

IN THE SUPREME COURT OF OHIO

NATIONAL SOLID WASTES MANAGEMENT)
ASSOCIATION,)

Plaintiff-Appellant,)

v.)

STARK-TUSCARAWAS-WAYNE)
JOINT SOLID WASTE MANAGEMENT)
DISTRICT,)

Defendant-Appellee.)
)
)

09 - 0211

On Appeal from the Stark
County Court of Appeals,
Fifth Appellate District

Court of Appeals
Case No. 2008-CA-00011

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE
SUMMIT/AKRON SOLID WASTE MANAGEMENT AUTHORITY

Terrence Fay (0022933)
Christopher Habel (0064913)
Frost Brown Todd, LLC.
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215-3484

Counsel for Appellant, National Solid Wastes
Management Association

Thomas W. Connors (0007226)
Kristin R. Zemis (0015812)
Victor R. Marsh (0062182)
220 Market Avenue South, Suite 1000
Canton, Ohio 44702

Counsel for Appellee, Stark-Tuscarawas-Wayne
Solid Waste Management District

Terrence S. Finn (0039391)
Roetzel & Andress, LPA
222 South Main Street
Akron, OH 44308
Telephone: 330.376.2700
Facsimile: 330.376.4577
tfinn@ralaw.com

Counsel for Amicus Curiae, Summit/Akron
Solid Waste Management Authority

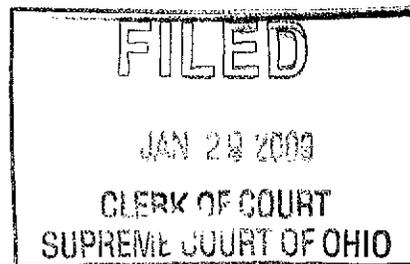


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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR
GREAT GENERAL INTEREST**

This case presents the following two issues that are critical to management planning and disposal of solid waste throughout Ohio:

1. Whether the Director of the Ohio Environmental Protection Agency (the "Director") has the authority to enforce local rules that are adopted by a solid waste management district under Revised Code ("R.C.") §343.01(G); and

2. Whether local rules adopted by a solid waste management district under R.C. §343.01(G) are valid and enforceable when the Director, as opposed to the solid waste management district, prepares the district's plan.

In this case, local rules were adopted under R.C. §343.01(G) by the Stark-Tuscarawas-Wayne Solid Waste Management District ("STW") in November of 2006 (the "STW Rules").¹ Rule 9.04 of the STW Rules prohibits a solid waste facility within STW's boundaries from accepting waste that originates in another solid waste management district to the extent that the other district does not exceed certain recycling standards ("Rule 9.04").

The Court of Appeals ruled that the Director is the party that has the authority to enforce the STW Rules and, therefore, the Director is a necessary party to the underlying declaratory judgment action. The ruling is in direct conflict with R.C. Chapter 343 and R.C. §§3734.50 through 3734.57, which establish and provide for solid waste management planning within Ohio. Under these statutory provisions each local solid waste management district is charged with the responsibility and obligation of planning for the management of solid waste generated within the district's boundaries. The Director is charged with the responsibility of reviewing and approving plans prepared by solid waste management districts. Once a plan is approved, the district is then obligated to implement the plan. Plan implementation includes implementing any local rules that

¹ The STW Rules also state that the rules were adopted under R.C. §3734.53. R.C. §3734.53(C) provides that a district's plan may allow for the adoption of rules under R.C. §343.01(G) after the approval of the plan.

are authorized to be adopted under an approved plan. When a district fails to adhere to its statutory planning obligation, as in the instant case, the Director is then required to prepare a plan and order the district to implement the plan. Thus, even when the Director prepares a district's plan, it is still the district, and not the Director, that is responsible for implementing the plan.

The Court of Appeals' ruling is not only in direct conflict with the statutory solid waste management planning provisions, the ruling creates uncertainty throughout the state as to which governmental entity is now required to implement local plans and enforce local rules. This lack of certainty directly impacts each solid waste management district throughout the state.

In addition to the foregoing regulatory considerations, which makes this case one of great public interest, the decision also has great general interest. Citizens and businesses throughout Ohio generate solid waste. The legislature establishes a specific management planning scheme in which local districts, as opposed to the Director, are charged with the implementation of plans and enforcement of local rules. When the implementation of plans and enforceability of local rules becomes uncertain, planning becomes more difficult and less effective, which directly increases the cost for the disposal of solid waste. These increased costs will be passed on to the citizens and businesses that generate solid waste.

The Court of Appeals' decision also has great significance because it undermines the solid waste management planning process in Ohio. If the Director is the party that has authority to enforce local rules, as opposed to the solid waste management district that adopted the rules, the Director would then need to be directly involved in the implementation of each local solid waste management plan in Ohio. This would be a major undertaking that would require a significant increase in Ohio EPA's staff. Moreover, consistent with the statute, local solid waste management districts should already be equipped to handle this function. The duplication of

effort by state and local governments that results from the erroneous Court of Appeals decision leads to a far more expensive and far less effective solid waste management planning process.

Due to its erroneous ruling, the Court of Appeals failed to rule on the validity and enforceability of the STW Rules. In addition, while the Trial Court stayed the effective date of Rule 9.04 until June 1, 2009, the result of the Court of Appeals' ruling is that Rule 9.04 became effective on January 1, 2008. Therefore, this case is also of both public and great general interest because Rule 9.04, which has the potential to prohibit landfills within STW from accepting waste that does not originate in STW, is now in effect. Thus, solid waste management districts, landfills and generators of solid waste face the possible enforcement of Rule 9.04 by the Director, even though Rule 9.04 is not valid or enforceable under the solid waste management statutory provisions.

In sum, this case goes to the very essence of solid waste management planning within the state of Ohio. It affects not only the governmental entities charged with solid waste management planning, but it also affects the citizens and businesses that generate solid waste and the businesses that haul and dispose of solid waste. These citizens and businesses rely upon the planning and implementation function of the local districts. Erroneously shifting the local rule enforcement authority to the Director will only result in confusion and a less effective and more expensive process. As a result, *Amicus Curiae*, Summit/Akron Solid Waste Management Authority urges this Court to grant jurisdiction and review the erroneous decision of the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from the adoption of STW's Rules. STW is a joint solid waste management district formed under R.C. §§343.01 and 3734.52. As such, STW is charged with

the legal obligation to provide for solid waste management planning within its jurisdiction. STW's initial solid waste plan was approved by the Director on February 24, 1993. Pursuant to R.C. §3734.56, STW was required to prepare an amendment to its solid waste management plan, and obtain the Director's approval of the same by no later than August 24, 1999. STW failed to obtain the Ohio EPA's approval of an amendment to its solid waste management plan by the required deadline. When a district does not adhere to its planning obligations and fails to provide the Director with an approval plan or amended plan, the Director is required to prepare the plan or amended plan and issue an order requiring the district to implement and comply with the plan or amended plan. R.C. §§3734.55(D) and 3734.56(A).

On December 20, 2006, the Ohio EPA prepared the necessary plan for STW (the "Ohio EPA Plan") and issued an order requiring STW to implement and comply with the Ohio EPA Plan. Importantly, the Ohio EPA Plan provides that STW does not have the authority to adopt local rules, and the Ohio EPA Plan does not authorize STW to enforce previously adopted rules.

In November 2006, several years after the expiration of STW's prior plan, and shortly before the Ohio EPA's issuance of the Ohio EPA Plan, STW adopted STW's Rules, including Rule 9.04. Appellant, National Solid Wastes Management Association ("NSWMA") filed a complaint in the Stark County Court of Common Pleas (the "Trial Court") on December 13, 2006 against STW challenging the validity and enforceability of the STW Rules. On December 18, 2007, the Trial Court issued an Order denying NSWMA's request to declare STW's rules void and unenforceable. NSWMA filed a timely notice of appeal with the Fifth District Court of Appeals challenging the Trial Court's Order. On December 15, 2008, the Court of Appeals ruled that the Director was the party with the authority to enforce the STW's rules, and that the Director was a necessary party. Since the Director was not a party, the Court of Appeals held

that the Trial Court lacked jurisdiction, dismissed the Trial Court's decision and remanded the case to the Trial Court for further proceedings.

The Court of Appeals erred in ruling that the Director was a necessary party and not ruling that the STW Rules were invalid and unenforceable. In support of its position on these issues, *Amicus Curiae*, Summit/Akron Solid Waste Management Authority presents the following argument:

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Director of Environmental Protection does not have the authority to enforce local rules adopted by a solid waste management district under R.C. §343.01(G).

R.C. Chapters 3734 and 343 establish a statutory scheme for solid waste management planning in Ohio. In summary, local districts are charged with the responsibility and duty to prepare, adopt, amend and implement a solid waste management plan that has been approved by the Director. R.C. §§3734.54 through 3734.56. As a result, local solid waste districts must plan for disposal capacity for the solid waste generated within its jurisdictional boundaries as well as provide for recycling goals for such waste. R.C. §3734.53. The Director is charged with the responsibility of reviewing and approving plans submitted by local solid waste management districts. R.C. §3734.55. In addition, when a district fails to submit a plan or a plan amendment the Director is then required to prepare the plan and issue an order requiring the district to implement the plan. R.C. §§3734.55(D) and 3734.56(A).

The Court of Appeals held that R.C. §3734.02 vests the power of enforcement of a solid waste management district's local rules with the Director. However, R.C. §3734.02 does not provide the Director with any such authority. In fact, R.C. §3734.02 does not even pertain to solid waste management districts or solid waste management planning. R.C. §3734.02 does

provide the Director with the authority to regulate solid waste facilities, including the following authority:

The director of environmental protection, in accordance with Chapter 119. of the Revised Code, shall adopt and may amend, suspend, or rescind rules having uniform application throughout the state governing solid waste facilities and the inspections of and issuance of permits and licenses for all solid waste facilities in order to ensure that the facilities will be located, maintained, and operated, and will undergo closure and post-closure care, in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, create a health hazard, or violate 40 C.F.R. 257.3-2 or 40 C.F.R. 257.3-8, as amended.

The authority to regulate the operation, licensing, closure, etc. of solid waste facilities is not the same as the authority to enforce local rules pertaining to solid waste management planning. Moreover, the rules adopted under R.C. §3734.02(A) must be of “uniform application throughout the state”. Local rules only apply in the jurisdictional boundaries of the district that adopts the rules.

STW’s rule-making authority is set forth in R.C. §343.01(G). That section does not provide the Director with the authority to adopt or enforce local rules. R.C. §3734.50 provides the Director with the authority to prepare a statewide solid waste management plan. However, nowhere in that section does it provide the Director with the authority to adopt or enforce local rules. In fact, no where within the Revised Code does it provide the Director such authority.

While the Revised Code does not provide the Director with the authority to adopt or enforce local rules, Ohio’s statutory scheme for solid waste management planning expressly places the authority of implementing plans and enforcing local rules into the hands of solid waste management districts. A local solid waste management district, and not the Director, is charged with the implementation of a solid waste management plan for the district. R.C. §3734.55(C)(4). Moreover, R.C. §343.01(G) provides that a solid waste management district has the authority to

adopt and enforce local rules, but only to the extent authorized in its plan. Thus, the implementation and enforcement of local rules is tied to the district's plan, and it is the responsibility of the district, and not the Director, to implement the plan.

In addition, not only does the Director lack authority to enforce local rules, local rule authority is extinguished when the Director prepares a plan, as in the case at hand. If a district prepares and obtains approval of its own plan, R.C. §3734.53(C) provides that the plan may provide for the adoption of local rules under R.C. §343.01(G). However, R.C. §§3734.55(D) and 3734.56(A) provide that if the Director prepares the district's plan, the plan shall not contain any of the provisions required or authorized to be included in the plan under R.C. §3734.53(C). As a result, when the Director prepares a plan, the plan cannot provide for local rule authority under R.C. §343.01(G). Therefore, when the Director prepared the Ohio EPA Plan in the instant case, any authority to adopt and enforce new local rules, and any authority to enforce prior local rules, including the STW Rules, was extinguished.

Proposition of Law No. II: Local rules adopted under R.C. §343.01(G) are no longer valid and enforceable when the Director of Environmental Protection prepares a district's plan pursuant to R.C. §§3734.55(D) and 3734.56(A).

STW, as a political subdivision created and empowered by the General Assembly, has powers which are limited to those expressly provided by statute. *Temple v. Wean United, Inc.* (1977) 50 Ohio St. 2d 317, 327. STW's rule-making authority is set forth in R.C. §343.01(G), which in pertinent part provides as follows:

To the extent authorized by the solid waste management plan of the district approved under section 3734.521 or 3734.55 of the Revised Code or subsequent amended plans of the district approved under section 3734.521 or 3734.56 of the Revised Code, the . . . board of directors of a joint district may adopt, publish and enforce rules doing any of the following

Therefore, R.C. §343.01(G) provides that a solid waste management district only has authority to adopt and/or enforce local rules to the extent authorized in its plan or, if applicable, subsequent amended plan. When the Director prepares the district's plan, a solid waste management district is not permitted to take advantage of the rule-making authority under R.C. §343.01(G) and, thus, such district is not authorized to adopt or enforce local rules. In the instant case, because STW failed to comply with its statutory mandate to prepare an amended solid waste management plan, the Director was required to prepare the Ohio EPA Plan. The Ohio EPA Plan does not provide STW with rule making authority, and there is no authorization within the Ohio Plan for the enforcement of the STW rules. Thus, STW lost its rule authority; i.e., the authority to adopt and enforce new rules and the authority to enforce any previously adopted rules. As a result, the STW Rules are invalid and unenforceable.

In addition to the foregoing, the STW Rules were adopted in November 2006, which was several years after the August 24, 1999 expiration of STW's prior solid waste management plan and one month before the issuance of the Ohio EPA Plan. Therefore, at the time the STW's Rules were adopted, STW did not have a valid plan. Since R.C. §343.01(G) limits a district's authority to only adopt rules to the extent authorized in the district plan, the STW Rules are invalid and unenforceable because the adoption of the STW's Rules was not authorized by an existing, valid, solid waste management plan.

CONCLUSION

For the reasons set forth above, this case involves matters of public and great general interest. As a result, Summit/Akron Solid Waste Management Authority requests that this Court accept jurisdiction in this case, so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

SUMMIT/AKRON SOLID WASTE
MANAGEMENT AUTHORITY

By: 
Terrence S. Finn (0039391)
Roetzel & Andress, LPA
222 South Main Street
Akron, OH 44308
tfinn@ralaw.com; survan@ralaw.com
Ph: (330) 376-2700
Fx: (330) 376-4577

ATTORNEYS FOR SUMMIT/AKRON
SOLID WASTE MANAGEMENT
AUTHORITY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing was served via regular U.S.

Mail this 29th day of January, 2009 upon:

Terrence Fay
Christopher Habel
Frost Brown Todd, LLC.
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215-3484

Thomas W. Connors
Victor R. Marsh
Kristin R. Zemis
220 Market Avenue South, Suite 1000
Canton, Ohio 44702


Terrence S. Finn