STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LENAWEE

LENAWEE COUNTY HEALTH DEPARTMENT,
Plaintiff,

vs.

SAMUEL EICHER, et al.
DAVID W. SCHWARTZ, et al.
JONAS WAGLER, et al.
LOUIS GRABER, et al.
DAVID LENAGACHER[1], et al.
LEWIS LENAGACHER, et al.
JOSEPH GRABER, et al.
SAMUEL DELAGRANGE, et al.
SIMON GRABER, et al.
AMOS DELAGRANGE, et al.
ISAIAH EICHER, et al.
MELVIN DELAGRANGE, et al.
JOHN SCHWARTZ, et al.

Defendants
_____/

Hon. Michael R. Olsaver

File Nos.
19-6384-CE [S. Eicher]
19-6386-CE [D. Schwartz]
19-6387-CE [J. Wagler]
19-6389-CE [L. Graber]
19-6391-CE [D. Lenagacher]
19-6393-CE [L. Lenagacher]
19-6394-CE [L. Lenagacher]
19-6418-CE [L. Lenagacher]
19-6385-CE [J. Graber]
19-6388-CE [S. Delagrange]
19-6390-CE [S. Graber]
19-6392-CE [A. Delagrange]
19-6395-CE [I. Eicher]
19-6396-CE [M. Delagrange]
19-6397-CE [J. Schwartz]

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[1] The County's lawsuits spell these Defendants' last names as Lenagacher. The correct spelling of their name, which we use everywhere but the caption, is Lengacher.

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DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. The Amish's Michigan Constitution and RLUIPA Claims Are Subject to Strict Scrutiny.

The Amish have already explained why their RLUIPA claim and their claims under both the Michigan and United States Constitutions are entitled to strict scrutiny. Amish MSD Br, pp 18–26. The County's response does not contest that religious liberties claims under both the Michigan Constitution and RLUIPA are subject to strict scrutiny. Its *only* argument with respect to these claims is that a litigant cannot maintain RLUIPA claims or Michigan constitutional claims while also asserting a First Amendment claim. County Resp Br, p 11.

The County made the same arguments in its motion for summary disposition, and the Amish have explained why these arguments are frivolous. See Amish Resp Br, pp 16–17. In short, both the Michigan Constitution and RLUIPA are more protective of religious liberties than the First Amendment. Unlike the First Amendment, the Michigan Constitution requires that governmental action that burdens religious liberties be subjected to strict scrutiny even if the government relies on neutral, generally applicable laws. See *Champion v Sec'y of State*, 281 Mich App 307, 314–315; 761 NW2d 747 (2008) ("We apply the compelling state interest test (strict scrutiny) to challenges under the free exercise language in Const. 1963, art 1, § 4 regardless of whether the statute at issue is generally applicable and religion-neutral, which is the case here."). And RLUIPA was explicitly drafted to require strict scrutiny even when the U.S. Constitution does not require it. See *Cutter v Wilkinson*, 544 US 709, 714; 125 S Ct 2113; 161 L Ed 2d 1020 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens."); see also *Mast v Fillmore Co, Minn*, __ US __; 141 S Ct 2430; 210 L Ed 2d 985 (2021) (analyzing Amish RLUIPA claim about septage disposal under strict scrutiny without determining whether the law in question was neutral and generally applicable). It is nonsense to suggest that anyone who seeks protection under the First

Amendment cannot also seek the greater protections offered by statute or the Michigan Constitution. The County offers no other argument why strict scrutiny should not apply to these claims, so this Court should apply strict scrutiny in analyzing them.

II. The Amish's First Amendment Claim Is Subject to Strict Scrutiny As Well.

In its own motion for summary disposition, the County conceded (correctly) that the Amish's First Amendment claims were subject to strict scrutiny so long as the Amish demonstrated a relevant and sincerely held religious belief. County MSD Br, p 17. Now, the County backtracks. It argues for the first time that the Amish's First Amendment claims are not subject to strict scrutiny. The County now says it is acting pursuant to a neutral law of general applicability. County MSD Resp Br, pp 12–15. The heart of this argument is a newfound contention that the Amish's septage practices violate *state* law rather than the County's health code, and thus that the County cannot grant a variance allowing the Amish not to use septage haulers. *Id.*, pp 14–15, citing MCL 324.11702 *et seq.* (also known as "Part 117"). The County's argument disingenuously covers up facts known to the County and is legally irrelevant in any event.

The County did not so much as allude to Part 117 in the fifteen Complaints it filed seeking to seize the Amish's farms, instead citing only the County code. That, perhaps, is because the actual record establishes that the County has been told by the state regulators who administer Part 117 that Part 117 does *not* prohibit local governments from allowing smallhold farmers to spread their own septage. In an email exchange with Greg Merricle from the Michigan Department of Environment, Great Lakes, and Energy (EGLE), the County was told: "Property owners (including farmers) land applying their own septage is not authorized by Part 117. *It also is not a violation of Part 117. It's a violation of local code. Part 117 regulates licensed [septage] haulers only*." Exhibit 22, p 1, attached hereto (emphasis added). EGLE sent this email in response to an email

from Lenawee County Director of Environmental Health Kasee Johnson in which Ms. Johnson herself acknowledged being told in a phone call with ELGE officials "that issues with a homeowner servicing their own septic tank and land applying on their own property would have to be handled through the local environmental health code." *Id.*, p 3; see also *id.*, p 4 (another EGLE official informs the County that "[a] single landowner wouldn't be violating Part 117 if they were applying sewage/septage to their own farm field; this would just be improper disposal of sewage/septage on your own property in violation of the local Code"). Thus, the County *has explicitly been told* by state regulators that only the County code stands in the way of the Amish living in conformity with their religious beliefs. For the County to falsely represent to this Court that it cannot grant variances because the state will not allow it[2] underscores the lengths to which it will go to deny a reasonable religious accommodation to the Amish.

In any event, even if the County *were* attempting to enforce Part 117, strict scrutiny would still apply. As a threshold matter, even if Part 117 was a neutral law of general applicability for First Amendment purposes, then as stated in Section I above, the County has presented no argument why strict scrutiny would not apply under the Michigan Constitution and RLUIPA.

But even if the First Amendment claims were the only religious liberties claims here (and they are not), the County still cannot insulate its actions from constitutional review even if it were acting pursuant to state law (and it is not). See, e.g., *Steffel v Thompson*, 415 US 452, 94 S Ct 1209; 39 L Ed 2d 505 (1974) (upholding a court's jurisdiction to grant relief in a First Amendment § 1983 action brought against county officials which alleged that the *county* officials would

[2] This is not the first instance of the County attempting to falsely cloak its actions under the authority of EGLE in its legal campaign against the Amish. The County repeatedly represented to the Amish and this Court that a number of EGLE regulators, including some of the individuals involved in the email exchange just described, would appear as expert witnesses in support of the County. This representation was false, and forced EGLE to file a notice with this Court advising "that none of its employees have agreed to testify as expert witnesses in this matter; that none of its employees have been retained as expert witnesses in this matter; and that EGLE objects to this purported naming of state employees as 'experts' for any party." EGLE Notice to the Court (August 19, 2022).

enforce a *state* statute in a manner that was unconstitutional as applied to the plaintiff). In fact, courts have held that county governments can even be held liable for damages for enforcing unconstitutional state laws when, as here, the county exercises any discretion in choosing how or when to enforce the law. See *Reid v Lee*, __ F Supp 3d __; 2022 WL 1050645 (MD Tenn, 2022).

Furthermore, even if Part 117 did prohibit individual farmers from spreading septage (contrary to EGLE's own interpretation), it would not constitute a neutral and generally applicable law and thus would still be subject to First Amendment strict scrutiny. Under such an interpretation, Part 117 would provide licenses for corporate septage haulers to land apply millions of gallons of septage to their land while denying small landowners the ability to apply a miniscule fraction of such amounts to their land in a safe and agriculturally sustainable way when their religions compel them to do so. But licensing septage haulers while providing no way for small-hold religious farmers to engage in less dangerous activities is the very definition of a non-neutral law. See *Fulton v City of Philadelphia*, __ US __; 141 S Ct 1868, 1877; 210 L Ed 2d 137 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."). The County's arguments are meritless, and this Court should apply strict scrutiny to the First Amendment claims.

III. The County's Actions Violate the Amish's Religious Liberties Under a Strict Scrutiny Analysis.

Under strict scrutiny, the record compels the conclusion that the County's actions violate the Amish's religious liberties. See Amish MSD Br, pp 26–37. The County's response literally provides no argument as to how it can survive strict scrutiny. Instead, it relies on only the faulty arguments addressed above to try to evade the application of strict scrutiny in the first place.

In particular, the County's response cites *no* evidence whatsoever to meet *its burden*, under a strict scrutiny analysis, of demonstrating that the Amish are doing anything unsafe. See *Mast*,

141 S Ct at 2432 (reiterating that under strict scrutiny "*the government* bears the burden of proving both that its regulations serve a 'compelling' governmental interest—and that its regulations are 'narrowly tailored.'" (emphasis added)), quoting *Fulton*, 141 S Ct at 1881. The County has no expert evidence at all to support its argument that the Amish's septage practices threaten public safety. Its own officials acknowledge that they have no evidence that the Amish are acting unsafely. See Amish MSD Br, pp 5–9. And they admit they were aware that the Amish community in next-door Hillsdale County has followed similar practices for decades without incident. See *id.*

Instead of offering any expert testimony of its own, the County criticizes the Amish's septage expert, Dr. Stehouwer, for basing his opinions about the safety of the Amish's practices on what the Amish report that they are doing. County Resp Br, p 17. But that is *precisely* what experts are supposed to do: offer expert opinions based on a set of proffered facts. See *Durbin v K-K-M Corp*, 54 Mich App 38, 54–55; 220 NW 2d 110 (1974) (explaining that experts may offer opinion on "any state of facts which the evidence tends to establish"). Dr. Stehouwer explained that his expert opinion was based on the fact that the Amish report using "about a cup of lime to four gallons of latrine waste," Stehouwer Dep (Ex 17), p 23:23–24, which allowed him to opine that any risk posed by their activities is "minimal . . . because the quantity of material is so small," *id.*, p 25:5–6. The County has not offered a single fact that would undercut the Amish's own description of the facts or their septage expert's analysis. Thus, the County has not even come close to meeting *its* burden under a strict scrutiny analysis. The Amish motion should be granted and this Court should issue a declaration and injunction (1) holding that the County has violated the Amish's constitutional and statutory rights and (2) ordering the County to accommodate the Amish's sincerely held religious beliefs in a safe manner consistent with the proposals the Amish have set forth in their variance applications and/or expert reports.

Respectfully submitted,

/s/ Philip Mayor
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Attorneys for Defendants

Dated: December 1, 2022

PROOF OF SERVICE

On December 1, 2022, I caused a copy of this brief to be served by electronic mail on John Gillooly, Attorney for Plaintiff, at jgillooly@garanlucow.com.

/s/ Stephen D. Behnke
Stephen D. Behnke

EXHIBIT 22

March 2022 Emails Between County and EGLE

Kasee Johnson

From: Hoeh, Jeremy (EGLE) <HOEHJ@michigan.gov>
Sent: Monday, March 28, 2022 9:42 AM
To: Merricle, Greg (EGLE); Kasee Johnson
Cc: Stevenson, Caterina (EGLE); Young, Regina (EGLE)
Subject: RE: Septage Question

Thanks Greg for responding during my absence.

One other item to mention, that was maybe already addressed, is the very big difference in Biosolids application and Septage application. Biosolids are treated wastewater solids coming from a WWTP, where Septage has not been treated.

Jeremy Hoeh
Cell: 517-898-3711
hoehj@michigan.gov

From: Merricle, Greg (EGLE) <MERRICLEG@michigan.gov>
Sent: Friday, March 25, 2022 8:28 AM
To: Kasee Johnson <Kasee.Johnson@lenawee.mi.us>
Cc: Stevenson, Caterina (EGLE) <StevensonC4@michigan.gov>; Hoeh, Jeremy (EGLE) <HOEHJ@michigan.gov>; Young, Regina (EGLE) <YoungR15@michigan.gov>
Subject: RE: Septage Question

Hey Kasee,

I'll try to address each of your questions but there's a lot there, so if I miss something, please let me know and I'll try to tackle that too.

Property owners (including farmers) land applying their own septage is not authorized by Part 117. It is also not a violation of Part 117. It's a violation of local code. Part 117 regulates licensed haulers only. The removal of the homeowner exemption ensured this, thankfully. I think Jeremy was trying to convey that.

Compliance with GAAMPs is meant to protect farmers from "nuisance lawsuits" from neighbors. Compliance with GAAMPs doesn't mean a farmer can break other rules or ignore their permit requirements. They still have to comply with other laws. Septage has to be applied per Part 117. Biosolids per Part 24. Bodies of dead animals have to be handled per BODA. GAAMPs only comes into play when a neighbor accuses a farmer of doing something that is causing a nuisance, like excessive odors, flooding, flies, etc. If the determination is made that the farmer is following GAAMPs, the complaint is "not verified". Compliance with other laws or permits is required and does not depend on GAAMPs and no GAAAMPs compliance determination from MDARD will change that. As an example, if a farmer took Biosolids and a neighbor complained, MDARD might determine that they were in compliance with the nutrient management GAAMPs, but EGLE could still determine that the farmer was not in compliance with Part 24 requirements, NPDES permit requirements, soil erosion and sedimentation control requirements, or that an illicit discharge had occurred.

The GAAMPs/Local Code fight is interesting, but I think you're thinking about it too broadly. The way I understand it is that the local code can't include or stipulate standards or requirements for Agricultural Management Practices where GAAMPs already apply. You could still use your code in other ways to regulate farming activities to protect public health. As an example, if GAAMPs allow 10 cows per acre, and a farmer has a 2 acre pen with 20 cows in it. AND their well and septic are within that pen. You could use your code to change that situation despite the fact that they are in compliance with GAAMPs.

Now, specifically to privies. There's an old law on the books that Regina's more familiar with than I am. I believe it's simply called the Privy Law or something similar. Essentially, it says that a privy can be moved to a new location and placed over a new pit and the "human waste" in the old pit must be covered with 12 inches of soil. It's pretty broadly written, so internally we discussed that you could argue that one might be able to get away with scooping/cleaning out the old pit, spreading the "night soil" somewhere and covering it with 12 inches of soil, but really, who would want to do that?! Also, you could argue that they can't get away with that. And your local code may have something to say about that, too.

I think that does it….

Greg

From: Stevenson, Caterina (EGLE) <StevensonC4@michigan.gov>
Sent: Friday, March 25, 2022 7:38 AM
To: Merricle, Greg (EGLE) <MERRICLEG@michigan.gov>
Subject: FW: Septage Question

Hi Greg,

Kasee was trying to reach Jeremy and he is out of office, so I am forwarding to you as it appears to be septage related.

Thanks!

Caterina

From: Kasee Johnson <Kasee.Johnson@lenawee.mi.us>
Sent: Thursday, March 24, 2022 4:03 PM
To: Stevenson, Caterina (EGLE) <StevensonC4@michigan.gov>
Subject: FW: Septage Question

Hi Caterina,

Please see the email below. I sent it to Jeremy this afternoon and got his message that he's out of the office until Monday. This is a time sensitive matter, so is there any way it could be sent to other program staff? The following individuals have been included on other related correspondence: Greg Merricle, Regina Young, and Dana DeBruyn.

Thank you,

Kasee Johnson, REHS/RS
Director of Environmental Health
Lenawee County Health Department
Phone: 517-264-5219
Fax: 517-264-0790
lenaweehealthdepartment.org

From: Kasee Johnson
Sent: Thursday, March 24, 2022 3:51 PM
To: 'Hoeh, Jeremy (EGLE)' <HOEHJ@michigan.gov>
Subject: RE: Septage Question

Hi Jeremy,

We've had some internal conversations over the last couple of weeks and I wanted to run a couple things by you.

First, during our phone conversation on 2-4-22, you indicated that EGLE no longer thought that these property owners land applying their own septage was a violation of Part 117. I say "no longer" since it looks like EGLE staff did previously indicate to our department over several years that this activity was a violation of Part 117. These previous conversations were documented in written notes from our staff. You also mentioned in the 2-4-22 call that Part 117 was essentially meant to apply to businesses that service septage and that issues with a homeowner servicing their own septic tank and land applying on their own property would have to be handled through the local environmental health code.

After that call, we took a look at older versions of Part 117 and found that the 1994 version (attached) actually included an exemption for homeowners to land apply their own septage in Section 11702 (2) . This exemption was then removed in 2004. To us, the removal of that exemption would seem to indicate that the intent was for Part 117 to apply to anyone who meets the definition of "service" or "servicing", regardless of if they're a property owner or land applying septage to their own property. Can you provide your/EGLE's thoughts on this? Also, could you confirm that EGLE's current stance is that Part 117 wouldn't apply to our local situation? And, is it possible for you to provide some context on why EGLE's stance has changed from what our department was previously told in regards to Part 117?

Second, during some conversations this week with colleagues from other local health departments, it was mentioned to us a couple different times that Right to Farm allows farmers to land apply their own septage. One department told us that, several years ago, they had a local farmer who owned several properties with farm houses that he rented out. This farmer would service the septic tanks on these properties and then land apply that septage on one of his own farm fields. The department thought this was a violation of state law, but was told that this practice was okay due to Right to Farm. Obviously, this is an anecdotal account and we don't have all of the context, so I reached out to Jay Korson at Right to Farm for some clarification. He pointed me to the Nutrient Utilization GAAMP (attached), which does list human septage/waste as a potential nutrient source. He also specifically cited the section on page 23 that states, "Municipal and privately owned treatment works that treat sewage may obtain authorization to land apply biosolids (wastewater treatment sludges) through the EGLE Water Resources Division (WRD)." He also stated that any farmer who is land applying septage would need to be permitted through EGLE. I responded to ask for clarification on if that specific section of the GAAMP would apply to a farmer land applying their own septage, since it doesn't seem like that septage would be classified as coming from a municipal or privately owned treatment work. I have not yet heard back on that. Do you have any thoughts on if Right to Farm would factor into our situation, or if EGLE would be involved with regulating the land application as Jay indicated? I know that Right to Farm is handled by MDARD, but I figured I'd ask since Jay said this activity would need to be permitted through EGLE.

Lastly, while looking at some of the Right to Farm information, I found the 2018 Attorney General's opinion (Opinion #7302) which states: "Unless otherwise approved under subsection 4(7) MCL 286.474(7), subsection 4(6) MCL 286.474(6) of the Right to Farm Act, 1981 PA 93, MCL 286.471 *et seq*., preempts provisions in ordinances adopted by local units of government that regulate farming activities when the Commission of Agriculture and Rural Development has developed generally accepted agricultural and management practices that address those farming activities." This appears to say that, as long as a farmer is in compliance with the GAAMPs, that our local code would not apply. So, if our local property owners land applying their own septage falls under Right to Farm, and our own code doesn't apply, and that activity is not regulated by Part 117, then is it just not regulated?

I know that I'm throwing a lot at you and that this is a complex subject. That being said, mediation for our court case is scheduled for Tuesday afternoon and we really need some clarification on these items before then. The Right to Farm issue was only raised this week and we're trying to figure out where that leaves us. Any help you can provide is extremely appreciated.

Kasee Johnson, REHS/RS

Director of Environmental Health
Lenawee County Health Department
Phone: 517-264-5219
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lenaweehealthdepartment.org

From: Hoeh, Jeremy (EGLE) <HOEHJ@michigan.gov>
Sent: Tuesday, March 1, 2022 3:21 PM
To: Kasee Johnson <Kasee.Johnson@lenawee.mi.us>
Subject: RE: Septage Question

Hello Kasee,

I had asked our staff and new enforcement analyst to look through your EH Code and never did get any direct responses. During some conversations, we did agree that your citation is a key component of the violations.

As we discussed on the phone, the focus could also be on the fact that these properties are utilizing an unapproved Individual Sewage Disposal System (bucket privy, Chapter 1, Section 3, Definition L) without submitting an Application For Permit (Chapter 2, Section 1, 2.1.B, C, E) or receiving any type of review or permit (Chapter 2, Section 2.1.I, J, K, O, Q; Chapter 2, Section 2; Chapter 2, Section 3). Utilizing a Part 117-licensed hauler would only come into play after the local Code issues of an approved and permitted Individual Sewage Disposal System are resolved. A single landowner wouldn't be violating Part 117 if they were applying sewage/septage to their own farm field; this would just be improper disposal of sewage/septage on your own property in violation of the local Code. (per your citation, below)

This unapproved Individual Sewage Disposal System is also creating a Nuisance under the Code (Chapter 1, Section 2, Definition F) and does not meet the definition of a Safe And Adequate Sewage Disposal System (Chapter 1, Section 3, Definition U).

Sorry for the delay. I hope all is well.

Jeremy Hoeh
Cell: 517-898-3711
hoehj@michigan.gov

From: Kasee Johnson <Kasee.Johnson@lenawee.mi.us>
Sent: Friday, February 4, 2022 2:07 PM
To: Hoeh, Jeremy (EGLE) <HOEHJ@michigan.gov>
Subject: RE: Septage Question

Hi Jeremy,