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Township Makes “Moo”ves Against Dairy: The Nebraska Supreme Court Recognizes Local Government Regulation of Agriculture in *Butler County Dairy, L.L.C. v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013)

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Note*

Township Makes “Moo”ves Against Dairy: The Nebraska Supreme Court Recognizes Local Government Regulation of Agriculture in *Butler County Dairy, L.L.C. v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013)

TABLE OF CONTENTS

I. Introduction	197
II. Background	198
A. The Authority of Townships to Legislate	198
B. Limitations on Local Authority	202
1. Dillon’s Rule	202
2. Preemption	205
III. <i>Butler County Dairy, L.L.C. v. Butler County</i>	206
A. Facts and Procedural Posture	206
B. The Nebraska Supreme Court Opinion	209
1. The Authority to Regulate Liquid Livestock Waste Pipelines and Large Livestock Confinement Facilities	209
2. Preemption Issues	212
IV. Analysis	214
A. Placing <i>Butler County Dairy</i> in Context with Other Courts’ Decisions	215
B. The Consequences of Nebraska’s Differing Stance ..	218

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1. The Resultant Multiple Layers of Government .	218
a. Recognizing Some Benefits of Local Government Control	219
b. The Resultant Multiple Layers in the Context of <i>Butler County Dairy</i>	220
2. Addressing Century-Old Power Often Is Clouded by Local Politics	222
C. The Court's Implicit Call for the Nebraska Legislature to Step In	223
V. Conclusion	224

I. INTRODUCTION

Agriculture is a critical industry to Nebraska's economy, generating over \$21 billion in cash receipts and \$6.9 billion in agricultural exports in 2011.¹ Indeed, despite the many changes in agriculture over the years, agriculture is as prevalent in our modern society as ever before. For example, some people have experienced large hog confinements setting up shop in areas near their homes.² Others express concern for the source of their food and sustainability of agriculture, demonstrated in recent advertising campaigns by the restaurant chain Chipotle.³ Many more remember the contributions of Norman Borlaug in developing a disease-resistant, high-yield strain of wheat that saved hundreds of millions of people worldwide from starvation—a contribution that continues to influence crop genetics today.⁴ No matter the specific issue, concerns and opinions about agriculture are part of the everyday public discourse in Nebraska agriculture.

The Nebraska Supreme Court contributed to this discourse with its decision in *Butler County Dairy, L.L.C. v. Butler County*.⁵ The court addressed the issue of whether a local township possessed the authority to enact environmental ordinances, including a ban on pipelines carrying liquid livestock waste, and whether state law preempted

1. NEB. DEPT OF AGRIC. ET AL., NEBRASKA AGRICULTURE FACT CARD (2013), <http://www.nda.nebraska.gov/facts.pdf>, archived at <http://perma.unl.edu/CN8K-B9UT>.

2. See generally CAROLYN JOHNSEN, RAISING A STINK: THE STRUGGLE OVER FACTORY HOG FARMS IN NEBRASKA (Charles A. Francis et al. eds., 2003) (describing the growth of factory hog farming in Nebraska and the interplay between farmers, neighbors, pork producers, politicians, environmentalists, and agribusinesses in navigating this industry).

3. Elizabeth Weiss, *What Does "The Scarecrow" Tell Us About Chipotle?*, NEW YORKER (Sept. 23, 2013), archived at <http://perma.unl.edu/N9BY-F9DV>.

4. See generally LEON HESSER, THE MAN WHO FED THE WORLD (2006). Known as the Father of the Green Revolution, Dr. Borlaug was the only person during the twentieth century to be "awarded the Nobel Peace Prize for work in agriculture and food." *Id.* at ix.

5. 285 Neb. 408, 827 N.W.2d 267 (2013).

those ordinances.⁶ The court found that the township did indeed possess the requisite statutory authority⁷ and state law did not preempt the township's regulations.⁸ With the modernization of agriculture bringing new environmental challenges in Nebraska, courts are sure to face similar issues as in *Butler County Dairy* as to the role of local governments in regulating their agricultural neighbors. In fact, while most environmental regulation of agriculture has been in the hands of state and federal governments, the recent trend has been for local governments to provide their own regulations,⁹ as did the township in *Butler County Dairy*. The legal and practical ramifications of the court's decision to uphold this local authority are detailed throughout this Note.

This Note focuses on the legal doctrine known as Dillon's Rule and whether the Nebraska Supreme Court should have more fully considered Dillon's Rule in its interpretation of local government authority. Part II of this Note provides a legal background for local government law, particularly in the area of townships, and describes the legal doctrines of Dillon's Rule and preemption. Part III continues with a summary of the facts and the court's holding in *Butler County Dairy*. Part IV considers the legal developments in other jurisdictions and discusses the consequences of the court's refusal to apply a Dillon's Rule framework. Part IV concludes with a discussion of the court's implicit call to the Nebraska Legislature for statutory reform.

II. BACKGROUND

A. The Authority of Townships to Legislate

In order to understand whether a township or any other local government body has the authority to legislate, one must first have a basic knowledge of local government structure in Nebraska. Nebraska is divided into ninety-three counties¹⁰ which contain numerous villages and cities.¹¹

6. *Id.* at 410–11, 827 N.W.2d at 274.

7. *Id.* at 429, 827 N.W.2d at 285.

8. *Id.* at 437, 827 N.W.2d at 290–91.

9. Christopher A. Novak, *Agriculture's New Environmental Battleground: The Preemption of County Livestock Regulations*, 5 *DRAKE J. AGRIC. L.* 429, 430–31 (2000). See also Thomas R. Head, III, *Local Regulation of Animal Feeding Operations: Concerns, Limits, and Options for Southeastern States*, 6 *ENVTL. LAW* 503, 537 (2000) (explaining that “[n]otwithstanding the various federal and state regulation of certain operations, many local governments increasingly have felt the need or political pressure to impose local requirements or controls” and have done so “through a variety of mechanisms”).

10. *NEB. REV. STAT. §§ 22-101 to -193* (Reissue 2012).

11. See generally *All Nebraska Local, City, County Websites*, NEBRASKA.GOV, <http://www.nebraska.gov/community/local-city-county-websites.html> (last visited Oct. 19, 2013), archived at <http://perma.unl.edu/3TUG-4PE7>.

A county can be further broken down into either a commissioner system or township system.¹² Specifically, the law in Nebraska provides that:

The powers of the county as a body corporate or politic, shall be exercised by a county board, to wit: [i]n counties under township organization by the board of supervisors, which shall be composed of the town and such other supervisors as are or may be elected pursuant to law; in counties not under township organization by the board of county commissioners.¹³

The township finds its origins in the Anglo-Saxon era of England, in a time when a community of people lived on a homestead, a farm, or a village, and surrounded the area of land with an enclosure to form a township.¹⁴ Early American colonists brought this form of local government with them to the New World.¹⁵ Since their implementation during the early colonial period and statehood, townships have essentially remained unchanged and have only undergone change when adaptation was needed.¹⁶ In essence, a township “is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature.”¹⁷

County citizens can exercise their voting rights to implement township organization. Nebraska law provides that in a county’s general election, “the qualified voters in any county may vote for or against township organization in such county.”¹⁸ Once this system is adopted, the county attorney, clerk, and treasurer select seven supervisors.¹⁹ This board of supervisors has multiple enumerated powers, including the power to implement necessary bylaws and to raise “money by taxation . . . for the prosecution or defense of suits by or against the town.”²⁰ Indeed, “[t]he purely local affairs” are entrusted to the township supervisors.²¹

The distinguishing feature of a township is its “more popular and democratic form of government,” with “the idea of local self government being the essence of the township system.”²² Indeed, a township

12. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 416, 827 N.W.2d 267, 277–78 (2013) (citing *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895)).

13. NEB. REV. STAT. § 23-103 (Reissue 2012).

14. 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 1:32 (3d ed. 2010).

15. *Id.*

16. *State ex rel. Newman v. Columbus Twp. Bd.*, 15 Neb. App. 656, 660, 735 N.W.2d 399, 404 (Neb. Ct. App. 2007) (citing 87 C.J.S. *Towns* § 4 (2000)).

17. *State v. Bone Creek Twp., Butler Cnty.*, 109 Neb. 202, 204, 190 N.W. 586, 587 (1922).

18. NEB. REV. STAT. § 23-201 (Reissue 2012).

19. *Id.* § 23-207.

20. *Id.* § 23-224.

21. *Van Horn v. State*, 46 Neb. 62, 71, 64 N.W. 365, 367 (1895).

22. *Wilson v. Ulysses Twp. of Butler Cnty.*, 72 Neb. 807, 811, 101 N.W. 986, 988 (1904).

“is one of the rare examples in Nebraska of direct democracy.”²³ This idea of self-government inherent in a township is the major difference between a township and a county.²⁴

In addition to knowing what a township is, one must also understand the sources of a township’s regulatory authority. This requires a top-down review of government structure. Whenever a unit of government chooses to act on an issue, it must first have the authority to do so.²⁵ The federal government derives its power from the Constitution of the United States, including the Supremacy Clause,²⁶ which provides that federal law reigns supreme over state law.²⁷ Therefore, “state laws which ‘interfere with, or are contrary to the laws of Congress’ are unconstitutional.”²⁸ Certain powers, however, are reserved for the states,²⁹ including the inherent authority under the police powers “to protect the health, safety and welfare” of their citizens.³⁰ States, on the other hand, exercise complete dominion over their smaller governmental counterparts. As a result, local governments can only derive their power “from either the state constitution, their local charter, or, most commonly, state legislation.”³¹

For example, Nebraska operates in part under a doctrine known as “home rule.” The first home-rule charter appeared in Missouri’s constitution in 1875.³² Nebraska adopted its own constitutional provi-

23. *State ex rel. Newman v. Columbus Twp. Bd.*, 15 Neb. App. 656, 660, 735 N.W.2d 399, 404 (Neb. Ct. App. 2007).

24. *Wilson*, 72 Neb. at 810–11, 101 N.W. at 988.

25. Charles W. Abdalla & John C. Becker, *Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game?*, 3 *DRAKE J. AGRIC. L.* 7, 18 (1998).

26. Head, *supra* note 9, at 539.

27. U.S. CONST. art. VI, cl. 2. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” *Id.*

28. Head, *supra* note 9, at 539 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

29. See U.S. CONST. amend. X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.*

30. Abdalla & Becker, *supra* note 25, at 14.

31. JESSE J. RICHARDSON, JR. ET AL, IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON’S RULE ON GROWTH MANAGEMENT 3 (2003), <http://www.brookings.edu/es/urban/publications/dillonsrule.pdf>, archived at <http://perma.unl.edu/C5FK-4JGC>. Local government units often are called “creatures” of the state. *Id.*

32. 2A MCQUILLIN, *supra* note 14, § 9:8 (2006). Although this case does not focus on home rule authority, the reader should know that home rule is thought of as a reaction to Dillon’s Rule, and thus the two doctrines often are considered counterparts. See Charles J. Bussell, *As Montville, Maine Goes, So Goes Wolcott, Vermont? A Primer on the Local Regulation of Genetically Modified Crops*, 43 *SUFF. U. L. REV.* 727, 735 (2010).

sion in 1912.³³ Article XI, section 2 of the Nebraska Constitution provides, in relevant part, “[a]ny city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, *consistent with and subject to* the constitution and laws of this state”³⁴ The benefit of home rule authority is that it gives local governments the power to govern their “local” affairs and allows them to “avoid interference from the state.”³⁵

Because the Nebraska Constitution only provides for a home rule charter for cities comprised of more than 5,000 people and lacks any express provision applying a home rule charter to townships,³⁶ townships are vested only with the power expressly given to them by statute.³⁷ Further, because townships are political subdivisions of the state government, their “right to act is dependent upon a grant from the state.”³⁸

Nebraska statutory law provides that “[e]very town shall have [the] corporate capacity to exercise the powers granted thereto, or necessarily implied, and no others.”³⁹ An early Nebraska Supreme Court decision mirrored this strict limitation of power when the court articulated, “[t]he powers with which [townships] are entrusted are powers segregated and carved out from the mass of the sovereignty of the state.”⁴⁰ A state sometimes gives a township these powers as a matter of convenience because a township is in a better position to perform particular functions.⁴¹ A township’s purpose “is to carry into effect with ease and facility certain powers and functions which are governmental in their nature, and which may be more readily and conveniently carried on by subdivision of the territory of the state into smaller areas.”⁴²

33. NEB. CONST. of 1875, art. XI, § 2 (1912).

34. *Id.* (emphasis added).

35. RICHARDSON ET AL., *supra* note 31, at 10–11.

36. *See generally* NEB. CONST.

37. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 418, 827 N.W.2d 267, 278 (2013). *See discussion infra* subsection II.B.1.

38. 1 McQUILLIN, *supra* note 14, § 1:33.

39. NEB. REV. STAT. § 23-223 (Reissue 2012). A township is sometimes called a town, so the use of the word “town” in this statute is meant to refer to a “township.” *State ex rel. Newman v. Columbus Twp. Bd.*, 15 Neb. App. 656, 660, 735 N.W.2d 399, 404 (Neb. Ct. App. 2007).

40. *Wilson v. Ulysses Twp. of Butler Cnty.*, 72 Neb. 807, 812, 101 N.W. 986, 988 (1904).

41. *Id.* at 812, 101 N.W. at 988 (holding that townships “are subdivisions of the state government upon which, for convenience, certain powers have been conferred, strictly limited, however, to the exercise of certain functions more easily carried out by subdivision”).

42. *Id.*

B. Limitations on Local Authority

A finding that a township or other municipal government entity has regulatory authority to enact a regulation does not end the inquiry. The next question is whether either Dillon's Rule⁴³ or preemption by state law⁴⁴ limits that regulation or ordinance. If the regulation is restricted by either of these two methods, it is invalid.

1. Dillon's Rule

Because Nebraska townships do not operate under home rule authority,⁴⁵ and because their power is derived from the state, their grants of authority often are construed under a doctrine known as Dillon's Rule. In the late 19th and early 20th centuries, John Dillon, a federal judge, advanced his theory that a local government is a creature of the state that can only exercise those powers given to it by an act of the state.⁴⁶ Judge Dillon's philosophy arose out of the increasing autonomy of, and corruption in, local governments and their promotion of private economic activity.⁴⁷ Particularly prevalent was the local governments' pursuit of railroad companies, which often led to the invasion of private property rights in the quest for revenue and economic development. It was this "conflict between private property rights and local government pursuit of revenue" that troubled Judge Dillon.⁴⁸ In developing his ideals of limiting local governments' authority, Judge Dillon believed that:

It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . All acts beyond the scope of the powers granted are void.⁴⁹

43. See RICHARDSON ET AL., *supra* note 31, at 6.

44. See Abdalla & Becker, *supra* note 25, at 15–16.

45. See *supra* note 36 and accompanying text.

46. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 260 (2000). See JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 237–39 (5th ed. 1911) [hereinafter COMMENTARIES].

47. RICHARDSON ET AL., *supra* note 31, at 7.

48. *Id.*

49. COMMENTARIES, *supra* note 46, § 237 (citation omitted). Nebraska courts have recognized Judge Dillon's trifurcated legal standard. See *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922) (observing Judge Dillon's rule of strict construction for construing the authority to enact ordinances); *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 655 N.W.2d 363 (2003) (also recognizing the rule of strict construction for legislative grants), *overruled on other grounds* by *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004).

Judge Dillon proposed a rule of strict construction to be applied in determining the extent of the express, implied, or indispensable powers.⁵⁰ Although Judge Dillon felt that construction should be “just,”⁵¹ he also asserted that “any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State’s grantee.”⁵² Overall, Judge Dillon recognized that although these principles are well-settled, courts have struggled to apply them because of the “complex character of municipal duties” and the wide range of powers which municipalities are authorized to exercise.⁵³

Judge Dillon observed that, in some respects, the root of the problem rested with the state legislatures that were granting the power to municipalities. He felt that too often these powers were “extraordinary” and “extra-municipal” because they were “incautiously or unwisely granted” or because the enacting legislation was “carelessly worded” and “loosely construed.”⁵⁴ Therefore, the authority granted to local governments by state legislatures “ought to be more carefully defined and limited, and should embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants.”⁵⁵ But because the power of a state government reigns supreme over a municipality, the legislature ultimately has the ability to limit the power of local government.⁵⁶ Perhaps most pointedly, the legislature “may erect, change, divide, and even abolish [a municipality’s powers], at pleasure, as [the legislature] deems the public good to require.”⁵⁷ So, while legislatures often carelessly draft grants of authority, in the end they possess the supremacy to redefine their grants of authority and to determine what a local government can and cannot do.

According to Judge Dillon, the judiciary should also play a part in curbing unwarranted local authority. In addition to the rule of strict construction,⁵⁸ Judge Dillon instructed state courts to “require municipalities ‘to show a plain and clear grant for the authority they assume to exercise; *to lean against constructive powers*, and, with firm hands, to hold them and their officers within chartered limits.’”⁵⁹

50. COMMENTARIES, *supra* note 46, § 239.

51. *Id.* According to Judge Dillon, a “just” construction requires an initial consideration of “the legislative intent in order to give it fair effect.” *Id.*

52. *Id.*

53. *Id.*

54. *Id.* § 18.

55. *Id.*

56. Note, *Dillon’s Rule: The Case for Reform*, 68 VA. L. REV. 693, 694–95 (1982).

57. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 30 (1872).

58. See *supra* note 50 and accompanying text.

59. Note, *supra* note 56, at 695 (quoting JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 9 (2d ed. 1873)).

Judge Dillon did, however, recognize some limited benefits of local control: local citizens have a greater investment in, and knowledge of, their communities than that of the “distant central power.”⁶⁰ Today, the fear of waste, extravagance, and ineptitude which justified Dillon’s Rule in its early years has subsided, and many local governments in the modern era are sophisticated legal bodies unlikely to make frivolous and corrupt decisions.⁶¹

Despite its century-old origins and the dwindling fear of inept local governments, Dillon’s Rule has many modern justifications, and its principles still find application today.⁶² Modern scholars offer an abundance of reasons for supporting Dillon’s Rule.⁶³ First, Dillon’s Rule keeps state sovereignty intact “by ensuring that municipalities exercise only as much power as the state delegates to them.”⁶⁴ Dillon’s Rule also tempers some of the effects of local politics. If local governments enact exclusionary or provincial regulations, often as a result of local bias and/or political pressures, courts are able to step in and protect minority interests and state policy.⁶⁵ Additionally, Dillon’s Rule ensures compliance with the federal and state constitutions, state statutes, and state policies.⁶⁶ Financial considerations also play a role, because “[s]tate agencies often have greater budgets and technical expertise than local agencies.”⁶⁷ Not only that, “Dillon’s Rule leaves most of the financial decision making powers at the state level” so municipalities do not “undercut the revenue base of state governments.”⁶⁸ Finally, and perhaps most relevant to this Note, is the justification that Dillon’s Rule leads to greater uniformity in the law.⁶⁹ This consistency among the law “facilitates economic growth by assuring companies that requirements such as business licenses and methods of taxation will be consistent throughout the state.”⁷⁰

60. COMMENTARIES, *supra* note 46, § 18. In addition, Judge Dillon acknowledged that past experience dictates that local governments should retain some ability to enact local legislation. *Id.*

61. Note, *supra* note 56, at 705.

62. *Id.* at 707.

63. See, e.g., Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon’s Rule, a Common Law Restraint on Municipal Power?*, 29 N.C. CENT. L.J. 194 (2007); Note, *supra* note 56.

64. Note, *supra* note 56, at 707.

65. Csoka, *supra* note 63, at 211; Note, *supra* note 56, at 707.

66. Note, *supra* note 56, at 707–08.

67. Csoka, *supra* note 63, at 210.

68. *Id.* at 211.

69. *Id.* at 210.

70. RICHARDSON ET AL., *supra* note 31, at 14.

2. Preemption

In addition to Dillon’s Rule, preemption also operates to limit local authority.⁷¹ The doctrine of preemption in Nebraska is fairly well-settled. Preemption finds its roots in “the fundamental principle that ‘municipal ordinances are inferior in status and subordinate to the laws of the state.’”⁷² Therefore, when a municipal ordinance and a state statute directly conflict, the statute preempts the ordinance.⁷³ Preemption is grounded in legislative intent, particularly “whether the legislature intended to deny municipalities the right to legislate on the subject.”⁷⁴ The courts must determine the “purpose and intent of the Legislature” through the “plain, ordinary, and popular” meaning of the language of the statute, and must construe the state and local enactments as compatible if at all possible.⁷⁵

A state law may preempt a municipal ordinance in one of three ways: (1) express preemption, (2) field preemption, and (3) conflict preemption.⁷⁶ Express preemption exists when the Legislature “expressly declare[s] in explicit statutory language its intent to preempt municipal ordinances.”⁷⁷ A court will find field preemption by inferring the Legislature’s intent to preempt a municipal ordinance from the “comprehensive scheme of legislation.”⁷⁸ Finally, a state law will preempt a municipal ordinance to the extent they actually conflict.⁷⁹ A local “ordinance is inconsistent with a statute if it is contradictory in a sense that the two legislative provisions cannot coexist. . . . Generally, an ordinance cannot prohibit what the Legislature has expressly licensed, authorized, or permitted.”⁸⁰ Whether the issue is express,

71. For a more thorough analysis of preemption’s role in the debate over local environmental regulations, aside from what is provided in this Note, see Weiland, *supra* note 46.

72. State *ex rel.* City of Alma v. Furnas Cnty. Farms, 266 Neb. 558, 567, 667 N.W.2d 512, 521 (2003) (quoting 5 McQUILLIN, *supra* note 14, § 15.20 (1996)).

73. *Id.*

74. *Id.* at 567–68, 667 N.W.2d at 521 (citing 5 McQUILLIN, *supra* note 14, § 15.18 (2013)).

75. *Id.* at 568, 667 N.W.2d at 521–22.

76. *Id.* at 568–69, 667 N.W.2d at 522.

77. *Id.* at 568, 667 N.W.2d at 522.

78. *Id.* This intent to preempt the field “need not be expressly declared” and “may be implied from the nature of the subject matter being regulated and the purpose and scope of the state statutory scheme.” 5 McQUILLIN, *supra* note 14, § 15:18 (2013). Further, “an ordinance may cover an authorized field of local laws not occupied by general laws, or may complement a field not exclusively occupied by the general laws.” *Id.* (citation omitted). But, if “the state has occupied the field of prohibitory legislation on a particular subject, a municipality lacks authority to legislate with respect to it.” *Id.*

79. *Furnas Cnty. Farms*, 266 Neb. at 569, 667 N.W.2d at 522 (citations omitted).

80. *Id.* at 569, 667 N.W.2d at 522–23 (internal quotation marks omitted) (quoting *Herman v. Lee*, 210 Neb. 563, 567, 316 N.W.2d 56, 59 (1982)).

field, or conflict preemption, the analysis calls for a case-by-case study of the relevant facts and circumstances.⁸¹

III. BUTLER COUNTY DAIRY, L.L.C. V. BUTLER COUNTY

A. Facts and Procedural Posture

Nestled two miles north of Surprise, Nebraska, and just inside Read Township, Butler County, Butler County Dairy, L.L.C. (BCD), is home to 6,000 dairy cows.⁸² Opened by owner Todd Tuls in 2008,⁸³ this dairy is part of a Nebraska dairy industry that, in 2009, boasted 58,000 dairy cows and approximately 250 dairy farmers.⁸⁴ Between his two Nebraska dairies, Tuls owns more than 20% of the state's dairy cows as of 2013.⁸⁵

In 2007, the Nebraska Department of Environmental Quality (DEQ) approved a dairy permit allowing BCD to construct and operate a livestock waste control facility pursuant to the Livestock Waste Management Act (LWMA).⁸⁶ BCD's livestock waste disposal plan involved pumping liquid manure from its lagoon system, transporting it by pipeline to several center pivot irrigation systems,⁸⁷ and applying

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81. Leah N. Hansen, Note, *Canadian Connection v. New Prairie Township: Sniffing out an Opening in the Doctrines of Preemption and Conflicts of Law, and Allowing Local Governments the Authority to Regulate Odor Concerns*, 3 GREAT PLAINS NAT. RESOURCES J. 177, 183 (1999).
82. Larry Peirce, *Huge Dairy Planned in Butler County*, LINCOLN J. STAR, Apr. 5, 2007, http://journalstar.com/business/huge-dairy-planned-in-butler-county/article_3ed7c4ab-34fb-52f0-a3bd-bbb89bd0df77.html#.UgGpclPpWDs.email, archived at <http://perma.unl.edu/596F-U7ZC>.
83. AGRIC. PROM. & DEV. DIV., NEB. DEP'T OF AGRIC., NEBRASKA: DAIRY'S NEW WORLD OF OPPORTUNITY 5, http://www.nda.nebraska.gov/publications/promotion/dairy_expansion.pdf (last visited Oct. 24, 2013), archived at <http://perma.unl.edu/9GY3-TXTD>.
84. Lisa Munger, *Meadow Gold Closing Changes Landscape for Dairy Farmers*, LINCOLN J. STAR, Apr. 20, 2009, http://journalstar.com/news/local/meadow-gold-closing-changes-landscape-for-dairy-farmers/article_3505e923-0e00-5d9c-b9a5-04320e4221a8.html#.UgGmIh1CHxE.email, archived at <http://perma.unl.edu/BTB3-PN6P>.
85. *Id.* Tuls's two Nebraska dairies, Butler County Dairy and Double Dutch Creamery, near Rising City, Nebraska, account for 12,000 of Nebraska's 58,000 dairy cows. *Id.*
86. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 411, 827 N.W.2d 267, 274 (2013). The Livestock Waste Management Act is codified in NEB. REV. STAT. §§ 54-2416 to -2438 (Reissue 2010 & Cum. Supp. 2012). It classifies livestock facilities according to size so that "operations with 300 animal units or more [must] be inspected" by the DEQ "to determine whether livestock wastes contaminate surface or ground water." J. DAVID AIKEN, LIVESTOCK WASTE MANAGEMENT ACT 1 (2001).
87. Larry Peirce, *Supreme Court Upholds Butler County Dairy Ruling*, COLUMBUS TELEGRAM, Mar. 19, 2013 [hereinafter *Supreme Court Upholds BCD Ruling*], <http://columbustelegram.com/banner-press/news/supreme-court-upholds-butler->

it to cropland through the pivots.⁸⁸ To carry out this plan, BCD had to apply for a permit from Read Township and Butler County to install a pipeline under road No. 27. The road was located primarily in Butler County and partially in Read Township.⁸⁹ In September 2007, Read Township adopted a township regulation that provided: “No person shall be allowed to place on, over or under town property, including town roads, right-of-ways and ditches, any pipeline which carries liquid livestock waste.”⁹⁰ One week later, at its regular board meeting, it denied BCD’s application for a permit.⁹¹ Butler County followed suit in February 2009, denying the permit on the basis of not wanting to override Read Township’s decision.⁹²

BCD filed a complaint in the District Court for Butler County, Nebraska, in March 2009 against Read Township, asking for declaratory and injunctive relief, as well as damages for the expenses of operating without a pipeline.⁹³ BCD asserted that the pipeline regulation went beyond the scope of Read Township’s authority and that it was preempted by the LWMA,⁹⁴ the DEQ’s livestock waste control regulations in Title 130 of the Nebraska Administrative Code (Title 130),⁹⁵ and county zoning laws.⁹⁶ BCD also alleged that a second township regulation—which implemented minimum setback requirements for large livestock confinement facilities; required the facilities “to demonstrate that livestock waste would not be carried onto township property in the event of a 25-year storm; and prohibited the spillage of livestock waste onto township roads, ditches, or property from such facilities or during transport”—was invalid.⁹⁷ Summit Township, Butler County, subsequently intervened, seeking a ruling from the court as well on the ground that it had regulations identical to those of Read Township.⁹⁸ The district court denied the parties’ three separate motions for summary judgment because Butler County was not a named party.⁹⁹ Because the court decided that Butler County had control over road No. 27, it determined that Butler County was a necessary party and ordered BCD to file an amended complaint naming Butler

county-dairy-ruling/article_a995da10-06e1-5c9e-a373-36768656e685.html#.
UgGnyDWwkNk.email, archived at <http://perma.unl.edu/7PFX-LTNK>.

88. *Butler Cnty. Dairy*, 285 Neb. at 411, 827 N.W.2d at 274.

89. *Id.*

90. *Id.* at 419, 827 N.W.2d at 279.

91. *Id.* at 411, 827 N.W.2d at 274.

92. *Id.*

93. *Id.* at 412, 827 N.W.2d at 274–75.

94. NEB. REV. STAT. §§ 54-2416 to -2438 (Reissue 2010 & Cum. Supp. 2012).

95. 130 NEB. ADMIN. CODE (2011).

96. *Butler Cnty. Dairy*, 285 Neb. at 412, 827 N.W.2d at 274–75.

97. *Id.* at 412, 827 N.W.2d at 275.

98. *Id.*

99. *Id.*

County as a defendant.¹⁰⁰ Following a hearing, the district court concluded that BCD was not entitled to relief or damages and granted summary judgment in favor of Butler County, Read Township, and Summit Township.¹⁰¹

First, the district court determined the Read Township possessed the statutory authority to implement the two township regulations.¹⁰² Second, the district court determined that state law did not preempt the Read Township regulations, finding that none of the three types of preemption—express, field, and conflict—were present.¹⁰³ Although BCD alleged preemption under both LWMA¹⁰⁴ and Title 130,¹⁰⁵ the court did not address preemption under Title 130.¹⁰⁶ Finally, the court found no preemption by the zoning laws because it determined the regulations were not zoning laws but rather were created through Read Township’s legislative authority.¹⁰⁷

On appeal, BCD argued that Read Township’s regulations exceeded its statutory authority and that *Nebraska Revised Statutes (NRS)* section 23-224¹⁰⁸ did not provide statutory authority for the regulations.¹⁰⁹ It also asserted that LWMA, Title 130, and county zoning statutes preempted the Read Township regulations.¹¹⁰ Finally, BCD alleged Butler County improperly deferred to Read Township’s authority in enacting the pipeline and that Butler County was not a necessary party.¹¹¹

100. *Id.*

101. *Id.* at 415, 827 N.W.2d at 276.

102. *Id.* at 413, 827 N.W.2d at 275. It is interesting to note, however, is that the court’s holding did not translate into a ruling that Read Township had control over road No. 27. In fact, the court did not make a determination of whether Butler County or Read Township had control over the road in question because both parties had denied BCD’s request for a permit anyway. *Id.* at 413–14, 827 N.W.2d at 276.

103. *Id.* at 414, 827 N.W.2d at 276.

104. NEB. REV. STAT. §§ 54-2416 to -2438 (Reissue 2010 & Cum. Supp. 2012).

105. 130 NEB. ADMIN. CODE (2011).

106. *Butler Cnty. Dairy*, 285 Neb. at 414, 827 N.W.2d at 276.

107. *Id.* at 414–15, 827 N.W.2d at 276.

108. NEB. REV. STAT. § 23-224 (Reissue 2012). This statutory provision enumerates the powers granted to the electors who are present at the township’s annual meeting. These powers include, among others, the authority “[t]o take all necessary measures and give directions for the exercise of” the electors’ corporate powers, “[t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town,” and “[t]o make such bylaws, rules, and regulations as may be deemed necessary to carry into effect the powers herein granted and to impose such fines and penalties . . . as shall be deemed proper” *Id.*

109. *Butler Cnty. Dairy*, 285 Neb. at 415, 827 N.W.2d at 277.

110. *Id.*

111. *Id.* BCD did not present an argument regarding Summit Township’s regulations, so the court did not address them. *Id.*

B. The Nebraska Supreme Court Opinion

The Nebraska Supreme Court addressed three main issues in its opinion: (1) whether Read Township possessed the requisite statutory authority to enact its regulations relating to the pipeline ban and large livestock confinement facilities, particularly the second regulation's 25-year storm provision;¹¹² (2) whether LWMA,¹¹³ Title 130,¹¹⁴ and county zoning statutes preempted the regulations; and (3) whether Butler County was, in fact, a necessary party.

1. *The Authority to Regulate Liquid Livestock Waste Pipelines and Large Livestock Confinement Facilities*

The Nebraska Supreme Court first addressed Read Township's authority to enact its pipeline ban and its authority to regulate large livestock confinement facilities through minimum setback, 25-year storm, and spillage prevention requirements.¹¹⁵ After giving a thorough explanation of Nebraska township organization,¹¹⁶ the court then considered Read Township's authority to enact the pipeline ban through a two-part analysis: (1) whether Read Township was vested with authority over township roads; and (2) whether Read Township possessed the authority to ban the pipeline under *NRS* section 23-224(6).¹¹⁷ Only if both of these conditions were satisfied could Read Township have legally enacted the pipeline regulation.¹¹⁸

In finding Read Township did have general authority over township roads, the court designated road No. 27 as a public road located entirely within Butler County and partially within Read Township.¹¹⁹ Then, the court interpreted *NRS* sections 39-1402¹²⁰ and 39-1520¹²¹ to mean that Butler County and Read Township have concurrent authority over road No. 27.¹²² In doing so, the court reasoned, because

112. A 25-year, 24-hour rainfall event "is the largest amount of rain which could be expected to fall during any 24 hour period with a 25 year time span." J. DAVID AIKEN, ANNETTE M. HIGBY & NANCY L. THOMPSON, *A FARMER'S HANDBOOK ON LIVESTOCK REGULATION IN NEBRASKA* 2 (1994), <http://agecon-cpanel.unl.edu/LivestockRegHandbook94.pdf>, archived at <http://perma.unl.edu/TZ6J-CU8G>.

113. NEB. REV. STAT. §§ 54-2416 to -2438 (Reissue 2010 & Cum. Supp. 2012).

114. 130 NEB. ADMIN. CODE (2011).

115. *Butler Cnty. Dairy*, 285 Neb. at 416, 827 N.W.2d at 277.

116. *Id.* at 416-19, 827 N.W.2d at 277-79.

117. *Id.* at 419-20, 827 N.W.2d at 279.

118. *Id.* at 420, 827 N.W.2d at 279-80.

119. *Id.* at 421, 827 N.W.2d at 280.

120. Section 39-1402 provides, in relevant part, that "[g]eneral supervision and control of the public roads of each county is vested in the county board." NEB. REV. STAT. § 39-1402 (Reissue 2008).

121. Section 39-1520 provides, in relevant part, that "[a]ll township road and culvert work shall be under the general supervision of the township board . . ." *Id.* § 39-1520.

122. *Butler Cnty. Dairy*, 285 Neb. at 421, 827 N.W.2d at 280.

section 39-1402 merely vested, but did not require, the exercise of general supervisory power in county boards, and because it did not provide for the power vested in county boards to be exclusive, the two statutes did not conflict.¹²³ Therefore, the two statutes imply that a county board and a township board, in this case, Butler County and Read Township, “are both vested with general supervisory authority over a township road.”¹²⁴ The court supported this notion that the two political entities could possess concurrent authority over public roads within a township so long as the statutes do not conflict.¹²⁵ The court qualified this statement by adding that in the hierarchy of Nebraska political subdivisions, counties sit higher than townships, and therefore, although the powers are concurrent, they are not equal.¹²⁶

Using this hierarchy, the court also looked at the interrelation between county and township powers over township roads and determined, “the exercise of a county’s authority over township roads can supersede a township’s authority over those same roads.”¹²⁷ The court explained, “(1) a township can exercise authority over township roads until the point in time at which a county assumes control, (2) the assumption of control by a county supersedes the authority of a township, and (3) a county can assume control by improving the road.”¹²⁸ As to road No. 27, Butler County had not exercised control over the road and thus did not supersede Read Township’s authority.¹²⁹ In fact, Butler County was not responsible for maintenance of the road and had a policy of sending any matter relating to a public road within a township to the individual township.¹³⁰ Because Read Township enacted the pipeline ban in 2007, and Butler County did not exercise control over Read Township’s roads prior to 2009, “Read Township possessed general supervisory authority over those township roads.”¹³¹

The court also found Read Township had not exceeded its statutory authority by enacting the liquid livestock waste pipeline ban, concluding that *NRS* section 23–224(6) grants Read Township enough authority to prohibit a liquid livestock waste pipeline.¹³² Section 23-224(6)

123. *Id.* at 421, 827 N.W.2d at 280.

124. *Id.* at 422, 827 N.W.2d at 281.

125. *Id.* at 421–22, 827 N.W.2d at 281 (citing *SID No. 2 v. Cnty. of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997); NEB. REV. STAT. §§ 39-1524, 39-1907 (Reissue 2008)).

126. *Id.* at 423, 827 N.W.2d at 282.

127. *Id.* at 424, 827 N.W.2d at 282.

128. *Id.* at 425, 827 N.W.2d at 283.

129. *Id.*

130. *Id.*

131. *Id.* at 426, 827 N.W.2d at 283. Based on this discussion, the court additionally concluded that Butler County properly deferred to Read Township’s decision to enact the pipeline ban. *Id.* at 426, 827 N.W.2d at 284.

132. *Id.*

provides, “[t]he electors present at the annual town meeting shall have power . . . [t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town.”¹³³ By giving the words of the statute their ordinary meaning, and construing the language strictly, the court determined liquid livestock waste was, in fact, an offensive or injurious substance as contemplated by the statute.¹³⁴ To support this conclusion, the court noted, at the time the Nebraska Legislature created LWMA¹³⁵ and Title 130,¹³⁶ the Legislature was aware that livestock waste is potentially harmful if not managed well, because it included provisions in LWMA relating to the unlawfulness of not building approved livestock waste control facilities and discharging animal waste without a permit or exemption.¹³⁷ Further, Title 130’s definition of livestock waste “expressly recogniz[es] that livestock wastes are pollutants.”¹³⁸ Quoting the language of the statute, the court held section 23-224(6) gave Read Township the authority “to ‘prevent the exposure or deposit of’ livestock waste within the township.”¹³⁹ Going one step further, the court also decided that the “pipeline ban was a proper exercise of the authority to ‘prevent the exposure or deposit of livestock waste’ in Read Township.”¹⁴⁰ A pipeline ban was a reasonable means to prevent the accumulation of waste on township roads, so it “fell within one of Read Township’s limited statutory powers and was not an invalid exercise of township authority.”¹⁴¹

Because of these foregoing conclusions, Read Township had “general authority over township roads and specific authority to enact a liquid livestock waste pipeline ban,” and the regulation “was a valid exercise of Read Township’s statutory authority.”¹⁴² The court also concluded that Read Township possessed the authority to regulate large livestock confinement facilities, in particular through the use of

133. NEB. REV. STAT. § 23-224(6) (Reissue 2012).

134. *Butler Cnty. Dairy*, 285 Neb. at 427, 827 N.W.2d at 284.

135. NEB. REV. STAT. §§ 54-2416 to -2438 (Reissue 2010 & Cum. Supp. 2012).

136. 130 NEB. ADMIN. CODE (2011).

137. *Butler Cnty. Dairy*, 285 Neb. at 427–28, 827 N.W.2d at 284.

138. *Id.* at 428, 827 N.W.2d at 285. This definition provides that livestock waste is any “animal and poultry excreta and associated feed losses, bedding, spillage or overflow from watering systems, wash and flushing waters, sprinkling waters from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation, and other materials polluted by livestock wastes.” 130 NEB. ADMIN. CODE. § 1-027.

139. *Butler Cnty. Dairy*, 285 Neb. at 428, 827 N.W.2d at 285 (quoting NEB. REV. STAT. § 23-224(6) (Reissue 2012)).

140. *Id.* (quoting § 23-224(6)).

141. *Id.*

142. *Id.* at 429, 827 N.W.2d at 285.

minimum setback, 25-year storm, and spillage prevention requirements.¹⁴³

2. Preemption Issues

Turning to preemption, the court first noted the absence of Nebraska case law involving the issue of preemption of township laws by state law and decided that the case law discussing the preemption of municipal law would provide a legitimate comparison.¹⁴⁴ Therefore, the same principles of preemption apply to both municipal law and township law.¹⁴⁵

The court quickly disposed of any argument that LWMA¹⁴⁶ and Title 130¹⁴⁷ “expressly preempt local laws on the subject of livestock waste management.”¹⁴⁸ Noting that in the past, the Nebraska Legislature included provisions explicitly stating its intent for the statutory scheme to preempt local laws, govern the entire subject, or prohibit local governments from enacting conflicting legislation, the court pointed out the absence of this language in the LWMA.¹⁴⁹

On the issue of field preemption, the court found two clear examples of “intent for these state statutes and regulations to coexist with local laws”¹⁵⁰ The first clear indication that the LWMA¹⁵¹ and its regulations were not meant “to occupy the entire field of livestock waste management regulation”¹⁵² was LWMA section 54-2420.¹⁵³ Section 54-2420 states nothing in LWMA’s permitting provision, sec-

143. *Id.* at 430, 827 N.W.2d at 286. In a matter of first impression, the court distinguished between facial and as-applied challenges in an action raising a question of statutory authority. *Id.* at 429, 827 N.W.2d at 835. The court made this distinction because BCD was challenging the regulation before even being affected by it, and thus its complaint constituted a facial challenge. *Id.* This led to the conclusion that “when a party challenges the validity of a township regulation without arguing that a particular application of the regulation is improper,” the court “will consider that to be a facial challenge that can succeed only ‘by establishing that no set of circumstances exists under which the [regulation] would be valid.’” *Id.* (quoting *State v. Harris*, 284 Neb. 214, 221, 817 N.W.2d 258, 268 (2012)). Because BCD did not establish that there were no circumstances under which the regulation would be valid, its facial challenge to this second township regulation lacked merit. *Id.* at 430, 827 N.W.2d at 286.

144. *Id.* at 431, 827 N.W.2d at 286.

145. *Id.* at 431, 827 N.W.2d at 287. For an explanation of preemption, see *supra* subsection II.B.2.

146. NEB. REV. STAT. §§ 54-2416 to -2438 (Reissue 2010 & Cum. Supp. 2012).

147. 130 NEB. ADMIN. CODE (2011).

148. *Butler Cnty. Dairy*, 285 Neb. at 433, 827 N.W.2d at 288.

149. *Id.*; REV. STAT. §§ 54-2416 to -2438.

150. *Butler Cnty. Dairy*, 285 Neb. at 434, 827 N.W.2d at 288.

151. REV. STAT. §§ 54-2416 to -2438.

152. *Butler Cnty. Dairy*, 285 Neb. at 433, 827 N.W.2d at 288.

153. NEB. REV. STAT. § 54-2420 (Reissue 2010).

tion 54-2419,¹⁵⁴ “shall be construed to change the zoning authority of a county that existed prior to May 25, 1999.”¹⁵⁵ The second clear indication came from the DEQ’s enforcement of LWMA¹⁵⁶ and the associated regulations.¹⁵⁷ The court noted that throughout the permit application process, the DEQ continually advised applicants to comply with all local laws.¹⁵⁸ Therefore, field preemption did not exist.¹⁵⁹

Finally, the facts did not support a finding of conflict preemption. At issue was the difference in the 25-year storm requirement—Read Township’s ordinance required yearly updates of 25-year storm demonstrations, while LWMA¹⁶⁰ and Title 130¹⁶¹ only require “demonstration of compliance with the 25-year storm requirement when applying for a construction and operating permit.”¹⁶² Although Read Township’s regulation was more stringent, “[t]he fact that a local law is more stringent than state law does not by itself lead to conflict preemption.”¹⁶³ Because BCD argued conflict preemption only on the basis of the ordinance being more stringent, the court concluded that alone that was insufficient to show conflict preemption.¹⁶⁴

BCD also argued that county zoning statutes preempted Read Township’s regulation regarding setback requirements.¹⁶⁵ At the time of trial, however, Butler County had not enacted any county zoning laws, and so there were no zoning laws to preempt the setback regulation.¹⁶⁶ Thus, “Read Township’s regulation imposing setback requirements was not preempted by county zoning statutes.”¹⁶⁷ Finally, the court decided that Butler County was in fact a necessary

154. *Id.* § 54-2419.

155. *Id.* § 54-2420.

156. *Id.* §§ 54-2416 to -2438.

157. *Butler Cnty. Dairy*, 285 Neb. at 434, 827 N.W.2d at 288.

158. *Id.*

159. *Id.*

160. REV. STAT. §§ 54-2416 to -2438.

161. 130 NEB. ADMIN. CODE (2011).

162. *Butler Cnty. Dairy*, 285 Neb. at 436, 827 N.W.2d at 290. *See* 130 NEB. ADMIN. CODE § 8-002.

163. *Butler Cnty. Dairy*, 285 Neb. at 436, 827 N.W.2d at 290.

164. *Id.* at 437, 827 N.W.2d at 290.

165. *Id.* at 437, 827 N.W.2d at 291.

166. *Id.* at 437–38, 827 N.W.2d at 291.

167. *Id.* at 438, 827 N.W.2d at 291. Note that even though BCD argued the district court incorrectly ruled that the regulation involving setback requirements did not constitute zoning and that townships do not have the authority to enact a zoning ordinance, the court would not consider the argument on appeal because BCD did not assign as error Read Township’s lack of authority in its brief. *Id.*

party.¹⁶⁸ Based on the foregoing conclusions, the court affirmed the judgment of the district court.¹⁶⁹

IV. ANALYSIS

Read Township relied on *NRS* section 23-224¹⁷⁰ for its authority to prohibit BCD's liquid livestock waste pipeline.¹⁷¹ Ultimately, the court found the statute vested Read Township with this authority.¹⁷² Once the court made this critical move, it then completed the next step of analysis by concluding that state law did not preempt Read Township's ordinances.¹⁷³ One can question the court's swift acceptance of Read Township's statutory authority and whether Dillon's Rule ought to have played a role in construing Read Township's authority more strictly. While the consequences of this move by the court are yet to be determined, weak preemption analysis, initiated by the court so easily finding authority that rests in local government, has led to a stream of decisions in Nebraska which pose significant hurdles for the agricultural industry.

As noted, *NRS* section 23-224(6) provides "[t]he electors present at the annual town meeting shall have the power . . . [t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town."¹⁷⁴ The statutory language does not mention roads, yet the court construed the statute as granting Read Township "sufficient authority to prohibit liquid livestock waste pipelines."¹⁷⁵ Considering Dillon's Rule may operate to "confine municipal power to that

168. *Id.* at 439, 827 N.W.2d at 292. A necessary party "is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting" the necessary party's interest. *Id.* at 439, 827 N.W.2d at 291. Because the court had earlier held Butler County and Read Township were vested with concurrent jurisdiction over township roads and that the township "could exercise its authority over those roads only if the county had not as yet superseded the township's authority," the decision as to whether Read Township possessed sufficient authority to regulate township roads "necessarily involved a determination of the rights of Butler County—namely, whether Butler County had exercised power over township roads such that it superseded the township's otherwise concurrent authority." *Id.* at 439, 827 N.W.2d at 291–92.

169. *Id.* at 440, 827 N.W.2d at 292.

170. NEB. REV. STAT. § 23-224 (Reissue 2012).

171. In particular, see *id.* § 23-224(2), (6), and (7).

172. *Butler Cnty. Dairy*, 285 Neb. at 426, 827 N.W.2d at 284. See *supra* subsection III.B.1 (discussing the language of section 23-224(6) and the court's interpretation and conclusion).

173. *Butler Cnty. Dairy*, 285 Neb. at 437, 827 N.W.2d at 290–91.

174. REV. STAT. § 23-224(6).

175. *Butler Cnty. Dairy*, 285 Neb. at 426, 827 N.W.2d at 284. The author recognizes that the court did find that Read Township had concurrent authority over road No. 27 pursuant to *NRS* section 39-1520, but this Note focuses solely on *NRS* section 23-224 and its failure to mention anything about roads or pipelines.

which the statute grants *literally*,¹⁷⁶ then certainly, with no mention of a road or pipeline, the statute strictly excludes such types of actions. Additionally, legislative history reveals that the Nebraska Legislature originally enacted the statute over a century ago, in 1895.¹⁷⁷ Since 1895, the issues facing townships and the solutions to those issues undoubtedly have changed.¹⁷⁸ Perhaps it is time to reconsider archaic statutes such as section 23-224 which only offer either overly-general or impractical provisions. Although this is simply a broad statement of where potential problems lie, the following analysis will develop these issues more fully. Specifically, this Note will consider why the court's failure to consider more deeply a strict construction of section 23-224(6) has significant repercussions, not only for the agricultural industry, but for future cases in which a township uses its statutory authority to enact local regulations.

A. Placing *Butler County Dairy* in Context with Other Courts' Decisions

Courts in Nebraska have had the opportunity to review the issue of state law preemption over local ordinances in the context of livestock agriculture, as have courts in other jurisdictions.¹⁷⁹ Placing the decision in *Butler County Dairy* in the context of other decisions is helpful in understanding the ramifications of the court's decision. Although this Note does not aim to parse through each and every relevant decision, it is important to know that these decisions exist and how the legal development in Nebraska compares.

A seminal case appeared in Iowa in the late 1990s. In *Goodell v. Humboldt County*, the issue was whether a county's four ordinances regulating large livestock confinement facilities and operations were valid.¹⁸⁰ At the heart of this dispute was how particular state laws were to be interpreted and the laws' resultant effect on the county's authority to enact regulations.¹⁸¹ As is usually done in this type of analysis,¹⁸² the Supreme Court of Iowa conducted a two-part inquiry questioning the county's authority—in this case, home rule author-

176. Note, *supra* note 56, at 695 (emphasis added).

177. 1895 Neb. Laws 137.

178. For example, consider that the statute which enumerates the powers of township electors gives authority "[t]o guard against the destruction of property in the town by prairie fire." NEB. REV. STAT. § 23-224(9) (Reissue 2012).

179. *Goodell v. Humboldt Cnty.*, 575 N.W.2d 486 (Iowa 1998); *State ex rel. City of Alma v. Furnas Cnty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003); *Craig v. Cnty. of Chatham*, 565 S.E.2d 172 (N.C. 2002).

180. *Goodell*, 575 N.W.2d at 489. The four ordinances contained requirements for pre-construction and pre-operation permits, financial security, groundwater protection policies, and toxic air emissions. *Id.* at 489–90.

181. *Id.* at 492.

182. *See supra* section II.B.

ity¹⁸³—and the state of Iowa’s power to preempt local regulations.¹⁸⁴ The plaintiffs, proponents of hog confinement facility construction, argued “that the regulation of livestock confinement feeding operations is a matter of statewide concern” and that the operations were not a “local affair” under home rule.¹⁸⁵ However, the court held otherwise, finding that “[e]nsuring that livestock operations within a county are conducted in such a manner as to avoid contamination of the environment and interference with others’ enjoyment and use of their property is a matter of local concern and is, therefore, a ‘local affair’ within the meaning of the home rule amendment.”¹⁸⁶ Although the Humboldt County Board of Supervisors had properly enacted the ordinances, the Supreme Court of Iowa found, after a detailed preemption analysis, that Iowa law preempted the ordinances.¹⁸⁷

North Carolina also faced the issue in *Craig v. County of Chatham*,¹⁸⁸ where the county’s Board of Commissioners enacted two ordinances, one governing waste (including financial responsibility for contaminations), setback distances, and well testing, and the other implementing zoning regulations for swine farms that operate animal waste management systems of a certain design capacity.¹⁸⁹ Because counties are creatures of the state and only have those powers granted to them, the Supreme Court of North Carolina looked to the laws of North Carolina and found that counties have “the power and authority to enact ordinances.”¹⁹⁰ The court qualified this, though, with a finding that another state statute¹⁹¹ limits a county’s power by providing that an ordinance must be consistent with North Carolina law.¹⁹² This declaration dovetailed into the court’s preemption analy-

183. Iowa’s constitution grants home rule authority by providing that counties have the power “to determine their local affairs and government,” but only to the extent that those determinations are “not inconsistent with the laws of the general assembly.” IOWA CONST. art. III, § 39A.

184. *Goodell*, 575 N.W.2d at 492.

185. *Id.* at 494.

186. *Id.* Despite this finding, the court noted that a local matter still may have statewide importance, and the legislature can enact uniform statewide regulations or preempt local control even if local regulations are described as concerning local issues. *Id.*

187. *Id.* at 494–08.

188. *Craig v. Cnty. of Chatham*, 565 S.E.2d 172 (N.C. 2002).

189. *Id.* at 174–75. The zoning ordinance at issue limited these particular swine farms to the “Light Industrial” or “Heavy Industrial” zones of the county. *Id.* at 175. The Board also enacted “Health Board Rules” nearly identical to the first ordinance. *Id.*

190. *Id.* at 175–76. The court found this authority in *North Carolina General Statutes* section 153A-121(a) (2001), which provides that “[a] county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens”

191. N.C. GEN. STAT. § 160A-174 (2000).

192. *Craig*, 565 S.E.2d at 176 (citing GEN. STAT. § 160A-174).

sis, with the result being North Carolina's swine farm laws preempted the two regulations because the General Assembly "had provided a 'complete and integrated regulatory scheme' of swine farm regulations."¹⁹³

A decade ago, Nebraska had the chance to rule on the battle between agricultural interests and local authority in *State ex rel. City of Alma v. Furnas County Farms*.¹⁹⁴ When the City of Alma (City) learned that Furnas County Farms (FCF) and Sand Livestock Systems (SLS) "planned to build a large hog confinement facility" eight miles northwest of the City, it enacted several ordinances¹⁹⁵ and claimed it had the authority to do so pursuant to *NRS* sections 17-536¹⁹⁶ and 17-537.¹⁹⁷ Interestingly, FCF did "not challenge the authority of the City to adopt the ordinances pursuant" to the statutory provisions, so the court did not take up the issue.¹⁹⁸ FCF only challenged the City's authority within the framework of its preemption argument.¹⁹⁹ In the end, the Nebraska Environmental Protection Act (NEPA) did not preempt the field of pollution control, although it did preempt a small provision of one of the ordinances that provided for a mandatory bond requirement because the requirement conflicted with

193. *Id.* at 176 (quoting *Craig v. Cnty. of Chatham*, 545 S.E.2d 455 (N.C. Ct. App. 2001)). In particular, the court found that the General Assembly provided clear expressions of intent to preempt the entire field of swine farm regulation through its two swine farm regulations, the Swine Farm Siting Act and the Animal Waste Management Systems component of the statewide regulations. *Id.* at 177-78. Further, these two regulations were so comprehensive that there was no room left for local regulation. *Id.* at 179. As for the zoning ordinance, although it was not *per se* invalid, it was invalid as written because it incorporated the first ordinance, which had already been found to be preempted by the field of legislation. *Id.* at 181.

194. *State ex rel. City of Alma v. Furnas Cnty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

195. The ordinances, like others throughout this Note, "detail the process which an entity seeking to build a livestock facility within 15 miles of the City must follow in order to obtain a permit from the City for such purpose." *Id.* at 561, 667 N.W.2d at 517. This process includes complying with the Nebraska Department of Environmental Quality's requirements and with particular enumerated requirements, such as soil testing. *Id.*

196. Section 17-536 provides that "[t]he jurisdiction of such city or village, to prevent any pollution or injury to the stream or source of water for the supply of such waterworks, shall extend fifteen miles beyond its corporate limits." NEB. REV. STAT. § 17-536 (Reissue 2012).

197. Section 17-537 provides that "[t]he council or board of trustees of such cities and villages shall have power to make and enforce all needful rules and regulations in the construction, use, and management of such waterworks, mains, portion or extension of any system of waterworks or water supply and for the use of the water therefrom." *Id.* § 17-537.

198. *Furnas Cnty. Farms*, 266 Neb. at 561, 667 N.W.2d at 517.

199. *Id.*

the NEPA.²⁰⁰ Aside from the mandatory bond requirement, the court upheld the ordinances.²⁰¹

As evidenced by these three decisions, some courts readily find the existence of local authority, as did the Supreme Court of Nebraska most recently in *Butler County Dairy*. In contrast, other courts regularly use preemption to strike down local laws, thus protecting their state's agricultural businesses. In so doing, their decisions often are more amenable to industry and a robust legislative process.²⁰² As noted, the focus of this Note is not the preemption question but instead is the more perplexing question of why various states' highest courts so readily uphold a local municipality's choice to act.²⁰³ In fact, were courts not so swift to answer this first inquiry in the affirmative, they would never even reach the preemption question.²⁰⁴ Thus, problems arise from the Nebraska Supreme Court's superficial treatment of Read Township's authority to enact its pipeline ban.

B. The Consequences of Nebraska's Differing Stance

1. *The Resultant Multiple Layers of Government*

As noted above,²⁰⁵ Dillon's Rule provides greater uniformity in the law and prevents multiple "layers" of government regulations for agricultural producers to muddle through when they operate or plan to

200. *Id.* at 572–74, 667 N.W.2d at 524–25. FCF also attempted to argue that the LWMA, the statute at issue in *Butler Cnty Dairy*, preempted the City's ordinances. *Id.* at 565, 667 N.W.2d at 520. Interestingly, FCF did not raise this argument at the trial court level because the LWMA had not yet been enacted, and although the LWMA was in effect by the time of appeal, the court dismissed any argument to this effect because it had not been considered by the trial court. *Id.* at 565–67, 667 N.W.2d at 520–21.

201. *Id.* at 572–73, 667 N.W.2d at 524–25. The court also decided issues relating to evidentiary errors, injunctive relief, and damages. *Id.* at 575–79, 667 N.W.2d at 526–29.

202. *See infra* subsection IV.C.1, calling for legislative reform in Nebraska.

203. The author recognizes the swiftness of the decision partially lies in the fact that some local governments are acting under home rule authority, as in *Goodell*, but the court in *Craig* was silent on the issue, and because home rule authority in Nebraska only extends to cities with populations greater than 5,000 people, the City of Alma in *Furnas Cnty Farms* also was acting without home rule authority. *See* NEB. CONST. art. XI, § 2; *Goodell v. Humboldt Cnty.*, 575 N.W.2d 486 (Iowa 1998) (describing the county's home rule authority); *Furnas Cnty. Farms*, 266 Neb. at 560, 667 N.W.2d at 516 (describing the City of Alma as a city of the second class and thus having a population of less than 5,000 people); *Craig v. Cnty. of Chatham*, 565 S.E.2d 172 (N.C. 2002).

204. *See* Bussell, *supra* note 32, at 740 (explaining that “[c]ourts in Dillon's Rule states avoid implied preemption analysis altogether, as any reasonable doubt concerning local authority is resolved by the courts against the local government”).

205. *See* Csoka, *supra* note 63, at 210 (stating that “Dillon's Rule may lead to greater uniformity”).

operate their businesses in a locality or multiple localities. A benefit to conformity of the law is greater economic prosperity because uniformity “allow[s] corporations to spread their sphere of influence more readily throughout the state, without having to fear inconsistent legal obligations.”²⁰⁶ Another benefit is that an agricultural producer will not have his local government authority instructing him to comply in one way, while the state—through the DEQ, for example—tells him to comply in another way. Essentially, Dillon’s Rule helps to avoid conflict between state, county, and other local laws, and increases the ease with which agricultural producers can maximize their business opportunities.²⁰⁷

In fact, both methods for limiting local authority, Dillon’s Rule and preemption, are grounded in “the need to avoid dual regulation.”²⁰⁸ Thus, no matter the means courts use to approach the issue, the end is the same, and local governments should be careful to regulate only in ways that will not create insurmountable hurdles for local business owners.

a. Recognizing Some Benefits of Local Government Control

These considerations require a recognition that delegating power to local governments, with the resultant “layers,” is not necessarily unfavorable. In fact, local governments, including townships, villages, cities, and counties, often are fully competent to handle their local issues.²⁰⁹ For example, localities excel in protecting their local water supply, so much so that state governments will designate them as the sole authority for doing so.²¹⁰ Perhaps, then, the court’s decision to uphold Read Township’s ordinances as a valid exercise of statutory authority²¹¹ is not so out of line. The “[f]ear of local waste, extrava-

206. *See id.* *See also* RICHARDSON ET AL., *supra* note 31, at 14 (explaining that uniformity “facilitates economic growth by assuring companies that requirements such as business licenses and methods of taxation will be consistent throughout the state”).

207. For example, imagine a dairy operator who has applied for and has been granted the mandatory environmental permits from the state but is ineligible to operate his business under county regulations. These regulations would directly conflict with state law. Agricultural producers in this type of situation often do not know “which way to turn.” Novak, *supra* note 9, at 458–59.

208. *Craig v. Cnty. of Chatham*, 565 S.E.2d 172, 175 (N.C. 2002).

209. Note, *supra* note 56, at 705 (discussing the Virginia General Assembly’s practice of granting authority for specific purposes to local governments because of the governments’ ability to handle their local issues).

210. For example, Colorado has created local government entities, similar to metropolitan districts, whose sole duty is to manage the water supply and quality. Norman F. (Rick) Kron, *Choice of Entity: Using Limited Purpose Local Governments To Solve Problems*, 38 COLO. LAW. 59, 60–61 (Oct. 2009).

211. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 429, 827 N.W.2d 267, 285 (2013).

gance, and ineptitude” underlying Dillon’s Rule lacks justification in modern society, where “professionally operated, sophisticated local governments [are] unlikely to engage in the frivolous and corrupt practices that Judge Dillon feared.”²¹² Additionally, providing for local control in matters like water supply and waste disposal allows municipalities to respond quickly when there is a local problem.²¹³ Therefore, when an entity like Read Township is allowed to regulate livestock waste, it can act almost immediately to enforce its regulations or to respond to environmental hazards.

A part of the reason that localities such as Read Township are so competent at handling local issues is because they are the ones most familiar with the issues, desires, and needs of their citizenry.²¹⁴ The idea is that a township, a county, or a city has the right not to smell like a feedlot,²¹⁵ and that only those most closely-situated are in a position to act in an effective way.²¹⁶ Thus, sometimes multiple layers of government are acceptable, and what the court did in *Butler County Dairy* may not have such a dramatic effect that agricultural businesses cannot operate. It would be unfair for this Note not to recognize that reality.

b. The Resultant Multiple Layers in the Context of Butler County Dairy

Despite these benefits of local control, the court’s decision in *Butler County Dairy* also has disadvantages. That Dillon’s Rule operates to reduce the “layers” of multiple levels of legislation is particularly relevant in context of the consequences that flow from the court’s broad construction of local control.

The effect of the court’s holding is that it complicates matters for business owners when they want to establish operations in a new locale or when they are currently operating under existing regulations with which they already comply. Specifically, agricultural producers and local businesses generally “fear inconsistent legal obligations.”²¹⁷

212. Note, *supra* note 56, at 705.

213. Csoka, *supra* note 63, at 209.

214. COMMENTARIES, *supra* note 46, § 18; Alexandra Manchik Barnhill, Note, *Entrenching the Status Quo: The Ninth Circuit Uses Preemption Doctrines to Interpret CERCLA as Setting a Ceiling for Local Regulation of Environmental Problems*, 31 *ECOLOGY L.Q.* 487, 498 (2004).

215. In the *Furnas Cnty Farms* case, even local farmers expressed their concern about the effect of the hog farm on their local water supply. JOHNSEN, *supra* note 2, at 33.

216. Barnhill, *supra* note 207, at 498 (stating that in particular, “[l]ocal governments are usually the most familiar with the effects of local environmental problems, thus municipalities are often in the best position to determine the appropriate course of action in remediating contaminated property”). See *supra* notes 41–42, 60 and accompanying text.

217. Csoka, *supra* note 63, at 210.

When the *Furnas County Farms* appeal was pending in the Nebraska Supreme Court, local farmers worried about the slippery slope the court would create if it upheld the City's ordinances.²¹⁸ Even though many local farmers disfavored the hog farm being built, agricultural producers often are "apprehensive" about their local government having the power to regulate them.²¹⁹ Thus, these particular farmers expressed concern that if the ordinances indeed were valid, then the City would try to impose more regulations telling them "how to operate."²²⁰ As one farmer, Terry Woollen, aptly stated, "It's one of these things where people do not like government intrusion until they have a problem and then they want government to be an intercessor on their behalf."²²¹ And when a benefit of Dillon's Rule is economic growth,²²² a logical conclusion is that courts limit this growth when they uphold local regulations without giving more credence to Dillon's Rule and its positive effects.

When the court considered Read Township's choice of a pipeline ban, it analyzed this choice under a "reasonableness" framework.²²³ But recall that Dillon's Rule is a rule of strict statutory construction.²²⁴ No express words²²⁵ of *NRS* section 23-224²²⁶ give Read Township the go-ahead to dictate what can and cannot be done to roads. Further, it could hardly be said that outlawing pipelines is "essential" to the objectives of Read Township²²⁷—whatever those objectives may be—when a pipeline-center pivot system that is correctly designed and operated offers many positive, environmentally-sound benefits.²²⁸ And though Dillon's Rule allows those powers "necessarily or fairly implied,"²²⁹ it does not reach the standard of "reasonableness."

218. JOHNSON, *supra* note 2, at 33.

219. *Id.*

220. *Id.*

221. *Id.*

222. *See supra* note 70 and accompanying text.

223. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 428, 827 N.W.2d 267, 285 (2013) (finding that "a ban on liquid livestock waste pipelines reasonably could have been enacted as a means of 'prevent[ing] the exposure or deposit of livestock waste on township roads . . .").

224. *See supra* note 50 and accompanying text.

225. COMMENTARIES, *supra* note 46, § 237.

226. NEB. REV. STAT. § 23-224 (Reissue 2012).

227. COMMENTARIES, *supra* note 46, § 237.

228. *See generally* WILLIAM L. KRANZ ET AL., APPLICATION OF LIQUID ANIMAL MANURES USING CENTER PIVOT IRRIGATION SYSTEMS (2007), archived at <http://perma.unl.edu/5XST-5H4G> (describing proper materials, mechanisms, and installation for waste pipelines connecting a manure storage facility and a center pivot, including requirements that must be met under the DEQ's Title 130 regulations, as well as offering information on odor control, water quality, soil conservation and quality, pathogen transmission, and phytotoxic effects on plants).

229. COMMENTARIES, *supra* note 46, § 237.

The language of the statute—that townships possess the authority “[t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town”²³⁰—is overly broad, and “any ambiguity or . . . substantial doubt as to the extent of [Read Township’s] power”²³¹ ought to have been resolved in favor of the state. Instead, as a result of the court’s decision, Tuls and numerous other agricultural producers in Butler County now must parse through the LWMA, the DEQ’s regulations in Title 130, county regulations, Read Township’s pipeline ban, and any future ordinances passed under this great deference to local legislation.

2. *Addressing Century-Old Power Often Is Clouded by Local Politics*

Although the legal ramifications of the court’s move are paramount, practical consequences also flow from the decision to uphold local power.

In small communities and rural areas, local politics often rule the day. Where local officials, sitting on their local school boards, church councils, and county zoning committees, wield some degree of political power, they may find themselves tempted to “favor political friends and disfavor political enemies.”²³² Further, because these communities often are made up of “economically and racially homogenous populations . . . the opportunity for a majority to act in a manner insensitive to the interests of politically impotent minorities is greatest at the local level.”²³³

By upholding Read Township’s authority to enact its liquid livestock waste ordinance, the court indirectly allows local politics to play a role. Had the court permitted Dillon’s Rule to operate, it may have prevented the potential for “exclusionary and provincial actions by local governments”²³⁴ because “to the extent the rule provides for some judicial review of municipal decisions, it may safeguard both minority interests and state policy from unfettered local biases.”²³⁵ The deci-

230. REV. STAT. § 23-224(6).

231. COMMENTARIES, *supra* note 46, § 239.

232. Csoka, *supra* note 63, at 211.

233. Note, *supra* note 56, at 708. For example, Butler County, Nebraska, the county at issue in this Note, has a population whose race was classified in 2012 as 98.2% “white.” *Butler County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/31/31023.html> (last updated June 27, 2013), archived at <http://perma.unl.edu/TT8W-F7SE>. Even in Nebraska’s most populated county, Douglas, this figure was 81.6% in 2012. *Douglas County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/31/31055.html>, archived at <http://perma.unl.edu/N3JV-T5ER> (last updated June 27, 2013).

234. Csoka, *supra* note 63, at 211.

235. Note, *supra* note 56, at 707.

sion of the Butler County Board of Supervisors to defer to Read Township's ordinance²³⁶ because it "did not want to go against the wishes of the township or start a precedent for similar requests" from dairy owners like Tuls in the future,²³⁷ provides an example of this local bias toward fellow political organizations when perhaps the issue should be considered more fully. Although one can only speculate as to the political forces at play, surely local viewpoints played a part in the discussion details of Read Township's electors at the annual town hall meeting or in general opinions about BCD. Whether those viewpoints will produce any lasting discriminatory effect is an inquiry that probably is too premature to determine. However, it is important to ponder the potentially different outcomes that could result were the state to handle livestock regulation on a statewide level.

C. The Court's Implicit Call for the Nebraska Legislature to Step In

The Nebraska Supreme Court's acceptance of Read Township's local authority arguably is an implicit call for the Nebraska Legislature to step in and update its statutes.

The court is not entirely to blame for upholding Read Township's statutory authority. Responsibility rests with the Legislature as well. Perhaps the court in *Goodell* stated it best when it said:

In this matter of public interest, our court is limited to determining whether Humboldt County had the *authority* to enact the challenged ordinances. The *wisdom* of those ordinances is not before us. Nor is it our role to decide whether local government *should* be allowed to regulate livestock confinement operations. The question before us is simply whether, under the constitution and state law, the county *can* regulate in this area.²³⁸

Considerations of Dillon's Rule aside, perhaps what the court in *Butler County Dairy* was doing was interpreting the law that gave Read Township authority and refusing to legislate from the bench. The result is for the Nebraska Legislature to notice this move and act accordingly.

Recall that Judge Dillon directed state legislatures to avoid drafting "carelessly worded" and "loosely construed" statutes so as not to give local governments "extra-municipal" power.²³⁹ Because state governments and their legislatures reign supreme over their local governments, they have the ability to redefine localities' power.²⁴⁰ Thus, the Nebraska Legislature should reevaluate the power it gave town-

236. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 411, 827 N.W.2d 267, 274 (2013).

237. *Supreme Court Upholds BCD Ruling*, *supra* note 87.

238. *Goodell v. Humboldt Cnty.*, 575 N.W.2d 486, 493–94 (Iowa 1998).

239. COMMENTARIES, *supra* note 46, § 18.

240. Note, *supra* note 56, at 694–95.

ships in 1895 when it enacted *NRS* section 23-224.²⁴¹ Although the “court cannot refuse to enforce a statute on the ground that it is unwise,”²⁴² it can, when it sees a generally-defined statute, concede the granting of local authority, conduct preemption analysis, and send a signal to the Legislature that it is time to update these outdated statutes so that they are more operable. If not, local villages, counties, and townships, seeing the ease with which their ordinances can be upheld, will continue to pass restrictive regulations on agricultural producers.²⁴³ The foreboding result is that while these regulations may be directed at zoning-out the factory farms, their impact “also falls upon small family farmers who are seeking to expand their operations.”²⁴⁴

Until the Legislature acts, it appears that, so long as local governmental units act “reasonably” within the statutory power conferred to them, and construct regulations that avoid preemption by state law, the Nebraska Supreme Court will uphold those regulations. Indeed, Nebraska is partial to local control.²⁴⁵ Practically, this may be why the court found for BCD, and why it may continue to do so for similar local regulations of agribusinesses in the future absent any responsive action by the Legislature and despite any Dillon’s Rule considerations.

V. CONCLUSION

The modern changes in agriculture bring with them modern challenges. Read Township addressed these challenges by enacting regulations relating to liquid livestock waste pipelines and large livestock confinement facilities. The Nebraska Supreme Court upheld Read Township’s statutory authority to do so and found state law did not preempt these regulations.

Butler County Dairy raises questions as to the extent of local government control that should be allowed in the area of environmental regulations. Unfortunately, the court failed to consider this question more deeply. Townships are creatures of the state, and only have those powers given to them, but when those powers are so easily upheld, the court fails to draw any sort of meaningful line as to a permissible level of authority. Because Dillon’s Rule offers many modern

241. 1895 Neb. Laws 137.

242. *Goodell*, 575 N.W.2d at 493.

243. Obviously this was a concern of producers in *Furnas Cnty Farms*. See *supra* note 220 and accompanying text. Further, one sees indications of it in Summit Township’s intervention to seek a judgment on its regulations that were identical to Read Township’s regulations. *Butler Cnty. Dairy, L.L.C. v. Butler Cnty.*, 285 Neb. 408, 412, 827 N.W.2d 267, 275 (2013).

244. Novak, *supra* note 9, at 443.

245. JOHNSON, *supra* note 2, at 37 (describing the state’s twenty-three natural resources districts as just one example of many of Nebraska’s “fondness for local control”).

benefits, including financial stability, a non-biased political process, and uniformity in the law, it ought to have played a larger role in the court's consideration of Read Township's statutory authority.

As a result, agricultural businesses must navigate a complex field of federal, state, and local environmental regulations. The next step, then, is for the Nebraska Legislature to critically evaluate the functions it delegates to local governments and whether it needs to speak more clearly in the area of environmental regulation. Once every governmental player knows its role, the parties involved will be able to move forward for the benefit of Nebraska agriculture.