

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
Office of Attorney General, by	:	
Thomas W. Corbett, Jr., Attorney	:	
General,	:	
Petitioner	:	
	:	
v.	:	
	:	
Packer Township and Packer	:	
Township Board of Supervisors,	:	No. 432 M.D. 2009
Respondents	:	Argued: December 8, 2009

BEFORE: HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 6, 2010

The Commonwealth of Pennsylvania, Office of Attorney General, by Thomas W. Corbett, Jr., Attorney General (Corbett) filed a Petition for Review in the form of a Complaint, in this Court’s original jurisdiction, seeking injunctive and declaratory relief against Packer Township and Packer Township Board of Supervisors (Township). The Township filed Preliminary Objections to the Petition for Review. For reasons set forth in this opinion, we overrule the Township’s Preliminary Objections.

On June 11, 2008, the Township enacted Packer Township Ordinance No. 08-003 (Packer Township Local Control, Sewage Sludge and Chemical Trespass Ordinance) (Ordinance). The Ordinance regulates the land application of sewage

sludge in the Township. On October 5, 2008, the Township's Board of Supervisors enacted Amendment No. 08-005 (Amendment). The Amendment removes the authority of the Attorney General to enforce any state law that removes authority from the people of the Township. On August 18, 2009, Corbett filed a Petition for Review against the Township alleging that the Ordinance is an unauthorized local ordinance prohibited by Act 38 of 2005, Agriculture, Communities and the Rural Environment (ACRE) Act (Act 38), 3 Pa.C.S. §§ 311-318. The Petition for Review seeks a declaration that the Ordinance is null and void, and an injunction against the enforcement of the Ordinance.

The Township filed Preliminary Objections to the Petition for Review raising four issues: (1) whether under the Amendment, Corbett lacks jurisdiction to enforce Act 38, (2) whether Act 38 exempts municipal regulation of the land application of sewage sludge, (3) whether Act 38 exempts normal agricultural operation thus, not applying to the land application, and (4) whether Corbett lacks the authority to challenge ordinance provisions unrelated to the regulation of agricultural operations.

Corbett subsequently filed a Motion for Summary Relief requesting that the Ordinance be declared null and void as a matter of law. The underlying issue in both the Preliminary Objections and the Motion for Summary Relief is whether land application of sewage sludge, as regulated in the Ordinance, is a "normal agricultural operation," the regulation of which would thus be considered "unauthorized" under Act 38. Only the Township's Preliminary Objections are currently before the Court.

The Township first argues that the Amendment eliminates the authority of the Attorney General to enforce state laws in the Township; thus, Corbett's Petition for Review must be dismissed. However:

[I]t is fundamental that municipal corporations are creatures of the State and that the authority of the Legislature over their powers is supreme. Municipal corporations have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do.

Office of Attorney Gen. v. East Brunswick Twp. (East Brunswick I), 956 A.2d 1100, 1107 (Pa. Cmwlth. 2008) (quoting *Denbow v. Borough of Leetsdale*, 556 Pa. 567, 576, 729 A.2d 1113, 1118 (1999) (citations and quotation omitted)). The Pennsylvania Constitution “does not recognize or protect the rights of local governments from encroachment by state government.” *East Brunswick I*, 956 A.2d at 1108. Accordingly, the Township does not have authority to annul the jurisdiction of the Attorney General.

Next, the Township argues that Act 38 specifically exempts from its application municipal ordinances that regulate sewage sludge. Specifically, the Township contends, Corbett’s Petition for Review based on Act 38 cannot stand because Section 313(c) of the ACRE Act, 3 Pa.C.S. § 313(c) states:

Notwithstanding the provisions of this section, nothing in this chapter shall be construed to diminish, expand or otherwise affect the legislative or regulatory authority of local government units under State law, including the following: (1) Chapter 5 (relating to nutrient management and odor management). (2) The regulation, control or permitting procedures for the land application of class A or B biosolids.

However, the language of Section 313(c) merely confirms that municipalities retain their authority to regulate, as otherwise provided by law. “[T]he legislature’s use of the phrase ‘or otherwise affect’ means that the authority of local governments to legislate under State law was not expanded, diminished or otherwise *changed* by Act

38.” *East Brunswick I*, 956 A.2d at 1109. Accordingly, Section 313(c) does not exempt the Ordinance from the application of Act 38.

The Township further argues that land application of sewage sludge is, by law, not a normal agricultural operation under Act 38. The Township contends that the definition of normal agricultural operation, per Act 38, refers to farmers (i.e., human beings, not corporations) and their activities, practices, equipment and procedures, not the regulation of sewage sludge. Thus, the Township concludes, since the Ordinance regulates land application of sewage sludge, it is not an unauthorized ordinance under Act 38, i.e., it does not prohibit or limit a normal agricultural operation.

In addition, Act 38 borrowed the definition of “normal agricultural operation” from a statute enacted in 1982, well before the creation of the sewage sludge land application program, to protect individual family farmers from nuisance suits triggered by odor from normal animal manures.¹ According to the Township, the definition does not apply to the corporate industry of sewage sludge hauling and land application, which is not agriculture but rather the disposal of industrial, municipal and human waste. Thus, the Township concludes that the absence of “sewage sludge” from the definition of normal agricultural operation under Act 38 means such activity is not included. However, Corbett contends that the definition of “normal farming operation” in the state regulations includes the use of sewage sludge, thereby supporting the interpretation that normal agricultural operations does in fact, include land application of sewage sludge.

¹ Section 2 of the Right-to-Farm Act, Act of June 10, 1982, P.L. 454, *as amended*, 3 P.S. § 952.

Because this issue is being raised as a preliminary objection, it is not necessary for us to completely resolve the issue at this time. It is sufficient for us to determine whether Corbett has set forth a sustainable claim under the governing standard for sustaining preliminary objections.

The standards for sustaining preliminary objections in the nature of a demurrer are quite strict. A demurrer admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law.... In order to sustain the demurrer, it is essential that the plaintiff's complaint indicate on its face that his claim cannot be sustained, and the law will not permit recovery.... If there is any doubt, this should be resolved in favor of overruling the demurrer.

Pennsylvania Medical Soc. v. Foster, 585 A.2d 595, 598 (Pa. Cmwlth. 1991) (quoting *Gekas v. Shapp*, 469 Pa. 1, 5-6, 364 A.2d 691, 693 (1976)). As the interpretation of “normal agricultural operation” is far from clear, this preliminary objection must be overruled.

Lastly, the Township objects to the Petition for Review listing all sections of the Ordinance that do not prohibit or limit a “normal agricultural operation” or “restrict or limit the ownership structure of a normal agricultural operation” per Act 38. The Township contends this includes sections referring to corporate hauling and land application of sewage sludge, and sections referring to disposing of toxic chemicals, which are not prohibited under Act 38.

It is not clear whether corporate hauling and land application of sewage sludge are included in the definition of normal agricultural operations. Further, the Ordinance sections referred to can be viewed as part of the overall regulation of the land application of biosolids and thus, not severable. As stated above, in order to sustain a demurrer, it is essential that the complaint indicate on its face that its aim

cannot be sustained, and the law will not permit recovery. *Id.* If there is any doubt, it should be resolved in favor of overruling the demurrer. *Id.* As the interpretation of “normal agricultural operation” is not clear, and the intertwined nature of the Ordinance sections is evident, this preliminary objection must be overruled.

For all of the above reasons, the Township’s Preliminary Objections are overruled.

JOHNNY J. BUTLER, Judge

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Packer Township and Packer	:	
Township Board of Supervisors,	:	No. 432 M.D. 2009
Respondents	:	

ORDER

AND NOW, this 6th day of January, 2010, the Preliminary Objections filed by Packer Township and Packer Township Board of Supervisors are overruled.

JOHNNY J. BUTLER, Judge