

IN THE SUPREME COURT OF 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

09-0228

ON APPEAL FROM THE OHIO
COURT OF APPEALS FOR STARK
COUNTY,

FIFTH APPELLATE DISTRICT,

CASE NO. 2008-CA-00026

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

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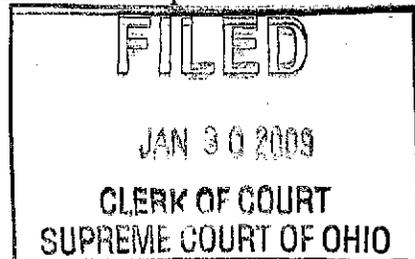
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I. INTRODUCTION: THIS CASE INVOLVES A MATTER OF GREAT GENERAL INTEREST.

The Ohio Township Association (“OTA”), *amicus curiae*, urges this Court to accept jurisdiction over this case in order to reverse *Osnaburg Township Zoning Inspector v. Eslich Environmental Incorporated v. Osnaburg Township, et al.*, Stark Co. App. No. 2008-CA-00026. This case is of great public or general interest because, if left undisturbed, its holding will strip all government authorities of their ability to regulate the location of landfills throughout their respective jurisdictions.

The Fifth District Court of Appeals’ decision will adversely impact the ability of townships in Ohio to regulate land use through zoning resolutions. By fixing its blinders and determining whether a conflict existed between a state regulatory scheme and local zoning by looking to the regulations of a single zoning district, to the exclusion of all others, the Fifth District misapplied this Court’s holding in *Village of Sheffield v. Rowland* and sets a dangerous precedent whereby townships (and presumably all other political subdivisions with zoning authority) are rendered powerless to keep landfills out of residential areas.¹

If other Courts of Appeals follow the Fifth District’s lead, townships throughout the State will be hindered in their ability to regulate land use to promote the health, safety, and general welfare of their residents. This cannot be allowed. It is because certain activities and facilities, like landfills, pose a substantial risk to the health and safety of the public, that the General Assembly has adopted statutory schemes for their regulation. It is for this very reason that townships, as the form of government closest to citizens, must be permitted to determine the most appropriate location for such activities and facilities within their limits.

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

This Court should reverse the erroneous decision of the Fifth District Court of Appeals and ensure that Ohio's townships may continue to reasonably regulate land use to promote the health, safety, and general welfare.

II. STATEMENT OF AMICUS INTEREST

OTA is a state-wide professional organization dedicated to the promotion and preservation of township government in Ohio. OTA, founded in 1928, is organized in 87 Ohio counties. OTA has over 5,200 active members, comprised of elected township trustees and township fiscal officers from Ohio's 1,309 townships. OTA has an additional 3,000 associate members who are dedicated to supporting the causes of OTA.

A large number of these 1,309 townships have enacted zoning resolutions. As a result, members of OTA have a compelling interest in Ohio's preemption law and the decision of the Fifth District Court of Appeals.

III. STATEMENT OF THE CASE AND FACTS

OTA hereby adopts, in its entirety, and incorporates by reference the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of Plaintiff-Appellant Osnaburg Township Zoning Inspector and Third-Party Defendant-Appellant Osnaburg Township.

IV. ARGUMENT

Proposition of Law: No conflict exists between Revised Code Chapter 3714 and township zoning, and preemption is not appropriate, where townships seek to restrict state-authorized facilities to certain zoning districts.²

It is well-settled that a township may not adopt a zoning resolution that contravenes a general law of the state.³ The test for determining whether a conflict exists between a local

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

government's zoning resolution and a general law of the state is "whether the ordinance [or the resolution in the case of townships] permits or licenses that which the state forbids and prohibits, and vice versa."⁴ A township cannot through zoning forbid or prohibit what the general laws of the state permit.

The general law at issue in this case is Chapter 3714 of the Revised Code ("Chapter 3714").⁵ Chapter 3714 sets forth a scheme for state licensing and regulation of construction and demolition debris disposal facilities. Osnaburg Township's Zoning Resolution does not forbid or prohibit these facilities throughout the Township, but only restricts them to appropriate districts, more specifically to the Township's General Industrial District.⁶

The Fifth District Court of Appeals has erroneously held that Osnaburg Township's Zoning Resolution contravenes Chapter 3714, and is preempted, to the extent that it prohibits state-authorized construction and demolition debris disposal facilities within the Township's Single-Family Residential Zoning District. The court apparently overlooked the fact that the

³ *Yorkavitz v. Columbia Bd. of Twp. Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655 (1957); see *Village of Sheffield v. Rowland*, 87 Ohio St. 3d 9, 716 N.E.2d 1121 (1999); *Clarke v. Bd. of County Comm'rs of Warren County*, CA2005-04-048, 2006-Ohio-1271, 2006 Ohio App. LEXIS 1161 (Warren County Mar. 20, 2006); *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, Case No. 2001-A-0050, 2002-Ohio-6690, 2002 Ohio App. LEXIS 6462 (Ashtabula County Dec. 6, 2002); *Center Twp. Bd. of Twp. Trustees v. Valentine*, Case No. WD-99-065, 2000 Ohio App. LEXIS 5177 (Wood County Nov. 9, 2000); *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, 56 Ohio App. 3d 90, 564 N.E.2d 1113 (Butler County 1989); 1985 Op. Att'y Gen. No. 85-053 at 2-199 and 2-200.

⁴ *Clarke v. Bd. of County Comm'rs of Warren County*, at ¶24 (quoting *Village of Sheffield v. Rowland*, at 11); accord *Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Zoning Appeals*, at ¶24; *Center Twp. Bd. of Twp. Trustees v. Valentine*, at *5; see *Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals*, at 94.

⁵ "It appears beyond dispute that R.C. Chapter 3714 is a general law..." *Village of Sheffield v. Rowland*, at 11; *Clarke v. Bd. of County Comm'rs of Warren County*, at ¶25; *Center Twp. Bd. of Twp. Trustees v. Valentine*, at *4.

⁶ Osnaburg Township Zoning Resolution, Section 722.2(B)(3).

Zoning Resolution permits these facilities as conditional uses within the Township's General Industrial District.

By looking solely to the regulations of the Single-Family Residential Zoning District in conducting its conflict analysis, the Fifth District misapplied this Court's holding in *Village of Sheffield v. Rowland*.⁷

In *Sheffield*, the Village, unlike Osnaburg Township in the case at hand, sought to prohibit the location of construction and demolition debris disposal facilities, not within a single zoning district, or within a number of zoning districts, but throughout the entire village. This Court held that Sheffield's zoning scheme did in fact contravene Chapter 3714, but limited its holding to situations where a local government entity attempts to completely prohibit these facilities. **"Nothing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities to certain districts with appropriate zoning."**⁸ This is precisely what Osnaburg Township had attempted to achieve through its Zoning Resolution, to restrict construction and demolition debris disposal facilities to an appropriate district.

By focusing exclusively on the regulations of Osnaburg Township's Single-Family Residential Zoning District, to the exclusion of those of all other districts, the Fifth District misapplied *Sheffield*. In doing so, the court found a conflict to exist between its Zoning Resolution and Chapter 3714 where there is none. Had the Fifth Circuit properly applied this Court's decision in *Sheffield*, and looked beyond Osnaburg Township's Single-Family Residential District regulations, it would have realized that the Township did not forbid or prohibit construction and demolition debris disposal facilities; it simply restricted them to its General Industrial District, as this Court has indicated it is entitled to do.

⁷ *Village of Sheffield v. Rowland*, at 12.

⁸ *Village of Sheffield v. Rowland*, at 12.

Other Courts of Appeals have properly applied this Court's decision in *Sheffield*, both in situations where the local government entity sought to prohibit state-authorized waste and debris facilities entirely, and in situations where the local government entity simply restricted them to appropriate zoning districts.

The Twelfth District found no conflict to exist between a county's zoning resolution and Chapters 3734 and 3745 of the Revised Code where the county restricted solid waste disposal facilities to a specific solid waste disposal district.⁹

On the other hand, the Sixth District found a township's zoning resolution to contravene Chapter 3714 where the township sought to prohibit all construction and demolition debris disposal facilities, while noting that the conflict could have been avoided had the township sought to control the location of the facilities rather than prohibiting them entirely.¹⁰

The Ohio Attorney General has also applied *Sheffield* properly in an official opinion in which he advised a county that it could not amend its zoning resolution to prohibit construction and demolition debris disposal facilities "**throughout the entire territory of the county.**"¹¹

The potential consequences for Ohio's townships should this Court allow the Fifth District's decision to stand are great, and extend far beyond that court's jurisdiction. If other Courts of Appeals follow the Fifth District's lead, townships throughout the State, like Osnaburg Township in this case, would be stripped of their authority to zone for the health, safety, and general welfare and of their ability to keep landfills out of residential areas. This Court has

⁹ *Clarke v. Bd. of County Comm'rs of Warren County*, CA2005-04-048, 2006-Ohio-1271, 2006 Ohio App. LEXIS 1161 (Warren County Mar. 20, 2006).

¹⁰ *Center Twp. Bd. of Twp. Trustees v. Valentine*, Case No. WD-99-065, 2000 Ohio App. LEXIS 5177 (Wood County Nov. 9, 2000).

¹¹ 2007 Op. Att'y Gen. No. 07-038, at 8.

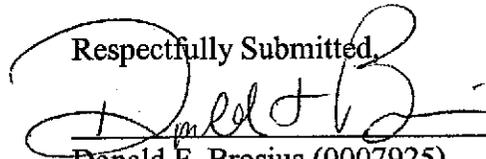
interpreted the law of this state in such a way that local government entities may restrict state-authorized facilities to certain districts with appropriate zoning. That interpretation should be uniformly adopted and followed by the Fifth District Court of Appeals.

For townships and other local government entities to effectively regulate land use for the general welfare of their residents, they must be confident in their authority to do so, and they must be confident in the courts of this state to enforce their regulations in a reasonable and consistent manner. The Fifth District's decision casts a shadow of doubt on this authority and on townships' ability to rely on the courts. For these reasons, and for those discussed above, this Court should accept jurisdiction and reverse the decision of the Fifth Circuit Court of Appeals.

CONCLUSION

For the reasons discussed above, this case involves a matter of public and great general interest. The Ohio Township Association respectfully requests this Court to accept jurisdiction over this case in order to reverse the decision of the Court of Appeals to assure that townships, and other local government entities, may continue to regulate land use to promote the general welfare.

Respectfully Submitted,



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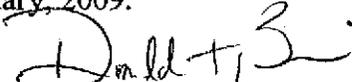
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Amicus Curiae is being mailed by regular U.S. Mail, postage prepaid, to all parties entitled to service under Rule 5 of the Ohio Rules of Civil Procedure on the 29th day of January, 2009.



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