

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,
Office of Attorney General
By Thomas W. Corbett, Jr.,
Attorney General,
Plaintiff

v.

Heidelberg Township, Heidelberg
Township Board of Supervisors,
North Heidelberg Township,
North Heidelberg Township Board
of Supervisors, Borough of Robesonia,
Robesonia Borough Council, Borough
of Womelsdorf, and Womelsdorf
Borough Council,
Defendants

No. 357 M.D. 2006
Argued: November 13, 2006

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Office of Attorney General
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Litigation Section

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: December 12, 2006

Before this court are the preliminary objections filed by Heidelberg Township, the Heidelberg Township Board of Supervisors, North Heidelberg Township, the North Heidelberg Board of Supervisors, the Borough of Robesonia and Robesonia Borough Council (collectively, Defendants) in response to the Petition for Review (Petition) filed in this court's original jurisdiction by the Commonwealth of Pennsylvania, Office of Attorney General By Thomas W.

Corbett, Jr., Attorney General (Attorney General).¹ We sustain Defendants' preliminary objections and dismiss the Petition without prejudice as to the Defendants.

Chapter three of the Agricultural Code (ACRE), 3 Pa. C.S. §§311-318, which took effect July 6, 2005, deals with local regulation of normal agricultural operations so that such operations are consistent with state policies and statutes.² To that end, section 313 of ACRE, in relevant part, provides:

¹ In this opinion we address only the preliminary objections filed by Heidelberg Township, North Heidelberg Township and the Borough of Robesonia. It does not appear that the Borough of Womelsdorf filed preliminary objections.

² Section 312 of ACRE, 3 Pa. C.S. §312, adopts the definition of "normal agricultural operation" in section 2 of the Right to Farm Act, 3 P.S. §952. Section 2 of the Right to Farm Act, Act of June 10, 1982, P.L. 454, *as amended*, 3 P.S. §952, defines a "normal agricultural operation" as:

[t]he activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is:

- (1) not less than ten contiguous acres in area; or
- (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least \$10,000.

The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural

(Footnote continued on next page...)

(a) Adoption and enforcement of unauthorized local ordinances -- *A local government unit shall not adopt nor enforce an unauthorized local ordinance.*^[3]

(b) *Existing local ordinances* – This chapter [ACRE] shall apply to *the enforcement of local ordinances existing on the effective date of this section* and to the enactment or enforcement of local ordinances enacted on or after the effective date of this section.

....

3 Pa. C.S. §313 (emphasis added).

(continued...)

equipment and machinery defined by the act of December 12, 1994[, P.L. 944, 3 P.S. §§1901-1915], known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

3 P.S. §952.

³ Section 312 of ACRE defines an “unauthorized local ordinance” as:

[a]n ordinance enacted or enforced by a local government unit which does any of the following:

(1) *Prohibits or limits a normal agricultural operation unless the local government unit:*

(i) has expressed or implied authority under State law to adopt the ordinance; and

(ii) *is not prohibited or preempted under State law from adopting the ordinance.*

(2) Restricts or limits the ownership structure of a normal agricultural operation.

3 Pa. C.S. §312 (emphasis added).

On or about November 17, 2005, pursuant to section 314(a) of ACRE, 3 Pa. C.S. §314(a),⁴ an agricultural entity located in North Heidelberg Township requested the Attorney General to review the Joint Ordinance of 2004 (Joint Ordinance), enacted on January 10, 2004, by Heidelberg Township, North Heidelberg Township, the Borough of Robesonia and the Borough of Womelsdorf and to determine whether to bring legal action against these municipalities. Following his review, the Attorney General filed the Petition pursuant to section 315 of ACRE, 3 Pa. C.S. §315, which authorizes the Attorney General to bring an action against a local government unit in Commonwealth Court to invalidate an unauthorized local ordinance or enjoin the enforcement of an unauthorized local ordinance. In the Petition, the Attorney General asserts that certain sections of the Joint Ordinance violate ACRE,⁵ (Petition ¶¶22; Exh. B), and seeks declaratory and injunctive relief. Specifically, the Attorney General asks this court to invalidate

⁴ Section 314(a) of ACRE provides:

[a]n owner or operator of a normal agricultural operation may request [the Attorney General] to review a local ordinance believed to be an unauthorized local ordinance and consider whether to bring legal action under section 315(a) (relating to right of action).

3 Pa. C.S. §314(a).

⁵ The challenged sections of the Joint Ordinance, sections 202, 308(B), 309(G), 402(Y)(5) and 403(D)(3), pertain to: (1) the regulation of intensive agricultural activities; (2) the requirement that an operator of an intensive agricultural activity submit tests and studies to ensure that a public health, safety or welfare concern will not be created; and (3) the regulation of composting activities related to intensive agricultural activity. (Petition ¶¶10-22.) The Attorney General avers that these sections of the Joint Ordinance are invalid under ACRE and/or preempted by, *inter alia*, the Nutrient Management Act, 3 Pa. C.S. §§501-520, the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202, the Agriculture Area Security Law, Act of July 30, 1981, P.L. 128, *as amended*, 3 P.S. §§901-915, and the Right to Farm Act. (Petition ¶¶35-39, 49, 52, 55.)

these provisions of the Joint Ordinance and to enjoin these municipalities from attempting to enforce the challenged provisions. The Petition does not indicate that Defendants have attempted to enforce any of the challenged sections of the Joint Ordinance.

Defendants filed preliminary objections in the nature of a demurrer challenging the legal sufficiency of the Petition and requesting that the court dismiss the Petition.⁶ Relying on section 313(b) of ACRE, 3 Pa. C.S. §313(b), Defendants assert that the Attorney General lacks the authority to bring the instant action under ACRE because the Attorney General failed to plead facts averring that Defendants have acted to enforce the challenged provisions of the Joint Ordinance, all of which pre-existed ACRE.

The Attorney General counters that sections 313(a) and 315(a) of ACRE provide him with the requisite authority. The Attorney General points out that section 313(a) specifically prohibits local government units, like Defendants, from *adopting or enforcing* unauthorized local ordinances, 3 Pa. C.S. §313(a), and section 315(a) expressly authorizes the Attorney General to bring an action to invalidate or enjoin the enforcement of an unauthorized ordinance without regard

⁶ In ruling on preliminary objections, the court must accept as true all well-pled allegations of material fact as well as all inferences reasonably deducible therefrom. *Department of General Services v. Board of Claims*, 881 A.2d 14 (Pa. Cmwlth. 2005). However, the court need not accept conclusions of law or expressions of opinion. *Id.* For preliminary objections to be sustained, it must appear with certainty that the law will not permit recovery, and any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Id.*

to whether the ordinance was enacted before or after ACRE's effective date.⁷ 3 Pa. C.S. §315(a). However, we agree with Defendants.

Although the Attorney General is correct that section 315(a) authorizes him to bring an action to invalidate or enjoin the enforcement of unauthorized local ordinances under section 313(a), the Attorney General fails to consider section 313(b) of ACRE. This section specifically addresses ACRE's application to ordinances that existed prior to the effective date of section 313, such as the Joint Ordinance challenged in the Petition here, and states that with regard to such ordinances, ACRE applies only to their *enforcement*. 3 Pa. C.S. §313(b). Thus, we agree with Defendants that in order for the Attorney General to state a cause of action under ACRE, he must aver facts in the Petition to indicate

⁷ The Attorney General also claims authority to bring this action based on the general rule of law allowing for those who are or will be affected by the enforcement of a law to seek review of the law by alleging that the law is illegal or invalid. *Hydropress Environmental Services, Inc. v. Township of Upper Mount Bethel*, 575 Pa. 479, 836 A.2d 912 (2003) (waste-processing company challenging the provisions of an ordinance requiring the company to pay for road improvements); *Arsenal Coal Company v. Department of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333 (1984) (regulated mining company challenging the validity of regulations pertaining to anthracite mining); *Rouse & Associates v. Pennsylvania Environmental Quality Board*, 642 A.2d 642 (Pa. Cmwlth. 1994) (land developer challenging the redesignation of a creek from a less environmentally protected level to a more environmentally protected level). However, in the cases cited, the challenges to the validity of the laws were brought by those parties who would have been directly affected, i.e., aggrieved, by the enforcement of the laws, not by the Attorney General. The interest of the party who will be affected by the alleged illegal law must be distinguishable from the interest shared by all of the citizens. *Id.* In the present matter, the interest of the Attorney General cannot be distinguished from the interest shared by all citizens; thus, the Attorney General's reliance on these cases to support *his authority* to bring an action under ACRE is misplaced.

that Defendants have *attempted to enforce* the challenged provisions of the Joint Ordinance.

The Attorney General contends that he has pleaded sufficient facts in the Petition because Defendants' actions of *enacting* the Joint Ordinance and *maintaining* the Joint Ordinance's provisions "on the books" constitutes all the "enforcement" necessary to support a claim under ACRE. We cannot agree.

ACRE does not define the terms "enforce" or "enforcement;" however, the "enforcement" of local ordinances is addressed in the MPC, in section 1601 of the Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §66601, and in section 3301 of the Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §48301, all of which provide guidance in the present matter. The MPC, which authorizes local municipalities to enact and enforce zoning regulations, *see* sections 601 and 616.1 of the MPC, 53 P.S. §§10601, 10616.1,⁸ provides that a municipality shall initiate *enforcement* proceedings against a party by sending an "*enforcement* notice" to the alleged violating party. The MPC further authorizes a municipality to take any appropriate action to prevent, restrain, correct or abate a violation including the commencement of civil enforcement proceedings that may result in the violating party paying a civil judgment or fine. *See* sections 616.1, 617 and 617.2 of the

⁸ Section 616.1 was added by the Act of December 21, 1988, P.L. 1329, *as amended*, 53 P.S. §10616.1.

MPC, 53 P.S. §§10616.1, 10617-10617.2.⁹ Sections 1601(c.1)(1), (2) and (4) of the Second Class Township Code authorize a township to *enforce* an ordinance through civil *enforcement* (civil penalties), equitable *enforcement* or *enforcement* by initiating summary offense proceedings before a district justice. 53 P.S. §§66601(c.1)(1), (2), (4). Section 3301 of the Borough Code provides that a borough can *enforce* a violation or failure to comply with any borough ordinance by prosecuting such violation as a summary offense. 53 P.S. §48301. As these provisions clearly illustrate, in order to *enforce* an ordinance, a municipality must go beyond merely maintaining the enacted ordinance “on the books;” the municipality must take affirmative action to compel compliance with the ordinance or penalize noncompliance.

After reviewing the Attorney General’s pleadings, we agree with Defendants that the Petition fails to aver facts that state a cause of action under ACRE; specifically, the Petition fails to aver that Defendants have attempted to enforce the alleged invalid provisions of the Joint Ordinance.¹⁰ Accordingly, we

⁹ Section 617.2 was added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §10617.2.

¹⁰ In December 2003, an appeal was submitted to this court concerning the North Heidelberg Township Zoning Hearing Board’s (ZHB) denial of an agricultural operator’s (operator) zoning permit application (Application) for a proposed dairy operation in North Heidelberg Township. *See Gelsinger, t/a Gel-Bare Farms v. Zoning Hearing Board of the Township of North Heidelberg*, (Nos. 1891 and 1912 C.D. 2003, filed January 13, 2004). The ZHB denied the Application on the grounds that the proposed use was an intensive agricultural use under section 201.4(9) of North Heidelberg Township’s Zoning Ordinance of 1993 (1993 Ordinance) and section 522.3a of the 2002 amended provisions of the Ordinance (2002 Ordinance Amendments). In an unreported opinion, we affirmed the ZHB’s denial, holding that the ZHB did not err in: (1) characterizing the proposed use as an intensive agricultural use pursuant to the 1993 Ordinance and 2002 Amendments; (2) denying the operator’s request for **(Footnote continued on next page...)**

sustain Defendants' demurrer and dismiss the Attorney General's Petition without prejudice as to the Defendants.


ROCHELLE S. FRIEDMAN, Judge

(continued...)

special exception because the operator could not comply with the setback required in the 1993 Ordinance and 2002 Ordinance Amendments; and (3) denying the operator's variance request because the operator failed to meet its heavy burden of showing unnecessary hardship and that the variance would be consistent with the public interest. Although this opinion reveals that North Heidelberg Township has enforced its previous ordinance, this enforcement action is not relevant to the present matter because the ordinances enforced in *Gelsinger* were the 1993 Ordinance and the 2002 Ordinance Amendments and not the Joint Ordinance enacted in 2004. The ordinances in question in *Gelsinger* are no longer in effect having been replaced by the Joint Ordinance, which was enacted on January 10, 2004. As previously stated, the Petition contains *no allegation* that the Defendants, including North Heidelberg Township, have attempted to enforce the provisions of the Joint Ordinance challenged by the Attorney General.

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Defendants

ORDER

AND NOW, this 12th day of December, 2006, the preliminary objections filed by Heidelberg Township, the Heidelberg Township Board of Supervisors, North Heidelberg Township, the North Heidelberg Township Board of Supervisors, the Borough of Robesonia and Robesonia Borough Council (Defendants) are hereby sustained, and the Petition for Review filed by the Commonwealth of Pennsylvania, Office of Attorney General By Thomas W. Corbett, Jr., Attorney General seeking declaratory judgment and injunctive relief is hereby dismissed without prejudice as to Defendants.


ROCHELLE S. FRIEDMAN, Judge

Certified to be the Record

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