STATE OF MICHIGAN

COURT OF APPEALS

RONDIGO, LLC.,	UNPUBLISHED December 16, 2010
Plaintiff-Appellant,	
v	No. 292611 St. Clair Circuit Court
TOWNSHIP OF CASCO,	LC No. 08-002291-CZ
Defendant-Appellee.	

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order denying its request for a declaratory judgment that MCL 324.11521 preempts those portions of defendant's zoning ordinance regulating composting operations.[1] We affirm.

In 2003, plaintiff purchased a 42-acre parcel of property, zoned industrial and located within defendant township, intending to use it for commercial composting operations. In December 2004, defendant enacted new zoning ordinance provisions regulating commercial composting operations within the Township. Defendant's zoning ordinance, since amended, allows for yard waste composting activities in industrial zones, but only under a special use permit subject to a series of locally-imposed requirements. In 2007, the Michigan Legislature amended part 115 (Solid Waste Management) of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.11521, effective March 26, 2008, to add regulations pertaining to composting operations. Plaintiff asserts that it has taken the necessary steps to become a "registered composting facility" under MCL 324.11521, and that, consequently, it is entitled to commence composting activities on the property without further approvals or restrictions imposed by defendant. After defendant declined to approve plaintiff's site plans for a composting facility on the property, plaintiff filed suit seeking a declaratory judgment that MCL 324.11521 preempts those portions of defendant's zoning ordinance which attempt to

[1] Plaintiff is not challenging defendant's entire zoning code, but only those parts which are specific to composting operations. Plaintiff agrees that it must follow those local regulations which apply to more than just composting facilities.

regulate yard waste composting. The trial court determined that the ordinance is not preempted by the state statute and denied plaintiff's requested relief.

On appeal, plaintiff argues that the trial court erred in holding that the portions of plaintiff's zoning ordinance addressing composting are not preempted by MCL 324.11521. We disagree.

Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that this Court reviews de novo. *Mich Coalition For Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003). A decision to grant or deny a declaratory judgment is likewise reviewed de novo, but the trial court's factual findings will not be overturned unless clearly erroneous. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 459; 566 NW2d 517 (1996).

State law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or where the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). With regard to a direct conflict, as this Court recently explained in *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262, 267-268; 776 NW2d 346 (2009):

> "For purposes of preemption, a direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits." *McNeil* [*v Charlevoix Co*, 275 Mich App 686, 697; 741 NW2d 27 (2007)], citing *People v Llewellyn*, 401 Mich 314, 322 n. 4; 257 NW2d 902 (1977). It is well established, however, that a local ordinance that regulates in an area where a state statute also regulates, with mere differences in detail, is not rendered invalid due to conflict. *Walsh v River Rouge*, 385 Mich 623, 635-636; 189 NW2d 318 (1971). "As a general rule, additional regulation to that of a State law does not constitute a conflict therewith." *Id.* at 636 (quotation marks and citation omitted). Where no direct conflict exists, both laws stand. *Id.*

And, to determine whether a statute completely occupies a field of regulation, courts are to consider the following four factors:

> 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 which should be considered as evidence of pre-emption.

Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [*Rental Prop Owners*, 455 Mich at 257, quoting *Llewellyn*, 401 Mich at 323-324.]

The state statute at issue here, MCL 324.11521, regulates composting operations, such as that sought to be operated by plaintiff. It provides in pertinent part:

(1) Yard clippings shall be managed by 1 of the following means:

* * *

(e) Composted at [a] site that qualifies as a registered composting facility under subsection (4).

* * *

(4) A site qualifies as a registered composting facility if all of the following requirements are met:

(a) The owner or operator of the site registers as a composting facility with the department and reports to the department within 30 days after the end of each state fiscal year the amount of yard clippings and other compostable material composted in the previous state fiscal year. The registration and reporting shall be done on forms provided by the department. The registration shall be accompanied by a fee of $600.00. The registration is for a term of 3 years. Registration fees collected under this subdivision shall be forwarded to the state treasurer for deposit in the solid waste staff account of the solid waste management fund established in section 11550.

(b) The site is operated in compliance with the following location restrictions:

(*i*) If the site is in operation on December 1, 2007, the management or storage of yard clippings, compost, and residuals does not expand from its location on that date to an area that is within the following distances from any of the following features:

(A) 50 feet from a property line.

(B) 200 feet from a residence.

(C) 100 feet from a body of surface water, including a lake, stream, or wetland.

(*ii*) If the site begins operation after December 1, 2007, the management or storage of yard clippings, compost, and residuals occurs in an area that is not in

the 100-year floodplain and is at least the following distances from each of the following features:

(A) 50 feet from a property line.

(B) 200 feet from a residence.

(C) 100 feet from a body of surface water, including a lake, stream, or wetland.

(D) 2,000 feet from a type I or type IIA water supply well.

(E) 800 feet from a type IIB or type III water supply well.

(F) 500 feet from a church or other house of worship, hospital, nursing home, licensed day care center, or school, other than a home school.

(G) 4 feet above groundwater.

(c) Composting and management of the site occurs in a manner that meets all of the following requirements:

(*i*) Does not violate this act or create a facility as defined in section 20101.

(*ii*) Unless approved by the department, does not result in more than 5,000 cubic yards of yard clippings and other compostable material, compost, and residuals present on any acre of property at the site.

(*iii*) Does not result in an accumulation of yard clippings for a period of over 3 years unless the site has the capacity to compost the yard clippings and the owner or operator of the site can demonstrate, beginning in the third year of operation and each year thereafter, unless a longer time is approved by the director, that the amount of yard clippings and compost that is transferred off-site in a calendar year is not less than 75% by weight or volume, accounting for natural volume reduction, of the amount of yard clippings and compost that was on-site at the beginning of the calendar year.

(*iv*) Results in finished compost with not more than 1%, by weight, of foreign matter that will remain on a 4 millimeter screen.

(*v*) If yard clippings are collected in bags other than paper bags, debags the yard clippings by the end of each business day.

(*vi*) Prevents the pooling of water by maintaining proper slopes and grades.

(*vii*) Properly manages storm water runoff.

(*viii*) Does not attract or harbor rodents or other vectors.

> (d) The owner or operator maintains, and makes available to the department, all of the following records:
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> (*i*) Records identifying the volume of yard clippings and other compostable material accepted by the facility and the volume of yard clippings and other compostable material and of compost transferred off-site each month.
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> (*ii*) Records demonstrating that the composting operation is being performed in a manner that prevents nuisances and minimizes anaerobic conditions. Unless other records are approved by the department, these records shall include records of carbon-to-nitrogen ratios, the amount of leaves and the amount of grass in tons or cubic yards, temperature readings, moisture content readings, and lab analysis of finished products.

Defendant's ordinance addresses concerns similar to those addressed by the statute regarding the location and manner of composting, and the maintenance of appropriate site drainage. However, the ordinance also contains a number of additional requirements not present in the statute. For example, the ordinance requires that a compost facility have sufficient restrooms to accommodate facility staff, have maintenance structures for equipment storage, and have an emergency plan for responding to fires. It also requires that an applicant for a special use permit to operate a compost facility provide defendant with a study on the traffic impact of the facility and a plan for mitigating the impact of truck traffic, and that the facility, once operating, conduct semiannual soil tests, keep noise and vibrations below certain levels, and manage the decomposition process so as to prevent obnoxious odors. Additionally, the ordinance requires inspections by Township officials "several times per year based on a schedule established by resolution of the Township Board," and, it requires that the operator "submit a bond, in an amount established by resolution of the Township Board, to guarantee restoration of the site in the event of abandonment and to guarantee cleanup of chemical or other hazardous spills."

Plaintiff first asserts that MCL 324.11521 preempts defendant's composting ordinance because the ordinance is in direct conflict with the state statutory scheme. As previously noted, an ordinance directly conflicts with a statute only if the ordinance permits what the statute prohibits, or prohibits what the statute permits. *Rental Prop Owners*, 455 Mich at 262, citing 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409. MCL 324.11521 states that yard clippings "shall be managed" by certain means including "[c]ompost[ing] at site that qualifies as a registered composting facility under subsection (4)." MCL 324.11521(1)(e). However, the plain language of the statute does not indicate that the Legislature intended the statutory requirements to be the only requirements for establishing and operating a composting facility of the nature intended by plaintiff. Rather, we conclude that the statute establishes the minimum requirements for such facilities, and thus, defendant is permitted to impose additional, non-conflicting requirements upon the construction and operation of such facilities. *USA Cash #1*, 285 Mich App at 267. As this Court explained more expansively in *USA Cash # 1*,

> . . . "As a general rule, additional regulation to that of a State law does not constitute a conflict therewith." [*Walsh*, 385 Mich] at 636 (quotation marks and citation omitted). Where no direct conflict exists, both laws stand. *Id.*

In *Rental Prop Owners Ass'n of Kent Co*, *supra* at 262, and in the cases cited therein, *id.* at 261, our Supreme Court quoted with approval the following passage from 56 Am Jur 2d, Municipal Corporations, § 374, pp. 408-409:

> "It has been held that in 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."
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> "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.*" [*Id.* at 267-268 (emphasis in original).]

With this in mind, there being no indication that MCL 324.11521 and the local ordinance provisions regulating composting operations cannot coexist, we hold that there is no direct conflict between the ordinance and the statute at issue in this case.

Plaintiff argues alternatively, that even absent this finding of a direct conflict, the portion of defendant's zoning ordinance that regulates composting operations is preempted by MCL 324.11521 because that provision occupies the field of regulation which the ordinance seeks to enter. We disagree.

As an initial matter, we observe that the statute neither expressly preempts, nor permits, local ordinances addressing composting operations. And, plaintiff does not argue that the ordinance is expressly preempted.[2] Rather, plaintiff asserts that preemption is warranted based on the legislative history of the pertinent statutory provisions, the pervasiveness of the statutory scheme and the necessity for exclusive state regulation of the subject matter of composting.

Contrary to plaintiff's assertion, however, we find the legislative history to be inconclusive as to preemption. While "legislative analyses are 'generally unpersuasive tool[s] of statutory construction,'" a court may nevertheless " ' "look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions." ' " *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007) (citations omitted; alteration by *Kinder*). Senate Fiscal Agency Analysis, SB 523, July 5, 2007, p 1, explains that the rationale for amending Part 115 of NREPA to add MCL 324.11521 was to restrict fraudulent composting operations by providing state agencies with authorization to intervene. "Some people are concerned," the analysis states, "that existing law does not give State agencies sufficient authority to take action against rogue composters in a timely fashion. To address these concerns, it has been suggested that the law should prescribe the conditions under which composting may be conducted." *Id.* This analysis suggests that the Legislature's intent was to establish a minimum standard for composting operations that the state could enforce in places where local regulations either did not exist or were not enforced. It does not suggest that the Legislature was intending to create a comprehensive regulatory scheme, preemptive of local regulation.

We likewise conclude that the degree of pervasiveness of the statutory scheme set forth in MCL 324.11521 does not suggest preemption. In *Cascade Twp v Cascade Resource Recovery, Inc*, 118 Mich App 580, 587-590; 325 NW2d 500 (1982), this Court held that the Hazardous Waste Management Act (HWMA)[3] preempted local ordinances, in part based on the pervasiveness of the statutory scheme. The Court explained that the HWMA is a "comprehensive 51-section statutory framework designed to regulate all aspects of hazardous waste disposal." *Id.* at 587. The statute proscribes a planning process and affords the state with the authority to issue separate licenses for the construction and operation of hazardous waste sites and for drivers who transport that waste. *Id.* at 587-588. It also sets forth specific rules for closing a disposal site, and sets monitoring requirements to be met after a site is closed. *Id.* at 588. This Court also noted that the pervasiveness of the statutory scheme was "buttressed by the numerous provisions of [the HWMA] which are intended to strike a balance between local interests and the state's need for a uniform system of hazardous waste management." *Cascade*

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[2] Defendant seems to argue that the statute expressly permits local legislation, pointing to language in MCL 324.11521(5) and (6) that provides that, for the purposes of the statute, a site for management of yard clippings is not a disposal area, and management of the clippings is not disposal. But this language merely means that the statutes governing "disposal sites" such as landfills do not apply to composting sites.

[3] Currently codified at MCL 324.11101 *et seq*.

Twp, 118 Mich App at 588. Local governments were given a say in the planning process, and the statute directed the Department of Natural Resources (MDNR) to consider local ordinances when making decisions. *Id.* at 588-589. In this context, this Court concluded that to allow a municipality to veto the state's decision to grant a license or permit would upset the statutorily established balance between the state and its municipalities. *Id.* at 589.

For similar reasons, this Court reached the same conclusion regarding the Solid Waste Management Act (SWMA)[4] in *Southeastern Oakland Co Incinerator Auth v Avon Twp*, 144 Mich App 39; 372 NW2d 678 (1985) (hereinafter "*SOCIA*"). This Court explained that the SWMA has a scheme similar to the HWMA, which calls for a planning process involving local input while the right to issue permits and licenses was reserved to the state. *Id.* at 44. Of course, the statutory provision at issue in this case is part of the SWMA. And, plaintiff argues that this, together with the fact that the Legislature deleted yard clippings from a list of materials that are not considered solid waste, means that the preemptive effect of MCL 324.11521 is established by this Court's *SOCIA* decision. However, although yard clippings may now be considered solid waste, MCL 324.11521(5) and (6) expressly state that a registered composting facility is not considered a "disposal area" under the SWMA, and management of yard clippings does not constitute "disposal." Therefore, the extensive regulations provided by the SWMA for solid waste in general do not apply to composting activities. That is, yard clippings are not governed by the extensive system of planning and licensing that this Court previously determined, in *SOCIA*, 144 Mich App at 39, to be preemptive of local regulation. Our analysis of the pervasiveness of the statutory scheme is confined to the requirements set forth in MCL 324.11521 alone.

MCL 324.11521 covers setbacks, rules of operation, health concerns, registration, and recordkeeping. Standing alone, this provision is substantially less pervasive than the provisions of the entire SWMA, which this Court found preemptive in *SOCIA*, 144 Mich App at 39. Furthermore, because MCL 324.11521 does not incorporate, and composting operations are not subject to, the planning process laid out elsewhere in the SWMA, local considerations are not accounted for by MCL 324.11521. Thus, we do not find MCL 324.11521 to be pervasive enough to suggest an intent to preempt local regulation of composting activities. We note further that, in any event, pervasiveness alone will not support a finding of preemption. *Rental Prop Owners*, 455 Mich at 257.

Finally, the nature of the regulated subject matter – the composting of yard clippings – does not demand exclusive state regulation. The Legislature's efforts to establish minimum regulations pertaining to composting of yard clippings does not evidence that the "state's purpose or interest" or the "nature of the subject matter regulated" demands exclusive state control over composting operations. In this regard, it is again noteworthy that the Legislature exempted yard waste composting operations from the expansive reach of the SWMA by declaring that sites at which yard waste clippings are managed are not disposal areas, and that

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[4] Currently codified at MCL 324.11501 *et seq*.

management of yard clippings is not considered disposal, within the meaning of the SWMA. MCL 324.11521(5) and (6). Further, the operation of a yard waste composting facility is a particular land use subject to regulation by townships under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, and we find nothing in MCL 324.11521 that exempts operators of compost facilities from local zoning controls, so long as those controls are not in direct conflict with MCL 324.11521. See, e.g., *Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 295; 715 NW2d 89 (2006).

In sum, the statute at issue in this case does not expressly preempt local ordinances, and the legislative history suggests that the Legislature did not intend to preempt local regulations. Further, we find nothing in the pervasiveness of the statutory scheme, or in the nature of the subject matter being regulated, that warrants a finding of preemption.

We affirm. A public question having been presented, no costs shall be taxed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray