2002-14

STATE OF MICHIGAN
IN THE MICHIGAN COURT OF APPEALS

VILLAGE OF ROTHBURY, A
MUNICIPAL CORPORATION
Plaintiff/Appellee

Court of Appeals
Docket No. 246596
Trial Court Case No. 01-2610-CE

v

DOUBLE JJ RESORT RANCH, INC., a
MICHIGAN CORPORATION
Defendant/Appellant.

Rodger I. Sweeting P44625
Attorney for Appellee
Vanderploeg, Wells & Sweeting
110 W. Colby Street, P.O. Box 86
Whitehall, Michigan 49461
(231) 894-4652

Eric R. Fox P51877
Attorney for Appellant
Springstead, Waltz, Springstead
& Fox, P.C.
214 Washington Street
Hart, Michigan 49420
(231) 873-4022 Fax (231) 873-4024

Eric D. Williams P33359
Attorney for Amicus Michigan
Municipal League
524 North State Street
Big Rapids, MI 49307
(231) 796-8945

MICHIGAN MUNICIPAL LEAGUE'S AMICUS CURIAE BRIEF

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INTRODUCTION

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of some 514 Michigan cities and villages of which 434 also are members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the interests of member cities and villages in litigation involving municipal legal issues of statewide significance.

The Village of Rothbury requested the assistance of the Legal Defense Fund Board, which authorized the preparation and filing of this amicus curiae brief.

The issue of statewide significance to municipalities is the misconstruction of the Right to Farm Act by which all zoning authority of cities and villages over agricultural

land use is impliedly repealed, rather than limited as described in the RTFA to ordinances that do not conflict with the RTFA or generally accepted agricultural and management practices developed under this act. This is a matter of first impression, after the 1999 amendments to the RTFA. The ramifications of the trial court's erroneous interpretation and application of the RTFA are explained in this amicus curiae brief, with the hope that the Court of Appeals will correct and not compound the error of the trial court.

The trial court correctly determined that a corn maze and horse riding stables were not protected activities under the RTFA and the specific facts of this case, and utilized a two part test based on specific provisions of the RTFA that should be affirmed. The use of the two part test is a matter of first impression.

STATEMENT OF QUESTIONS INVOLVED

I. DOES THE RIGHT TO FARM ACT (RTFA) PREEMPT THE VILLAGE OF ROTHBURY'S PREEXISTING RESIDENTIAL ZONING DISTRICT THEREBY ALLOWING THE DOUBLE JJ RANCH TO CONDUCT AGRICULTURAL ACTIVITY ON THE PROPERTY ZONED FOR RESIDENTIAL USES, EVEN THOUGH THE ZONING ORDINANCE DOES NOT CONFLICT IN ANY MANNER WITH THE RTFA OR GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES?

Appellant says	YES
Appellee says	NO
Michigan Municipal League says	NO

II. **DID THE TRIAL COURT CORRECTLY DETERMINE THAT DOUBLE JJ'S CORN MAZE AND RIDING STABLE WERE NOT PROTECTED ACTIVITIES UNDER THE RTFA?**

Appellant says	NO
Appellee says	YES
MML says	YES

STATEMENT OF FACTS

The facts are in the Statement of Stipulated Facts, (APPENDIX, EXHIBIT 1) and the trial court's opinions of July 13, 2002, (APPENDIX, EXHIBIT 2) and November 12, 2002 (APPENDIX, EXHIBIT 3). Double JJ Ranch owns about 75 acres of land located within the Village of Rothbury which is zoned R-1 Residential. The properties were not used for agricultural purposes when the Double JJ Ranch purchased the properties. (Opinion of July 13, 2002, page 1; Opinion of November 12, 2002, page 1.)

STATEMENT OF THE BASIS OF JURISDICTION

The parties' statements of the basis for jurisdiction are complete and correct.

STANDARD OF REVIEW

This is an issue of statutory construction which requires de novo review. *Cherry Growers, Inc. v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153; 610 NW2d 613 (2000).

ARGUMENT

I. THE RIGHT TO FARM ACT (RTFA) DOES NOT PREEMPT THE VILLAGE OF ROTHBURY'S PREEXISTING RESIDENTIAL ZONING DISTRICT REGULATIONS, AND THE DOUBLE JJ RANCH SHOLD NOT BE ALLOWED TO CONDUCT AGRICULTURAL ACTIVITIES IN THE RESIDENTIAL DISTRICT BECAUSE THE ZONING ORDINANCE DOES NOT CONFLICT IN ANY MANNER WITH THE RTFA OR GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES.

Questions of statutory interpretation or construction are reviewed de novo. *Cherry Growers, Inc. v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153; 610 NW2d 613 (2000). This case illustrates the reason for de novo review. The parties and the trial court mistakenly assumed a conflict existed between the statute and the Village of Rothbury zoning ordinance, where none was asserted or found.

The central issue presented to the Court is a question of statutory interpretation of the RTFA; (APPENDIX, EXHIBIT 4). In particular, the Court is asked to interpret the 1999 amendment of the RTFA found at MCL 286.474 (6) that preempts local ordinances that ***conflict*** with the act. MCL 286.474(6):

> (6) Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

The trial court presumed that the Village of Rothbury zoning ordinance was in conflict with the Right to Farm Act, without identifying and determining the nature and extent of the conflict. This is the critical point on which the whole case turns, because without a conflict between the Village of Rothbury zoning ordinance and the Right to Farm Act, there can be no preemption of the Village of Rothbury zoning regulations.

The trial court effectively misconstrued the RTFA as an implied repeal of the City and Village Zoning Act, MCL 125.581 *et seq*, with respect to farming operations. This is a serious mistake that should be corrected by the Court of Appeals. The attention of the litigants was devoted to the specific factual circumstances of this case, and as sometimes happens in situations dominated by local concerns, the perception of broader legal issues becomes clouded or obscured.

Double JJ argued that it was legally allowed to conduct farm operations within the Village of Rothbury in a residential zoning district because the Right to Farm Act preempted the local zoning ordinance. The trial court incorrectly accepted Double JJ's contention, leading to an erroneous interpretation of the scope of the RTFA. Now Double JJ asks the Court of Appeals to extend the trial court's misconstruction of the RTFA.

The Court in *Cherry Growers, Inc.* at page 166 described the analytical framework utilized in interpreting a statute.

> This Court reviews questions of law, including statutory interpretation, de novo. *Faircloth v Family Independence Agency,* 232 Mich App 391, 406; 591 NW2d 314 (1998). The first step in discerning the intent of the Legislature is to consider the language of the statute. *Chandler v Dowell Schlumberger Inc.,* 456 Mich 395, 398; 572 NW2d 210 (1998). The language must be read according to its ordinary and generally accepted meaning. *Id.* If the language of the statute is clear and unambiguous, judicial construction is not permitted. *Frankenmuth Mut. Ins. Co. v Marlette Homes, Inc.,* 456 Mich 511, 515, 517-518; 573 NW2d 611 (1998). If reasonable minds can differ with regard to the meaning of a statute, judicial construction is appropriate. *Adrian School Dist. v Michigan Public School Employees' Retirement System,* 458 Mich 326, 332; 582 NW2d 767 (1998). The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins, supra* at 515; 573 NW2d 611. The court should apply a reasonable construction to best accomplish the Legislature's purpose. *Marquis v. Hartford Accident & Indemnity (After Remand),* 444 Mich 638, 644; 513 NW2d 799 (1994). Although statutory interpretation is a question of law, subject to review de novo, reviewing courts accord great weight to the administrative interpretation of a statute, unless that interpretation is clearly wrong. *Hoste v Shanty Creek Management, Inc.,* 459 Mich. 561, 569; 592 NW2d 360 (1999).

The Court in *In re Gaipa* 219 Mich App 80; 555 NW2d 867 (1996) indicated that when engaging in statutory construction the Court must use common sense and avoid an interpretation that would have unreasonable consequences: *In re Gaipa,* 219 Mich App 80, 84; 555 NW2d 867 (1996).

> The court must use common sense and apply a reasonable construction that best accomplishes the statute's purpose. See *Marquis v. Hartford Accident & Indemnity (After Remand),* 444 Mich. 638, 644, 513 N.W.2d 799 (1994). Furthermore, the statute should be construed so as to avoid unreasonable consequences. *ACCO Industries, Inc. v. Dep't of Treasury,* 134 Mich.App. 316, 321, 350 N.W.2d 874 (1984).

The Village of Rothbury's statutory authority to adopt and enforce its zoning ordinance is found in the City and Village Zoning Act, MCL 125.581 *et seq.* "The legislative body of a city or village may regulate and restrict the use of land and structures," ... "to insure that uses of the land shall be situated in appropriate locations"

… "and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section." MCL 125.581, as excerpted. Even more specific is the Legislature's statement regarding the designation of permitted or excluded land uses. ***"For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations."*** MCL 125.581, emphasis added.

An implied repeal of city, village, township and county zoning authority regarding all agricultural operations would not be favored. As summarized in *Dodak v State Administrative Board*, 441 Mich 547, 562; 495 NW2d 539 (1993):

> "[t]he presumption is always against the intention to repeal where express terms are not used, and the implication, in order to be operative, must be necessary. Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary." (Cites omitted.)

If the legislature intended to repeal the zoning enabling statutes that authorize cities, villages, townships and counties to permit or prohibit agricultural uses in certain zoning districts, then the legislature most probably would have repealed or amended the appropriate enabling language in MCL 125.581 and corresponding sections in the Township Zoning Act, MCL 125.271 *et seq*, and the County Zoning Act, MCL 125.201 *et*

seq. It is far more logical to interpret the RTFA as limiting the exercise of local zoning to provisions that do not conflict with the RTFA, rather than as an implied repeal of the City and Village Zoning Act. Nowhere in the RTFA is there an affirmative statement authorizing hog, chicken, horse, dairy, and other farm operations in established residential, industrial or retail zoning districts.

Double JJ may argue that the Village of Rothbury, the Michigan Municipal League, or the Court of Appeals must explain what the first sentence of MCL 286.474(6) means, if it does not preempt all zoning ordinance regulations pertaining to farm operations. That argument should be rejected, because the legislature stated that "it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act." MCL 286.474(6). There was no claim by Double JJ that the Village of Rothbury zoning ordinance extended or revised any provision of the RTFA. There was no finding by the trial court that the Village of Rothbury zoning ordinance extended or revised any provision of the RTFA. Similarly, there was no claim or finding that the Village of Rothbury zoning ordinance extended or revised a generally accepted agricultural and management practice. Simply stated, the first sentence of MCL 286.474(6) does not apply to the facts of this case at all.

Undoubtedly Double JJ will argue that the second sentence of MCL 286.474(6) indicates the state legislature's intent to preempt any local zoning ordinance that excludes agricultural or farm operations from a residential zoning district. But of course that is not how the statute reads. ***"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."*** The introductory clause refers to subsection (7), by which local ordinances can prescribe standards different than those contained in generally accepted agricultural and management practices. The final clause refers to local ordinances not developed and approved according to the provisions of subsection (7) that conflict with generally accepted agricultural and management practices. Double JJ must argue that the Village of Rothbury ordinance "conflicts in any manner with this act" by excluding agricultural or farm operations from one of the Village's residential zoning districts. But with what portion or provision of the RTFA does the Village of Rothbury zoning ordinance conflict? Double JJ and the trial court identified none. By way of illustration, there is no substantive provision in the RTFA affirmatively stating that all farm operations are exempt from zoning regulation. Nor is there a provision in the RTFA stating that cities and villages must allow agricultural or farm operations in every zoning district. In the absence of an affirmative statement or provision by which a farm operation can operate in any zoning district, Double JJ can make no persuasive argument that the Village of Rothbury zoning ordinance "conflicts in any manner with this act."

Preemption of a local ordinance is not automatic.

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even when there is no direct conflict between the two schemes of regulation.

People v Llewellyn, 401 Mich 314, 322; 257 NW2d 902 (1977). State preemption of municipal ordinance powers can be based on an express provision of a statute, *Noey v Saginaw*, 271 Mich 595; 261 NW 88 (1935).

The language of MCL 286.474(6) on preemption is clear and unambiguous. The act preempts a local ordinance that "purports to extend or revise in any manner the provisions of this act or generally accepted agricultural management practices developed under this act." Double JJ did not prove and the trial court did not find that the Village of Rothbury zoning ordinance purported "to extend or revise the provisions of the act or generally accepted agricultural management practices developed under the act."

The purpose of the RTFA as described in MCL 286.473 is to protect farms and farm operations against claims that farms or farm operations are either a public or private nuisance.

> Sec. 3. (1) 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. Generally accepted agricultural and management practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.
> (2) 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.
> (3) A farm or farm operation that is in conformance with subsection (1) shall not be found to be a public or private nuisance as a result of any of the following:
> (a) A change in ownership or size.
> (b) Temporary cessation or interruption of farming.
> (c) Enrollment in governmental programs.
> (d) Adoption of new technology.
> (e) A change in type of farm product being produced.

The stated purpose of the RTFA was determined by the Court of Appeals after the 1999 amendments to the RTFA. In *Travis v Preston*, 249 Mich App 338, 342; 643 NW2d 235 (2002) the Court said:

> The RTFA was implemented to protect farmers from nuisance lawsuits. *Belvidere Twp. v. Heinze,* 241 Mich.App. 324, 331, 615 N.W.2d 250 (2000). Under the RTFA, a farm or farming operation cannot be found to be a nuisance if it meets certain criteria, such as conforming to "generally accepted agricultural management practices."

Nowhere in the statute or in Michigan case law is there an assertion or indication that the RTFA prohibits governmental units from enacting and enforcing general zoning districts. In particular, there is nothing in the RTFA or Michigan case law suggesting the RTFA preempts existing zoning districts and thereby licenses farm operations in any preexisting zoning district, no matter how long the property has been zoned for uses other than agricultural.

All of the subsections within the RTFA are focused on protecting the farmer from nuisance complaints either at common law or on the basis of an ordinance enacted by a local governmental unit. Although not the law, the titles to the subsections within this statute are descriptive of the content.

> 286.471. Short title Sec. 1. This act shall be known and may be cited as the "Michigan right to farm act".
> 286.472. Definitions
> 286.473. Circumstances under which farms or farm operation are not public or private nuisances.
> 286.473b. Nuisance actions, costs
> 286.473c. Disclosures by sellers (that property purchased may be within one mile of a farm)
> 286.474. Environmental complaints involving farms or farm operations

Interestingly, the Double JJ Ranch cites MCL 286.474(6), within the section that addresses environmental complaints, for the proposition that the RTFA preempts all local zoning, without identifying how the zoning ordinance conflicts with a provision of the RTFA. MCL 286.474(6) prohibits local ordinances from conflicting with "this act" (RTFA), and it provides in the very next subsection, MCL 286.474(7), a procedure for a local governmental entity to "submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government." This refers to different standards for the size and capacity of operations like hog farms, rather than a zoning ordinance that creates residential (and other) zoning districts. The statutory focus of this portion of the RTFA is on local ordinances enacted to cover environmental issues and not on zoning

ordinances that create zoning districts, and certainly not on zoning districts that were in place long before someone decided to conduct farming activities on property zoned for residential uses.

The direct connection between nuisance complaints and zoning ordinances such as the one adopted by the Village of Rothbury is found at MCL 125.587:

> A building erected, altered, razed, or converted, or a use carried on in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the building or land, or both the owner and the agent, are liable for maintaining a nuisance per se. The legislative body in the ordinance adopted pursuant to this act shall designate the proper officials whose duty it is to administer and enforce the ordinance and do either of the following for each violation of the ordinance:
> (a) Impose a penalty for the violation.
> (b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.

Corresponding sections are found in the Township Zoning Act, MCL 125.294, and the County Zoning Act, MCL 125.224. The legislature aimed MCL 286.474(6) at least in part at local zoning ordinances that might be adopted and enforced against a farm operation as a nuisance per se, in conflict with Section 3 of the RTFA. MCL 286.473.

The conflict between the Village of Rothbury zoning ordinance and MCL 286.473, if any existed, was not identified by Double JJ or the trial court. For example, it was not established by the set of stipulated facts on which the trial court relied that Double JJ's farm operation "conforms to generally accepted agricultural and management practices

according to policy determined by the Michigan commission of agriculture." MCL 286.473(1). Nor was it established by stipulated facts that Double JJ's 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 286.473(2). The stipulated facts and the trial court's opinions reveal no basis for invoking or granting the protection of the RTFA described in MCL 286.473. Consequently, Double JJ cannot demonstrate a conflict between the Village of Rothbury zoning ordinance and the protection afforded to a farm operation under MCL 286.473, because neither one of the prerequisites for obtaining the benefit of the section was established.

The trial court's analysis of the statute was perfunctory and conclusory. "[T]he statute was initially written so that a farm or farm operation was subject to local zoning ordinances." "The practical effect of the 1999 amendment is that a farm or farm operation in compliance with generally accepted agricultural management practices is not only immune from public or private nuisance suits, but, also, exempt from local zoning laws." (Opinion of June 13, 2002, page 1.) The trial court did not find that Double JJ's activities constituted a farm operation in compliance with generally adopted agricultural management practices, so the trial court failed to make the preliminary determination necessary to reach the result of preemption.

According to the trial court's interpretation of the RTFA, a person could acquire land in a city or village within an established industrial, retail, or residential zoning district, and open a pig, chicken, dairy or blueberry farm in compliance with generally accepted agricultural and management practices.[1] This result was not intended by the Michigan Legislature, and the text of the RTFA does not support the interpretation of the statute employed by the trial court.

The Michigan Municipal League contends that the RTFA as amended was designed and intended first to protect farm operations from nuisance lawsuits, and second to prevent local ordinances from conflicting with generally accepted agricultural and management practices. For example, in an agricultural zoning district the municipality could not limit the number of hogs, cows, or chickens that might be fed, penned, raised, milked, or maintained contrary to generally accepted agricultural and management practices. However, the RTFA was not intended to permit farming operations to move into established residential zoning districts and to commence an otherwise prohibited agricultural land use. In this respect, the result reached by the trial court leads to absurd and unreasonable consequences.

Most of the misunderstanding of the statute can be traced to the 1999 amendment. As the trial court accurately observed, "the statute was initially written so

[1] It appears that GAAMPs have not been developed on all types of farm operations, leaving regulatory room for local ordinances that do not conflict with GAAMPs. This also reveals the absence of a pervasive and exclusive state regulatory scheme.

that a farm or farm operation was subject to local zoning ordinances." (Opinion of July 13, 2002, page 1.) *Village of Peck and Hoist*, 153 Mich App 787; 396 NW2d 536 (1986); *City of Troy v Papadelis*, 226 Mich App 90; 572 NW2d 246 (1997). But for the 1999 amendment, the decision in *City of Troy v Papadelis*, id, would have determined the outcome in the present case, which would have been completely favorable to the Village of Rothbury. The key portion of the 1999 amendment was quoted by the trial court, but was not analyzed properly. MCL 286.474(6):

> Beginning June 1, 2000, except as to otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

Double JJ never contended and the trial court never found that the Village of Rothbury zoning ordinance "purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act." Instead, Double JJ and the trial court apparently concluded that the Village of Rothbury zoning ordinance "conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act." However, the nature of the conflict was not identified, described, or analyzed. This is a fatal flaw in the trial court's interpretation and application of the RTFA, which should not be extended and compounded by the Court of Appeals.

Double JJ and the trial court presumably agreed that Double JJ's efforts to conduct a farm operation in a residential zoning district within the Village of Rothbury established a conflict between the zoning ordinance and the RTFA, but that conflict between the zoning ordinance and the RTFA was not identified, explained, or determined. Double JJ and the trial court incorrectly assumed that a conflict between the Village of Rothbury zoning ordinance and Double JJ's attempts to operate a "farm" within the Village was the legal equivalent of a conflict between the zoning ordinance and the act. It is not.

The only conflict established in this case was between the Village of Rothbury's residential zoning district and Double JJ's efforts to open and operate a prohibited business within the residential zoning district. Double JJ's activities were not an established prior nonconforming use entitled to traditional statutory protection. MCL 125.583a. See also *City of Troy v Papadelis*, supra. As the trial court noted, "the Village argues that land in question was used as a farm by the previous owners, but the agricultural use terminated after the land was zoned as residential and before JJ bought the land." (Opinion of June 13, 2002, page 1.) "The property at issue is 75 acres of land owned by Double JJ within the Village limits, and this property is zoned within the R-1 classification of a residential district." (Opinion of November 12, 2002, page 1.) The factual scenario recited by the trial court was not contested by Double JJ.

Therefore, the trial court translated the conflict between the Village of Rothbury's residential zoning district and Double JJ's prohibited agricultural operations as a conflict between the zoning ordinance and the RTFA. The Michigan Municipal League contends this was a misconstruction and misapplication of the RTFA that leads to a legislative license to use land for farm operations in any city, village, county, or township residential zoning district anywhere in the State of Michigan! Such a dramatic overhaul of city, village, county, and township zoning authority cannot be found in MCL 286.474(6). This is an implied repeal of all local zoning authority over agricultural land uses, which should be viewed with skepticism and disfavor.

The trial court's misinterpretation was stated plainly. "The practical effect of the 1999 amendment is that a farm or farm operation in compliance with generally accepted agricultural management practices is not only immune from a public or private nuisance suits, but, also, exempt from local zoning laws." (Opinion of June 13, 2002, page 1.) The Michigan Legislature did not proclaim or declare that farming operations are "exempt from local zoning laws."

The trial court relied on the article of Steven J. Laurent, 2002 L Rev Mich St U Det 213 (APPENDIX, EXHIBIT 5) for its conclusion, almost quoting the general assertion at page 6: "with the 1999 revision, farmers in compliance with the GAAMPS not only continue to receive immunity from nuisance suits, **but they also are granted an exemption from local zoning laws**." (Emphasis added.) Obviously, the trial court

accepted this proposition at face value, instead of analyzing and interpreting the text of the statute before applying the RTFA to the facts of this case.

There is the risk of additional misinterpretation of the RTFA on appeal. Double JJ argues that its horse riding stables are a farm operation entitled to protection by the RTFA against the Village of Rothbury zoning ordinance. But again Double JJ misses the point of proving a conflict with the act or a generally accepted agricultural management practice. The Village of Rothbury has not adopted or sought to enforce a zoning ordinance regulation that would contradict the generally accepted agricultural management practices for horse riding stables, growing corn, or growing pumpkins. The Village of Rothbury sought to enforce its residential zoning district regulations against prohibited agricultural land uses. This type of regulation of land uses still is authorized by the City and Village Zoning Act, MCL 125.581, which was not impliedly repealed by the enactment of MCL 286.474(6). The limited effect of MCL 286.474(6) is indicated by MCL 286.474(5): "Except as provided in subsection (6), this act does not affect the application of state statutes and federal statutes." Therefore, it was incumbent on Double JJ to prove how the Village of Rothbury zoning ordinance conflicted with a provision of the RTFA, rather than with Double JJ's use of its property, in order to trigger the preemptive effect of MCL 286.474(6).

Subsection (7) of MCL 286.474 helps clarify the type of conflict the legislature envisioned between local zoning ordinances and generally accepted agricultural and

management practices. A local unit of government may still propose an ordinance "prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government." Additional steps must be taken to obtain approval, and it is clear that without approval as prescribed in MCL 286.474(6), the local ordinance cannot be enforced. But of course the Village of Rothbury's zoning ordinance does not prescribe different agricultural standards for operating a horse riding stable within an agricultural zoning district inside the Village. The zoning ordinance prohibits agricultural operations in residential zoning districts. In this regard Double JJ's argument on appeal fails to identify any actual conflict between the Village of Rothbury's zoning ordinance and the RTFA or generally accepted agricultural and management practices for horse riding stables. Without proof of the conflict, there is no preemption.

If the Court concludes that it cannot determine the intent of the legislature from the language of the statute, the Court can then look outside of the RTFA to determine the intent and purpose of the statute; *Luttrell v. Department of Corrections*, 421 Mich 93, 103; 365 NW2d 74 (1984):

> Where ambiguity exists in a statute, a court may refer to the history of the legislation in order to determine the underlying intent of Legislature. "Courts do not exist in a vacuum. They may take cognizance of facts and events surrounding the passage and purpose of legislation." *Wilkins v. Ann Arbor City Clerk*, 385 Mich. 670, 691, 189 N.W.2d 423 (1971).

There is written material that can assist the Court in determining the purpose and intent of the legislature when it enacted the 1999 Amendments to the RTFA.

1. Senate Fiscal Agency Bill Analysis - Senate Bill 205 - 1-4-00. (APPENDIX, EXHIBIT 6). This analysis of the RTFA in describing the rationale for the statute gives an indication that the amendment to the statute was to address situations where local governmental entities adopted zoning ordinances directed toward preventing or limiting particular agricultural practices, rather than agricultural land use in general. The analysis states in part:

    Originally enacted in 1981, the Michigan Right to Farm Act is designed to protect farmers from lawsuits brought by neighboring residents who are not used to the noise, odor, and dust that accompany typical farming activities. Under the Act, a farm or farm operation may not be found to be a public or private nuisance (something that interferes with a person's enjoyment of his or her life or property) if the farm meets certain criteria, such as conformity to generally accepted agricultural and management practices (GAAMPS). The Act also provided, however, that it did not affect the application of Federal and State statutes, including local zoning ordinances. As a result, even though a farm might have a defense to a nuisance lawsuit, it still could be found in violation of a local ordinance.

    The application of local zoning ordinances apparently has been problematic and costly for some farmers, particularly when they wanted to expand operations. **A township ordinance, for example, might limit the number of animals allowed per acre, prohibit noxious odors, or restrict noise levels.** Since the Right to Farm Act did not supercede local land use laws, a farmer could be denied a permit necessary to expand, or after expanding, could find himself or herself subject to a lawsuit brought by displeased residents. To remedy this situation, it was suggested that the Right to Farm Act generally should preempt local ordinances.

However, this type of preemption did not produce the wholesale repeal of local zoning authority. The focus of the 1999 Amendment to the RTFA was on situations where a local governmental entity passed zoning regulations that created a basis for nuisance complaints against farming operations in conflict with section 3, MCL 286.473, or purported to establish different agricultural standards than generally accepted agricultural and management practices.

2. Public Policy Analysis - Right To Farm Amendments Public Act 261 of 1999 (SB 205), Michigan State University Extension, Elizabeth Moore, Patricia E. Norris and Gary D. Taylor, February, 2000. (APPENDIX, EXHIBIT 7).

This document was drafted to assist MSU Extension staff members in understanding the 1999 Amendments to the Right to Farm Act. The authors assert that the RTFA prevents local governmental entities from enacting ordinances that set different standards then the Generally Accepted Agricultural and Management Practices (GAAMP) set by the Michigan Department of Agriculture. Prior to the enactment of the 1999 Amendment, the RTFA precluded a nuisance complaint by private individuals if a farmer followed the established GAAMPs. The problem was that a local governmental entity could create a different standard thereby creating another basis for a nuisance complaint, contrary to the protection provided in section 3, MCL 286.473.

> The amended RTFA thus prevents local governments from enacting ordinances that set standards for farming operations that differ from those contained in the

GAAMPs. The logical corollary, then, is that ordinance provisions that do not do these things should be allowed under the law. For example, a local zoning ordinance that sets standards for odors, manure storage and application, or animal care would be prohibited because GAAMPs have been (or will soon be) developed to address these issues. **However, a local zoning ordinance that establishes zoning districts, the location of those districts, and the type of activities that can be carried on within those districts (without setting management standards) will presumably be allowed**. (Emphasis added).

3. Public Policy Analysis - Michigan's Right To Farm And Generally Accepted Agricultural And Management Practices Act 261 of 1999 (SB 205), Michigan State University Extension, Patricia E. Norris and Gary D. Taylor, July, 2000. (APPENDIX, EXHIBIT 8).

The authors assert that the RTFA does not prevent local governmental entities from establishing agricultural zones or other zoning districts.

> In general, the new GAAMPS leave with the local unit of government the decision of where, within its jurisdiction, livestock production facilities will be located. **More specifically, townships and counties are still able to establish agriculture zones and determine the location of those zones.** (Emphasis added)

4. Give Family Farms the Right to Farm, Traverse City Record-Eagle, Jack Laurie President of Michigan Farm Bureau, November 29, 1999. (APPENDIX, EXHIBIT 9).

> However, some township officials and extreme environmentalist would like you to believe it closes the door on the local control and opens the floodgate for "corporate" or "factory" farm operations. **This bill does not remove a township's ability to zone for land use**, and I challenge anyone to define a "corporate" or "factory" farm. (emphasis added)

As can be seen from this opinion letter written to the Traverse City Record-Eagle by the Jack Laurie, the President of the Michigan Farm Bureau and published by the newspaper on November 29, 1999, Mr. Laurie was of the opinion that local governmental entities had the ability to zone for land use, including agricultural land use.

It is clear from the published materials written at the time the 1999 amendment to the RTFA was enacted that the individuals and organizations impacted by the legislation did not believe that the intent of the legislature was to prohibit local units of government from enacting and enforcing zoning ordinance districts. The problem the legislature sought to correct was the adoption of local ordinances that purported to extend or revise the RTFA, or the adoption of local ordinances that set standards for farm activities different than generally accepted agricultural and management practices developed under this act. The Village of Rothbury zoning ordinance does not conflict with the RTFA, and is not preempted by the RTFA.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT DOUBLE JJ'S HORSE RIDING STABLES, AND ITS CORN MAZE WERE NOT PROTECTED ACTIVITIES UNDER THE RTFA.

The trial court applied a two-part test to determine whether the Double JJ Ranch's tourist horseback riding operation was a protected activity under the RTFA. The trial court concluded that in order for the activity to be protected by the RTFA the

activity must involve the commercial production of a farm product and the activity must be involved with the production of the farm product.

The trial court found that "horseback riding as part of a recreational activity provided by a resort does not fulfill the second part of the test to determine protection under the RTFA, because the activity is not reasonably connected to the production of a farm product. In contrast, raising horses (like flowers and Christmas trees) for sale or using a horse to pull a farm implement in corn field would meet the test." (Opinion of November 12, 2002).

While the trial court correctly determined that a tourist horseback riding operation was not reasonably connected to the production of a farm product, commercial horseback riding also is not a protected activity because it is not an agricultural activity. The operation of a tourist horseback riding stable does not fall under the protection of the RTFA because tourist horseback riding is not defined in the act as an agricultural activity.

In order to determine whether a tourist horseback riding stable is a protected activity under the RTFA the Court must look to the definitions found within the statute. In particular, the RTFA contains definitions for a "farm", "farm operation" and "farm product" in MCL 286.472.

(a) "Farm" means the land, plants, animals, buildings, structures, including ponds used for agricultural or aqua cultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

(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:
(*i*) Marketing produce at roadside stands or farm markets.
(*ii*) The generation of noise, odors, dust, fumes, and other associated conditions.
(*iii*) The operation of machinery and equipment necessary for a farm including, but not limited to, irrigation and drainage systems and pumps and on-farm grain dryers, and the movement of vehicles, machinery, equipment, and farm products and associated inputs necessary for farm operations on the roadway as authorized by the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.
(*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.
(c) "Farm product" means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products, cervidae, livestock, including breeding and grazing, equine, fish, and other aqua cultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

The definition of "farm" limits activity to the "commercial production of farm products." As to the definitions of "farm operation" and "farm product" the statute gives a general definition for each phrase followed by specific examples for "farm operation" and "farm

product." Nowhere in the general definitions or in the listed examples does the statute include a tourist horseback riding stable as a "farm operation" or a "farm product". Importantly, even though both definitions indicate the specific examples are not all inclusive, rules of statutory construction compel the conclusion that a tourist horseback riding stable is not a covered and protected activity.

In *Huggett v Department of Natural Resources,* 464 Mich 711; 629 NW2d 915 (2001) the Court was asked to determine whether a cranberry farm was exempt from the wetland permit requirements under MCL 324.30305 (2)(e). The Court found that the farming activity exemption to the statute did not cover the cranberry farm. The statute in question indicated that farming activity was exempt from the permit requirement and then defined farming activity "including" specific farming activities. Since cranberry farming was not listed within the specific farming activities, the question was whether the statute could be interpreted to cover the cranberry farming activity. In *Huggett* at page 718 the Court stated:

> When a statute uses a general term followed by specific examples included within the general term, as the farming activities exemption does, the canon of statutory construction ejusdem generis applies. See *Belanger v. Warren Bd. of Ed.,* 432 Mich. 575, 583, 443 N.W.2d 372 (1989). This canon gives effect to both the general and specific terms by "treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words." *Id.,* quoting 2A Sands, Sutherland Statutory Construction (4th ed.), § 47.17, p. 166. **In light of the specific terms, the general term is restricted to include only things of the same kind, class, character, or nature as those specifically enumerated.** See *Sands Appliance Servs., Inc. v. Wilson,* 463 Mich. 231, 242, 615 N.W.2d 241 (2000). (Emphasis added.)

As in *Huggett,* where the Court found that the cranberry farm operation did not fit within the farming exemption, here a tourist horseback riding stable does not fit within the definition of "farm operation" or "farm product". It is not one of the listed activities found in each definition and, importantly, it is not of the "same kind, class, character, or nature as those specifically enumerated." Even if the Court would determine that the Double JJ Ranch could conduct some farming activity on the land in question, the operation of a tourist horseback riding stable is not a protected farming activity under the RTFA.

The trial court carefully reviewed and analyzed portions of the RTFA that define a farm, farm operation, and farm product. MCL 286.472(a), (b), and (c). (Opinion, November 12, 2002, pages 2-3). The trial court found a maze in a corn field was not a farm product or farm operation. Double JJ argues on appeal that the use of planted corn as a maze makes the corn maze a farm product under the RTFA. The trial court rejected Double JJ's argument and so should the Court of Appeals. According to Double JJ's method of analysis, using a corn field for paint ball games or a rock concert would entitle the paint ball games or rock concert to protected status as farm products and a farm operation.

The two part test developed and utilized by the trial court was based on the plain language of the statute. Horseback riding does not involve production of farm

products, so it does not qualify as a "farm operation" as defined in MCL 286.472(b), or a "farm product" as defined in MCL 286.472(c). Double JJ's reliance on generally accepted agricultural and management practices on riding stables is misplaced, because the activity at issue in this case is outside the pertinent statutory definitions. The presence and terms of "GAAMP"s on horse riding stables does not amend the RTFA.

RELIEF

The Michigan Municipal League requests no relief on its own behalf, and acknowledges the Village of Rothbury filed no claim of appeal or cross appeal. The trial court's decision on Double JJ's pumpkin patch is not before the Court of Appeals for review.

Double JJ's request to interpret and apply the RTFA to its corn maze and horse riding stables is squarely before the Court of Appeals. That request should be denied because the stipulated facts did not establish that Double JJ was operating a farm operation in conformity with generally accepted agricultural and management practices, MCL 286.473(1), or prior to a change in land use or occupancy in a manner that was not a nuisance before that change, MCL 286.473(2). In addition, the trial court misconstrued the RTFA as preempting all municipal zoning authority over agricultural land uses, rather than preempting only those ordinances that purport to extend or revise the RTFA, or conflict with a provision of the RTFA, or conflict with generally accepted agricultural and management practices developed under this act. Finally, the

trial court correctly determined that Double JJ's corn maze and horse riding stables were not protected activities under the RTFA and the specific stipulated facts of this case.

The trial court's decision should be affirmed, with clarification by the Court of Appeals that the RTFA preemption of local zoning must be based on a specific conflict with a provision of the RTFA or a generally accepted agricultural management practice developed under the act, neither one of which was established in this case.

Dated: August 22, 2003

Eric D. Williams P33359
Attorney for Amicus MML
524 North State Street
Big Rapids, MI 49307
(231)796-8945