

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NABIL SALAMEY, a/k/a BILL SALAMEY,

Plaintiff-Appellant,

v

DEXTER TOWNSHIP ZONING BOARD OF  
APPEALS,

Defendant-Appellee.

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UNPUBLISHED  
December 2, 2004

No. 248702  
Washtenaw Circuit Court  
LC No. 01-001126-AV

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Plaintiff, Nabil Salamey, appeals by leave granted from an order affirming defendant Dexter Township Zoning Board of Appeals' decision to deny plaintiff's request for a conditional use permit to operate a gas station in an area zoned as a "General Commercial District." On appeal, plaintiff argues that the court erred when it found that 1) the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* ("NREPA"), did not preempt local regulation of the use and installation of underground storage tank systems, and 2) defendant's decision was supported by competent, substantial and material evidence. Because we do not find plaintiff's arguments persuasive on appeal, we affirm.

Plaintiff owns twelve acres of vacant land in Dexter Township. Plaintiff's property is zoned C-2, "General Commercial District," that provides for principal permitted uses such as retail sales businesses and personal, professional and agricultural service businesses. A gas station is a conditional use in the district, requiring a property owner to obtain a conditional use permit for such a use. Directly across the street from plaintiff's property are three residences zoned "Convenience Commercial District" (C-1), that were built before the land around the intersection was zoned for commercial uses. This area is a water recharge area and the underlying soil contains a large proportion of gravel. It is located 1000 feet from the Huron River and the Metro Park system.

In September 1998, plaintiff submitted an application for a conditional use permit and approval of a preliminary site plan. The preliminary site plan showed a gas station, car wash, fast food restaurant, and convenience store occupying the northeast corner of plaintiff's parcel. Pursuant to township ordinance, the gas station and fast food restaurant required conditional use permits. Despite some revisions by plaintiff in response to concerns expressed by the Township

planning staff and the Planning Commission, the application was denied. Plaintiff filed an appeal of this denial but withdrew it.

Plaintiff filed a second application in May 1999, seeking the same four uses but with certain limitations in response to the Township's concerns. The Planning Commission denied the application on the grounds that the proposed development was too intense for the rural nature of the intersection, increased traffic and noise, and the proximity to a wetland creating a threat to the environment from the storage of fuels. Plaintiff appealed the denial but withdrew the appeal after the Planning Commission indicated it would accept a third application.

Plaintiff filed a third application in June 2000, proposing only a gas station and convenience store with limited hours of operation. The application included, among other things, a project narrative, a proposed Pollution Incident Prevention Plan, a traffic/trip generation study, a preliminary environmental site assessment, a Washtenaw County Environmental Health Division approval of the site for on-site sewage disposal, and a preliminary approval from the Underground Storage Tank Division of the Department of Environmental Quality (DEQ) for the installation of three underground storage tanks, product piping, and gas pumps. Plaintiff's application proposed various safety features, including double-walled USTs with monitors to detect leaks, safety valves at the pumps, and asserted that a clay barrier existed to protect the groundwater.

The Dexter Township Planning Commission held a meeting where it heard the comments of plaintiff's engineering and planning consultants. The Commission decided to retain an environmental consulting service to review the environmental impact on the area, including the potential impact on the water table, an adjoining wetland area, and the three residences across the road from the proposed development. At a subsequent meeting, the Planning Commission again tabled the matter to allow plaintiff's consultants to submit written responses to the Township's environmental consultant's concerns.

In September 2000, the Planning Commission met again and voted to grant the conditional use permit contingent upon plaintiff's compliance with twenty-eight conditions, the first being that he conduct a deep soil boring in the vicinity of the UST location with a gamma ray analysis of the bore hole sediments. The purpose of the boring was to determine if a confining layer of clay soil was present between the surface aquifer and the confined aquifer to protect the groundwater from a potential leak or spill.

Plaintiff conducted two soil borings with gamma ray analysis, however, neither showed the presence of the asserted layer of clay soil. Plaintiff and his consultants proposed a multifaceted solution with extra safeguards to compensate for the absence of the clay layer. On January 23, 2001, after additional discussions, submissions of reports by the consultants, and interim meetings, the Planning Commission approved plaintiff's application for a conditional use permit for operation of a gas station and also approved plaintiff's preliminary site plan for a convenience store.

The Dexter Neighbors, a group of Township residents that included the owners of the residences across the road from appellant's property, appealed to the Zoning Board of Appeals (ZBA) from the Planning Commission's grant of a conditional use permit and approval of plaintiff's site plan. The group argued that it had not had an opportunity to review or be heard

regarding the most recent changes to plaintiff's proposal before the Commission approved it. The ZBA held two hearings and remanded the matter to the Planning Commission to hear the Dexter Neighbors' presentation and new evidence. It directed the Planning Commission to make recommendations and specific findings of fact addressing the latest revisions to the site plan.

The Planning Commission held further hearings where it discussed plaintiff's proposal, the respective experts' evaluations of it, its hazards, and the potential solutions. The Planning Commission was unable to form a consensus as three members favored affirming its earlier decision to grant the conditional use permit, and three members favored reversing the decision.

In September 2001, the ZBA adopted a resolution overturning the grant of a conditional use permit for a gas station. The ZBA upheld the approval of the site plan for a convenience store. Plaintiff then filed an appeal in the circuit court, challenging the ZBA's decision on two grounds: (1) the decision was contrary to law because it usurped the exclusive authority of the DEQ under the Natural Resources and Environmental Protection Act (NREPA), MCL 324.21101 *et seq.*, to regulate underground storage tanks and wetlands, and (2) the decision was not supported by competent, material, and substantial evidence on the record.

The circuit court affirmed the ZBA's decision, ruling that the township's authority to deny a conditional use permit for the proposed gas station was not preempted by the NREPA, and that the ZBA's decision was supported by competent, material, and substantial evidence on the whole record. Thereafter, plaintiff's application for leave to this Court was granted, and this appeal followed.

Plaintiff first argues that NREPA, MCL 324.101, expressly preempts local regulation of underground storage tanks. Plaintiff specifically contends that NREPA preempts Section 13.01 of the township zoning ordinance because the ordinance is in "direct conflict" with NREPA and because the statute completely occupies the field that the ordinance attempts to regulate.

Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that this Court reviews *de novo*. *Michigan Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003).

State law preempts a municipal ordinance where "1) the statute completely occupies the field that ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Michigan Coalition for Responsible Gun Owners, supra*, 256 Mich App 408, quoting *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). Regarding the second method of preemption set forth above, our Supreme Court has held that "[a] direct conflict exists . . . when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *People v Llewellyn (City of East Detroit v Llewellyn)*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

According to MCL 324.21109(3) of NREPA, a local unit of government "shall not enact or enforce a provision of an ordinance that requires a permit, . . . [or] approval . . . for the installation, use, closure, or removal of an underground storage tank system." The act further provides that a local unit of government "shall not enact or enforce a provision of an ordinance that is inconsistent with this part or rules promulgated under this part." MCL 324.21109(2). Under the township zoning ordinance at issue in the instant case, Section 13.01(D)(5), Art XIII

of the Dexter Township zoning ordinance requires a special approval use permit in order for the ZBA to permit an “automobile service station” in a general commercial district.

Plaintiff contends that, because the township zoning ordinance requires plaintiff to obtain a special approval use permit in order to operate a gas station, i.e., a facility with an underground storage tank system, NREPA preempts that section of the zoning ordinance. This argument is not persuasive in light of the plain language of MCL 324.21109<sup>1</sup> and the plain language of the ordinance. Clearly, MCL 324.21109 of NREPA neither expressly permits nor prohibits the operation of a gas station in a general commercial district. And, Section 13.01(D)(5), Art XIII of the Dexter Township zoning ordinance does not strictly regulate underground storage tanks, but rather promulgates rules for the operation of an automobile service station.

In other words, we recognize, as plaintiff points out, that in order to operate a gas station, an underground storage tank system is required, however, a tank system is only one facet of service station installation, operation, and maintenance. There are countless other factors to be researched, analyzed, and considered by the planning commission and ZBA when deciding whether to permit construction of an automobile service station in a general commercial district. The township need consider environmental factors, economic factors, aesthetic factors, health and safety factors, as well as various other community concerns. The ordinance at issue necessarily encompasses all of these factors and provides a mechanism for them all to be addressed. The ordinance does not improperly hinge the decision of the construction of the service station on *only* the installation of an underground storage tank system. Thus, the ordinance is not in “direct conflict” with NREPA, and NREPA does not preempt the zoning ordinance.

Plaintiff further asserts that NREPA preempts the township zoning ordinance because the state has completely occupied the field of regulating the use and installation of underground

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<sup>1</sup> MCL 324.21109 of NREPA provides as follows:

- (1) The department may, upon resolution of the governing body of a local unit of government in whose jurisdiction an underground storage tank system is being installed, require additional safeguards, other than those specified in rules, when the public health, safety, or welfare, or the environment is endangered.
- (2) A local unit of government shall not enact or enforce a provision of an ordinance that is inconsistent with this part or rules promulgated under this part.
- (3) A local unit of government shall not enact or enforce a provision of an ordinance that requires a permit, license, approval, inspection, or the payment of a fee or tax for the installation, use, closure, or removal of an underground storage tank system. [MCL 324.21109.]

storage tank systems. Our Supreme Court set forth four guidelines to aid courts in determining whether a statute occupies the field of regulation:

First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.

Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [*Llewellyn, supra*, 401 Mich 323-324 (citations omitted).]

As outlined *supra*, the statute at issue merely regulates "the installation, use, closure, or removal of an underground storage tank system" and does not impinge on a local unit of government's ability to regulate the installation of automobile service stations in their communities. MCL 324.21109(3). Even assuming, without deciding that the state has completely occupied the field of regulating the use and installation of underground storage tank systems, because the statute and the ordinance regulate separate and distinct areas, namely the narrow installation of an underground storage unit versus the broad concerns surrounding granting permission to operate an automobile service station, plaintiff's argument fails as a matter of law. Put a different way, if the Township had denied the special use permit to plaintiff due to the singular factor of issues surrounding the installation of an underground storage tank system, then NREPA would preempt the ordinance. However, NREPA does not preempt municipal regulation under these facts when a review of the record reveals that various factors outside of the installation of the underground storage system were legitimate reasons for the Township's denial of the special use permit, see *infra*.

Next, plaintiff argues that defendant's decision was not supported by competent, material and substantial evidence on the whole record. We review appeals from decisions by local zoning boards to circuit courts de novo. *Cryderman v Birmingham*, 171 Mich App 15, 20; 429 NW2d 625 (1988). However, the decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material and substantial evidence on the record, or an abuse of discretion. *Reenders v Parker*, 217 Mich App 373, 378; 551 NW2d 474 (1996).

Our careful review of the record reveals that there was competent, material and substantial evidence presented that supports defendant's decision to deny the permit. Plaintiff's environmental consultant, Strata Environmental Services, as well as an environmental consulting firm that the planning commission hired, J & L Consulting, issued reports explaining the fragile environment, its permeable soil, its character as a groundwater recharge area close to the Huron River and wetlands, all resulted in a risk that fuel spills and leaks could contaminate the groundwater. It is also undisputed that several local residents obtain their drinking water from

the groundwater through private wells Gary Dannemiller, a certified storage tank professional, a certified stormwater manager, and a geologist, explained to the planning commission that, if there is a release at the proposed site, the impacted groundwater migrates directly to the Hudson River or it could enter a number of wells in the area. There was also evidence presented regarding the possibility of MTBE, a highly soluble fuel additive known for causing groundwater contamination, entering the fuel supply system and contaminating the soil and groundwater.

There was also a great deal of evidence presented regarding the inefficacy of the proposed Bentomat liner that is contrary to plaintiff's assertion on appeal that it is undisputed that a fuel spill or leak would remain contained for a period of two years. Further, there is evidence in the record regarding concerns about the effectiveness of monitors used to detect contamination. In sum, there were a number of questions regarding costs, containment of potential spills and leaks, and the effectiveness of the Bentomat liner under a gas station that all contributed to the decision to deny the permit.

Further, a traffic impact study that plaintiff obtained showed that the project would increase noise and road congestion. It also showed that the automobile service center would create nuisance vehicle headlight glare on abutting residential properties during both morning and evening hours.

Under section 6.05(O)(1) of the township zoning ordinance requires the applicant to demonstrate that:

[R]easonable precautions will be made to prevent hazardous materials from entering the environment including:

1. Sites at which hazardous substances are stored, used or generated shall be designed to prevent spills and discharges to the air, the surface of the ground, ground water, lakes, streams, rivers or wetlands. [Dexter Township Zoning Ordinance, section 6.05(O)(1).]

According to defendant, plaintiff did not submit "clear evidence that waste . . . will be confined, purified, and treated . . . to prevent pollution of air, water and soil resources." Thus, plaintiff did not provide the necessary reassurance to convince the ZBA that spills would be contained, as required under the ordinance. Because defendant's decision to deny the conditional use permit was based on competent, material and substantial evidence on the record, we must affirm the ZBA's decision.

Plaintiff also argues that the circuit court erred when it failed to take judicial notice of the fact that the ZBA approved plaintiff's final site plan for a convenience store and that the township had previously acknowledged that it lacked authority to interfere with decisions of the DEQ regarding the installation of underground storage tanks. A court's decision to take judicial notice is discretionary. MRE 201(c). Therefore, we will review the lower court's failure to take judicial notice of adjudicative facts for an abuse of discretion.

The ZBA's approval of the final site plan for plaintiff's proposed convenience store was not an issue particularly pertinent to the present appeal. As the circuit court stated in its opinion and order affirming the ZBA, plaintiff did not require a conditional use permit to operate a convenience store in a general commercial district. The only true issue before the ZBA was

whether it should affirm or deny plaintiff's request for a conditional use permit to operate a gas station. Accordingly, the circuit court did not abuse its discretion in failing to take judicial notice of the approval of the plan for a convenience store.

Finally, plaintiff argues that the township lacked authority to regulate wetlands and points out that defendant's decision to deny the conditional use permit based on wetlands considerations was invalid because NREPA preempts local regulation of wetlands. Defendant also raises the argument that res judicata bars plaintiff's claims. However, these issues were not addressed in the application for leave to appeal process. And this Court's review is limited to issues raised in the application. MCR 7.205(D)(4), *O'Connor v Comm'r of Ins*, 236 Mich App 665, 673; 601 NW2d 168 (1999), rev'd on other grounds 463 Mich 864 (2000). Accordingly, we decline to consider the issues.

Affirmed.

/s/ Pat M. Donofrio

/s/ Jane E. Markey

/s/ Karen M. Fort Hood