Chapter 3:

Legal Issues Involved in Rural Planning and Zoning

This chapter discusses the legal issues involved in the regulation of land use in general, with a particular emphasis on issues arising in rural areas. It begins with a general discussion of the legal principles that underlie the regulation of land use and then applies those principles to some of the unique issues that arise in the regulation of agriculture, including animal agriculture.

Please note that this chapter provides general information on the state of the law only. Anyone contemplating or seeking specific action involving a particular local government, a particular piece of property or a particular facility involved in animal agriculture should do so only with appropriate legal advice. While the authors have made every effort to provide accurate information, every case is different and requires considered review of the circumstances and available options. Many of the legal issues addressed in this chapter are relatively clear. In two important areas, however, the law is still evolving and thus is not clear:

1) The takings issue continues to evolve both nationally and in Michigan. Although it is unlikely that there will be a significant change in the basic principles outlined here in the near future, additional state and federal cases will almost certainly provide additional definition and precision to those principles.

2) The issues involved in the question of possible preemption of some local authority over animal agriculture by state regulation of these facilities is unsettled in Michigan. Agricultural interests have proposed that the State preempt regulation of agriculture under local planning and zoning. The U.S. Environmental Protection Agency is pressing Michigan to address federal requirements for regulating concentrated animal feeding operations, and a task force is developing an environmental assurance program that it hopes will respond to local governments' concerns about animal and manure management.

This chapter provides citations to relevant cases and statutes in Michigan[1] for the convenience of attorneys who may be familiar with land use or real estate law but who may not be familiar with all of the specific principles involved in the regulation of animal agriculture. Users seeking the advice of counsel on these issues may wish to provide their attorneys with a copy of this

[1]Internal citations and references have been omitted for clarity and brevity.

chapter as a starting point for their own analysis.

Although current discussion of issues involved in the regulation of animal agriculture often focuses on perceived limitations of the ability of government to regulate this particular type of activity, it is important to understand the broad powers of local governments in the land use field before considering specific limitations on them.

Planning and Implementation Authority of Local Governments

Police Power

Local governments regulate the use and development of land under the *police power.* Although law enforcement officers also act under the police power, the legal notion of police power is much broader than the term might suggest. Stated simply, the police power is the right and duty to regulate private activity for the protection of the public health, safety and welfare. Police power is inherent in the state and is delegated to local governments through specific enabling acts that also specify the scope of the delegation.

The authority of government to regulate private activity, including the use of private land, for the protection of the public health and safety is one that is fundamental to the notion of democratic government in a civilized society. Through the police power, government peacefully resolves and often avoids conflicts over private activity ranging from the discharge of firearms in an urbanized area to smoking in confined quarters.

Most valid local government regulations fall under the police power. Among those is zoning. Courts in Michigan have broadly construed the concept of police power to uphold local zoning and land use controls. "Property is held subject to the right of government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote public health, morals, safety, and welfare." *Patchak v. Township of Lansing*, 361 Mich. 489, 105 N.W.2d 406 (1960). In this case, land owners argued that township zoning prohibited them from using their land for what they considered its best use and therefore the zoning was unreasonable. The Michigan Supreme Court concluded that all property is held subject to the right of government to regulate its use. Valid land use regulations are not deemed confiscatory or unreasonable.

Property owners sometimes view zoning and other police power regulations as attempts to interfere with their property rights. In fact, property owners were among those who lobbied for the creation of the earliest zoning ordinances, primarily to *protect* property rights. Zoning and other land use regulations do protect property rights, by keeping factories out of residential neighborhoods, by keeping dangerous activities (such as the manufacture of explosives) far from most other human activities, and by protecting agricultural

areas from the unnecessary intrusion of incompatible uses.

The apparent conflicts between the police power and property rights are discussed later in this chapter, but it is important to understand that land owners' rights to use land are subject to regulation and restriction. As those early property owners who lobbied for zoning recognized, it may be necessary to limit individual action to protect the rights of all. Through the exercise of police power, responsible local governments attempt to balance the interests of individual liberty with the interests of the larger community in preserving order. Thus, for example, most local governments prohibit junkyards in residential areas, choosing to protect the interests of the residents even at the expense of limiting the freedom of action of a property owners in the area who might prefer to enjoy the profits of a junkyard on his or her property.

To understand the scope of authority of Michigan's local government to engage in planning and zoning, it is important to look at the enabling acts that set forth both the authority to plan and zone and a number of limitations on that authority. That is the subject of the next section of this chapter. While Michigan has specific enabling acts for counties, townships, and cities and villages, only the county and township enabling acts will be discussed since they have jurisdiction over rural areas likely to face questions related to agricultural land uses.

Planning and Zoning in Michigan

In Michigan, the legislature has separately authorized planning and zoning authority for counties and townships. Those statues can be found in the following sections of the state code:

- County planning, MCL §125.101 *et seq.*
- County zoning, MCL §125.201 *et seq.*
- Township planning, MCL §125.321 *et seq.*
- Township zoning, MCL §125.271 *et seq.*

In addition, there are separate provisions for regional planning (MCL §125.11 *et seq.*).

The scope of authority granted to counties and townships differs somewhat. It is not the purpose of this report to describe all of the differences. It is important, however, for any local government considering the adoption or amendment of such controls to review carefully the specific zoning provisions applicable to it.

There are similarities among the authorizing provisions, however. For example, **local zoning in all jurisdictions should be based on a comprehensive plan**, which is defined under county and township provisions:

> "The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare; to encourage the use of lands in accordance with their character and adaptability, and to limit the improper use of land; to conserve natural resources and energy; to meet the needs of the state's residents for food, fiber, and other natural resources, places of

> residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; to provide adequate light and air; to lessen congestion on the public roads and streets; to reduce hazards to life and property; to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements; and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development." MCL § 125.273(3) (township); MCL § 125.203(3) (county).

Early judicial interpretation of what constitutes a plan may be found in *Sabo v. Township of Monroe* 394 Mich. 531, 232 N.W.2d 584 (1975), and *Lanphear v. Antwerp Township, Van Buren County* 50 Mich. App. 641, 214 N.W.2d 66 (1973). The courts have held that they [the courts] should make every effort to preserve master zoning plans where they are developed in good faith and are reasonable as a whole with regard to the needs of the local and the general community. *Binkowski v. Shelby Township* 46 Mich. App. 451, 208 N.W.2d 243 (1973).

The basic nature of zoning for both forms of local governments is similar. Both contemplate the division of the jurisdiction into districts and the regulation of the uses to which land and buildings may be put in each of those districts. In addition, the local governments can regulate within those districts the location, height, number of stories, and size of dwellings, buildings and structures that may be erected or altered, the specific uses for which buildings can be erected, the size of yards and open spaces, and the number of families which may be housed in buildings, dwellings, and structures. There are slight variations in the wording, but both counties and townships have the authority to regulate all of these matters. However, neither counties nor townships are authorized to regulate or control the drilling, completion, or operation of an oil or gas well.

There is one other aspect of the enabling legislation that is important to understand in rural areas, and that is the relationship between planning and zoning activities of a township and the planning and zoning of the county of which it is a part. The statutes address this explicitly:

> "The [township's] plan...shall be referred to the county planning commission of the county of which the township is a part for its approval. The county planning commission shall approve or disapprove the plan within 45 days after date of receipt...In counties where there is no county planning commission, the referral shall be made to

the regional planning commission, if any, having planning jurisdiction over the township." MCL §125.328

"...the township zoning board shall submit the proposed zoning ordinance including any zoning maps to the county zoning commission of the county in which the township is situated for review and recommendation if a commission has been appointed...and is functioning in the county, or to the county planning commission...or, by resolution of the county board of commissioners, to the coordinating zoning committee of the county. If there is not a county zoning commission or county planning commission, the proposed zoning ordinance, including any zoning maps, shall be submitted to the coordinating zoning committee. If the recommendation of the county zoning commission, planning commission, or coordinating zoning committee has not ben received by that township within 30 days after receipt of the ordinance by the count, it shall be conclusively presumed that the county has waived its right for review and recommendation of the ordinance. The county board of commissioners of a county by resolution may waive the county review of township ordinances and amendments required by this section." MCL §125.280

Constitutional and Statutory Limitations of Planning and Zoning Authority

Local governments exercise police power only in accordance with the terms of various constitutional provisions and enabling acts. Local governments' exercise of police power is also explicitly limited by the U.S. and Michigan constitutions and by laws passed at the state and federal levels.

Protection From Takings

Owners of land and other property are protected from illegal seizure of that property by the U.S. and Michigan Constitutions. In particular, the Fifth Amendment to the U.S. constitution provides that "nor shall private property be taken for public use without just compensation." The Michigan Constitution states that "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. " Mich. Const. 1963, art 10, §2.

Early efforts to implement zoning were met by arguments that zoning amounted to an unconstitutional taking – that is, a taking of land for public use without just compensation. However, federal and state courts have consistently concluded that zoning is a legitimate exercise of the police power, so long as zoning is implemented and enforced according to enabling statutes and constitutional limitations. A brief review of how U.S. and Michigan courts have responded to arguments of illegal takings follows.

Evolution of Takings Law in the U.S. Supreme Court

The U.S. Supreme Court initiated the current period of takings legislation in 1922, when it held squarely that excessive regulation might amount to a taking. *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158 (1922).

Although it largely left the question of "how much regulation is excessive?" unanswered for six decades, it is important to note that only four years after handing down that decision, the Supreme Court upheld zoning as a valid form of regulation, explicitly finding that residential zoning as applied to land that an owner wished to use for industrial purposes did *not* amount to an unconstitutional taking. *Village of Euclid v. Ambler Realty Co.*, 47 S.Ct. 114 (1926).

The Supreme court reconsidered this issue beginning in the 1970s. The court clearly recognized two competing public policy interests involved in this issue. On the one hand, the notion of private property and its protection is a fundamental one in this society, as the takings provision in the Bill of Rights acknowledged. On the other hand, living in a civilized society requires some reasonable regulation to avoid land use disputes among neighbors and to provide for a peaceful resolution of those that arise. Clearly if a local government must pay compensation every time it decides that a particular piece of property ought only to be used for agricultural or residential use rather than for industrial or commercial purposes, it would be prohibitively expensive for local government to regulate land.

The Supreme Court finally found a middle ground between the competing interests by giving local government a choice. It concluded that, if a local regulation is found to be a taking, a local government ought to be able to choose between keeping the regulation in effect and buying the land, as though it had actually been condemned, or repealing the invalidated regulation and compensating the owner simply for the lost use of the property from the date of adoption of the regulation to the date of its repeal. See, *San Diego Gas and Electric v. City of San Diego*, 101 S.Ct. 1287 (1981). Although there was no majority opinion in that case, the notion of a "temporary taking" established there underlies all of the subsequent takings litigation. The court subsequently adopted that position more clearly in *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304 (1987).

Since that time, the Court has established several clear principles governing takings law. First, it has held that in determining whether there is a taking, one must consider the impact of the regulation on the entire property held by the owner, not on a small part of it. *Penn Central Transportation Company v. New York City*, 98 S.Ct. 2646 (1978), and *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232 (1987). That is an important principle for zoning law. Most zoning ordinances establish yard area and setback requirements prohibiting most uses in those yard and setback areas but allowing a reasonable use of the entire property.

The Court has also established some categorical rules for determining when an unconstitutional taking has occurred:

- Where a local ordinance purports to permit others to invade the physical space of the landowner, there is an unconstitutional taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). This case involved stringing television

cable across buildings, but the same principles would apply to a law that permitted utility or canal companies to cross rural lands without easements.

- Where an ordinance deprives a landowner of "all economically viable use" of his or her land, there is an unconstitutional taking. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). In that case, state law designed to limit the exposure of people and property to hurricanes prohibited the owner from building residences on two residential building lots that appeared to have little other use.
- There must be a "rational nexus" between the purpose of a regulation and its effect; otherwise there may be an unconstitutional taking. *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987). In that case, the Court found insufficient nexus between the owner's proposal to replace one house with a larger house on the same lot and the state's demand that the owner dedicate land for a beachfront trail.
- Where there is a rational nexus between the purpose of the regulation and its effect, there must also be a "rough proportionality" between the burden imposed on the property owner and the impact of the owner's proposed use or development. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994). In that case, the Court found insufficient evidence of proportionality where the city demanded dedication of land for a trail and installation of a variety of improvements as conditions of approving the expansion of an existing business.

It is quite clear, however, that where the purpose of the regulation is to prevent a clear nuisance or otherwise to protect essential public health and safety values, a local government has greater authority to impose significant restrictions on property. For example, in *Dolan*, the Court saw no constitutional bar to the city's adoption of a very restrictive floodplain ordinance; it simply objected to the city's requiring that the owner transfer title to the floodplain to the city.

Takings Law in the Michigan Courts

The Michigan Supreme Court recently handed down a landmark takings decision involving the regulation of wetlands on private property. In *K&K Construction v. Department of Natural Resources*, 456 Mich. 570, 575 N.W.2d 531 (1998), the Michigan Supreme Court set forth a taxonomy of takings law and procedures that provide a rational framework for Michigan governments and landowners to plan and resolve land use regulation conflicts.

Following the U.S. Supreme Court's guidance, the Court in *K & K* divided all takings cases into two general types:

> "(1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land". *K & K*, 576.

The *K & K* court went on to point out that those regulatory takings cases, of the second type, where a regulation denies a property owner of an economically viable use of land, can be further subdivided into two situations:

> "(a) a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land' [citing *Lucas*, 505 U.S. 1003]; or (b) a taking recognized on the basis of the application of the application of the traditional 'balancing test' [citing *Penn Central*, 438 U.S. 104]."

In other words, the extent of the alleged economic loss, complete or partial, determines the type of analysis to be used by the courts. For categorical takings, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. This is the case where there has been a physical invasion of the property or where a regulation forces an owner to lose all economically beneficial uses of his land in the name of the common good.

The *K&K* court did point out that regulations and restrictions that reduce the commercial value of land do not necessarily render it worthless or economically idle. Accordingly, in those taking situations where there has been no physical invasion and all economically beneficial uses have not been impaired by governmental activity, a balancing test is called for. Such a test considers (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations.

The *K&K* court also established a preliminary but crucial matter for takings cases in the state. The court set forth the parameters for determining what parcel or parcels owned by the plaintiff should be used in evaluating a claimed taking. This determination is referred to as determination of the "denominator parcel." This is critically important because it often affects the analysis of what economically viable uses remain for a person's property after the regulations are imposed.

The factors to be used to determine the size and composition of the denominator parcel include;

- the degree of contiguity of the parcels
- the dates of acquisition
- the extent to which the parcel has been treated as a single unit, and
- the extent to which the protected lands enhance the value of remaining lands.

The *K&K* court went on to instruct that the "failure to include a parcel of land in a development plan should not, by itself, exclude that parcel from consideration as part of the denominator. To do so would encourage piecemeal development."

Protection of Rights through Process

Typical use of the phrase "due process" refers to the inherent fairness of a legal or administrative process itself. **The basic notion of due process is that someone whose rights are affected by proposed**

government action ought to have: (1) **notice** of that proposed action; (2) the opportunity for a **fair hearing** on the matter (3) before an **unbiased tribunal**.

Substantive Due Process

The underlying purpose of substantive due process is to protect the individual from the arbitrary exercise of governmental power. *Michigan v. Sierb* 456 Mich. 519, 523 (1998). Land use controls must satisfy the substantive limits of federal and state due process clauses. That means that land use regulations must advance a legitimate state interest that serves the public health, safety, morals, and general welfare. The major substantive due process question regarding land use controls concerns whether the regulations serve the general welfare.

Objections to land use controls and regulations based on alleged violations of substantive due process do not usually succeed. Approved governmental purposes included serving the public's health, safety, moral, and general welfare. Examples of some land use control purposes that have been approved include: landmark preservation, preservation of open space, and retention of residential zoning. It should be noted that successful application of a plaintiff's substantive due process claim has not been forthcoming in federal or Michigan courts.

Procedural Due Process

Procedural due process protections apply to administrative or quasi-judicial proceedings. Acceptable procedures must be followed in administrative decision making. The minimum requirements are usually procedures that provide for notice and a hearing.

Federal courts usually treat zoning and re-zoning matters as legislative acts and therefore do not apply procedural due process analysis to such matters unless such a matter "inherently treats a particular class of persons inequitably." Procedural due process requirements are applied in federal court land use control cases only if a landowner has a claimed entitlement, not an expectancy, to a property interest protected by state law.

The Michigan Supreme Court in *Mudge* recently addressed and affirmed Michigan's requirements of procedural due process in light of recent federal Court of Appeals and Supreme Court rulings.

> "The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard 'in a meaningful manner.' Many procedural due process claims are grounded on violations of state-created rights, as is the case here; rights that do not enjoy constitutional standing. However, the right to a hearing prior to the deprivation is of constitutional stature and does not depend upon the nature of the right violated." *Mudge v. Macomb County* 458 Mich. 87, 580 N.W. 2d 845 (1998).

Notice issues usually are not complex. State statutes and local ordinances typically specify what notices (date, time and location of proposed meeting hearing or other action)

must be given. Statutes and administrative rules specify how much time before a meeting, hearing or action that notice must be given, as well as to whom and in what manner (e.g. public posting, newspapers, U.S. Mail). Most courts require at least substantial compliance with such requirements, although they may not always require absolute adherence to the requirements. For specific requirements regarding hearings, local governments should refer to the applicable enabling acts and legislation for the specific action being taken, as well as to the state open meeting law.

Issues related to a **fair** hearing are equally important. For example, counting the number of persons attending a hearing who 'oppose this application' or allowing opponents to dominate a hearing may deprive an applicant of a fair hearing. In *Certain-teed Products Corporation v. Paris Township.* 351 Mich. 434, 88 N.W. 2d 705 (1958), the Court concluded,

> "...it is apparent to us from this record that plaintiff-appellant never had other than a cursory (even though formally courteous) hearing before the township board. It appears to us that the fact issues were largely determined by the board under the impact of a completely-committed audience reaction, and that plaintiff was denied its right under the zoning ordinance for a review of this decision by the zoning board of appeals."

In this case, an industrial use was refused a special use permit by the township board. The court concluded that the board made its decision wholely on the basis of public pressure at a public hearing and did not give sufficient weight to facts and materials presented by the plaintiff in its permit application.

Although public officials often enter a hearing with opinions on matters before them, any expression of those opinions before the hearing (whether in public or in private) raises questions about whether the decision-making tribunal is in fact unbiased.

Limitations by Preemption

Local governments have only the authority expressly granted them through state enabling legislation. **When a higher level of government, such as the state, has, within its constitutional and statutory authority, regulated a matter, it is said that the higher government level *preempts* lower levels of government from regulating the same matter.** For example, once the state has set age limits for those buying or consuming alcoholic beverages, local governments cannot set lower or higher age limits for the same activity.

The preemption doctrine is an accepted part of the legal system in the United State. There are a number of good reasons for the doctrine's existence. The principal policy reason is that it limits the number of conflicts arising between laws and regulations of different levels of government. To use the previous example, if the state prohibited the sale of alcohol to anyone under 21 years of age, but one township in Michigan decided that the legal drinking age should be 22, genuine

confusion would exist about which law must be obeyed. Preemption prevents local governments from enforcing laws that conflict with state laws.

The issue becomes somewhat more complex, however, when federal or state regulations do not fully cover a subject. What if, for example, the state prohibited the operation of hazardous waste facilities in agricultural zones? Could a local government then prohibit such facilities in other zones? Could a local government prohibit other types of industry in agricultural zones? The Courts resolve such questions by trying to determine whether the state intended to "occupy the field" or whether it simply intended to pass a very narrow law addressing a very specific issue. **When state (federal) laws are intended to cover all aspects of a particular subject area and exclude local regulation, the state (federal) regulations are said to occupy the field.**

The Michigan Supreme Court's decision in *Rental Property Owners Association of Kent County v. City of Grand Rapids*, 455 Mich. 246; 566 N.W.2d 514 (1997) restated the criteria of the state's preemption doctrine as it relates to land use regulation.

> "The Michigan Supreme Court has long held that the existence of statewide statutes does not prohibit local municipalities from passing or enforcing their own ordinances. However, municipal ordinances are preempted by state law if 1) the statute completely occupies the field that ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute."

The Michigan Supreme Court went on to reiterate the guidelines for determining whether a statute has preempted municipal ordinances by completely occupying the field of regulation:

> "First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted...Second, preemption of a field of regulation may be implied upon an examination of legislative history...Third, the pervasiveness of the state regulatory scheme may support a finding of preemption...Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Rental Property Owners Association of Kent County v. City of Grand Rapids*, 455 Mich. 246; 566 N.W.2d 514 (1997).

The municipalities may enact ordinances that have requirements in addition to those of state law. The key for municipalities is that there is no conflict between the two sets of regulations, that the municipal ordinance is not unreasonable or discriminatory, and that the municipal ordinance does not run counter to the state statute.

> "Where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the

> prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective." *Rental Property Owners Association of Kent County v. City of Grand Rapids*, 455 Mich. 246; 566 N.W.2d 514 (1997).

The question of preemption is important to the issue of regulating animal agriculture when local governments attempt to address environmental aspects of animal agriculture through performance standards and other means of controlling management and production practices. However, there have been no tests of whether local governments can legitimately enforce management requirements or environmental regulations.

Equal Protection Limitations

Because zoning and land use controls classify land uses, they may give rise to claims based on the constitutional guarantee of equal protection of the law. This protection, found in the Fourteenth Amendment to the U.S. Constitution, prohibits a state from denying a person or class of persons the same protection of the laws, the enjoyment of rights, and the prevention and redress of wrongs enjoyed by other persons. The doctrine requires that similarly situated people must receive the same treatment under the law. Landowners can base their objection to classifications between land uses in zoning ordinances and their objection to classifications made by a zoning map on an equal protection claim. The former equal protection claim is a facial attack of the ordinance. The latter is an attack on the ordinance as applied; the ordinance may look fine on its face but its application violates equal protection.

Equal protection claims often overlap with takings cases and substantive due process claims. While the courts often do not make clear whether they are considering a takings claim together with an equal protection claim, the courts do apply similar standards of review when examining due process and equal protection claims. The judicial standard of review applied to legislative classifications such as zoning classifications usually requires a rational relationship between a legitimate state interest and the classification.

While the rational relationship standard has most often been applied by courts to equal protection claims, the majority and dissenting opinions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) demonstrate the range of tests that may apply in equal protection cases. The Court upheld an ordinance that allowed no more than two unrelated persons to qualify as a family in a single-family zoning district. The majority of the U.S. Supreme Court used a rational relationship test to uphold the legislative classification because there was some rational basis for its application. The dissenting opinion called for the application of the more rigorous strict scrutiny because of its belief that claimed fundamental

interests (privacy and association) were affected.

The Supreme Court in *Euclid*, 272 U.S. 365 (1926) applied the rational relationship test to uphold the usual zoning classification, exclusion of industrial and multi-family uses from a single family residential district. The rational relationship, in that case, was the protection of the community's health and safety.

The use of the strict scrutiny standard in equal protection cases has been applied by the Supreme Court when the classification is suspect or burdens a fundamental interest. Examples of suspect classifications include race, sex, and national origin. Fundamental rights include First Amendment rights of free speech and religion, as well as privacy and interstate travel.

The application of the rational relationship standard to equal protection claims has not been crucial in most land use regulation disputes. Where no suspect classification is claimed or no fundamental right has been violated, the rational relationship standard, a relatively low standard, applies. Zoning classification challenges may depend more on the adoption of comprehensive zoning than on constitutional arguments per se. The adoption and mapping of districts in a comprehensive zoning ordinance which relies upon independent uses of adjoining zones seems to be persuasive to courts. Courts may tend to be less inclined to apply the presumption of constitutionality when municipalities do not have comprehensive mapping. D. R. Mandelker, Land Use Law (4th ed. 1997).

Limitations on Exclusionary Zoning

Zoning ordinances and land use controls separate land uses and differentiate within use classifications. Therefore, zoning and land use controls exclude some uses from some areas. This general restriction does not trigger inquiry into impermissible "exclusionary zoning." Rather, it is the notorious use of zoning as a form of economic segregation, with sometimes racial overtones, that triggers constitutional review of zoning and land use controls.

Michigan's zoning enabling laws specifically address the exclusion of land uses.

> "A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township [county] in the presence of a demonstrated need for that land use within either the township [county] or surrounding area within the state, unless there is no location within the township [county] where the use may be appropriately located, or unless the use is unlawful." MCL § 125.297a (township); MCL § 125.227a (county).

To date, most of the cases involving the exclusion of a particular use from a community involve the exclusion of industrial and commercial uses. Further, most of the cases addressing these issues involve relatively small communities with limited geographical areas. To hold that a small town consisting of only a few hundred acres in an area can exclude a steel mill or a waste disposal site is quite different from

holding that an entire county or township can exclude a viable agricultural use. Although the ultimate question of whether a local government may entirely exclude certain agricultural uses remains subject to speculation in Michigan, it is an important issue to consider. Any rational consideration of it must take place in the context of the vast geographic areas of most counties and townships.

Enforcement

Enforcement is a critical element in the success of any government regulation. Shoppers in a downtown area take only a few days to discover that a community does not issue parking tickets for meter violations. After that, the meters become meaningless. Similarly, an unenforced, or unenforceable, land use regulation is so useless to a community that it may amount to a misrepresentation of the intent of the local government adopting it.

To take an urban example, it is fairly common for a local government approving a retail use (such as a convenience store) on the edge of a residential area to impose on it conditions related to the operating hours and the delivery of goods. Such conditions might require that deliveries be made "only between 7 a.m. and 7 p.m." and that the store operates "only between the hours of 7 a.m. and 11 p.m." Some restrictions even go farther and restrict particular activities (such as the sale of gasoline or alcohol) during particular hours. The difficulty with all of these restrictions is that enforcement must take place during the hours when certain activities are prohibited – in other words, between 11 p.m. and 7 a.m. (for operating hours) or between 7 p.m. and 7 a.m. Few communities have zoning enforcement officers on duty overnight. Most must pay over-time and endure a good deal of employee grousing to bring enforcement officers in during those hours. Although a community might decide to do so to halt a pattern of continuing and obvious violations (such as operating hours that regularly continued to 1 or 2 a.m.), enforcing something like delivery times is even more troublesome. Not only must an inspector work odd hours to enforce the restriction on delivery times, she or he must wait at the location, perhaps for hours, to catch the one or two trucks that may be violating the condition.

Local governments imposing such conditions often seek "win-win" solutions, permitting the development to proceed while offering some protection to the neighborhood. The problem is that the unenforceable conditions offer essentially no protection to the neighborhood. If the proposed use would be acceptable only with such conditions in place, then the local government should not have approved the use – because the conditions are unenforceable and thus meaningless. If the use was acceptable with or without the conditions, then the local government should have been honest with the neighbors and approved the use with or without the conditions. Of course, in some cases there may be voluntary, good-faith compliance with the conditions, but a local government cannot count on that as it adopts regulations, just as states do not count on voluntary compliance with speed limits.

Enforceability is often a problem with tailor-made conditions that arise during the regulatory permitting process. Restrictions included in adopted ordinances and other regulations have usually received the sort of review necessary to ensure that they are reasonably enforceable. A condition developed in the heat of public protests at a particular meeting is much less likely to be enforceable.

Unique Aspects of Planning for and Regulating Agriculture

Historic Perspective

Zoning originally evolved primarily in urban and suburban areas, providing a management tool to separate relatively intense but sometimes incompatible uses from one another. Land use conflicts were less significant in rural areas, largely because the level of activity was less intense. The combination of large spaces between rural land uses and a relatively low intensity of those uses that existed tended to mitigate the sorts of problems that led to early demands for zoning in cities and suburbs.

Zoning expanded to counties and townships for several reasons. First, a proliferation of special districts and other service providers in many states permitted suburban-type development to take place outside of municipalities. The intensity and character of that development often required suburban-type regulations to manage it and mitigate land use conflicts. Second, as suburbanites fled the suburbs for rural areas, they often sought the protection of suburban-type zoning in their new, exurban environments. Third, as family farmers expanded their scope of activities, the nature of land use conflicts in rural areas increased. Although a corn farmer might have lived in relative peace next to a soybean farmer or even a dairy farmer, when one of the farmers built a machine shop or a trailer court on the family farm, neighbors sometimes became concerned about conflicts between the different land use types. Finally, local governments began to use zoning to ensure that development in rural areas occurred on lots large enough for septic tanks and wells where those provided the only form of services.

Thus, beginning in the 1950s, zoning in rural areas became increasingly common. Now all states except Texas provide zoning authority to the counties and/or townships that have general jurisdiction over rural areas, and a significant number of counties and townships in most of those states have used that authority to implement their own zoning controls.

As zoning has evolved and spread, it has also changed. Early zoning ordinances in urban areas allowed single-family homes everywhere in the community. Similarly, early rural zoning permitted all agricultural activities in every zone. The assumption underlying such regulations was that the fundamental purpose of zoning was to protect residential and agricultural uses from incompatible uses. Although that remains one of the valid purposes of zoning today, many communities have begun to recognize that some uses besides agriculture and

residences needs protection. For example, major industries now prefer to be located in industrial parks where residences are prohibited, thus eliminating a possible source of citizen complaints and/or suits.

Communities have also begun to recognize that residences and agriculture may need protection from one another. The location of new subdivisions near agricultural lands may limit the practical ability or willingness of farmers to use pesticides and other farm chemicals, and that proximity may lead to conflicts between the children and dogs who live in subdivisions and the animals and plants that live on farms.

Furthermore, many people have an idyllic view of rural life and believe that they might welcome the opportunity to live in a subdivision next to a cornfield or meadow with a few cows. When faced with a large animal production facility, some may not be as comfortable with the odor, noise or hours of operation of such a facility. Thus, contemporary zoning involves distinctions and protections that did not seem necessary and that thus typically did not exist under early zoning regulations.

Part of the difficulty of addressing the issue of animal agriculture through planning and zoning is that many people still think of rural zoning as something that allows or even encourages the development of a variety of agricultural and residential uses in comfortable proximity to one another. In most cases, that is not a realistic scenario today.

Zoning Authority and Agriculture

The relationship between local planning and zoning authority and Michigan's Right to Farm Act (RTFA) is often questioned. **However, as currently written, the RTFA does not limit the authority of counties and townships provided under the county and township zoning acts.**

The RTFA was passed to protect agricultural uses of land from nuisance suits brought by people or businesses moving into agricultural areas. However, the law was also intended to provide for protection of environmental quality and minimize negative impacts on surrounding land users. Specifically, the statute states:

> "A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture." MCL 286.472 § 3(1)

Also,

> "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." MCL 286.472 § 3(2)

Generally Accepted Agricultural Management Practices for Manure Management and Utilization have been established by the Michigan Department of Agriculture, with assistance from Michigan State University Extension. The guidelines (GAAMPS) are updated annually to reflect new information and developments in technology and include recommendations for runoff control and wastewater management, odor management, construction of manure storage and treatment facilities, and manure application to land.

The Michigan Department of Agriculture is required to investigate when a complaint is lodged against an operation alleging that it is not using GAAMPS. In the event that an operation is not using GAAMPS,

> "...the director of the Michigan Department of Agriculture or his or her designee 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. The director of the Michigan department of agriculture or his or her designee shall determine if those changes are implemented and shall notify the person responsible for the farm or farm operation and the complainant of this determination in writing." MCL 286.473a § 3a(3)

There has been some debate about what kinds of agricultural operations are protected under the RTFA or, more specifically, what kinds are operations are defined as farms.

Under the statute definitions:

> "(a) 'Farm' means 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.
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> (b) 'Farm operation' means 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:
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> (i) Marketing produce at roadside stands or farm markets.
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> (ii) The generation of noise, odors, dust, fumes, and other associated conditions.
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> (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...
>
> (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."

There has been some litigation addressing the definition of a farm or farm operation. In *Jerome Tp. v. Melchi* 184 Mich.App. 228, 457 N.W.2d 52(1990), the maintenance of an apiary(beekeeping) was found to constitute a "farm" or "farm operation" for purposes of the RTFA. In *Richmond Tp. v. Erbes* 195 Mich.App. 210, 489 N.W.2d 504(1992), pallet construction of wood and nails were not "farm products" within the meaning of the RTFA where the majority of wood used for the pallets originated from outside the owners' property.

The RTFA was amended in 1995 to insure that it does not affect the application of other state and federal laws. Specifically:

"This act does not affect the application of state statutes and federal statutes... For purposes of this section, "state statutes" includes, but is not limited to, any of the following:

(a) The county rural zoning enabling act...

(b) The township rural zoning act...

(c) Act No. 207 of the Public Acts of 1921 [city or village zoning]." MCL 286.474 § 4

The Takings Issue and the Regulation of Agriculture

Property owners in rural areas often have great concerns about the interference of government regulation with their property rights. In that context, they often cite the taking issue as a basis for objecting to local regulation.

Where the takings issue may arise in rural areas is under regulations limiting the use of land strictly to agricultural purposes. Farm owners on the fringes of urban areas sometimes challenge exclusive agricultural zoning on the grounds that it interferes with their right to sell their land for development. Although such cases are often resolved when a local government simply rezones the farm to allow its development, some local governments have refused to do that leading landowners to sue. In his treatise, *American Land Planning Law*, Norman Williams has discussed the result of those cases, finding broad support for exclusive agricultural zoning. The common theme among those cases, from a variety of jurisdictions, is that agriculture itself is a reasonable use of land and that the limitation of land to an agricultural use thus is not arbitrary, unreasonable, unconstitutional or otherwise proscribed by legal principles.

Preemption and the Regulation of Animal Agriculture

The issue of preemptions seems like quite an abstract one, until it is applied to a particular set of facts and circumstances. Such a set of facts and circumstances can arise in the regulation of feedlots and other animal agriculture. Although zoning addresses land uses, some of the issues relevant to regulating land uses may relate to concerns also addressed by the state. For example, industrial performance standards related to smoke emissions that were long used in zoning have now largely been preempted and effectively superseded by a comprehensive system of state and federal regulation of air pollution.

Some of the issues involved in animal agriculture are classic zoning and land use issues. The noise and odors associated with such facilities may serve as the basis for regulating them, just as they serve as the basis for regulating other types of uses that generate noise and odors. To the extent that some such facilities generate unusual traffic, that is a classic land use issue. The very nature of the use and its intensity are standard zoning issues. On the other hand, legitimate concerns about the quality of runoff from such facilities may influence local government land use regulations, but they are matters also addressed by the Michigan Department of Environmental Quality and the U.S. Environmental Protection Agency through their responsibility for environmental regulation in the state.

Although it is unlikely that a local government will attempt to regulate water quality directly (a matter which would seem to fall squarely within the scope of state preemption), local governments may establish special setback requirements for such facilities from streams, may prohibit holding ponds as uses in floodplains, and may require special runoff management plans, much as a city might impose on an urban development. The legal issue that arises from such approaches is the question of whether the state's direct regulation of water quality and other environmental matters and the federal government's direct regulation of Concentrated Animal Feeding Operations preempt local efforts to regulate such matters. There has been no consideration of this issue by a Michigan court.

In 1998, the Michigan Court of Appeals addressed the question of whether local zoning ordinances which limited development in wetland areas were preempted by state wetland protection regulations. *Frericks v. Highland Township*, 228 Mich. App. 575, 579 N.W.2d 441 (1998). Highland Township implemented a "natural hazard areas" regulation as part of its zoning ordinance to "protect environmentally sensitive natural resources...from unnecessary developmental encroachment." The definition of "natural hazard areas" includes lake margins, stream valley flood plain areas, permanent march and swamp areas, high water table areas, and steep land areas. The ordinance provides that "natural hazard areas" shall not be counted toward meeting the minimum

buildable area requirements of the ordinance.

The ordinance was challenged on the grounds that the ordinance is preempted by state law. The Court of Appeals noted that the Township Rural Zoning Act, MCL § 125.271, provides for the establishment of zoning districts within which the proper use of land and natural resources may be encouraged or regulated by ordinance. Thus, it concluded that Highland Township's exclusion of environmentally sensitive areas from buildable areas falls within the broad powers afforded by the zoning enabling statute and constitutes a proper subject of zoning.

Water Quality Regulations and Animal Agriculture

While state and federal water pollution control laws prohibit discharges to surface water, in general, there are specific references made to animal agriculture in the federal Clean Water Act. In particular, Concentrated Animal Feeding Operations (CAFOs) are regulated as point sources of discharge under the Clean Water Act and, as such, are required to attain a discharge permit. As currently written, federal rules require that all concentrated animal operations of 1000 animal units or greater attain a discharge permit. Operations with 300 animal units or more may be required to obtain a permit, depending upon how water drains from the operation. In fact, a facility with fewer than 300 animal units may be required to obtain a permit if it is found to be improperly discharging wastes.

According to federal regulations,

> "The term animal unit means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds), multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0. 40 CFR 122, Appendix B.

Equivalencies are also provided in the regulation for poultry species.

At present, Michigan does not administer a discharge permit for CAFOs. Michigan's Department of Environmental Quality is currently debating with the U.S. EPA how this permitting requirement will be implemented in the state.

Also under debate is whether compliance with the RTFA GAAMPS will insure that an operation is managed so that environmental risks are minimized. However, use of GAAMPS is not required; it merely affords an operation protection from nuisance complaints. Nevertheless, some localities in Michigan have include a requirement that animal operations comply with GAAMPs. As discussed previously, the MDA is required to investigate when a complaint is lodged against an operation alleging that it is not using GAAMPS. There have been no tests of whether townships could request MDA investigations to support zoning ordinances nor of how MDA would respond

to such requests. Including such a requirement is likely to place a significant enforcement burden on the local government.

Enforcement Issues

Enforceability of zoning provisions in rural areas is a particular concern. Rural townships and counties typically have limited personnel for any function and may have no one assigned full-time to enforcement duties. Building inspectors and health officers often draw enforcement duty in rural areas. Although some become well-versed in land use issues from participation in professional seminars, others have so many demands on their time that they never have the time to master the complexities of zoning. Thus zoning enforcement in general is often lacking in rural areas.

To complicate that through the adoption of complex performance standards or other seemingly-innovative techniques may ultimately be a disservice to the community. **A county or township considering the adoption of any complex or sophisticated form of regulation of animal agriculture (or any other complex use) ought to study carefully the issue of enforcement before acting.** Only if local officials are satisfied that their staff can enforce what they adopt should they approve such regulatory programs.

This warning need not act as a bar to appropriate regulation. Techniques like locational restrictions and setbacks are relatively easy to administer and enforce. Persons currently responsible for enforcement of other zoning regulations can easily manage the administration and enforcement of such regulations. It is only with the more complex controls or those requiring constant vigilance (such as restrictions on the hours of arrival and departure of trucks) that the enforcement issues become uniquely difficult. Although the more sophisticated regulations may appear to offer unique solutions to complex problems, they only make sense if they are simple enough to be enforced or if staff are able and willing to enforce them.