IN THE SUPREME COURT OF OHIO

OSNABURG TOWNSHIP ZONING INSPECTOR, Plaintiff-Appellant, vs. ESLICH ENVIRONMENTAL, INC., Defendant/Third-Party Plaintiff-Appellee, vs. OSNABURG TOWNSHIP, et al., Third-Party Defendant-Appellant.	)))))))))))))))))	SUPREME COURT CASE NO: 2009-0228 ON APPEAL FROM THE OHIO COURT OF APPEALS FOR STARK COUNTY, FIFTH APPELLATE DISTRICT, CASE NO. 2008-CA-00026

APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

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EXPLANATION OF WHY THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED IN THIS CASE AND WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case involves no constitutional issue. Nor is this case of public or great interest. The only issue in this case is whether a township zoning ordinance mandating a single family residential use that prohibits the operation of an existing construction and demolition debris ("C&DD") disposal facility authorized and licensed by the State of Ohio under a recognized general state law, Revised Code, Chapter 3714, presents an impermissible direct conflict and, therefore, cannot be enforced. Both the Trial Court and the Court of Appeals determined that Appellant Osnaburg Township's single family zoning classification, as applied to Appellee's licensed C&DD facility under Revised Code, Chapter 3714, prohibited that which was authorized and licensed by the Ohio Environmental Protection Agency through the Stark County Board of Health. Accordingly, under this Court's well-settled precedent, both courts held that the single family residential zoning classification could not be enforced by the Osnaburg Zoning Inspector.

This case involves fewer than 30 acres in one township that has been licensed as a C&DD facility by the State of Ohio since 1997. Appellants never appealed any of the state licenses. As limited by the Court of Appeals' decision, the preemption of the local zoning classification applies only to the acreage historically licensed as a C&DD facility and does not extend to any other property owned by the Appellee that is not licensed pursuant to Revised Code, Chapter 3714. As appropriately reflected by the Court of Appeals, a finding of an impermissible conflict is fully supported by this Court's decision in *Sheffield v. Rowland* (1999), 87 Ohio St.3d 9, 716 N.E.2d 1121, wherein it was stated that "[w]hen the requirements of Revised Code 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." *Osnaburg Twp.*

Zoning Inspector v. Eslich Environmental, Inc., Stark App. No. 2008-CA-0026, 2008-Ohio-6671, P57, citing *Sheffield*, 87 Ohio St.3d at 12-13.

There are no constitutional or public policy issues involved in determining whether a local police power regulation conflicts with a general state law. This is a straightforward and simple analysis of "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; *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph two of the syllabus. The fact that the Osnaburg Township Zoning Inspector and the *Amicus Curiae* may not want Appellee to continue to use its historically licensed property as a C&DD facility does not elevate this case to one of public or great general interest.

Appellants and *Amicus Curiae* concede that the Osnaburg Township zoning ordinance is an exercise of the police power, rather than of local self-government, and that the C&DD licensing statute, Revised Code, Chapter 3714, is a general law. Implicitly, they also concede that the single family residential zoning ascribed to Appellee's property conflicts with the state issued license to establish and operate a C&DD facility, but they argue that the Court must look further into the entire zoning scheme. In essence, the Appellants and *Amicus Curiae* are asking the Court to disregard 75 years of jurisprudence that has identified and applied the simple conflict test between local police power ordinances and general state laws.

The Trial Court and the Court of Appeals correctly applied this Court's precedent to determine whether a conflict existed between Appellee's C&DD operations licensed under Revised Code, Chapter 3714 and the Osnaburg Township zoning ordinance that required that this former strip mine area be used only for single family residential purposes. The conflict was obvious and these lower courts went no further than authorized by this Court's precedent. Clearly, this case was narrowly decided on the particular facts presented. It is not a matter of

public or great general interest, but merely a matter of the interest of local officials who attempted to deny Eslich Environmental, Inc. the proper legal use of its property.

STATEMENT OF THE CASE AND RELEVANT FACTS

This action began as an enforcement action by the Osnaburg Township Zoning Inspector against Appellee Eslich Environmental, Inc. ("Eslich Environmental") to prevent further disposal of C&DD on acreage licensed for C&DD disposal by the Ohio Environmental Protection Agency, through the Stark County Board of Health, pursuant to Revised Code, Chapter 3714. In 1989, Eslich Environmental purchased 175 acres of contiguous property in Osnaburg Township to continue the historical disposal of C&DD that had predated the 1961 passage of the Osnaburg Township Zoning Resolutions. This property, despite being an old strip mine, had been zoned a R-1 Single Family Residential District by Osnaburg Township. The operation of a C&DD facility is clearly not a permitted use in an R-1 Single Family Residential District (Stipulated Facts, ¶6). However, on March 26, 1990, the Osnaburg Township Board of Zoning Appeals recognized the historical use of the property by issuing a Certificate of Non-Conforming Use to Eslich Environmental for operation of the C&DD facility.

From the beginning of the State's C&DD licensing program in 1996 to the present, the Eslich Environmental facility has received a C&DD annual license from the Stark County Board of Health, as the authorized agent of the Ohio Environmental Protection Agency. (Stipulated Facts, ¶17). In issuing the license, the Board of Health carefully considered and evaluated the site's characteristics and determined that the facility was protective of the public health and safety and the environment. See Revised Code, Section 3714.06(A). Appellants never appealed any of the annual licenses to challenge the issuance of the state license or to contest that the disposal of C&DD at this facility was protective of the public health and safety and the environment.

The Eslich Environmental C&DD facility is divided into two licensed areas: (1) an approximately 20.2 acre area where Eslich Environmental was actively disposing of C&DD (referred to as the "Active Licensed Disposal Area" or "ALDA"); and (2) an approximately 8.5 acre area which was undergoing preparation and which had not yet received any C&DD (referred to as the "Inactive Licensed Disposal Area" or "ILDA"). Appellant's Complaint sought an injunction to prevent filling of the 8.5 acre "inactive" licensed disposal area. Although Eslich Environmental had contemplated a further expansion in addition to the licensed 8.5 acre ILDA, this property was not at issue since that license was denied. The Court of Appeals confirmed that the issue of "conflict" regarding the balance of Eslich Environmental's 175 acre property was 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. *Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.*, Stark App. No. 2008-CA-0026, 2008-Ohio-6671, PP56-58. However, with respect to the existing licensed acreage (both ALDA and ILDA), the Court of Appeals, on stipulated facts, found that the Osnaburg Township zoning classification limiting the licensed acreage to single family residential use only conflicted with the authorized and licensed use as a C&DD facility under general state law. Accordingly, the Court of Appeals found the conflicting zoning classification could not be enforced.

ARGUMENTS OPPOSING APPELLANTS'/*AMICUS CURIAE'S* PROPOSITIONS OF LAW

Response to Proposition of Law No. 1: A local zoning classification that prohibits the operation of a construction and demolition debris facility authorized and licensed pursuant to general state law presents an impermissible direct conflict and cannot be enforced.

The Trial Court and Court of Appeals recognized that the Osnaburg Zoning Resolution which classified the subject property as R-1 Single Family Residential prohibited the operation of a construction and demolition debris facility. (Stipulated Facts, ¶6). Accordingly, since the

zoning classification prohibited a use that was authorized and licensed by a general state statute, the lower courts determined that the zoning classification for the licensed acreage was unenforceable because it was in direct conflict with state law. Under this Court's long standing precedent, the lower courts were correct. As stated in *Sheffield, supra*:

> Upon compliance with the requirements of R.C. Chapter 3714 and the issuance of a license, the operator of a proposed construction and demolition facility is authorized to establish such a facility. R.C. 3714.06(A). However, it is readily apparent that the Sheffield Village Codified Ordinances prohibit such a facility. Thus, the ordinances prohibit what the statute permits and are therefore in conflict with R.C. Chapter 3714.

Sheffield, 87 Ohio St.3d at 12.

Appellants and *Amicus Curiae* both concede that the "conflict test" for local police power ordinances is well settled. Appellants' Memorandum at 5. Indeed, there appears to be little dispute that the three prongs of the "conflict" test as originally announced in *Struthers v. Sokol, supra*, are met in this case. There is no dispute that the zoning ordinance at issue is merely an exercise of a police power delegated to township trustees by the General Assembly in Revised Code, Section 519.02 -- not a matter of self-government protected by the "Home Rule Amendment," Ohio Constitution Article XVIII. See Appellants' Memorandum at 5, citing *Yorkavitz v. Board of Twp. Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 142 N.E.2d 655, paragraph one of the syllabus. Furthermore, there is no dispute that Revised Code, Chapter 3714 which licenses and authorizes the establishment and operation of C&DD facilities are "general laws." See Appellants' Memorandum at 5, citing *Sheffield*, 87 Ohio St.3d at 11 ("It appears beyond dispute that Revised Code Chapter 3714 is a general law . . .").

Finally, there can be no dispute (and it was stipulated) that a zoning classification permitting only a single family residential use prohibits the operation of a C&DD disposal facility. Once this conflict is established, the state law prevails and the local ordinance cannot be

enforced. *Amicus Curiae* expressly agrees: "A township cannot through zoning forbid or prohibit what the general laws of the state permit." *Amicus Curiae* Memorandum at 3. There are no exceptions recognized by this Court once the prohibited conflict has been demonstrated.

Appellants attempt to create a "constitutional issue" by referencing the Home Rule Provision in the Ohio Constitution, Article XVIII. However, Appellant Osnaburg Township is not covered by this provision and derives its authority for zoning solely under Revised Code, Section 519.02. *Torok v. Jones* (1983), 5 Ohio St.3d 31, 32, 448 N.E.2d 819, citing *Yorkavitz*, 166 Ohio St. 349 ("A township's authority to enact zoning ordinances is not inherent, nor does it derive from a constitutional provision. Rather, this authority is dependent upon grant by the General Assembly."). Moreover, "where matters of statewide concern are at issue, the state retains the power -- despite the Home Rule Amendment -- to address those matters." *American Financial Services Ass'n v. City of Cleveland* (2006), 112 Ohio St.3d 170, 174, 2006-Ohio-6043. The Court of Appeals did not find Appellant Osnaburg Township's zoning resolution to be "unconstitutional," only that the R-1 Single Family Residential classification as applied to the 20.2 acre ALDA and 8.5 acre ILDA conflicted with the use authorized by Revised Code, Chapter 3714.

This Court has repeatedly and consistently ruled that the "conflict analysis" must be used in resolving home-rule cases. *American Financial Services,* 112 Ohio St.3d at 175. Nevertheless, Appellants and *Amicus Curiae* insist that the Court ought to recognize an exception for township ordinances. Yet, a conflict between a township police power ordinance like zoning and general state law is expressly prohibited by the General Assembly in Revised Code, Section 504.04(A)(2).

According to Appellants, the well settled conflict analysis ought to be disregarded where the township does not completely prohibit a state licensed facility in the township but may

conditionally permit a C&DD facility on a parcel not licensed by the State. As its sole authority, Appellants cite to this Court's statement in *Sheffield* that "nothing in this decision should be construed to suggest that Sheffield cannot restrict state-authorized facilities to certain districts with appropriate zoning." *Sheffield*, 87 Ohio St.3d at 12. Clearly, if acreage licensed by the State is within an area zoned for C&DD facilities, a conflict may never materialize. Under these circumstances, the zoning would be "appropriate." However, the conflict test cannot be ignored. Otherwise, a program of state-wide importance would be forever subservient to a township's arbitrary or political prerogatives -- circumstances strictly prohibited by the General Assembly in Revised Code, Section 504.04(A)(2).

The lower court cases cited by the Appellants fully support the proposition that a local zoning ordinance -- even if it does not totally prohibit a C&DD facility throughout the township or municipality -- remains subject to the conflict test. See, *e.g.*, *Clarke v. Warren Cty. Bd. of Comm'rs.* (Warren Cty. 2006), 2006-Ohio-1271, P27, appeal not allowed, 110 Ohio St.3d 1442, 2006-Ohio-3862 ("Once the Ohio EPA has granted approval, its permit is subject to those local zoning provisions that do not conflict with the environmental laws and regulations approved by the state."); *Aluminum Smelting & Refinery Co., Inc. v. Denmark Twp. Bd. of Zoning Appeals* (Ashtabula Cty. 2002), 2002-Ohio-6690, PP24-25 ("zoning ordinances may not be in conflict with general law . . . municipal requirements which alter, impair or limit the operation of state-licensed waste facilities are not valid.")

The zoning ordinance in the instant case is clearly prescriptive because it prohibits the disposal of C&DD on both the 20.2 acre ALDA and the 8.5 acre ILDA which is authorized under the state license. Appellants and *Amicus Curiae* apparently do not like the conflict test and its application in this case and propose a vague proposition that if the township authorizes a C&DD facility as a potential conditional use elsewhere in the township on property not owned

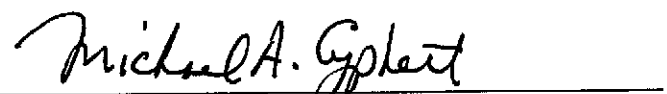
by the C&DD operator and not licensed by the State, somehow, this eliminates the conflict regarding the subject property. No case in this state so holds.

Because the Osnaburg Township zoning classification expressly prohibits what the state law permits, the Osnaburg Township zoning ordinance is in conflict with the general laws of the State of Ohio governing the location and operation of C&DD disposal facilities. Accordingly, Osnaburg Township's Zoning Resolution, as applied to Eslich Environmental's property covered by the state license, cannot be enforced and must yield to the general laws of the State of Ohio.

CONCLUSION

For all the foregoing reasons, Appellee respectfully requests the Court not to accept jurisdiction of Appellants' appeal as it involves no constitutional issue and is not of public or great general interest.

Respectfully submitted,



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A copy of the foregoing Memorandum Opposing Jurisdiction was served via regular U.S. Mail, postage paid, this 24th day of February, 2009, upon the following:

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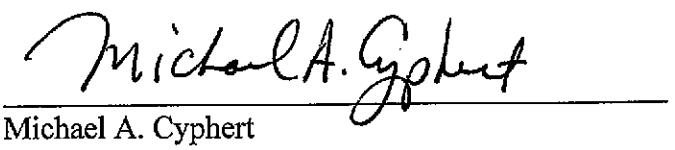

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