On direct appeal, we concluded that in respect to juror No. 3, the record did not suggest that there was any misconduct on the juror's part, much less prejudicial misconduct. We concluded the record did not suggest Robinson was prejudiced by the removal of the juror who slept during parts of the testimony.

On direct appeal, we concluded the court did not abuse its discretion in removing the two jurors. Robinson is procedurally barred from reasserting this claim.

6. Motion for Rehearing on Direct Appeal

Robinson claims his counsel was ineffective by not timely filing a motion for rehearing after we affirmed Robinson's convictions and sentences on direct appeal. Motions for rehearing are discretionary with this court. On postconviction, Robinson has not shown that we would have granted his motion for rehearing or that if the motion had been granted, we would have changed our opinion and granted him redress.

VI. CONCLUSION

Because Robinson cannot establish that he was prejudiced by his counsel's representation, we find no merit to his assignments of error. We affirm the district court's denial of Robinson's motion for postconviction relief.

Affirmed.

Heavican, C.J., not participating.

Butler County Dairy, L.L.C., appellant, v. Butler County, Nebraska, and Township of Read, Butler County, Nebraska, appellees, and Township of Summit, Butler County, Nebraska, intervenor-appellee.

___ N.W.2d ___

Filed March 8, 2013. No. S-12-173.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

2. **Constitutional Law: Statutes: Political Subdivisions.** The determination of the proper scope of the powers vested in the subordinate divisions of the state, and the lawfulness of the exercise thereof by the statutory agencies concerned, necessitates recourse to the terms of the state Constitution and the language of the statutes relating thereto.
3. **Courts: Statutes: Ordinances.** When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.
4. **Statutes.** The interpretation of statutes and regulations presents questions of law.
5. **Jurisdiction.** The question of jurisdiction is a question of law.
6. **Counties: Statutes.** A board of supervisors has all the powers applicable to county boards as provided by the general laws of this state.
7. **Political Subdivisions: Words and Phrases.** A township is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature.
8. **Political Subdivisions.** Every town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, and no others.
9. **Political Subdivisions: Statutes.** The powers conferred upon a township by statute are limited and confined to those which properly belong to the government of the state as a whole and which are merely devolved upon the township as a portion of the state government.
10. ____: ____. The statutes granting a township certain powers must be strictly construed.
11. **Counties: Highways.** General supervision and control of the public roads of each county is vested in the county board.
12. **Political Subdivisions: Highways.** All township road and culvert work shall be under the general supervision of the township board.
13. **Counties: Political Subdivisions: Highways.** A county board and a township board are both vested with general supervisory authority over a township road.
14. ____: ____: ____. The exercise of a county's authority over township roads can supersede a township's authority over those same roads.
15. **Political Subdivisions: Public Officers and Employees.** Under Neb. Rev. Stat. § 23-224(6) (Reissue 2012), the electors of a township have the power to prevent the exposure or deposit of offensive or injurious substances within the limits of the town.
16. **Constitutional Law: Political Subdivisions: Proof.** When a party challenges the validity of a township regulation without arguing that a particular application of the regulation is improper, a court will consider that to be a facial challenge that can succeed only by establishing that no set of circumstances exists under which the regulation would be valid.
17. **Statutes: Ordinances.** Preemption of municipal ordinances by state law is based on the fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state.
18. ____: ____. In the case of a direct conflict between a statute and a city ordinance, the statute is the superior law.
19. **Political Subdivisions: Statutes.** Any laws enacted pursuant to a township's limited statutory authority necessarily are subordinate to the laws of the state from which the township's powers derived.

20. **Municipal Corporations: Political Subdivisions.** The same preemption doctrines apply to the laws of both municipalities and townships.
21. **Statutes.** There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.
22. **Political Subdivisions: Statutes: Legislature: Intent.** Express preemption occurs when the Legislature has expressly declared in explicit statutory language its intent to preempt local laws.
23. **Legislature: Statutes.** The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.
24. **Statutes: Political Subdivisions.** Where the state has occupied the field of prohibitory legislation on a particular subject, there is no room left for local laws in that area and a political subdivision lacks authority to legislate with respect to it.
25. **Statutes: Ordinances: Legislature.** That which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express legislative grant, an ordinance cannot authorize what the statutes forbid.
26. **Political Subdivisions: Statutes.** The fact that a local law is more stringent than state law does not by itself lead to conflict preemption.
27. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
28. **Jurisdiction: Parties.** The presence of necessary parties is jurisdictional.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Township of Read.

Gregory D. Barton, of Harding & Shultz, P.C., L.L.O., for intervenor-appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

Butler County Dairy, L.L.C. (BCD), challenged two regulations adopted by Read Township, Butler County, Nebraska, governing livestock confinement facilities after those regulations were cited by Read Township and Butler County in

denying BCD's request for a permit to install a liquid livestock manure pipeline under a public road. The district court ruled that Read Township had the statutory authority to enact the regulations and that they were not preempted by the Livestock Waste Management Act (LWMA)[1] or Nebraska's Department of Environmental Quality (DEQ) livestock waste control regulations in title 130 of the Nebraska Administrative Code (Title 130). Because Read Township had the statutory authority to enact the pertinent regulations and the regulations are not preempted by state statute or regulation, we affirm.

II. BACKGROUND

BCD applied for and received a permit from DEQ for the construction and operation of a livestock waste control facility pursuant to LWMA. As part of the operation of the facility, BCD planned to pipe liquid livestock manure to crop ground, where the livestock waste would then be applied through a pivot irrigation system. For this purpose, BCD wished to install a pipeline under road No. 27, a section line road in Butler County. The southern portion of road No. 27 lies within Read Township. This action addresses only the southern portion of the road.

BCD applied for a permit from Read Township to install the pipeline, but the permit was denied due to the existence of a township regulation prohibiting the placement of any pipeline carrying liquid livestock waste "on, over or under town property, including town roads, right-of-ways and ditches." This specific township regulation was adopted by the electors at the annual townhall meeting for Read Township on September 13, 2007, and became effective September 20. BCD's application for a permit was denied at a regular Read Township board meeting on September 20.

BCD also applied for a permit from Butler County to install the pipeline. When Read Township denied BCD's application, the Butler County Board of Supervisors refused to override the township's decision and on February 17, 2009, voted to deny the permit.

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[1] Neb. Rev. Stat. §§ 54-2416 to 54-2438 (Reissue 2010).

In March 2009, BCD filed a complaint against Read Township alleging that the pipeline regulation was invalid because it "exceed[ed] the scope of Read Township's authority" and was preempted by LWMA, Title 130, and zoning laws. BCD also challenged as invalid a second township regulation adopted on September 13, 2007, pertaining to large livestock confinement facilities. This second regulation implemented minimum setback requirements for large livestock confinement facilities from churches, public use areas, and dwelling units "not of the same ownership and on the same premises as the operation"; required owners and operators of such facilities to demonstrate that livestock waste would not be carried onto township property in the event of a 25-year storm; and prohibited the spillage of livestock waste onto township roads, ditches, or property from such facilities or during transport. BCD prayed for declaratory and injunctive relief along with damages for additional expenses incurred in managing its livestock waste without a pipeline.

Shortly after the filing of BCD's complaint, Summit Township, Butler County, intervened. Summit Township had regulations identical to those of Read Township and wished the court to declare both sets of regulations valid and enforceable.

BCD, Read Township, and Summit Township subsequently filed three separate motions for summary judgment. After receiving evidence, the district court denied all three motions because it determined that a necessary party was not present. The court ordered BCD to bring in Butler County as a party because it concluded that Butler County had control over road No. 27.

In accordance with the district court's order, in December 2010, BCD filed an amended complaint naming Butler County as a defendant. The amended complaint restated the causes of action and prayers for relief from the original complaint. Additionally, the amended complaint alleged that Butler County erroneously denied BCD a permit for the pipeline based on the belief that Read Township had authority over road No. 27 and asked the court to declare that the county had exclusive authority over placement of a pipeline under road No. 27. Butler

County, Read Township, and Summit Township all filed separate answers, and Summit Township made a counterclaim asking the court to hold the pertinent township regulations valid and enforceable.

Following resolution of the issue of necessary parties, which had previously prevented summary judgment, BCD, Read Township, and Summit Township again separately filed motions for summary judgment in July 2011. Butler County also filed a motion for summary judgment. At a hearing before the district court on these motions, the parties jointly offered the transcript from the previous hearing, including all exhibits received during that proceeding. The court also accepted additional evidence.

On February 7, 2012, the district court granted summary judgment for Butler County, Read Township, and Summit Township because it determined that Read Township did in fact have the authority to enact the township regulations at issue and that the regulations were not preempted by state law. The court also considered BCD's standing to challenge the Read Township regulations—a matter that is not raised on appeal.

On the issue of the scope of Read Township's regulatory authority, the district court concluded that the regulation of animal waste generated by large livestock confinement facilities was a proper exercise of the township's authority "[t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town" under Neb. Rev. Stat. § 23-224(6) (Reissue 2012). As for the prohibition against liquid livestock waste pipelines on town property, the court determined that such a regulation was authorized by Neb. Rev. Stat. § 39-1520 (Reissue 2008), which declared that "[a]ll township road and culvert work shall be under the general supervision of the township board," and § 23-224(8)(a), which granted to townships the authority to raise money "for constructing and repairing roads and bridges within the town." Thus, the court concluded that Read Township had the statutory authority to enact both regulations at issue.

The conclusion that the pipeline regulation was a valid exercise of Read Township's authority did not, however, translate

into a holding that the specific road in this case was under the control of the township and subject to the pipeline regulation. Even though BCD had specifically asked the court to determine whether Butler County or Read Township had control over road No. 27, the court refused to decide this matter, stating that there was "no issue as both entities denied the request." Despite this holding, the court did consistently refer to "County Road 27" throughout its journal entry.

The remainder of the district court's written decision—indeed, the bulk of the court's analysis—focused on the issue of preemption. After providing a thorough review of state preemption doctrine, the court first addressed the question whether Read Township's regulations governing large livestock confinement facilities are preempted by LWMA. It determined that the Legislature "has not expressly declared that regulation of livestock waste by any other governmental entity is prohibited" and "explicitly provided that [LWMA] 'shall not be construed to change the zoning authority of a county that existed prior to May 25, 1999.'" Having thus dismissed explicit preemption and field preemption, the court next turned to the possibility of conflict preemption and concluded as follows:

> Addressing this claim under this analysis, the court finds that under the provisions of [LWMA] a permit[t]ee is not automatically allowed to build or operate a livestock facility upon receipt of a permit. To the contrary, the applicant is explicitly obligated to follow local law before commencing livestock operations. The fact that local requirements may be more stringent does not create a conflict; rather, the State and local legislative provisions can coexist and be equally enforced. Therefore, there is no conflict preemption under [LWMA].

BCD's complaint alleged preemption under both LWMA and Title 130—the regulations enacted pursuant to LWMA. Although BCD made a single argument for preemption under both the statutes and the regulations, the district court did not address preemption by Title 130 in its decision.

BCD had also raised a preemption claim under zoning law. Because the district court concluded that the relevant township regulations were not zoning laws and that they had been

"enacted by the townships pursuant to clear legislative authority," the court held that there was no preemption by zoning law. It also noted that Butler County had not as yet enacted any county zoning regulations with which the township regulations would conflict.

Thus finding that BCD was not entitled to relief or damages, the district court granted summary judgment in favor of Butler County, Read Township, and Summit Township.

BCD timely appeals. Pursuant to statutory authority, we moved the case to our docket.[2]

III. ASSIGNMENTS OF ERROR

BCD alleges, restated and reordered, that the district court erred in (1) failing to find that the pertinent Read Township regulations exceeded the township's statutory authority, (2) finding that § 23-224 provided a statutory basis for these regulations, (3) failing to find that the Read Township regulations are preempted by LWMA and Title 130, (4) failing to find that the regulations are preempted by "county zoning statutes," (5) finding that Butler County properly deferred to Read Township's "invalid township authority" over the permitting of the waste pipeline, and (6) finding that Butler County was a necessary party. BCD does not attack the validity of Summit Township's regulations, and thus, our decision does not address them.

IV. STANDARD OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[3]

[2-5] All issues in the present appeal are questions of law and thus are governed by this standard. The determination of the proper scope of the powers vested in the subordinate divisions of the state, and the lawfulness of the exercise thereof by the statutory agencies concerned, necessitates recourse to the terms of the state Constitution and the language of the statutes

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[2] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

[3] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

relating thereto.[4] When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.[5] The interpretation of statutes and regulations required by these two issues presents questions of law.[6] The question of jurisdiction also is a question of law.[7]

V. ANALYSIS

1. READ TOWNSHIP'S AUTHORITY

BCD's first two assignments of error relate to the authority of Read Township to enact the regulations establishing the pipeline ban and other requirements for large livestock confinement facilities. We will consider each of BCD's arguments in turn. To do so, however, requires a solid understanding of the system of township organization and the division of powers within a county so organized.

(a) Township Organization

As this court has previously explained, in Nebraska, a county can be organized under one of two systems of government.[8] Under the commissioner system, "the government of the county at large and of its subdivisions is entrusted to a board of county commissioners, who, together with certain governmental agents subordinate to them, conduct all the affairs of the county, local and general."[9] In the alternative, a county may be organized under the township system, under which a county is further subdivided into townships and "purely local affairs are entrusted to the town meetings of the several towns, or to township officers selected by the towns, while the general

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[4] *Cheney v. County Board of Supervisors*, 123 Neb. 624, 243 N.W. 881 (1932).

[5] *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[6] See *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[7] See *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[8] See *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895).

[9] *Id.* at 70-71, 64 N.W. at 367.

affairs of the county are conducted by a board constituted of the various township supervisors."[10]

[6] The adoption of township organization does not alter the basic powers of a county. A board of supervisors has "all the powers applicable to county boards as provided by the general laws of this state."[11] Indeed, Nebraska statutes vest the powers of a county in a "county board,"[12] which term is defined to encompass both boards of supervisors existing under township organization and boards of county commissioners in counties not under township organization.[13] As a result, the powers and duties of a county board are not altered by the adoption of township organization.

[7] As the name "township organization" suggests, the distinguishing feature of a county under township organization is the existence of smaller political subdivisions within a county called townships. A township "is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature."[14] Its purpose is "to carry into effect with ease and facility certain powers and functions . . . which may be more readily and conveniently carried on by subdivision of the territory of the state into smaller areas."[15]

The powers of a township are exercised through direct local self-government.[16] During annual town meetings, the electors of a township exercise the corporate powers of a township[17] along with other powers provided by statute.[18] Although each

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[10] *Id*. at 71, 64 N.W. at 367.

[11] Neb. Rev. Stat. § 23-270 (Reissue 2012). See, also, Neb. Rev. Stat. § 23-208 (Reissue 2012).

[12] Neb. Rev. Stat. § 23-103 (Reissue 2012).

[13] See, *id*.; Neb. Rev. Stat. § 39-1401(1) (Reissue 2008).

[14] *State v. Bone Creek Township*, 109 Neb. 202, 204, 190 N.W. 586, 587 (1922).

[15] *Wilson v. Ulysses Township*, 72 Neb. 807, 812, 101 N.W. 986, 988 (1904).

[16] See *id*.

[17] See § 23-224(2).

[18] See § 23-224.

township also has a township board and township officers,[19] each of which has statutorily prescribed powers and duties,[20] the electors of a township, when assembled for the annual town meeting, "constitute a governing body of the township."[21] This use of town meetings to realize direct local self-government makes township organization "one of the rare examples in Nebraska of direct democracy."[22]

[8-10] A township does not have the authority to exercise any powers outside those explicitly given to it by statute. When enumerating the powers of a township, Neb. Rev. Stat. § 23-223 (Reissue 2012) explicitly states that "[e]very town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, *and no others*." (Emphasis supplied.) This statutory language has long been interpreted by this court to mean that the powers conferred upon a township by statute "are limited and confined to those which properly belong to the government of the state as a whole, and which are merely devolved upon the township as a portion of the state government."[23] The same can be said of the powers conferred upon counties.[24] In fact,

> there is but little difference between the powers, duties and liabilities of a county in this state and those of a township. The object and purpose of their organization are the same, and the results sought to be accomplished are substantially alike, except in degree and territorial extent of jurisdiction. The main point of distinction between the two systems is the more popular and democratic form of government allowed by the township; the idea

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[19] See, Neb. Rev. Stat. §§ 23-215, 23-222, and 23-228 (Reissue 2012).

[20] See, e.g., Neb. Rev. Stat. §§ 23-249 to 23-252 (Reissue 2012).

[21] *State ex rel. Newman v. Columbus Township Bd.*, 15 Neb. App. 656, 662, 735 N.W.2d 399, 406 (2007).

[22] *Id.* at 660, 735 N.W.2d at 404.

[23] *Wilson v. Ulysses Township, supra* note 15, 72 Neb. at 812, 101 N.W. at 988.

[24] See, *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000); *Morton v. Carlin*, 51 Neb. 202, 70 N.W. 966 (1897).

> of local self-government being the essence of the township system.[25]

Because a township is a political subdivision of the state, the statutes granting a township certain powers must be strictly construed.[26]

In the instant case, BCD argues that Read Township exceeded its limited statutory authority by enacting the two regulations at issue. Of these two regulations, BCD confesses that it has been harmed thus far only by the pipeline ban. Thus, we first address Read Township's authority to enact such a ban.

(b) Authority to Enact Pipeline Ban

The exact language of the Read Township regulation enacting the pipeline ban is as follows: "No person shall be allowed to place on, over or under town property, including town roads, right-of-ways and ditches, any pipeline which carries liquid livestock waste." BCD mainly objects to the ban on pipelines "on, over or under" township roads. According to BCD, Read Township did not have the authority to regulate and control the roads located within its territory through a pipeline ban because Butler County alone could exercise authority over the roads within Read Township. In the event we find that Read Township did have the authority to regulate roads within its borders, BCD argues that the authority of the electors of Read Township to regulate "offensive or injurious substances" under § 23-224(6) was not a proper statutory base for enactment of the pipeline ban.

We agree that the question whether Read Township possessed authority to regulate the placement of liquid livestock waste pipelines "on, over or under" the roads within its territory actually presents two separate questions. First, we must determine whether Read Township had the general authority to regulate roads within its territory, which roads necessarily also

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[25] *Wilson v. Ulysses Township, supra* note 15, 72 Neb. at 810-11, 101 N.W. at 988.

[26] See *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002).

lie within Butler County. Second, we must consider whether the electors of Read Township had the statutory authority to enact a regulation prohibiting liquid livestock waste pipelines. Only if Read Township had the authority both to regulate township roads and to enact a pipeline ban was the resulting regulation prohibiting pipelines "on, over or under" township roads a valid exercise of township authority.

(i) Authority Over Township Roads

Turning first to the question of Read Township's authority to regulate the roads within its territory, we note that Nebraska statutes distinguish between types of roads within a county. We mention only the designations relevant to our discussion in the instant case.

The broadest designation for a road is that of public road, which includes "all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years."[27] The statutes refer to public roads as county roads or township roads depending on where they are located.[28]

Any public road within a county can also be designated by the county board as a primary or secondary county road.[29] All public roads within a county are county roads in the sense that they are located within the territory of a county, but not all public roads within a county are designated as primary or secondary county roads. The kinds of roads typically designated as primary or secondary county roads are "main traveled roads," roads connecting cities, roads leading to and from schools, and mail route roads.[30] All primary and secondary county roads must be maintained at county expense.[31]

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[27] § 39-1401(2).

[28] See, e.g., Neb. Rev. Stat. §§ 39-1408 and 39-1801 (Reissue 2008).

[29] See Neb. Rev. Stat. § 39-2001(1) (Reissue 2008).

[30] *Id.*

[31] See Neb. Rev. Stat. § 39-2003 (Reissue 2008).

In the instant case, there was no evidence at trial that road No. 27 was designated as a primary or secondary county road. Thus, we treat it as a public road located wholly within Butler County and partially within Read Township.

[11,12] Under Nebraska statutes, the general supervision of public roads is vested in both county boards and township boards. Neb. Rev. Stat. § 39-1402 (Reissue 2008) states that "[g]eneral supervision and control of the public roads of each county is vested in the county board." Similarly, § 39-1520 states that "[a]ll township road and culvert work shall be under the general supervision of the township board . . . ."

In the case of a road that is located within both a county and a township, such as road No. 27, a plain reading of these statutes suggests that the county board and the township board have concurrent authority over that road. The statutory grants of power in the instant case—§§ 39-1402 and 39-1520—do not, on their face, conflict. The language of § 39-1402 only *vests* the power of general supervision in county boards—it does not require county boards to exercise that power. Neither does the language of § 39-1402 indicate that the power of general supervision vested in county boards is exclusive. Indeed, in *State, ex rel. Piercey, v. Steffen*,[32] this court explained that a county "is not required to maintain [township, precinct, or district] roads at county expense. It is merely required to see that the roads under the jurisdiction of these smaller political units are maintained and repaired." Because the power vested in county boards is neither exclusive nor mandatory, the grants of supervisory authority over public roads in §§ 39-1402 and 39-1520 do not discernibly conflict.

This court has previously found that grants of general supervisory authority over public roads to both counties and smaller political subdivisions can relate to the same public road and still be consistent with one another. In *SID No. 2 v. County of Stanton*,[33] we concluded that two political subdivisions had

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[32] *State, ex rel. Piercey, v. Steffen*, 121 Neb. 39, 42, 236 N.W. 141, 142 (1931).

[33] *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997).

concurrent authority over public roads located within both of their territories because the statutory grants of power to each of the political subdivisions did not conflict. Although that case involved the power of sanitary and improvement districts and not of townships, it stands for the proposition that two political subdivisions can possess concurrent authority over public roads provided that those powers as granted by statute do not conflict.

[13] Because §§ 39-1402 and 39-1520 do not inherently conflict, we conclude that they vest general supervisory authority over public roads located within a township in *both* the county board and the township board, respectively, and that these political subdivisions have concurrent powers over township roads. In other words, a county board and a township board are both vested with general supervisory authority over a township road. Such concurrent authority is consistent with other Nebraska statutes relating to public roads. Neb. Rev. Stat. § 39-1524 (Reissue 2008) provides that a township may request funds from the county "to aid in the building, constructing, or repairing" of township roads. If a township can request money for the purpose of building township roads, it must necessarily have the authority to actually build and maintain those roads. Notwithstanding § 39-1524, Neb. Rev. Stat. § 39-1907 (Reissue 2008) allows a township to appropriate money to the county "to assist in the construction or improvement" of roads within the township. Given the language of § 39-1907, a county must also have the power to build township roads. When read together, these provisions contemplate that both counties and townships may, depending on the situation, build and improve public roads within a township.

The case cited by BCD does not dissuade us from this conclusion that counties and townships have concurrent authority over public roads within a township. BCD cites to *Art-Kraft Signs, Inc. v. County of Hall*[34] for the proposition that "a township possesses no authority over what is erected on a township

[34] *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979).

road"[35] and argues that this case is "directly on point."[36] This is an inaccurate statement of the holding in that case. In *Art-Kraft Signs, Inc.*, we considered whether a township's supervisory authority over public roads within its territory prevented a county from exercising its authority over those same roads. Faced with a township's attempt to enjoin a county from exercising any authority over a township road, we held specifically that the authority of a township over public roads within its territory did not override the authority of a county. We did not hold that townships possessed no authority over township roads, but that a township's authority over such roads did not *supersede* the general supervisory power of a county. These are distinct issues, the former of which the court in *Art-Kraft Signs, Inc.* simply did not reach.

Art-Kraft Signs, Inc. does, however, highlight the significant fact that a county is higher than a township in the hierarchy of political subdivisions in Nebraska. A township is created by a county from the territory of the county.[37] And a county can effectively delegate the maintenance of public roads within a township to that township so long as it ensures that "the roads under the jurisdiction of these smaller political units are maintained and repaired."[38] As such, the powers over township roads vested in both counties and townships may be concurrent, but they are not equal.

We now turn, as did the court in *Art-Kraft Signs, Inc.*, to the interrelation of the powers of a county and a township over township roads. But unlike in *Art-Kraft Signs, Inc.*, where we considered whether the exercise of authority over township roads *by a township* overrode the general supervisory power of a county over all public roads, we must determine whether the exercise of authority *by a county* over township roads supersedes the authority of a township. This latter question, not the former, is the one raised in the instant appeal.

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[35] Brief for appellant at 17.

[36] *Id.* at 16.

[37] See Neb. Rev. Stat. § 23-209 (Reissue 2012).

[38] *State, ex rel. Piercey, v. Steffen, supra* note 32, 121 Neb. at 42, 236 N.W. at 142.

[14] Consistent with the hierarchy of political subdivisions, the exercise of a county's authority over township roads can supersede a township's authority over those same roads. In *Franek v. Butler County*,[39] we considered whether a county was liable for injuries that resulted when a vehicle was driven into an open, unmarked culvert on a road within one of the county's townships. Because the county had entered into a contract to improve the township road in question, we held that the county had "assumed control under statutory power" over the road and "superseded the townships in authority."[40] We specifically explained that "[a]fter [the county] assumed control under statutory power, responsibility for the public improvement and liability to individuals for negligence resulting in damages did not continue in or shift to townships or oscillate between county and townships. Liability followed the exercise of power and the superseding of the townships."[41]

The characterization of the county's actions pertaining to the road as superseding the township is significant. To supersede commonly means "to take the place of and outmode by superiority."[42] And the court in *Franek* stated that the county superseded the township when it "exercised power to improve the [township road]."[43] Since the county superseded, or *took the place of*, the township when it began improving the township road, the township must have been in the position of improving the road prior to that time. Furthermore, the court explicitly stated that responsibility over the township road "did not continue in . . . townships" once the county "assumed control under statutory power,"[44] from which we conclude that the county's assumption of control—manifested by improving

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[39] *Franek v. Butler County*, 127 Neb. 852, 257 N.W. 235 (1934).

[40] *Id.* at 856, 257 N.W. at 236.

[41] *Id.*

[42] Webster's Third New International Dictionary of the English Language, Unabridged 2295 (1993).

[43] *Franek v. Butler County, supra* note 39, 127 Neb. at 856, 257 N.W. at 236.

[44] *Id.*

the road—caused the change in responsibility. Thus, from *Franek*, we conclude that (1) a township can exercise authority over township roads until the point in time at which a county assumes control, (2) the assumption of control by a county supersedes the authority of a township, and (3) a county can assume control by improving the road.

We note that the court in *Franek* held the county responsible for the township road despite not having formally designated the road as a primary or secondary county road. In fact, the court specifically rejected the argument that the county could not be held responsible for the road simply because it had failed to designate the road as a primary or secondary county road. Instead, the court focused on the fact that the county had "assumed control under statutory power" by grading, excavating, and generally improving the road.[45]

Turning to the road at issue in the instant case, we find that at the time the relevant regulations were adopted, Butler County had not exercised any control over road No. 27 so as to supersede Read Township in authority. Although the district court repeatedly referred to road No. 27 as "County Road 27," there was no evidence at trial that road No. 27 had been designated a primary or secondary county road or that the county was responsible for the maintenance of the road. Rather, the evidence demonstrated that it was the policy of Butler County to defer matters relating to public roads located within townships to the individual townships. The permit to bury a utility in a road right-of-way used by Butler County in 2007 stated that "[i]t is the [a]pplicant's responsibility . . . [t]o get approval from the Township Board if this utility is on township road right-of-way." This requirement of township approval continued until at least 2009, when the permit listed as the first of several "PERMIT REQUIREMENTS" that "Township Board approval must be obtained if this permit involves a township right-of-way." Both the 2007 and 2009 permits required the signature of a township board member in addition to the signature of the chairman of the Butler

[45] *Id.*

County Board of Supervisors. The Butler County Board of Supervisors enforced this requirement and denied permits if township approval was not obtained. Indeed, following the unanimous vote to deny BCD's permit because it had not obtained approval from Read Township, one of the Butler County supervisors explained that the county had a "policy of letting townships rule in permit issues," that this policy "ha[d] worked in the past," and that the board of supervisors "understood they had the authority to override townships but [it] chose not to."

Given this evidence that it was Butler County's policy to defer matters relating to township roads to townships, we find that the county had not chosen to exercise control over the township roads in Read Township prior to 2009. The electors of Read Township enacted the pipeline ban in September 2007. Therefore, because Butler County had not exercised control over township roads at the time the pipeline ban was adopted, Read Township possessed general supervisory authority over those township roads. The pipeline ban was not invalid due to a lack of authority over township roads.

BCD separately assigns error to the district court's conclusion that "Butler County properly deferred to Read Township's invalid township authority over the permitting of the waste pipeline." Given our explanation that Read Township possessed concurrent authority over public roads within its territory and the evidence that Butler County had declined to exercise its authority over township roads at the time the pipeline ban was enacted, the court committed no error in determining that Butler County had the power to defer to Read Township on any issue relating to township roads, including the placement of livestock waste pipelines.

(ii) Authority to Ban Pipeline Under § 23-224(6)

When the electors of Read Township enacted the pipeline ban, they specifically cited to their powers under § 23-224(2), (6), and (7). Because we find that § 23-224(6) vested Read Township with sufficient authority to prohibit liquid livestock waste pipelines, we do not discuss § 23-224(2) or (7).

[15] Under § 23-224(6), the electors of a township have the power "[t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town." If liquid livestock waste falls within the category of offensive or injurious substances contemplated by § 23-224(6), this subsection clearly gave Read Township the authority to enact a ban on liquid livestock waste pipelines "on, over or under" township property.

Because § 23-224 provides no definition of offensive or injurious substances and does not otherwise note that this language is subject to a special statutory meaning, we give the words in § 23-224(6) their ordinary meaning.[46] In common usage, a substance or thing is offensive if it can be described as "giving painful or unpleasant sensations."[47] A substance or thing is injurious if it "inflict[s] or tend[s] to inflict injury."[48] Even construing this language strictly, as we must do,[49] we find that liquid livestock waste is an offensive and potentially injurious substance.

By enacting LWMA and Title 130, both of which focused on the proper management, use, and disposal of livestock waste, the Legislature acknowledged that livestock waste is a potentially harmful substance that must be handled properly. Among other things, LWMA made it unlawful (1) to operate an animal feeding operation without having "an approved livestock waste control facility,"[50] which facilities are used "to control livestock waste . . . until it can be used, recycled, or disposed of in an environmentally acceptable manner,"[51] and (2) to discharge "animal excreta" and "other materials polluted by livestock waste" without obtaining the appropriate permits or an exemption.[52] These requirements indicate that livestock

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[46] See *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

[47] Webster's, *supra* note 42 at 1566.

[48] *Id.* at 1164.

[49] See *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, *supra* note 26.

[50] § 54-2432(3).

[51] § 54-2417(10).

[52] § 54-2432(4).

waste can be managed in a manner that is detrimental to the environment. Indeed, Title 130 defines "[l]ivestock wastes" as including "animal and poultry excreta and associated feed losses, bedding, spillage or overflow from watering systems, wash and flushing waters, sprinkling waters from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation, and other materials *polluted by livestock wastes*"[53]—a definition expressly recognizing that livestock wastes are pollutants.

Because livestock waste can be a pollutant and, under Nebraska law, must be managed in a manner that is environmentally acceptable, it can be described as both offensive and injurious. Therefore, the electors of Read Township had the authority under § 23-224(6) to "prevent the exposure or deposit of" livestock waste within the township.

Read Township's pipeline ban was a proper exercise of the authority to "prevent the exposure or deposit of" livestock waste within the township. Although BCD argues that the ability to install a pipeline would actually decrease the possibility that livestock waste would be spilled onto township roads, the electors plausibly could have reasoned that by preventing livestock waste from being physically piped "on, over or under" township roads, the potential for livestock waste to be leaked or spilled onto township property would thereby be minimized. Because a ban on liquid livestock waste pipelines reasonably could have been enacted as a means of "prevent[ing] the exposure or deposit of" livestock waste on township roads, the pipeline ban fell within one of Read Township's limited statutory powers and was not an invalid exercise of township authority.

(iii) Conclusion as to Pipeline Ban

Having concluded that Read Township (1) had concurrent authority over township roads, which authority had not been superseded by Butler County at the time of the pipeline ban's enactment, and (2) was authorized by statute to regulate offensive or injurious substances on town property, which

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[53] 130 Neb. Admin. Code, ch. 1, § 028 (2008) (emphasis supplied).

includes liquid livestock waste, we find that the township had both general authority over township roads and specific authority to enact a liquid livestock waste pipeline ban. The regulation enacting a pipeline ban was a valid exercise of Read Township's statutory authority.

(c) Authority to Regulate Large Livestock Confinement Facilities

The second Read Township regulation challenged by BCD governs large livestock confinement facilities. As noted in the background section, this regulation implemented minimum setback requirements for large livestock confinement facilities; required owners and operators of such facilities to demonstrate that livestock waste would not be carried onto township property in the event of a 25-year storm; and prohibited the spillage of livestock waste onto township roads, ditches, or property from such facilities or during transport.

[16] Because BCD had not been affected by this regulation at the time of bringing suit, we consider its complaint as bringing only a facial challenge. This court has not previously relied upon the distinction between facial and as-applied challenges in actions raising questions of statutory authority, but we believe that the distinction applies. Thus, when a party challenges the validity of a township regulation without arguing that a particular application of the regulation is improper, we will consider that to be a facial challenge that can succeed only "by establishing that no set of circumstances exists under which the [regulation] would be valid."[54] Accordingly, we apply that standard in the instant case. By considering the facial validity of the Read Township regulation here, we do not preclude a later as-applied challenge by BCD.

Like the pipeline ban, Read Township's regulation governing large livestock confinement facilities is a plausible means of preventing livestock waste from polluting township property. As stated in the preamble to the regulation, the electors of Read Township adopted this regulation because they found that "large scale livestock confinement facilities may present

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[54] See *State v. Harris*, 284 Neb. 214, 221, 817 N.W.2d 258, 268 (2012).

a threat of contamination and destruction of county roads, ditches, and property due to overflow of lagoon and impoundments during and following storms, during operation, and during transport of livestock and livestock waste." The prohibition against the spillage of livestock waste onto township property from such facilities or during transport prevents livestock waste from polluting township property by penalizing the careless handling of livestock waste. Under the regulation, any spillage of livestock waste can be punished by a fine. When faced with this penalty, large livestock confinement facilities such as BCD may exercise increased care when handling livestock waste. Similarly, the requirement that large livestock confinement facilities demonstrate that livestock waste would not be carried onto township property during a 25-year storm ensures that these facilities have taken the necessary precautions to prevent livestock waste from entering township property. Finally, by requiring large livestock confinement facilities to be located at least a minimum distance from public buildings and private homes, the setback requirements in this regulation minimize the risk of exposure to livestock waste outside of the large livestock confinement facility that could conceivably reach township property.

As we have already discussed, livestock waste is an offensive and injurious substance as contemplated by § 23-224(6). As such, under this subsection, the electors of Read Township had the authority to enact regulations that would "prevent the exposure or deposit of" livestock waste within the township. Because BCD has not established that there were no circumstances under which the regulation would be valid, we find that its facial challenge to the regulation lacks merit.

2. PREEMPTION

In addition to arguing that Read Township's regulations were not a proper exercise of the township's statutory authority, BCD also asserts that these regulations are preempted by LWMA, Title 130, and "county zoning statutes."[55] We find no such preemption.

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[55] Brief for appellant at 14.

(a) General Principles of Preemption

[17,18] The parties have not cited nor have we found any case law in Nebraska discussing the preemption of township laws by state law. There is, however, considerable case law on the preemption of municipal law. In discussing the preemption of municipal law, this court has previously explained that "[p]reemption of municipal ordinances by state law is based on the fundamental principle that 'municipal ordinances are inferior in status and subordinate to the laws of the state.'"[56] Further, we have explained that municipal laws are inferior to state law because "a municipal corporation derives all of its powers from the state and . . . has only such powers as the Legislature has seen fit to grant to it," concluding from this fact that "in the case of a direct conflict between a statute and a city ordinance, the statute is the superior law."[57]

[19,20] Like a municipality, a township possesses only the limited powers conferred upon it by statute.[58] Consequently, any laws enacted pursuant to a township's limited statutory authority necessarily are subordinate to the laws of the state from which the township's powers derived. Due to the similar subordinate nature of municipal laws and township laws, we conclude that the same preemption doctrines apply to the laws of both municipalities and townships.

[21,22] There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.[59] In all three cases, "[t]he touchstone of preemption analysis is legislative intent."[60] Express preemption occurs when the Legislature has "expressly declare[d] in explicit statutory language its intent to preempt" local laws.[61] Field preemption and

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[56] *State ex rel. City of Alma v. Furnas Cty. Farms, supra* note 5, 266 Neb. at 567, 667 N.W.2d at 521 (quoting 5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 (3d ed. 1996)).

[57] *Phelps Inc. v. City of Hastings*, 152 Neb. 651, 653, 42 N.W.2d 300, 302 (1950).

[58] See, *Wilson v. Ulysses Township, supra* note 15; § 23-223.

[59] See *State ex rel. City of Alma v. Furnas Cty. Farms, supra* note 5.

[60] *Id.* at 567, 667 N.W.2d at 521.

[61] *Id.* at 568, 667 N.W.2d at 522.

conflict preemption arise in situations where the Legislature did not explicitly express its intent to preempt local laws, but we can infer such intent from other circumstances.

[23,24] In field preemption, legislative intent to preempt local laws is "inferred from a comprehensive scheme of legislation."[62] When there is not comprehensive legislation on a subject, local laws "'may cover an authorized field of local laws not occupied by general laws, or may complement a field not exclusively occupied by the general laws.'"[63] Indeed, "'[t]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.'"[64] But "'where the state has occupied the field of prohibitory legislation on a particular subject,'" there is no room left for local laws in that area and a political subdivision "'lacks authority to legislate with respect to it.'"[65] Because a comprehensive scheme of legislation effectively keeps localities from legislating in that area, we infer from such a scheme that the Legislature intended to preempt local laws.

[25] In conflict preemption, legislative intent to preempt local laws is inferred "to the extent that [a local law] actually conflicts with state law."[66] As this court has previously explained, "'[t]hat which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express legislative grant, an ordinance cannot authorize what the statutes forbid.'"[67] Nonetheless, when a court considers preemption claims, it "is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject."[68]

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[62] *Id.*

[63] *Id.* at 569, 667 N.W.2d at 522 (quoting 5 McQuillin, *supra* note 56).

[64] *Id.* at 571, 667 N.W.2d at 524 (quoting 5 McQuillin, *supra* note 56).

[65] *Id.* at 569, 667 N.W.2d at 522 (quoting 5 McQuillin, *supra* note 56).

[66] *Id.*

[67] *Id.* (quoting 5 McQuillin, *supra* note 56).

[68] *Id.* at 568, 667 N.W.2d at 521-22.

We now apply these principles of preemption to the Read Township regulations at question in the instant case.

(b) Preemption by LWMA and Title 130

BCD alleges that the pertinent Read Township regulations are preempted by LWMA and the regulations issued pursuant thereto—Title 130. BCD does not contend that there is express preemption, but instead focuses on field preemption, arguing that "[t]he scope and breadth of Title 130 clearly indicates that [DEQ's] regulatory process has occupied the field with respect to regulating [concentrated animal feeding operations] and their waste facilities."[69] We do not agree that Read Township's regulations are preempted by LWMA and Title 130.

For the sake of completeness, we begin by agreeing that LWMA and Title 130 do not expressly preempt local laws on the subject of livestock waste management. When enacting other statutory schemes in Nebraska, the Legislature has included provisions explicitly stating in some manner (1) that the legislation preempts local laws related to the subject matter of the legislation,[70] (2) that a certain subject is governed solely by the legislation,[71] or (3) that political subdivisions are prohibited from enacting any local law conflicting with the legislation.[72] LWMA does not include any such language indicating legislative intent to preempt local laws either by the enactment of LWMA itself or by the promulgation of regulations pursuant thereto. Therefore, there is no express preemption of local laws by LWMA or Title 130.

Turning next to field preemption, we note, as did the district court, that LWMA includes language indicating that the Legislature did not intend to occupy the entire field of livestock waste management regulation. Section 54-2420 states that "[n]othing in [the permitting provisions of LWMA] shall be construed to change the zoning authority of a county that

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[69] Brief for appellant at 38.

[70] See, e.g., Neb. Rev. Stat. § 2-2625 (Reissue 2012).

[71] See, e.g., Neb. Rev. Stat. § 9-841 (Reissue 2012).

[72] See, e.g., Neb. Rev. Stat. § 69-510(2) (Reissue 2009).

existed prior to May 25, 1999." Even though LWMA and Title 130 do provide a detailed regulatory scheme for livestock waste management, § 54-2420 indicates that the state requirements were meant to coexist with local requirements.

This intent also is apparent from DEQ's enforcement of LWMA and Title 130. The application for a permit under LWMA and Title 130 states that the applicant "is responsible for compliance with all local laws, and for obtaining applicable local, county, and other permits." The permits subsequently issued by DEQ also are accompanied by a letter noting that the state permit "does not remove your responsibility to comply with any county or local zoning regulations." A supervisor from DEQ who was deposed in the instant case explained that this language on the application and permit was included to remind permittees "it's their responsibility to comply with [local or county regulations]" and that compliance with county and local zoning "is a separate issue from [DEQ's] consideration of their application." Together, § 54-2420 and these examples from DEQ's enforcement of LWMA and Title 130 indicate an intent for these state statutes and regulations to coexist with local laws, which fact precludes a finding of field preemption.

Finally, we consider whether local laws governing livestock waste management are preempted by state law according to principles of conflict preemption. In its brief, BCD only briefly addresses conflict preemption, arguing that the township regulation requiring yearly updates of 25-year storm demonstrations conflicts with LWMA and Title 130 because the state statutes and regulations do not require yearly updates. This is not a true conflict between the township regulations and state law and does not support a finding of conflict preemption.

Read Township's regulation and Title 130 both have requirements related to 25-year storms. The township regulation requires large livestock confinement facilities to demonstrate on a yearly basis that "livestock waste, liquid or solid, will not be carried or washed onto or into town roads or ditches or properties adjacent to a facility during or following a 25-year storm." Under Title 130, a livestock waste control facility

must be designed so as to "provide adequate storage capacity for all . . . runoff [or] the runoff from a 25-year, 24-hour rainfall event."[73]

Even though the Read Township regulation and Title 130 use different terms to refer to the facilities governed by each law, both laws apply to similar facilities. A large livestock confinement facility is defined by the township regulation as "a livestock operation that is over 600 animal units and where the livestock are or can be confined to areas which are roofed." A facility that meets this definition is also likely to be an animal feeding operation as defined in Title 130, which includes "a location where . . . livestock have been, are, or will be stabled or confined and fed or maintained for a total of forty-five days or more in any twelve-month period."[74] Animal feeding operations are required under certain circumstances to have livestock waste control facilities.[75] As such, operations that are large livestock confinement facilities under township law likely may be required by state law to operate livestock waste control facilities and thus will be subject to both township and state provisions relating to 25-year storms.

Read Township's 25-year storm demonstration requirement is similar to Title 130's 25-year storm requirement. An applicant for a construction and operating permit under LWMA and Title 130 must submit a "description of the methods that will be implemented to [e]nsure the facility is constructed in accordance with the applicable design criteria and these regulations."[76] The 25-year storm requirement is included within the chapter of Title 130 that enumerates "Design Criteria and Construction Requirements."[77] In other words, under LWMA and Title 130, an applicant must provide as part of his or her application some sort of demonstration that the proposed livestock waste control facility is designed and

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[73] 130 Neb. Admin. Code, ch. 8, § 002 (2008).

[74] 130 Neb. Admin. Code, ch. 1, § 002 (2008).

[75] See 130 Neb. Admin. Code, ch. 2, § 003 (2008).

[76] 130 Neb. Admin. Code, ch. 4, § 001.06 (2008).

[77] See 130 Neb. Admin. Code, ch. 8 (2008).

will be constructed so as to adequately store livestock waste in the event of a 25-year storm. Read Township's regulation requires precisely this sort of demonstration, except on a yearly basis. Substantively, therefore, the township regulation addresses the same concern as the state law—whether a facility can properly contain livestock waste even in the event of a 25-year storm.

The main difference between the requirements imposed by Read Township and the state is that the township requires more frequent demonstrations. While Title 130 requires only a demonstration of compliance with the 25-year storm requirement when applying for a construction and operating permit, Read Township's regulation requires yearly updates to the 25-year storm demonstration. In this regard, the township regulation is more stringent.

[26] The fact that a local law is more stringent than state law does not by itself lead to conflict preemption. In *Phelps Inc. v. City of Hastings*,[78] we considered whether a municipal ordinance that imposed more stringent requirements than state statute was inconsistent with state law such that it was preempted. We held that the municipal ordinance was not inconsistent with state law, citing with approval the following explanation from a legal commentary:

> "So long as there is no conflict between the two, and the requirements of the municipal bylaw 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

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[78] *Phelps Inc. v. City of Hastings, supra* note 57.

> 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."[79]

Under this holding, a local law is not preempted simply because it is more stringent than state law.

BCD does not argue that the township regulation imposing the demonstration requirement is inconsistent with state law for any reason other than that it is more stringent. This fact alone is not sufficient to prove preemption. Therefore, under the precedent of *Phelps Inc.*, Read Township's demonstration requirement is not preempted based on the fact that it is more stringent than LWMA and Title 130.

Apart from Read Township's demonstration requirement relating to 25-year storms, BCD does not identify any other ways in which Read Township's regulations conflict with LWMA and Title 130. Given our finding that the demonstration requirement is not in conflict with state law and in the absence of any additional arguments for the application of conflict preemption, we do not find that Read Township's regulations are preempted because they directly conflict with LWMA and Title 130.

In conclusion, we find that none of the three types of preemption apply in the instant case. Read Township's regulations governing large livestock confinement facilities are not preempted by LWMA and Title 130. The district court did not err in so holding.

(c) Preemption by County Zoning

BCD also alleges that Read Township's regulation enacting setback requirements is preempted by "county zoning statutes."[80] But as BCD itself confesses, Butler County has not

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[79] *Id.* at 657, 42 N.W.2d at 304 (quoting 37 Am. Jur. *Municipal Corporations* § 165 (1941)).

[80] Brief for appellant at 14.

enacted any county zoning laws. Because there are no county zoning laws applicable to Read Township, there is no county zoning to preempt the township's setback requirements.

In its brief, BCD uses its argument on this assignment of error to attack Read Township's authority to enact the setback requirements. It asserts that the district court "wrongly concluded that [the township regulation imposing setback requirements] did not constitute zoning."[81] Then, over several pages, BCD argues that "[t]he plain language alone of Nebraska's zoning statutes demonstrate[s] that a township does not have the authority to enact a zoning ordinance."[82]

[27] BCD makes this argument about Read Township's lack of authority in its brief, but does not specifically assign it as error. Errors argued but not assigned will not be considered on appeal.[83] Therefore, because BCD did not assign error to the district court's failure to conclude that Read Township did not possess the authority to enact zoning laws, we do not address the issue on appeal.

Having considered only the error actually assigned by BCD in regard to zoning statutes, we conclude that Read Township's regulation imposing setback requirements was not preempted by county zoning statutes.

3. Butler County as Necessary Party

[28] BCD's final assignment of error relates to the district court's conclusion that Butler County was a necessary party to the case. Because "[t]he presence of necessary parties is jurisdictional"[84] and "[t]he question of jurisdiction is a question of law,"[85] we resolve the question whether Butler County was a necessary party independently of the district court.[86]

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[81] *Id.* at 40.

[82] *Id.*

[83] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[84] *Reed v. Reed*, 277 Neb. 391, 399, 763 N.W.2d 686, 693 (2009).

[85] *In re Estate of McKillip, supra* note 7, 284 Neb. at 369, 820 N.W.2d at 872.

[86] See *id.*

"An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest . . . ."[87] Given our holding that Butler County and Read Township had concurrent jurisdiction over township roads and that Read Township could exercise its authority over those roads only if the county had not as yet superseded the township's authority, the determination whether Read Township had the authority to enact regulations governing township roads necessarily involved a determination of the rights of Butler County—namely, whether Butler County had exercised power over township roads such that it superseded the township's otherwise concurrent authority. Therefore, Butler County was a necessary party to this action, and the district court did not err in ordering BCD to bring the county in as a party.

VI. CONCLUSION

A county and a township have concurrent authority over public roads located within a township. However, due to the superiority over townships within the hierarchy of political subdivisions within the state, the exercise of a county's authority over township roads supersedes a township's authority over those same roads. Due to this relationship, Butler County was indeed a necessary party to this action. However, because Butler County had not exercised its authority over the roads within Read Township at the time the township's electors enacted regulations governing those roads, the township had authority over township roads. Under § 23-224(6), Read Township also had the authority to enact regulations to prevent livestock wastes from polluting township property. Accordingly, Read Township did not act outside of its statutory authority when enacting the regulations in question. Finally, we conclude that Read Township's regulations governing large livestock confinement facilities are not preempted by LWMA, Title 130, or

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[87] *American Nat. Bank v. Medved*, 281 Neb. 799, 806, 801 N.W.2d 230, 237 (2011).

county zoning statutes on principles of express preemption, field preemption, or conflict preemption. Therefore, we affirm the judgment of the district court.

AFFIRMED.

CHRISTY BLACK, APPELLEE, V.
LORNA BROOKS, APPELLANT.
___ N.W.2d ___

Filed March 8, 2013. No. S-12-176.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. ____: ____. An appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Attorney Fees.** In determining a reasonable attorney fee, the court is to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
4. **Landlord and Tenant: Attorney Fees.** The attorney fee provisions of Neb. Rev. Stat. §§ 76-1416(3) and 76-1425(2) (Reissue 2009) are mandatory.
5. **Attorney Fees.** The most common purpose behind fee-shifting statutes is to encourage private litigation to enforce a particular statute or right.
6. ____. Allowing legal services organizations recovery of statutory attorney fees generally enhances their capabilities to assist those who are financially unable to obtain private counsel.
7. ____. Insofar as a statutory attorney fee provision is designed to encourage private action to vindicate the rights granted by the statutory scheme, an award of attorney fees to the pro bono organization indirectly serves the same purpose as an award directly to a fee paying litigant.
8. **Landlord and Tenant: Attorney Fees.** To limit attorney fee awards under Neb. Rev. Stat. §§ 76-1416(3) and 76-1425(2) (Reissue 2009) to pro bono attorneys would be to insert the additional term "incurred" into the statutes.
9. **Statutes: Appeal and Error.** An appellate court may not add language to the plain terms of a statute to restrict its meaning.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed as modified.