STATE OF MICHIGAN

COURT OF APPEALS

CITY OF ROMULUS,

Plaintiff-Counter-Defendant Appellee,

v

ENVIRONMENTAL DISPOSAL SYSTEMS, INC.,

Defendant-Counter-Plaintiff-Appellant.

UNPUBLISHED
October 15, 1999

No. 207850
Wayne Circuit Court
LC No. 93-330171 CE

Before: Bandstra, C.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's request for permanent injunctive relief. Defendant also challenges two prior orders granting partial summary disposition to plaintiff. We reverse and remand.

Defendant is a company in the business of disposing of hazardous waste. In 1990, it acquired an interest in some land in the city of Romulus on which it intended to build and operate a deep injection hazardous waste well. By the summer of 1993, defendant had obtained outside financing in the amount of five million dollars from the Detroit Policemen and Firemen Retirement System and permission to drill the well from state and federal agencies. Defendant also received informal support for the well project from the mayor of Romulus and various other city officials. In July and August of 1993, defendant drilled the well at a cost of over two million dollars. During the entire period of time during which defendant was preparing for the project, both defendant and Romulus city officials operated under the assumption that the city's zoning ordinances were not applicable to the project. All parties involved apparently believed that the local zoning ordinances were preempted by state and federal law. Accordingly, defendant made no effort to comply with the city's zoning ordinances when it began construction on the well.

Municipal elections were scheduled for November 1993. In September 1993, a candidate challenging for a position on the city counsel voiced her opposition to defendant's well project at a council meeting. Over the following weeks, other city residents began to make similar protestations. In

October 1993, at the urging of the mayor, the Romulus City Council voted to file a lawsuit against defendant to stop the project. This action sought to enjoin defendant's planned use of the well site to dispose of hazardous wastes. Plaintiff alleged that it was entitled to such relief because a deep injection hazardous waste well was not a permitted use in the area zoned M-1 light industrial. Plaintiff also alleged that defendant violated various local ordinances when it commenced drilling the well without submitting a site plan to the planning commission or securing the proper permits.

In response, defendant filed an answer and a counterclaim seeking a declaration that plaintiff could not regulate the proposed well site. Defendant alleged that local regulation of the well project was preempted by state and federal law. Defendant also alleged, in the alternative, that plaintiff should be estopped from enforcing its local regulations and that its claim was barred by laches. In January 1994, the trial court issued a preliminary injunction preventing defendant from operating the well. The parties brought cross motions for summary disposition on the preemption issue. In an opinion and order dated July 5, 1994, the trial court reasoned that plaintiff's local control over the construction of hazardous waste facilities was not preempted. Accordingly, the trial court granted plaintiff's motion for summary disposition and denied defendant's motion for summary disposition. This put an end to the preemption issue in the trial court.

The remaining issues (defendant's compliance with plaintiff's zoning regulations and plaintiff's right to enforce its zoning ordinances) were litigated over the following three years. In May of 1996, the trial court affirmed the decision of the Romulus Zoning Board of Appeals that a deep injection hazardous waste well was not a permitted use in the M-1 zoning district and that defendant was not entitled to a use variance. In August 1996, plaintiff moved for summary disposition on defendant's affirmative defenses and the remaining counts in defendant's counterclaim. In an opinion and order dated February 18, 1997, the trial court granted plaintiff's motion in its entirety. Finally, in November 1997, the trial court entered a judgment providing that, for the reasons stated in its February 18, 1997, order, defendant was permanently enjoined from using the property at issue as an underground injection well for the disposal of waste.

On appeal, defendant argues that the trial court erred in denying its motion for summary disposition and granting plaintiff's motion for summary disposition on the issue of preemption by state law. This Court reviews de novo a trial court's decision on a motion for summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997).

Where state law expressly provides that the state's authority to regulate in a specified area is exclusive, municipal regulation in the same specified area is preempted. *People v Llewellyn*, 401 Mich 314, 323; 257 NW2d 902 (1977), citing *Noey v Saginaw*, 271 Mich 595; 261 NW 88 (1935). In 1993, when defendant drilled its deep injection well and plaintiff filed suit to enjoin defendant's use of the well, the disposal of hazardous waste in Michigan was governed by the Hazardous Waste Management Act (HWMA), MCL 299.501 *et seq.*; MSA 13.30(1) *et seq.*[1] Defendant contends that the local zoning ordinances and permit requirements were expressly preempted by § 21 of the HWMA, which provided as follows: "A local ordinance, permit requirement, or other requirement shall not prohibit the construction of a treatment, storage, or disposal facility."[2] We agree that the language of §

21 unambiguously stood for the proposition that the construction of a hazardous waste disposal facility, including the siting of such a facility, was a matter outside the bounds of local control. See *Cascade Twp v Cascade Resource Recovery, Inc*, 118 Mich App 580, 586-587; 325 NW2d 500 (1982), remanded 422 Mich 882; 367 NW2d 68 (1985), modified after remand 428 Mich 894; 403 NW2d 811 (1987); see also *Groveland Twp v Jennings*, 419 Mich 719, 728; 358 NW2d 888 (1984) (explaining that in the absence of certain particular circumstances, local ordinances are preempted by the HWMA); *Southeastern Oakland Co Incinerator Authority v Avon Twp*, 144 Mich App 39, 47; 372 NW2d 678 (1985) (Shepherd, P.J., concurring).

Plaintiff does not dispute the proposition that § 21 provided for the exclusive state control of hazardous waste disposal facilities regulated by the HWMA. Instead, plaintiff contends that there was no preemption because defendant's facility was exempted from regulation under the HWMA, including § 21. Section 26(3) of the HWMA provided, in part, as follows:

> The director [of the Department of Natural Resources (DNR)] may promulgate rules which exempt certain hazardous wastes and certain treatment, storage, or disposal facilities from all or portions of the requirements of this act . . . upon a determination by the director that a hazardous waste, or a treatment, storage, or disposal facility, is adequately regulated under other state or federal law, and that scientific data supports a conclusion that an exemption will not result in an impairment of the department's ability to protect the public health and the environment . . . [MCL 299.526(3); MSA 13.30(26)(3), repealed by 1994 PA 451, § 90101].

Presumably, the purpose of this provision was to avoid duplicative regulation.[3] Pursuant to § 26(3), the director of the DNR promulgated 1985 AACS, R 299.9503, which provided, in part, as follows:

> (3) The following shall be deemed to have an operating license if the listed conditions are met:
>
> (a) The owner or operator of an injection well disposing of hazardous waste, if the owner or operator meets the following requirements:
>
> (i) Has a permit for underground injection issued under the provisions of 40 C.F.R. parts 124, 144, 145, 146, and 147, subpart X.
>
> (ii) Complies with the conditions of that permit and the requirements of the provisions of 40 C.F.R. § 144.14.
>
> * * *

It is undisputed that defendant met the two requirements listed in Rule 299.9503(3)(a).

The rules of statutory construction apply to administrative rules. MCL 24.232(1); MSA 521.21. Under the clear language of Rule 299.9503(3)(a), defendant was made exempt from the requirement of securing an "operating license." An "operating license" was required before a person could "conduct, manage, maintain, or operate a treatment, storage, or disposal facility." See MCL

299.522 – 524; MSA 13.30(22) – 30(24), repealed by 1994 PA 451, § 90101. Contrary to plaintiff's contention, however, the rule exempting defendant from the operating license requirement does not amount to an exemption from the entire HWMA. For instance, in addition to the requirement of an operating license, a person seeking to "establish" a disposal facility was also required to obtain a "construction permit." See MCL 299.518; MSA 13.30(18), repealed by 1994 PA 451, § 90101. A construction permit could only be awarded after completion of a detailed site review process pursuant to which local concerns related to siting were taken into consideration. See MCL 299.520; MSA 13.30(20). It is clear that Rule 299.9503 did not exempt defendant from the requirement of securing a construction permit. Subsections (1) and (2) of that rule expressly provided that certain persons were exempt from the requirement of obtaining an operating license as well as from the requirement of obtaining a construction permit. Given the inclusion of the construction permit exemption in subsections (1) and (2) of Rule 299.9503, its omission from subsection (3) should be construed as intentional. Cf. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."). Because Rule 299.9503(3)(a) expressly exempted defendant from the operating license requirement only, and not from other applicable sections of the HWMA, we reject plaintiff's contention that defendant's facility was wholly exempt from regulation under the HWMA.

In a related argument, plaintiff contends that a disposal facility made exempt from the construction permit requirement should be made subject to local zoning ordinances and other local regulation regarding site approval. Plaintiff relies on *Groveland Twp*, *supra*, for this proposition. In *Groveland Twp*, *supra* at 729, our Supreme Court held that a facility made exempt from the construction permit requirement by § 16 of the HWMA (a "grandfather clause") was subject to local ordinances governing land use and the construction of such facilities. Because defendant was *not* made exempt from the construction permit requirement by Rule 299.9503(3)(a), or by any other statute or regulation,[4] plaintiff's contention is without merit.

Accordingly, because (1) § 21 of the HWMA expressly provided that state's authority to regulate the construction of defendant's facility was exclusive, and (2) defendant's facility was not made wholly exempt from regulation under the HWMA, we conclude that state law preempted the city's local control over the construction of defendant's facility. Therefore, we hold that the trial court's conclusion on the issue of state law preemption was erroneous.

Given our resolution of the state preemption issue we need not address defendant's arguments regarding federal preemption or plaintiff's right to enforce its zoning ordinances.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Talbot

[1] The HWMA has since been repealed and recodified as Part 111 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*; MSA 13A1.1 *et seq.* Part 111 of the NREPA, which is substantially the same as the former HWMA, became effective on March 30, 1995. Inexplicably, both parties refer to Part 111 of the NREPA rather than to the HWMA despite the fact that the HWMA was the controlling authority during the relevant time period. Given the substantial similarity between the two statutory schemes, we assume they have done so for the sake of convenience. Accordingly, we will read their references to Part 111 of the NREPA as being references to the corresponding statutes in the HWMA.

[2] It is beyond dispute that defendant's deep injection hazardous waste well fit the definition of a disposal facility. Section 3(7) of the HWMA defined "disposal facility" as "a facility or part of a facility at which managed hazardous waste, as defined by rule, is intentionally placed into or on any land or water and at which hazardous waste will remain after closure."

[3] If defendant's facility was made wholly exempt from regulation under the HWMA due to duplicative federal regulation, the dispositive preemption issue in this case would be whether plaintiff's local ordinances were preempted by the duplicative *federal* regulation.

[4] In making its argument that defendant was exempt from the construction permit requirement of the HWMA, plaintiff relies in part on a private letter dated February 27, 1992, from James F. Cleary, then director of the DNR, to State Senator Jim Berryman. In the letter, which discussed a deep injection well other than the one involved in this case, Clearly states that "it is the Department's position that [an HWMA] construction permit is not required for underground injection wells [deemed to have an operating license under 1985 AACS R 299.9503(3)]." Cleary's letter suggests that, in February of 1992, the DNR had adopted a position contrary to the clear language of its own administrative rules. Because the issue whether a local ordinance is preempted by state law depends on the nature of the legal scheme in place rather than on a state agency's enforcement of the legal scheme in place, Cleary's private articulation of the DNR's "position" regarding the HWMA's construction permit requirement is irrelevant. Finally, whether defendant actually complied with the regulations imposed by the HWMA, including the construction permit requirement, is not an issue before this Court.