Is Marijuana Cultivation Covered by Michigan's Right to Farm Act?

By Robert Hendricks

The Right to Farm Act was enacted by the Michigan legislature in 1981.[1] The Michigan Department of Agriculture & Rural Development explains that the act's goal was "to help address...clashes between farmers and residents" and mediate between local regulation and farming activity.[2] The department views the act as active and dynamic: "The law is constantly evolving to respond to advancements in agricultural technology, practices, and lifestyles."[3] This article examines whether the protections afforded under the act extend to legalized marijuana[4] farming—in particular, immunity from nuisance liability and preemption of local regulations.

Since 2008, Michigan has significantly changed the legal status of marijuana. Beginning with the adoption by voters of the Michigan Medical Marihuana Act,[5] continuing with the 2016 Medical Marihuana Facilities Licensing Act (MMFLA),[6] and culminating with a ballot initiative scheduled for this November to legalize adult recreational use of marijuana,[7] Michigan has transformed marijuana policy and social and legal acceptability. It is now legal under state law to grow marijuana in Michigan in limited circumstances and the permissible scope of that activity will probably expand.

Despite statewide legal authorization and the increasing social acceptance of marijuana use and cultivation, these activities are not without neighborhood and local governmental opposition, which leads some to wonder about using the Right to Farm Act to defend marijuana cultivation.

Immunity from nuisance liability

The Right to Farm Act immunizes farms or "farm operations" from public or private nuisance liability if the farm or operation conforms to generally accepted agricultural and management practices (GAAMPs).[8] I believe that three questions must be answered to determine the applicability and value of this immunity:

(1) Is marijuana cultivation a farm or a farm operation?

(2) Which GAAMPs, if any, are available to marijuana cultivators?

(3) Without immunity, would marijuana cultivators be subject to nuisance claims?

A marijuana cultivation business is a farm operation under the Right to Farm Act if it commercially produces plants or animals that are held out for sale for a profit *and* are useful to human beings.[9] Since medical marijuana cultivation is a commercial enterprise[10] producing a plant useful to humans[11] for profitable sale, these criteria appear to be met. Moreover, anecdotal evidence suggests that objections against MMFLA-licensed growers by local governments or neighbors may be based on the sights, sounds, and smells of marijuana cultivation as a nuisance. Thus, the answers to the first and third questions support application of the Right to Farm Act to marijuana cultivation.

As to the second question, GAAMPs are "defined by the Michigan [C]ommission of [A]griculture,"[12] which has the responsibility "to recommend, and in some cases determine, policy on food, agricultural, and rural development issues."[13] Since its inception, the commission has established a total of eight formal GAAMPs[14] and Policy 8, which might be considered a GAAMP.[15] While these GAAMPs may seem to have little relationship to marijuana cultivation, a closer reading suggests otherwise. For example, nutrient utilization, irrigation and water use, and pesticide utilization/pest control contain many provisions that would likely apply to most plant cultivators, including marijuana growers. Thus, it would appear marijuana cultivation satisfies all three criteria for immunity under the Right to Farm Act.

To successfully assert the Right to Farm Act Section 3 defense to a nuisance claim, a party must prove that the farm or farm operation conforms to generally accepted agricultural and management practices.[16] Because the language of Section 3 is ambiguous, one plausible interpretation is that a farm conforming to GAAMPs has a complete defense to nuisance claims—in effect, a defendant may argue, "I'm a farm and my operation conforms to all the GAAMPs applicable to my farm; therefore, I cannot be found to be a nuisance."

Most Right to Farm Act cases require the GAAMP to be specifically related to the nuisance claim.[17] The mere existence of one or more GAAMPs that apply to the farmer does not seem to be sufficient for protection under the act. The nuisance claim the farmer seeks to avoid must relate in some way to the activity covered by a GAAMP. For example, if the nuisance claim is that odors emanating from a livestock operation are a nuisance, a farm's compliance with the livestock GAAMP will provide the defense. Even those early cases that take an expansive view of the applicability of the act have found a relation between the alleged nuisance activity and one or more GAAMPs.[18]

Some of the provisions of the nutrient utilization, irrigation and water use, and pesticide utilization/pest control GAAMPs are probably applicable to marijuana cultivation operations. However, marijuana farmers are unlikely to be cited for nuisance violations for these practices. If marijuana farms run afoul of their neighbors or local government, it will likely be because of odor, light, or noise issues, which do not appear to be the subject of cultivation GAAMPs.

If relevant GAAMPs are required but absent, this would not prevent the farmer from asserting other defenses to nuisance actions; it only means that the Right to Farm Act defense is not available. Moreover, if the only impediment to application of the act to marijuana farmers is the absence of a GAAMP relevant to the potential nuisance, the industry is presumably free to persuade the Michigan Department of Agriculture & Rural Development that a marijuana GAAMP is necessary and appropriate.

Regulatory preemption

The second way the Right to Farm Act might help marijuana cultivators is as a shield against unwanted local regulation (zoning and similar ordinances) that may prevent or limit marijuana farming. Subsection 4(6) of the act preempts certain types of regulation:

> Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.[19]

Preemption under Subsection 4(6) is limited by Subsection 4(5), which states: "Except as provided in Subsection (6), this act does not affect the application of state statutes and federal statutes."[20] Thus, state and federal statutes authorizing local regulation of farming activity are not preempted.

At a Glance

The Right to Farm Act "is constantly evolving to respond to advancements in agricultural technology, practices, and lifestyles."

A marijuana cultivation business is a farm operation if it commercially produces plants or animals that are held out for sale for a profit *and* are useful to human beings.

If marijuana farms run afoul of local governments and neighbors it will likely be because of odor, light, or noise issues, which do not appear to be the subject of cultivation GAAMPs (generally accepted agricultural and management practices).

The Right to Farm Act might help marijuana cultivators as a shield against unwanted local regulation (zoning and similar ordinances) that may prevent or limit marijuana farming.

The Michigan Department of Agriculture & Rural Development legal counsel opined in a letter dated March 7, 2018,[21] that because the MMFLA specifically authorizes local municipal regulation of marijuana facilities,[22] regulations of marijuana facilities as authorized by the act are not preempted. Presumably, local regulation would need to be consistent with the scope of allowed regulation provided in the MMFLA. If it is, however, the Right to Farm Act seems to allow it.

In addition, Michigan caselaw makes clear that

> only those ordinances, regulations, and resolutions by local units of government that either purport to extend or revise or that conflict with the RTFA or the GAAMPs are improper. An action by a local unit of government that impairs a farm or farm operation is not preempted by the RTFA if it is not an ordinance, regulation, or resolution that purports to extend or revise or that conflicts with the RTFA or the GAAMPs.[23]

Here, as with nuisance claims, the relevant inquiry for application of the Right to Farm Act appears to focus directly on whether there are applicable GAAMPs effected by the regulatory authority. If not—or if any such regulations are authorized by state or federal statutes—the act provides no protection.

Conclusion

As things currently stand, the Right to Farm Act seems only marginally applicable to marijuana farming. However, if a GAAMP were specifically developed for this industry, the act may provide significant legal protections to marijuana farmers. Establishing such GAAMPs would be one more sign of marijuana's growing acceptability in Michigan. ■

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ENDNOTES

1. MCL 286.471 *et seq.*
2. Mich Dep't of Agriculture and Rural Dev, *Michigan Right to Farm* <http://www.michigan.gov/mdard/0,4610,7-125-1599_1605---,00.html>. All websites cited in this article were accessed June 30, 2018.
3. *Id.*
4. Michigan law uses an "h" following the spelling in the Marihuana Tax Act of 1937. Many others, such as the Court in *People v Kolanek*, 491 Mich 382 (2012), use "j" for different reasons, including the rationale that "marijuana" is the more common spelling. This article and the others in this theme issue use "j" for consistency.
5. MCL 333.26421 *et seq.*
6. MCL 333.27101 *et seq.*
7. Regulate Marijuana Like Alcohol, *Initiative Language* <https://www.regulatemi.org/initiative/> and Ballotpedia, *Michigan Marijuana Legalization Initiative (2018)* <https://ballotpedia.org/Michigan_Marijuana_Legalization_Initiative_(2018)>.
8. MCL 286.473(1).
9. *Charter Twp of White Lake v Ciurlik Enterprises*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 2016 (Docket No. 326514).
10. MCL 333.27102(g).
11. MCL 333.26422(a).
12. MCL 286.472(d).
13. Mich Dep't of Agriculture and Rural Dev, *Michigan Commission of Agriculture and Rural Development Policy Manual* (May 10, 2017) <https://www.michigan.gov/documents/mdard/Commission_Policy_Manual_-_APPROVED_5.10.17_reduced_571657_7.pdf>.
14. Manure management and utilization; pesticide utilization/pest control; nutrient utilization; care of farm animals; cranberry production; site selection and odor control for new and expanding livestock facilities; irrigation water use; and farm markets. See Mich Dep't of Agriculture and Rural Dev, *Right to Farm GAAMPs Review—FY 17* (December 2016) <https://www.michigan.gov/documents/mdard/FY17_MDARD_ESD_RTF_GAAMPs_Annual_Report_623903_7.pdf>.
15. Mich Dep't of Agriculture and Rural Dev, Policy Manual, *Right to Farm Program*, Policy 8, pp 27–31 (May 10, 2017) <http://www.michigan.gov/documents/mdard/Commission_Policy_Manual_-_APPROVED_5.10.17_reduced_571657_7.pdf>.
16. MCL 286.473(1). See *Lima Twp v Bateson*, 302 Mich App 483, 496 (2013).
17. See, e.g., *Twp of Richmond v Rondigo*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2013 (Docket No. 307520).
18. See *Milan Twp v Jaworski*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2003 (Docket No. 240444) and *Village of Rothbury v Double JJ Resort Ranch*, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2004 (Docket No. 246596).
19. MCL 286.474(6).
20. MCL 286.474(5).
21. Letter from Bradley Deacon, Director, Office of Legal Affairs, Mich Dep't of Agriculture and Rural Dev (March 7, 2018) (used with the permission of Mr. Deacon) <http://cannalexlaw.com/letter-from-mdard-cannalex-law/>.
22. MCL 333.27205(1).
23. *Scholma v Ottawa County Rd Comm'n*, 303 Mich App 12, 23–24 (2013).