

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Office	:	
of Attorney General, by Linda L. Kelly,	:	
Attorney General,	:	No. 432 M.D. 2009
	:	Submitted: April 13, 2012
Petitioner	:	
	:	
v.	:	
	:	
Packer Township and Packer	:	
Township Board of Supervisors,	:	
	:	
Respondents	:	

BEFORE: HONORABLE DAN R. PELLEGRINI, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION BY SENIOR JUDGE FRIEDMAN

FILED: July 12, 2012

Packer Township and Packer Township Board of Supervisors (together, Township) have filed a motion for summary judgment or partial summary judgment (Motion) in response to the petition for review filed by the Commonwealth of Pennsylvania, Office of Attorney General, by Linda L. Kelly,¹ Attorney General (Attorney General), pursuant to Chapter Three of the Agricultural Code (ACRE), 3 Pa. C.S. §§311–318.² We deny the Township’s Motion.³

¹ When this action was filed, now-Governor Thomas W. Corbett, Jr. was the Attorney General. On August 31, 2011, the Office of Attorney General filed a praecipe to amend the caption to conform with the appointment of the present Attorney General, Linda L. Kelly.

² ACRE, which went into effect on July 6, 2005, deals with the local regulation of normal agricultural operations. Section 311 of ACRE, 3 Pa. C.S. §311.

³ We will grant summary judgment if, after viewing the record in the light most favorable to the non-moving party, we determine that there are no genuine issues of material fact and that judgment is appropriate as a matter of law. *Township of Derry v. Department of Labor and* **(Footnote continued on next page...)**

The relevant history of this case is as follows. On June 11, 2008, Packer Township enacted Ordinance Number 08-003 entitled “Packer Township Local Control, Sewage Sludge and Chemical Trespass Ordinance” (Ordinance). The Ordinance prohibits the land application of sewage sludge by corporations and regulates the land application of sludge by individuals within the Township.

Clyde Hinkle owns and operates a 100-acre dairy and crop farm (farm) located in the Township’s Agricultural Security Area. The Department of Environmental Protection (DEP) approved Hinkle’s farm for the land application of Class A biosolids to fertilize his croplands. Prior to the enactment of the Ordinance, Hinkle applied Class A biosolids with a lime mix to fertilize his farm. After the Township adopted the Ordinance, Hinkle voluntarily ceased using Class A biosolids as a fertilizer. Hinkle requested the Attorney General to review the Ordinance pursuant to section 314(a) of ACRE, 3 Pa. C.S. §314(a), to determine whether the Ordinance was “unauthorized.”⁴

(continued...)

Industry, 12 A.3d 489, 492 n.2 (Pa. Cmwlth. 2011). Summary judgment may be entered only where the right to relief is clear. *Commonwealth v. Peoples Benefit Services, Inc.*, 923 A.2d 1230, 1234 n.8 (Pa. Cmwlth. 2007).

⁴ Section 314(a) of ACRE provides:

An 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 to consider whether to bring legal action under section 315(a) (relating to right of action).

3 Pa. C.S. §314(a).

The Attorney General conducted the requested review and concluded that the Ordinance was an “unauthorized local ordinance” under ACRE.⁵ On August 18, 2009, the Attorney General initiated this action against the Township by filing a petition for review in the nature of a complaint for declaratory judgment and

⁵ Section 312 of ACRE defines an “unauthorized local ordinance” as an ordinance that 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). Section 312 of ACRE refers to the definition of “normal agricultural operations” employed in section 2 of the act of June 10, 1982, P.L. 454, *as amended*, which provides, in relevant part:

The 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.

3 P.S. §952.

injunctive relief in this court's original jurisdiction pursuant to section 315(a) of ACRE, 3 Pa. C.S. §315(a).⁶ In the petition for review, the Attorney General seeks to invalidate and enjoin the enforcement of the Ordinance. The Attorney General contends, *inter alia*, that the Solid Waste Management Act⁷ (SWMA) and the act commonly referred to as the Nutrient Management Act⁸ (NMA) establish uniform statewide standards regulating the application of sewage sludge to land, which preclude the Ordinance's inconsistent regulation of these activities. The Attorney General contends that the Township's Ordinance interferes with normal agricultural operations and is an unauthorized local ordinance under ACRE.

In response to the petition for review, the Township filed preliminary objections,⁹ which this court overruled in their entirety. Thereafter, the Township filed an answer, which it subsequently amended, to the Attorney General's petition for review.

⁶ Section 315(a) of ACRE authorizes the Attorney General to bring an action against a local government unit in the Commonwealth Court to invalidate an unauthorized local ordinance or enjoin the enforcement of an unauthorized local ordinance. 3 Pa. C.S. §315(a).

⁷ Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§6018.101–6018.1003.

⁸ Chapter 5 of the Agricultural Code, 3 Pa. C.S. §§501–522.

⁹ The Township asserted that: (1) the Attorney General lacked capacity to bring this action; (2) this court lacked subject matter jurisdiction; (3) the petition for review failed to state a claim upon which relief can be granted because the land application of sewage sludge is not a normal agricultural operation; and (4) the petition for review failed to state a claim upon which relief can be granted because the Ordinance is not an “unauthorized local ordinance” under ACRE.

The Attorney General filed an application for summary relief pursuant to Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure,¹⁰ asserting that the Ordinance violates and is preempted by state law and that the Attorney General is entitled to judgment in her favor as a matter of law. By order dated March 17, 2010, this court granted the Attorney General's application for summary relief 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 court denied the application in all other respects.

Following discovery, the Township filed the instant Motion, seeking summary judgment on the basis that ACRE, which authorizes the Attorney General to enforce a preemptive scheme, violates the right of Township residents to local self-government and is unconstitutional. The Township further claims that, without an affected complainant, the Attorney General cannot bring this action. Alternatively, the Township seeks partial summary judgment to remove the Ordinance's corporate sludging ban and community bill of rights from the challenge. The Township asserts that the complainant, who operates an unincorporated farm, is not affected by the Ordinance's ban on corporate sludging and, therefore, the Attorney General lacks authority to challenge this provision. The Township further asserts that the Ordinance's community bill of rights is immune from attack because it does not purport to limit or prohibit agricultural operations. Viewing the record in the light

¹⁰ Rule 1532(b) provides that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear."

most favorable to the non-moving party, as we must, we conclude that the Township is not entitled to summary judgment or partial summary judgment.

First, the Township contends that it is entitled to summary judgment as a matter of law because ACRE interferes with the constitutionally guaranteed right to local self-government. Relying upon the Pennsylvania Constitution and the Declaration of Independence, the Township contends that it has the right to enact and enforce laws to protect the public health and environment, especially when those laws impose more stringent standards than those established by state or federal law, and that ACRE violates this right by empowering the Attorney General to file an action to nullify such laws. We disagree.

The Township invokes Article 1, section 2 of the Pennsylvania Constitution, which declares that citizens have the “inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper,” and Article 1, section 25, which states that each right declared in Article 1 is “excepted out of the general powers of government and shall forever remain inviolate.” Pa. Const. art. 1, §§2, 25. The Township contends that Article 1, section 2 establishes an “inalienable right of local self-government,” (Township’s Br. at 49), and that Article 1, section 25 means that “this right is not subject to the general government’s procedures for altering government or for providing for local government,” (Township’s Br. at 46).

In *Commonwealth v. East Brunswick Township*, 956 A.2d 1100 (Pa. Cmwlth. 2008), East Brunswick Township raised a similar self-governance argument

in defense of its restrictive sludge ordinance.¹¹ We rejected the argument, explaining that “local governments are creatures of the legislature from which they get their existence.” *Id.* at 1107 (quoting Robert E. Woodside, Pennsylvania Constitutional Law 507 (1985)). We continued:

[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.

Id. (quoting *Denbow v. Borough of Leetsdale*, 556 Pa. 567, 576, 729 A.2d 1113, 1118 (1999) (internal citations and quotation omitted)). The Pennsylvania Constitution protects individual citizens against government infringement; it “does not recognize or protect the rights of local governments from encroachment by state government.” *Id.* at 1108. We concluded that the General Assembly acted constitutionally when it restricted municipalities from adopting “unauthorized local ordinances” that interfere with normal agricultural operations. *Id.*

Here, the instant Ordinance and the Township’s self-governance arguments are virtually identical to those involved in *East Brunswick*.¹² We see no

¹¹ We note that the same attorney representing the Township in this case also represented the township involved in *East Brunswick*.

¹² Not only have we rejected the Township’s self-governance argument in *East Brunswick*, but we have also rejected this argument in this case when ruling upon the Attorney General’s application for summary relief, *Commonwealth v. Packer Township* (Pa. Cmwlth., No. 432 M.D. 2009, memorandum opinion filed March 17, 2010), and when ruling upon the Township’s **(Footnote continued on next page...)**

reason to depart from our holding in *East Brunswick*.¹³ We conclude that the Township is not entitled to summary judgment on this basis.

Next, the Township contends that summary judgment should be granted in its favor because ACRE requires an affected complainant and the Attorney General has failed to show that the complainant's agricultural operation is affected by the Ordinance. We disagree.

The Attorney General may bring an action against the local government unit in this court to invalidate or enjoin the enforcement of an unauthorized local ordinance. Section 315(a) of ACRE, 3 Pa. C.S. §315(a). Additionally, “*any person who is aggrieved by the enactment or enforcement of an unauthorized local ordinance may bring an action against the local government unit in Commonwealth Court to invalidate the unauthorized local ordinance or enjoin the enforcement of the unauthorized local ordinance.*” Section 315(b) of ACRE, 3 Pa. C.S. §315(b) (emphasis added). Section 314(a) of ACRE, 3 Pa. C.S. §314(a), provides that “[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 to consider whether to bring legal action”

(continued...)

preliminary objections, *Commonwealth v. Packer Township* (Pa. Cmwlth., No. 432 M.D. 2009, memorandum opinion filed January 6, 2010).

¹³ While the Township contends that *East Brunswick* was “wrongly decided,” (Township Br. at 49-53), the Township offers no basis for reconsideration and simply reiterates the same arguments previously rejected by this court.

In *Commonwealth v. Locust Township*, 600 Pa. 533, 545, 968 A.2d 1263, 1270-71 (2009), our Supreme Court stated that, “[a]lthough Section 314(a) of ACRE provides that a farmer may request the Attorney General to review a local ordinance, such review is not a necessary prerequisite to the Attorney General’s action.” In fact, the Court rejected the argument that the Attorney General acts “in the stead of a local property owner.” *Id.* at 545, 968 A.2d at 1270. The Court explained that the Attorney General is acting in her “own right, as the official charged with administering the program established by [ACRE], in order to defend and maintain the Commonwealth’s interest in limiting local regulation of agriculture.” *Id.* at 545, 968 A.2d at 1271.

Here, Hinkle owns and operates a 100-acre dairy and crop farm, which qualifies as a “normal agricultural operation.” See Section 312 of ACRE, 3 Pa. C.S. §312. Hinkle, pursuant to section 314(a) of ACRE, requested the Attorney General to review the Ordinance. The Attorney General, upon determining that the Ordinance is an “unauthorized local ordinance,” filed an action against the Township. The Township maintains that the Ordinance does not “limit” Hinkle’s farm and, consequently, Hinkle’s request cannot serve as the basis for the Attorney General’s action. Contrary to the Township’s assertions, ACRE does not require Hinkle’s farm to be affected by the Ordinance in order for Hinkle to make the request. Section 314(a) merely requires that Hinkle be an owner/operator of a “normal agricultural operation” to make a request.

Moreover, ACRE does not require an affected complainant as a prerequisite for the Attorney General to challenge an ordinance. *Locust Township*, 600 Pa. at 545, 968 A.2d at 1270-71. Section 315(a) of ACRE, 3 Pa. C.S. §315(a), explicitly authorizes the Attorney General to bring an action against the local government unit to invalidate an unauthorized local ordinance regardless of whether an owner/operator of a normal agricultural operation initiated an investigation of the ordinance. *Id.* at 545-546, 968 A.2d at 1271. The action is brought by the Attorney General on behalf of the Commonwealth. *Id.* at 545, 968 A.2d at 1271; *see East Brunswick*, 956 A.2d at 1112 (stating that “[w]hen the Attorney General carries out [her] statutory duties, [she] acts on behalf of the entire public” for the benefit of the public interest). There is no requirement that the Attorney General must make a specific finding that an ordinance limits a particular farm operation as a threshold burden. Rather, the Attorney General may challenge an ordinance as unauthorized as applied to *any* normal agricultural operation within the Township. We, therefore, conclude that this argument is without merit and the Township is not entitled to summary judgment on this basis.

Next, the Township contends that it is entitled to partial summary judgment to the extent the Attorney General’s action challenges the Ordinance’s ban on corporate sludging because Hinkle, as an unincorporated complainant, is not affected by the Ordinance’s ban. The Township’s argument again centers on the premise that only an affected complainant can request an investigation leading to the Attorney General’s action. As discussed above, whether or not Hinkle’s farm is directly impacted by the Ordinance has no bearing on the Attorney General’s authority to challenge the Ordinance as an unauthorized local ordinance. The

Attorney General is authorized to challenge the Ordinance as applied to *any* normal agricultural operation subject to its provisions, not solely to Hinkle's farm operation. Thus, the Attorney General is empowered to challenge the Ordinance's ban on corporate sludging. We, therefore, conclude that the Township is not entitled to partial summary judgment on this basis.

Finally, the Township contends that it is entitled to partial summary judgment because the Attorney General seeks to nullify the Ordinance's community bill of rights, which cannot, as a matter of law, be challenged under ACRE because it does not purport to limit or prohibit "normal agricultural operations" and, therefore, cannot be invalidated as an "unauthorized local ordinance." We disagree.

Section 7 of the Ordinance, entitled "Specific Rights of Packer Township Residents and Communities," proclaims the Township's authority to enact the Ordinance and declares the Township residents' rights to, *inter alia*, sustainable water, self-government, a healthy environment, cultural heritage and sovereignty. (Ordinance at 6-7.) All of the Ordinance provisions, including section 7, are part and parcel of the Township's overall regulation of the land application of biosolids. Therefore, we cannot separate section 7 from the Ordinance. We conclude that the Township is not entitled to partial summary judgment on this basis.

Accordingly, we deny the Township's Motion.

ROCHELLE S. FRIEDMAN, Senior Judge

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v.	:	
	:	
Packer Township and Packer	:	
Township Board of Supervisors,	:	
	:	
Respondents	:	

ORDER

AND NOW, this 12th day of July, 2012, we deny the motion for summary judgment or partial summary judgment filed by Packer Township and Packer Township Board of Supervisors.

ROCHELLE S. FRIEDMAN, Senior Judge