



## Court Strikes Down Township Ordinance that Regulated Sale of Pesticides - but Recognized there may be Room for a Similar Ordinance in other Circumstances

Administrative & Municipal Practice Group

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**PRACTICE AREAS**

Zoning & Land Use

In early October, the Michigan Court of Appeals struck down a township zoning ordinance that regulated the sale and distribution of agricultural pesticides and fertilizers. Although the township claimed it could regulate the *location* of such sales, the Court disagreed and held that the ordinance was preempted by the Natural Resources and Environmental Protection Act (NREPA). However, the Court did leave room for a similar ordinance if certain additional actions had been taken. *War-Ag Farms, LLC v Franklin Township*, unpublished opinion per curiam of the Court of Appeals (Docket No. 270242, dec'd 10/7/08).

In *War-Ag*, Franklin Township denied a conditional use permit (CUP) that the plaintiffs sought to sell and distribute seed, pesticides, and fertilizers from a 20 acre parcel of agriculturally-zoned property as part of their 1,500 acre farming operation. The township's denial was based on its ordinance that allowed sales and distribution only on an operating farm when the sales are secondary and incidental to the principal farming operation. Because the Michigan Department of Agriculture (Department) already issued the plaintiffs the requisite licenses to sell seed, pesticide, and fertilizer from the same location as involved in the CUP request, the plaintiffs sued the township. The Court of Appeals held that this ordinance is preempted by NREPA.

As with all preemption issues, the Court relied heavily on the language in the underlying statute, the NREPA. The Court specifically relied on these provisions of the NREPA:

- Unless there is an express exception, a township may not enact an ordinance that conflicts with the NREPA.
  - A township may enact an ordinance that regulates pesticides and fertilizers identical to the NREPA if the township is under contract with the Department to act as its agent or if the Department approves the ordinance in writing.
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- A township may enact an ordinance that sets different standards than in the NREPA if the township can show that (a) unreasonable adverse effects will result on the environment or on the public health; or (b) the use, manufacturing, storage, distribution or sale of pesticides or fertilizers will result in a violation of other existing state or federal laws. However, this ordinance is only effective if the Commission of Agricultural approves that ordinance.

Applying that statutory language, the Court held that the NREPA does allow some regulation of farm chemicals but that the township's ordinance was not acceptable. The Court's rationale is below:

- The Court found that the township's ordinance conflicted with the Department's decision to grant to the plaintiffs a license to sell and distribute pesticides and fertilizers at the very location at issue in the CUP.
- The Court rejected the township's claim that the NREPA allows it to regulate the *location* of businesses distributing pesticides and fertilizers. The Court explained that the nontransferable licenses specifically identified the site where the chemicals may be sold or distributed.
- The Court found that the ordinance set standards above and beyond that which the NREPA set. Because of this, and because the Commission on Agriculture did not approve the ordinance, the ordinance is invalid.

Foster, Swift's team of municipal attorneys are experienced and well-versed in preemption issues in general and the NREPA in particular. If you would like help with such issues, including evaluating an ordinance's preemptive state or drafting an ordinance to avoid a preemption challenge, please contact any member of Foster, Swift's municipal team.