

OPINION NO. 85-101

Syllabus:

Pursuant to R.C. 921.23(C), a municipality is without authority to enact ordinances imposing registration, notice or other requirements on persons who have been licensed as pesticide applicators under R.C. 921.06, R.C. 921.07, R.C. 921.08, or R.C. 921.12.

To: Dale L. Locker, Director, Department of Agriculture, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1985

I have before me your opinion request in which you ask whether R.C. 921.23(C) preempts a municipality from imposing registration, notice, or other requirements on commercial pesticide applicators operating within the municipality.

Before addressing your precise question, I find it necessary to set forth the statutory scheme governing pesticide applicators. R.C. Chapter 921 sets forth various powers and duties imposed upon the Director of Agriculture with respect to pesticides and their use. Pursuant to R.C. 921.16:

(A) The director of agriculture shall adopt, pursuant to Chapter 119. of the Revised Code, such rules as he determines necessary for the effective enforcement and administration of sections 921.01 to 921.28 of the Revised Code....Such rules may relate and not be limited to the time, place, manner, and methods of application, materials, and amounts and concentrations of application of pesticides, may restrict or prohibit the use of pesticides in designated areas during specified periods of time, and shall encompass all reasonable factors that the director determines necessary to minimize or prevent damage to the environment.

(B) The director shall adopt, pursuant to Chapter 119. of the Revised Code, rules which set forth the conditions under which he:

(1) Requires that notice or posting be given of a proposed application of a pesticide;

(2) Requires a permit to apply a restricted use pesticide....

(C) The director may adopt, pursuant to Chapter 119. of the Revised Code, rules which set forth the conditions under which he will:

...
(3) Prescribe other necessary registration information.

(D) The director may designate, pursuant to Chapter 119. of the Revised Code, in addition to those "restricted uses" so classified by the administrator, "restricted uses" of pesticides for the state or for designated areas within the state, and if he considers it necessary, to further restrict such use.

(E) The director shall prescribe standards for the certification of applicators of pesticides consistent with those prescribed by the Federal Insecticide, Fungicide and Rodenticide Act or rules adopted thereunder. Such standards may relate to the use and handling of pesticides, or to the use and handling of the pesticide or class of pesticide uses

covered by the individual's certification, and shall be relative to the hazards involved, and the use experience.

The director shall take into consideration standards of the United States environmental protection agency.

(F) Rules adopted under this chapter shall not permit any pesticide use which is prohibited by the federal act and rules or orders issued thereunder.

(G) Rules adopted under this chapter as to certified applicators of "restricted use pesticides" as designated under the federal act, and rules adopted as to experimental use permits as authorized by the federal act, shall not be inconsistent with the requirements of the federal act and rules promulgated thereunder. (Emphasis added.)

See generally 2 Ohio Admin. Code Chapter 901:5-11.

R.C. Chapter 921 also sets forth specific licensing procedures. R.C. 921.06 prohibits any person from acting or holding himself out to the public as a custom applicator without having obtained a custom applicator license issued by the Director of Agriculture. Custom applicators, upon obtaining valid licenses under R.C. 921.06, are "certified applicators for the purpose of applying restricted use pesticides pertinent to their respective categories." R.C. 921.06(C). See R.C. 921.01(J) (defining "certified applicator" as "an individual who is certified by the director to use or to supervise the use of restricted use pesticides in categories specified in the certification, or for specific uses named in the permit"). See generally 7 U.S.C. §136(b) (federal or state certification of pesticide applicators). R.C. 921.07 states, in pertinent part:

(A) No person other than a licensed custom applicator shall act as a custom operator without having a custom operator license issued by the director of agriculture....

....
(C)...Custom operators, upon obtaining a valid license, under this section are certified applicators for the purpose of applying or supervising the use of restricted use pesticides pertinent to their respective categories.

Similar licensing provisions are set forth in R.C. 921.08 and R.C. 921.12 for public operators and limited commercial applicators, respectively.

I turn now to R.C. 921.23(C), which states:

After March 1, 1978, no person who is licensed under section 921.06, 921.07, 921.08, or 921.12 of the Revised Code shall be required to obtain a license or permit to operate in such capacity by any local ordinance, or to meet any other condition except as provided by statute or rule of the United States or of this state.

Pursuant to this statute, once a person has been licensed under R.C. 921.06, .07, .08, or .12, he is authorized to operate in the capacity in which he has been licensed. Further, no person who has been licensed under any of the four statutes set forth above "shall be required to obtain a license or permit to

operate in such capacity by any local ordinance, or to meet any other condition except as provided by statute or rule of the United States or of this state." The meaning of R.C. 921.23(C) is plain and unambiguous. Once a person is licensed by the Director of Agriculture as a custom applicator, custom operator, public operator, or limited commercial applicator, he may operate in such capacity throughout the state and no additional license or permit may be required by any local ordinance. Further, such licensee may not be required to meet "any other condition except as provided by statute or rule of the United States or of this state." R.C. 921.23(C). Thus, R.C. 921.23(C) prohibits a municipality from enacting ordinances imposing registration, notice or other requirements on persons licensed pursuant to R.C. 921.06, R.C. 921.07, R.C. 921.08, or R.C. 921.12.

Although R.C. 921.23(C) clearly prohibits a municipality from imposing any requirements on pesticide applicators, I must determine whether a municipality may, pursuant to its home rule powers, supersede the provisions of R.C. 921.23(C) and enact requirements regulating pesticide applicators. Pursuant to Ohio Const. art. XVIII, §3, "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." (Emphasis added.) In Weir v. Rimmelin, 15 Ohio St. 3d 55, 472 N.E.2d 341 (1984), the court explained the authority conferred upon municipalities by this constitutional provision, stating:

The Home Rule Amendment to the Ohio Constitution confers a significantly high degree of sovereignty upon municipalities....However, the amendment does not provide cities the absolute power of local self-government....Where the General Assembly has enacted legislation pursuant to the state's police power which governs a statewide concern, the statute takes precedence over ordinances enacted under the home rule authority of municipalities. (Citations omitted.)

15 Ohio St. 3d at 56, 472 N.E.2d at 343. See 1985 Op. Att'y Gen. No. 85-034 at 2-119 ("in matters of local self-government, chartered municipalities may vary the provisions of state statutes by charter or by legislative enactment; however, police, sanitary, and similar regulations must be consistent with state laws"; nonchartered municipalities have this same power, but may not vary state statutes with regard to procedural and organizational matters of local self-government). Thus, if R.C. 921.23(C) is a statute which has been enacted pursuant to the state's police power, a municipality may not enact a provision in conflict with R.C. 921.23(C). See generally State ex rel. Strain v. Houston, 138 Ohio St. 203, 211, 34 N.E.2d 219, 223 (1941) (characterizing police powers as "laws to safeguard the peace, health, morals, and safety, and to protect the property of the people of the state").

R.C. 921.23(C) concerns the authority of a person licensed by the state with regard to the application of pesticides. R.C. 921.23 was enacted in 1975-1976 Ohio Laws, Part II, 3470 (Am. H.B. 1015, eff. Sept. 1, 1976). The Legislative Service Commission analysis of Am. H.B. 1015 (as reported by S. Agriculture & Conservation) provides a statement of the purpose and background of the bill as follows:

The purpose of the bill is to enable the state to continue state government control of the use of pesticides in Ohio, rather than lose the power to the federal government after October 21, 1977.

On October 21, 1972 the Federal Environmental Pesticide Control Act of 1972 was signed, amending the FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act). By the terms of the 1972 amendments, the federal government has assumed jurisdiction over the sale and use of pesticides and charged the Administrator of the federal EPA (the Environmental Protection Agency) with the classification of all pesticides as either "general use" pesticides or "restricted use" pesticides. General use pesticides may be used, by anyone, but after October 21, 1977, restricted use pesticides may be used only by or under the supervision of a person who has been properly certified to use them....

Although Congress authorized the federal EPA Administrator to prescribe standards for the certification of applicators of restricted use pesticides, it did not contemplate federal certification of pesticide applicators except where a state fails to do so. Thus the act allows the Governor of any state that desires to certify pesticide applicators to submit a state plan for the purpose. The plan must designate a state agency to administer the plan throughout the state, contain satisfactory assurances that the agency has or will have the legal authority and qualified personnel necessary to implement it, give satisfactory assurances that the state will devote adequate funds to the administration of the plan, submit such reports as the Administrator requires, and give satisfactory assurances that state standards for certification will conform with those prescribed by the Administrator. To be certified, an individual must be determined to be "competent with respect to the use and handling" of pesticides, or the pesticide or class of pesticides covered by such individual's certification.

The federal act allows a state desiring to certify pesticide applicators until October 21, 1976 to submit its plan to the Administrator. Amended House Bill 1015 establishes the legislative basis upon which [the] Governor will submit the state's plan to the Administrator.

See generally 7 U.S.C. §136(b) (providing for federal or state certification of applicators of pesticides); 7 U.S.C. §136v (authority of states with regard to regulation of the sale or use of federally registered pesticides or devices, labeling or packaging, and registration for additional uses of federally registered pesticides). Thus, the legislation enacted in Am. H.B. 1015, including R.C. 921.23, is the state's plan for participation in the regulation of pesticides and pesticide use in accordance with the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter FIFRA).

In National Agricultural Chemicals Association v. Rominger, 500 F. Supp. 465 (E.D. Cal. 1980), plaintiffs challenged the constitutionality of California's pesticide regulations, asserting, in part, that California's registration procedure concerning restricted-use pesticides requires additional data beyond that required by the Environmental Protection Agency

under FIFRA, and that FIFRA preempts all state registration procedures. The court found no federal preemption of the state legislation, and stated: "the legislation in question here comes within the historic police powers of the state. The major goal of FIFRA is to protect the consumer by keeping unhealthful or unsafe commodities off the market and preventing deception of consumers" (citation omitted). 500 F. Supp. at 470.

I am unaware of any Ohio case law discussing the nature of pesticide legislation in this state. It is evident, however, that the General Assembly enacted such legislation to ensure that regulation of pesticide applicators would remain with the state and to protect the health and safety of the public and the environment statewide. See generally R.C. 921.05(B) (authorizing Director to suspend registration of a pesticide when he determines "that there is an imminent hazard to the public or environment"); R.C. 921.15 (prohibiting transportation, storage, disposal, display, or distribution of any pesticide or pesticide container "in such a manner as to have unreasonable adverse effects on the environment"); R.C. 921.16(H) (authorizing Director to declare a pest various forms of plant or animal life which are "injurious to health or the environment"). Like the pesticide legislation at issue in Rominger, R.C. 921.23 was, therefore, enacted under the police power of the state. Cf. Clermont Environmental Reclamation Co. v. Wiederhold, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982) (R.C. 3734.05(D)(3), prohibiting political subdivisions from requiring additional zoning or other approval for the construction and operation of a hazardous waste facility authorized by a hazardous waste facility permit issued under R.C. Chapter 3734, was enacted for the protection of the environment of the state and for the health and safety of the state's citizens as a reasonable exercise of the state's general police power); City of Canton v. Whitman, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975), appeal dismissed 425 U.S. 956 (1976) (syllabus, paragraph one) ("[p]revention and control of dental caries, a common disease of mankind, is a proper subject, in relation to public health, for legislation enacted pursuant to the police power vested in the state, as well as in municipalities, by the general laws and Constitution of the state of Ohio"); City of Bucyrus v. State Department of Health, 120 Ohio St. 426, 166 N.E. 370 (1929) (sanitary regulations relate to the public health and are within the police power of the state).

Concerning the powers of municipalities to legislate in matters related to police powers, it is well established that:

1. Municipalities in Ohio are authorized to adopt local police, sanitary and other similar regulations by virtue of Section 3, Article XVIII, of the Ohio Constitution, and derive no authority from, and are subject to no limitations of, the General Assembly, except that such ordinances shall not be in conflict with general laws.
2. In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus, paragraphs one and two). See Weir v. Rimmelin; Clermont Environmental Reclamation Co. v. Wiederhold;

City of Canton v. Whitman (syllabus, paragraph two). Since R.C. 921.23(C) is a statute of statewide concern and was enacted pursuant to the state's police power, a municipality is without authority to enact any ordinance which would conflict with the provisions of that statute. As set forth above, pursuant to R.C. 921.23(C), any person who is licensed under R.C. Chapter 921 as a custom applicator, custom operator, public operator, or limited commercial applicator may operate in such capacity throughout the state and no additional license or permit may be required by any local ordinance. Pursuant to R.C. 921.23(C), such licensees may not be required to meet "any other condition except as provided by statute or rule of the United States or of this state." Thus, any additional restriction imposed by a municipality on a pesticide applicator would be in obvious conflict with R.C. 921.23(C).

In Clermont Environmental Reclamation Co. v. Wiederhold, the court considered the impact of a statute similar to R.C. 921.23(C) upon a municipality's home rule powers. The statute considered in Wiederhold, R.C. 3734.05(D)(3), stated:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or regulation that in any way alters, impairs, or limits the authority granted in the permit issued by the board.

1979-1980 Ohio Laws, Part I, 877 (Am. S.B. 269, eff. Oct. 9, 1980). The court found the safe and proper operation of hazardous waste disposal facilities within the state to be a matter of statewide concern and R.C. 3734.05(D)(3) to be a general law enacted in furtherance of the police power of the state. The court concluded that R.C. 3734.05(D)(3) superseded any conflicting municipal ordinance and, read in pari materia with the other provisions of R.C. Chapter 3734 dealing with the disposal of hazardous wastes, prohibited political subdivisions from regulating hazardous waste disposal facilities.

Like the statute at issue in Wiederhold, R.C. 921.23(C) expressly prohibits a municipality from imposing any additional licensing or other conditions upon persons licensed under state statute. It is clear, therefore, that R.C. 921.23(C) prohibits a municipality from enacting any ordinance which would impose registration, notice or other conditions upon persons licensed under R.C. Chapter 921.

It is, therefore, my opinion, and you are advised, that pursuant to R.C. 921.23(C), a municipality is without authority to enact ordinances imposing registration, notice or other requirements on persons who have been licensed as pesticide applicators under R.C. 921.06, R.C. 921.07, R.C. 921.08, or R.C. 921.12.