COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

October 20, 2014

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
[redacted]

William H. Poole, Jr., Esquire
3030 East Market Street
York, PA 17402

RE: ACRE Review
East Hopewell Township Sewage Sludge Ordinance

Dear Mr. Poole:

On September 30, 2014, we wrote to inform East Hopewell Township that its Sewage Sludge Ordinance No. 3-1999 unlawfully prohibits or limits a normal agricultural operation in violation of ACRE. As we discussed on Friday, this letter will provide an overview of the law supporting the Attorney General's position, the legal problems with the ordinance, and the model biosolids ordinance developed through a prior ACRE litigation.

The Solid Waste Management Act (SWMA) and Department of Environmental Protection (DEP)'s SWMA regulatory scheme comprehensively regulates Class A, Class B, and residential septage biosolids, which includes: permit, application, and testing requirements for land application of Class A, Class B, and residential septage biosolids; standards for concentration of pollutants, pathogens, and vector attractants and for sampling, analysis, and monitoring; and authority for the DEP to deny, suspend, modify, or revoke any permit or license and otherwise to enforce the SWMA and DEP regulations. 35 P.S. § 6018.101, *et seq.*; 25 Pa. Code § 271.1, *et seq.*

The Commonwealth Court has consistently interpreted the SWMA and its accompanying regulations as preempting local regulation of the land application of biosolids with requirements that duplicate or exceed the DEP's regulatory scheme. Commonwealth v. East Brunswick Township, 980 A.2d 720, 733 (Pa. Cmwlth. 2009) (East Brunswick II) (explaining that "Liverpool and Synagro teach that a township cannot duplicate the regulatory regime established by the SWMA and cannot impose more stringent requirements than the SWMA."); Liverpool

Township v. Stephens, 900 A.2d 1030, 1037 (Pa. Cmwlth. 2006) (en banc) (holding that to the extent the ordinance "regulates the application of municipal waste to agricultural land, [it] is preempted."). I have enclosed copies of these cases for your review.

A few examples of ordinance provisions held to be preempted by the SWMA include requiring a separate local permitting process, regulating hours of operations, charging testing and bonding fees, imposing different setbacks and soil pH levels, and other such regulation of how, when, and where biosolids may be used to fertilize farmland. Liverpool Township, 900 A.2d at 1037; Abbey v. Zoning Hearing Bd. of the Borough of East Stroudsburg, 559 A.2d 107, 112 (Pa. Cmwlth. 1989); Southeastern Chester County Refuse Auth. v. Bd. of Supervisors of London Grove Township, 545 A.2d 445, 446 (Pa. Cmwlth. 1988); Longenecker v. Pine Grove Landfill, Inc., 543 A.2d 215, 217 (Pa. Cmwlth. 1988); Township of Ross v. Crown Wrecking Co., 500 A.2d 1293, 1293 (Pa. Cmwlth. 1985); see also Synagro-WWT, Inc. v. Rush Township, 299 F. Supp. 2d 410, 420-21 (M.D. Pa. 2003).

In Liverpool Township, the ordinance at issue required a township permit in order to apply biosolids to agricultural land. 900 A.2d at 1031. The ordinance had specific land application setbacks required to obtain the township permit. Id. at 1033-34. The Court explained that the permit required under the ordinance duplicated that required by DEP and the required setbacks conflicted with the SWMA. Id. The Court held the ordinance was both preempted by the SWMA and beyond the township's authority under the Second Class Township Code. In so holding, the court explained that a municipal ordinance must not interfere "with the General Assembly's goal of a uniform and comprehensive scheme of regulation of municipal sewage treatment that leaves no room for side-by-side municipal regulation. . . . Balkanized regulation of the disposal of municipal sewage sludge would stand as an obstacle to the SWMA's comprehensive regulatory scheme." Id. at 1038 (citation omitted).

Moreover, based on an ACRE review, our Office filed a lawsuit against East Brunswick Township to challenge its sewage sludge ordinance. The ordinance required notice, bonding, testing fees, testing parameters, post-application reporting requirements, operational requirements, as well as inspection, enforcement, and penalty provisions. East Brunswick II, 980 A.2d at 727-728. The court held that the ordinance provisions "far exceed what is required in the Department's regulations, and, therefore, conflict with the SWMA." Id. at 732. The court also opined that:

> The SWMA does not authorize the Township to set up its own sewage sludge police force to enforce the SWMA. The Township cannot establish a comprehensive scheme of sewage sludge regulation to replicate the one set forth in the SWMA and the Department's regulations at 25 Pa. Code, Chapter 271. As noted in Synagro, the Township has a remedy in Section 604 of the SWMA to enjoin violations of the SWMA. . . . The remedies provided by the legislature in the SWMA preclude other forms of "self-help" by the Township.

Id. at 733-34.

The provisions in the East Hopewell Township sewage sludge ordinance sit on all fours with the ordinances at issue in East Brunswick II and Liverpool Township. The Township's ordinance imposes a permit scheme for the land application of Class B biosolids. The requirements for a permit duplicate and exceed the requirements under the DEP's regulatory scheme for the land application of biosolids. 25 Pa. Code § 271.1, *et seq.* Specifically, the ordinance provisions requiring a permit; well and soil testing; permit fees and costs; a township review process to obtain a permit; imposition of liability; "special rules;" inspections; enforcement; and penalties are, on their face and as a matter of law, prohibited and/or preempted by State law.

As stated, the Township's ordinance has identical provisions to those that our Office challenged in the East Brunswick Township ACRE litigation, which resulted in the Commonwealth Court's decision in East Brunswick II. Following this decision, East Brunswick Township proposed amendments to its ordinance to resolve the legal problems identified in our lawsuit. After negotiations, East Brunswick Township enacted ordinance number 2009-3 and we discontinued our lawsuit. I have enclosed for your review a copy of East Brunswick Township's ordinance number 2009-03.

This model ordinance, which applies only to Class B biosolids, requires notice to the township of land application activities and the posting of signs along land abutting public roads during application. It allows the township limited opportunity to inspect and take samples at the application site, but only at the township's expense and only with prior notice to the landowner. The ordinance has no enforcement provisions; the township's remedy to redress an alleged violation of the SWMA or DEP regulations would be to report the violation to DEP and/or seek an injunction in court. 35 P.S. § 6018.604(b). If East Hopewell Township commits to repealing its ordinance or to replacing it with the model ordinance developed through the East Brunswick litigation, then our Office will not pursue legal action against the Township.

Please review the enclosed information with the Township Supervisors and let me know whether the Township will commit to resolving the legal problems with its ordinance in the manner discussed above. We plan to file a lawsuit against East Hopewell Township by the beginning of January, unless the Township, before then, notifies us that it will take the necessary steps to resolve this review with our Office.

Sincerely,

Susan L. Bucknum

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag
cc: John Marstellar, Sr. (w/o encl.)

980 A.2d 720
Commonwealth Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, OFFICE OF ATTORNEY GENERAL, By Thomas W. Corbett, Jr., Attorney General, Petitioner
v.
EAST BRUNSWICK TOWNSHIP, and East Brunswick Township Board of Supervisors, Respondents.

Argued June 11, 2009. | Decided Aug. 21, 2009.

Synopsis

Background: Attorney General brought action for declaratory and injunctive relief, seeking to invalidate a township ordinance regulating land application of sewage sludge on the grounds it was preempted by state statutes on the same subject and that it interfered with normal agricultural operations in violation of the Agricultural, Communities and Rural Environment (ACRE) Act. The Commonwealth Court, 956 A.2d 1100, overruled the township's preliminary objections and denied the Attorney General's request for summary relief. In the meantime, township had repealed its original ordinance and replaced it with a new one. Attorney General filed an amended petition challenging the validity of the new ordinance. Township filed preliminary objections in the nature of a demurrer.

Holdings: The Commonwealth Court, No. 476 M.D. 2007, Leavitt, J., held that:

[1] Attorney General had not been required to attached certain writings to his amended petition, such that those writings could be attached as exhibits to Attorney General's opposition brief;

[2] Attorney General stated cause of action that the ordinance was preempted by the Solid Waste Management Act (SWMA);

[3] Nutrient Management Act addressed post-application soil and water quality and was not limited to nutrient and odor issues; and

[4] Attorney General stated a cause of action that ordinance violated the Agricultural Area Security Law.

Preliminary objection sustained in part and overruled in part.

West Headnotes (9)

[1] **Environmental Law**
⇐ Pleading, petition, or application

Attorney General was not required, under rule governing contents of pleadings, to attach an adjudication of the Environmental Hearing Board, or the affidavit of a water program specialist of the Department of Environmental Protection, to his amended petition for review challenging validity of township ordinance that regulated the application of sewage sludge to land, and thus both writings could be attached as exhibits to Attorney General's subsequent opposition brief in response to township's preliminary objections; the writings at issue were illustrative and provided for the convenience of the court, and they did not amend the pleading or constitute the basis for the action. Rules Civ.Proc., Rule 1019(i), 42 Pa.C.S.A.

Cases that cite this headnote

[2] **Pleading**
⇐ Nature and office of demurrer, and pleadings demurrable

A demurrer tests the legal sufficiency of a complaint.

1 Cases that cite this headnote

[3] **Pleading**
⇐ Facts well pleaded

Pleading
⇐ Inferences and conclusions of fact

Pleading
⇐ Conclusions of law and construction of written instruments

When ruling on preliminary objections in the nature of a demurrer, the court must accept as true every well-pleaded material fact set forth in the complaint as well as all inferences

reasonably deducible therefrom, but is not required to accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion.

1 Cases that cite this headnote

[4] **Pleading**
⇐ Insufficiency of facts to constitute cause of action

Pleading
⇐ Hearing and Determination on Demurrer

The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible, and any doubt should be resolved in favor of overruling the demurrer.

1 Cases that cite this headnote

[5] **Environmental Law**
⇐ State preemption of local laws and actions

Attorney General stated a cause of action that township ordinance requiring that fees, bond, chemical tests, notice and sign requirements be met before use of sewage sludge on land was preempted by the Solid Waste Management Act (SWMA), although ordinance did also require that sludge application or storage be done in accordance with Department of Environmental Protection permits and regulations under SWMA; ordinance imposed notice, testing, and operational requirements upon the land application of sewage sludge, and any requirements that were redundant of or stricter than those in SWMA would be preempted. 35 P.S. § 6018.101–6018.1003; 25 Pa.Code § 271.901–271.933.

1 Cases that cite this headnote

[6] **Environmental Law**
⇐ State preemption of local laws and actions

Zoning and Planning
⇐ Environmental regulations and considerations

A township cannot duplicate the regulatory regime established in the Solid Waste Management Act (SWMA) and cannot impose more stringent requirements than the SWMA; on the other hand, a township can address land use issues in a zoning ordinance because zoning is a public health and safety issue not addressed in the SWMA. 35 P.S. § 6018.101–6018.1003; 25 Pa.Code §§ 271.901–271.933.

2 Cases that cite this headnote

[7] **Environmental Law**
⇐ State preemption of local laws and actions

Environmental Law
⇐ Administrative and Local Agencies and Proceedings

Environmental Law
⇐ Enforcement in general

Environmental Law
⇐ Injunction

Township was not authorized by the Solid Waste Management Act (SWMA) to set up its own sewage sludge police force to enforce the SWMA, or establish a comprehensive scheme of sewage sludge regulation to replicate the one set forth in the SWMA and the Department of Environmental Protection's regulations; instead, the township had a remedy in the SWMA to enjoin violations of the SWMA, and could also intervene in the administrative site approval proceeding. 35 P.S. §§ 6018.101–6018.1003; 25 Pa.Code §§ 271.901–271.933.

1 Cases that cite this headnote

[8] **Agriculture**
⇐ Fertilizers

Nutrient Management Act, which regulates fertilizers produced from sewage sludge and has charged the Department of Environmental Protection and the State Conservation Commission with authority over the use of nutrients, defined as manures, compost as fertilizer, chemical fertilizers, and sewage sludge, addresses the effect of nutrient application on surface and ground water quality, which necessarily refers to post-application soil

and water quality, and does not address only nutrient and odor issues. 3 Pa.C.S.A. § 501 et seq.

Cases that cite this headnote

[9] **Environmental Law**

⇐ Sewage and septic systems

Attorney General stated a cause of action that township ordinance requiring that fees, bond, chemical tests, notice and sign requirements be met before use of sewage sludge on land violated the Agricultural Area Security Law, which required the township to encourage farming by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices; Attorney General asserted that land application of sewage sludge was a "farm practice" within meaning of the statute and that the ordinance rendered the practice of using sewage sludge to fertilize land cost prohibitive through its imposition of testing fees and bond requirements. 3 P.S. § 911(a).

Cases that cite this headnote

Attorneys and Law Firms

*722 Susan L. Bucknum, Sr. Deputy Attorney General, Harrisburg, for petitioner.

James E. Crossen, III, Pottsville, for respondents.

BEFORE: SIMPSON, Judge, LEAVITT, Judge, and FLAHERTY, Senior Judge.

Opinion

OPINION BY Judge LEAVITT.

The Pennsylvania Attorney General, Thomas W. Corbett, Jr., has commenced an action for declaratory and injunctive relief, seeking to invalidate an ordinance of East Brunswick Township. The Attorney General challenges this ordinance, enacted in 2008 and entitled "Ordinance to Assure Local Public Health and Safety During and After Land Application of Sewage Sludges" (2008 Ordinance),[1] on two principal grounds. First, he contends that the 2008 Ordinance is preempted by state statutes that regulate sewage sludge and its uses in the Commonwealth. Second, he contends that the 2008 Ordinance interferes with normal agricultural operations, which violates another state law. The Township and its Board of Supervisors (collectively, Township) have filed preliminary objections in the nature of a demurrer to the Attorney General's action. At the heart of this case is whether the Township may regulate the land application of sewage sludge in tandem with the Pennsylvania Department of Environmental Protection (Department).

1 EAST BRUNSWICK TOWNSHIP, SCHUYLKILL COUNTY, PA. ORDINANCE No.2008–2 (ORDINANCE No.2008–2).

Background

The Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101–6018.1003, regulates the disposal of sewage sludge throughout the Commonwealth, including the application of sewage sludge to land, and it has charged the Department with the responsibility of enforcing the statute's terms. To that end, the Department has adopted comprehensive regulations at 25 Pa.Code, Chapter 271, Subchapter J (25 Pa.Code § 271.901–§ 271.933), which, *inter alia*, set standards for the land application of sewage sludge and require a permit for this activity. However, the Department may impose even more stringent standards in a particular case "when necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge." 25 Pa.Code § 271.904.

Jeff Hill, owner of J.C. Hill Tree Farms, Inc. (Hill Farms), fertilizes his 1000–acre tree farm in the Township with sewage *723 sludge and does so in accordance with a nutrient management plan approved by the Schuylkill County Conservation District and a permit issued by the Department. In 2006, the Township enacted a sewage sludge ordinance (2006 Ordinance) that prohibited any corporation, such as Hill Farms, from applying sewage sludge to its land, even though the corporation operated under a permit from the Department. At the request of Hill, the Attorney General reviewed the 2006 Ordinance and concluded it was invalid. Accordingly, he instituted an action to invalidate the 2006 Ordinance on several grounds, including the ground that the Township lacked authority to deprive a person of the ability to do business in the form of a corporation.

In response, the Township filed preliminary objections to have the Attorney General's petition for review dismissed. In turn, the Attorney General filed a motion for summary relief, asserting that he was entitled to judgment on the merits, even before an answer was filed. The motions were consolidated. This Court overruled the Township's preliminary objections, but it denied the Attorney General's request for summary relief. *Office of Attorney General v. East Brunswick Township*, 956 A.2d 1100 (Pa.Cmwlth.2008) (*East Brunswick I*). Summary relief was denied because a question central to the Attorney General's theory for relief, *i.e.*, whether the use of sewage sludge was a "normal agricultural operation," was not a pure question of law but needed to be established by evidence. *Id.* at 1115–1116.[2] This Court issued this ruling on September 23, 2008, unaware that the 2006 Ordinance had been repealed on September 4, 2008. On that same date, the Township replaced the 2006 Ordinance with the 2008 Ordinance, which is under review in this proceeding.

2 Notably, the Court did not hold that the Attorney General's pleading was inadequate in this regard.

Notably, the 2008 Ordinance does not prohibit corporations, such as Hill Farms, from using sewage sludge to fertilize land, as did the 2006 Ordinance. The 2008 Ordinance does, however, establish fee, bond, chemical testing, notice and signage requirements that must be satisfied in order to apply sewage sludge to land in the Township.[3]

3 The requirements of this 2008 Ordinance are discussed in greater detail *infra*.

Again, Jeff Hill requested the Attorney General to review the new ordinance. The Attorney General did so and then filed the instant amended petition for review.[4] The petition contains six counts. Each count asserts that the 2008 Ordinance is unauthorized or preempted under a different statute: (1) the Agricultural, Communities and Rural Environment (ACRE) Act, 3 Pa.C.S. §§ 311–318,[5] in Count I; (2) the Solid Waste Management Act (SWMA) in Count II; (3) the Nutrient Management Act, 3 Pa.C.S. §§ 501–522 in Count III; (4) the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101–11202 in Count IV; (5) the Agricultural Area Security Law, Act of June 30, 1981, P.L. 128, *as amended*, 3 P.S. §§ 901–915 in Count V; and (6) the Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §§ 65101–68701 in Count VI.

4 On January 13, 2009, this Court granted leave to the Attorney General to file the instant amended petition for review, because its original petition for review had become moot.

5 The ACRE Act is Chapter 3 of the Agriculture Code, Title 3 of the consolidated statutes.

The Attorney General's petition details the benefits of using sewage sludge to *724 improve soil quality, forest productivity and crop growth. The use of sewage sludge to reconstitute soil is a well-established agricultural practice that is encouraged by the U.S. Environmental Protection Agency. In the past ten years, the Department has approved approximately 827 farms in Pennsylvania as suitable sites for the application of sewage sludge, one of which is Hill Farms. Amended Petition for Review, ¶ 46.

To apply sewage sludge to land in Pennsylvania, the generator of the sludge must obtain a general permit from the Department that will allow it to make any number of land applications. 25 Pa.Code § 271.902 ("Permits and direct enforceability"). Most generators in Pennsylvania are municipal wastewater treatment plants; they generate over 300,000 tons of sewage sludge each year. Amended Petition for Review, ¶¶ 33, 53. Other generators are haulers of sewage from residential septic tanks, and they must also obtain a permit before this type of sewage may be used as fertilizer. Amended Petition for Review, ¶ 54. The Department does not issue a permit until the generator demonstrates by testing that its sewage sludge meets certain quality standards. 25 Pa.Code §§ 271.902(a)(2).[6]

6 Section 271.902(a)(2) provides that in order to obtain a land application permit, the generator must have a permit to operate its facility from which the Department can determine that the sewage sludge meets certain standards.

Sewage sludge is categorized as exceptional, non-exceptional or residential, *i.e.*, derived from on-lot septic tanks. Each category of sludge is subject to different regulatory requirements. Exceptional quality sewage sludge is that which contains low levels of "pollutants" and "pathogens." 25 Pa.Code § 271.911(b)(1). The application of exceptional quality sludge to land is not regulated, except where the Department determines regulation is "needed to protect public health and the environment." 25 Pa.Code § 271.911(d). However, the generator must give the Department 24–hour advance notice of its intent to apply such sludge to

land. More stringent regulations apply to non-exceptional and residential septage;[7] these categories of sewage sludge cannot be applied until the Department reviews and approves the proposed site prior to the first application. 25 Pa.Code § 271.913(g)(1) (requiring notice to the Department at least 30 days prior to the first application of sewage sludge at a particular location); Attorney General Brief, Exhibit 1, Exh. B at 2. Before any approvals are given, the Department notifies the municipality where the proposed site is located, and it also notifies the municipality of the Department's subsequent decision on site suitability. Attorney General Brief, Exhibit 1, Exh. B at 2. The Department's regulation is on-going, requiring testing and reporting from general permit holders for all categories of sludge. 25 Pa.Code § 271.918 ("Recordkeeping") and § 271.919 ("Reporting"). The generator's applications and reports, as well as the Department's actions thereon are public records available to municipalities such as the Township. 25 Pa.Code § 271.5(a) ("Public records and confidential information").

7 These types of sewage sludge are subject to the "general requirements" found in 25 Pa.Code § 271.913 and the "management practices" found in 25 Pa.Code § 271.915.

The Attorney General contends that the real purpose of the 2008 Ordinance is to render the land application of sewage sludge so costly that it cannot take place in the Township. The generator of sewage sludge bears most, if not all, of the cost of *725 land application. Amended Petition for Review, ¶ 70. Currently, the average cost to dispose of sewage sludge is $40 per wet ton and $145 per dry ton. Typically, in a single application, generators apply 22 wet tons per acre. Amended Petition for Review, ¶ 78. Accordingly, a 100–acre farm requires 2,200 wet tons of sewage sludge per application at a cost of $88,000. The bonding and testing requirements in the 2008 Ordinance would add $223,800 to this cost, for a total of $311,800. The 2008 Ordinance raises the cost to fertilize a 100–acre farm with 500 dry tons of sewage sludge from $72,500 to $162,000. Amended Petition for Review, ¶¶ 82–85. On October 3, 2008, a Republican Herald newspaper article quoted a Township Supervisor as saying "[t]he object is you make it as difficult and expensive as you can so they don't attempt it." Amended Petition for Review, Exhibit D.

The Township has filed preliminary objections in the nature of a demurrer to each count in the Attorney General's amended petition for review. The Township contends that its 2008 Ordinance is fully consistent with Pennsylvania law, pointing out that the standards and terms in the 2008 Ordinance are the same as those used in the SWMA.[8] The Township also asserts that because the 2008 Ordinance protects the Township residents "from exposure to sewage sludge," it is public health and welfare legislation expressly authorized by the Second Class Township Code and by the SWMA. Preliminary Objections ¶ 17. Finally, the Township contends it is in the best position to assure compliance with the Department's regulations. It can respond quickly to a violation, whereas the Department may, or may not, respond with equal alacrity. The Township requests the Court to dismiss the amended petition for review.

8 The Township expounds at length on 40 C.F.R. § 503.5, a federal regulation that provides, in relevant part, that it does not preclude a "a State *or political subdivision thereof* or interstate agency from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." However, this regulation, adopted by the EPA under authority of the Clean Water Act, 33 U.S.C. §§ 1251–1387, is irrelevant to whether a local ordinance has been preempted by a state statute.

In addition, the parties have each filed a motion to strike. The Township has moved to strike exhibits attached to the Attorney General's brief, and the Attorney General has moved to strike the Township's reply brief.

Motions to Strike

[1] We begin with the Township's motion to strike exhibits attached to the Attorney General's brief filed in opposition to the Township's preliminary objections. These exhibits include, as Exhibit 1, an affidavit of Dennis C. Wilson, water program specialist with the Department, together with certain forms used in the Department's sewage sludge program. Exhibit 2 consists of an adjudication of the Pennsylvania Environmental Hearing Board issued in *Douglass Township v. Commonwealth*, EHB Docket No. 2007–154–L (April 16, 2009). The Township asserts that because these exhibits were not attached to the amended petition for review, they must be stricken. In addition, Exhibit 2, the adjudication of the Environmental Hearing Board, should be stricken because it has no precedential value. The Attorney General replies that the materials in Exhibit 1 are merely illustrative of the factual averments in its amended petition for review and that Exhibit 2, an administrative agency adjudication, may be considered by this Court, even though it is not binding.

*726 We deny the Township's motion to strike. Writings must be attached to a pleading where the writing is the basis of the action, such as an action to enforce a written contract. PA. R.C.P. No. 1019(i); *Feigley v. Department of Corrections*, 872 A.2d 189, 195 (Pa.Cmwlth.2005).[9] The exhibits attached to the Attorney General's brief are illustrative and provided for the convenience of the Court. In no way do they amend the pleading or constitute the basis for the action.

9 Rule 1019(i) provides in relevant part:

> When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof ...

PA. R.C.P No. 1019(i).

The Attorney General has filed a motion to strike the Township's reply brief as untimely. The Attorney General filed its brief in opposition to preliminary objections on May 1, 2009. Under PA. R.A.P. 2185(a), which is applicable to original jurisdiction proceedings as provided in PA. R.A.P. 106, the Township's reply brief was due no later than May 18, 2009.[10] The Township did not file its reply brief until May 21, 2009, which was untimely. Accordingly, the Township's reply brief must be stricken from the record.

10 These rules provide, in relevant part, as follows:

> Unless otherwise prescribed by these rules the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied.

PA. R.A.P. 106.

The appellate rules do contain time limitations for filing briefs; therefore the appellate rules apply to this case. Specifically, Rule 2185(a) provides, in relevant part, that "[a] party may serve and file a reply brief permitted by these rules within 14 days after service of the preceding brief...." PA. R.A.P. 2185(a)(1). Further, pursuant to Rule 121(e), three days are added to the prescribed period if the other party's brief was served by mail, as was the case here. PA. R.A.P. 121(e). Accordingly, the Township had 17 days to file its reply brief.

We turn, next, to the Township's preliminary objections.

Standards for Demurrer

[2] [3] [4] A demurrer tests the legal sufficiency of a complaint. *Insurance Adjustment Bureau, Inc. v. Allstate Insurance Company*, 588 Pa. 470, 480, 905 A.2d 462, 468 (2006). When ruling on preliminary objections in the nature of a demurrer, this Court must accept as true every well-pleaded material fact set forth in the complaint as well as all inferences reasonably deducible therefrom, but we are not required to accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations or expressions of opinion. *Bundy v. Beard*, 924 A.2d 723, 725 n. 2 (Pa.Cmwlth.2007). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible, and any doubt should be resolved in favor of overruling the demurrer. Id.

The principal legal question in ruling on the Township's demurrer is whether the 2008 Ordinance is preempted, as asserted by the Attorney General, or not, as asserted by the Township. In evaluating whether the 2008 Ordinance is preempted by state law, this Court applies the following 5-part test:

> (1) Does the [2008 Ordinance] conflict with the state law, either because of conflicting policies or operational effect, that is, does the [2008 Ordinance] forbid what the legislature has permitted?
>
> *727 (2) Was the state law intended expressly or impliedly to be exclusive in the field?
>
> (3) Does the subject matter reflect a need for uniformity?
>
> (4) *Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?*
>
> (5) Does the [2008 Ordinance] stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

Liverpool Township v. Stephens, 900 A.2d 1030, 1033 (Pa.Cmwlth.2006) (emphasis added). These principles govern our evaluation of the Township's preliminary objections.

2008 Ordinance

According to the Township, the 2008 Ordinance regulates the use of sewage sludge in ways that complement, not conflict with, the SWMA and, thus, is not susceptible to preemption. In order to address this contention, which is central to the Township's demurrer, we first summarize the substantive provisions of the 2008 Ordinance. [11]

11 Sections I and II provide the purposes and title of the 2008 Ordinance. Section XI authorizes the Township Board of Supervisors to enforce the 2008 Ordinance. Section XII provides that the provisions of the Ordinance are severable, meaning that if any section, clause, sentence, part or provision is illegal, it does not invalidate any other sections, clauses, sentences, parts or provisions.

Section III and Section IV of the 2008 Ordinance are designed to eliminate a conflict with the SWMA. Section III specifies that the 2008 Ordinance's terms shall have the meanings set forth in the SWMA and in the Department's regulations. ORDINANCE No.2008–2, § III. Section IV requires sewage sludge application or storage to be done in accordance with Department permits and regulations. ORDINANCE No.2008–2, § IV. Stated otherwise, the Township has made the SWMA and its implementing regulations a law of the Township.

Section V of the 2008 Ordinance imposes a series of notice requirements upon any person intending to apply sewage sludge to land. Thirty days prior to a land application of sewage sludge, this person must provide, *inter alia,* the following information to the Township: a copy of the notification required by 25 Pa.Code § 271.913(g) (notification to the Department, county conservation district and adjacent landowners); a copy of the written consent of the owner of the land receiving the sewage sludge, as required by the Department; proof that written notification has been given to adjacent landowners; a copy of the applicable permits issued by the Department; the identity of the person who prepared the sludge; a copy of the most recent sludge analysis done under 25 Pa.Code § 275.207(a); a copy of the most recent annual operating report submitted pursuant to Department regulation; and an executed "Consent of Owner to Access by Township" form. ORDINANCE No.2008–2, § V(A). Five days before each land application begins, this person must give the Township a bond in the amount of $500 for each acre on which sludge will be applied; an emergency plan; and the date, time and amount of sludge to be applied within the Township. ORDINANCE No.2008–2, § V(B)(1–3). The Township will release the security three years after the last application of sewage sludge, assuming this person has complied with all applicable laws and the 2008 Ordinance.

Section VI of the 2008 Ordinance establishes fees. A "Public Safety and Environmental *728 Data Assessment Fee" of $79 is imposed upon each ton of sewage that is applied. ORDINANCE No.2008–2, § VI. The fee funds the Township's costs of enforcing the ordinance, which include inspections, testing of sewage sludge, post-application testing of water and soil for two years and record maintenance.

Section VII of the 2008 Ordinance specifies reporting requirements. These include, *inter alia,* a copy of the generator's daily operational records and the annual operating report required by Department regulations to be remitted to the Township; reports on the concentration of various pollutants in the sewage sludge; and a report on how various Department requirements were met. ORDINANCE No.2008–2, § VII. The Township will retain these reports for twenty years.

Section VIII regulates the hours and manner of sewage sludge application. Entitled "Protection of Public Health and Welfare," Section VIII restricts application to weekdays between 8:00 a.m. and dusk. ORDINANCE No.2008–2, § VIII(A). Any vehicle transporting sludge must contain a sign identifying the hauler, generator and the cargo. Sludge may not be applied in any manner or location that will adversely affect animal health, the food chain or drinking water supply. If sewage sludge is applied to lands abutting a public road, the applicant or landowner must place clearly visible signs written in both English and Spanish at intervals of 50 feet along the road stating "WARNING" in red and prohibiting access to such lands. ORDINANCE No.2008–2, § VIII(c). Further, if sewage sludge is applied to land that is "accessible" to the public, the area must be fenced or otherwise barricaded. ORDINANCE No.2008–2, § VIII(D).

Section IX of the 2008 Ordinance establishes the Township's inspection rights. It authorizes the Township to inspect land slated for fertilization by sewage sludge for the purpose of identifying "any factors" relating to public health and safety not otherwise addressed in the Department regulations or permit. ORDINANCE No.2008–2, § IX (A). The Township's inspector will oversee the actual spreading of the sewage sludge to assure proper application and will collect and analyze sewage sludge samples.

Section X creates sanctions. Section X makes it a summary offense punishable by a fine up to $1,000 per violation and/or imprisonment to violate the 2008 Ordinance. Each day a violation exists is a separate offense and each section that is violated is a separate offense. ORDINANCE No.2008–2, § X(A–D).

Count I—Violation of the Agricultural, Communities and Rural Environment (ACRE) Act

The Legislature has invested the Attorney General with responsibility to initiate litigation to enjoin the enforcement of a local ordinance that interferes with a "normal agricultural operation." Section 315(a) of the ACRE Act, 3 Pa.C.S. § 315(a).[12] An "unauthorized local ordinance," which may trigger the Attorney *729 General's litigation, is one that does any of the following:

12 It states:

> The Attorney General may bring an action against the local government unit in Commonwealth Court to invalidate the unauthorized local ordinance or enjoin the enforcement of the unauthorized local ordinance.

3 Pa.C.S. § 315(a). Further, the ACRE Act provides:

> An owner or operator of a normal agricultural operation may request the Attorney General to review a local ordinance believed to be an unauthorized local ordinance and to consider whether to bring legal action under section 315(a) (relating to right of action).

3 Pa.C.S. § 314(a).

(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.

3 Pa.C.S. § 312. Section 312 of the ACRE Act incorporates by reference the definition of "normal agricultural operation" found in Section 2 of the Right–to–Farm Act, Act of June 10, 1982, P.L. 454, *as amended*, 3 P.S. § 952.[13]

13 Section 2 of the Right–to–Farm Act provides the following definition:

> "NORMAL AGRICULTURAL OPERATION." *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 P.S. § 952 (emphasis added).

The Attorney General alleges that the application of sewage sludge to land is a "normal agricultural operation." Amended Petition for Review, ¶ 47. Further, he asserts that the substantive provisions in the 2008 Ordinance, particularly the fees it assesses and the bonds it requires, severely limit, if not prohibit, the ability of a generator to apply sewage sludge to land in the Township. These limits in the 2008 Ordinance violate Section 312 of the ACRE Act because the Township had no "expressed or implied authority under State law" to enact these limits. 3 Pa.C.S. § 312. Thus, Count I seeks to have the 2008 Ordinance, in its entirety, declared invalid under the ACRE Act.

The Township seeks a dismissal of Count I. It contends that application of sewage sludge to agricultural land is not a "normal agricultural operation," but it acknowledges that this is a question to be resolved by evidence, not law. *East Brunswick I*, 956 A.2d at 1115–1116. Indeed, for purposes of considering the Township's demurrer, we must presume that the application of sewage sludge to farmland *is* a normal

agricultural operation. This leaves the legal question of whether the Township was authorized to enact the limits on a normal agricultural operation that are contained in the 2008 Ordinance.

The Attorney General contends that the substantive provisions of the 2008 Ordinance are pre-empted and, thus, not authorized for purposes of the exception in Section 312 of the ACRE Act. Likewise, the Township did not have authority to enact the 2008 Ordinance because Section 1506 of the Second Class Township Code forbids the enactment of an ordinance that *730 is inconsistent with the "laws of this Commonwealth." 53 P.S. § 66506.[14] The Attorney General contends that the fees, bonds, notice and signage requirements in the 2008 Ordinance are inconsistent with the SWMA. Thus, the 2008 Ordinance is preempted by the SWMA and, at the same time, unauthorized by reason of the Second Class Township Code.

14 Section 1506 of the Second Class Township Code provides:

> The board of supervisors may make and adopt any *ordinances,* bylaws, rules and regulations *not inconsistent with or restrained by* the Constitution and *laws of this Commonwealth* necessary for the proper management, care and control of the township and its finances and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers.

53 P.S. § 66506 (emphasis added). The Township contends that it may adopt any legislation to advance the "health and welfare" of its citizens. This broad reading of Section 1506 fails to appreciate that an ordinance "conflicts" with state law if it undermines a comprehensive state regulatory regime. This reading would allow, for example, a township to adopt its own version of the Vehicle Code and undertake its own program of driver licensing, an absurd result.

In sum, if the 2008 Ordinance is preempted by the SWMA (Count II), then the Attorney General has stated a claim in Count I, as well as in Count VI. For the reasons set forth below, we conclude that the Township did *not* have authority to adopt many, if not all, of the provisions of the 2008 Ordinance by reason of the SWMA. That determination requires that we overrule the Township's preliminary objections to Counts I (the ACRE Act), II (the SWMA) and VI (the Second Class Township Code).

Count II—Violation of the SWMA

[5] The SWMA regulates the disposal of every type of solid waste in the Commonwealth, including sewage sludge. Section 102 provides, in relevant part, as follows:

> The Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:
>
> (1) *establish and maintain a cooperative State and local program of planning and technical and financial assistance for comprehensive solid waste management;*
>
> * * *
>
> (3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and permits for hazardous waste storage, treatment, and disposal;
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes[.]

35 P.S. § 6018.102 (emphasis added). The Township asserts the 2008 Ordinance is an example of a "local program of ... solid waste management" that is expressly authorized by Section 102 of SWMA. 35 P.S. § 6018.102(1). Accordingly, it argues that the Attorney General has failed to state a claim of preemption by reason of the SWMA.

The Township concedes, as it must, that local ordinances that attempt to regulate the disposal of sewage sludge have not fared well under preemption challenges. The key precedent from this Court is *Liverpool* *731 *Township v. Stephens,* 900 A.2d 1030 (Pa.Cmwlth.2006).

In *Liverpool Township,* the township enacted an ordinance mandating that a landowner obtain a township permit before applying sewage sludge to agricultural land. The ordinance contained requirements that conflicted with the SWMA. For example, the ordinance allowed spreading sewage sludge up to a boundary line, but the SWMA prohibited spreading sludge within 50 yards of a boundary line. In addition,

the ordinance prohibited spreading sludge within 500 yards of any building that might be occupied from time to time while the SWMA prohibited spreading sludge within 300 feet of a house that was actually occupied. These conflicts rendered the ordinance preempted. In addition, the ordinance impermissibly set up a permit system that was duplicative of the state permit system. This Court ruled that the township could not regulate the disposal of sewage sludge, reasoning as follows:

> Ordinance 13 not only conflicts with the SWMA, it also interferes with the *General Assembly's goal of a uniform and comprehensive scheme of regulation of municipal sewage treatment that leaves no room for side-by-side municipal regulation....* Balkanized regulation of the disposal of municipal sewage sludge would stand as an obstacle to the SWMA's comprehensive regulatory scheme.

Liverpool Township, 900 A.2d at 1038 (emphasis added).

Liverpool Township explained, nevertheless, that a municipality may regulate solid waste management in ways that do not replicate the Department's efforts to advance what this Court has called "geological standards," *i.e.*, standards that affect air and water. *Id.* at 1036. In *Sunny Farms, Ltd. v. North Codorus Township*, 81 Pa.Cmwlth. 371, 474 A.2d 56 (1984), this Court held that Sunny Farms could be enjoined from operating a hazardous waste landfill within 500 yards of homes in the township, in accordance with a local ordinance. The Court explained that a "local municipality cannot set geological or engineering standards stricter than those established by [the Department] for issuance of its permit." Id. at 60. However, a municipality could set standards dealing with land use planning, *i.e.*, zoning, such as where the landfill could be located. On the basis of *Sunny Farms*, we held that the SWMA does not preempt zoning regulation; however, when a township attempts to regulate "how, when and where sewage waste may be used to fertilize farmland, it sets 'geological standards' " that violate the SWMA. *Liverpool Township*, 900 A.2d at 1036. [15]

15 We pointed out that even if a hazardous waste dump met all requirements established in the SWMA, a township would not be required to allow its placement in a residential district or in the middle of a historic village green. *Liverpool Township*, 900 A.2d at 1036 n. 17.

In addition, a township is permitted to "prohibit accumulations of ashes, garbage, solid waste and other refuse materials upon private property" as authorized by the SWMA. 53 P.S. § 67101. In *Liverpool Township*, this Court explained that Section 2101 of the Second Class Township Code authorizes a township to regulate junkyards, littering and trash pickup, but does not allow a township to establish "standards for the application of municipal sewage sludge to farmland that differ from those in the SWMA." *Liverpool Township*, 900 A.2d at 1036.

Persuasive, but not binding, precedent is found in *732 *Synagro–WWT, Inc. v. Rush Township*, 299 F.Supp.2d 410 (M.D.Pa.2003). In that case, the federal district court considered an ordinance that imposed numerous requirements on the transport and application of sewage sludge within the township, which Synagro challenged on preemption grounds. In considering this preemption claim, the federal court stated that "when the land use in question is the management or disposal of solid waste, most local ordinances are preempted by [SWMA]." *Id.* at 419 (alteration in original). The court further explained that certain local regulations may be permissible but they "cannot impose onerous requirements that stand as obstacles to the accomplishment and execution of the full purposes and objectives of the legislature." *Id.* (internal quotation marks omitted).

In accordance with this analytical framework, the court held that the provisions of the ordinance that mandated groundwater tests to be performed by qualified hydrologists and the hours for trucking activities were not preempted. On the other hand, the court found the ordinance's permit requirement and enforcement provisions, which duplicated the Department's permit system, were preempted. The district court explained that the township had two available remedies: it could inform the Department of any possible SWMA violations so that the Department could inspect the site and take enforcement action pursuant to its regulations, or the township could bring an action in equity for an injunction to restrain violations of the SWMA as provided for in Section 604 of SWMA. [16] *Id.* at 422.

16 It provides in relevant part:

> (b) In addition to any other remedies provided for in this act ... upon relation of the solicitor of any municipality affected, an action in equity may be brought in a court of competent jurisdiction for

> an injunction to restrain any and all violations of this act or the rules and regulations promulgated hereunder, or to restrain any public nuisance or detriment to health.
>
> 35 P.S. § 6018.604(b).

The Township argues that the holdings in *Liverpool Township* and *Synagro* support the grant of its preliminary objections. It contends that the notification, bonding and fee requirements in the 2008 Ordinance do not conflict with the SWMA, as was the problem with the ordinance in *Liverpool Township.* Further, the Department's regulations in Chapter 271 do not account for the fact that children on bikes and non-English speaking farm workers are accustomed to traversing farmers' fields throughout the Township and could be exposed to the sewage sludge if not warned against doing so. The Township argues that the additional testing required by the 2008 Ordinance and the regulation of hours during which sewage sludge may be applied to land have been specifically held to be authorized by the SWMA. *Synagro,* 299 F.Supp.2d at 421.

The Attorney General argues that the Township's vigorous program of regulating sewage sludge is itself an impediment to the comprehensive scheme established in the SWMA. The Township assigns too much significance to the legislative expression of cooperation in Section 102 of the SWMA. The Township's signage, notification, testing, fees and bonding requirements far exceed what is required in the Department's regulations, and, therefore, conflict with the SWMA.[17] In sum, the *733 2008 Ordinance undermines, rather than advances, the goals of the SWMA.

17 According to the Attorney General, the bond requirement in Section V and testing fees in Section VI of the 2008 Ordinance are preempted because they exceed what is required in Title 25 of the Pennsylvania Code and have been established to render the practice cost prohibitive. The testing requirement in Section VI is preempted because the Department has its own testing, monitoring and reporting requirements. The post-application information requirements found in Section VII are preempted because the Department already requires identical information which it makes available for public inspection. Section VII also requires information after each land application, which exceeds Department requirements. The requirements setting the hours of operation in Section VIII are preempted because they regulate the operations of sludge land application, which is regulated by the SWMA. Requirements in Section VIII pertaining to the labeling of vehicles transporting sewage sludge, posting of notices on the property line, and protection of animal health, food chain and drinking water are preempted because they are duplicative of similar requirements in Title 25, Chapter 271. The fencing requirement is preempted because it exceeds the Department's regulations in Chapter 271.

In further support, the Attorney General brings to our attention a recent decision of the Environmental Hearing Board in *Douglass Township v. Commonwealth,* EHB Docket No. 2007–154–L (April 16, 2009). There, the Department approved a particular farm as a site for land application of sewage sludge. The Township challenged the site approval, asserting that it should have included conditions that the generator provide advance notice of sewage sludge application to the Township; allow a Township representative to be present during sewage sludge application; and supply the Township with a copy of all documents supplied to the Department. The Board denied the request, noting, *inter alia,* that the Township failed to produce any evidence that its "joint oversight at the site would add any value, is necessary, or would be anything other than superfluous." Id. at 6. The Board explained that the Department's "duty [under the SWMA] to cooperate [with municipalities] does not equate to a duty to give the Township oversight authority." *Id.* at 7.

[6] *Liverpool Township* and *Synagro* teach that a township cannot duplicate the regulatory regime established in the SWMA and cannot impose more stringent requirements than the SWMA. On the other hand, a township can address land use issues in a zoning ordinance because zoning is a public health and safety issue not addressed in the SWMA. The 2008 Ordinance imposes notice, testing, and operational requirements upon the land application of sewage sludge. Requirements that are redundant of or stricter than those in the SWMA are preempted.

Synagro held that regulation of hours for sludge transportation is an appropriate subject for local regulation. The Township argues we must adhere to the *Synagro* holding in this regard; however, *Synagro* is not binding on this Court. *Liverpool Township,* which is binding, explained that local regulation cannot impede a comprehensive, statewide scheme of regulation. *Liverpool Township,* 900 A.2d at 1038. It may be that the Township is not preempted from regulating the hours during which sewage sludge may be applied to land. At this stage, however, we have to assume that regulating hours, as the Attorney General avers, will effectively make it impossible to use sewage sludge in the Township. For example, there may be reasons why it is preferable to apply

sewage sludge to land in the evening hours of the day; this is a mixed question of fact and law. Further, *Synagro* dealt with sludge transportation, while limiting hours for *application* more directly impacts the actual operation of sewage sludge disposal. It is not true, as the Township argues, that the holding in *Synagro* has given it a blank check to regulate the hours of sewage sludge application.

[7] The SWMA does not authorize the Township to set up its own sewage sludge *734 police force to enforce the SWMA. The Township cannot establish a comprehensive scheme of sewage sludge regulation to replicate the one set forth in the SWMA and the Department's regulations at 25 Pa.Code, Chapter 271. As noted in *Synagro*, the Township has a remedy in Section 604 of the SWMA to enjoin violations of the SWMA. *Synagro*, 299 F.Supp.2d at 423. It may also intervene in the site approval proceeding, as did Douglass Township. The axiom *expressio unius est exclusio alterius* provides that the express inclusion of one thing in a statute implies the exclusion of another, meaning that the omission of other remedies by the legislature was deliberate. *Veterans of Foreign Wars Post 1989 v. Indiana County Board of Assessment Appeals*, 954 A.2d 100, 106 (Pa.Cmwlth.2008). The remedies provided by the legislature in the SWMA preclude other forms of "self help" by the Township.

The Attorney General has stated a cause of action in Count II. To prevail with respect to every provision of the 2008 Ordinance will require evidence; at this point, however, we must presume all facts pled in the amended petition for review to be true. Accordingly, we overrule the Township's demurrer to Count II.

Count III—Violation of the Nutrient Management Act

The Nutrient Management Act regulates fertilizers produced from, *inter alia*, sewage sludge. It has charged the Department and the Pennsylvania State Conservation Commission with authority over the use of "nutrients," which are defined as "livestock and poultry manures, compost as fertilizer, commercially manufactured chemical fertilizers, *sewage sludge* or combinations thereof." 3 Pa.C.S. § 503 (emphasis added). The Commission has adopted regulations governing the storage, handling and land application of nutrients.

Section 519 of the Nutrient Management Act is entitled "Preemption of local ordinances" and provides in relevant part:

> (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 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.
>
> * * *
>
> (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 Attorney General contends that the provisions of the 2008 Ordinance that impose notification, bonding, testing fee, signage, and access restriction requirements, and the provisions that authorize the Township *735 to conduct inspections, testing, monitoring and investigations, conflict with and are "more stringent" than those in the Nutrient Management Act and in the Commission's regulations.[18] As such, they are preempted.

18 For example, the regulations authorize state conservation districts to review and approve nutrient management plans; prescribe nutrient land application procedures; provide for soil testing of biosolids applied to agricultural lands; and provide that the Commission, state conservation districts and the Pennsylvania Department of Agriculture are responsible for taking enforcement actions for violations of the Nutrient Management Act and the regulations.

The Township asserts that the Nutrient Management Act does not apply because it deals with nutrient management plans and odor management plans, subjects not even addressed in the 2008 Ordinance. The Township also asserts that the Nutrient Management Act does not deal with the "post-application consequences" of land application of sewage sludge and, thus, does not preempt a municipal ordinance that addresses these consequences.[19] Township Brief at 21. In any case, the Township contends that the 2008 Ordinance is consistent with the goals of the Nutrient Management Act.

19 It cites *Synagro*, wherein the court stated that if the Nutrient Management Act does not regulate mine reclamation activities, the Nutrient Management Act cannot preempt municipal regulation of those activities. *Synagro*, 299 F.Supp.2d at 417.

[8] Hill Farms has an approved nutrient management plan, which regulates the amount and frequency of nutrient application to its land. Amended Petition for Review, ¶ 100. The Nutrient Management Act specifically includes sewage sludge in the definition of nutrient, thereby bringing any land application of sewage sludge within the purview of the act. It is unclear what the Township means by "post-application consequences." However, the Nutrient Management Act addresses the effect of nutrient application on surface and ground water quality, which necessarily refers to "post-application" soil and water quality. The Township is simply incorrect that the act addresses only nutrient and odor issues. The Township's preliminary objection to Count III is based upon an incorrect understanding of the Nutrient Management Act and is overruled.

Count IV—Violation of the Municipalities Planning Code

The Township admits that the 2008 Ordinance is not a zoning ordinance adopted under authority of the Municipalities Planning Code. Accordingly, the Attorney General agrees to a dismissal of Count IV and no further discussion is required.

Count V—Violation of the Agricultural Area Security Law

[9] The Agricultural Area Security Law requires the Township to encourage farming. Section 11(a) states:

> *Every municipality* or political subdivision within which an agricultural security area 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.

3 P.S. § 911(a) (emphasis added). In Count V, the Attorney General asserts that the 2008 Ordinance renders the practice of using sewage sludge to fertilize land *736 cost prohibitive. As such, it violates the Agricultural Area Security Law.

The Township asserts that the 2008 Ordinance does not restrict "farm practices," as long as these practices conform to the Department's regulations in Chapter 271. The Township points to the legislative findings which make clear that the main concern of the Agricultural Area Security Law is encroachment of urban development on farmland.[20] The Township argues that the 2008 Ordinance safeguards the agricultural economy and resources within the Township, not limits them.

20 Section 2, entitled "Statement of legislative findings," discusses urban development and the desire to protect agricultural land. 3 P.S. § 902.

However, the Attorney General avers that the land application of sewage sludge is a "farm practice" and that the 2008 Ordinance renders the use of sewage sludge cost prohibitive. We must presume those facts to be true. Therefore, we overrule the Township's preliminary objection to Count V.

Count VI—Violation of the Second Class Township Code

Because we have overruled the Township's preliminary objection to Count II, we must also overrule its objection to Count VI. The Township is not authorized to adopt legislation that is inconsistent with the SWMA, as it has done in the 2008 Ordinance.

Conclusion

The Township's entire 2008 Ordinance is being challenged. Some aspects of the 2008 Ordinance may be sustained, depending on what record is developed. However, the parallel local scheme of regulation is fundamentally flawed. With the exception of Count IV, the Attorney General has stated a claim in each of the Counts in its amended petition for review. Accordingly, the Township's preliminary objections are overruled.

Judge Cohn Jubelirer did not participate in the decision in this case.

ORDER

AND NOW, this 21st day of August, 2009, the preliminary objection filed by East Brunswick Township and the East Brunswick Township Board of Supervisors to Count IV of the amended petition for review filed by the Office of Attorney General is hereby SUSTAINED. The remainder of the preliminary objections are OVERRULED. The Township's motion to strike exhibits is DENIED. The Attorney General's motion to strike the Township's reply brief as untimely is GRANTED. An answer to the amended petition for review is due within 30 days.

End of Document

900 A.2d 1030
Commonwealth Court of Pennsylvania.

LIVERPOOL TOWNSHIP, Appellant
v.
Dean STEPHENS.

Argued April 5, 2006. | Decided June 19, 2006.

Synopsis

Background: Township filed action to enjoin landowner from fertilizing agricultural land with processed municipal sewage until landowner obtained appropriate permit from township in accordance with township ordinance. Landowner moved for summary judgment. The Court of Common Pleas, Perry County, No. 2003-7-EQ, Rehkamp, President Judge, entered decision enjoining enforcement of ordinance. Township appealed.

Holdings: The Commonwealth Court, No. 503 C.D. 2005, Leavitt, J., held that:

[1] township ordinance that regulated application of processed municipal sewage to agricultural land was preempted by state Solid Waste Management Act (SWMA), and

[2] township exceeded its authority under Second Class Township Code in enacting ordinance.

Affirmed.

Pellegrini, J., dissented and filed an opinion in which McGinley, J., joined.

West Headnotes (7)

[1] **Agriculture**
⇐ Fertilizers
Municipal Corporations
⇐ Concurrent and Conflicting Exercise of Power by State and Municipality

Township ordinance that regulated application of processed municipal sewage to agricultural land was preempted by state Solid Waste Management Act (SWMA); ordinance conflicted with SWMA regulatory scheme and ordinance set geological standards stricter than those established by state. 35 P.S. § 6018.101 et seq.

2 Cases that cite this headnote

[2] **Municipal Corporations**
⇐ Concurrent and Conflicting Exercise of Power by State and Municipality

Under five-part test used to determine whether local ordinance has been preempted by state law, Commonwealth Court considers: (1) whether ordinance conflicts with state law, either because of conflicting policies or operational effect, that is, whether ordinance forbids what legislature has permitted; (2) whether state law intended expressly or impliedly to be exclusive in field; (3) whether subject matter reflects need for uniformity; (4) whether state scheme is so pervasive or comprehensive that it precludes coexistence of municipal regulation; and (5) whether ordinance stands as obstacle to accomplishment and execution of full purposes and objectives of legislature.

3 Cases that cite this headnote

[3] **Environmental Law**
⇐ State Preemption of Local Laws and Actions
Municipal Corporations
⇐ Concurrent and Conflicting Exercise of Power by State and Municipality

Fact that General Assembly has enacted statewide regulatory scheme relating to disposal of waste does not, in itself, preclude township from also regulating in that area as municipal corporation with subordinate power to act in matter may make such additional regulations in aid and furtherance of purpose of general law as may seem appropriate to necessities of particular locality and which are not in themselves unreasonable.

2 Cases that cite this headnote

[4] **Municipal Corporations**
⇦ Concurrent and Conflicting Exercise of Power by State and Municipality

If general tenor of state statute indicates intention on part of legislature that it should not be supplemented by municipal bodies, that intention must be given effect and attempted local legislation held invalid.

Cases that cite this headnote

[5] **Agriculture**
⇦ Fertilizers

Municipal Corporations
⇦ Concurrent and Conflicting Exercise of Power by State and Municipality

Township's authority under Second Class Township Code to prohibit accumulations of ashes, garbage, solid waste, and other refuse materials was exceeded by township ordinance that sought to regulate application of processed municipal sewage to agricultural land; township regulation had to be in manner authorized by state Solid Waste Management Act (SWMA), and, by establishing standards that differed from SWMA, township did not regulate in manner authorized by SWMA. 35 P.S. § 6018.101 et seq.; 53 P.S. § 67101.

2 Cases that cite this headnote

[6] **Municipal Corporations**
⇦ Concurrent and Conflicting Exercise of Power by State and Municipality

Municipality may be foreclosed from exercising power it would otherwise have if state has sufficiently acted in particular field.

Cases that cite this headnote

[7] **Municipal Corporations**
⇦ Concurrent and Conflicting Exercise of Power by State and Municipality

Municipal Corporations
⇦ Ordinances Permitting Acts Which State Law Prohibits

Local legislation cannot permit what state statute or regulation forbids, or prohibit what state enactments allow.

3 Cases that cite this headnote

Attorneys and Law Firms

*1031 P. Richard Wagner, Harrisburg, for appellant.

James H. Turner, Harrisburg, for appellee.

BEFORE: COLINS, President Judge, McGINLEY, Judge, PELLEGRINI, Judge, FRIEDMAN, Judge, LEADBETTER, Judge, SIMPSON, Judge, and LEAVITT, Judge.

Opinion

OPINION BY Judge LEAVITT.

Liverpool Township appeals a decision of the Court of Common Pleas of the 41st Judicial District (Perry County Branch) (trial court) enjoining the enforcement of a township ordinance that regulates the application of processed municipal sewage to agricultural land. The trial court found that this ordinance conflicted with a state law that regulates this activity and, thus, was preempted. Accordingly, the owner of the farmland, Dean Stephens, was found to have done all that was required in order to fertilize his fields lawfully by obtaining a permit from the state. We affirm.

In 1993, the Township adopted Ordinance 13 pursuant to Section 708 of The Second Class Township Code.[1] It made it unlawful "for any person to use or continue to use their land or any other land as a storage, transfer, collection, processing *1032 or disposal site of solid waste or residual waste *unless such person shall have a permit* ...." LIVERPOOL TWP., PA., ORDINANCE NO. 13, art. III(1) (1993) (Ordinance 13) (emphasis added). The application of processed municipal waste, *i.e.*, fertilizer, to farmland is considered the "disposal ... of solid waste" and, as such, is regulated by Ordinance 13. To qualify for a "disposal" permit under Ordinance 13, the landowner must agree not to spread the fertilizer "within five hundred (500) yards of any dwelling, church, school, or any other building or buildings which from time to time are utilized for human occupancy or residency." ORDINANCE 13, Article V(1).

1 Act of May 1, 1933, P.L. 103, *as amended,* 53 P.S. §§ 65101–68701. Section 708 of The Second Class Township Code was originally enacted by the Act of May 1, 1933, P.L. 103, but was amended by the Act of November 9, 1995, P.L. 350, and renumbered as Section 2101 of The Second Class Township Code, 53 P.S. § 67101.

On December 17, 2003, the Township filed an action to enjoin Stephens from fertilizing his fields with processed municipal sewage until he obtained an appropriate permit from the Township. The Township instituted this action because Stephens had fertilized his fields on several occasions in 2003 without the benefit of a Township permit.[2] This was not disputed by Stephens, but he contended that he did not need a Township permit because he had a permit from the Pennsylvania Department of Environmental Protection (DEP) and was in compliance with the terms thereof. Stephens argued that Ordinance 13 was preempted by the Solid Waste Management Act (SWMA)[3] and its implementing regulations. Stephens then filed a motion for summary judgment requesting the trial court to enjoin the enforcement of Ordinance 13 or, alternatively, to direct the Township to issue Stephens a permit with terms consistent with those in his DEP permit. On February 10, 2005, the trial court granted Stephens' motion, holding that Ordinance 13 was preempted by the SWMA. The Township appealed.[4]

2 However, on April 27, 2004, Stephens applied to the Township for a permit to spread processed solid waste. Reproduced Record at 19a–21a (R.R. __).

3 Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §§ 6018.101–6018.1003.

4 This Court's scope of review of an order granting summary judgment is plenary. *O'Donoghue v. Laurel Savings Association,* 556 Pa. 349, 354, 728 A.2d 914, 916 (1999). Our standard of review is clear: the trial court's order will be reversed only where it is established that the trial court committed an error of law or abused its discretion. *Dunkle v. Middleburg Municipal Authority,* 842 A.2d 477, 480 n. 6 (Pa.Cmwlth.2004). Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Pa. R.C.P. No. 1035.2. The record must be viewed in the light most favorable to the opposing party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Dunkle,* 842 A.2d at 480 n. 6. Summary judgment is proper only when the facts are so clear that reasonable minds cannot differ. *Harahan v. AC & S, Inc.,* 816 A.2d 296, 298 (Pa.Super.2003).

[1] The Township presents two principal arguments for our consideration. First, the Township contends that Ordinance 13 is not preempted by the SWMA.[5] Second, it contends that it was authorized to set up its own permitting system by The Second Class Township Code.[6]

5 The DEP has filed an *amicus* brief in support of Stephens' position that Ordinance 13 is preempted by the SWMA.

6 The Township appears to offer a third argument as well. It contends that because Ordinance 13 bears a reasonable relationship to the public welfare, safety and health, it should not be struck down as unreasonable. We need not address this argument in light of our holding on the first two issues.

***1033** The impact of the SWMA upon the ability of local government to regulate in the area of solid waste has been a persistent subject of litigation and was most recently addressed by our Supreme Court in *Hydropress Environmental Services, Inc. v. Township of Upper Mount Bethel, County of Northampton,* 575 Pa. 479, 836 A.2d 912 (2003). At issue in *Hydropress* was an ordinance entitled "Ordinance for Agricultural Utilization or Other Land Application of Biosolids, Sludge, Septage or Other Waste Materials," which had been found preempted in its entirety by this Court. The Supreme Court affirmed in part and reversed in part in a plurality opinion. Six justices agreed that two provisions in the ordinance should be enjoined.[7] The first provision regulated the roads entering a waste disposal site, and the second required landowners to obtain permits for processing waste. However, the justices did not agree upon the legal basis for striking these provisions. Three believed that those two provisions were preempted by the SWMA; indeed, they believed that the entire ordinance was preempted. The other three justices believed that the township simply lacked the statutory authority to enact the two provisions in question. Notably, the six justices agreed that the township lacked the authority to duplicate DEP's waste disposal permit system.[8] As in *Hydropress,* the permit required under Ordinance 13 duplicates that required by DEP under the SWMA.

7 The seventh, Justice Newman, did not believe that Hydropress had standing to bring suit.

8 Three justices believed requiring such permits was an *ultra vires* act by the municipality, and three believed the permitting system was preempted.

[2] Because *Hydropress* is a plurality decision, it is not dispositive of the preemption issue raised in this case. We must look, then, to the 5–part test long followed by this Court for evaluating whether an ordinance has been preempted by state law. That test is as follows:

(1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the legislature has permitted?

(2) Was the state law intended expressly or impliedly to be exclusive in the field?

(3) Does the subject matter reflect a need for uniformity?

(4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?

(5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

Duff v. Township of Northampton, 110 Pa.Cmwlth. 277, 532 A.2d 500, 505 (1987). If the answer to one of these questions is affirmative, then the local ordinance will be found preempted by the state law.

To apply *Duff* to this appeal, we begin with a review of the SWMA. Section 104(6) of the SWMA gives DEP the duty to regulate the storage, collection, transportation, processing, treatment and disposal of solid waste. 35 P.S. § 6018.104(6). Disposal of solid waste includes, specifically, the application of sewage sludge on agricultural land, and such disposal activities are regulated to protect the air, water and public health of citizens. Regulations adopted by the Environmental Quality Board have established the standards for a DEP permit to apply sewage sludge to agricultural land. Among them are standards establishing setbacks and buffers. *See* ***1034** 25 Pa.Code § 271.915(c)[9] and 275.202.[10] Relevant here is Section 271.915(c)(3), which provides that sewage sludge may not be applied to agricultural land that is within 300 feet from an occupied dwelling. 25 Pa.Code § 271.915(c)(3).[11] In addition, Section 275.202(5) states that sewage sludge may not be applied closer than within 50 feet of a property line, unless otherwise approved by DEP. 25 Pa.Code § 275.202(5).[12]

9 Chapter 271 governs the general provisions for municipal waste management and specifies certain general procedures and rules for persons who operate municipal waste management facilities. 25 Pa.Code § 271.2(a). Notably, a "facility," as defined in this chapter, is "[l]and, structures and other appurtenances or improvements where municipal waste disposal, processing or beneficial use is permitted or takes place." 25 Pa.Code § 271.1. This would include the land owned by Stephens.

10 Chapter 275 governs the land application of sewage sludge.

11 It states:

> (c) Sewage sludge may not be applied to agricultural land, forest or a reclamation site that is:
>
> * * *
>
> (3) Within 300 feet (or 91 meters) from an occupied dwelling unless the current owner there has provided a written waiver consenting to activities closer than 300 feet (or 91 meters). The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner. This paragraph does not apply to features that may come into existence after the date upon which adjacent landowner notification is given under Chapter 275 or § 271.913(g) (relating to land application of sewage sludge; and general requirements).
>
> 25 Pa.Code § 271.915(c)(3).

12 It states:

> Except for areas permitted by the Department prior to April 9, 1988, the land application of sewage sludge may not be conducted:
>
> * * *
>
> (5) Within 50 feet of a property line within which the sludge is applied, unless otherwise approved by the Department, in writing.
>
> 25 Pa.Code § 275.202(5).

Ordinance 13 also regulates the application of sewage sludge to agricultural land, including where and how this activity will be conducted. It prohibits the application of sewage sludge within 500 yards of a dwelling, church, school, or any other building that from "time to time" is used for human occupancy or residency. ORDINANCE 13, Article V(1). Further, Ordinance 13 requires a landowner, such as

Stephens, who wishes to apply sewage sludge to agricultural land to apply for a permit from the Township. A permit will not issue unless the landowner satisfies the Township's standards. ORDINANCE 13, Article IV(2).

Ordinance 13 conflicts with the SWMA regulatory scheme. Under the SWMA, sludge may not be applied within 50 feet of a property line or within 300 feet of an occupied building. 25 Pa.Code §§ 271.915(c)(3), 275.202(5). This latter requirement affects, presumably, buildings on and off the property being fertilized. By contrast, Ordinance 13 allows the application of sludge on farmland up to the property line so long as it is not applied within 500 yards of a building occupied "from time to time."[13] There is a significant difference between 500 yards and 300 feet of a building, and between 50 feet and 0 feet of a boundary line. There is a difference between a building occupied from "time to time," as it is expressed in Ordinance 13, and one actually occupied, as it is stated in the SWMA. These differences cannot be reconciled.

13 Occupancy under Ordinance 13 is so broadly stated that it would include even an outbuilding where equipment is stored and visited "from time to time" by persons retrieving equipment.

*1035 [3] [4] The fact that the General Assembly has enacted a statewide regulatory scheme relating to the disposal of waste does not, in itself, preclude a township from also regulating in that area. As our Supreme Court has explained

> a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable.

Western Pennsylvania Restaurant Ass'n v. City of Pittsburgh, 366 Pa. 374, 381, 77 A.2d 616, 620 (1951) (citation omitted). Nevertheless, "if the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation held invalid." *Id.*

The goal of the SWMA is to protect the "public health, safety and welfare." Section 102(4) of the SWMA, 35 P.S. § 6018.102(4).[14] The Township claims that Ordinance 13 is allowed because the SWMA does not prohibit supplemental regulation by municipalities and, further, is authorized expressly by Section 2101 of The Second Class Township Code. This Court's holding in *Sunny Farms, Ltd. v. North Codorus Township,* 81 Pa.Cmwlth. 371, 474 A.2d 56 (1984), the Township contends, supports the concept of a supplemental municipal regulatory regime with respect to the application of municipal sewer sludge to farmland.

14 Section 102 of the SWMA states in pertinent part:

> The Legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:
>
> * * *
>
> (3) require permits for the operation of municipal and residual waste processing and disposal systems, licenses for the transportation of hazardous waste and permits for hazardous waste storage, treatment, and disposal;
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes.
>
> 35 P.S. § 6018.102(3)-(4).

We begin with a consideration of *Sunny Farms.* In that case, Sunny Farms sought to construct a hazardous waste dump on 325 acres of land in violation of the township's setback requirement that a hazardous dump be sited 500 yards from existing buildings. Although this Court upheld the ordinance, we did so because we found that it did not conflict with the SWMA's engineering or geological standards. *Sunny Farms,* 474 A.2d at 60. Because the township's ordinance was intended to protect general health, property values and aesthetics, its purposes were found to be different from those under the SWMA.[15] Thus, the ordinance was sustained against a preemption challenge.

15 *Sunny Farms* considered the scope of Act 97, a predecessor version of the current SWMA; Act 97 does not differ from the current version of the SWMA in any way material to this appeal.

The ordinance in *Sunny Farms,* as expressly stated in *Municipality of Monroeville v. Chambers Development Corp.,* 88 Pa.Cmwlth. 603, 491 A.2d 307 (1985), has been understood to be a zoning ordinance.[16] This Court has long

held that because the SWMA does not expressly *1036 state an intention to preempt zoning regulation, zoning regulation is permissible. *See, e.g., Greene Township v. Kuhl,* 32 Pa.Cmwlth. 592, 379 A.2d 1383 (1977). Even so, we have also long understood that a "local municipality cannot set geological or engineering standards stricter than those established by [DEP] for issuance of its permit." *Id.* at 1385. In *Greater Greensburg Sewage Authority v. Hempfield Township, Westmoreland County,* 5 Pa.Cmwlth. 495, 291 A.2d 318, 321 (1972), we held that the SWMA preempts local regulation of the *operation* of a sewage treatment plant, including the disposal of the sludge produced by the plant.

16 We stated: "[*Sunny Farms*] involved a *zoning ordinance* requiring a buffer zone around a proposed hazardous waste disposal facility." *Monroeville,* 491 A.2d at 310 (emphasis added).

In short, the result in *Sunny Farms* is explained by the type of ordinance that was at issue. Regardless of whether the township's ordinance was actually a zoning ordinance, it regulated the placement of a dump, not its operation, to the specific end of protecting township property values and aesthetics. [17] By contrast, Ordinance 13 regulates an activity, *i.e.,* the "operation" of applying sewage sludge to farmland, and it has nothing to do with aesthetics or property values, which are the traditional goals of zoning. Because Ordinance 13 regulates how, when and where sewage waste may be used to fertilize farmland, it sets "geological standards." As we explained in *Sunny Farms,* "[a] local municipality cannot set geological or engineering standards stricter than those established by [DEP] for issuance of its permit." *Sunny Farms,* 474 A.2d at 60 (quoting *Greene Township,* 379 A.2d at 1385).

17 Even if a hazardous waste dump met all operational standards established in the SWMA, it does not follow that a township does not have the right to prevent its placement in the middle of a historic village green or in the middle of a district zoned for residential use.

[5] We consider next whether Section 2101 of The Second Class Township Code, 53 P.S. § 67101, authorized the Township to supplement the SWMA's regulation of farmland fertilization. Section 2101 authorizes a second class township to prohibit accumulations of "ashes, garbage, solid waste and other refuse materials upon private property." 53 P.S. § 67101. Townships have always regulated junkyards, littering and trash pickup, and Section 2101 simply authorizes the continuation of these worthy efforts. However, it specifically requires that such township regulation be done "in the manner authorized by ... [the SWMA]." *Id.* By establishing standards for the application of municipal sewage sludge to farmland that differ from those in the SWMA, Ordinance 13 does not regulate "in the manner authorized by the SWMA." Accordingly, the Township exceeded its grant of authority under Section 2101 in enacting Ordinance 13. [18]

18 At oral argument, the Township cited *Hunlock Township v. Hunlock Sand and Gravel Corporation,* 144 Pa.Cmwlth. 499, 601 A.2d 1305 (1992), to support its argument that The Second Class Township Code grants the Township the power to adopt Ordinance 13. The issue in *Hunlock* was whether the township ordinance, which set restrictions for the operation of, *inter alia,* sludge composting facilities in the township without zoning, was an attempt to regulate zoning or was merely a nuisance regulation. The ordinance in question restricted the operation of a sludge composting facility, using such language as, "by nature of the type of activity undertaken, and odor necessitated by such activity and operation, ... contrary to the best interests and welfare of residents within a radius of two thousand (2000) feet of said operation or activity and constitutes a nuisance...." *Id.* at 1306 n. 1. This Court followed *Commonwealth v. Hanzlik,* 400 Pa. 134, 161 A.2d 340 (1960), which held that a township had authority to regulate an activity (*i.e.,* maintenance of automobile graveyards) to prevent a nuisance. *Hunlock,* 601 A.2d at 1307 (citing *Hanzlik,* 400 Pa. at 138, 161 A.2d at 343). Thus, in *Hunlock,* we held that the township's decision to restrict composting facilities was permitted by virtue of The Second Class Township Code. *Id.* at 1308. We held that the ordinance in question was simply a nuisance regulation and not a zoning ordinance. *Id.* at 1307.

The present case differs from *Hunlock* and *Hanzlik* in several respects. First, there was no evidence presented here that Stephens' fertilization of his fields presented the Township with a nuisance. As a matter of law, because Stephens did exactly what was permitted by DEP, it is impossible that this activity could constitute a common law nuisance, in fact or *per se.* Second, in *Hunlock,* there was no indication that the owner had a permit from DEP that regulated the placement or operation of its facility. In sum, preemption by the SWMA was not an issue in *Hunlock* and *Hanzlik.*

*1037 **[6]** **[7]** The SWMA regulates the application of sewage sludge to agricultural land to the end of protecting "the public health, safety and welfare." Section 102(4) of the SWMA, 35 P.S. § 6018.102(4). The implementing

regulations specify where, how and when such sludge can be applied. It can be applied to ground no closer than 50 feet from a property boundary line. 25 Pa.Code § 275.202(5). It may not be applied to ground that is too dry, cold or wet. 25 Pa.Code § 271.915(b), (c). Ordinance 13 has adopted a regulatory scheme that imposes geological standards that conflict with those in the SWMA.[19] Ordinance 13 cannot survive as legislation complementary of the SWMA because of this conflict. Our Supreme Court has directed that municipal regulations that are complementary, and thus permissible, must not conflict with the state regulation. *Western Pennsylvania Restaurant Ass'n,* 366 Pa. at 381, 77 A.2d at 620. The standards in Ordinance 13 are in some respects stricter and in some respects more relaxed.[20] As we explained in *Duff,*

19 Ordinance 13 operates through a permit system, which is duplicative of the state permit system. This duplication is in itself anathema under *Hydropress.*

20 As noted, Ordinance 13 disallows the application of municipal sludge within 500 yards of a building; the SWMA regulations use a 300 feet standard. Under Ordinance 13, fertilizer may be applied up to the boundary line; under the SWMA regulations, the limit is within 50 feet of a boundary.

> [A] municipality may be foreclosed from exercising power it would otherwise have if the state has sufficiently acted in a particular field. Obviously local legislation cannot permit what a state statute or regulation forbids or *prohibit what state enactments allow.*

Duff, 532 A.2d at 504 (emphasis original). Ordinance 13 allows what is forbidden by the state and prohibits what is allowed by the state.[21] We hold, therefore, that Ordinance 13, to the extent it regulates the application of municipal waste to agricultural land, is preempted.[22]

21 It was this duplication that the Supreme Court found offensive in *Hydropress,* albeit under different legal theories. In *Hydropress,* only two sections of the township's ordinance were questioned on grounds of preemption: Section 4(c), which required that the cost of any improvements to a township road used to access a waste material site be charged against the landowner, generator, hauler, or non-owner applicator of any waste material; and Section 7, which required applicants for a permit under the ordinance to post security, in a specified amount, to ensure their compliance with the ordinance. *Hydropress,* 575 Pa. at 483–484, 836 A.2d at 914–915.

22 In *Synagro–WWT, Inc. v. Rush Township, Pennsylvania,* 299 F.Supp.2d 410 (M.D.Pa.2003), the U.S. District Court held that a township ordinance regulating the application of sewage sludge to agricultural land was preempted by the SWMA. The plaintiff in *Rush Township,* Synagro, was in the business of managing treated municipal sewage sludge for municipal treatment plants. Synagro obtained a permit from DEP to apply sewage sludge to certain mine reclamation sites. Rush Township then enacted its "Land Application of Sewage Sludge Ordinance," which applied to "all current existing permits issued or authorized by PA DEP for the land application of sewage sludge in Rush Township." *Id.* at 414. The ordinance required landowners with a DEP permit to do additional groundwater and soil testing before acting under the DEP permit. Relying entirely upon Pennsylvania appellate case law precedent, the district court found the township's requirement not only duplicative of DEP's permit system, but also a substantial obstacle to the SWMA's goal of orderly and efficient land application of sewage sludge. *Id.* at 419 (citing *Abbey v. Zoning Hearing Bd. of the Borough of East Stroudsburg,* 126 Pa.Cmwlth. 235, 559 A.2d 107 (1989); *Municipality of Monroeville v. Chambers Development Corp.,* 491 A.2d 307 (Pa.Cmwlth.1985); *Greater Greensburg Township Sewage Authority v. Hempfield Township, Westmoreland County,* 5 Pa.Cmwlth. 495, 291 A.2d 318 (1972)). *Rush Township* is persuasive precedent on the precise legal question of whether the SWMA preempts local regulation of the activity of applying sewage sludge to farmland.

***1038** Ordinance 13 not only conflicts with the SWMA, it also interferes with the General Assembly's goal of a uniform and comprehensive scheme of regulation of municipal sewage treatment that leaves no room for side-by-side municipal regulation. *Duff,* 532 A.2d at 505. This statutory scheme addresses not just the treatment of sewage but also the disposal of the end product, *i.e.,* municipal sewage sludge. This sludge has to go somewhere. It is doubtful, for example, that there is enough farmland remaining in the City and County of Philadelphia on which to deposit all sewage sludge generated by Philadelphia. Balkanized regulation of the disposal of municipal sewage sludge would stand as an obstacle to the SWMA's comprehensive regulatory scheme. Under *Duff,* Ordinance 13 cannot be allowed to stand insofar as its terms conflict with and stand in the way of accomplishing the purposes of the SWMA.

For these reasons, the decision of the trial court is affirmed.

ORDER

AND NOW, this 19th day of June, 2006, the decision of the Court of Common Pleas of the 41st Judicial District (Perry County Branch), dated February 10, 2005, in the above-captioned matter, is hereby AFFIRMED.

DISSENTING OPINION BY Judge PELLEGRINI.

I respectfully dissent. Not following the well-settled law of this Commonwealth, the majority finds that Liverpool Township (Township), a township of the second class, has no authority to regulate where sewage sludge is placed on property because it impermissibly interferes with "geological standards" set by administrative regulations of the Pennsylvania Department of Environmental Protection (DEP). I suggest that regulation has nothing to do with "geological standards" because it has nothing to do with "geology," but has everything to do with "smell"—bad smells —caused by sewage sledge dumped from other places that affect the ability of citizens of second class townships to enjoy their homes, property and lives. Because the General Assembly recognized that the statewide administrative regulations issued by DEP do not take into consideration local conditions and only deal with the operation of waste sites, it gave second class townships the authority to enact legislation regulating the placement of sludge and other solid waste to protect the health, welfare and safety of their citizens.

In 1993, the Township adopted Ordinance 13 "pursuant to the provision of the Act of May 1, 1993, P.L. 103, as amended by the Act of May 9, 1961, P.L. 194 (53 P.S. Section 65708)." [1] It made it unlawful ***1039** "for any person to use or continue to use their land or other land as a storage, transfer, collection, processing or disposal site of solid waste or residual waste unless such person shall have a permit...." Article III.1 of Ordinance 13. The permit application to operate any of the facilities was to be in accord with the Solid Waste Management Act (SWMA) [2] and, among other requirements, the SWMA prohibited the application of waste "within 500 yards of any dwelling, church, school or other building or buildings which from time to time are utilized for human occupancy or residency." Dean Stephens (Stephens) admitted to disposing of solid waste on his farm and further admitted that he had not applied for a permit from the Township as required by Ordinance 13. [3]

1 53 P.S. § 65708 of the Second Class Township Code was originally enacted by the Act of May 1, 1933, P.L. 103, No. 69, but was amended by the Act of November 9, 1995, P.L. 350, 53 P.S. § 67101 and renumbered as Section 2101 of the Second Class Township Code. For convenience purposes, we will refer to it by its renumbered cite throughout the opinion even where previous opinions referred to it by its old number.

2 Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §§ 6018.101–6018.1003.

3 The SWMA is silent on proximity requirements. DEP regulations provide for less severe setbacks and buffers than does Ordinance 13. 25 Pa.Code §§ 271.915, 275.202 and 275.203. For instance, 25 Pa.Code § 202(5) provides "the land application of sewage sludge may not be conducted within 50 feet of a property line within which the sludge is applied, unless otherwise approved by [DEP], in writing," and 25 Pa.Code § 271.915(c)(3) mandates that sewage sludge not be applied to farm land that is "within 300 feet from an occupied dwelling."

The Township filed a complaint in equity seeking an injunction against Stephens from utilizing his property as a disposal site for solid waste until he applied and received an appropriate permit from the Township. Stephens defended against the action contending that he did not need a permit from the Township because he had a permit from DEP for the agricultural utilization of sewage sludge on a portion of his farm. He argued that he did not have to seek a permit from the Township because the area sought to be regulated by the Ordinance, i.e., the disposal of solid waste, was preempted by the SWMA and the rules, regulations, standards and procedures promulgated by DEP. The trial court and the majority agrees, holding that Ordinance 13 was preempted from local regulation because it had been preempted by the General Assembly's enactment of the SWMA, and the Township had no authority to enact such legislation.

The Township contends Ordinance 13 was not preempted by the SWMA because it had the authority to enact Ordinance 13 with its powers given to it under the Second Class Township Code. [4] Whether a state statute preempts local regulation is determined by the intent of the General Assembly. The General Assembly can specifically express its intent by either providing that municipalities may enact ordinances not inconsistent with state law or by expressly forbidding municipal regulation. [5] However, the General Assembly is often silent and is not presumed to have ***1040** preempted the field by legislating in it; therefore, it must be clearly

shown that it was the General Assembly's intent to preempt the field by legislation. *Retail Master Bakers Association v. Allegheny County,* 400 Pa. 1, 161 A.2d 36 (1960); *Baird v. Township of New Britain,* 159 Pa.Cmwlth. 333, 633 A.2d 225 (1993). The presumption against preemption is based on the understanding that what is being preempted is the ability of the municipality, through its elected local officials, to address the needs of its citizens.

4 Act of May 1, 1933, P.L. 103, *as amended,* 53 P.S. §§ 65101–68701.

5 For an example of express preemption, Section 602 of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended,* 58 P.S. § 601.602, provides:

> Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the Pennsylvania Municipalities Planning Code, and the Act of October 4, 1978 (P.L. 851, No. 166), known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

Once it has been determined that an area has not been preempted, local legislation cannot interpose hurdles that would stand as obstacles "to the accomplishment and execution of the full purposes and objectives of the legislature." *Klein v. Straban Township,* 705 A.2d 947, 950 (Pa.Cmwlth.1998); *Duff v. Township of Northampton,* 110 Pa.Cmwlth. 277, 532 A.2d 500 (1987). Because recently, in *Southeastern Chester County Refuse Authority v. Zoning Hearing Board of London Grove Township,* 898 A.2d 680 (2006), where we held that the SWMA did not preempt local regulation, the issue in this case is whether the Township Ordinance has interposed regulatory hurdles that would frustrate the purpose of the state legislation.

Applying those standards in *Sunny Farms, Ltd. v. North Codorus Township,* 81 Pa.Cmwlth. 371, 474 A.2d 56, 59 (1984), we addressed the exact issues involved in this case. An operator of a landfill challenged an ordinance that prohibited the construction and operation of an underground, hazardous waste disposal facility and provided "[n]o such site for incineration or for disposition by the Sanitary Land Fill method shall be established within five hundred (500) yards of any dwelling, church, school or any other building or buildings which, from time to time, are utilized for human occupancy." In that case, we held that the township had the power under Section 2101 of the Second Class Township Code, 53 P.S. § 67101, to enact legislation regarding where a solid waste site could be located as well as not being preempted by the SWMA. We stated:

> We reject the contention that [local regulation] is preempted by the SWMA (Act 97), thus rendering the Township powerless to require a buffer zone between the waste site and occupied residences. Both Act 97 and its predecessor, the now-repealed Pennsylvania Solid Waste Management Act (Act 241), are substantially similar in that each provides for extensive state regulation of the construction and operation of solid waste disposal facilities. When we construed Act 241 and failed to find explicit language evincing a legislative intent to override local zoning regulations, we allowed local regulation of sanitary landfills on the condition that engineering and geological standards were not stricter than the state's.

The majority attempts to distinguish *Sunny Farms* from the facts of this case in several ways. First, relying on *Municipality of Monroeville v. Chambers Development,* 88 Pa.Cmwlth. 603, 491 A.2d 307 (1985), the majority tries to explain away *Sunny Farms* claiming what was at issue was a zoning ordinance which has not been preempted by the SWMA, while the setback here was in an ordinance regulating where sewage sludge could be deposited. We did say in a stray comment in *Monroeville* that the ordinance in question in *Sunny Farms* was a zoning ordinance, not a police power ordinance, but by examining primary sources, not secondary ones, it is ***1041** evident that characterization was wrong. In *Sunny Farms,* referencing the title of the ordinance, we expressly stated that "Ordinance 18 was enacted under the township's power granted by Section [2101] of the Second Class Township Code (Code), [53 P.S. § 67101], '[t]o

regulate or prohibit the dumping or otherwise depositing of ashes, garbage, rubbish and other refuse materials within the township.' "[6] 474 A.2d at 60. It cannot be any clearer that the ordinance in *Sunny Farms* was not a zoning ordinance.

6 Not only is it clear from our decision in *Sunny Farms*, the trial court in *Sunny Farms* expressly identified the ordinance as one controlling waste disposal. *Sunny Farms, Ltd. v. North Codorus Township*, 67 Mun.L.R. 183, 1976 WL 17411 (York County 1976). ("That case [*Greater Greensburg Sewage Authority v. Hempfield Township*, 5 Pa.Cmwlth. 495, 291 A.2d 318 (1972)], involved a dispute as to whether a township zoning ordinance prohibiting disposition of sludge from a sewage disposal plant could be applied to a disposal plant the operation of which had been authorized by the Department of Environmental Resources. Although the township legislation there controlled zoning rather than waste disposal as here....")

Second, as a fall back position, the majority then states regardless of whether it was a zoning ordinance or not, the ordinance in *Sunny Farms* regulated the "placement" of the waste while Ordinance 13 regulates how waste is disposed of, which has nothing to do with aesthetics or property values. In *Sunny Farms*, we held that a township's waste disposal ordinance disallowing the placement of a dump within 500 yards of any dwelling was permissible even if the landfill operator had a zoning occupancy permit to place it to the border of its property. More recently, in *Hunlock Township v. Hunlock Sand and Gravel Corporation*, 601 A.2d 1305 (Pa.Cmwlth.1992), we held that a second class township had the power to enact an ordinance under Section 2101 of the Second Class Township Code to forbid the maintenance, operation and utilization of a sewage sludge composting facility or solid waste facility within a 2,000 feet radius of any residence or residential area. *See also Kavanagh v. London Grove Township*, 33 Pa.Cmwlth. 420, 382 A.2d 148 (1978).

Other than the Ordinance here being less restrictive—because a farmer can still farm up to his property line—and the dump in *Sunny Farms* and the sewage sludge composting facility in *Hunlock* requiring the setback area to remain fallow, I cannot see any difference that a farmer could not dump sewage sludge within 500 yards of the dwelling at issue here and those that precluded dumping in *Sunny Farms* and *Hunlock*. All those ordinances impose setback requirements regulating only "where" the waste is put down, none of which goes to the operation of the site which involves "how and when" waste can be put down.

Third, the majority then states that Ordinance 13 interferes with geological or engineering standards set by DEP, admittedly preempted, and has nothing to do with advancing aesthetics or protecting property values. A similar argument was made in *Sunny Farms*. In that case, the landfill operator also contended that the local 500–yard proximity requirement conflicted with and was an impermissibly more strict engineering or geological standard than that provided for by the regulation of 25 feet [now 50 feet] contained in the state regulation. Finding that a second class township had the authority to enact the regulation under [Section [2101] of the Second Class Township Code, moreover, empowers local government to protect and enhance "the quality of life of its citizens," 474 A.2d at 60], we held that the proximity requirements were not impermissibly more strict than the narrow, ***1042** technical, engineering concerns addressed by DEP regulations because rather than directly setting specific, engineering or geological standards, the Ordinance, consistent with basic land use planning principles, promoted and protected public health, property values and aesthetics. We then went on to quote our Supreme Court in *Franklin Township v. Department of Environmental Resources*, 500 Pa. 1, 6, 452 A.2d 718, 720 (1982), which emphasized a local government's major responsibility in environmental matters as follows:

> Aesthetics and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life's quality for all of its inhabitants.

As to the majority's statement that Ordinance 13 has nothing to do with aesthetics or property values, I would suggest that aesthetics involve more than an historic village green —no matter where you live, if you had to smell another person's sewage sludge all day, you would say that was a matter of aesthetics and that it would adversely affect your property's value, not to mention the health and welfare of the community.

Finally, the majority finds that Section 2101 of the Second Class Township Code does not authorize second class townships to enact supplemental regulations of solid waste, even though we specifically said so in both *Sunny Farms* and *Hunlock*. Section 2101 of the Second Class Township Code provides:

> The board of supervisors in the manner authorized by the act of July 7, 1980 (P.L. 380, No. 97), known as the "Solid Waste Management Act," and the act of July 28, 1988 (P.L. 556, No. 101), known as the "Municipal Waste Planning, Recycling and Waste Reduction Act," may prohibit accumulations of ashes, garbage, solid waste and other refuse materials upon private property, including the imposition and collection of reasonable fees and charges for the collection, removal and disposal thereof.

The majority then states that "Townships have always regulated junkyards, littering and trash pickup and Section 2101 simply authorizes the continuation of these worthy efforts. However, it specifically requires that such township regulation be done 'in the manner authorized by [the SWMA].' " (Opinion at 1036.) Under the majority's interpretation, because only the Second Class Township Code has such a provision, all other municipalities could prohibit the disposal of trash and ignore the SWMA altogether—the ultimate reverse preemption. The majority does not recognize that "authorized" is a grant of power coming from the SWMA and has nothing to do with departmental regulations issued pursuant to its grant of power which goes to the operation of the waste site itself, not off-site effects of the waste disposal site.

Recognizing that solid waste sites would be located in second class townships of the Commonwealth, the only sensible interpretation of the General Assembly's reason for enacting this provision is to interpret Section 2101 of the Second Class Township Code as we did in *Sunny Farms* and *Hunlock*, which was that under that provision, second class townships had the ability, other than through land use ordinances, to provide for setback requirements of solid waste disposal sites to insure the health, safety and welfare of the community.

For the reasons set forth in this opinion, I respectfully dissent.

Judge McGINLEY joins in this dissenting opinion.

End of Document

ORDINANCE NO. 2009-3

AN ORDINANCE AMENDING ORDINANCE NUMBER 2008-2 TITLED "AN ORDINANCE TO PROTECT THE SAFETY AND HEALTH OF CITIZENS OF EAST BRUNSWICK TOWNSHIP BY PROVIDING FOR ACCESS TO INFORMATION RELATING TO SLUDGE APPLICATION IN THE TOWNSHIP AND FOR MEASURES TO ASSURE PUBLIC SAFETY DURING AND AFTER LAND APPLICATION AND/OR STORAGE OF SEWAGE SLUDGES"

PREAMBLE

East Brunswick Township is a rural community, and consists of farms, tree farms, equestrian activities and riding trails, which are located in proximity to residential communities and businesses. Citizens of East Brunswick Township have expressed concern that the public health will be adversely impacted by exposure to sewage sludge on lands in the Township. Ordinance Number 2008-2 was adopted to address health and welfare concerns of the Township and its citizens from exposure to sewage sludge.

The Supervisors of East Brunswick Township are hereby amending Ordinance Number 2008-2, so as not to duplicate the regulatory scheme of the Pennsylvania Department of Environmental Protection regarding the land application of non-exceptional quality sewage sludge. The amended Ordinance is intended to (1) provide the Township with notice of the land application of non-exceptional quality sewage sludge in the Township; and (2) provide local monitoring to ensure that the public health and safety is not adversely impacted as a result of the land application of such sludge.

The Supervisors of East Brunswick Township hereby repeal the following provisions of Ordinance 2008-2 in entirety: Section VI; Section VII(A), (B),(D); Section VIII(B), (D) and (E) and Section X(A), (B), (C) and (D). The remaining provisions of this Ordinance, as amended, are hereby adopted and anything contrary hereto in Ordinance 2008-2 is likewise repealed.

Section I: General Provisions

The purposes of this Ordinance shall be as follows:

A. To provide to the citizens of East Brunswick Township and others notice, information and records relating to non-exceptional sewage sludge (hereinafter referred to as Class B sewage sludge) application and storage practices within the Township.

B. To provide for the health, safety and general welfare of all East Brunswick Township citizens and others and, to the extent possible, prevent unknowing or inadvertent exposure to Class B sewage sludge.

C. To preserve and protect agriculture and agriculture-related activities and the commercial and agricultural economy and land base in East Brunswick Township.

D. To assure that local concerns are addressed in the planning, management and application of Class B sewage sludge to lands within the Township.

Section II: Title

This Ordinance shall be known and may be cited as "An Ordinance Providing Notice to East Brunswick Township of the Land Application of Sewage Sludges and Assuring Local Public Health and Safety During and After Land Application of Sewage Sludges."

Section III: Definitions

Terms used in this Ordinance shall have the meanings set forth in the Solid Waste Management Act, 35 P.S. §6018.101 et seq., and accompanying Department of Environmental Protection Regulations.

Section IV: Compliance with PaDEP Standards

Application or storage of Class A or Class B sewage sludge, as defined in 25 PA. Code §271.1, within East Brunswick Township shall be in accordance with the requirements set forth by the Pennsylvania Department of Environmental Protection.

Section V: Notification to the Township and its Occupants of Land Application of Class B Sewage Sludge

A. Any person or company intending to store or apply Class B sewage sludge to agricultural land in East Brunswick Township shall, at least thirty (30) days prior to the first intended application, notify the Township by submitting to the Township copies of all information required to be submitted to the Pennsylvania Department of Environmental Protection pertaining to the land application of Class B sewage sludge in the Township.

B. (repealed by Board of Supervisors October 15, 2009).

C. At least 48 hours prior to the actual land application of Class B sewage sludge, any person or company intending to apply Class B sewage sludge to agricultural land in East Brunswick Township shall notify the Township of:

1. the dates and times of the intended land applications so that the Township can monitor the spreading operations pursuant to Section IX(B) below; and

2. how the site restrictions specified in 25 Pa. Code Section 271.932(b)(5)(vii) or (viii), as applicable, will be complied with following the land application of Class B sewage sludge.

Section VI: Public Safety and Environmental Data Assessment Fee (repealed by Board of Supervisors October 15, 2009).

Section VII: Providing Post-Application Information to the Township

A. (repealed by Board of Supervisors October 15, 2009).

B. (repealed by Board of Supervisors October 15, 2009).

C. A person or company that prepares or applies Class B sewage sludge that is applied on agricultural lands within the Township shall provide to the Township copies of any information required to be submitted to the Pennsylvania Department of Environmental Protection at the time the recordkeeping information is submitted to the Pennsylvania Department of Environmental Protection.

D. (repealed by Board of Supervisors October 15, 2009).

Section VIII: Protection of Public Health and Welfare

A. Sludge application in the Township shall not take place on the holidays of Christmas, New Year's Day, Easter, Memorial Day, July 4th, Labor Day and Thanksgiving.

B. (repealed by Board of Supervisors October 15, 2009)

C. When Class B sewage sludge is applied to lands abutting a public road, the applicant and/or landowner shall place clearly visible signs written in English and Spanish at intervals at least every 50 feet along said road or roads at least 48 hours prior to sludge

application and for the duration of operations at such lands. The signs shall state "WARNING" in red, contain notice that Class B sludge has been applied to the land and prohibit public access to such lands. Such signs shall be at least 12" by 12" and in format similar to that set forth at Attachment A to this Ordinance or other form acceptable to the Township.

D. (repealed by Board of Supervisors October 15, 2009).

E. (repealed by Board of Supervisors October 15, 2009).

Section IX: Investigation and Inspection

A. Prior to the first land application of Class B sewage sludge, the Township or its agent may inspect the fields on which land application is to take place to assess conditions on the fields and to ensure compliance with the DEP permit requirements. The Township or its agent may also obtain one representative soil chemical sample for each field on which sewage sludge is to be land applied for pH and those constituents listed in the tables in 25 Pa. Code Section 271.914(b). The Township may test well water only with the consent of the landowner. The Township must provide the landowner and the land applier 72 hours advance notice prior to an inspection. The Township will bear the expense of the inspection and testing. The Township will only conduct one inspection prior to the first land application at the DEP approved site.

B. During the spreading of Class B sewage sludge, the Township or its agent may inspect the spreading operations to ensure compliance with the DEP permit requirements and regulations. Samples of the sewage sludge being applied may be collected by the Township and analyzed utilizing Department-approved procedures. Samples may be tested for the pollutants listed in the DEP regulations. The Township may require written proof from the land applier to indicate which pathogen reduction treatment alternative and which vector attraction reduction option was used to produce the Class B sewage sludge used at the site. The Township may test

well water only with the consent of the landowner. The Township will bear the expense of all inspections and testing and may only conduct an inspection during the land application at the DEP approved site. Copies of any test results shall be maintained by the Township as part of the land application history within the Township.

Section X: Enforcement and Penalties

A. (repealed by Board of Supervisors October 15, 2009).

B. (repealed by Board of Supervisors October 15, 2009).

C. (repealed by Board of Supervisors October 15, 2009).

D. (repealed by Board of Supervisors October 15, 2009).

E. If the operation or application of Class A or Class B sewage sludge is in violation of the Pa. DEP regulations or this ordinance, the Township hereby empowers its authorized representative to seek such equitable remedy for the violation(s) as the Township may seek under the Solid Waste Management Act or the Second Class Township Code.

Section XI: Administration

The provisions of this Ordinance shall be administered by the East Brunswick Board of Supervisors or their duly authorized representatives who shall keep and maintain records hereunder of sewage sludge land application, disposal, or storage within the Township, make such records available to residents and other interested parties and enforce the provisions of this Ordinance.

Section XII: Severability

The provisions of this ordinance are severable, and if any section, clause, sentence, part or provision shall be held illegal, invalid or unconstitutional by any court of competent

jurisdiction, such decision of the court shall not affect, impair or invalidate any of the remaining sections, clauses, sentences, parts or provisions of this Ordinance. It is hereby declared to be the intent of the Board of Supervisors that this Ordinance would have been adopted if any such section, clause, sentence, part or provisions determined to be illegal, invalid or unconstitutional had not been included.

ENACTED AND ORDAINED into law by the Township of EAST BRUNSWICK, Schuylkill County, Pennsylvania, this 15 day of October, 2009.

ATTEST: **TOWNSHIP OF EAST BRUNSWICK**

Lisa M. Stanchick, Secretary

BY: _____
Jeffrey A. Faust,
Chairperson of the Board of Supervisors

BY: _____
Thomas A. Strauss,
Vice-Chairperson of the Board of Supervisors

BY: _____
J. Donald Rubinkam, Member
Board of Supervisors

CERTIFICATE OF ADOPTION

The undersigned, Secretary of the Township of East Brunswick, Schuylkill County, Pennsylvania, does hereby certify that the foregoing ordinance was duly adopted by a majority vote of the East Brunswick Township Board of Supervisors at a duly advertised, called and held public meeting of said Council, which meeting was held on the 15th day of October, 2009, at the Offices of the Township.

TOWNSHIP OF EAST BRUNSWICK

BY: Lisa M Stanchick
Lisa M. Stanchick, Secretary

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

January 27, 2015

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
[redacted]

William H. Poole, Jr., Esquire
3030 East Market Street
York, PA 17402

RE: ACRE Review
East Hopewell Township Sewage Sludge Ordinance

Dear Mr. Poole:

We have reviewed the proposed draft ordinance that you submitted to me on January 9, 2015, to amend the East Hopewell Township Sewage Sludge Ordinance. We have the following comments.

With respect to the "whereas" clauses, the last three clauses are completely unnecessary for the enactment the ordinance and were not part of the model ordinance. We suggest the Township remove them from the proposed draft. In the alternative, the Township can revise the third clause to remove the following phrase: "upon complaint by John Marstellar, Jr." There is no need to state Mr. Marstellar's name in the proposed amendment. The last clause can be revised to remove the phrase: "which it cannot afford against the state, which has much more substantial ability to afford said litigation" and replace it with "and comply with State law."

Under Section 2, the number of the new ordinance should be revised to reflect the year 2015.

Section 3(A), the word "systems" should be "citizens."

Section 4, there is no need for subsection B. The DEP's municipal waste regulations define "person" to include these terms. 25 Pa. Code § 271.1.

Section 6(A), the word "zip" should be deleted from the parenthesis. Also, subsection B of Section 6, contains two typos: "cap" and "captioned" that should be deleted.

Under Section 8(B), we accept the addition of the requirement that the signage remain up for seven days after land application. However, we will not agree with the change in the size of the sign to 18 inches by 18 inches. The size of the signage under the model ordinance is 12 inches by 12 inches. There is no reason to change the size of the sign and this model ordinance has been enacted by multiple municipalities, thus land appliers are entitled to consistency on size of required signage. The Township can revise this Section by replacing the size to 12 inches by 12 inches.

Under Section 9, you added a subsection (C) to encompass potential testing of wells on property other than the land application site with the property owner's permission and at the expense of the Township. We will accept this addition if the Township changes the language of this section to read "testing of wells on property other than the land application site that is neighboring property or in the vicinity of the land application site." We think this revision provides clarity on the property referred to in this subsection.

We accept the addition of subsection (B) under Section 10 regarding the authority of the Township to enforce the requirements under Sections 6, 7, 8, and 9.

We would appreciate receiving a revised proposed ordinance that implements these revisions.

Sincerely,

Susan L. Bucknum

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

April 7, 2015

Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
[redacted]

William H. Poole, Jr., Esquire
3030 East Market Street
York, PA 17402

RE: ACRE Review
East Hopewell Township Sewage Sludge Ordinance

Dear Mr. Poole:

Thank you for emailing me the ordinance amendments (No. 2-2015) to the East Hopewell Township Sewage Sludge Ordinance that were enacted on April 1, 2015. The enactment of these amendments resolves the ACRE issues that we identified with the prior Ordinance No. 3-1999 and concludes this matter.

We appreciate the Township's cooperation in resolving this matter.

Sincerely,

Susan L. Bucknum

SUSAN L. BUCKNUM
Senior Deputy Attorney General

SLB/kmag

FINAL ENACTED ORD

EAST HOPEWELL TOWNSHIP
YORK COUNTY, PENNSYLVANIA

ORDINANCE NO. 2-2015

AN ORDINANCE TO PROTECT THE SAFETY AND HEALTH OF CITIZENS OF EAST HOPEWELL TOWNSHIP BY PROVIDING FOR ACCESS TO INFORMATION RELATING TO SLUDGE APPLICATION IN THE TOWNSHIP AND FOR MEASURES TO ASSURE PUBLIC SAFETY DURING AND AFTER LAND APPLICATION AND/OR STORAGE OF SEWAGE SLUDGE

WHEREAS, East Hopewell Township ("East Hopewell") is a political subdivision, being a second class township, governed by the Second Class Township Code, 53 P.S. §66101 et seq,; and

WHEREAS, on April 7, 1999 the Township enacted Ordinance No. 3-1999, entitled "An Ordinance Of East Hopewell Township, York County Pennsylvania Setting Regulations For The Disposal Or Agricultural Utilization Of Any Sewage Sludge On Land Within The Township, Requiring Notice Of Such Disposal Or Agricultural Utilization, Requiring Permits, Test Results, Permitting The Township To Test Sludge And Soil, And Providing Penalties For Any Violations"; and

WHEREAS, on September 30, 2014 the Township was notified by the Office of the Attorney General of Pennsylvania (OAG) that the OAG had determined that the provisions of Ordinance No. 3-1999 "unlawfully prohibit or limit a normal agricultural operation" in violation of Section 314 of Act 38 of 2005 (ACRE), and threatened the Township with legal action "to invalidate or enjoin the enforcement of the Ordinance provisions" unless the Township substantially amended the Ordinance; and

WHEREAS, the OAG has provided the Township with an OAG-approved ordinance; and

WHEREAS, the Township desires to avoid litigation:

NOW, THEREFORE, BE IT ORDAINED AND ENACTED, and it is ordained and enacted, by the Board of Supervisors of East Hopewell Township, as follows:

SECTION 1: Short Title. This Ordinance shall be known and may be cited as "The East Hopewell Township Land Application of Sewage Sludge Ordinance".

SECTION 2: Background; Purpose. The Township is a rural community, consisting primarily of farms and open spaces, which are located in proximity to residential communities. Citizens of the Township have expressed concern that the public health will be adversely impacted by exposure to sewage sludge on lands in the Township. As a result, the Township adopted Ordinance No. 3-1999. The Township's a Board of Supervisors are hereby adopting this Ordinance No. 2-2015 to replace Ordinance No. 3-1999, so as not to duplicate the regulatory scheme of the Pennsylvania Department of Environmental Protection (hereafter referred to as "DEP") regarding the land application of non-exceptional quality sewage sludge. This Ordinance is intended to:

1. Provide the Township with notice of the land application of non-exceptional quality sewage

sludge (hereafter referred to as "Class B sewage sludge") into the Township; and

2. Provide local monitoring to ensure that the public health and safety is not adversely impacted as a result of the land application of such large.

SECTION 3: General Provisions. The purpose of this Ordinance shall be as follows:

A. To provide the citizens of the Township and others and notice, information, and records relating to Class B sewage sludge application and storage practices within the Township;

B. To provide for the health, safety, and general welfare of all Township citizens and others, and, to the extent possible, prevent unknowing or inadvertent exposure to Class B sewage sludge;

C. To preserve and protect agriculture and agriculture-related activities and the commercial and agricultural economy and land based in the Township; and

D. To ensure that local concerns are addressed in the planning, management, and application of Class B sewage sludge to lands within the Township.

SECTION 4: Definitions. Terms used in this Ordinance shall have the meanings set forth in the Solid Waste Management Act, 35 P. S. §6018.101 et seq., and accompanying DEP Regulations.

SECTION 5: Compliance with DEP Standards. Application of Class A or Class B sewage sludge, as defined in 25 Pa. Code §271.1, within the Township shall be in accordance with requirements set forth by DEP.

SECTION 6: Notification to the Township and its Occupants of Land Application of Class B Sewage Sludge.

A. Any Person or Company intending to store or apply Class B sewage sludge to agricultural land in the Township shall, at least thirty (30) days prior to the first intended application, notify the Township by submitting to the Township copies of all information required to be submitted to DEP pertaining to the land application of Class B sewage sludge in the Township.

B. At least 48 hours prior to the actual land application of Class B sewage sludge, any Person or Company intending to apply Class B sewage sludge to agricultural land in the Township shall notify the Township of:

1. The dates and times of the intended land applications so that the Township can monitor the spreading operations pursuant to Section 9.B, below; and

2. How the site restrictions specified in 25 Pa. Code §271.932(b)(5)(vii) or (viii), as applicable, will be complied with following the land application of Class B sewage sludge.

SECTION 7: Providing Post-Application Information to the Township. A Person who or Company that prepares or applies Class B sewage sludge that is applied on agricultural lands within the Township shall provide to the Township copies of any information required to be submitted to DEP at the time the recordkeeping information is submitted to DEP.

SECTION 8: Protection of Public Health and Welfare.

A. Sludge application in the Township shall not take place on the holidays of Christmas, New Year's Day, Easter, Memorial Day, July 4th, Labor Day, and Thanksgiving.

B. When Class B sewage sludge is applied to lands abutting a public road, the applicant and/or landowner shall place clearly visible signs written in English and Spanish at intervals at least every fifty (50) feet along said road or roads at least forty-eight (48) hours prior to sludge application, and for the duration of operations at such lands, and for seven (7) days after completion of operations. The signs shall state "WARNING" in red, containing notice that Class B sludge will be/has been applied to the land and prohibit public access to such lands. Such signs shall be at least 12 inches by 12 inches and in a format similar to that set forth at Attachment A to this Ordinance, or other form acceptable to the Township.

SECTION 9: Investigation and Inspection.

A. Prior to the first land application of Class B sewage sludge, the Township or its agent may inspect the fields on which land application is to take place to assess conditions on the fields and to assure compliance with the DEP permit requirements. The Township or its agent may also obtain one (1) representative soil chemical sample for each field on which sewage sludge is to be land applied for pH and those constituents listed in the tables in 25 Pa. Code §271.914(b). The Township may test well water only with the consent of the landowner. The Township must provide the landowner and the land applier seventy-two (72) hours' advance notice prior to an inspection. The Township will bear the expense of the inspection and testing. The Township may only conduct one inspection prior to the first land application at the DEP approved site.

B. During the spreading of Class B sewage sludge, the Township or its agent may inspect the spreading operations to ensure compliance with the DEP permit requirements and regulations. Samples of the sewage sludge being applied may be collected by the Township and analyzed utilizing DEP-approved procedures. Samples may be tested for the pollutants listed in the DEP regulations. The Township may require written proof from the land applier to indicate which pathogen reduction treatment alternative and which vector attraction reduction option was used to produce the Class B sewage sludge used at the site. The Township may test well water only with the consent of the landowner. The Township will bear the expense of all inspections and testing, and may only conduct an inspection during the land application at the DEP-approved site. Copies of any test results shall be maintained by the Township as part of the land application history within the Township.

C. Nothing in this Section or this Ordinance shall prevent or prohibit the Township, at its expense, from testing wells on property other than the land application site that are on

neighboring property or in the vicinity of the approved land application site with the prior permission of the property owner and/or occupier of the property on which the Township wishes to conduct its testing.

SECTION 10: Enforcement and Penalties.

A. If the operation or application of Class A or Class B sewage sludge is a violation of the DEP regulations or this Ordinance, the Township hereby empowers its authorized representative to seek such equitable remedy for the violation as the Township may seek under the Solid Waste Management Act or the Second Class Township Code.

B. The Township also empowers its authorized representative to seek the remedies and follow the procedures authorized by Section 1601(c.1)(2) of the Second Class Township Code, 53 P.S. §66601(c.1)(2), for any violations which are violations solely of this Ordinance, and which are not regulated or controlled by ACRE or DEP regulations, specifically the requirements in Sections 6, 7, 8, and/or 9 of this Ordinance. Specifically, as authorized by Section 1601(c.1)(2) of the Second Class Township Code, any Person who or Company which violates the provisions of Sections 6, 7, 8, and/or 9 of this Ordinance shall commit a summary offense, and upon conviction by a Magisterial District Judge (formerly known as District Justice), shall result in a fine of $250.00 for the first offense, $300.00 for a second offense, and $1,000.00 for the third and each subsequent offense, which fines shall be in addition to costs of prosecution. The remedies and penalties in this subsection B shall be in addition to the remedies in subsection A of this Section.

SECTION 11: Administration. The provisions of this Ordinance shall be administered by the Township's Board of Supervisors or their duly authorized representatives, who shall keep and maintain records hereunder of sewage sludge land application, disposal, or storage within the Township, make such records available to residents or other interested parties, and enforce the provisions of this Ordinance.

SECTION 12: Severability. The provisions of this Ordinance are severable, and if any section, clause, sentence, part, or provision shall be held to be illegal, invalid, or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of this Ordinance. It is hereby declare to be the intent of the Township's Board of Supervisors that this Ordinance would have been an adopted if such section, clause, sentence, part, or provisions determined to be illegal, invalid, or unconstitutional had not been included in this Ordinance.

SECTION 13: Repealer. This Ordinance hereby repeals Ordinance No. 3-1999 in its entirety upon this Ordinance taking effect.

SECTION 14: This Ordinance shall become effective five (5) days after enactment.

ORDAINED AND ENACTED the 1st day of April, 2015.

ATTEST:

Martha J. Miller

Martha J. Miller, Secretary

(SEAL)

EAST HOPEWELL TOWNSHIP
BOARD OF SUPERVISORS

By: Dean H. Miller
Dean H. Miller, Chairman

By: William G. Rinas
William G. Rinas, Supervisor

By: Richard D. Seitz, Jr.
Richard D. Seitz, Jr., Supervisor

WARNING/CUIDADO !!
DO NOT ENTER
NO TRESPASSING
NO TRESPASE

CLASS B SEWAGE SLUDGE HAS BEEN APPLIED TO THIS LAND

for additional information contact:

[Name/Phone Number of landowner or applier]

ATTACHMENT A