STATE OF MICHIGAN

COURT OF APPEALS

WAR-AG FARMS, L.L.C., DALE WARNER, and DEE ANN BOCK, Plaintiffs-Appellants, v FRANKLIN TOWNSHIP, FRANKLIN TOWNSHIP ZONING BOARD OF APPEALS, and FRANKLIN TOWNSHIP PLANNING COMMISSION, Defendants-Appellees.	UNPUBLISHED October 7, 2008 No. 270242 Lenawee Circuit Court LC No. 05-001940-AA

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal a circuit court order denying their appeal of a decision of the Franklin Township Zoning Board of Appeals that denied plaintiffs' request for a conditional use permit to sell and distribute pesticides and fertilizer as a secondary business to their farming operation. This Court originally denied plaintiffs' application for leave to appeal, but the Supreme Court remanded the case to this Court "for consideration as on leave granted." *War-Ag Farms, LLC v Franklin Twp*, 480 Mich 948; 741 NW2d 302 (2007). We reverse and remand.

I. Facts and Proceedings

Plaintiffs operate a 1,500-acre farm in Franklin Township in Lenawee County. They submitted an application to the Franklin Township Planning Commission for a conditional use permit to allow them to sell and distribute seed, pesticides, and fertilizer from a 20-acre parcel of their property secondary to their farming operation. Plaintiffs intended to store fertilizer and pesticides on their property and directly provide those products to farmers located within 10 to 15 miles of their farm, and to sell additional product to other farmers located more than 15 miles away, which would be shipped directly from the manufacturer to those distant farmers. At the time plaintiffs applied for the conditional use permit, they had already been issued licenses by the Michigan Department of Agriculture to distribute pesticides and fertilizer from the location at issue.

The planning commission denied plaintiffs' request for a permit because § 7.03(12) of the Franklin Township Zoning Ordinance permitted such usage only on an operating farm as

incidental and secondary to the use of the farm for agricultural activities. The commission determined that plaintiffs' proposed usage was not incidental and secondary to their farming operation. Plaintiffs appealed to the Franklin Township Zoning Board of Appeals ("ZBA"), which upheld the planning commission's decision. Plaintiffs then appealed to the Lenawee Circuit Court, which denied the appeal. In essence, the trial court ruled that the statute did not preempt the ordinance because it did not regulate the location for the sale of the fertilizer and pesticides, and proof of that was the fact that the Department never came out to review the suitability of the property locations.

II. Analysis

Plaintiffs first argue that the circuit court erred in determining that the township's ordinance, § 7.03(12), is not preempted by the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et. seq.* We agree. "The issue of preemption is a legal question that this Court reviews de novo." *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 555; 711 NW2d 442 (2006), aff'd 478 Mich 348 (2007).

Townships have no inherent powers, but only possess those limited powers conferred on them by the Legislature or state constitution. *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005). The township ordinance act, MCL 41.181, allows townships to enact ordinances that regulate the public health, safety, and general welfare. "While the provisions of the Constitution and law regarding counties, townships, cities, and villages must be liberally construed in their favor, the powers granted to townships by the Constitution and by law must include only those fairly implied and not prohibited by the Constitution. Const 1963, art 7, § 34." *Howell Twp v Rooto Corp*, 258 Mich App 470, 475-476; 670 NW2d 713 (2003). Accordingly, an ordinance may not preempt state law.

The issue in this case is whether the NREPA preempts the township's ordinance. "State law preempts a municipal ordinance in two situations: (1) where the ordinance directly conflicts with a state statute or (2) where the statute completely occupies the field that the ordinance attempts to regulate." *Czymbor's Timber, supra* at 555. In *Howell Twp, supra* at 476-477, quoting *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257, 262; 566 NW2d 514 (1997), this Court explained:

> With regard to whether a statute preempts a municipal ordinance by completely occupying the field of regulation, our Supreme Court set forth several guidelines:
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> '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.
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> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
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> 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 that 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.'

With regard to determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject

"the test *is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.* Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden.

* * *

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.* Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.' [Citations omitted.]

Article VII, § 7.03, of the township's zoning ordinance addresses conditional uses of land in agricultural districts. The ordinance provides, in relevant part:

Section 7.03. CONDITIONAL USE. The following uses shall be permitted subject to the conditions hereinafter imposed and subject further to the review and approval of the Planning Commission.

* * *

12. The sales and transporting of agricultural commodities including seed, fertilizer, and other accessories and the service or repair of farm machinery provided that such sales, service or repairs are conducted on an operating farm

> and incidental and secondary to the use of the farm for agricultural activities. All potentially dangerous chemicals shall be stored in closed and locked building [sic].

Thus, the township's zoning ordinance imposes various conditions that must be satisfied in order for a conditional permit involving the sale or transportation of agricultural commodities, including fertilizer and other accessories, to be issued. The specific conditions include: (1) the applicant has an operating farm; (2) the sale and transportation of commodities such as seed, fertilizer, and other accessories must be incidental and secondary to the use of the farm for agricultural activities; and (3) all potentially dangerous chemicals shall be stored in closed and locked buildings.

In this case, plaintiffs' application for a conditional use permit was denied by the board on the basis that their proposed usage was not incidental and secondary to the use of their farm for agricultural activities. Plaintiffs, who were previously issued licenses to sell pesticides and fertilizer at the location in question by the state Department of Agriculture, argue that the township's attempt to regulate their sale of pesticides and fertilizer under § 7.03 of its zoning ordinance is invalid, because the ordinance is preempted by the NREPA. We agree.

Article II of the NREPA addresses pollution control. Part 83 of that article, MCL 324.8301 *et seq.*, addresses pesticide control, and Part 85, MCL 324.8501 *et seq.*, addresses fertilizers. With respect to pesticides, MCL 324.8328 provides:

> (1) Except as otherwise provided in this section, it is the express legislative intent that this part preempt any local ordinance, regulation, or resolution that purports to duplicate, extend, or revise in any manner the provisions of this part. *Except as otherwise provided for in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that contradicts or conflicts in any manner with this part.*
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> (2) If a local unit of government is under contract with the department to act as its agent or the local unit of government has received prior written authorization from the department, then that local unit of government may pass an ordinance that is identical to this part and rules promulgated under this part, except as prohibited in subsection (7). The local unit of government's enforcement response for a violation of the ordinance that involves the use of a pesticide is limited to issuing a cease and desist order as prescribed in section 8327.
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> (3) A local unit of government may enact an ordinance identical to this part and rules promulgated under this part regarding the posting and notification of the application of a pesticide. Subject to subsection (8), enforcement of such an ordinance may occur without prior authorization from the department and without a contract with the department for the enforcement of this part and rules promulgated under this part. The local unit of government shall immediately notify the department upon enactment of such an ordinance and shall immediately notify the department of any citations for a violation of that ordinance. A person who violates an ordinance enacted under this subsection is responsible for a

municipal civil infraction and may be ordered to pay a civil fine of not more than $500.00.

(4) *A local unit of government may enact an ordinance prescribing standards different from those contained in this part and rules promulgated under this part and which regulates the distribution, sale, storage, handling, use,* application, transportation, or disposal of pesticides under either or both of the following circumstances:

(a) Unreasonable adverse effects on the environment or public health will exist within the local unit of government. The determination that unreasonable adverse effects on the environment or public health will exist shall take into consideration specific populations whose health may be adversely affected within that local unit of government.

(b) The local unit of government has determined that the use of a pesticide within that unit of government has resulted or will result in the violation of other existing state laws or federal laws.

(5) An ordinance enacted pursuant to subsections (2), (3), and (4) shall not conflict with existing state laws or federal laws. *An ordinance enacted pursuant to subsection (4) shall not be enforced by a local unit of government until approved by the commission of agriculture. If the commission of agriculture* denies an ordinance enacted pursuant to subsection (4), the commission of agriculture shall provide a detailed explanation of the basis of the denial within 60 days.

(6) Upon identification of unreasonable adverse effects on the environment or public health by a local unit of government as evidenced by a resolution submitted to the department, the department shall hold a local public meeting within 60 days after the submission of the resolution to determine the nature and extent of unreasonable adverse effects on the environment or public health due to the use of pesticides. Within 30 days after the local public meeting, the department shall issue a detailed opinion regarding the existence of unreasonable adverse effects on the environment or public health as identified by the resolution of the local unit of government.

(7) The director may contract with a local unit of government to act as its agent for the purpose of enforcing this part and the rules promulgated pursuant to this part. The department shall have sole authority to assess fees, register and certify pesticide applicators, license commercial applicators and restricted use pesticide dealer firms, register pesticide products, cancel or suspend pesticide registrations, and regulate and enforce all provisions of this part pertaining to the application and use of a pesticide to an agricultural commodity or for the purpose of producing an agricultural commodity.

(8) For any ordinance enacted pursuant to this section, the local unit of government shall provide that persons enforcing the ordinance comply with the

training and enforcement requirements as determined by the director. A local unit of government shall reimburse the department for actual costs incurred in training local government personnel. [Emphasis added.]

Similarly, with respect to fertilizers, MCL 324.8517 provided[1]:

(1) Except as otherwise provided in this section, it is the express legislative intent that this part preempt any local ordinance, regulation, or resolution that purports to duplicate, extend, or revise in any manner the provisions of this part. Except as otherwise provided for in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that contradicts or conflicts in any manner with this part.

(2) If a local unit of government is under contract with the department to act as its agent or the local unit of government has received prior written authorization from the department, that local unit of government may enact an ordinance that is identical to this part and rules promulgated under this part, except as prohibited in subsection (6). The local unit of government's enforcement response for a violation of the ordinance that involves the manufacturing, storage, distribution, or sale use of products regulated by this part is limited to issuing a cease and desist order in the manner prescribed in section 8511.

(3) A local unit of government may enact an ordinance prescribing standards different from those contained in this part and rules promulgated under this part and that regulates the manufacturing, storage, distribution, or sale of a product regulated by this part under either or both of the following circumstances:

(a) Unreasonable adverse effects on the environment or public health will exist within the local unit of government. The determination that unreasonable adverse effects on the environment or public health will exist shall take into consideration specific populations whose health may be adversely affected within that local unit of government.

(b) The local unit of government has determined that the manufacturing, storage, distribution, or sale of a product regulated by this part within that unit of government has resulted or will result in the violation of other existing state or federal laws.

(4) An ordinance enacted pursuant to subsections (2) and (3) shall not conflict with existing state laws or federal laws. An ordinance enacted pursuant

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[1] MCL 324.8517 was amended by 2008 PA 14, effective February 29, 2008. The amendments appear to be grammatical only. For purposes of this case, we rely on the former version of MCL 324.8517, which was in effect when this matter was decided.

> to subsection (3) shall not be enforced by a local unit of government until approved by the commission of agriculture. The commission of agriculture shall provide a detailed explanation of the basis of a denial within 60 days.
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> (5) Upon identification of unreasonable adverse effects on the environment or public health by a local unit of government as evidenced by a resolution submitted to the department, the department shall hold a local public meeting within 60 days after the submission of the resolution to determine the nature and extent of unreasonable adverse effects on the environment or public health due to the manufacturing, storage, distribution, or sale of a product regulated by this part. Within 30 days after the local public meeting, the department shall issue a detailed opinion regarding the existence of unreasonable adverse effects on the environment or public health as identified by the resolution of the local unit of government.
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> (6) The director may contract with a local unit of government to act as its agent for the purpose of enforcing this part and the rules promulgated under this part. The department shall have sole authority to assess fees, register fertilizer or soil conditioner products, cancel or suspend registrations, and regulate and enforce provisions of section 8512.
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> (7) For any ordinance enacted pursuant to this section, the local unit of government shall provide that persons enforcing the ordinance comply with the training and enforcement requirements as determined appropriate by the director.

MCL 324.8328 and MCL 324.8517 both allow some local regulation and, therefore, do not expressly preempt all local legislation. Instead, they allow for limited local regulation to the extent that it does not conflict with or contradict any portion of parts 83 or 85 of the NREPA, "[e]xcept as otherwise provided in [those] section[s]." MCL 324.8328(1); MCL 324.8517(1). Therefore, these portions of the NREPA do not completely occupy the field of regulation of farm chemicals to exclude local government intervention. Thus, local regulation is permissible, except where it is specifically preempted by MCL 324.8328 or MCL 324.8517, or conflicts with the NREPA. *Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 294; 715 NW2d 89 (2006). Therefore, the township's ordinance is enforceable to the extent that it is not inconsistent with the state's licensure of plaintiffs' operation. And, if they are inconsistent, the ordinance could still be valid if it was submitted to and approved by the agricultural commission. MCL 324.8328(5); MCL 324.8517(4).

Defendants argue that they may regulate the locations of businesses distributing pesticides and fertilizer without running afoul of the NREPA, because the NREPA is not concerned with location. We disagree.

MCL 324.8310(1) and (2) address the licensure of not only persons, but also locations for selling or distributing pesticides. Similarly, MCL 324.8504 addresses licenses to distribute or sell fertilizer, and also the location of the site where the fertilizer may be sold or distributed. In this case, plaintiffs were issued licenses by the Department of Agriculture that clearly state that they are for both the establishment and the address listed on the licenses and that the licenses are not transferable. Plaintiffs had to obtain separate licenses for each location at which they

intended to sell or distribute pesticides and fertilizers. Accordingly, the NREPA regulates not only the licensure of persons who may deal in pesticides and fertilizers, but also the locations of any businesses dealing in those products.

Furthermore, the Legislature has authorized the Department of Agriculture to adopt regulations related to not only the licensure of pesticide and fertilizer distributors, but also the proper storage, transportation, and distribution of these products. See MCL 324.8325(1), MCL 324.8513, and MCL 324.8518(1). The Department of Agriculture has adopted several regulations that relate to the location and operation of businesses dealing with pesticides and fertilizers that address various concerns, including security or possible contamination. See 2 Michigan Administrative Code, RR 285.640 and 285.641 *et seq.* The regulations also require applicants to submit site plans for the proposed location and a discharge response plan. R 285.640.a(1). Accordingly, in issuing the license, the state has regulated the storage and distribution of pesticides and fertilizers.

In this case, the township's ordinance imposes additional conditions relating to the sale and transportation of agricultural chemicals and requires that these activities be (1) conducted on an operating farm, and (2) incidental and secondary to the use of the farm for agricultural activities. These requirements are not found in the NREPA and conflict with the Department of Agriculture's decision to allow plaintiffs to sell and distribute pesticides and fertilizer from their farm. This is an area of regulation expressly reserved for the state under the NREPA. MCL 324.8328; MCL 324.8517.[2]

However, even if the ordinance provisions were considered permissible enlargements to the statute, *Howell Twp, supra* at 476-477, the ordinance provisions could not be enforced against plaintiff. As previously noted, MCL 324.8328(4) allows local governments to enact ordinances to adopt "standards different from those contained in this part and rules promulgated under this part and which regulates the distribution, sale, storage, handling, use, application, transportation, or disposal of pesticides under" two different circumstances. MCL 324.8517(3) provides for similar local ordinances with respect to the regulation of fertilizers. MCL 324.8328(4)(a) and (b), and MCL 324.8517(3)(a) and (b), both allow local governments to adopt their own standards based on the adverse effects of pesticides and fertilizers on the environment or public health, or if the use of a pesticide or fertilizer within a local unit of government will result in a violation of other existing state or federal laws. However, such an ordinance may not be enforced until the local government receives the approval of the commission of agriculture. MCL 324.8328(5) and MCL 324.8517(4). The ordinance at issue here was not approved by the

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[2] We also have some difficulty with the Township's position that the ordinance only regulates the location, while the statute only regulates the person, or licensee. First, as already shown, the statute and, more particularly the regulations, make repeated reference to providing a license for a particular location, and require the applicant to submit material regarding the location sought to be licensed. See R 285.640 *et. seq*. Second, under the zoning ordinance the sale and transportation of these materials is permitted in the agricultural district, but only particular entities are allowed to do so. Those entities are farms where the sale and transportation of material will be incidental or secondary to its other farming operations.

commission of agriculture, and did not otherwise comply with MCL 324.8328 or MCL 324.8517. Thus, it is not enforceable against plaintiffs, who were previously licensed by the Department of Agriculture to sell and distribute pesticides and fertilizer on their farm.

Because of our resolution on the preemption issue, we need not address plaintiffs' remaining arguments.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot