

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

OSNABURG TOWNSHIP ZONING)
INSPECTOR,)
Plaintiff-Appellant,)
)
v.)
)
ESLICH ENVIRONMENTAL, INC.,)
Defendant/ Third-Party)
Plaintiff-Appellee,)
)
v.)
)
OSNABURG TOWNSHIP, et al.,)
Third-Party Defendant-)
Appellant.)

CASE NO. 09-0228

ON MOTION FOR LEAVE TO
APPEAL FROM THE OHIO COURT
OF APPEALS FOR STARK COUNTY,
FIFTH APPELLATE DISTRICT,
CASE NO. 2008-CA-00026

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-
APPELLANT OSNABURG TOWNSHIP ZONING INSPECTOR AND
THIRD-PARTY DEFENDANT-APPELLANT OSNABURG TOWNSHIP**

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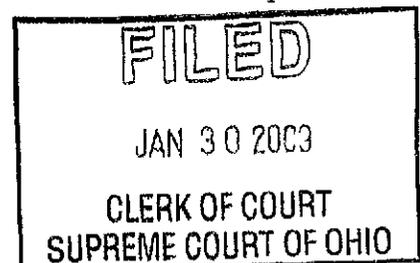


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Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.,
Stark App. No. 2008-CA-00026, 2008-Ohio-6671.

WHY THIS CASE SHOULD BE ACCEPTED FOR REVIEW

This is a case of public or great general interest and also presents a substantial constitutional issue. It presents an issue of the most basic form of local government home rule: zoning. It also presents an issue of zoning's application to one of the most controversial land uses to local communities: a landfill. This case is of statewide significance because what began as a superficial misinterpretation of a key decision of this Court has effectively rendered township zoning a nullity.

The legal issue presented by this case is straightforward. The question that this Court's home rule and preemption jurisprudence has never answered explicitly is whether, in considering whether a conflict exists between a state regulatory scheme and local zoning ordinances, the analysis looks to a single discrete ordinance or rather, collectively, to the entire zoning code implicated in the conflict analysis. This Court's preemption jurisprudence implicitly and explicitly considers state regulation in its entirety. *A fortiori*, local zoning codes should be evaluated in their entirety as well. Otherwise, when an ordinance is viewed in isolation, the result may effectively eliminate local zoning and land use controls.

The challenged decision of the Fifth District Court of Appeals compels the (surely unintended) result that if a construction and demolition debris facility receives a state-issued permit, a township is without authority to regulate such a facility, or the expansion of an existing facility, in a residential district. The fact that the township otherwise permits such facilities in an industrial district is given no weight. While a C & D disposal site in one's backyard may not be as controversial to the general public as, say, a hazardous waste disposal site, control over the placement and expansion of such a facility is exactly what local zoning and land use controls

have been created for.

The appellate decision in this case is based upon a misreading of a touchstone case of this Court's home rule and preemption jurisprudence. This decision should not be dismissed as a fluke decision with no precedential authority, however, because of the vast implication of its superficial analysis. The appellate court found a single family residential zoning classification unconstitutional because the classification does not permit C & D landfills. As the decision stands, legally it is antithetical to every zoning and home rule decision of this Court. Practically, it allows C & D landfills, and their expansion, literally into the backyards of township residents.

STATEMENT OF CASE AND FACTS

In 1989, appellee Eslich Environmental, Inc. ("Eslich") purchased approximately 175 acres located at 7280 Lisbon Street Southeast, East Canton, Stark County, Ohio. This property is located within the unincorporated portion of Osnaburg Township and is zoned according to the Osnaburg Township Zoning Resolutions, which were adopted in 1961. The Eslich property is within an area zoned R-1 Single Family Residential.

Between 1989 and 1996, Eslich operated a construction and demolition debris (C & D) disposal facility on the property. A C & D disposal facility is not a permitted use in an R-1 Residential District pursuant to the Osnaburg Township zoning resolutions; such a facility is, however, conditionally permitted in an I-2 General Industrial District. On March 26, 1990, the Osnaburg Township Board of Zoning Appeals issued a Certificate of Non-Conforming Use to Eslich for the property.

In 1996, non-party Stark C & D Disposal, Inc. leased the property from Eslich, took over the operations of the C & D disposal facility, and has operated the facility ever since.

From 1996 through the present, approximately 20.2 acres of the Eslich property have been actively used as a C & D landfill. Stark C & D is also presently licensed for an additional 8.5 acres of “inactive licensed disposal area.”

This litigation arose on May 30, 2007, when Eslich manifested its plans to expand the landfill without seeking a permit to expand the nonconforming use. As a nonconforming or “grandfathered” use of the property for a landfill in a residentially zoned district, approval from the township’s Board of Zoning Appeals is required prior to expansion. Eslich had not sought any permit for the proposed expansion. Instead, Eslich only applied to the Stark County General Health District to expand the licensed landfill from approximately 20 acres to approximately 117 acres. Appellant, the Osnaburg Township Zoning Inspector, filed a Complaint and Motion for Temporary Restraining Order to prevent the unapproved expansion.

The parties agreed that the preparation activities on the property did not yet constitute a zoning violation and, therefore, no restraining order was necessary. In the meantime, Eslich filed counterclaims against the zoning inspector and third-party claims against the township board of trustees, arguing that (1) zoning is preempted by state law, (2) township zoning is unconstitutional as applied to this property, and (3) no approval of the expansion is required because the approved nonconforming use applies to the property as a whole, not only the active landfill portion.

The trial court granted Eslich’s motion for summary judgment on the preemption issue, thereby disposing of the entire case. The township and the zoning inspector appealed the decision to the Fifth District Court of Appeals, Stark County, citing one assignment of error. The township argued that state law does not preempt zoning in this case pursuant to *Sheffield v.*

*Rowland*¹ because township zoning does not prohibit C & D landfills altogether. C & D disposal facilities are permitted in industrial districts. The Fifth District Court of Appeals affirmed the decision of the trial court, however, holding that the single-family residential zoning classification is preempted by Revised Code Chapter 3714.²

The zoning inspector and township now appeal from the decision of the Fifth District Court of Appeals.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: No conflict exists between R.C. Chapter 3714 and local zoning ordinances where such ordinances, read *in pari materia*, neither prohibit what the state regulations allow nor alter, impair, or limit the operations of a C & D disposal facility, and therefore the local zoning ordinances are not preempted. [*Sheffield v. Rowland*, 87 Ohio St.3d 9, 1999-Ohio-217, 716 N.E.2d 1121 and *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797 construed and followed.]

The Fifth District Court of Appeals considered the question of whether Osnaburg Township's Single Family Residential zoning classification is invalid as a violation of Article XVIII of the Ohio Constitution. In holding that one zoning ordinance is unconstitutional as applied to the Eslich property, the appellate court eliminated the township's right to determine where a C & D landfill may be located. Instead, the appellate court should have found that no conflict existed, and therefore preemption does not apply, because Osnaburg Township Zoning

¹*Sheffield v. Rowland*, 87 Ohio St.3d 9, 12, 1999-Ohio-217, 716 N.E.2d 1121.

²*Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.*, Stark App. No. 2008-CA-00026, 2008-Ohio-6671, ¶57.

The Fifth District further held that the township ordinance is preempted only as to the Eslich property presently licensed by the Board of Health as an active or inactive disposal site because the issue is not yet ripe as to the remainder of the property. *Osnaburg Twp. Zoning Inspector*, supra, 2008-Ohio-6671 at ¶56, citing *Trans Rail Am., Inc. v. Hubbard Twp.*, 172 Ohio App.3d 499, 2007-Ohio-3478, 875 N.E.2d 975. Appellants do not challenge this holding.

Ordinances do not prohibit C &D landfills.

This Court's preemption jurisprudence is well-settled but nonetheless prone to misinterpretation. A state statute preempts a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.³ The parties agree that the Osnaburg Township Zoning Ordinances are an exercise of the police power, rather than of local self-government.⁴ The parties also agree that the state regulations at issue, Revised Code Chapter 3714, are "general laws."⁵ The Fifth District Court of Appeals erred, however, in determining that R.C. Chapter 3714 preempts the township ordinance because the appellate court looked to a single ordinance in isolation, instead of reading the zoning code *in pari materia*.

The test to determine whether a conflict exists between a local ordinance and a state statute is "whether the ordinance permits or licenses that which the statute forbids and prohibits,

³*Canton v. State*, 95 Ohio St.3d 149, 151, 2002-Ohio-2005, 766 N.E.2d 963, citing *Ohio Assn. Of Private Detective Agencies, Inc. v. N. Olmsted* (1992), 65 Ohio St.3d 242, 244-245, 602 N.E.2d 1147, and *Auxter v. Toledo* (1962), 173 Ohio St. 444, 20 O.O.2d 71, 183 N.E.2d 920.

⁴*Yorkavitz v. Board of Tp. Trustees of Columbia Tp.* (1957), 166 Ohio St. 349, 142 N.E.2d 655, paragraph one of the syllabus ["The zoning power of township trustees, described in Chapter 519, Revised Code, is solely a police power delegated to township trustees by the General Assembly."]

⁵*Sheffield v. Rowland*, 87 Ohio St.3d 9, 11, 1999-Ohio-217, 716 N.E.2d 1121 ["It appears beyond dispute that R.C. Chapter 3714 is a general law..."]

and vice versa.”⁶ This Court has moved toward a conflict-by-implication test.⁷ In other words, does the local law penalize an act which the state law authorizes? To answer this question, this Court has endorsed “look[ing] at a comprehensive regulatory enactment as a whole;”⁸ *a fortiori*, the local regulatory enactment must be evaluated as a whole as well.

Instead, the Fifth District Court of Appeals viewed the Single Family Residential classification in isolation, summarily found that C & D disposal sites are prohibited within that classification, and pronounced the ordinance unconstitutional. The appellate court thereby ignored the key factor that distinguishes this case from *Sheffield v. Rowland*. Reading the Sheffield ordinances *in pari materia*, C & D landfills were completely prohibited anywhere in the township. This complete prohibition led this Court to hold that the Sheffield ordinances conflict with R.C. 3714:

...[T]he Sheffield ordinances do more than merely impair or limit the operation of a state-authorized facility: they completely prohibit the facility. **Nothing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities to certain districts with appropriate zoning.** (Emphasis added.)

Sheffield v. Rowland, supra, 87 Ohio St.3d at 12, citing *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797.

⁶*Dayton v. State*, 157 Ohio App.3d 736, 753, 2004-Ohio-3141, 813 N.E.2d 707, citing *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph two of the syllabus, and *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797, paragraph two of the syllabus.

⁷*Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 178, 2006-Ohio-6043, 858 N.E.2d 776.

⁸*Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776 (O'Connor, J., dissenting).

While acknowledging the conflict-by-implication inherent in the local ordinances, this Court stressed the surviving importance of zoning in terms of determining where state-regulated facilities are located. In the instant case, no complete prohibition exists; C & D landfills are permitted in industrial districts, thereby eliminating the direct conflict at issue in *Sheffield*.

The problem is that Eslich argued, and the Fifth District agreed, that because C & D landfills are prohibited in Single Family Residential districts, zoning must yield altogether to R.C. Chapter 3714.⁹ (Eslich has never argued that the ordinances otherwise “alter, impair, or limit” the operations of the C & D facility.)¹⁰ This conclusion is in error because it disregards the Court’s cautionary instruction in *Sheffield* and thereby renders township zoning meaningless in the context of C & D landfills. Such is not the intent of any case in the State of Ohio which has examined the interrelationship of local zoning and state regulation of landfills.

The Twelfth District Court of Appeals agreed that *Sheffield’s* finding of preemption is premised upon the complete prohibition of C & D landfills. In a similar case, the Twelfth District found that zoning coexists with state environmental regulation, and there is no preemption where the local ordinances do not completely prohibit a solid waste facility.¹¹ In its conflict analysis, the court looked at the Warren County ordinances *in pari materia* and

⁹Eslich’s argument that zoning is preempted by the Single Family Residential ordinance is artful in light of that fact that the property was zoned before Eslich started its operation, its operation has been allowed to continue as a nonconforming use, and only when the owners sought to expand the nonconforming use did zoning become an issue.

¹⁰See, *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 217, 492 N.E.2d 797.

¹¹*Clarke v. Warren Cty. Bd. of Commrs.*, Warren App. No. CA2005-04-048, 2006-Ohio-1271, ¶¶26-29, appeal not allowed 110 Ohio St.3d 1442, 2006-Ohio-3862, 852 N.E.2d 189.

found that solid waste facilities are still subject to local zoning restrictions:

...[U]nlike the zoning ordinance in *Sheffield*, the Warren County Zoning Code does not prohibit what is permitted by the general laws of this state. The amended Warren County Zoning Code does permit the use of the property for the storage of solid waste, but restricts such use to property that is subject to SD [solid waste disposal district] zoning. The addition of SDT zoning to the Warren County Zoning Code merely restricts *where* solid waste may be stored in Warren County, which is a proper exercise of the county's police power.

Clarke, 2006-Ohio-1271 at ¶29.

The Sixth District Court of Appeals has read *Sheffield* to state that a conflict exists between a local zoning resolution and Chapter 3714 where the township attempts to prohibit *all* landfills.¹² Significantly, the court held that the township could control the location of the landfill at issue but could not prohibit its existence altogether.¹³

Additionally, where the local ordinance does not “imped[e] the landfill’s seminal operations in any substantive or significant way,” there is no conflict between the ordinance and the regulation.¹⁴ The C & D facility on the Eslich property has not been hampered in any way and has been permitted to flourish as a nonconforming use subject to local zoning.

The Home Rule Amendment to the Ohio Constitution permits municipalities (and, by extension, townships) to exercise “all powers of local self-government and to adopt and enforce

¹²*Center Tp. Bd. Of Tp. Trustees v. Valentine* (Nov. 9, 2000), Wood App. No. WD-99-065, unreported, 2000 WL 1675511.

¹³*Id.*, at *2.

¹⁴*Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 217, 492 N.E.2d 797; see also, *Middleburg Hts. v. Ohio Bd. of Bldg. Standards*, 65 Ohio St.3d 510, 1992-Ohio-11, 605 N.E.2d 66.

within their limits such local police, sanitary, and other similar regulations, as are not in conflict with the general laws.”¹⁵ Townships may only enact laws to the extent permitted by the General Assembly.¹⁶ Pursuant to R.C. 519.02, townships are endowed with the statutory authority to enact land use and zoning regulations.¹⁷ “This clear statutory authority has the same force and effect as the constitutional authority of home rule municipalities to regulate local land use.”¹⁸

This Court has reviewed the Home Rule Amendment in a number of contexts: “As we explained more than 50 years ago, the Home Rule Amendment was designed to give the ‘broadest possible powers of self-government in connection with all matters which are *strictly* local,’ but the framers of the amendment did not want to ‘impinge upon matter which are of a state-wide nature or interest.’”(Emphasis in original.)¹⁹ No legislative subject could be more strictly local than zoning and land use control. In fact, the ability of political subdivisions to zone their communities as they see fit has been described as the “heart” of home rule.²⁰

Courts have recognized the distinct purposes, yet harmonious coexistence, of local zoning

¹⁵Ohio Constitution, Section 3, Article XVIII.

¹⁶*Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.* (1990), 55 Ohio St.3d 106, 108, 563 N.E.2d 717.

¹⁷*Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.* (1992), 62 Ohio St.3d 387, 390, 583 N.E.2d 302.

¹⁸*Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill*, 67 Ohio St.3d 293, 297, 1993-Ohio-216, 617 N.E.2d 1089, fn. 6.

¹⁹*Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 175, 2006-Ohio-6043, 858 N.E.2d 776.

²⁰*Canton v. State*, 95 Ohio St.3d 149, 157, 2002-Ohio-2005, 766 N.E.2d 963.

and state regulation.²¹ E.P.A. regulation of solid waste disposal sites, as described in Chapter 3734, coexists with local zoning.²² Similarly, even though oil and gas wells are subject to state regulation, a township may regulate oil and gas well sites in a residential area where appropriate if zoning actions were based upon legitimate health and safety concerns.²³ Zoning and state regulations have distinct legislative purposes in the area of surface mining, but both together “present dual conditions to the operation of a mineral quarry.”²⁴ Nuisance litigation co-exists with solid waste disposal regulation.²⁵

In short, the existence of statutory regulation for C & D landfills does not mean that

²¹See, *Aluminum Smelting & Refining Co., Inc. v. Denmark Tp. Bd. Of Zoning Appeals*, Ashtabula App. No. 2001-A-0050, 2002-Ohio-6690, ¶20, appeal not allowed 98 Ohio St.3d 1538, 2003-Ohio-1946, 786 N.E.2d 901 (“Simply put, [the township] cannot prevent Aluminum Smelting from doing what it has been doing—maintaining a captive landfill, but [the township] can adopt reasonable zoning requirements that prevent other, more extensive, landfill uses.”)

²²*Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797, paragraph four of the syllabus; See also, *Families Against Reily/Morgan Sites v. Butler County Bd. Of Zoning Appeals* (1989), 56 Ohio App.3d 90, 97, 564 N.E.2d 1113 [“The purposes of zoning and EPA regulations are inherently different, leading to the conclusion that both frameworks are distinct but harmonious”]; *Hulligan v. Columbia Tp. Bd. Of Zoning Appeals* (1978), 59 Ohio App.2d 105, 392 N.E.2d 1272; *Columbia Township Trustees v. Williams* (Aug. 5, 1976), Franklin App. Nos. 76AP-107, 76AP-109, 76AP-153, unreported, 1976 WL 190118, at *5 [“Neither the laws pertaining to air or water quality, nor the laws pertaining to waste water treatment or solid waste disposal contain provisions of a zoning philosophy. The latter in our view have been left to local authorities, both municipal and township, within the zoning laws of Ohio, and should remain there until such time as the legislature might see fit to enact laws concerning statewide land use”].

²³*Newbury Twp. Bd. of Trustees v. Lomak Petroleum (Ohio), Inc.* (1992), 62 Ohio St.3d 387, 583 N.E.2d 302, paragraph two of the syllabus.

²⁴*Set Products, Inc. v. Bainbridge Tp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 265, 510 N.E.2d 373.

²⁵See, *Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill*, 67 Ohio St.3d 293, 1993-Ohio-216, 617 N.E.2d 1089.

townships lose their ability to determine the most appropriate uses of land through zoning.²⁶

Considering legislative frameworks as a whole has been an important means of allowing this Court to determine whether a state statute is a “general law.”²⁷ The pattern of preemption analysis indicates that it makes more sense to examine statutes or zoning codes in their entirety, rather than in isolation, to determine whether a conflict exists. Otherwise, fluke decisions such as that of the Fifth District Court of Appeals appear.

The Osnaburg Township Zoning Inspector and Osnaburg Township urge this Court to accept this appeal because this case presents more than an error of law and a misreading of precedent. It has created a decision which may be used to defeat local land use controls, a result which is completely contrary to the express warnings of this Court.

The State of Ohio respectfully urges this Court to accept jurisdiction and reverse the decision of the Fifth District Court of Appeals.

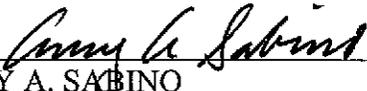
²⁶See, *Rumpke Waste, Inc. v. Henderson* (S.D. Ohio 1984), 591 F.Supp. 521.

²⁷*Canton v. State*, 95 Ohio St.3d 149, 152-153, 2002-Ohio-2005, 766 N.E.2d 963, citing *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 442 N.E.2d 1278, and *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted* (1992), 65 Ohio St.3d 242, 602 N.E.2d 1147, and *Linndale v. State* (1999), 85 Ohio St.3d 52, 706 N.E.2d 1227.

CONCLUSION

For the reasons discussed above, this case raises a substantial constitutional question and involves matters of public and great general interest. The State requests that this Court grant jurisdiction and allow this case so that these important issues may be reviewed on the merits.

Respectfully submitted,
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PROOF OF SERVICE

A copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION was sent by ordinary U.S. mail this 28 th day of January, 2009, to MICHAEL A. CYPHERT, Walter & Haverfield LLP, 1301 East Ninth Street, Suite 3500, Cleveland, Ohio 44114 and to STANLEY P. RUBIN, 437 Market Ave. North, Canton, Ohio 44702.



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APPENDIX

OSNABURG TOWNSHIP ZONING INSPECTOR,
Plaintiff-Appellant,

v.

ESLICH ENVIRONMENTAL, INC.,
Defendant-Appellee,

v.

OSNABURG TOWNSHIP, et al.,
Third-Party Defendant-Appellant.

Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.,
Stark App. No. 2008-CA-00026, 2008-Ohio-6671.

NANCY S. REINHOLD
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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

OSNABURG TOWNSHIP ZONING
INSPECTOR,

JUDGES:

Plaintiff-Appellant

Hon. Sheila G. Farmer, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

-vs-

Case No. 2008CA00026

ESLICH ENVIRONMENTAL INC.,

Defendant/ Third-Party
Plaintiff-Appellee,

OPINION

Heath

-vs-

OSNABURG TOWNSHIP, et al.,

Third-Party Defendants-
Appellants.

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas Court Case No. 2007 CV
02262

JUDGMENT:

AFFIRMED IN PART; REVERSED IN
PART & REMANDED

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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TRUE COPY TESTE:
NANCY S. REINHOLD, CLERK
By *[Signature]* Deputy
Date *12.16.08*

Delaney, J.

{¶1} Appellants Osnaburg Township Zoning Inspector, Osnaburg Township and Osnaburg Board of Trustees ("Appellants") appeal the January 16, 2008 entry of the Stark County Common Pleas Court which granted summary judgment in favor of Appellee Eslich Environmental, Inc. ("Appellee") as to one count (Count II) of Appellee's Counterclaim and Third-Party Complaint.

{¶2} This appeal pertains to the operation of a Construction and Demolition Debris ("C&DD") disposal facility that has operated in Osnaburg Township since 1961. The stipulated facts are as follows:

{¶3} Appellant, Osnaburg Township Zoning Inspector, Dorothy Bucher, is the duly appointed and acting zoning inspector for Osnaburg Township, Stark County, Ohio.

{¶4} Appellee owns approximately 175 acres located at 7280 Lisbon St. S.E., East Canton, Osnaburg Township, Stark County, Ohio (the "Property").

{¶5} Appellee purchased the Property in July, 1989, from the Crescent Brick Company, and the transfer was duly recorded in October, 1989.

{¶6} The Property is located in the unincorporated portion of Osnaburg Township, Stark County, Ohio. The zoning of the Property is controlled by Osnaburg Township's Zoning Resolutions, adopted November 7, 1961, including text and maps.

{¶7} The Property is in an area which is designated as an R-1 Single Family Residential District pursuant to Osnaburg Township Zoning Resolution §702 and has been designated as Single Family Residential since the establishment of zoning regulations in 1961.

{¶18} The operation of a C&DD disposal facility is not a Permitted Use in an R-1 Single Family Residential District under the Osnaburg Township Zoning Resolution.

{¶19} The operation of a C&DD disposal facility is a Conditionally Permitted Use in the 1-2 General Industrial District under the current Osnaburg Township Zoning Resolution.

{¶10} A nonconforming use is permitted to continue in a district in which it does not conform to the existing zoning pursuant to R.C. 519.19 and Article X of the Osnaburg Township Zoning Resolution.

{¶11} Under date of March 26, 1990, the Osnaburg Township Board of Zoning Appeals issued a Certificate of Non-Conforming Use to Appellee related to the Property.

{¶12} From 1989-1996, Eslich Environmental operated the C&DD disposal facility on the Property.

{¶13} In approximately 1996, non-party Stark C&D Disposal, Inc. ("Stark C&D") began leasing the Property from Eslich Environmental in order to take over operations of the C&DD disposal facility on the Property.

{¶14} Since 1996, Stark C&D has operated the C&DD disposal facility on the Property.

{¶15} As of September 30, 1996, and through the present, approximately twenty and two/tenths (20.2) acres are designated as the Active Licensed Disposal Area under the annual license issued to Stark C&D by the Stark County Board of Health.

{¶16} Stark C&D is presently licensed by the Stark County Health Department for 20.2 acres of "active licensed disposal area" and an additional 8.5 acres of "inactive licensed disposal area."

{¶17} A 2006 Stark C&D application to the Stark County Health Department requested an increase in the inactive licensed disposal area from 8.5 acres to 95.5 acres. This application was denied by the Stark County Board of Health on November 28, 2007.

{¶18} The Stark County Board of Health has approved and renewed Stark C&D's license every year since 1996 to the present.

{¶19} On May 30, 2007, Appellant, the township zoning inspector, who was authorized to enforce the township zoning resolution, filed a complaint for injunctive relief to prevent any expansion of the nonconforming use. The zoning inspector alleged the landfill has greatly expanded from its original 2-acre nonconforming size to 20.2 acres, with the possibly an additional 8.5 acres and/or 95 acres of active disposal area if approved by the Stark County Health Department. None of the past or future expansion was approved by the Osnaburg Township Board of Zoning Appeals.

{¶20} Upon consultation with the trial court on June 1, 2007, the parties agreed that no imminent use of the area outside the 20-acre active licensed disposal area would occur and the matter was submitted to the Court for determination. Appellee filed its Answer, Affirmative Defenses, and Counterclaims on June 27, 2007. A Third-Party Complaint was filed with leave of the trial court on September 19, 2007 restating Appellee's Counterclaim allegations.

{¶21} Appellee alleged that the nonconforming use of the Property is applicable to all 175 acres of the Property for the operation of a licensed C&DD disposal facility (Count I); that the R-1 zoning regulation adopted by Osnaburg Township are preempted by Ohio law applicable to the licensing of C&DD disposal facilities (Count II); and that

the R-1 Single Family Residential Zoning classification as applied to Eslich's property by Plaintiff is unlawful, illegal, unreasonable, and unconstitutional (Count III). Appellee filed a partial motion for summary judgment on Count II of its Counterclaim and Third-Party Complaint, which alleges that the R-1 Single Family Residential District is preempted by R.C. Chapter 3714.

{¶22} Appellants then filed a cross-motion for summary judgment on all claims of Appellee's Counterclaims and Third-Party Complaint. Appellants concede that Appellee's C&DD facility is permitted despite its location in the R-1 but only to the extent that it existed as a nonconforming use in 1961, and no more. Appellants rely upon R.C. 519.19 and Article X of the Zoning Resolution of Osnaburg Township for its contention that Appellee is required to obtain approval from the Osnaburg Board of Zoning Appeals in order to expand beyond its original 2-acre size despite having received a license, at least for part of the expansion, from the Stark County Board of Health pursuant to R.C. Chapter 3714.

{¶23} R.C. 519.19 reads:

{¶24} "The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, * * *

{¶25} "The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution."

{¶26} Article X of the Zoning Resolution of Osnaburg Township, which applies to nonconforming uses, states in part:

{¶27} "A nonconforming building, structure, or use existing at the time this Resolution takes effect may be altered or enlarged as to extend such use or structure not to exceed an additional twenty-five (25) percent in square foot area of the original nonconforming use, as determined by the Board of Zoning Appeals. Such alteration or enlargement shall not take place unless a permit has first been obtained from the Board of Zoning Appeals as set forth hereinafter."

{¶28} The trial court granted summary judgment in favor of Appellee holding that Article X of Osnaburg was preempted by R.C. Chapter 3714. The trial court stated that the "parties appear to agree that the appropriate issue is whether Article X of the Zoning Resolution of Osnaburg Township ("Osnaburg"), limiting the expansion of the nonconforming use, 'conflicts with a general state law.'" ¹ The trial court then overruled Appellants' motion for summary judgment.

{¶29} It is from this decision that Appellants appeal.

{¶30} Appellants raise a single Assignment of Error:

{¶31} "I. THE TRIAL COURT COMMITTED ERROR IN RULING THAT PREEMPTION APPLIED TO PROHIBIT LOCAL ZONING REGULATIONS OF A CONSTRUCTION AND DEMOLITION DEBRIS LANDFILL."

¹ As an initial matter, we must note that the trial court's framing of the dispositive issue does not correspond to the allegations of Appellee's Counterclaim and Third-Party Complaint for declaratory relief. We will address the claims of the parties as they are set forth in the pleadings and dispositive motions.

I.

{¶32} Appellants argue in their sole assignment of error that the trial court committed error by granting summary judgment and finding that state law preempted a local zoning ordinance. We agree in part and disagree in part.

{¶33} For the reasons that follow, we hold Appellee is entitled to limited summary judgment on Count II of its Counterclaim and Third-Party Complaint. Specifically, Appellee is entitled to a declaration that R.C. 3714 preempts the R-1 Single Family Residential District zoning classification as applied to the Property for only the acreage of the Property that is, in fact, licensed for active or inactive disposal by the Stark County Board of Health pursuant to R.C. 3714. To the extent it is not, the R-1 Single Family Residential zoning classification of Osnaburg Township is not in conflict with R.C. 3714.

{¶34} Our standard of review is de novo, and as an appellate court, we must stand in the shoes of the trial court and review summary judgment on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶35} Civil Rule 56 (C) states in part:

{¶36} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶37} Summary judgment is a procedural device to terminate litigation so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

{¶38} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶39} The validity of a zoning regulation can be attacked in two ways: (1) an appeal from an administrative zoning decision, pursuant to R.C. Chapter 2506; and (2) a declaratory judgment, pursuant to R.C. Chapter 2721. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 526 N.E.2d 1350, paragraph one of the syllabus; *Joseph Airport Toyota, Inc. v. Vandalia*, 2nd Dist. No. 18904, 2002-Ohio-928.

{¶40} The validity of the zoning regulation in this case came before the trial court as a declaratory judgment action in Count II of Appellee's Counterclaim (¶23) and Third-Party Complaint (¶24), alleging:

{¶41} "Pursuant to Ohio Revised Code § 2721.03, Defendant is entitled to a declaration that the R-1 Single Family Residential zoning classification as applied to the

Property is invalid under Article XVIII of the Ohio Constitution because it is in conflict with the general law of the State of Ohio, including Chapter 3714 of the Ohio Revised Code and related regulations governing the licensing and operation of C&DD disposal facilities.”

{¶42} Section 3, Article XVIII of the Ohio Constitution states that “[m]unicipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

{¶43} R.C. 504.04(A) mirrors this provision and states:

{¶44} “A township that adopts a limited home rule government may * * *, by resolution, * * * (2) Adopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws * * *.”

{¶45} While the statute governing declaratory judgment actions “grants the general authority to test the construction of a law, there must exist a justiciable issue for declaratory relief to ensue.” *State ex rel. Bolin v. Ohio Environmental Protection Agency* (1992), 82 Ohio App.3d 410, 415, 612 N.E.2d 498. In order to grant declaratory relief, there must exist “a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Bilyeu v. Motorists Mut. Ins. Co.* (1973), 36 Ohio St.2d 35, 37, 65 O.O.2d 179, 303 N.E.2d 871, quoting *Aetna Life Ins. Co. v. Haworth* (1937), 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617.

{¶46} In the instant matter, Appellee contends “[b]y zoning the area comprising the Property as R-1 Single Family Residential, however, Osnaburg Township has completely prohibited Stark C&D’s facility on the Property. Therefore, Osnaburg Township’s zoning regulations are in conflict with the general laws of the state of Ohio governing the siting and operation of C&DD disposal facility. See, Motion for Partial Summary Judgment, p. 6-7. Appellee’s motion is supported by the affidavit of Richard Eslich, president of Appellee. In the affidavit, Eslich states, in relevant part:

{¶47} “Despite the issuance of a valid Certificate of Non-Conforming Use, Osnaburg Township and the Plaintiff in this case have refused to recognize that the operation of the C&DD facility on the Property is a legal, permitted, non-conforming use within the R-1 Single Family Residential District classification.

{¶48} “Osnaburg Township and the Plaintiff have refused to acknowledge that the Osnaburg Township’s zoning classification of the Property is preempted by state law, under which the C&DD disposal facility on the property has been licensed and approved by the Stark County Board of Health.”

{¶49} Affidavit of Richard M. Eslich, ¶12-13.

{¶50} In response, Appellants submit it has allowed the operation of a C&DD landfill facility since Appellee purchased the property. In 1990, Appellants issued a nonconforming use certificate to Appellee at a time the facility was licensed by the Stark County Health Department for two acres of disposal. In its complaint for injunctive relief, Appellants only seek an injunction to prevent expansion beyond this acreage.

{¶51} We begin our analysis by noting the Ohio General Assembly established comprehensive schemes for regulating the disposal of construction and demolition debris, solid wastes and hazardous wastes. See, R.C. Chapters 3714 and 3734.

{¶52} R.C. Chapter 3714 governs the licensing and regulation of construction and demolition debris facilities throughout the state of Ohio. This chapter has been declared to be a general law. *Village of Sheffield v. Rowland* (1999), 87 Ohio St.3d 9, 11, 716 N.E.2d 1121.

{¶53} Under this chapter, the operator of a proposed construction and demolition facility is authorized to establish such a facility after compliance with the requirements of R.C. Chapter 3714 and the issuance of a license by the health district in which the facility is located. R.C. 3714.06(A).

{¶54} Courts have held that “ * * * the [Ohio] legislature intended for the state through the Ohio EPA to preempt and solely occupy the licensing and regulation of solid waste disposal and sanitary landfill facilities. However, local zoning does play a pivotal role in the installation and chartering of these facilities. Once the Ohio EPA has granted approval, its permit is subject to those local zoning provisions which do not conflict with the environmental laws and regulations approved by the state.” *Clarke v. Bd. Of County Comm’rs of Warren County*, 12th App. No. CA2005-04-048, 2006-Ohio-1271, quoting, *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals* (1989), 56 Ohio App.3d 90, 94, 564 N.E.2d 1113.

{¶55} The test for determining whether a conflict exists between a township's zoning resolution and R.C. Chapter 3714 is “whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.” *Fondessy Enterprises, Inc.*

v. Oregon (1986), 23 Ohio St.3d 213, 492 N.E.2d 797, paragraph two of the syllabus; and *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph two of the syllabus.

{¶156} We further note the issue of preemption is not ripe for a court's consideration until such time as a state license or permit to operate the C & DD facility has actually been issued. *Trans Rail America v. Hubbard Twp.* (2007) 172 Ohio App.3d 499, 875 N.E.2d 975.

{¶157} Applying the above, this Court finds that the R-1 Single Family Residential District designation of Osnaburg Township is preempted by state law as to only the acreage of the Property that is currently licensed by the Stark County Health Department pursuant to R.C. Chapter 3714 for active or inactive disposal. This conclusion is supported by the Ohio Supreme Court's decision in *Sheffield*, wherein it was stated: "[w]hen the requirements of R.C. Chapter 3714 are met and a license is issued thereunder, any zoning regulation that prohibits the operation of such a facility is in "direct conflict" and thus, "the state regulation prevails". *Sheffield*, supra, at 12-13, 716 N.E.2d 1121.

{¶158} Conversely, this Court finds the R-1 Single Family Residential designation of Osnaburg Township is not preempted by state law as to acreage of the Property that is not currently licensed by the Stark County Health Department pursuant to R.C. 3714. No conflict exists under these circumstances as Osnaburg Township has not prohibited which R.C. 3714 permits. This issue is not ripe for adjudication and this Court will not issue an advisory opinion.

{¶59} For these reasons, Appellee is entitled to only limited summary judgment upon Count II of the Counterclaim and Third-Party Complaint.

{¶60} The decision of the Stark County Common Pleas Court granting summary judgment in a favor of Appellee is affirmed in part and reversed in part.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.



HON. PATRICIA A. DELANEY



HON. SHEILA G. FARMER



HON. JOHN W. WISE

PAD:kgb

