

G. Everett

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

PENNSYLVANIA INDEPENDENT WASTE HAULERS : NO. 02-01,629
ASSOCIATION and COUNTY OF LYCOMING, :
Plaintiffs :

vs. :

COUNTY OF NORTHUMBERLAND, COUNTY OF :
UNION, SNYDER COUNTY SOLID WASTE :
MANAGEMENT AUTHORITY, COUNTY OF :
COLUMBIA, and COUNTY OF MONTOUR, :
Defendants :

: CIVIL ACTION
: DECLARATORY JUDGMENT
:
:
: Motions for Summary Judgment

OPINION AND ORDER

Before the Court are cross-motions for summary judgment, filed by the Pennsylvania Independent Waste Haulers Association (PIWHA) on November 1, 2004, by the Counties of Northumberland, Union, Columbia and Montour also on November 1, 2004, and by the Snyder County Solid Waste Management Authority on October 28, 2004.¹ Argument was heard December 23, 2004.² There are no disputed facts, and all parties agree the matter is ready for final disposition by the Court.

In this Action for Declaratory Judgment, the PIWHA challenges the imposition by the defendant counties³ of what they term an "administrative fee" on each ton of municipal solid waste (MSW) disposed of at the Lycoming County landfill. Each County has a contract with Lycoming County, entered into in or about December 2000, relating to the disposal of municipal waste generated in each of the counties at the landfill owned and operated by

¹ The County of Lycoming was joined as an involuntary Plaintiff and, as such, did not file a motion and did not participate in the argument.

² The Pennsylvania Municipal Authorities Association participated in the briefing and argument as an Amicus Curiae, as authorized by Order of this Court dated September 2, 2004.

³ Although Snyder County has delegated its waste management powers and duties to the Snyder County Solid Waste Management Authority, and thus that body is the defendant in this matter rather than Snyder County, for ease of discussion the Court will refer to all defendants as counties unless the distinction requires separate notation.

Lycoming County.⁴ In each contract, Lycoming County agrees to collect "all state and local Act 101 mandated fees", specified to "presently include" a \$2 per ton Recycling Fee, \$1 per ton Host Municipality Benefit Fee, and \$.25 per ton Environmental Stewardship Fund Fee.⁵ Lycoming County also agrees to collect a "County Administrative Fee" charge per ton of MSW disposed of at the facility, payable to the contracting County and subject to annual adjustments as determined by the contracting County at its sole discretion. By subsequent notices, Lycoming County was directed by Northumberland, Columbia and Montour counties to collect \$3.00 per ton for the administrative fee, and by Union and Snyder counties to collect \$2.00 per ton for the administrative fee. Defendant counties contend this fee is imposed to help fund their recycling programs, that such programs are part of their Waste Management Plan, and that authority for such action is found in Section 303 of Act 101, which grants to counties "the power and duty to implement its approved plan". Snyder County Solid Waste Management Authority contends the fee is imposed to pay for its regulation of the disposal and recycling of MSW, and that authority to impose the fee is found in Section 5607(d)(13) of the Pennsylvania Municipal Authorities Act, which authorizes an Authority to charge a fee to cover its services and administrative costs. PIWHA contends that levying of fees in the field of solid waste management has been preempted by the state legislature.⁶

A review of the Solid Waste Management Act and the Municipal Waste Planning, Recycling and Waste Reduction Act reveals no express declaration of an intention to preempt all other rulemaking. Indeed, the Commonwealth Court has held that, with respect to the location of landfill sites, the SWMA does not preempt local zoning regulations, Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township, 450 A.2d 273 (Pa.

⁴ Each contract notes the requirement that the contracting County adopt and implement a municipal waste management plan under the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), 53 Pa.C.S. Section 4000.101 et seq., and indicates the contract is being entered in furtherance of the County's responsibilities under that Act.

⁵ These fees are to be forwarded by Lycoming County to the Department of Environmental Resources, the host municipality (in this case, Brady Township), and the State Treasury, respectively. The Court notes the \$.25 per ton Environmental Stewardship Fund Fee is actually imposed by Act 68 (the Environmental Stewardship and Watershed Protection Act, 27 Pa.C.S. Section 6101 et seq.), rather than Act 101.

⁶ PIWHA also contends the fee is in effect a tax, imposition of which exceeds the counties' taxing authority. The Court does not reach this issue, in light of its disposition of the matter on the basis of preemption.

Commw. 1982), and Act 101 expressly states the legislature's intention that the zoning powers of municipalities are to remain unaffected for the most part. 53 Pa.C.S. Section 4000.505(c). The Commonwealth Court has held, however, that municipal powers have been preempted by this legislation with respect to regulation of the transportation, processing, treatment and disposal of solid waste, and that, in this area, municipalities have only the powers expressly granted to them by the SWMA and Act 101. Kasper Brothers, Inc. v. Falls Township, 672 A.2d 1386 (Pa. Commw. 1996)(township has no authority to require a waste hauler's per vehicle license because Act 101 provides for no such authority).

In Monroeville v. Chambers Development Corp., 491 A.2d 307, 309 (Pa. Commw. 1985), the Commonwealth Court addressed the issue of whether the state has preempted the regulation of landfill operations through the SWMA by considering whether "the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies". The municipality of Monroeville argued its authority to enact an ordinance regulating the days and hours of landfill operation came from Section 202 of the Act, which provided that each municipality shall be responsible for the collection, transportation, processing and disposal of municipal waste which is generated or present within its boundaries, and that in carrying out its responsibilities, any such municipality may adopt ordinances for the storage and collection of municipal waste. The Commonwealth Court examined this section and found, however, that "disposal" of waste was not included in the meaning of "storage and collection". The Court reasoned that since landfill operation clearly fell within the definition of "disposal", but Section 202 allowed for ordinances addressing only "storage and collection", that section provided no authority to enact the ordinance at issue. The Court then went on to find a preemption of the regulation of landfill operations, stating

Given the legislature's specific, detailed provision that municipalities may regulate the "storage" and "collection" of solid waste, the exclusion of "disposal" from the definition of "storage", and the obvious omission of any other permitted areas, we conclude that the legislature did not intend municipalities to have the power to regulate any aspects of the *operation* of a sanitary landfill.

Id. at 311. The Court thus held the ordinance invalid as preempted by the SWMA.

With respect to the issue at hand, whether the counties may impose their own fee to help fund their recycling programs, examination of Act 101 reveals a plan for recycling programs set out with such detail that the Court cannot help but find "an intention on the part of the legislature that it should not be supplemented by municipal bodies".

Among the legislative findings enumerated in support of Act 101 is, of course, that waste reduction and recycling are preferable to the processing or disposal of municipal waste. 53 Pa.C.S. Section 4000.102(a)(8). Among the purposes of the Act listed are those of (1) encouraging recycling through planning, grants and other incentives, (2) establishing a recycling fee to provide grants for recycling, planning and related purposes, (3) requiring all public agencies of the Commonwealth to aid and promote the development of recycling, and (4) requiring certain municipalities to implement recycling programs. 53 Pa.C.S. Section 4000.102(b)(2), (6), (11) and (12). The Department of Environmental Resources is given general oversight of the municipal waste planning, recycling and waste reduction program established by the Act, and directed to, inter alia, provide technical assistance to municipalities, regulate municipal waste planning, compel compliance with the provisions of the Act, encourage and require counties and other municipalities to carry out their duties under the Act, collect the recycling fee imposed by the Act, administer and distribute moneys in the recycling fund, and promote and emphasize recycling and waste reduction. 53 Pa.C.S. Section 4000.301. Each county is given the duty of insuring the availability of adequate processing and disposal capacity for the waste generated within its boundaries and in connection therewith, is allowed to establish rules addressing the recycling of municipal waste, but only to the extent such do not interfere with the implementation of any recycling program established by a municipality or are necessary to implement a program which a municipality has delegated to the county, as the primary responsibility for such programs is placed on the municipalities other than counties. 53 Pa.C.S. Section 4000.303 and 304. Specifically, Section 304 places on municipalities other than counties the duty of assuring the proper and adequate transportation, collection and storage of municipal waste generated within its boundaries, assuring adequate disposal capacity, and, if required by the Act, adopting and implementing programs for the collection and recycling of municipal waste. To fulfill that duty, municipalities other than counties are allowed to establish

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rules for the recycling, transportation, storage and collection of municipal waste. Municipalities other than counties are also required to report to their respective county each year the weight or volume of materials that were recycled, and the counties are required to report such information to the Department. 53 Pa.C.S. Sections 4000.304 and 303. Section 1501 indicates which municipalities (by population) must implement recycling programs and when, and delineates the elements of such programs, including what materials are to be recycled and how often. Pa.C.S. Section 4000.1501. Section 1502 places restrictions on landfills regarding acceptance for disposal of recyclable materials. Pa.C.S. Section 4000.1502. Commonwealth agencies are directed by Section 1503 to implement recycling programs with respect to agency-generated waste, and by Section 1504 to review their procurement procedures and revise such to encourage the use of recycled materials. 53 Pa.C.S. Sections 4000.1503 and 1504. The Department of General Services is directed by Section 1505 to grant a preference to bidders who meet the minimum qualifications with respect to recycled content, which qualifications that department is directed to establish, and by Section 1511 to purchase only such paper products that are produced from recycled paper. 53 Pa.C.S. Sections 4000.1505 and 1511. Finally, Section 1509 requires the Department of Education to distribute guidelines developed by DER for recycling in schools and colleges, and to encourage their implementation. 53 Pa.C.S. Section 4000.1509.

Act 101 also addresses in similar detail the legislature's plan for the funding of such recycling programs. In Section 701 the legislature imposes a recycling fee of \$2 per ton for all solid waste processed at resource recovery facilities or disposed of at municipal waste landfills, to be paid by the operator of such facilities or landfills. 53 Pa.C.S. Section 4000.701. The fee is to be paid quarterly to DER and interest accrues on untimely payments. 53 Pa.C.S. Sections 4000.702 and 703. Those required to pay the fee are allowed to collect it as a surcharge on any fee schedule established for solid waste processing or disposal, and collectors and transporters of solid waste, who would be paying such a surcharge, are allowed to pass it through as a surcharge on their own fee schedule established for solid waste collection and transportation. 53 Pa.C.S. Section 4000.705. The Act establishes a Recycling Fund in the State Treasury and directs DER to pay all recycling fees received into said fund. 53 Pa.C.S. Section 4000.706. All

moneys placed in the fund are appropriated to DER for allocation as specified in Section 706, including grants to municipalities for the development and implementation of recycling programs, recycling coordinators, market development and waste reduction studies and research. Id. Section 902 sets forth a procedure by which municipalities may apply for such grants and directs DER to award grants to those municipalities which meet the requirements of the Section. 53 Pa.C.S. Section 4000.902. The grant for establishing a municipal recycling program is specified to be 90% of the approved cost of such. Id. Section 903 directs DER to award grants to reimburse counties for authorized costs incurred for the salary and expenses of recycling coordinators, of up to 50% of the approved cost. 53 Pa.C.S. Section 4000.903. Section 904 directs DER to award annual performance grants for municipal recycling programs, upon application from a municipality, but only if the materials collected were actually marketed. 53 Pa.C.S. Section 4000.904. Finally, the Act directs the establishment of a Recycling Fund Advisory Committee, which is to meet at least annually to review the Commonwealth's progress in meeting the goals of the Act, recommend priorities on expenditures from the fund, and advise the secretary on associated activities concerning the administration of the fund. 53 Pa.C.S. Section 4000.706. DER is also directed to submit an annual report on the fund to the General Assembly. Id.

In addition to the detailed plan for the implementation and funding of recycling programs, other references in the Act appear to support the conclusion the legislature did not intend for the recycling fee to be supplemented by other, municipality-imposed fees on waste disposal. In its Municipal Waste Management Plan, each county is directed to describe the estimated costs of operating and maintaining a recycling program, estimated revenue from the sale or use of materials and avoided costs of processing or disposal. 53 Pa.C.S. Section 4000.502(e)(1)(x)(emphasis added). Revenue from other sources, such as the administrative fee imposed here, is not contemplated. Indeed, the Act provides in Section 1712 that it shall be an affirmative defense to any action brought against any municipality alleged to be in violation of Section 1501 (which requires the implementation of recycling programs) that such municipality's failure to comply is because the reasonable and necessary costs of operating the program exceed income from the sale or use of collected material, grant money received and

avoided costs of processing or disposal. 53 Pa.C.S. Section 4000.1712. Moreover, apparently recognizing that the funding scheme originally provided for by the Act might not be enough to accomplish their purpose, in 2002 the legislature added Section 1513, which requires DER to develop a plan to assist municipalities in making recycling programs financially self-sufficient. Specifically, the plan is to include a market development program (to be funded by the recycling fund), address the extent to which municipal recycling programs can be sustained by restructuring the allocation of available recycling grants, include recommendations to county recycling coordinators designed to encourage market development, and identify the specific means, including legislative changes, that DER intends to use to assist municipalities in making their recycling programs self-sufficient. 53 Pa.C.S. Section 4000.1513. The implication is, of course, that no funds other than those provided for by the Act are contemplated.

Having concluded that municipal powers have been preempted by Act 101 with respect to the funding of recycling programs, Defendant Counties may impose the administrative fee at issue only if expressly authorized to do so by the Act. As noted above, Defendant Counties argue authority for such action is found in Section 303 of Act 101, which grants to counties "the power and duty to implement its approved plan". That Section allows implementation of the approved plan "as it relates to the processing and disposal of municipal waste", however, 53 Pa.C.S. Section 4000.303(a)(2), and recycling is not included in the definition of either "processing" or "disposal". 53 Pa.C.S. Section 4000.103. The power and duty of counties as it relates to recycling is specifically addressed in subsection (a)(4) of Section 303, but that subsection is more narrowly drawn, allowing a county to "adopt ordinances, resolutions, regulations and standards for the recycling of municipal waste". The Court cannot find that imposition of an administrative fee on each ton of waste disposed of at the landfill is a regulation or standard for recycling.


Further, in imposing the \$2 per ton recycling fee, the legislature leaves no room for additions or modifications thereto, in contrast with the imposition of the host municipality benefit fee, which gives host municipalities and host counties the option of negotiating the fee with the operator of the landfill. 53 Pa.C.S. Section 4000.1301. The Court believes the

distinction lends support for the Court's conclusion the legislature did not intend for counties or municipalities to impose their own recycling fees on the disposal of solid waste.

On a final note, the Court has considered the Commonwealth Court's conclusion in Northern Tier Solid Waste Authority v. Commonwealth, Department of Revenue, 860 A.2d 1173 (Pa. Commw. 2004), that "the General Assembly intended a uniform system of municipal waste fee imposition." It is acknowledged that the Court there was deciding whether municipal authorities were responsible to pay the waste disposal fee of \$4 per ton imposed by Act 90, 27 Pa.C.S. Section 6301(a), and was not addressing the recycling fee or any municipality-imposed fee. Were this Court to uphold the administrative fees imposed in the instant matter, however, such would not be consistent with the uniform system of municipal waste fee imposition envisioned by the legislature.

Accordingly, inasmuch as imposition of the administrative fees herein has been preempted by Act 101 and related legislation, and such legislation provides no authority for such fees, the Court finds the provisions for such fees in the contracts involved herein to be unenforceable.⁷

ORDER

AND NOW, this  day of February 2005, for the foregoing reasons, PIWHA's Motion for Summary Judgment is hereby GRANTED. The Motions for Summary Judgment filed by the Defendants are hereby DENIED. The contracts between Lycoming County and Defendants which are the subject of the instant litigation are hereby declared to be unenforceable to the extent of the imposition or collection of the administrative fee.

BY THE COURT,


Dudley N. Anderson, Judge

⁷ The Court recognizes the argument of the Snyder County Solid Waste Management Authority that it is authorized to impose fees under the Pennsylvania Municipality Authorities Act, but since the Authority is acting pursuant to the power and duty delegated to it by Snyder County under Act 101, 53 Pa.C.S. Section 4000.303(d), it has only that power which Snyder County would have under the Act.

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