Re: City of Los Angeles, et al. v. County of Kern, et al.

Case No.: 242057

Date: June 9, 2011 Time: 8:30 A.M. Dept. 10 – The Honorable Lloyd L. Hicks

Motion: Plaintiffs' Motions for Preliminary Injunction

Tentative Ruling: To grant Plaintiffs' Motions for a preliminary injunction, and enjoin enforcement of "Measure E" pending resolution of this action.

All objections have been ruled on and will be made available to the parties. For convenience, Plaintiffs collectively will be referred to as "LA." Defendants will be referred to as "Kern."

Brief History

LA used to dump its sewer sludge in the ocean. That was not allowed after about 1987. LA then used a variety of disposal methods, including land fill.

In 1989, California passed Public Resources Code section 40000, et seq., known as the Integrated Waste Management Act ("The Act"). The Act required local governments to divert solid waste out of landfills and to promote recycling, composting, and land disposal.

In 1994, LA City started land application of its treated sewer sludge ("biosolids") on about a 4,700 acre site in Kern County ("Greenacres"). LA County began land application on about 4000 acres in Kern County owned by Plaintiff Magan.

In 1998, Kern began regulating biosolids. In 1999, Kern passed an ordinance phasing out over three years the application of (EPA Regulation defined) Class B biosolids, & allowing only Class A.

In response, LA spent many millions of dollars upgrading their treatment plants to meet the "A" standard. LA City also purchased the Greenacres site, and improved it.

Both sites operate under the Federal Clean Water Act and its regulations, and California Regional Water Quality Control Board orders and permits.

In 2006, Kern voters passed an initiative, "Measure E," which took the place of the 1999 ordinance, and completely banned the land application of biosolids in the area under the jurisdiction of the County of Kern.

LA filed an action in Federal District Court seeking to invalidate Measure E. LA sought and obtained a preliminary injunction barring enforcement of Measure E pending that litigation.

LA was successful in obtaining a ruling on summary judgment invalidating Measure E. However, the Ninth Circuit ruled that the federal court should have declined to exercise its jurisdiction to hear the case. The District Court then declined to keep jurisdiction of only the state law claims, and dismissed the entire case.

LA has now refiled essentially the same complaint in state court, and now seeks to stop Kern from enforcing Measure E pending determination of the issues in this action.

Criteria for a Preliminary Injunction

The purpose of a preliminary injunction is to preserve the status quo pending a resolution of the claims of the parties. This type of injunction is statutorily permitted. (Code of Civil Procedure section 526(a)(1).) The court is to consider two interrelated factors: The applicants' likelihood of success on the merits, and the comparative harm to the parties. The more likely an applicant is to prevail, the less severe harm they must allege, particularly where the goal is to maintain, rather than alter, the status quo. The court must also consider the public interest if an injunction is requested against a public entity.

The Merits

A. Is "E" a valid exercise of the Police Power?

Measure E's stated purpose is to protect agricultural land and products, and the health of Kern's citizens from the unknown potential harm from biosolids. It cites the risk of airborne particulates, odor, and insects.

Legislation is a valid exercise of the police power if it is reasonably related to the general welfare, with the caveat (Associated Home Builders v. Livermore (1976) 18 Cal. 3d 582) that if the enactment has an effect beyond the territory of the enacting local government, the general welfare to be considered is that of the entire affected area and not just that of the local jurisdiction.

The enactors must identify, consider, and weigh any competing interests affected. The question for a reviewing court is whether, considering the extraterritorial effect of the ordinance, it represents a reasonable accommodation of any competing interests.

The record is devoid of any consideration of any competing interests, and of any attempt to accommodate any competing interests. Since "E" was enacted by initiative, there is no legislative history to look at. We are left with campaign material, which, as a generality, seems to be an indication the proponents were seeking to prevent big LA from taking advantage of little Kern by exporting its foul products to Kern and dumping them in Kern.

The competing interests here are Kern's need to protect its citizens from the unknown potential harm from biosolids, and their alleged effect on the reputation of Kern's agricultural products, versus LA's need to dispose of biosolids in an environmentally appropriate and least costly manner.

There is no law with statewide application which prohibits the land application of biosolids.

There are federal and state laws and regulations which contemplate the propriety of the land application of biosolids, and which regulate that activity.

California does not consist of 58 separate fiefdoms, or of three or four separate regions, all insular from each other. As noted by the Court of Appeal in County Sanitation District No. 2 of Los Angeles County, et al. v. County of Kern (2005) 127 Cal. App. 4th 1544, in the context of effects to be considered in an EIR, localities cannot retreat into isolationism and ignore this fact. We all live here, and what any state actor does elsewhere may affect us all.

LA cannot engage in "source reduction." Its population is increasing. It has to do something with its biosolids, and whatever it does, and wherever it does it, someone will be affected.

A reasonable accommodation would seem to be the 1999 ordinance, restricting the land application to "A" grade biosolids.

"E" represents no accommodation. A complete ban precludes an "accommodation."

The court thus finds that there is a very reasonable probability that LA will prevail on the theory that "E" is invalid as beyond the scope of an allowed police power measure.

B. Is "E" invalid because it conflicts with state law?

The declared policy of the Act is to promote source reduction, recycling, and re-use of solids to reduce the amount going into landfills.

Kern argues that the Act only "promotes" but does not require this. However, as stated by the Court of Appeal in County Sanitation District No. 2, supra, the Act ". . .requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. . ." and "this legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it – as a fertilizer applied to agricultural . . . land."

The Act allows local regulation not in conflict with the policies of the Act, but a complete ban is not a permitted regulation.

"E" takes away as to Kern County a method of disposing of biosolids that state law specifically requires be promoted by local governments.

The court finds that it is reasonably probable that LA will prevail on the theory that "E" is invalid as contrary to state law.

C. Other Contentions

In light of the above findings, the court need not address the federal and state commerce clause issues.

Balance of Hardships

LA presents declarations from qualified individuals with first hand knowledge of the sites and, particularly as to Greenacres, who have studied the test reports relating to the subject biosolids.

These experts opine that continued biosolid applications will not effect the groundwater; will not effect the water banks nearby; that metals will not leach down anywhere near the water level. They opine that the net effect of the application is a benefit to Kern, in that it improves the soil and allows marginal land to grow crops.

LA presents declarations from qualified persons with respect to the costs incurred to date, and additional significant costs, and expenses which would be incurred in effectuating alternatives to continued Kern application, and the adverse environmental effects of some of these.

Other Plaintiffs present declarations regarding the affect on their business and employees' jobs were land application to be stopped by Kern.

LA also discusses the time which would be required to set up and start operations with alternatives, specifically composting at Liberty.

Kern presents a declaration, without reference to the subject sites and conditions, to the effect that there is some literature in the United States (without differentiating between "A" and "B" classes) indicating there could possibly be some as yet unknown risks which biosolids could pose.

Kern also now claims there are composting businesses in Kern with permits sufficient to handle the quantity of biosolids being applied by LA. However, there is no evidence these sites would take it all, or of how long a process would be required to do so (LA says at least 18 months).

Kern presents declarations from water bank operators, with no admissible information other than that the banks are in the area of Greenacres.

Kern presents no evidence of any actual harm to the environment: to the air, water, or soil, as a result of LA's continued application of biosolids.

Kern does present individual complaints of adjacent (for the most part) employees to the effect that the two farms smell bad, and that there are many flies in their area adjacent to the farms.

Per other declarations, there are also dairies in the area. Dairies are famous for the pervasive odor of urine and manure, and for flies. The same goes, to a lesser extent, for cattle ranches and horse ranches.

The declarants are careful to say the smell is "different" from dairy smell (but do not compare on an offensiveness scale).

It cannot be ascertained from the declarations the extent to which the flies result from the application of biosolids, or from other uses, nor the extent to which there may also be smell from dairies, the cattle ranch, and the horse operation.

There is some degree of smell inherent in agricultural operations. Dairies smell; feedlots smell. Dairies are frequently scraped, and the untreated manure applied to other ag land as fertilizer, causing that land to smell.

Dairy pond water is also frequently used for irrigation, also causing smell from the watered land.

There are fly and odor control requirements in LA's Water Quality Permit, with only one fly violation noted years ago.

The legislature has long recognized that a problem, consisting mainly of many nuisance suits, was being caused by residential encroachment into ag areas, particularly dairies (e.g. Chino).

This resulted in the legislature enacting, in 1981, the "right to farm" law (Civil Code section 3481.5), under which any farm (or processing plant, CC section 3482.6) legally in operation for three years could not be declared a nuisance due to a change in the area.

These complaints represent something those of us who live in agricultural areas know we simply have to put up with as part of our local ag based economy.

The declarants here report an annoyance to their olfactory sensibilities (with apologies to Justice Richli for stealing his phrase) in the nature of a private nuisance. This does not represent a health and safety issue.

LA seeks to preserve the long time status quo. The private nuisance aspects are limited to a few individuals working immediately adjacent to the property. Kern presents no evidence whatsoever of any health and safety or environmental actual harm.

LA presents evidence of substantial monetary harm and the inability to quickly adapt to alternatives. Individual Plaintiffs present evidence of irreparable harm consisting of job losses.

There is no public policy reason to deny the injunction, and a good public policy reason to grant it.

The court finds that there is no evidence at all that Kern will suffer any harm or injury by the grant of the injunction, and that there is a substantial likelihood of significant, and some irreparable, harm to Plaintiffs if the injunction is denied.

If no one requests oral argument, Plaintiffs must submit an order in compliance with California Rules of Court, rule 3.1312(a).