IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Office of Attorney General By Thomas W. Corbett, Jr., Attorney General, Petitioner	:	
v.	:	No. 358 M.D. 2006
	:	Argued: June 6, 2012
Locust Township and Locust Township Board of Supervisors, Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION BY JUDGE BROBSON **FILED: July 17, 2012**

Before this Court is the Commonwealth of Pennsylvania, Office of Attorney General's (Attorney General) motion for summary judgment on its petition for review (Petition) of Locust Township Ordinance No. 4-2001 (Ordinance), which we shall treat as an application for summary relief pursuant to Pa. R.A.P. 1532(b). For the reasons that follow, we grant in part summary judgment on Counts II, III, and IV and deny summary judgment as to the remaining claims and counts.[1]

[1] This case is before us on remand from our Supreme Court. After the Attorney General filed its petition for review, the Township filed preliminary objections, challenging the Court's subject matter jurisdiction and asserting that the Attorney General presented no justiciable cause of action. We sustained the preliminary objection
(Footnote continued on next page…)

I. BACKGROUND

In June 2006, the Attorney General[2] brought the Petition in our original jurisdiction against Locust Township and its Board of Supervisors (collectively, Township), a second-class township located in Columbia County, to invalidate or enjoin the Ordinance, captioned "An Ordinance Amending the Zoning Ordinance of Locust Township, Columbia County, Pennsylvania to Provide for and Regulate Intensive Animal Agriculture." The Petition alleges that the Ordinance violates Chapter 3 of the Agricultural Code (ACRE),[3] 3 Pa. C.S. §§ 311-318, because it prohibits or limits normal agricultural operations where it is preempted from doing so by state law (Count I). The Petition also challenges Section 503(a), (d), (f), (h), (j), Part 3(b), and Part 5 of the Ordinance, alleging that they are preempted by Chapter 5 of the Agricultural Code, known as the Nutrient Management Act (NMA), 3 Pa. C.S. §§ 501-522 (Count II). The Petition challenges Section 503(g) of the Ordinance as preempted under the act known as the Water Resources Planning Act (WRPA), 27 Pa. C.S. §§ 3101-3136 (Count III).

(continued…)

that the Attorney General failed to state a ripe cause of action, because he failed to aver facts that the Ordinance had been applied or enforced in a manner inconsistent with state law and, therefore, the harm alleged was purely speculative. In *Commonwealth v. Locust Township*, 600 Pa. 533, 551, 968 A.2d 1263, 1274 (2009), our Supreme Court reversed, holding that the Attorney General is explicitly empowered to invalidate enacted local ordinances without regard to enforcement.

[2] The Honorable Linda L. Kelly has succeeded the Honorable Thomas W. Corbett, Jr., as Attorney General of the Commonwealth of Pennsylvania.

[3] ACRE stands for the "Agricultural, Communities and Rural Environmental Act," which was enacted as The Act of July 6, 2005, P.L. 112, commonly referred to as "Act 38."

The Petition also alleges that the Ordinance violates Section 603(h) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10603(h) (Count IV), and the Agricultural Area Security Law (AASL), Act of June 30, 1981, P.L. 128, *as amended*, 3 P.S. §§ 901-915 (Count V). The Attorney General's final contention in the Petition is that Part 3(a) of the Ordinance conflicts with the act commonly referred to as the Right to Farm Law (RFL), Act of June 10, 1982, P.L. 454, *as amended*, 3 P.S. §§ 951-957 (Count VI).

One cannot read the Ordinance without realizing that the underlying purpose of the Ordinance is to regulate comprehensively a class of farming, which Part 1 of the Ordinance defines as "intensive animal agriculture,"[4] within the Township. The Ordinance defines "intensive animal agriculture" as follows:

> . . . Intensive Animal Agriculture is hereby defined as the keeping, housing, confining, raising, feeding, production, or other maintaining of livestock or poultry animals when, on an annualized basis, there exists more than 150 Animal Equivalent Units (A.E.U.'s) on the agricultural operation, *regardless of the actual acreage owned*, used, or otherwise available to the agricultural operation. An A.E.U. is defined as one thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit. An *agricultural operation* is defined as a farm or other property utilized for the management and use of farming resources for the keeping, housing, confining, raising, feeding, production, or other maintaining of crops, livestock or poultry.

[4] Part 1 of the Ordinance amends Section 302 of the Township Zoning Ordinance, which is titled "Definition of Terms."

> Intensive agriculture also specifically includes:
>
> > 1. Concentrated Animal Operations (CAO). CAO's are defined as agricultural operations having an animal density of more than two (2) [A.E.U.'s] per acre of cropland or acre of land suitable for application of animal manure on an annualized basis; and
> >
> > 2. Concentrated Animal Feeding Operations (CAFO's). CAFO's are defined as agricultural operations with either more that (sic) 1,000 A.E.U.'s, which have the potential to discharge to surface waters.
>
> When applicable, the number of AEU's on the agricultural operation shall be calculated in accordance with Act 6 by using the steps and tables located in 25 Pa. Code § 83.262, as amended from time to time.

(Emphasis added.)

Part 2 of the Ordinance amends Section 503 of the Township Zoning Ordinance to allow intensive animal agriculture as a permitted use within the Rural Agricultural District by special exception subject to eleven (11) separate and express "conditions" and "such other lawful criteria as the Zoning Hearing Board deems necessary." Part 3 of the Ordinance imposes certain setback and minimum lot size requirements for intensive animal agriculture operations. Part 4 of the Ordinance adopts the NMA and the related regulations. Part 5 of the Ordinance imposes a bond or insurance requirement on all intensive animal agricultural operations: (1) $300,000 for CAOs or CAFOs, and (2) $150,000 for all others. A lower amount can be imposed at the discretion of the Township. Part 6 imposes penalties for noncompliance. Part 7 authorizes the zoning officer to enforce the

ordinance. Part 8 provides that the Ordinance provisions are severable. Part 9 repeals a prior ordinance. Part 10 provides the effective date.

II. DISCUSSION

A. NMA Preemption (Count II)[5]

The General Assembly enacted the NMA for the purposes of, *inter alia*, regulating nutrient and odor management measures,[6] required and voluntary, on certain agricultural operations in the Commonwealth of Pennsylvania. *See* 3 Pa. C.S. § 502. We have observed that "[t]he preparation and implementation of nutrient management plans is the centerpiece of the NMA." *Burkholder v. Zoning Hearing Bd. of Richmond Twp.*, 902 A.2d 1006, 1008 (Pa. Cmwlth. 2006) (en banc); 3 Pa. C.S. § 506. As the NMA also expressly requires preparation and implementation of odor management plans, 3 Pa. C.S. § 509, we consider this also to be a centerpiece of the NMA.

With respect to preemption of local ordinances, the NMA expressly provides:

> **(a) General.—**This chapter and its provisions are of Statewide concern and occupy the whole field of regulation regarding nutrient management and odor management, to the exclusion of all local regulations.
>
> **(b) Nutrient management.—**No ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling

[5] Because our rulings on Counts I and IV of the Petition depend in part on our rulings on the remaining counts, we will address those counts last.

[6] "Nutrient" is defined in the NMA to include, *inter alia*, livestock and poultry manures. 3 Pa. C.S. § 503.

> or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices *otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.*
>
> **(c) Odor management.—**No ordinance or regulation of a political subdivision or home rule municipality may regulate the management of odors generated from animal housing or manure management facilities *regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.*
>
> **(d) Stricter requirements.—**Nothing in this chapter shall prevent a political subdivision or home rule municipality from adopting and enforcing ordinances or regulations *which are consistent with and no more stringent than the requirements of this chapter and the regulations or guidelines promulgated under this chapter*. No penalty shall be assessed under any such local ordinance or regulation under this subsection for any violation for which a penalty has been assessed under this chapter.

3 Pa. C.S. § 519 (emphasis added).

The preemption language is as perplexing as it is verbose. Nonetheless, we take the following legislative intent from the General Assembly's chosen words. First, in passing the NMA, the General Assembly unmistakably intended to occupy "the whole field" of nutrient and odor management in the Commonwealth (subsection (a)). To that end, the NMA prohibits the adoption and enforcement of any local ordinance that conflicts with the provisions of the NMA or "regulations and guidelines promulgated under it" (subsections (b) and (c)). But, a municipality is free

to adopt and enforce ordinances that "are consistent with and no more stringent than" the NMA, its regulations, and its guidelines (subsection (d)).

1. Preemption of Ordinance Definition

The Attorney General contends in her summary judgment motion that the definition of "intensive animal agriculture" set forth in Part 1 of the Ordinance is preempted under Section 519 of the NMA. The essence of the argument is that the NMA and associated regulations define two classes of agricultural operations—(1) those that are large enough to meet the definition of a "concentrated animal operation," or "CAO," or a "concentrated animal feeding operation," or "CAFO;" and (2) those that are not, which the Attorney General refers to as "non-CAO/CAFOs." With the definition of "intensive animal agriculture," the Attorney General argues, the Ordinance creates a new category of agricultural operation not set forth in the NMA. Thus, according to the Attorney General, the term and its definition are in conflict with the NMA and, therefore, preempted.

The Township, in response, argues that this issue is not before the Court because the Attorney General did not plead in her Petition that Part 1 of the Ordinance is preempted by the NMA. Alternatively, the Township argues that its definition of a category of agricultural operation separate and apart from those categories regulated by the NMA is not a conflict.

The pleading requirements for a petition for review addressed to this Court's original jurisdiction are set forth in Rule 1513(e) of the Pennsylvania Rules of Appellate Procedure. One requirement is that the petition plead "a general statement of the material facts *upon which the cause of action is based.*" Pa. R.A.P. 1513(e) (emphasis added). In

addition, Rule 1517 of the Pennsylvania Rules of Appellate Procedure provides that, "[u]nless otherwise prescribed by these rules, the practice and procedure under this chapter relating to pleadings in original jurisdiction petition for review practice shall be in accordance with appropriate Pennsylvania Rules of Civil procedure, so far as they may be applied." On these appellate rules, this Court has opined:

> Our original jurisdiction provides for a cause of action cognizable at common law in the nature of equity, replevin, mandamus, quo warranto, declaratory judgment or prohibition, and be commenced by filing a petition for review rather than a complaint. Accordingly, the petition for review, in our original jurisdiction, is a fact pleading document and detailed factual allegations will generally be required to describe adequately the challenged action.
>
> Unless otherwise proscribed in Chapter 15 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 106 and 1517 incorporate the rules of civil procedure in matters brought before us within [our] original jurisdiction insofar as they may be applied. *The pleader must define the issues, and every act or performance essential to that act must be set forth in the complaint.*

Machipongo Land & Coal Co. v. Commonwealth, Dep't of Envtl. Res., 624 A.2d 742, 746 (Pa. Cmwlth. 1993) (citations omitted) (emphasis added), *rev'd on other grounds*, 538 Pa. 361, 648 A.2d 767 (1994).

Upon review of the Attorney General's Petition, we agree with the Township that the question of whether Part 1 of the Ordinance is preempted by the NMA is not before the Court. In Count II, the Attorney General lays out her NMA preemption claim. In those paragraphs (30 through 39), the Attorney General identifies specific provisions of the

Ordinance that she claims are preempted under Section 519 of the NMA because they impose requirements that are either more stringent than or in conflict with provisions of the NMA. Part 1 of the Ordinance is not included in the Attorney General's NMA preemption claim. Accordingly, it is not before the Court and will not be addressed as part of the Attorney General's summary judgment motion.[7]

2. Preemption of Site Plan Requirement

Section 503(d) of the Ordinance provides: "A Site Plan shall be submitted illustrating topographic and other significant features of the land, inhabitated (sic) residences, other buildings and structures, manure storage facilities, prevailing wind direction, building ventilation direction, stormwater retention facilities, groundwater sources, and fresh water streams and tributaries." The Attorney General argues that this provision is preempted, because it "duplicates and exceeds the [NMA] regulations which require CAOs and CAFOs to submit site-specific information, maps, and photographs." (Attorney General Principal Br. at 34.) The Attorney General cites to the NMA regulations, specifically 25 Pa. Code §§ 83.281-.282; 83.761, .771, and .781.

[7] If not waived, we would nonetheless deny the Attorney General's motion for summary judgment on this issue. We see nothing about a definition that, standing alone, is in conflict with, inconsistent with, or more stringent than the operative provisions of the NMA. Accordingly, we would not find the definition of "intensive animal agriculture" preempted under Section 519 of the NMA.

In addition, the Attorney General argues in her motion for summary judgment that Section 503(k) and Parts 3(a), 4, 6, and 7 of the Ordinance are preempted by the NMA. These provisions of the Ordinance, however, are not included in Count II of the Attorney General's Petition. Accordingly, they too are not before the Court and will not be addressed as part of the Attorney General's motion for summary judgment.

In response, the Township argues that there is no conflict and that the site plan requirement of the Ordinance is *less* onerous than the NMA site plan requirements. The Township also argues: "The NMA does not preempt a site plan from being submitted as part of an application for a special exception to a zoning variance. The site plan has absolutely no regulatory impact and therefore is not more stringent than the requirements under the NMA." (Twp. Principal Br. at 15.)

The NMA expressly empowers the State Conservation Commission (Commission) to promulgate regulations establishing, *inter alia*, requirements for nutrient and odor management plans. 3 Pa. C.S. § 504(1), (1.1). The NMA regulations provide that any nutrient management plan (25 Pa. Code § 83.281(b)) or odor management plan (25 Pa. Code § 83.761(b)) must include a site plan, or map, of the agricultural operation in question. Thus, the Commission decided, under its regulatory authority, that site plans would be beneficial in the course of the planning, submission, and review of a nutrient and odor management plans.

In essence, the Attorney General argues that because the Commission has decided that site plans should be included with nutrient and odor management plan submissions under the NMA, municipalities are preempted by Section 519 of the NMA from requiring an applicant for special exception approval to submit a site plan as part of its application. We, however, see no conflict or inconsistency between the site plan requirement under the NMA regulations and a local ordinance that requires an applicant for land use approval to submit a site plan to a municipal body. Each serves a separate purpose with independent legal significance. One

provides the Commission with information the Commission requires to review odor and nutrient management plans under the NMA. The other provides the municipality, exercising its authority to regulate land use and development under Section 501 of the Municipalities Planning Code (MPC),[8] *see Hamilton Hills Group, LLC v. Hamilton Twp. Zoning Hearing Bd.*, 4 A.3d 788, 795 (Pa. Cmwlth. 2010), with the information the municipality requires to ensure that the proposed land use is consistent with the local ordinances that authorize, govern, and restrict that use.

Because Section 503(d) of the Ordinance is a valid exercise of the Township's authority under the MPC and is not an ordinance provision regulating odor or nutrient management practices of agricultural operations within the Township, we deny the Attorney General's motion for summary judgment directed to this provision of the Ordinance.

3. Preemption of Emergency Plan and Odor Management Requirements

Section 503(f) of the Ordinance provides:

> The applicant shall prepare an emergency contingency plan pursuant to the guidelines of the Nutrient Management Act and the Pennsylvania Technical Guide to address inadequate manure management practices, manure leaks and spills, disease and other manure handling emergencies. The plan shall be provided to the Zoning Hearing Board, the Township, and local emergency management.

Section 503(j) of the Ordinance provides:

> The applicant shall demonstrate that odors arising from the intensive animal agricultural

[8] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10501.

> operations will be controlled to minimize and, where economically practical, eliminate off-site and downwind detection of malodors. A written proposal for controlling and eliminating odors shall be submitted with the application and shall address all of the following as well as other forms of odor control the applicant deems beneficial:
>
> > (i) Low technology odor control practices include, but are not limited to the following: moisture reduction, evergreen screening, aerobic condition maintenance, ph adjustment, shelter to reduce dissipation, water sprays to scrub the air, barriers to promote turbulent air mixing and dilution, appropriate site location, observance of local weather conditions, timing of land application activities, subsurface injection and incorporation, masking agents, odor counteractants, odor absorption chemicals, and enzymatic biological inhibitors
> >
> > (ii) More sophisticated odor control solutions, include, but are not limited to the following: improved air disbursion (stacks), process modification, ventilation modification, add-on controls including wet scrubbing, dry scrubbing, condensation, incineration, and biofiltration, chemical oxidation with chlorine ozone.

The Attorney General argues that these provisions are preempted because they duplicate or exceed the NMA regulation requirements for emergency response plans (25 Pa. Code § 83.312), as part of a nutrient management plan, and odor management plans (25 Pa. Code § 83.741).

Section 506 of the NMA requires "concentrated animal operations" (or CAOs) to develop and implement a nutrient management plan. 3 Pa. C.S. § 506(b). A CAO must submit a plan for review and approval by either the local conservation district or, if there is none, the State

Conservation Commission (Commission). *Id.* § 506(e). The Commission has promulgated regulations addressing the preparation, review and approval, and implementation of nutrient management plans. *See* 25 Pa. Code §§ 83.201-.381. Though the Ordinance and the NMA both include reference to this term—CAOs—we are guided by the definition in the NMA. The NMA defines a CAO as an "*agricultural operation* where the animal density exceeds two AEUs per acre on an annualized basis." 3 Pa. C.S. § 506(a) (emphasis added). The NMA defines "agricultural operations" as "[t]he management and use of farming resources for the production of crops, livestock or poultry." *Id.* § 501.

Section 509 of the NMA requires existing CAOs, under certain circumstances, and all new CAOs to develop and implement an odor management plan. *Id.* § 509(a). Section 509 also requires existing and new agricultural operations that qualify as "concentrated animal feeding operations" (or CAFOs), under criteria established by DEP, to develop and implement odor management plans. *Id.* Again, we are guided by how DEP, and not the Ordinance, defines a CAFO. In this regard, the DEP definition for a CAFO provides: "A CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under [federal regulations]." 25 Pa. Code § 92a.2. Odor management plans must be submitted to the Commission or a local conservation district for review and approval. 3 Pa. C.S. § 509(c). As with nutrient management plans, the Commission has promulgated regulations addressing the preparation, review, approval, and

implementation of odor management plans. *See* 25 Pa. Code §§ 83.701-.812.

The Township takes the position that because the Ordinance proposes only to require those smaller farms—*i.e.*, those not large enough to qualify as CAOs or CAFOs under the NMA—to submit odor and nutrient management plans or proposals, the Ordinance is not preempted by the NMA. In other words, the Ordinance would only be preempted under the NMA if the Ordinance proposed to place additional burdens on CAOs and CAFOs. We disagree.

Subsumed in the Township's reasoning is the assumption that smaller farms are *not* regulated by the NMA. This is a flawed proposition. The NMA expressly addresses these smaller farms specifically in reference to the NMA requirements to submit odor and nutrient management plans, the latter of which must include an emergency response plan. With respect to nutrient management plans, Section 506(h) of the NMA provides:

> . . . **Voluntary plans.—**Any agricultural operation *which is not a concentrated animal operation may voluntarily* develop a nutrient management plan and have it reviewed pursuant to this section. To the extent possible, the commission, the Cooperative Extension Service, the department, and the Department of Environmental Protection and conservation districts shall assist and promote the development of *voluntary* plans.

3 Pa. C.S. § 506(h) (emphasis added). Similarly, with respect to odor management plans, Section 509(f) of the NMA provides:

> . . . **Voluntary plans.—**Any agricultural operation *which is not required to comply with subsection (a) may voluntarily* develop an odor management plan and have it reviewed pursuant to

> this section. To the extent possible, the commission, the Cooperative Extension Service, the department, the Department of Environmental Protection and conservation districts shall assist and promote the development of *voluntary plans*.

3 Pa. C.S. § 509(f) (emphasis added). The Commission's regulations addressing the review and approval process for nutrient management and odor management plans expressly include within their scope plans submitted voluntarily by those agricultural operations that are not required under the NMA to prepare, submit, or implement plans. *See* 25 Pa. Code §§ 83.202, .702.

Based on the foregoing, we conclude that the General Assembly has unquestionably, and expressly, spoken in terms of the obligations of smaller farms—*i.e.*, those not large enough to meet the definition of a CAO or CAFO—to submit nutrient and odor management plans. The General Assembly has decided that such smaller farms should not be required to do so; rather, they should be encouraged to do so *voluntarily*. The reason for the distinction is obvious. Both the preparation and implementation of the odor and nutrient management plans come at a cost, which the General Assembly clearly and expressly recognized. The cost of compliance appears to have been such a significant concern to the General Assembly that it expressly authorized the Commission to provide financial assistance—in the form of loans, loan guarantees, and grants—to existing agricultural operations to implement the mandated plans. 3 Pa. C.S. § 511. Thus, it does not appear that the General Assembly's differentiation between CAOs and CAFOs on the one hand, and smaller agricultural operations on the other hand, was a matter of whim. Rather, the General

Assembly made a conscious decision to spare smaller farms the cost of mandatory compliance.

Section 503(f) and (j), as adopted by Part 2 of the Ordinance, are in direct conflict with this intent. By requiring farms too small to meet the definition of CAO or CAFO to submit and implement emergency response and nutrient management plans or proposals similar in type and scope to what is required under the NMA, the Township attempts to make mandatory what the General Assembly has already decided must be voluntary. In this regard, Section 503(f) and (j) are in conflict with the NMA and, thus, are preempted pursuant to Section 519 of the NMA.[9]

4. Preemption of Setback Requirement

Part 3(b) of the Ordinance imposes a minimum setback of 500 feet for intensive agricultural operations generally. The only setback

[9] This matter was originally argued before a three-judge panel of the Court. By Order dated April 30, 2012, the Court scheduled the matter for argument before the Court en banc. In that Order, the Court directed the parties to be prepared to address, *inter alia*, whether this particular question is even before the Court in this case. Specifically, we asked the parties to be prepared to address this question in light of (a) the fact that the Attorney General did not cite Sections 506(h) and 509(f) of the NMA in the Petition and (b) the paragraph in the Attorney General's undisputed material facts in support of its motion, wherein it admitted that agricultural operations that are too small to be considered CAOs and CAFOs are not subject to the NMA. The parties submitted supplemental pre-argument briefs on this issue. Upon considering the parties' arguments, we are satisfied that the question is properly before us. Although the Attorney General does not cite Sections 506(h) and 509(f) of the NMA in the Petition, in Count II, the Attorney General expressly claims that Section 506(f) and (j) of the Ordinance are preempted by the NMA. Thus, that issue is clearly before the Court, and it is that issue which we resolve above in favor of the Attorney General based on our reading of the NMA. As for the Attorney General's statement that smaller farms are not subject to the NMA, the statement is ambiguous. One could interpret it as a concession by the Attorney General that the NMA does not at all address smaller agricultural operations. Alternatively, the statement can be interpreted, as the Attorney General suggests, as merely an acknowledgement that smaller farms are not required to comply with the NMA provisions. Regardless, we are not bound by a party's statement of law.

requirements imposed by the NMA relate to a specific type of facility, or structure, within a CAO or CAFO—that being a manure storage facility. Though there are several different setback requirements in the NMA regulations for manure storage facilities,[10] the most stringent setback requirement is 300 feet from a property line. 25 Pa. Code § 83.351(a)(2)(vi)(H). Because the Ordinance imposes a setback on *all* portions of an intensive agricultural operation (not just manure storage facilities), and because the 500 foot setback (a) exceeds the maximum setback provided in the NMA regulations for just manure storage facilities on CAOs and CAFOs, and/or (b) applies to farming operations that the General Assembly has deemed to be so small as to justify their exclusion from the lesser NMA setback requirements for larger farming operations, the Ordinance setback requirement is more stringent than that imposed under the

[10] The regulations define "manure storage facility" as follows:

> *Manure storage facility*—
>
> (i) A permanent structure or facility, or portion of a structure or facility, utilized for the primary purpose of containing manure.
>
> (ii) Examples include: liquid manure structures, manure storage ponds, component reception pits and transfer pipes, containment structures built under a confinement building, permanent stacking and composting facilities and manure treatment facilities.
>
> (iii) The term does not include the animal confinement areas of poultry houses, horse stalls, freestall barns or bedded pack animal housing systems.

25 Pa. Code § 83.201.

NMA regulations and thus is preempted under Section 519 of the NMA.[11] *See Commonwealth v. Richmond Twp.*, 2 A.3d 678 (Pa. Cmwlth. 2010) (single-judge opinion by Friedman, J.) (holding, in similar context, 1500 foot setback provision preempted by NMA).

Based on the foregoing, we grant the Attorney General's motion for summary judgment and enter judgment in favor of the Attorney General and against the Township on Count II of the Petition with respect to Section 503(f) and (j), as adopted by Part 2 of the Ordinance, and Part 3(b) of the Ordinance.[12] We deny the Attorney General's motion for summary judgment as to the remaining claims in Count II.

B. WRPA Preemption (Count III)

In Count III, the Attorney General alleges that Section 503(g) of the Ordinance is preempted by the WRPA, which regulates water withdrawal and use and establishes registration, monitoring, record-keeping and reporting requirements. The WRPA requires those whose total water withdrawal exceeds an average rate of 10,000 gallons per day in a 30-day period to register with the Pennsylvania Department of Environmental Protection (DEP) and comply with its record-keeping and reporting

[11] That the Ordinance grants discretion to the Township to reduce the setback requirement under certain circumstances does not save the Ordinance from preemption in this regard.

[12] The Attorney General also moves for summary judgment on its claim that Section 503(h) of the Ordinance, which requires that facilities be located, "to the maximum extent feasible," to reduce the impact of odors on residential uses located downwind, is also preempted under Section 519 of the NMA. Though we question whether this particular provision can survive in the absence of Township authority to review and consider an odor management plan, we are not yet convinced that the Attorney General is entitled to judgment as a matter of law on this claim. For this reason, we will deny summary judgment as to this claim.

requirements. 27 Pa. C.S. § 3118. These requirements include, *inter alia*, submitting to DEP reports regarding the source, location, and amount of withdrawals or uses.

Like the NMA, the WRPA contains a specific preemption provision. Section 3136(b) of the WRPA provides that "no political subdivision shall have any power to allocate water resources or to regulate the location, amount, timing, terms or conditions of any water withdrawal by any person." 27 Pa. C.S. § 3136(b). Subsection (c) further provides:

> Nothing in subsection (b) shall affect the power of any municipality to adopt and enforce ordinances pursuant to 35 Pa.C.S. Pt. V (relating to emergency management services) *or regulate the use of land pursuant to the [MPC]* or other laws. Further, each municipality shall retain and may exercise such authority as conferred by other statutes to adopt ordinances and regulations concerning:
>
> > (1) mandatory connection to and use of available public water supplies; and
> >
> > (2) The prohibition or regulation of withdrawals from particular sources of water that may be contaminated in order to protect public health and safety from exposure to the contamination or avoid the induced migration of the contamination.

27 Pa. C.S. § 3136(c) (emphasis added). In order to determine whether a local ordinance is preempted by the WRPA under this provision, it first must be determined whether the ordinance attempts to allocate water resources or regulate water withdrawal. If it does, then it must be determined whether it is a permissible exercise of power by the municipality relating to (1) emergency management services, (2) regulation of land use per the MPC, (3) mandatory connection to and use of available public water supplies, or

(4) the regulation of withdrawals from contaminated sources of water. If an ordinance's provision does not fall within one of these exceptions or conflicts with the WRPA's regulations, it is preempted.

Section 503(g) of the Ordinance provides, in relevant part:

> Intensive agricultural operations which are expected to consume ten-thousand (10,000) gallons or more of water per day shall be registered with the Susquehanna River Basin Commission (SRBC) as a Consumptive Water Use. Proof of registration shall be provided with the Application for Special Exception.
>
> If the applicant's proposed intensive animal agriculture operation is expected to use an average of more than ten thousand (10,000) gallons of water per any twenty-four (24) hour period, (determined by a thirty (30) day average), the applicant shall submit a water impact study to demonstrate that sufficient water is available for use by the operation and that the operation's water use shall not have an adverse impact on the water rights of neighboring properties. The water impact study shall be a comprehensive study prepared by a hydrologist holding a Ph.D. in the field which studies and evaluates the impact of new construction or a new use on private and public well water sources. The area to be studied shall encompass at least a one-half mile radius from the proposed operation, new construction or new use.

Under this provision, the Township may deny an application for special exception based on the results of the water impact study. It also requires applicants to meter, measure, and record the amount of water actually used on a daily basis in a log book that shall be available for inspection by the Township at all times, and provides that the Township may

revoke an exception if the applicant's average daily use exceeds 10,000 gallons of water.

The Township contends that it has the power to enact Section 503(g) of the Ordinance pursuant to the MPC, which provides that "zoning ordinances may include provisions regulating the siting, density, and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies," Section 603(d) of the MPC, 53 P.S. § 10603(d), and that zoning ordinances shall be designed to "promote, protect and facilitate…the provision of a safe, reliable and adequate water supply," Section 604 of the MPC, 53 P.S. § 10604.

While the MPC does provide municipalities with the authority to consider water supply in regulating land use, it does not authorize municipalities to impose water withdrawal and use requirements on agricultural uses, which Section 503(g) of the Ordinance purports to do. To the extent that Section 503(g) of the Ordinance relates to emergency management services, or falls within Section 3136(c)(1) or (2) of the WRPA, it is, nonetheless, preempted because its requirements, particularly the water impact study requirement, far exceed the requirements of the WRPA. Because Section 503(g)'s requirements are irreconcilable with the WRPA, that section of the Ordinance is preempted. Finding no remaining issues of material fact, we grant summary judgment as to Count III of the Petition and conclude that Section 503(g) of the Ordinance is preempted.

C. Violation of AASL (Count V)

In Count V, the Attorney General alleges that the Ordinance violates the AASL. The purpose of the AASL is "to provide means by

which agricultural land may be protected and enhanced as a viable segment of the Commonwealth's economy and as an economic and environmental resource of major importance." Section 2 of the AASL, 3 P.S. § 902. One way in which municipalities can further this purpose is by designating certain lands as agricultural security areas (ASA). The AASL provides:

> Every municipality or political subdivision within which an [ASA] is created shall encourage the continuity, development, and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety.

Section 11(a) of the AASL, 3 P.S. § 911(a). The Township has an ASA consisting of approximately 480 acres on which there are normal agricultural operations. To demonstrate that the Ordinance violates the AASL, the Attorney General has to prove that (1) the challenged provisions will unreasonably restrict farm structures or farm practices within the Township's ASA, and (2) the restrictions do not bear a direct relationship to the public health or safety.

The Attorney General argues that the Ordinance violates the AASL in two respects. First, Part 3(b)(i) and (2), which provide for 500-foot setbacks from adjacent property lines and water sources may not allow for structures to be built on a given parcel, which, *per se*, constitutes an unreasonable restriction on farm structures. Second, the Attorney General alleges that the requirements of Sections 503(h) and (j) and

Part 3(b)(iii)(c)[13] of the Ordinance unreasonably restrict farm practices. These requirements, the Attorney General contends, restrict the steps a farmer can take to control odors on an agricultural operation and could preclude farmers from using large amounts of available land by requiring that grazing of animals must occur within fencing located 500 feet from property lines and water sources.

In response, the Township argues that nothing on the record indicates that any portion of the Ordinance falls within the purview of the terms "farm structures" and "farm practices." Furthermore, whether the Ordinance creates unreasonable restrictions on farm structures or farm practices is a genuine issue of material fact precluding a grant of summary judgment. In order for the Court to make such a reasonableness determination, the Township alleges, it would have to understand how the Ordinance is being applied to specific farm structures or farm practices.

We agree with the Township that in order to determine whether the Ordinance is unreasonable, we would have to determine how those restrictions apply to the Township's ASA, whether the restrictions are "unreasonable," and whether they "bear a direct relationship to the public health or safety." We cannot make those determinations based on the facts

[13] As noted above, Section 503(h) of the Ordinance requires facilities on intensive animal agriculture operations to be located "to take into account prevailing seasonal wind patterns" and requires a Site Plan showing "the direction of seasonal prevailing winds and the distance to the nearest inhabited residence." Section 503(j) of the Ordinance requires applicants to demonstrate by written proposal that odors arising from the intensive animal agricultural operations will be controlled to minimize and, where economically practical, eliminate off-site and downwind detection of malodors. Part 3(b)(iii)(c) of the Ordinance provides that "the above set back requirements shall not apply to…or prohibit seasonal grazing of animals within fenced areas within the setback area."

present in the motion for summary judgment. Accordingly, we deny summary judgment as to Count V of the Attorney General's Petition.

D. RFL Preemption (Count VI)

In Count VI, the Attorney General claims that the Ordinance violates Section 3(a) of the RFL. That section provides, in relevant part:

> Every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that *defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation* conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.

3 P.S. § 953(a) (emphasis added). The Attorney General argues that Section 3(a) of the Ordinance, which establishes a 60-acre minimum lot size for an intensive animal agriculture operation, violates the RFL because it conflicts with the definition of "normal agricultural operation" in the RFL. That definition, provides, *inter alia*, that an agricultural operation must include at least ten (10) contiguous acres to be considered a "normal agricultural operation." Section 2 of the RFL, 3 P.S. § 952.

The Attorney General cannot prevail on Count VI of her Petition. Section 3(a) of the RFL prohibits a municipality from declaring or prohibiting a public nuisance. The Ordinance does neither; rather, it is an amendment to the Township's Zoning Code that defines a use and provides where it is permitted and under what conditions. Accordingly, we deny the Attorney General's motion for summary judgment as to Count VI.

E. ACRE Preemption (Count I)

In Count I, the Attorney General alleges that the Ordinance violates Section 313 of ACRE, which prohibits local governments from adopting or enforcing "an unauthorized local ordinance." 3 Pa. C.S. § 313(a). ACRE defines an "unauthorized local ordinance" as follows:

> An ordinance enacted or enforced by a local government unit which does any of the following:
>
> (1) Prohibits or limits a *normal agricultural operation* unless the local government unit:
>
> (i) has expressed or implied authority under State law to adopt the ordinance; and
>
> (ii) is not prohibited or preempted under State law from adopting the ordinance.
>
> (2) Restricts or limits the ownership structure of a normal agricultural operation.

Id. § 312. An unauthorized ordinance under ACRE, therefore, is "one that prohibits or limits a normal agricultural operation absent authority of state law." *Commonwealth v. Richmond Twp.*, 917 A.2d 397, 405 (Pa. Cmwlth. 2007) (*Richmond I*). "It is well-settled that a local government has no authority to adopt an ordinance that is arbitrary, vague or unreasonable or inviting of discriminatory enforcement." *Id.*

The threshold question in any ACRE case is whether the Ordinance prohibits or limits a "normal agricultural operation." *Commonwealth v. East Brunswick Twp.*, 956 A.2d 1100, 1115 (Pa. Cmwlth. 2008) (*East Brunswick I*). As set forth above, the Ordinance purports to regulate and limit "intensive animal agriculture" within the Township. "Intensive animal agriculture" is defined in the Ordinance "as the keeping,

housing, confining, raising, feeding, production, or other maintaining of livestock or poultry animals when, on an annualized basis, there exists more than 150 Animal Equivalent Units [AEUs] on the agricultural operation, *regardless of the actual acreage owned*, used, or otherwise available to the agricultural operation." (Emphasis added.) The question, then, is whether a farm with more than 150 AEUs (the Ordinance), on at least ten (10) contiguous acres or with an anticipated yearly gross income of at least $10,000,[14] is *so* large that it could no longer be considered a "normal

[14] ACRE adopts the definition of "normal agricultural operation" set forth in Section 312 of the RFL, which provides:

> The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is:
>
> (1) not less than ten contiguous acres in area; or
>
> (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000.
>
> The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134), known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

3 Pa. C.S. § 312.

agricultural operation." If so, a local ordinance prohibiting or limiting such *abnormal* agricultural operations would not run afoul of ACRE.

The parties simply do not adequately address this threshold question in their briefs. As we held in *East Brunswick I*, this threshold question is a mixed question of fact and law. This does not mean the question cannot be resolved at the summary judgment level, where the facts necessary to make the determination are undisputed. Here, however, the lack of attention by the parties to this threshold question in their summary judgment filing simply precludes the Court from moving past this threshold question. *See also Richmond I*, 917 A.2d at 405 & n.14 (holding that mere averment that "intensive agricultural activity" defined in challenged ordinance constitutes "normal agricultural activity" for ACRE was conclusion of law, but granting leave to Attorney General to amend pleadings to assert facts describing how ordinance prohibits or limits "normal agricultural activities"). For this reason, we deny the Attorney General's motion for summary judgment on Count I.

F. MPC Preemption (Count IV)

In Count IV of the Petition, the Attorney General asserts that the Ordinance violates the MPC. Among the purposes of the MPC is

> to ensure that municipalities enact zoning ordinances that facilitate the present and future economic viability of existing agricultural operations in this Commonwealth and do not prevent or impede the owner or operator's need to change or expand their operations in the future in order to remain viable.

Section 105 of the MPC, 53 P.S. § 10105. The MPC authorizes zoning ordinances that regulate agriculture "except to the extent . . . that regulation

of activities related to commercial agricultural production would exceed the requirements imposed under the . . . [NMA, AASL or RFL]." Section 603(b) of the MPC, 53 P.S. §10603(b). Because, for reasons set forth above, we conclude at this stage of the proceeding that Section 503(f) and (j), Part 2, and Part 3(b) of the Ordinance are preempted by the NMA, they also violate Section 603(b) of the MPC.

III. CONCLUSION

As set forth above, we grant the Attorney General's motion for summary judgment in part and declare the following provisions of the Ordinance invalid:

1. Section 503(f) and (j) and Part 3(b) (Count II, NMA) (Count IV, MPC); and

2. Section 503(g) (Count III, WRPA).

The Attorney General's motion for summary judgment is denied in all other respects.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Office of Attorney General By Thomas W. Corbett, Jr., Attorney General, Petitioner	:	
v.	:	No. 358 M.D. 2006
Locust Township and Locust Township Board of Supervisors, Respondents	:	

O R D E R

AND NOW, this 17th day of July, 2012, the Attorney General's motion for summary judgment is GRANTED IN PART. Summary judgment is entered in favor of the Attorney General and against Respondents on Count II of the Petition for Review (Petition). Section 503(f) and (j) and Part 3(b) of the Ordinance are preempted by Section 519 of the act known as the Nutrient Management Act, 3 Pa. C.S. § 519, and are, therefore, declared invalid. As a result, summary judgment is also entered in favor of the Attorney General and against Respondents on Count IV of the Petition with respect to these Ordinance provisions. Summary judgment is also entered in favor of the Attorney General and against Respondents on Count III of the Petition. Section 503(g) of the Ordinance is preempted by Section 3136(b) of the Water Resources Planning Act, 27 Pa. C.S. § 3136(b), and is, therefore, declared invalid. In all other respects, the motion for summary judgment is DENIED.

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P. KEVIN BROBSON, Judge