
23 operation, arguably any of them?
24 A Depending on the enterprise, materials, conditions,
25 activities on the farm, one or more would likely apply

10

1 to a particular farm operation.
2 Q All right. I imagine they were developed one at a
3 time?
4 A Yes.
5 Q What was the first one?
6 A Manure Management and Utilization.
7 Q Okay. And what was the second one?
8 A Pesticide Utilization and Pest Control.
9 Q And are these coming out in chronological order?
10 A Yes.
11 Q Okay. What was the third then?
12 A Nutrient Utilization.
13 Q And number four?

14 A Care of Farm Animals.

15 Q Okay. We have four to go. What's number five?

16 A Cranberry Production.

17 Q My goodness. All right. And number six?

18 A Site Selection and Odor Control for New and Expanding

19 Livestock Production Facilities.

20 Q And we have got two to go. Number seven?

21 A Irrigation, Water Use.

22 Q And finally number eight?

23 A Farm Market.

24 Q Farm Market. When was the Farm Market, or the last one

25 to be initiated, approved?

11

1 A That was first adopted in 2010.

2 Q Can you tell me when the Site Selection and Odor

3 Control GAAMP was adopted?

4 A June of 2000.

5 Q Are there a number of other GAAMPs in process right

6 now?

7 A No, not currently.

8 Q Is there anticipated that there will be more developed

9 or is that something that is unknown?

10 A Unknown.

11 Q All right. Can you explain for us -- I know that the
12 act presupposes a complaint. Can you describe how your
13 department becomes involved in the management of this
14 act with regard to any particular given operation?

15 A The two primary ways that we interact with a farm
16 operation would be in response to a formal complaint
17 for investigation. The other would be when a farm
18 contacts us proactively to request a determination that
19 the site is suitable, that they are conforming to the
20 site selection practices.

21 Q Now, do all eight of these GAAMPs apply to any given
22 operation?

23 A The Right to Farm applies to all farms. Individual
24 farms may or may not be engaged in practices that are
25 covered by a particular set of GAAMPs.

1 Q All right. So, for example, if we look at the GAAMP
2 regarding cranberry production, that probably wouldn't

3 have any benefit to anyone working outside of cranberry
4 production?

5 A It would not apply, correct.

6 Q Okay. But if a person were -- or an entity were
7 conducting an operation, an agricultural operation, any
8 number, otherwise, of these GAAMPs might apply, such as
9 the Nutrient Utilization or the Care of Farm Animals,
10 or Manure Management? If someone had animals that
11 called for conformance, would those number of GAAMPs
12 apply?

13 A They would, yes.

14 Q Is there a size factor with regard to any operation
15 that your department would be involved with monitoring?

16 A No.

17 Q So there is no upper limit sizewise and there is no
18 lower limit, in terms of an operation that would be
19 expected to conform to the Right to Farm Act?

20 A Correct.

21 Q Now, can you tell us about the Site Selection and Odor
22 Control GAAMP and what it is?

23 A The GAAMP for Site Selection and Odor Control for New
24 and Expanding Livestock Production Facilities is
25 required by the statute. It provides guidance for a

1 land owner to properly plan, design, build, operate,
2 maintain and keep records of their facility, to meet
3 the standards for construction and maintenance of
4 manure storage structures, to follow a manure
5 management plan for land application or other off-site
6 utilization of manure that's generated from farm
7 animals kept at their facility, to develop and follow
8 an odor management plan for the facility and operation,
9 and to provide, among other documentation, a site plan
10 for the facility to demonstrate that it is properly
11 sited with appropriate setbacks from neighboring
12 non-farm properties and so forth.

13 Q In your administration of the Right to Farm Act, if
14 someone did not come to the department and seek
15 approval, where would they stand with regard to the
16 Right to Farm Act?

17 A If we have not made a GAAMPs determination, then we
18 wouldn't know whether or not they are conforming to
19 applicable GAAMPs or not.

20 Q If a -- an entity or person, such as Mr. and Mrs.

21 Buchler, had been involved in raising, for example, say
22 100 chickens and five sheep, would they have the
23 ability to seek your department's review and approval
24 as to their practices?
25 A Yes.

14

1 Q And that is one of the means that you described for
2 ensuring or determining whether or not any given
3 operation does comply with the GAAMPs?
4 A Yes.
5 Q All right.
6 (AT this point, a phone rang and a brief
7 discussion was held off the record.)
8 Q (By Mr. Koch) Now, you and I have talked two times; is
9 that correct? I have -- At least you have answered
10 phone calls from a person who identified himself as
11 Kevin Koch twice in the past?
12 A (By the Witness) Yes.
13 Q And I had called you some years ago with regard to this
14 matter. Is that accurate?
15 A You reminded me when you called a few weeks ago that we

16 had talked in the past, and it sounded familiar, but I
17 -- I don't recall specifics of a conversation we may
18 have had a year or two ago.

19 Q When I talked to you more recently, I -- you indicated
20 that you would need a subpoena, and you asked me what
21 you might bring, and I indicated and delivered you a
22 subpoena this morning, but in our last conversation, I
23 had asked you if you could explore whether or not there
24 had been any contact with your department by the
25 defendants in this case, Randy Buchler, Libby Buchler,

15

1 or the Shady Grove Farm U.P., LLC. And are you able to
2 answer whether or not you have had, in your capacity as
3 the manager for the Right to Farm Act, any contact from
4 Mr. and Mrs. Buchler or their LLC?

5 A I asked for my secretary to review records to determine
6 whether or not there had been any files, complaints,
7 proactive requests, site verification requests, and she
8 reported that there were no records in our files with
9 any of the names you just provided.

10 Q All right. And I think you had indicated that you did
11 have one matter that you recalled dealing with in the
12 U.P. As I recall, it was something in Menominee -- or
13 no, Chocolay Township. Have you had any requests out
14 of Marquette County for review, determination as to
15 compliance with the Right to Farm Act?

16 A None that I recall, other than the complaint response
17 at a different farm in Chocolay Township.

18 Q Okay. So your administrative assistant did review
19 files to look for any contact by Mr. and Mrs. Buchler
20 or the Shady Grove Farm, and there was nothing to be
21 found?

22 A Correct.

23 Q Now, can a person or an entity operate with, let's say,
24 a parallel system of approved, let's say, agricultural
25 practices and avoid any involvement with your

16

1 department in operating a farm in Michigan?

2 A Could you restate your question? I am not sure I
3 understand that.

4 Q It is a little long. Could any farm operator in

5 Michigan propose and follow their own agricultural
6 practices if they had not been approved by the
7 agricultural commission of the state?

8 A Farms may be operating without any contact from us, if
9 there has not been a complaint, they haven't contacted
10 us, they haven't requested verification for siting in
11 the facility. There are many existing farms I am sure
12 are operating, have operated, that have had no contact
13 from this program so we wouldn't know whether or not,
14 on any given date, if they are conforming to GAAMPs.

15 Q All right. Well, this Right to Farm Act was enacted in
16 1981, and I think you indicated that for a number of
17 years the director was the designated person to develop
18 the GAAMPs?

19 A Yes.

20 Q And that did not occur?

21 A Correct.

22 Q And that is -- Is that why you understand there was a
23 change in the procedure, to route those
24 responsibilities to the agricultural commission?

25 A I am not sure of all of the circumstances that resulted

1 in that legislative change.

2 Q All right. May we correctly assume that there have
3 been people farming in the State of Michigan long
4 preceding the enactment of the Right to Farm Act?

5 A Yes.

6 Q And what is it, in your understanding, that the Right
7 to Farm Act does for farmers in the State of Michigan?

8 A The Right to Farm Act provides an affirmative defense
9 for farms where our department has determined that they
10 are conforming to applicable GAAMPs, so that that farm
11 shall not be found to be a nuisance, public or private.

12 Q Is that a prerequisite to your department's
13 involvement, then, having those approved GAAMPs in
14 place for an operation?

15 A I don't understand your question.

16 Q What you just said was that the Right to Farm Act is an
17 affirmative defense for those farmers who comply with
18 its provisions?

19 A When our department determines that they are conforming
20 to the GAAMPs that apply to their operation.

21 Q All right. And then my question was, is that a
22 prerequisite, then, for that ability of one to use the

23 Right to Farm Act as an affirmative defense, that they
24 have the approval of your department and the
25 agricultural commission?

18

1 A Our department determines whether or not the farm
2 conforms to GAAMPs. The act tells the court system the
3 circumstances for that. The court system would
4 determine whether or not a particular farm has
5 protection under the Right to Farm Act.

6 Q And then I will go back to my previous question. Do
7 you know of any farm operation that has successfully
8 invoked the affirmative defense of the Right to Farm
9 Act that did not have your department's approval as to
10 compliance with the GAAMPs?

11 A Yes.

12 Q And what is that?

13 A One that I recall is referred to as Double JJ Ranch.

14 Q Tell us about the Double JJ Ranch, what you know,
15 please?

16 A I believe it is a horse riding facility near a small

17 town in the west central lower peninsula of Michigan
18 that was successful in using Right to Farm as a defense
19 for some conditions, activities on their property, in a
20 conflict with local government.

21 Q In a lawsuit?

22 A Yes.

23 Q Over zoning?

24 A I believe that was one of the issues, yes.

25 Q Okay. And what do you know of that -- the outcome of

19

1 that conflict?

2 A I believe the facility prevailed in an appellate
3 decision.

4 Q Can you tell us what you understand the decision to
5 have done?

6 A I believe it was to allow them to expand their
7 operation within the Village of Rothbury.

8 Q Rothbury?

9 A Yes.

10 Q R-O-T-H --

11 A -- B-U-R-Y.

12 Q -- B-U-R-Y. Okay. Do you know what county that is in?

13 A I am not certain.

14 Q Okay. Do I understand then that they did not have the
15 approval of a particular GAAMP, or more than one GAAMP,
16 and yet they were allowed, through litigation, to
17 continue with their practices?

18 A Yes.

19 Q How did your department get involved in that
20 controversy?

21 A We were not involved in that.

22 Q No, not at all?

23 A No.

24 Q How did you learn about it?

25 A Through media.

20

1 Q Has your department been involved with any other
2 litigation, in a case similar to this, where there is a
3 farming operation that is in question or in conflict
4 with a municipality, and there has been no effort,
5 apparently, on the part of the farmers to seek the

6 approval of your department and the application of the
7 GAAMPs formally?

8 A By "this," you mean the case we are reviewing today?

9 Q No. Any other case that you have been involved with
10 that is similar to this case?

11 A Similar to this --

12 Q Yes.

13 A -- the Buchlers' case?

14 Q Correct.

15 A I am sure we have. I don't recall specific cases right
16 now.

17 Q All right. Can you tell me, is a municipality's zoning
18 ordinance considered in the process of any of these
19 GAAMPs?

20 A Yes.

21 Q How many of them?

22 A Specifically, the site selection GAAMPs makes reference
23 to land use zoning as a component of suitability for a
24 site. And the GAAMPs for farm markets also reference
25 that, that on farm market would need to be on property

1 where land use zoning allows agriculture.

2 Q Do you -- Does your department or does the agriculture
3 department publish the GAAMPs?

4 A Yes.

5 Q And how might we obtain copies of the two that you have
6 just indicated, the Site Selection/Odor Control, and I
7 believe you indicated it was the Manure Management?

8 A Farm Market GAAMPs --

9 Q Farm Market?

10 A -- with reference to zoning.

11 Q Okay.

12 A They are available on our web site.

13 Q What is your web site, through the State of Michigan
14 Department of Agriculture?

15 A Yes, www.michigan.gov/mda.

16 Q Now, have you brought a copy of the Site Selection/Odor
17 Control GAAMP?

18 A Yes.

19 Q Can you identify for us those portions of that GAAMP
20 that pertain to zoning --

21 A Yes.

22 Q -- please.

23 A Part of the format of this set of practices includes

24 determining acceptable locations, Section III, for
25 livestock production facilities. Category 1, titled,

22

1 Sites normally acceptable for livestock production
2 facilities, includes the sentence, "New and expanding
3 livestock production facilities should only be
4 constructed in areas where local zoning allows for
5 agriculture uses."

6 Category 2, sites. "Sites where special
7 technologies and/or management practices may be needed
8 to make new and expanding livestock production
9 facilities acceptable" includes a sentence in the first
10 paragraph, "New and expanding livestock production
11 facilities shall only be constructed in areas where
12 local zoning allows for agriculture uses."

13 Category 3, "Sites generally not appropriate
14 for new and expanding livestock production facilities.
15 New and expanding livestock production facilities
16 should not be constructed in areas where local zoning
17 does not allow for agriculture uses." Further on, in
18 Category 3, there is a reference to residential zones.

19 "Areas zoned primarily for residential use will
20 generally have housing at a density that necessitates
21 setback distances for livestock production facilities
22 to prevent conflicts. New livestock production
23 facilities shall not be constructed within 1500 feet of
24 areas zoned for residential use where agriculture uses
25 are excluded. Existing livestock production facilities

23

1 may be expanded within 1500 feet of areas zoned for
2 residential use, with approval from the local unit of
3 government."

4 Q So that speaks, the last category you just defined, is
5 expanding on a use that was already allowed?

6 A Or an existing facility.

7 Q All right. Are those all of the references in that
8 particular GAAMP for Odor Control/Site Selection that
9 refer to the zoning?

10 A I believe so, yes.

11 Q In your opinion, does that language in that GAAMP
12 require adherence to otherwise legitimate zoning

13 ordinances that preexisted farming operations?

14 A No.

15 Q Okay. Can you explain why not?

16 A The Right to Farm does not affect the application of
17 other state or federal statutes, so this would not
18 require someone to comply with zoning. That would be a
19 different regulatory authority.

20 Q All right. You have referred to, I believe -- at least
21 you have drawn my interest to a portion of the Right to
22 Farm Act, which is under Section 4 and subsection five,
23 and that subsection reads, "Except as provided in
24 subsection six, this act does not affect the
25 application of state statutes and federal statutes."

24

1 Is that what you were just referring to?

2 A Yes.

3 Q And is it your understanding, then, that if a
4 municipality has relied upon the Zoning Enabling Act or
5 or the Planning Enabling Act or its predecessor in law
6 to enact a zoning ordinance, that that is given
7 deference under that reference of the Right to Farm

8 Act?

9 A Yes.

10 Q Is it your understanding -- No, let me ask you. What
11 is your understanding that if a farm operation had
12 commenced after a zoning ordinance was in effect that
13 prohibited farm operations or any agricultural
14 operations in a residential district, would those farm
15 operators have any protections under the Right to Farm
16 Act, if they had not gotten approval of their operation
17 through your department?

18 A Our department determines whether or not they conform
19 to GAAMPs. It would be up to a court to determine if a
20 particular land owner had protection under the Right to
21 Farm Act.

22 Q Okay. Can you go then to the other GAAMP, the Farm
23 Market GAAMP, please, if you have a copy of that?

24 A I did not bring a copy of that.

25 Q Oh, okay. Do you know offhand about references within

1 that GAAMP to zoning, and to the extent that you do,

2 can you describe them for us?

3 A Yes. It is similar to the references in the Site
4 Selection GAAMPs regarding placement, site selection
5 for a farm market. It makes reference that it needs to
6 be where land use zoning allows agriculture uses.

7 Q The Farm Market GAAMP, does that deal, as it appears
8 to, only with the sale of products that are produced on
9 a farm?

10 A Primarily. It describes that a majority of the retail
11 space used to market products at an on-farm farm market
12 needs to be devoted to products produced on and by the
13 affiliated farm, recognizing that some farm markets may
14 also market other products at their farm market.

15 Q Does that then feed back into any analysis as to the
16 farm operation itself, under the Farm Market GAAMP?

17 A I am not sure I understand your question.

18 Q All right. What I think you just told us is that the
19 Farm Market GAAMP does look to local zoning for the
20 placement of any farm market.

21 A Yes.

22 Q The farm market is also monitored through the GAAMP, as
23 to what type of product it sells, and it must primarily
24 be from that farm operation?

25 A In the definitions, that a majority of the area used to

1 display products for sale need to be devoted to
2 products produced on and by the affiliated farm.

3 Q All right. Then I am asking if that does not then go
4 in -- within the Farm Market GAAMP devote any analysis
5 to the farm operation that produces for the farm
6 market. Do you understand me?

7 A Do you mean, does it include then a review of
8 production practices?

9 Q Yes, that's what I am trying to say.

10 A No.

11 Q Okay.

12 A It would not.

13 Q All right. So as far as the Farm Market GAAMP goes for
14 my purposes, with regard to this litigation, it
15 pertains -- it applies local zoning but it only has to
16 do with the siting or the placement of those farm
17 markets and what they display?

18 A The Farm Market GAAMPs also includes a table which
19 describe a number of other activities, materials,

20 conditions which may take place at a farm market that
21 are outside of the scope of the Farm Market GAAMPs, and
22 advises the operator of a farm market that they need to
23 confirm and maintain compliance with other applicable
24 rules, regulations and so forth, which may include
25 local ordinances, other federal and state laws that

27

1 apply, depending on what the products or services they
2 are offering for sale.

3 Q I am going to ask you to assume that the defendants in
4 this case have an operation where they have 100 or more
5 chickens, they have approximately five sheep, or more,
6 and they have not -- Let me start that question over
7 again.

8 Is it possible for a farm operator to come to
9 your department, with an operation of approximately 100
10 chickens and five sheep, and seek compliance with the
11 GAAMPs in this state?

12 A To clarify, they can seek a determination from our
13 department as to whether or not they are conforming to
14 GAAMPs that apply to their operation.

15 Q Your department is not going to have a role in any farm
16 operation, outside of one of those two means of
17 invoking your interest, and that's by formal complaint
18 or by an operator's request to review whether or not
19 they comply with your prescribed Generally Accepted
20 Agricultural Management Practices?

21 A There is a -- Those are the two primary. Complaint
22 response, which typically deals with environmental or
23 nuisance conditions, where we contact the farm. A site
24 verification request, where they submit information,
25 and we determine if the site is suitable. And there

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1 are circumstances, individual cases, where a land owner
2 will make a proactive request that we make a
3 determination about their operation, as to whether or
4 not it is conforming to GAAMPs, where they are not
5 necessarily seeking a site verification approval but
6 they are asking for a determination from our department
7 if the GAAMPs that apply are being followed.

8 Q Do you have an opinion as to why -- No. Do you have an

9 opinion as to the benefit of including "resort to local
10 zoning" in the two GAAMPs that you have described for
11 us?

12 MS. HALLEY: I would like the record to
13 reflect that Mr. Whitman has not been qualified as an
14 expert witness, and therefore his opinion testimony may
15 be objected to at a later time.

16 MR. KOCH: Okay.

17 Q (By Mr. Koch) You may answer, subject to her
18 objection. Okay.

19 A (By the Witness) An advantage to that reference is to
20 try to help people make informed decisions about where
21 to conduct farming activities so that it is compatible
22 with other non-farm land use activities in the
23 vicinity.

24 Q In the administration of the Right to Farm Act, have
25 you envisioned that a site could be approved for

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1 agricultural operations right in the middle of a
2 residential zone?

3 A I am aware of a circumstance where a local unit of

4 government has allowed, under specific conditions, to
5 allow small numbers of farm animals in residential
6 areas.

7 Q Was that a case that had reached litigation, or was
8 that a case that your department was involved with
9 between a farm operator and municipality?

10 A Neither.

11 Q You just know about this?

12 A (Witness nodded head.)

13 Q Is that the JJ Ranch that you are talking about?

14 A No.

15 Q Double JJ Ranch. What is that one that you are --

16 A The City of Ann Arbor has a local ordinance to allow
17 individuals to keep four hens in their backyard,
18 provided they meet certain conditions under that local
19 ordinance.

20 Q And when was that ordinance enacted, do you know?

21 A I do not know.

22 Q You learned about this through the media again?

23 A Yes.

24 Q So your department had no role in reviewing a proposed
25 ordinance from Ann Arbor, as the act presupposes?

1 A We did not review their ordinance prior to their
2 adopting it.

3 Q Do you know if there are similar systems in other
4 states that have followed a pattern that is comparable
5 to Michigan?

6 A From research that was done through the office of
7 Attorney General, I am aware that every state has a
8 Right to Farm Law. Some are similar to Michigan's,
9 some are not. I am not familiar with specifics of
10 other states' administration of those laws.

11 Q And some of the purposes behind the promulgation of the
12 GAAMPs are for the protection of the welfare, the
13 safety, the health of the population?

14 A To clarify, GAAMPs are not promulgated rules. They are
15 adopted by the commission with the purpose of defining
16 acceptable farm management practices to prevent
17 pollution and minimize nuisance conditions from farm
18 operations to either natural resources or neighboring
19 properties or to neighbors in terms of managing
20 nuisance conditions.

21 Q All right. So it is, from your perspective, the

22 interface or the interaction between farming and other
23 operations that you are concerned with, with the
24 development of the GAAMPs?
25 A I don't understand what you are asking.

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1 Q All right. I will strike that question. Would it be
2 possible for Mr. and Mrs. Buchler to come to your
3 department and ask you to review what they are doing?

4 A Yes.

5 Q But they have not done so?

6 A Not that I am aware of, no.

7 MR. KOCH: Okay. Thank you, Mr. Whitman.
8 And thank you for coming up here. And now Ms. Halley
9 will be able to ask you some questions.

10 MS. HALLEY: I suggest we take a five minute
11 break.

12 MR. KOCH: Sure.

13 (Discussion off the record.)

14 EXAMINATION

15 BY MS. HALLEY:

16 Q Thank you for coming up. My name is Michelle Halley.
17 I am the attorney representing the Buchlers and Shady
18 Grove Farm. Are you here representing the department,
19 the Department of Agriculture I mean?
20 A Yes.
21 Q Yes. And so who authorized you to participate in this
22 deposition as a representative of the department?
23 A Expert witness testimony, or testimony under a
24 subpoena, is included in my job description.
25 Q Okay.

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1 A And I have reviewed, when I am requested to do this,
2 with my supervisor and others in our department, prior
3 to agreeing to it.
4 Q Okay. Thank you. Other than as reported by Mr. Koch,
5 are you familiar with the facts of this case?
6 A No.
7 Q Do you have any idea if anyone has been out to the
8 Buchler farm to start the process of assessing their
9 compliance with the GAAMPs?
10 A I am not aware of anyone from -- of my staff or from

11 our department having done that, no.

12 Q Okay. And are you aware of any complaints arriving at
13 your -- in your department or in the Department of
14 Environmental Quality related to any -- anything to do
15 with the Buchler farm?

16 A I am not aware of any complaints involving that.

17 Q All right. So did you check with the DEQ to see if,
18 for example, there has been water quality violations in
19 the lake that's -- provides a border to their farm?

20 A I did not --

21 Q Okay.

22 A -- specifically check with the DEQ.

23 Q Okay. But there is nothing like that, that you are
24 aware of?

25 A Correct.

1 Q Okay. I would like to get your copy of the Right to
2 Farm Act back, and I would like to look at Section
3 474(6), and I am just going to read it because it is
4 short. It says, "Beginning June 1st, 2000, except as

5 otherwise provided in this section, it is the express
6 legislative intent that this act preempt any local
7 ordinance, regulation, or resolution that purports to
8 extend or revise in any manner the provisions of this
9 act or Generally Accepted Agricultural and Management
10 Practices developed under this act. Except as otherwise
11 provided in this section, a local unit of government
12 shall not enact, maintain, or enforce an ordinance,
13 regulation or resolution that conflicts in any manner
14 with this act or generally accepted" agriculture --
15 "agricultural and management practices developed under
16 this act." Are you familiar with this language?

17 A Yes.

18 Q What is your interpretation on that language? What do
19 you think that means in plain language?

20 A That means that the Right to Farm Act applies
21 everywhere in Michigan, that the GAAMPs that have been
22 developed pursuant to the act are the statewide
23 standards with regards to farm operations, managing
24 conditions, activities, materials on their property,
25 siting of facilities, use of irrigation, water and so

1 forth, to prevent pollution, to minimize nuisance
2 conditions to non-farm neighbors.

3 Q Okay. Now, if a farm is operating -- I want to
4 apologize up front, we may cover some of the same
5 ground, but we might not. Might end up at a different
6 place.

7 If a farm is operating and there are no
8 complaints to you or to, you know, the Department of
9 Environmental Quality, is it perfectly reasonable and
10 acceptable that that farm continue to operate?

11 MR. KOCH: I will have to object as to this
12 witness' basis for answering that question.

13 Q (By Ms. Halley) My understanding of your professional
14 responsibilities include representing the Michigan
15 Department of Agriculture and Rural Development in
16 administering the Right to Farm Act; is that right?

17 A (By the Witness) Yes, that's correct.

18 Q And you have support staff that make inspections?

19 A Yes.

20 Q And you oversee staff that make inspections?

21 A Yes.

22 Q And you are involved, your department and you

23 personally, at times, are involved in site selection --

24 A Yes.

25 Q -- of livestock facilities?

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1 A (Witness nodded head.)

2 Q Yes. And you address complaints?

3 A Correct.

4 Q Right. Okay. Overall, you manage the Right to Farm

5 Program for the State of Michigan; is that right?

6 A Yes.

7 MS. HALLEY: Mr. Koch, I am not sure I
8 understand your objection so maybe we want to leave it
9 on the record and proceed?

10 MR. KOCH: Oh, yeah, we proceed regardless.
11 I make my objection. The judge listens and you go
12 ahead.

13 MS. HALLEY: Okay.

14 Q (By Ms. Halley) So back to the question, Mr. Whitman.
15 Is it conceivable that a farm that is operating, with
16 no complaints to your department, no complaints to the
17 Department of Environmental Quality about what's going

18 on at that farm, is it reasonable and acceptable that
19 that farm operate, continue to operate and carry out
20 their farm operations?

21 MR. KOCH: Before you answer, I am going to
22 pose another objection, that that is the question that
23 is given to Judge Solka in this case. And that is what
24 I meant by my objection that Mr. Whitman is not suited
25 to answer that question. He can answer it with regard

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1 to his role as the manager, but not as to whether or
2 not this is reasonable or suitable. But subject to my
3 objection, you go ahead and answer.

4 Q (By Ms. Halley) Go ahead and answer.

5 A (By the Witness) Our department, myself, cannot
6 determine whether or not a farm is managing things
7 according to GAAMPs without an on-site inspection, so I
8 cannot determine whether or not it is a suitable site
9 or acceptable to continue a farm operation at a
10 particular site in the absence of a complaint or a
11 request by that land owner to make a GAAMPs

12 determination.

13 Q Nor could you determine that it is not appropriate, I
14 would assume?

15 A That's correct.

16 Q Okay. So just because a farm has not sought your
17 approval, that does not mean that that farm is somehow
18 operating outside of the protection of the Right to
19 Farm Act overall; is that right?

20 A We determine if they conform to GAAMPs. The protection
21 would be determined by the court system, whether or not
22 a particular farm has the right to farm protection.

23 Q Okay. So just because a farm has not sought approval
24 with any GAAMP that may be applicable, your department
25 does not take the position then that it somehow is

1 violating the conditions of a GAAMP, any given GAAMP
2 that might apply?

3 A Correct.

4 Q Okay. You are simply saying, you don't know?

5 A Yes.

6 Q Okay. All right. So while we are on the topic of the

7 GAAMPs, let's talk about the Site Selection and Odor
8 Control for New and Expanding Livestock Production
9 Facilities. What is the definition of a livestock
10 production facility?

11 A The definition in the Site Selection GAAMPs for a
12 livestock production facility, includes all facilities
13 where farm animals, as defined in the Right to Farm
14 Act, are confined, with a capacity of 50 animal units
15 or greater, and/or the associated manure storage
16 facilities. Sites such as loafing areas, confinement
17 areas, or feed lots, which have livestock densities
18 that preclude a predominance of desirable forage
19 species are considered part of a livestock facility.
20 Pasture lands are excluded.

21 Q Thank you. Could you correlate the 50 animal units
22 with actual animals, when we talk about chickens and
23 sheep --

24 A Yes.

25 Q -- in terms of chicken and sheep?

1 A Yes. Table one, in the Site Selection GAAMPs provides
2 a reference for the number of animals to equate to a
3 certain number of animal units. For 50 animal units,
4 that would be 500 sheep or lambs, that would be 5,000
5 laying hens or broiler chickens.

6 Q Okay. Okay. So if a farm came to you that had lower
7 -- much lower numbers than the number required to meet
8 the definition of a livestock production facility, what
9 would you say to them if they are coming to you to seek
10 your opinion about whether they are in compliance with
11 GAAMPs?

12 A Typically, we request a written plan in advance of an
13 on-site inspection from that land owner or the person
14 who leases the property, to describe their agricultural
15 enterprise, the type of farm animals, the land base,
16 their manure storage, their manure handling practices
17 and so forth. And as our work schedule allows, once we
18 have reviewed that plan and determined that that plan
19 utilizes or is consistent with GAAMPs, both Site
20 Selection and Manure Management GAAMPs, then we would
21 schedule an on-site inspection to meet with them to
22 review their written plan, their record keeping
23 practices, and inspect the facility as it relates to is
24 it following the plan they have submitted.

25 Q Does that process change at all if the number of

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1 animals is far fewer than the number outlined in the
2 definition of a livestock -- livestock production
3 facility?

4 A No.

5 Q Okay. Because in order to meet the definition of a
6 livestock production facility, the definition in the
7 GAAMP indicates that the facility must have 50 animal
8 units or greater. You -- Would you apply these GAAMPs
9 directly to a much smaller facility?

10 A They would apply, in that they are referenced in the
11 Manure Management GAAMPs, in terms of whether or not a
12 particular site is suitable as it relates to having
13 livestock or manure handling facilities in close
14 proximity to non-farm neighbors.

15 Q But does this particular GAAMP apply, this Site
16 Selection?

17 A Yes.

18 Q How would it apply if the facility does not meet the

19 minimum number of animal units to meet the definition
20 of a livestock production facility?
21 A By reference in the Manure Management GAAMPs.
22 Q Okay.
23 A In Section 3, odor management.
24 Q Is that in this document or are you in a --
25 A I am referring to the Manure Management GAAMPs.

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1 Q Okay.
2 A The supporting text to the numbered bold text GAAMP
3 itself. This particular GAAMP, number 12, livestock
4 producers should plan, design, construct, and manage
5 their operations in a manner that minimizes odor
6 impacts upon neighbors.
7 Supporting text underneath, the proximity of
8 livestock operations to neighbors in populated areas is
9 usually the most critical factor in determining the
10 level of technology, management needed to minimize odor
11 impacts upon neighbors. Therefore, site selection is
12 an important factor in minimizing odor impacts for and
13 upon neighbors. The more remote the livestock

14 operation, the better likelihood that odors will not
15 become an annoyance for neighbors, and therefore a
16 lower level of technology management will adequately
17 manage odors at the livestock facility. However, the
18 distance which a livestock operation should be located
19 from neighboring land uses to effectively control odors
20 is not easily established. Additional information and
21 recommendations can be found in the current GAAMPs for
22 Site Selection and Odor Control for New and Expanding
23 Livestock Operations. That's the reference in Manure
24 GAAMPs to using the site criteria in the Site Selection
25 GAAMPs.

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1 Q Okay. So are you saying that every single farm in the
2 State of Michigan -- In order to be compliant with the
3 GAAMPs, every single farm, no matter how big, has to
4 comply with this GAAMP, the Site Selection GAAMP?

5 A The GAAMPs apply to all farms.

6 Q That wasn't my question.

7 A Maybe I don't understand your question.

8 Q Okay. My question to you is, does every single farm in
9 Michigan, regardless of its size, every single one,
10 have to comply with the Site Selection and Odor Control
11 for New and Expanding Livestock Production Facilities
12 GAAMP, in order to gain a letter of compliance from the
13 Department of Agriculture?

14 A Those with farm animals, yes.

15 Q Regardless of the number of farm animals?

16 A Yes.

17 Q So let's see. Are you familiar with, say, the Jaworski
18 case, it was a Court of Appeals case addressing the
19 Right to Farm Act?

20 A That name is familiar, but I don't recall specifics of
21 that.

22 Q Okay. In a nutshell, in that case the court determined
23 that even when a farm was engaged in some activity that
24 was not directly addressed by a GAAMP, that the farm
25 still fell under the protection of the Right to Farm

1 Act. Is it your opinion that that could correlate with
2 these small farms that may not fall directly under the

3 guidelines set out in any of the GAAMPs, including the
4 Site Selection GAAMP, when it comes to their ability to
5 invoke the protection of the Right to Farm Act?

6 MR. KOCH: I am going to object that he has
7 already answered that question.

8 Q (By Ms. Halley) Go ahead.

9 A (By the Witness) Could you repeat the question? I am
10 not sure I fully understand that.

11 Q Okay. Even in a situation where there is not a GAAMP
12 that is directly on point with the makeup of the farm
13 --

14 A Okay.

15 Q -- okay, the Court of Appeals has determined that the
16 protection of the Right to Farm Act still applies,
17 okay?

18 A Yes. I understand.

19 Q My question to you is, if we correlate that notion and
20 relate it to very small farms, is it your opinion that
21 the Right to Farm Act protections could also extend to
22 very small farms?

23 MR. KOCH: And again, I am going to object on
24 the same basis I did previously, that I think you are
25 asking Mr. Whitman the question that Judge Solka is

1 going to have to decide.

2 Q (By Ms. Halley) But you go ahead and answer.

3 A (By the Witness) Okay. Our role is to determine
4 conformance to GAAMPs. And it is up to the court to
5 determine what individual operation has protection
6 under the Right to Farm Act. There are cases where it
7 appears that that has been extended, but our role is
8 simply to determine if they are conforming to GAAMPs
9 that apply.

10 Q So is there any situation, any farming operation you
11 can imagine, to which the Site Selection GAAMP does not
12 apply?

13 A Those that are producing crops or other commodities
14 without having farm animals. This is specific to
15 livestock and poultry.

16 Q Livestock and poultry at 50 units or more?

17 A The definition in the Site Selection GAAMPs uses that
18 definition. The Manure Management Practices apply to
19 all farms, with any number of farm animals, and makes
20 reference to some of the site selection criteria in the

21 siting GAAMPs.

22 Q Okay, okay. Now, we read subsection 474(6) before of
23 the Right to Farm Act. Does it say anywhere in that
24 subsection that the provision applies only to lands
25 that were farmed at a certain period of time or in a

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1 certain place, or are there any apparent limits in
2 subsection six that you -- that you are aware of or you
3 consider when you are looking at the big picture of
4 whether a farm complies with the GAAMPs, for example?

5 A I am sorry, I --

6 Q Is there anything in subsection six that limits its
7 reach?

8 A No.

9 Q Okay. What is your opinion about the language in
10 subsection six? Do you think it is a good idea, bad
11 idea? Does it matter to you from a regulatory
12 perspective? How do you feel about it?

13 MR. KOCH: Relevance.

14 Q (By Ms. Halley) Go ahead.

15 A (By the Witness) From the testimony that was provided
16 to legislative committees to consider this most recent
17 amendment in 1999, this clarifies that Right to Farm
18 Law is universal across the state and that these are
19 statewide standards that will apply to all farms and
20 helped --

21 Q Just a minute, what do you mean by these are statewide
22 standards? Which standards are you referring to?

23 A GAAMPs are statewide standards that apply to all farms,
24 and add some predictability for farms so they know,
25 whether they are in a particular county or township,

1 that the same rules would apply across the township or
2 county line anywhere in Michigan. And while GAAMPs are
3 subject to annual review and revision as necessary,
4 these science-based standards help farmers better
5 understand their responsibilities and what they need to
6 do to meet GAAMPs. And in that regard, I think that
7 was helpful to include that. Other amendments were
8 also included, including requiring our department to
9 develop the Site Selection GAAMPs, along with that

10 change in 1999 when this law was most recently amended.

11 Q So your agency's responsibility is limited to -- you
12 are an executive agency; right?

13 A Yes.

14 Q In the executive branch of state government?

15 A Yes.

16 Q So your authority is limited to applying the laws. You
17 are not making laws. You are not interpreting laws;
18 right?

19 A Correct.

20 Q You are applying the laws as they are written?

21 A Correct.

22 Q Okay. And the Right to Farm Act is the statutory
23 authority under which you operate; is that right?

24 A Yes.

25 Q Okay. Have you ever been to Buchlers' farm?

1 A No, I don't believe so.

2 Q And I think you have said before that as far as you
3 know, no one from your department has been to the

4 Buchler farm?

5 A Correct.

6 Q Okay. So at this point, you have no opinion about
7 whether the Buchlers are complying with these GAAMPs;
8 is that correct?

9 A Correct.

10 Q Okay. Have you ever discussed the Buchler matter with
11 any representatives of the Michigan Townships
12 Association?

13 A No.

14 Q Okay. Have you ever discussed the issue of zoning, as
15 it relates to the Right to Farm Act, with anyone from
16 the Michigan Townships Association?

17 A Yes.

18 Q About how frequently?

19 A Michigan Townships Association has representatives on
20 the Site Selection GAAMPs committee and now on the Farm
21 Market committee.

22 Q Okay.

23 A And in the course of our review, we have had those
24 discussions with their representative.

25 Q How about lobbyists, specifically from the Michigan

1 Townships Association?

2 A I am not sure if the individuals I have talked with
3 there are registered lobbyists. They might be.

4 Q You don't know?

5 A I don't know.

6 Q Okay. Do you happen to know what the opinion of the
7 MTA is about this language in subsection six we have
8 been talking about?

9 A As I recall --

10 MR. KOCH: Relevance, but go ahead.

11 A (By the Witness) As I recall, they opposed some of the
12 provisions of this when this was in bill form in 1999.

13 Q (By Ms. Halley) Okay. And if you remember, do you know
14 why -- do you remember why?

15 MR. KOCH: Again, relevance.

16 A (By the Witness) I am not sure I really understand all
17 of the reasons why they would oppose it. It was a
18 change in terms of preempting what would otherwise be
19 conditions, activities that may be subject to a local
20 zoning ordinance. This may have changed some of that
21 authority at the local level, so that may be why they

22 were opposed to that particular change.
23 Q (By Ms. Halley) May have changed or did change?
24 A I don't know.
25 Q Is it your opinion that it may have changed authority

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1 at the local level or that it actually did change
2 authority at the local level?

3 MR. KOCH: And I have to object to that
4 question, because you are asking him to play the role
5 of the judge here in that question.

6 MS. HALLEY: Okay.

7 A (By the Witness) I think it clarified roles of both
8 our department and local units of government by this
9 particular provision in subsection six.

10 Q (By Ms. Halley) And did it change it from what it had
11 previously been, the separation of control over --

12 A It is a change, yes.

13 Q Okay. All right. Are you familiar with MSU Extension?

14 A Yes.

15 Q Okay. How so?

16 A They have a number of representatives on the GAAMPs

17 committees. Each committee is chaired by MSU faculty.
18 Many of them have an extension appointment. When there
19 is a complaint for investigation, to help in verified
20 complaints where change is necessary, our letter
21 references land owners to consult with their local
22 extension agent, to provide technical assistance in
23 resolving problems.

24 Q Okay. I would like to show you this flowchart. It was
25 developed by the Michigan State University Extension,

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1 and it is titled, Who is Protected From Nuisance Suits
2 Under the Right to Farm Act, and up on the top it is
3 dated May 5th, 2009. And it has the Michigan
4 university extension logo on the left. Do you see all
5 of that?

6 A Yes.

7 Q And I have provided a copy to counsel as well. So
8 could you take a moment and review this flowchart?

9 A Yes.

10 Q Okay. Do you have any disagreement with what this

11 flowchart lays out here, as the method for determining
12 whether a farm is protected by the Michigan Right to
13 Farm Act?

14 A Yes.

15 Q What's your disagreement?

16 A Our department determines whether or not a farm
17 conforms to GAAMPs. The Right to Farm Law defines
18 farm, farm operation, farm products, a method for
19 developing GAAMPs, annual review and so forth. It
20 would be up to a court to determine if a farm has
21 protection.

22 Q Okay. So you have an issue with the title of this
23 document, Who is Protected From Nuisance Suits Under
24 the Right to Farm Act?

25 A Yes.

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1 Q Yes. What do you think the title should be then?

2 MR. KOCH: That's a hard question for him to
3 answer. It is a document that someone else has
4 prepared, and you are asking him how it should be
5 entitled.

6 MS. HALLEY: He is responsible for oversight
7 of the Michigan Right to Farm Act.

8 MR. KOCH: But this is not prepared by the
9 Michigan Right to Farm department. This is --

10 MS. HALLEY: We just established his
11 relationship with Michigan State University Extension.

12 A (By the Witness) This was developed without
13 consultation with our department.

14 Q (By Ms. Halley) Okay.

15 A And we don't agree with the conclusions that people may
16 draw from this decision.

17 Q Any conclusion in particular you have in mind?

18 A That protection is provided by the person answering
19 these questions versus the court determines if a farm
20 is protected by Right to Farm.

21 Q Okay, I see, okay. So as far as -- How would you feel
22 about, you know, using -- if a court used this
23 flowchart to make that determination? Do you think
24 that would be a reasonable process for them to follow,
25 given the contents of this flowchart?

1 A That, I take as a legal question that I can't answer.

2 Q Okay. Okay. Do you know what the Michigan
3 Agricultural Environmental Assurance Program's Water
4 Stewardship Program is?

5 A I am familiar with that program.

6 Q Can you tell me how it relates to the Michigan
7 Department of Agriculture, if at all?

8 A That program is administered in our division, in the
9 same section where Right to Farm is administered.

10 Q The --

11 A The Environmental Stewardship Division.

12 Q Okay, thank you.

13 A And another acronym, MAEAP, Michigan Agricultural
14 Environmental Assurance Program, provides a voluntary
15 proactive way that farms can have their farm management
16 practices evaluated to determine their environmental
17 performance and identify any deficiencies, try to
18 prioritize and schedule changes necessary at their
19 farm.

20 Q Okay. Would you say it is -- Is it a first step or a
21 step toward coming into compliance with the GAAMPs, is
22 it -- What's the relationship there?

23 A It is consistent in that in order for a farm to achieve

24 verification under the MAEAP program, they need to meet
25 the Right to Farm GAAMPs that apply to their farm

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1 operation.

2 Q Okay. So if a farm is MAEAP certified, then they are
3 in compliance with the applicable GAAMPs, is that what
4 you are saying?

5 A It is a different determination. At the time of a
6 MAEAP verification, the verifier will review records,
7 will conduct an on-site inspection of that farm, and
8 determine if they are meeting all of the criteria to be
9 MAEAP verified. It is consistent but it is not the
10 same as a complaint response or a site selection
11 verification or even a proactive verification, which is
12 done under the Right to Farm Act.

13 Q Okay. It is not the same, but I thought I heard you
14 say that for a person -- a farm to gain MAEAP
15 verification, they had to be meeting the requirements
16 of applicable GAAMPs?

17 A Yes.

18 Q Okay.

19 A That's true, yes.

20 Q Okay. Thank you. That's what I was getting a little
21 fuzzy about. I understand now.

22 A All right.

23 Q Okay. Are you -- Do you know or are you familiar with
24 Mr. Mark Wyckoff's work related to zoning and land use?
25 He is a, you know, kind of a land use scholar?

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1 A I have met him and read some of the things he has
2 published, yes.

3 Q Okay. I wonder if you have read this Law Review
4 article. It appeared in the Michigan State Law Review
5 in 2011, and the title is "When Urban Agriculture Meets
6 Michigan's Right to Farm Act, The Pigs in the Parlor."
7 Are you familiar with that? Have you read this
8 document before?

9 A I have read most of this document, yes.

10 Q Okay. There are some portions of this document that
11 seem quite relevant to the situation in this case,
12 particularly the fact -- particularly Mr. Wyckoff's

13 discussion that in fact a farming operation could move
14 right in to, say, a residential area or some such thing
15 and be protected under the Michigan Right to Farm Act.
16 And we have covered the ground. I am not going to ask
17 you to tell me if you think that's right or wrong, but
18 he does talk about the -- I may mispronounce this --
19 Papadelis case at the Court of Appeals, in which the
20 Papadelis --

21 A Papadelis.

22 Q Papadelis, thank you -- moved into an area that was
23 already zoned residential and proceeded to open a
24 commercial, I believe, greenhouse operation. That
25 falls under the definition of farm in the Michigan

1 Right to Farm Act. And in fact the Court of Appeals
2 found that their operation was indeed protected under
3 the Right to Farm Act. Mr. Wyckoff goes on to sort of
4 expand on that idea, essentially to say that -- this is
5 on page 12, if you want to look at it. If not, I will
6 just read it -- that the Right to Farm Act now allows

7 farm operators to use the Right to Farm Act as a sword,
8 as well as a shield. It not only protects farmers from
9 nuisance complaints filed by those who come to the
10 nuisance, it also allows farmers to invoke the Right to
11 Farm Act to move in to densely settled residential
12 areas and establish farm operations, in defiance of
13 local zoning and nuisance regulations, even if those
14 operations result in nuisances in fact and a decline in
15 surrounding property value, as long as they meet the
16 legal standards that confer nuisance immunity.

17 What's your reaction to that?

18 A This seems to be drawing conclusions that I wouldn't
19 agree with.

20 Q Well, let's look at the language from the Court of
21 Appeals, just above the page break there, 387, and the
22 Court of Appeals said, in the Papadelis case, "We are
23 aware that a business could conceivably move into an
24 established residential neighborhood and start a farm
25 or a farm operation in contravention of local zoning

1 ordinances as long as the farm or farm operation

2 conforms to Generally Accepted Agricultural and
3 Management Practices. Although we might personally
4 disagree with the wisdom of the policy choice, we are
5 without authority to override the clearly expressed
6 intent of the legislature." Do you -- Do you disagree
7 with the Court of Appeals --

8 MR. KOCH: Well --

9 Q (By Ms. Halley) -- and Mr. Wyckoff?

10 MR. KOCH: Wait. Now, I have to place an
11 objection here. We haven't talked about the Papadelis
12 case, whether it is on three legs, two legs, one leg or
13 four, or none, with the current situation. So if you
14 are asking him for a reading on that case with regard
15 to this case, then I don't think that that's
16 appropriate. It is not -- You haven't laid a
17 foundation. So I don't think it is going to benefit
18 Judge Solka.

19 Q (By Ms. Halley) You can go ahead with your answer. We
20 have talked about the Papadelis case. You have
21 indicated that you are familiar with it; correct?

22 A (By the Witness) Yes.

23 Q Okay. Go ahead. Go ahead and answer.

24 A My role is to, in our department, administer the Right

25 to Farm Law; make determinations whether or not GAAMPs

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1 are followed; help resolve conflicts when changes are
2 needed. I can't provide legal advice or a legal
3 opinion on things. And in this context of, something
4 is conceivable, it is a statement taken out of a --
5 from a particular court, and apparently Mr. Wyckoff is
6 then editorializing on that in his comments below.
7 People do that.

8 Q But your view is if the court said it, it is something
9 that you and everybody else -- we all have to abide by
10 it, whether we like it or not, because here it is in
11 the words of the Court of Appeals --

12 MR. KOCH: I repeat my objection.

13 Q (By Ms. Halley) -- relevant to your administration of
14 the Right to Farm Act?

15 MR. KOCH: He may have read the Papadelis
16 case. My objection stands that you are asking him to
17 say that I agree that what the court said in Papadelis
18 applies to this case, and I don't think that that's
19 appropriate.

20 Q (By Ms. Halley) I want to clarify my question. I am
21 not asking you to tell me whether you think the
22 Papadelis case controls this case. What I am asking
23 you is, in your duties of carrying out the Right to
24 Farm Act, administering the Right to Farm Act, is it
25 your practice and belief that the Court of Appeals has

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1 spoken, this is what they have said. Whether you agree
2 with it or not is irrelevant, and this is what you have
3 to live by in administering your duties relative to the
4 Right to Farm Act. That's my question. I am not
5 asking you to apply that case to this case.

6 A (By the Witness) We are part of the administration.
7 This is part of the judicial branch of the government.

8 Q Right.

9 A We have to abide by what the judicial branch of
10 government tells us.

11 Q Okay. Thank you. All right. I think that's enough of
12 that. So again, in the statute, in Section 474(7) -- I
13 am sure you are familiar with this section?

14 A Yes.

15 Q -- which allows local units of government to submit to
16 the director, in this case the director of the
17 Department of Ag, a proposed ordinance prescribing any
18 standards that may be different from the GAAMPs. Is
19 that kind of it, in a nutshell?

20 A Yes.

21 Q Do you have anything else you want to add about this,
22 your interpretation of this section?

23 A No.

24 Q Okay. Have you received, your department -- Have you
25 received anything from Forsyth Township asking you to

1 in fact review and approve their zoning ordinance as it
2 impacts agricultural activities?

3 A No.

4 Q Okay. Let's see here. All right. What I am handing
5 you and Mr. Koch is an article that probably you wrote,
6 with Roberta Osborne, and I believe it was posted in
7 October of 2011. Can you review this and confirm that
8 this is in fact what you are looking at here? I

9 apologize, your name and her name and the date appeared
10 here on the screen, but when I printed it, it -- I
11 don't know what happened so --

12 A That's okay. I recall Roberta Osborne consulting with
13 me to clarify some of the text in the articles which
14 she submitted for publication, yes.

15 Q Okay. And in the online version of this, your name is
16 -- you are listed as an author. Is that an accurate
17 portrayal of this document?

18 A That's what you are telling me. I have no reason to
19 believe that that is not the case, sure.

20 Q Could you read the first sentence of the first
21 paragraph, please?

22 A "The Michigan Right to Farm Act, PA93, was enacted in
23 1981 to protect farmers from nuisance lawsuits."

24 Q Have you changed your mind about the purpose of the
25 Right to Farm Act, or do you still agree with that

1 sentence?

2 A I agree with that.

3 Q Okay. Could you read the first sentence of the second
4 paragraph?

5 A "In simple terms, a farm operation shall not be found
6 to be a public or private nuisance if the farm alleged
7 to be a nuisance conforms to Generally Accepted
8 Agricultural Management Practices, according to policy
9 determined by the Ag Commission."

10 Q Do you still agree with that sentence?

11 A Yes.

12 Q Okay. And then if you take a minute to review
13 paragraphs three and four, it looks to me like those
14 paragraphs essentially lay out a process by which
15 complaints can be made about a number of things,
16 including noise, surface water or groundwater pollution
17 and odor; is that right?

18 A Yes.

19 Q And this is the way that those types of complaints
20 should be addressed is following this guideline,
21 through your agency; is that correct?

22 A Yes.

23 Q Okay. And to your knowledge, Forsyth Township itself
24 and/or any resident of Forsyth Township has not
25 utilized this process. Is that true?

1 A I am not aware of a complaint against the Buchlers'
2 operation using this process.

3 Q All right. I just want to take one second to look back
4 through my notes, and I think we are about to wrap up,
5 if you will bear with me for a minute here.

6 I just want to clarify something. You said,
7 at some point during Mr. Koch's questioning of you,
8 that you hadn't received any requests from anybody in
9 Marquette County to come and do an inspection to
10 determine their compliance with GAAMPs. Is that what
11 you said?

12 A Not a proactive request.

13 Q Okay.

14 A I did recall one complaint where I don't recall the
15 complainant, but we were responding to a formal
16 complaint to investigate a farm in Chocolay Township,
17 which is in Marquette County.

18 Q Okay. But no farm, generally speaking, in Marquette
19 County has come to you proactively to say, do I comply
20 with your GAAMPs?

21 A I don't recall any, no.

22 Q And that does not per se mean that those farms are not
23 complying with your GAAMPs --

24 A Correct.

25 Q -- is that right?

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1 A Correct. We wouldn't know.

2 Q You wouldn't know, okay. And it doesn't mean
3 necessarily that those farms are not protected by the
4 Right to Farm Act; right?

5 A Right. Correct. Yes, I agree.

6 Q Okay. When we were talking about the Site Selection
7 GAAMP, you were -- you referenced a Category 3, and
8 maybe the other categories -- I would have to look
9 back -- but you talked about the -- an existing
10 facility, and as of when that existence -- as of when
11 does that existence matter? At the time of the
12 enactment of this GAAMP or when?

13 I will try to narrow that down a little bit.

14 I realize it is not very clear right now -- Well,
15 strike that question. I am sorry, I can't get more

16 clarity on what I was referencing.

17 A Okay.

18 Q All right. So in these -- in this -- in the Site
19 Selection GAAMP, there are specific setbacks for
20 particular numbers of animals and animal units; is that
21 correct? And I am looking, you know, for example, just
22 as an example, Category 2, and there is a table, table
23 five. It is on page nine.

24 A Um-h'm.

25 Q At the top there, it says, you know, the first column

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1 is total animal units, and could you read the first row
2 across, what that says?

3 A Under total animal units, 50 to 249, for expanding
4 operations non-farm residence distance, within the
5 distance eight to 20 homes within one quarter mile,
6 property line setback, with a subscript one, 125 feet.
7 That meaning that may be reduced or increased based
8 upon the odor plan. 125 feet is the first estimate, so
9 when proposing a site, would have an idea of is it even

10 feasible to propose it there. And then the MDARD site
11 review and verification process is upon producer
12 request. And that also footnoted, to be afforded
13 protection under Right to Farm, producers must conform
14 to all applicable GAAMPs but are not required to
15 complete site review and verification process if less
16 than 250 animal units.

17 Q Okay. So given that this table begins with 50 animal
18 units, being the cut off for being able to apply these
19 standards, regulations, whatever you want to call them,
20 what would you say -- how would you develop these
21 parameters, the number of miles, the number of feet,
22 that type of thing, for let's say a facility that was
23 -- contained maybe one animal unit? I mean, would you
24 scale this back to -- you know, would you cut this in
25 half or cut it into a tenth? I mean, how would you

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1 really practically go about that?

2 A On Section IV, site review and verification process --

3 Q What page are you on?

4 A Page 13.

5 Q Okay.

6 A The second paragraph in that section, "Producers with
7 new and expanding livestock production facilities that
8 have a total capacity less than 50 animal units may
9 request site verification from MDARD. The MDARD site
10 review and verification process will use criteria
11 applicable to a 50 animal unit facility for these
12 requests."

13 We would use that for a proposed facility
14 with less, and to clarify, it is the holding capacity,
15 not the numbers at a particular time. You know, flocks
16 and herds numbers may go up and down.

17 Q Sure.

18 A But we are looking at the pen, the barn, the corral,
19 the areas for holding, in terms of what is the capacity
20 for holding, that number of animals.

21 Q I see. So the purpose of this language is to -- sort
22 of acknowledges that facilities with a capacity of less
23 than 50 animal units, while they may not -- while all
24 of these provisions may not apply to them, you would --
25 you would honor the request for a proactive sort of --

1 A Site verification request.

2 Q -- site verification?

3 A Yes.

4 Q But you would apply the standards that are meant for
5 the 50 units and up farms; is that right?

6 A Right.

7 Q Okay. Okay. I just want to be clear about -- Mr. Koch
8 asked you some questions about the Farm Market GAAMP.

9 I just want to be clear that that's a completely -- the
10 farm market that's contemplated by that GAAMP is a
11 completely different thing than what's considered a
12 farmers market, where, you know, say in the middle of a
13 city, people -- farmers might come together to sell
14 their goods and, you know, things like that? That's a
15 whole different type of thing?

16 A Correct.

17 Q Okay.

18 A That is different, yes.

19 Q I just wanted to clarify that point.

20 MS. HALLEY: Okay, I don't believe I have any
21 further questions. Thank you.

22 THE WITNESS: You are welcome.

23 MR. KOCH: I am not going to let you go yet,

24 and I don't expect many questions further.

25 THE WITNESS: Okay.

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1 EXAMINATION

2 BY MR. KOCH:

3 Q The GAAMPs, are they an effort to collect the
4 collective wisdom of a number of experts in a number of
5 different areas?

6 A Yes.

7 Q The GAAMPs are an attempt to put together the opinions
8 of a number of experts in this area, that you have got
9 the responsibility to administer, to create the
10 standards statewide, that you have said these
11 represent?

12 A Yes, the areas reflected in the title, manure
13 management utilization, nutrient management,
14 irrigation, water use and so forth, yes.

15 Q And at the outset of your deposition you described who
16 comprises -- who puts these together, and you named

17 just a number of organizations, MSU Extension, MSU
18 faculty, a whole number of groups that were considered
19 and contributed information to create the GAAMPs, after
20 the director gave that responsibility to the
21 Agriculture Commission; is that right?

22 A When -- When the law changed, moving responsibility
23 from the director to the commission to define GAAMPs,
24 the commission turned to the university, which then
25 appointed a chair, and pursuant to the law to receive

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1 written recommendations from our department and advice
2 from other organizations, such as extension and so
3 forth, those organizations are represented specific to
4 the subject of GAAMPs. Those with animal science
5 information would typically serve on animal care and
6 probably manure management and site selection. Those
7 in crop and soil sciences would typically be called
8 upon for representation in nutrient GAAMPs and so
9 forth.

10 Q And as Michelle has just touched on, there was
11 apparently some level of conflict in the development of

12 the GAAMPs with regard to certain groups and interests
13 bumping into one another, specifically the Michigan
14 Townships Association and others have come in to
15 present their own concerns?

16 A People represent their organizations and bring
17 information and views to the committee meetings, and
18 there is not always --

19 Q Unanimity of opinion?

20 A Right. There is not always -- right, a --

21 Q A consensus?

22 A -- a 100 percent consensus on a particular
23 recommendation. At that point, the chair will often
24 decide, if this is the consensus of the group, to go
25 forward, or to table that issue and the GAAMP may stay

1 as it is until there is more uniform consensus on
2 changing a GAAMP, that's correct.

3 Q As it stands now, those statewide standards that have
4 been developed, those GAAMPs, do incorporate site
5 selection as an essential component, don't they? Site

6 selection is an important consideration in those state
7 standards, is it not?

8 A Yes. It is required to have a set of GAAMPs for site
9 selection and odor control.

10 Q And we have been dancing around what appears to be
11 neither my client, the township, having come to your
12 department to seek a proposed ordinance or to lodge a
13 complaint, as well as Michelle's clients not having
14 come to your department to ask, is what we are doing in
15 accordance with the GAAMPs, is that accurate?

16 A That's correct, yes.

17 MR. KOCH: Thank you very much, Mr. Whitman.
18 We appreciate your time, unless Michelle has some more
19 questions.

20 MS. HALLEY: Just one more.

21 EXAMINATION

22 BY MS. HALLEY:

23 Q I am handing you a document, again, Michigan State
24 University document, titled Restrictions on Zoning
25 Authority, out of what's called the Land Use Series.

1 At the top it says it was last revised June 14th, 2012,
2 because the document we are looking at --

3 MS. HALLEY: Mr. Koch, would you like a copy?

4 MR. KOCH: I would, thank you.

5 Q (By Ms. Halley) Now, I would like you to turn to page
6 four, please. And Section K, up at the top, it begins
7 "Regulations about farms/farming are severely
8 restricted by the Right to Farm Act." And then it goes
9 on to sort of give a synopsis of many of the issues we
10 have been talking about here today. Would you please
11 just take a minute and read this Section K. And then I
12 would just like to ask you a couple of questions about
13 it.

14 A Yes.

15 Q Thank you.

16 MR. KOCH: He is ready.

17 Q (By Ms. Halley) Okay. Can you just describe for me
18 what you took away from this little reading?

19 A (By the Witness) There is debate as to whether or not
20 regulations can or cannot restrict farming to certain
21 zoning districts. Unpublished court ruling suggests
22 farms/farm operations must be allowed anywhere.

23 Q At the, it would have been the second column, of row

24 four, the text that begins there say, the basic rule of
25 thumb is if the topic is covered in the Right to Farm

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1 Act or in a GAAMP, then that topic is off limits for
2 local regulation. Then it goes on to say, if a local
3 government submits its ordinance on farm/agriculture
4 showing that adverse effects on the environment or
5 public health will exist within the local government,
6 without the ordinance, to the Michigan Department of
7 Agriculture and the Michigan Agricultural Commission
8 approves the ordinance, then those local regulations
9 may apply. Do you agree with this interpretation of
10 the Michigan Department of Agriculture's role in
11 administering the Right to Farm Act?

12 A This --

13 MR. KOCH: Well, I am going to object. This
14 is not produced by the department. It is produced by
15 MSU Extension Service. And it is almost as if you are
16 asking him to comment on another opinion that you have
17 given him. So I will object, this is not his
18 department production. It is MSU Extension. If you

19 have got an opinion about the article, then go ahead.

20 Q (By Ms. Halley) All right.

21 A (By the Witness) This appears to paraphrase Subsection
22 7 in the Right to Farm Act, that a local unit of
23 government may submit a proposed ordinance to our
24 department for review under certain conditions.

25 Q So you disagree with what's stated here essentially,

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1 related to your department's role in administering that
2 section of the Right to Farm Act?

3 MR. KOCH: That's not what he said. He said
4 --

5 MS. HALLEY: I asked him a new question. I
6 am asking him if he disagrees with this statement about
7 his department's role in administering the act that he
8 is responsible for at the state level.

9 MR. KOCH: Does that pertain to the last
10 thing you asked him, about this provision where the
11 municipality could submit an ordinance, or are you
12 talking about the whole enchilada? Because that's what

13 we were talking about, that provision that you referred
14 to.

15 MS. HALLEY: I am not sure I understand your
16 objection.

17 MR. KOCH: I am asking if you were asking him
18 if he disagreed with what you last said or if he
19 disagreed with the entire subsection K that you have
20 asked him to read.

21 MS. HALLEY: Okay. Well, let's take it one
22 step at a time.

23 Q (By Ms. Halley) The section about the basic rule,
24 being that if the topic is covered in the Right to Farm
25 Act or in a GAAMP, then that topic is off limits for

1 public -- I am sorry, off limits for local regulation.
2 Does that conform to your understanding that you bring
3 to your duties when you are applying the Right to Farm
4 Act at the state level?

5 A (By the Witness) If a subject is defined in the act,
6 and clearly described in one of the GAAMPs, then the
7 Right to Farm applies.

8 Q Okay.

9 A I wouldn't phrase it this way in terms of describing
10 what we do. This is perhaps exaggerating a bit in
11 terms of if a subject is off limits. Maybe that's just
12 the style of the author. I wouldn't word something
13 this way.

14 Q Okay.

15 A We were not consulted in this document, in terms of
16 presenting or analyzing the application of the Right to
17 Farm Act or how it applies to local regulations, in
18 terms of this text that we have been reviewing.

19 Q Okay, fair enough. And let's move to the next
20 paragraph. And I am going to ask you the same question
21 about the next paragraph, that begins if a local
22 government submits its ordinance, et cetera, et cetera,
23 okay, through the end of Section K, does that comport
24 with in fact what happens when you are applying the act
25 in your duties?

1 A This paragraph, if a local unit of government submits

2 its ordinance, is paraphrasing Subsection 7 in the act.

3 Q Right.

4 A And again, it is not the way I would word that in terms
5 of how we would administer the Right to Farm Act.

6 Q Okay.

7 A When this refers to its ordinance, the act refers to a
8 proposed ordinance, not an existing ordinance, and I
9 want to be clear that there are distinctions between
10 those two.

11 Q I am sorry, can you repeat the last statement that you
12 made there?

13 A There are distinctions between an ordinance and a
14 proposed ordinance.

15 Q Okay. And in your view, what is that distinction?

16 A An ordinance exists. A proposed ordinance has not been
17 adopted yet.

18 Q Okay. And how is that relevant to the administration
19 of the Right to Farm Act?

20 A Subsection 7 references a proposed ordinance, not an
21 existing ordinance.

22 MS. HALLEY: Okay, all right. Okay. Okay, I
23 don't think I have any more questions.

24 MR. KOCH: Me neither. Thank you.

25 THE WITNESS: You are welcome.

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(The deposition was adjourned at about 12:11

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p.m.)

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