

Executive Summary

Animal agriculture land use issues are being debated hotly throughout the state of Michigan and other livestock producing states. These debates are largely being played out at the local government level where long time and recent residents are joining together and asking local government to protect their lifestyles from change. On the other side, of course, are operators of animal production facilities. They provide a key element in food production in the United States. They cannot operate in cities because of land costs and other concerns. The only place that they can operate is in the rural areas. Although they might welcome the opportunity to move to a location that is far from the nearest neighbor, that is hard to do in an area settled on quarter-section tracts, with a house every half-mile or so along roads at one-mile intervals.

Local governments have an extremely difficult job to do in this situation. Rational officials recognize the value of the animal agriculture industry to the entire state, and to their own communities. On the other hand, local officials recognize their duty to the citizens who want to preserve a good quality of life. Although the day-to-day business of government may have more to do with road maintenance than with disputes over land uses, the most fundamental role of government in our society is to balance competing interests and to provide a reasonable set of rules to protect all interests.

Finding balance here means planning for animal agriculture as a viable and acceptable part of the rural community. That involves addressing the reasonable expectation of residents that the location of animal operations will be considered with the same care as the location of other business enterprises, while protecting the ability of animal producers to continue to be an important part of the business of Michigan.

The purpose of this handbook is to help local governments in Michigan to do exactly that – to create an environment in which their citizens are comfortable living with animal agriculture and in which responsible agricultural operators are comfortable doing business.

Chapter 1: Introduction

Chapter 1 describes the key factors that have contributed to the current political and policy debate over the location of animal production facilities: changes in rural populations, changes in the animal agriculture industry, and changes in how property rights are understood. It also provides an overview of the important role that agriculture plays within the state economy.

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Changes in the Rural Population

Many residents of rural areas now have little connection to production agriculture and are, in fact, several generations away from any prior familial connection to farming. The sense of disconnection from farm life and the farm economy tends to make residents less tolerant of the realities of living near farming operations.

Continuing a trend that began in earnest after World War II, non-farming populations have moved even further from the city centers into rural Michigan. Some of these new commuters have purchased farm houses on former homesteads. Others have moved onto large lots divided from farmland. Their expectations of peace and quiet are those of city dwellers, not those of traditional rural people.

Changes in Agricultural Production

From 1954 to 1997, the number of farms in Michigan decreased from 138,922 to 46,027. During the same period, average farm size increased from 119 acres to 215 acres. There have been similar shifts in the animal sector of Michigan's agricultural economy, with a trend toward larger, intensive animal operations. In general, changes in the animal agriculture industry are characterized by three types of changes: growth in farm size, increase in vertical coordination, and changes in production locations.

Much of the debate around animal agriculture and issues of land use has been characterized as a conflict between farm and non-farm rural residents, caused largely by

the constant movement of urban residents who "don't understand agriculture" into rural areas. This characterization significantly oversimplifies reality. In fact, in many areas, existing farmers are vocal opponents of new and expanding animal operations. These farmers voice many of the same concerns expressed by their non-farm neighbors: water quality, odor, quality of life, and changes in the character of their community.

Changes in Property Rights Perspectives

The changing demographics and changing structure of animal agriculture are linked to a shift in property rights related to environmental quality. With more and more non-agricultural, rural residents, the previously understood and accepted negative impacts of agricultural production (i.e. dust, odors, etc.) have become less acceptable. In addition, the distinction between large, industrial-type farms and smaller, more diverse farms and their roles in environmental protection is increasingly scrutinized. Agricultural and non-agricultural residents, alike, are more critical of the environmental impacts associated with large, non-traditional agricultural operations.

Michigan's Agricultural Economy

Agriculture remains a key component of Michigan's economy and a dominant economic force in the state's many rural counties. Chapter 1 argues that in planning for the future of townships and counties, public officials and citizens should not overlook the vital economic role played by

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animal production and other forms of agriculture.

The Role of Government

Thrust into the middle of debates surrounding animal agriculture are local governments – in Michigan, the counties and townships that have land use jurisdiction in rural areas. Long-time and recent residents are joining together and asking local governments to protect their lifestyle from change.

Chapter 2: Planning for Animal Agriculture

Through long-range planning, Michigan's counties and townships can avoid some land use controversies and prepare for ones that cannot be avoided. At their best, plans can help prevent future land use conflicts from developing and help address present conflicts by providing self-implementing guidance for what otherwise might be difficult planning decisions. When that does not work, plans at least provide a method for weighing competing interests.

Recognizing the Need

Planning provides a vital foundation for dealing with tough land use issues like siting animal production operations. It provides a forum for stepping back, taking a look at the forest as well as the trees, and charting a course based on long-term goals. Whatever the motivation, however, one of the most important steps in the process of planning is

the first one: recognizing the need and setting out to get it done.

After explaining the importance of long-range planning as a foundation for effectively dealing with the animal agriculture issue, Chapter 2 goes on to provide guidance to those Michigan counties and townships interested in preparing a plan. It begins by describing types of plans that may be useful for addressing agricultural land use issues. It goes on to describe a common-sense strategy for preparing a plan.

Types of Plans

Comprehensive plans and land use plans are two types of plans of primary interest to counties and townships developing or revising a plan to more carefully address agricultural issues.

Organizing the Process

Before setting out to work on the plan there are a few organizational matters to consider; namely who oversees the process and who does the work?

Oversight

Someone or a group will need to assume an oversight role. Their responsibility will be to convene meetings, review information, provide policy direction and coordinate the process.

Legwork

The legwork of planning will likely fall to a combination of groups and individuals.

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Volunteers

Local volunteers can have a key role to play in preparing rural area plans. In fact, including as many people as possible in the planning process is advisable.

Consultant

Even with the involvement of local officials and citizens, some counties or townships may need the services of outside consultants. The role of consultants can take several forms.

Developing the Plan

Assessing Existing Conditions

Most good plans start with an assessment of existing conditions. The availability of Geographic Information Systems can simplify the compilation and evaluation of the information collected. An existing conditions analysis generally includes at least the following elements:

Natural Environment. This assessment consists of an inventory and analysis of natural environmental features found within the county or township and the surrounding area with a particular emphasis on the opportunities and constraints suggested by those features.

Human-Made Environment (Public Infrastructure). The presence of major roadways and the availability of public sewer and water service greatly influence an area's development potential.

Human-Made Environment - Private. Existing land use and development patterns are an extremely important determinant of future land use patterns.

Moreover, the availability of private facilities such as railroad lines, truck terminals, grain elevators, sale barns, industrial parks, and even vacant industrial buildings also offer significant opportunities, while lack of such facilities may be a significant constraint on attracting or keeping some types of development in an area.

Population Characteristics. A region's overall population and its characteristics – age, education, employment – are critical influences on its future.

Economic Base. A county or township's current economic base has a profound influence on its future. The industries and businesses now located in a county or township are likely to provide a large percentage of future employment. To the extent that new businesses come into an area, they are likely to be similar to or related to existing businesses.

Other Resources. There may be other unique factors that influence a region's future. The reputation of an area's public schools or the existence of nearby recreational opportunities, for example, can provide a spring board for growth or tourism-related development. These and other types of unique community resources should be included in the inventory of existing conditions.

Arriving at a Vision of the Future

This step of the planning process can be used as an opportunity to establish local residents' long-term vision of the future or to set general long-term goals for the township or county. It can also serve as the first opportunity to define a list of critical issues and concerns to be addressed in the plan.

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Citizen participation and broad-based community involvement are critical features of any successful planning effort, especially at this point in the process.

Although some vision or goal-setting work can occur prior to or simultaneously with data-gathering and analysis, it will usually be helpful to have collected information before working to develop a vision for the future. Information on existing land use, environmental features, and economic factors can be used to educate and inform decision-makers, interest groups, and the public on the opportunities and constraints that will affect the future.

Developing Alternatives (Scenarios)

After completing the assessment of existing conditions, and garnering consensus about the county or township's long-range, shared vision, the next step is to develop different alternatives for getting there. These alternatives, sometimes referred to as scenarios, are really just a series of options or paths to the future.

Consolidating Alternatives into a Plan

Ideally, the preferred plan will be consistent with and move the county or township closer to the vision established earlier in the process. Moreover, the selected plan should be consistent with other plans and strategies in effect throughout the area. If it is not, action will need to be taken to remedy such inconsistencies.

Implementing the Plan

Once a plan has been adopted, no decisions related to growth, development, land use or

public facility planning and budgeting issues should be made without examining whether such decisions would be consistent with the plan. Additionally, implementation tools should be developed and adopted to help ensure that the plan's goals are carried out in day-to-day activities. The most common plan implementation tools are the zoning ordinance, subdivision regulations and capital improvements programs.

Monitoring and Updating the Plan

Monitoring a plan's effectiveness is an important follow-up activity to the process of preparing it. Ideally, the plan will include a number of measurable objectives that will allow the county or town to track how much progress is being made toward its goals.

Chapter 3: Legal Issues Involved in Rural Planning and Zoning Regulation

Chapter 3 discusses the legal issues involved in the regulation of animal agriculture.

Planning and Implementation Authority of Local Governments

The chapter begins with a general discussion of the legal principles that underlie any regulation of land use and then discusses some unique issues that arise in the regulation of agriculture.

This chapter provides general information on the state of the law only. Anyone proposing to act in this field should do so only with appropriate advice of counsel.

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Although the authors are confident that the principles used by counsel in advising clients who act in this area will be similar to those set out in this chapter, two areas of related law are changing particularly rapidly. Anyone dealing with the *takings* issue or with the issue of *preemption* of local authority by the state is likely to find that the law will have evolved further or even changed direction shortly after publication of this handbook.

Police Power

Local governments regulate the use and development of land under the police power, which is the right and duty to regulate private activity for the protection of the public health, safety and welfare. Most valid local government regulations fall under the police power. Among those is zoning. Courts in Michigan have broadly construed the notion of the police power to uphold local zoning and land use controls.

The apparent conflicts between the police power and property rights are discussed later in this chapter, but it is important to understand that "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).

Planning and Zoning in Michigan

The Michigan legislature has separately authorized planning and zoning authority for counties, townships and cities and villages

in Michigan. In addition, there are separate provisions for regional planning. The scope of authority granted to counties, townships and cities and villages differs somewhat. Nonetheless, there are similarities among the provisions, such as the requirement that all zoning should be based on a comprehensive plan.

The basic nature of zoning for all three forms of local government is similar. All 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, bulk, number of stories, size of buildings and other structures, the percentage of lot which may be occupied, the size of yards and other open spaces and the density and distribution of land uses. This handbook focuses on county and township planning and zoning, since those units will deal with most rural land use issues.

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

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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. Farmers and other landowners have responded to increased government regulation of land by arguing that some land use regulations amount to an unconstitutional taking. Both Federal and Michigan courts have provided guidelines for judging when a regulation "goes too far" and amounts to a taking.

Other Protections

Other protections afforded land owners through limitations on exercise of police power include:

- protection of rights through process. Typical use of the phrase "due process" refers to the inherent fairness of a legal or administrative process itself.
- limitations by preemption. 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.
- equal protection limitations. This doctrine, found in the Fourteenth Amendment to the U.S. Constitution, requires that similarly situated people must receive the same treatment under the law.

- limitations on exclusionary zoning. Michigan law prohibits zoning ordinances or zoning decisions that totally prohibit the establishment of a land use in the presence of a demonstrated need for that land use, unless there is no location where the use may be appropriately located, or unless the use is unlawful.

Enforcement

Enforcement is a critical element in the success of any government regulation. 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. 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 and Regulating Agriculture

Historic Perspective

Zoning originally evolved primarily in urban and suburban areas, providing a management tool to separate sometimes incompatible uses from one another. Zoning in rural areas was authorized by Michigan with the passage of the County and Township Zoning Acts in the 1930s.

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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, a farm that is operated using generally accepted agricultural and management practices, according to policy determined by the Michigan Commission of Agriculture, will not be found to be a public or private nuisance.

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. In general, courts have concluded 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. Legitimate concerns about the quality of runoff from animal agriculture operations 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. The legal issue that arises is 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.

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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. 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.

Enforcement Issues

Enforceability of zoning provisions in rural areas is a particular concern. Townships and counties typically have limited personnel for any function and may have no one assigned full-time to enforcement duties. 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.

Chapter 4: Implementation Options

Chapter 4, the final chapter, addresses regulatory strategies for implementing animal agriculture and land use planning objectives.

Separation vs. Mitigation

The chapter begins by describing the differences between separation-based land use control strategies and mitigation-based approaches.

Separation-based land use control strategies are based on the notion that spatial segregation is the best method of ensuring that different land uses do not have an adverse effect on one another. Traditional zoning districts and use-specific separation standards are presented as examples of separation-based approaches. Use-specific separation standards are those that require minimum distances between specified uses – between feedlots and residences, for example. A box on page 4-2 discusses the role of *intensity* in planning for and regulating land uses.

Mitigation-based strategies, on the other hand, are based on the idea that it is not the type of use or its location that matters, but rather how well it handles its impacts on surrounding areas. The earliest mitigation-based regulations came in the form of industrial performance standards, aimed at controlling dust, smoke and other emissions of industry. Performance zoning takes this concept and applies it to land uses in general. Advocates claim that such an approach offers communities a very flexible, effective and fair tool for addressing land use compatibility issues. For a variety of reasons, however, pure performance-based land use control systems remain rare, although it is not uncommon to find individual performance-based provisions within the local zoning ordinances. It is also

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common to find industrial performance standards in local ordinances.

As a result of the shortcomings of pure separation and pure mitigation-based approaches, most modern land development ordinances are comprised of a combination of separation and mitigation-based controls. Zoning districts, with their focus on the grouping together of uses with similar characteristics, continue to form the backbone of most ordinances. Increasingly though, separation-based regulations are being supplemented, if not supplanted, by flexible regulatory strategies focusing on how a use operates in its setting, not necessarily what the use is called.

Regulatory Options

After presenting the theoretical underpinnings of potential control strategies, the chapter goes on to present specific regulatory options.

Zoning Districts

Agricultural zoning districts, although commonly used for addressing farmland preservation, are not widely used to address animal agriculture because they do not focus on the potential differences among different types of agricultural land uses. Chapter 4 suggests that creating two or more zoning districts aimed at different types of agriculture – something local governments have long done with business and manufacturing uses – is an idea that should receive greater attention.

The idea behind the multi-level agricultural zoning is that, through sound land use

planning, it may be possible to identify areas that are appropriate for different types of agricultural activities. Analysis of residential development patterns, soil conditions, environmental features, drainage patterns, prevailing winds, aesthetic and other pertinent considerations may enable jurisdictions to develop a long-term land use plan that specifically addresses crop and animal agriculture. Of course, such a plan should also analyze and take into account the role of all forms of agriculture within the area's economy and the substantial investment that agricultural activities represent for their owners.

Special Land Uses

Some jurisdictions use special land use requirements as a means of regulating animal agriculture and other types of use. Although this approach offers the opportunity to review the particular issues involved with a particular proposal, it has the unfortunate side effect of forcing a public hearing on every controversial land use proposal. Further, the public hearing approach to facility siting issues can become an excuse for not facing up to the complex issues involved in planning for agriculture and setting reasonable standards.

Use-Specific Standards

Regardless of whether uses are permitted by-right or as special land uses, townships and counties may want to impose special conditions on some types of development. By devising objective standards, the number of uses classified as special land uses can be kept to a minimum. Clear standards are also easier to enforce.

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Performance Standards

Performance standards are a form of regulation based upon objective measurements of a use's impacts on the environment and on nearby uses of land. Although the concept is sound in theory, there are a number of technical problems in developing workable performance standards for a use like animal agriculture.

Nonconforming Uses

The adoption of new zoning standards governing animal agriculture may result in the creation of nonconformities. In zoning parlance, nonconformities are lots, buildings or uses that were legal when established but that violate one or more subsequently adopted zoning standards. Regulations governing nonconformities are a vital component of zoning ordinances.

Definitions

Precise definitions are essential in crafting regulations that can be understood, administered and enforced. The sample ordinance language includes definitions.

Sample Regulations

Pages SZL-1 to SZL-14 set out sample ordinance language for regulating and protecting all forms of agriculture, with an emphasis on animal agriculture. Provisions include:

- Section 505: Definitions
- Article 31: Limited Agriculture District
- Article 32: Conditional Agriculture District
- Article 33: Exclusive Agriculture District
- Article 16: Special Use Standards

The sample language provided includes more regulation than might be adopted in any given municipality. This is done to provide examples of several different approaches that a municipality might consider.

Appendix A: Planning Approaches

Appendix A provides detail about several planning approaches that local governments can use in planning for agriculture or for other purposes.

Appendix B: Information and Technical Support

Appendix B provides an annotated list of sources of additional information and technical support, including regional, state, federal and private agencies. All listings include addresses and phone numbers. Most include fax numbers, e-mail addresses and/or World Wide Web addresses. Each listing includes a brief description of available resources, and several tables provide cross-references from types of information needed to the resource agencies that provide it.

Bibliography

An extensive bibliography is provided of reference materials on planning, agricultural land preservation, animal agriculture issues and trends, capital improvements, economic importance of agriculture and general materials related to the handbook.