

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	:	Submitted: January 29, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: March 17, 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. Corbett subsequently filed a Motion for Summary Relief. This Court overruled the Township’s Preliminary Objections¹ and Corbett’s Motion for Summary Relief is currently before the Court.

¹ *Office of Atty. Gen. ex rel. Corbett v. Packer Twp.*, (Pa. Cmwlth. No. 432 M.D. 2009, filed January 6, 2010).

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, the 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's Preliminary Objections (now overruled) to the Petition for Review raised 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's subsequently filed Motion for Summary Relief requests 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. As stated, this Court overruled the Township's Preliminary Objections; and the Motion for Summary Relief is currently before the Court.²

Corbett first argues that the application of biosolids to agricultural land is a "normal agricultural operation" thus the Ordinance is unauthorized under Act 38 which prohibits unauthorized local ordinances that interfere with normal agricultural operations. In support of this contention, Corbett submits the opinion of its expert, Dr. Herschel A. Elliott (Dr. Elliott), who opines that land application of sewage sludge (biosolids) has long been integrated into normal farming operations. Corbett's Brief, Exhibit A. Corbett argues that Dr. Elliott's report provides the evidentiary record required to make the factual finding that biosolids applied to agricultural land is a normal agricultural operation under the protection of Act 38 as a matter of law. In response, the Township has submitted a letter from Hugh Kaufman, a Senior Policy Analyst employed by the United States Environmental Protection Agency stating that land application of sewage sludge is not a normal agricultural application. Township's Brief, Exhibit No. 1.

The issue of whether the application of sewage sludge to land is a "normal agricultural operation" under the protection of Act 38 was previously raised in a Motion for Summary Relief before this Court in *Office of Atty. Gen. ex rel. Corbett v. East Brunswick Twp.*, 956 A.2d 1100 (Pa. Cmwlth. 2008) (*East Brunswick*). In that case, we held:

Summary relief is available only in the clearest of cases, and it is not clear to the Court that judgment can be entered in favor of the Attorney General at this juncture. The

² "A motion for summary relief may be granted only where no material fact is in dispute and the right of the moving party to relief is clear." *Brown v. Pennsylvania Dep't of Corr.*, 932 A.2d 316, 318 (Pa. Cmwlth. 2007).

threshold question, *i.e.*, whether the application of sewage sludge to land is a “normal agricultural operation” under the protection of Act 38, is not clear as a matter of law, as asserted by the Attorney General. In the absence of any evidence we must, therefore, deny summary relief.

East Brunswick, 956 A.2d at 1116. Although in the instant case, unlike in the *East Brunswick* case, Corbett has submitted an expert report, this does not resolve the issue. This Court must weigh that report against the letter submitted by the Township. If this Court must weigh evidence, then the issue is not clear as a matter of law.

Next, Corbett argues that the Township cannot enact an ordinance to remove the authority of the Attorney General to enforce state laws in the Township. Corbett contends, as a matter of law, the Township does not have the authority to annul the jurisdiction of the Attorney General to enforce state laws. We agree.

The subordinate role of municipalities within Pennsylvania’s system of governance has been explained by the Pennsylvania Supreme Court as follows: ‘[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.’ *Denbow v. Borough of Leetsdale*, 556 Pa. 567, 576, 729 A.2d 1113, 1118 (1999) (citations and quotation omitted). Indeed, under our constitution, local government begins with enabling legislation enacted by the General Assembly.

East Brunswick, 956 A.2d at 1107. As the authority of the General Assembly is supreme with respect to the power of the Township, the Township does not have authority to annul any legislative enactment, including provisions such as Act 38 which establish jurisdiction in the Attorney General.³ Accordingly, the amendment

³ 3 Pa.C.S. § 314.

removing the authority of the Attorney General to enforce any state law, is null and void as a matter of law.

Corbett further argues that provisions of the Ordinance referring to corporate hauling and land application of sewage sludge are preempted by the Solid Waste Management Act (SWMA)⁴ and the Nutrient Management Act (NMA).⁵ Specifically, Corbett contends that the Township cannot ban corporations from land-applying biosolids when it is an activity permitted and regulated by the SWMA, as evidenced by the inclusion of “corporation” in the definition of “person.” Section 103 of the SWMA, 35 P.S. § 6018.103; 25 Pa. Code § 271.1. We agree that “a township cannot duplicate the regulatory regime established in the SWMA and cannot impose more stringent requirements than the SWMA.” *Commonwealth v. East Brunswick Twp.*, 980 A.2d 720, 733 (Pa. Cmwlth. 2009). We also agree that the SWMA was specifically enacted to regulate solid waste management. *See* Section 102 of the SWMA, 35 P.S. § 6018.102. However, summary relief is available only in the clearest of cases, and it is not clear at this juncture which specific provisions of the Ordinance, if any, are preempted by the SWMA.

We further recognize that Section 519 of the NMA, 3 Pa.C.S. § 519, specifically states:

This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management and odor management, to the exclusion of all local regulations. . . . No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or

⁴ Act of July 7, 1980, P.L. 380, 35 P.S. §§ 6018.101-6018.1003.

⁵ 3 Pa.C.S. §§ 501-522.

practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.

However, as previously stated, summary relief is available only in the clearest of cases, and it is not clear at this juncture which specific provisions of the Ordinance, if any, are preempted by the NMA.

Lastly, Corbett argues that the Township has no authority to create the rights, causes of action and remedies set forth in the Ordinance. Corbett's argument, at least in part, relies on the same preemption principle addressed above as pertaining to the SWMA and the NMA. Because it is not clear at this juncture which specific provisions of the Ordinance, if any, are preempted, we must deny summary relief.

For all of the above reasons, Corbett's Motion for Summary Relief is granted with respect to the amendment removing the authority of the Attorney General to enforce state law. The Motion for Summary Relief is denied with respect to all remaining issues.

JOHNNY J. BUTLER, Judge

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

AND NOW, this 17th day of March, 2010, the Attorney General's Motion for Summary Relief is granted with respect to the amendment removing the authority of the Attorney General to enforce any state law that removes authority from the people of the Township; the Motion for Summary Relief is denied with respect to all remaining issues.

JOHNNY J. BUTLER, Judge