Superior Court of New Jersey, Appellate Division.

WASTE MANAGEMENT OF NEW JERSEY INC v. CITY OF NEWARK ZONING BOARD OF ADJUSTMENT CITY OF NEWARK

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff–Respondent, v. CITY OF NEWARK ZONING BOARD OF ADJUSTMENT, Defendant, CITY OF NEWARK, Defendant–Appellant.

DOCKET NO. A–5890–11T3

-- June 25, 2013

Before Judges Ashrafi and Guadagno.

Ivan J. Whittenburg, Assistant Corporation Counsel, argued the cause for appellant (Anna P. Pereira, Corporation Counsel, attorney; Mr. Whittenburg, of counsel and on the brief).Sandra T. Ayres argued the cause for respondent (Scarinci & Hollenbeck, L.L.C., attorneys; Ms. Ayres, of counsel and on the brief).

Defendant City of Newark (City) appeals from the June 22, 2012 order of the Law Division declaring that portions of the City's land use ordinances and redevelopment plan were preempted by the Solid Waste Management Act, N.J.S.A. 13:1E–1 to –174 (SWMA), and the Comprehensive Regulated Medical Waste Management Act, N.J.S.A. 13:1E–48.1 to –48.28 (CRMWMA), to the extent that they pertain to the licensing, location and operation of plaintiff's proposed medical waste processing facility.

Defendant argues that the CRMWMA does not conflict with the City's land use ordinances and redevelopment plan with regard to the siting of medical waste management facilities, and therefore does not preempt same. We disagree and affirm based on the comprehensive written decision of Judge Rachel N. Davidson.

I.

Plaintiff proposed to demolish the existing structure at 100 Lister Avenue, Newark, and construct a new building which would accept and process regulated medical waste. On July 8, 2010, defendant City of Newark Zoning Board of Adjustment (Board) heard testimony as to plaintiff's site plan, business operations and medical waste treatment process. The hearing continued on October 28, 2010, when the Board denied plaintiff's application.

On May 16, 2011, plaintiff filed a complaint in lieu of prerogative writs, seeking a declaratory judgment that the Board's denial of its application was invalid. After the Board and the City filed answers to plaintiff's complaint, plaintiff filed a motion for a declaratory judgment. Judge Davidson heard oral argument on plaintiff's motion on October 3, 2011.

On June 22, 2012, Judge Davidson entered an order accompanied by a written decision finding that the City's land use ordinances and redevelopment plan, promulgated pursuant to the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D–1 to –22, "to the extent that they pertain to the licensing, location and operation of plaintiff's proposed medical waste processing facility," were preempted by the SWMA and the CRMWMA.

Examining the Legislature's findings in enacting the CRMWMA, Judge Davidson found

the CRMWMA addresses many of the same concerns addressed by the SWMA, such as protecting the public health and managing the transportation and disposal of solid waste, in this case medical waste. The [L]egislature, by using the word "comprehensive" in both the title of the act and in its findings, was even more explicit about the need for a state-wide system in the CRMWMA than in the SWMA. In addition, the CRMWMA provides that its provisions "shall supersede any local ordinance, rule or regulation concerning the proper and safe tracking, identification, packaging, storage, control, monitoring, handling, collection, and disposal of regulated medical waste." N.J.S.A. 13:1E–48.28. Finally, the CRMWMA requires all commercial facilities to be incorporated in a solid waste management plan, as in SWMA, and then adds that "[n]othing in this section shall prohibit the granting of any . municipal approval" for any noncommercial facility (N.J.S.A. 13:1E–48.14(f)), suggesting that commercial facilities would not require municipal approval, as they fall under the jurisdiction of the [Department of Environmental Protection].

Judge Davidson noted that a finding of preemption did not extinguish the City's right to have its interest in the siting of plaintiff's medical waste facility considered, as the Department of Environmental Protection (DEP) is required to consider the City's interest in the context of CRMWMA's mandate.

On August 1, 2012, the City appealed the trial court's order, arguing that the City's authority to consider plaintiff's use variance application is not preempted by the statutory and regulatory framework set forth under the CRMWMA. The Board did not appeal the trial court's order.

II.

Questions of law are reviewed de novo, with no special deference to the trial court's ruling. Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 604–05 (2012); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The New Jersey Supreme Court has explained that "[p]reemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 461 (1976) (citing Summer v. Teaneck, 53 N.J. 548, 554 (1969)). "Preemption analysis calls for the answer initially to whether the field or subject matter in which the ordinance operates, including its effects, is the same as that in which the State has acted." Ibid. If so, further analysis is needed. Ibid. The Court set forth five considerations for determining the applicability of preemption:

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

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?

[Id. at 461–62.]

The Court has explained that the Legislature's intent is the deciding factor in determining whether preemption exists. Mack Paramus Co. v. Paramus, 103 N.J. 564, 573 (1986). "If the court determines that the Legislature intended 'its own actions, whether it exhausts the field or touches only part of it, to be exclusive,' then it will conclude that the State has preempted the field, thereby barring any municipal legislation." Ibid. (quoting State v. Ulesky, 54 N.J. 26, 29 (1969)).

A statute's express language of preemption is dispositive. Bubis v. Kassin, 184 N.J. 612, 629 (2005) (citing Tumino v. Long Beach Twp., 319 N.J.Super. 514, 520 (App.Div.1999)). N.J.S.A. 13:1E–48.28 of the CRMWMA provides:

The provisions of this act and any rule or regulation promulgated thereunder shall supersede any local ordinance, rule or regulation concerning the proper and safe tracking,

identification, packaging, storage, control, monitoring, handling, collection, and disposal of regulated medical waste.

In N.J.S.A. 13:1E–48.2, the Legislature set out its findings and declarations with regard to the CRMWMA as follows:

a. Various human and animal health care centers and clinics, hospitals, laboratories, and other facilities generate substantial volumes of medical waste that must be transported and disposed in a sanitary and environmentally sound manner; that this waste poses both a potential threat to the health of those persons who handle, transport, dispose, or otherwise come into contact with it and to the public health; that, in addition to the actual and perceived risks associated with the management of medical waste, there are important aesthetic concerns that must be addressed; that the present regulatory scheme for medical waste is confusing and inadequate, and the enforcement thereof has been lacking and the penalties assessed for violations insufficient; and that the citizens of the State generally lack confidence that medical waste in the State is being managed in a proper and safe manner.

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d. It is therefore appropriate, necessary, and in the best interest of the State to establish a comprehensive management system that provides for the proper and safe tracking, identification, packaging, storage, control, monitoring, handling, collection, and disposal of regulated medical waste; that monitoring of the regulated medical waste stream is best accomplished through the creation of a manifest tracking system for regulated medical waste; and strict enforcement of the law concerning regulated medical waste and the establishment of substantial civil and criminal penalties for violations thereof will deter unlawful behavior and further protect the State's beaches, coastline, waters, and land from illegally dumped medical waste that so greatly affects the health and welfare of citizens and visitors, the quality and safety of State waters, the valuable tourism industry, and the State and local economies.

N.J.A.C. 7:26–3A.39 sets forth the requirements and guidelines for the construction and management of medical waste management facilities. The sole reference to facility siting in that portion of the Code provides that an applicant seeking to build a medical waste management facility must submit to the DEP, among other things, "[p]hotocopies of all authorizations for siting, construction and operation obtained pursuant to applicable local, regional, State or Federal agency with jurisdiction over any aspect of the proposed facility." N.J.A.C. 7:26–3A.39(d)(3). Similarly, N.J.A.C. 7:26–3A.1(e) provides: "In addition to the requirements of this subchapter, generators, transporters, collection facilities and owners and operators of intermediate handling facilities and destination facilities shall comply with all applicable Federal, State, county and local statutes, rules and ordinances."

On appeal, the City relies heavily on N.J.A.C. 7:26–3A.39, arguing that this language indicates the Legislature's intent not "to exclusively occupy the field or to regulate the

field so comprehensively as to preclude the coexistence of municipal regulations regarding the siting of regulated medical waste facilities." This argument primarily rests on the contention that "the CRMWMA statute is virtually silent with respect to the issue of site plan approval and the MLUL," and "[i]f the Legislature intended to preempt the provisions of the MLUL it would have included express provisions to that effect." The City notes that the preemption clause of N.J.S.A. 13:1E–48.28 does not speak to facility siting.

However, applicants seeking to construct a medical waste management facility are required to obtain a permit from the DEP which must include siting information. See N.J.S.A. 13:1E–5, –48.10; see also N.J.A.C. 7:26–2.4, –2.9, –3A.8, –3A–40(c)(4), –3A.47 (c). The DEP may grant the permit even if the facility is not included in the municipality's development plan. N.J.A.C. 7:26–3A.39(d)(6).

Both N.J.A.C. 7:26–3A.39(d)(3) and N.J.A.C. 7:26–3A.1 note deference to "applicable" municipal laws relating to medical waste management facilities. Judge Davidson noted that the legislative intent in enacting the SWMA and CRMWMA was to create a comprehensive and controlling statewide scheme.

When applying the five considerations mentioned by the Court in Overlook, the first question is whether the municipal law directly conflicts with the statute's policies or operational effect. Overlook, supra, 71 N.J. at 461. The City's siting requirements do not directly conflict with the SWMA or CRMWMA, as neither is decisive on siting.

The second consideration examines whether the statute was "intended, expressly or impliedly, to be exclusive in the field." Ibid. The CRMWMA speaks both to superseding all other laws with regard to "tracking, identification, packaging, storage, control, monitoring, handling, collection, and disposal of regulated medical waste," N.J.S.A. 13:1E –48.28, and to the necessity of a "comprehensive management system" for all such facilities throughout the State, N.J.S.A. 13:1E–48.2. Although not expressly exclusive as to facility siting, these provisions imply exclusivity. Additionally, N.J.A.C. 7:26–3A.39 (d)(6), enacted pursuant to the CRMWMA, permits the DEP to override the municipality's preferences as to facility construction "if it determines that the collection facility is needed to help fulfill the objectives" of the statewide plan.

The third consideration examines whether the legislated area calls for uniformity. Overlook, supra, 71 N.J. at 461. In its findings and declarations, the Legislature was clear that the CRMWMA was "necessary . to establish a comprehensive management system" in light of the finding "that the [prior] regulatory scheme for medical waste [was] confusing and inadequate, and the enforcement thereof ha[d] been lacking and the penalties assessed for violations insufficient." N.J.S.A. 13:1E–48.2. The Legislature proclaimed that uniformity of medical waste management was a paramount concern in enacting the CRMWMA.

The fourth Overlook consideration is whether the nature of the statute is so comprehensive as to effectuate de facto preemption. Overlook, supra, 71 N.J. at 461–62. The CRMWMA requires DEP approval to construct a medical waste management facility,

N.J.S.A. 13:1E–48.10, and such approval is not dependent upon municipal consent, N.J.A.C. 7:26–3A.39(d)(6). That the State's interests override municipal interests strongly speaks in favor of preemption.

The fifth and final consideration questions whether the municipal law impedes the purposes and objectives of the Legislature. Overlook, supra, 71 N.J. at 462. The legislative intent to establish and control medical waste management facilities for the good of the State—not just individual municipalities—is clear. See N.J.S.A. 13:1E–48.2. Here, the City's land use ordinances and redevelopment plan serve only the interests of the City and not the broader interests of the State.

The Legislature specified its intent to closely monitor the construction and operation of medical waste management facilities across the State. Given the comprehensive nature of the CRMWMA and that the DEP can authorize facility construction in a municipality without that municipality's consent, the Legislature clearly intended to include facility siting within those areas superseded.

Affirmed.

PER CURIAM